ADDRESSING SYSTEMIC SEX DISCRIMINATION:
EMPLOYER DEFENCES TO DISCRIMINATION IN
CANADA AND SOUTH AFRICA

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Faculty of Law
University of Toronto

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0-612-54063-4
Abstract

Addressing systemic discrimination: employer defences to sex discrimination in
Canada and South Africa

L.L.M 2000
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A purpose of anti-discrimination law in Canada and South Africa is eradication of sex
discrimination in employment. In developing defences to discrimination in employment,
courts have battled with striking the balance between addressing systemic patterns of
disadvantage and the legitimate concerns of employers. The approach to employer defences
in Canada provides the doctrinal means to achieve this balance by permitting discriminatory
workplace standards to be struck down, where appropriate, and by application of the duty to
accommodate short of hardship, in cases of both direct and adverse effects discrimination.
The South African legislative framework for discrimination law includes almost all the
aspects of the Canadian approach, which should be followed in South Africa. I argue, with
reference to Canadian case law and South African legislation, that incorporation of
considerations of fairness into employer defences provides the appropriate mechanism to
address the systemic economic disadvantage of women in employment.
ACKNOWLEDGEMENTS

My thanks to Professor Denise Réaume for careful, thoughtful and encouraging supervision, to Assistant Professor Kerry Rittich for helpful comments, and to the University of Toronto and University of Cape Town for financial assistance.

My interest in these issues was sparked by collaborative work that I engaged in with the Women’s Legal Centre and the Community Law Centre at the University of the Western Cape in South Africa. My thanks to both organizations.

Thank you also to Michelle O’Sullivan for ongoing support and inspiration, as well as the collaborative work that laid the foundation for this thesis.
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Introduction

One of the purposes of anti-discrimination law in Canada and South Africa is the eradication of sex discrimination in employment. In developing defences to discrimination in employment, courts in both jurisdictions have battled with striking the balance between this overall purpose of discrimination law, which includes addressing systemic patterns of disadvantage, and the legitimate concerns of employers that compete with the eradication of discrimination.

In Chapter One, I outline the development of employer defences to discrimination in Canada and South Africa. In Canada, anti-discrimination law has been in place for a long time and there is a rich body of case law in relation to employer defences to draw on. The Canadian Supreme Court has recently delivered a groundbreaking judgment, *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*\(^1\) which departs from the traditional approach followed to employer defences to discrimination.

In interpreting discrimination legislation in Canada, the Supreme Court had developed a bifurcated approach, applying different defences to cases of direct and adverse effects discrimination. If the code included a Bona Fide Occupational Requirement (BFOR) defence in relation to the particular prohibited ground of discrimination, the BFOR defence applied in cases of direct discrimination. In addition to a subjective requirement, the defence was met if an objective relationship between the workplace requirement and the safe and efficient performance of the job was established. If a rule was not a BFOR it was struck down. If the rule met the BFOR test, the employer was entitled to continue its use. There was no duty to accommodate individuals or groups disadvantaged by the rule. In cases of adverse effects discrimination, the applicable defence was satisfaction of the duty to accommodate short of undue hardship. If the rule had a discriminatory impact on individuals or groups upon a prohibited ground of discrimination, there was a duty to accommodate the specific needs of such individuals, to the point of undue hardship. As long as there was a rational connection between the work rule and the duties of the job, the rule, however, was not struck down.

\(^1\) [1999] 3 S.C.R. 3 [hereinafter *Meiorin*].
This approach was severely criticized for legitimizing systemic discrimination, for two principal reasons. Firstly, the duty to accommodate did not apply in cases of direct discrimination. Secondly, where the duty to accommodate did apply, the defence precluded striking down the discriminatory workplace standard. The focus therefore shifted away from the substantive norms underlying the standard to how “different” individuals could fit into the “mainstream” represented by the standard. The unified approach addresses many of the criticisms levelled at the earlier approach by permitting discriminatory workplace standards to be struck down, where appropriate, and by application of the duty to accommodate short of undue hardship, in cases of both direct and adverse effects discrimination. The emphasis in Meiorin on the need to challenge male- based workplace norms and systemic issues, and the importance of accommodating difference in the workplace has considerable transformative potential.

The ability of the new BFOR test to address systemic discrimination should, however, not be over emphasized. Firstly, it does not follow from the adoption of the new unified BFOR test that all discriminatory workplace rules that have not met the BFOR defence will be struck down. The rule can be struck down and replaced, or the rule can remain intact and individual or group accommodation required. The Meiorin case involved a discriminatory standard which applicants had to meet in order to qualify for a particular job. Chapter Two illustrates that it is particularly in these types of cases where striking down the workplace rule is possible and appropriate. Nevertheless, the import of the Meiorin judgement is that systemic discrimination should be challenged and, wherever practical, workplace standards should be fashioned to incorporate the needs of different individuals.

Secondly, the undue hardship standard places a limit on the duty to accommodate. It is however, an appropriate doctrinal tool, because it provides the mechanism through which legitimate employer concerns are taken into account, whilst recognizing that employers may be required to incur a level of hardship towards achievement of equality for men and women in employment.

In South Africa, the constitutional and legislative framework for discrimination law has only very recently been introduced. The strength of the South African approach lies in the explicit commitment to the need to redress systemic disadvantage. Chapter One outlines the South
African constitutional and legislative framework and suggests an approach to employer defences for South African courts to follow. Labour legislation explicitly includes two employer defences, namely the inherent requirement of the job (IRJ) defence and a defence that shields affirmative action measures from a discrimination claim. I suggest that the legislation also includes a residual fairness defence. Such a fairness defence may assist in resolving discrimination in remuneration and employment benefits. The IRJ defence would be appropriate in resolving discrimination in employment policies or practices that establish qualifying standards for the job or relate to performance of the job. I have, however, not attempted to provide a comprehensive set of circumstances in which the IRJ defence or the fairness defence should apply or suggested that there be a strict demarcation between the two defences.

In relation to both defences, I argue that labour courts should interpret the defences in accordance with the South African Constitutional Court’s strong commitment to addressing systemic inequality and should have regard to the Promotion of Equality and Prevention of Unfair Discrimination Act, which prohibits unfair discrimination outside the employment sphere. The Equality Act includes all the aspects of the Canadian BFOR defence in Meiorin, except the notion of undue hardship. It is suggested that South African courts incorporate the notion of undue hardship into the approach to employer defences. I illustrate the attractions of such an approach throughout the thesis by drawing on Canadian case law and a few South African cases.

In Chapters Two to Four, the applicable employer defences in South Africa and Canada are applied to three areas of sex discrimination in employment, namely discrimination in qualifying standards for employment, pregnancy and family responsibilities. In relation to each of these three areas of discrimination there are cases where the discrimination arises in qualifying standards for the job or relates to performance of the job. I illustrate how the BFOR test developed in Meiorin and the suggested approach to the IRJ defence in South Africa are appropriate and desirable in resolving these types of cases.

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In relation to pregnancy and family responsibilities, discrimination in employment also arises in relation to benefits and remuneration, which differs from discrimination in performing the job or qualifying standards. Because of the different considerations that apply, I suggest that the enquiry in these cases should be about what economic costs it is fair to place on an individual employer to redress the systemic disadvantage of women in employment arising from their childbearing capacity. I argue that, in both Canada and South Africa, the enquiry should be structured so as to assist courts in determining what costs it would be fair to place on the employer. I suggest ways in which this could be done. For South Africa, I suggest that this can be achieved by application of the residual fairness defence, as opposed to the IRJ defence, to cases involving discrimination in benefits and pay. In the process the factors to determine fairness outlined in the Equality Act, incorporating the Canadian undue hardship standard into the factors, should be applied. In Canada, I suggest that the Meiorin BFOR test is sufficiently flexible to incorporate considerations of fairness into the enquiry. Fairness should incorporate some of the factors drawn from the South African Equality Act and application of the approach to pregnancy discrimination in Brooks v. Canada Safeway Ltd.,\textsuperscript{3} in balancing the employee’s right to be free from discrimination and legitimate employer concerns under the undue hardship standard. The suggested approaches in both jurisdictions permit the striking of the appropriate balance between redressing systemic economic disadvantage and legitimate employer concerns, towards achieving a society based on equality for men and women.

\textsuperscript{3}[1989] 1 S.C.R. 1219 [hereinafter Brooks].
Chapter One: Employer defences to discrimination

The first part of this chapter outlines the development of the Canadian case law relating to employer defences in discrimination. The second part outlines the constitutional and legislative framework of discrimination law in South Africa and briefly assesses the most recent case relating to employer defences to discrimination claims. Drawing on the Canadian case law, an approach to employer defences is suggested for application by South African courts.

Part One: Canada

In Canada, human rights codes at the provincial and federal level prohibit discrimination in various sectors of society, including employment. In each of the codes, discrimination is prohibited on a number of listed grounds that include sex, race, gender and family status.\(^4\) The initial formulations of the prohibition against discrimination did not refer to adverse effects discrimination. In respect of discrimination in employment, the codes include a Bona Fide Occupational Requirement (BFOR) or Bona Fide Occupational Qualification (BFOQ) defence.\(^5\) In some of the codes, such as Ontario’s, the defence does not apply to all the prohibited grounds of discrimination.\(^6\)

In interpreting the human rights codes, adjudicators grappled simultaneously with how broad the concept of discrimination was and which defences were appropriate. The Supreme Court interpreted the prohibition against discrimination to include both direct and adverse effects discrimination. Because the BFOR defence was arguably defined with direct discrimination as the paradigm, the Court developed a bifurcated approach to cases of direct and adverse effects discrimination: the BFOR defence applied in cases of direct discrimination, if the BFOR provision applied to the particular prohibited ground of discrimination, and satisfaction of the

\(^4\) The codes differ on the finer wording of the prohibition against discrimination and on the formulation in the codes of employer defences available to employers in the context of a discrimination claim.

\(^5\) The Supreme Court has held that the two defences have the same meaning, see below. Unless specific reference is made to the BFOQ defence, the term BFOR is used in this thesis.

\(^6\) In Ontario, the BFOQ defence applies to the prohibited grounds of age, sex, record of offences or marital status, Human Rights Code, R.S.O.1990, c. H-19, s. 24(1)(b) [hereinafter Ontario Human Rights Code].
duty to accommodate short of undue hardship applied in cases of adverse effects discrimination. In the recent *Meiorin* decision, the Supreme Court rejected the bifurcated approach to employer defences. This part of the chapter outlines the development of the bifurcated approach and adoption of the new, unified approach in *Meiorin*.

**Development of a bifurcated approach**

The first employment discrimination case before the Canadian Supreme Court involved direct discrimination on the prohibited ground of age. In *Ontario (Human Rights Commission) v. Borough of Etobicoke*, the human rights code expressly included an employer defence to discrimination that permitted discrimination on the basis of age, where age is a BFOQ and requirement for the position or employment involved. At issue was mandatory retirement at the age of 60 for firefighters. The Court was therefore called upon to develop a test for determining what an employer had to prove to establish a BFOQ defence. A two-pronged test was developed, incorporating both subjective and objective elements, to determine whether a BFOQ defence had been established:

To be a BFOQ and requirement a limitation, (such as mandatory retirement at a fixed age) must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable despatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives which would defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient performance of the job without endangering the employee, his fellow employees and the general public.

On the facts, the Court held that the employer had met the subjective requirement, but that there was insufficient evidence to conclude that men at 60 were unable to perform their jobs as firefighters safely and efficiently. The employer argued that age was a BFOQ on the basis that firefighting was a dangerous occupation that required physical strength, stamina and alertness beyond most occupations and accordingly young and fit men were required for the job. The Court held that evidence as to the duties to be performed and the relationship between the aging

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7 [1982] 1 S.C.R. 202 [hereinafter *Etobicoke*].
8 *Ibid.*, at 208 paras. g-j.
process and the safe, efficient performance of the those duties was imperative and that the evidence adduced by the employer was impressionistic and without sufficient weight. The complainants were reinstated, subject to continuing to possess the requisite physical and mental capacities to carry out their jobs.

The test established very clearly that employers couldn’t rely on stereotyped assumptions about the abilities of individual or groups of persons to perform the tasks associated with a particular job. Such stereotyped assumptions create barriers to equal opportunity in employment for members of groups protected by human rights legislation. If employers can rely on stereotyped assumptions about the ability of individuals to perform the tasks of the job, this would defeat the purpose of the human rights codes.

The next significant development in employer defences arose in the context of three Supreme Court religious discrimination cases. The first of these cases to come before the court was O'Malley v. Simpson-Sears Ltd., in which the workplace rule at issue was a requirement that all full-time sales clerks work on a rotational basis on Friday evenings, and two out of every three Saturdays. Mrs. O'Malley, after seven years with the employer, became a member of the Seventh Day Adventist church. The work rule was in conflict with Mrs. O'Malley's religious commitments and she was forced to accept a part-time position with the employer, with a reduction in earnings and benefits.

O'Malley differed from Etobicoke in two significant respects: the nature of the discrimination differed, and the relevant human rights code's BFOQ provision did not include religious discrimination in its provision. In O'Malley the workplace rule at issue was not related to the inherent capacity of the individual to perform the tasks of the job and was not directly discriminatory. The employer did not explicitly exclude members of a certain religion from employment; its workplace rule simply conflicted with the employee's religious beliefs making it impossible for her to be available for work when required. To take into account these sorts of issues, the Court interpreted the prohibition against discrimination in the human rights code to

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include the concept of adverse effects discrimination. A distinction was drawn between direct and adverse effect discrimination as follows:

Direct discrimination occurs where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." [Adverse effects discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and will apply equally to all employees but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes because of some special characteristic of the employee or group obligations, penalties, or restrictive conditions not imposed on other members of the workforce.10

The Court took the further significant step of imposing a duty on employers to accommodate employees short of undue hardship in cases of adverse effects discrimination in order to mitigate the adverse effects of neutral workrules on individuals or groups protected under the human rights codes. 11 On the facts, the court held that the employer did not show that undue hardship would result if the employee were accommodated. There was no evidence regarding the problems or expense that the employer would have experienced by rearranging working periods for the benefit of the complainant. The employer was ordered to compensate Mrs. O'Malley for the difference between the amount of Mrs. O'Malley's salary as a full-time employee and as a part-time employee. At the time of hearing, Mrs. O'Malley no longer desired full-time employment. The Court did not order the employer to amend its working rules to accommodate persons with religious commitments in the future.

In the second of the three religious discrimination cases, Bhinder v. Canadian National Railway Co., 12 the Court was again faced with a workplace rule that had an adverse effect on the exercise of an individual's religion. Mr. Bhinder had worked at CNR as a maintenance electrician for a number of years when his employer instituted a rule that all employees wear hard hats. As a

10 Ibid., at 551 paras. c-g.
11 Subsequent to O'Malley a general prohibition against constructive (adverse effects) discrimination was included in the Ontario Human Rights Code, supra note 6, s. 11(1). A general reasonable and bona fide defence to constructive discrimination was included, which does apply to religious discrimination, and all the other prohibited grounds of discrimination, s. 11(1)(a). The Code expressly provides that a reasonable and bona fide defence will not be met unless the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, s. 11(2).
practising Sikh who wore a turban, he could not comply with the workplace rule. Mr. Bhinder's request that he be exempted from the rule was denied. He was dismissed as a result of this failure to comply with the workplace rule.

There are two significant differences between the O'Malley case and Bhinder. Firstly, in Bhinder, the statutory BFOR defence did apply to religious discrimination. Although it was left open whether the BFOR and BFOQ defence had the same meaning, the majority of the court in Bhinder applied the Etobicoke test for a BFOQ defence, developed in a case of direct age discrimination, to determine whether the employer had established a BFOR defence. The Court interpreted the "occupational" aspect of the BFOR requirement to preclude an assessment of the impact of the impugned rule on an individual. It argued that to do otherwise would not just constitute a narrow interpretation of the defence but would ignore its plain language. The effect of this interpretation of the BFOR defence was that the duty to accommodate did not apply in cases of adverse effects discrimination where there was a BFOR defence in the relevant human rights code.

On the facts, it held that the employer had instituted the rule for genuine business reasons with no intent to offend the principles of the Act and that the rule was useful and reasonable in that it promoted safety by reducing the risk of injury and that, accordingly, a BFOR had been established. Once it was determined that, in general, the hard hat requirement was reasonable, the defence was established without further consideration of its effects on individual employees. The Court noted the disparity in outcomes between O'Malley and Bhinder, but felt bound by the differences in language between the two statutes.

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13 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 14. [am. 1998, c.9] [hereinafter Canadian Human Rights Act]. It provided that "it is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement." An amendment was introduced to the Canadian Human Rights Act which provides that "for any practice to be considered to be based on a bona fide occupational requirement ... it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person responsible for accommodating those needs considering health, safety and cost," s. 15(2). The provision applies in respect of a practice regardless of whether it results in direct discrimination or adverse effect discrimination, s. 15(8).
The second aspect in which *Bhinder* differed from *O'Malley* was in relation to the type of workplace rule at issue. In *O'Malley*, the workplace rule was a work schedule. Work schedules, on the face of it, are readily capable of being altered to accommodate an individual's specific needs, even if the work schedule "makes sense" for the rest of the workforce. In *Bhinder*, the workrule at issue involved safety considerations that may not as readily allow for exceptions. Although the Court did not engage in an analysis of the type of workplace rule at issue in *O'Malley*, the decision may have been influenced by the different types of workplace rules under consideration.

The minority judgement in *Bhinder* differed on the application of the BFOR and the duty to accommodate, arguing that the BFOR defence should incorporate the duty to accommodate in order to be consistent with the requirement that the individual be given the strongest protection from discrimination. The minority concurred with the tribunal's findings that no undue hardship would result if Mr. Bhinder and all other Sikhs were accommodated by exemption from the rule. It would not pose any risk to other employees and the public and the risk to Mr. Bhinder himself was negligible. There would be no administrative difficulties and any increased premiums under worker's compensation would be de minimis. The tribunal had ordered that Mr. Bhinder receive compensation for loss of earnings, reinstatement and that he be exempt from the hardhat rule.

The Supreme Court was called upon to consider similar issues in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, in which aspects of the *Bhinder* judgement were overturned. The case, as in *O'Malley*, involved adverse effects religious discrimination and work scheduling. The complainant, after three years of service with the employer, became a member of a religion that recognized particular holy days. In order to observe these religious holy days, the complainant requested leave for two specific days. The employer granted leave on the one day, but denied leave for the other, on the basis that attendance on that day was a BFOR because it fell on a Monday, which was a busy day for the employer. The complainant was dismissed for non-compliance with the attendance rule.

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If the Bhinder judgement had been followed in Central Alberta Dairy Pool, the complainant would not have succeeded. The case also involved adverse effects discrimination and the relevant statute included a BFOQ defence applicable to religious discrimination, which the Court held was the same as a BFOR defence. On the Bhinder line of reasoning, consideration of the impact of the rule on an individual employee would have been precluded by the BFOR defence.

At the outset, the Court noted the criticism that had been levelled at the Bhinder judgement and the concerns raised by the Canadian Human Rights Commission in a Special Report on the effects of the Bhinder decision. The Court expressly acknowledged that it had erred in concluding that the hardhat requirement was a BFOR in Bhinder. In response to the criticism in Bhinder, the Court developed a bifurcated approach to cases of direct and adverse effects discrimination in cases where the legislation included a BFOR defence. No distinction was drawn in the code between direct and adverse effects discrimination. In cases of direct discrimination, where a work rule was a BFOR, there was no duty to accommodate. Where the rule was not a BFOR it was struck down. In cases of adverse effects discrimination, the BFOR did not apply and the employer had a duty to accommodate short of undue hardship. The rule would, however, not be struck down if there was a rational connection between the rule and the performance of the job.

The minority rejected the bifurcated approach and argued that the duty to accommodate should apply in cases of direct and adverse effects discrimination. Under the minority approach, where there was a statutory BFOR the duty to accommodate would be discharged by establishing that the employer had a general accommodation policy and where there was no BFOR the duty to accommodate would be discharged by showing that reasonable efforts had been made to accommodate individual employees short of undue hardship.

On the facts, the majority found that the workrule met the test of rational connection, but that the complainant was entitled to exercise his religious beliefs. The onus was therefore on the employer to show that it had made efforts to accommodate the complainant short of undue hardship. Although the concept of undue hardship was introduced in O'Malley, the Court did not

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15 Individual's Rights Protection Act, R.S.A. 1980, C1-2, s. 7(3).
provide a definition of the concept or expand on its application. In *Central Alberta Dairy Pool* the Court, for the first time, listed factors that may be relevant to a determination that an accommodation imposes undue hardship on the employer, namely financial cost, disruption of a collective agreement, problems of morale of other employees and interchangeability of workforce and facilities. In enumerating the relevant factors a critical aspect of application of the duty to accommodate short of undue hardship was introduced: it requires a balancing of the employee’s right to be free from discrimination and the interests of employers.

The size of the employer’s operation may influence the assessment of whether a given financial cost is undue or the ease with which the workforce and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. The list is not intended to be exhaustive and “the results which will flow from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.” [emphasis added]¹⁶

On the evidence these factors had not been established, particularly in the light of the fact that the employer allowed absences from work on Mondays for other reasons such as illness. The Court ordered that the complainant receive compensation. It is not clear whether the complainant sought reinstatement and the employer was not ordered to amend its workrule.

The bifurcated approach developed in *Central Alberta Dairy Pool* was also severely criticized.¹⁷

In a number of subsequent decisions, a Federal Court and human rights tribunals attempted to mitigate the effects of the *Bhinder* and *Central Alberta Dairy Pool* cases.¹⁸ The reasons for revisiting the bifurcated approach and the criticism levelled at the approach were expressly canvassed and assessed in *Meiorin*, which is discussed below.

**Adoption of a unified approach**

The *Meiorin* case involved an aerobic standard which firefighters had to meet in order to qualify for a position as a firefighter. The standard had an adverse effect on women: a disproportionate

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¹⁶ *Supra* note 14 at 491 paras. f-i.

¹⁷ The key articles that criticized the decision are cited in *Meiorin, supra* note 1 at 7-8.
number of women were unable to meet the standard because of physiological differences between men and women.

In *Meiorin*, the parties asked the Court to revisit the bifurcated approach to cases of direct and adverse effects discrimination. This led to the abandonment of the bifurcated approach and adoption of a unified approach to all cases of discrimination. In order to give effect to this unified approach the court developed the following test for the establishment of a BFOR: An employer may justify an impugned standard by establishing:
1) That the employer adopted the standard for a purpose rationally connected to the performance of a job;
2) That the employer adopted the standard in an honest and good faith belief that it was necessary for the fulfillment of that work related performance; and
3) That the standard is reasonably necessary to the accomplishment of a work related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the complainant without imposing undue hardship on the employer.

Under the first leg of the test, the focus is on the validity of the general purpose of the standard. The purpose is generally safety and efficiency, although there may be other valid purposes. There also has to be a rational connection between the general purpose and the performance of the job. This standard will generally be easy to meet. The second leg of the test contemplates that in certain circumstances, the workplace rule may be objectively necessary but that the employer has instituted the rule for a discriminatory motive. This aspect of the test will seldom not be met. The third leg of the test focuses on the particular standard that was introduced by the employer. If individual differences may be accommodated without undue hardship on the employer, the standard is not a BFOR and the employer has failed to establish a defence to the charge of discrimination. The application of the BFOR test to the facts in *Meiorin* is discussed in Chapter Two.

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18 See *Canada (Human Rights Commission) v. Toronto Dominion Bank*, [1998] 4 F.C. 205. See also tribunal cases involving pregnancy discrimination discussed in Chapter Three.
The key features of the unified test are the abolition of the distinction between direct and adverse effects discrimination as a threshold for different employer defences, the incorporation of the duty to accommodate into the BFOR defence, the adoption of the BFOR defence in all cases of discrimination in employment and the retention of the undue hardship standard as a limit to the duty to accommodate.

One of the key reasons the Court advanced for abandoning the bifurcated approach was that the distinction upon which it was based was artificial, although the recognition of the concept of adverse effects discrimination had represented a significant step forward by recognizing harm that had not previously been recognized. The artificial nature of the distinction had been well illustrated by Day and Brodsky, whose analysis the Court adopted in Meiorin, with reference to disability discrimination: if a post is advertised that says “no blind people here”, the discrimination is clearly of a direct nature, but if the advertised post requires use of office equipment which has not been adapted for use by people who are blind, does this constitute direct or adverse effects discrimination? It could be characterized as direct discrimination because no blind person could ever meet the requirement or adverse effects discrimination because it is a neutral requirement that adversely affects people with visual disabilities. Day and Brodsky have also argued that the workrule in Central Alberta Dairy Pool could have been characterized as either direct or adverse effects discrimination. Any work or school schedule that designates Sunday as the regular day of rest is a religion centred schedule based on the calendar of the Christian majority religion and therefore constitutes direct discrimination against members of other religions.

19 All the provincial human rights codes and the federal Canadian Human Rights Act, currently include a BFOR defence. See Ontario Human Rights Code, supra note 6, ss. (11)(1)(a) and 11(2) read together with s. 24(1)(b) and s24(2); Human Rights, Citizenship and Multiculturalism Act, R.S.A.1980, c.H-11.7, s.7(3); Human Rights Act, R.S.N.B. 1973, c.H-11, s.3(5); Human Rights Code, R.S.B.C.1996, c.210, s.13.4. Human Rights Code, S.M. 1987-88, c.45, s.14 (1), Human Rights Act, R.S.N.S. 1989, c.68, s. 6(f)(i); Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 6(4); Saskatchewan Human Rights Code, S.S. 1979, c.S-24, s.16(7); Human Rights Code, R.S.N.1990, c.A-3, s.9(1); Charte des droits et libertes de la personne, L.R.Q.c.C-12, s. 20;Canada Human Rights Act, ss.14 and 15(2); Human Rights Act, R.S.Y. 1986 (Supp.), c 11, s.9 and the Fair Practices Act, R.S.N.W.T.1988, c.F-2, s.2(3). In all the codes, with the exception of Saskatchewan, the BFOR defence applies to all the prohibited grounds of discrimination in the particular code. In Saskatchewan, the BFOQ defence only refers to the prohibited grounds of sex, disability or age, s. 16(7). The BFOR defence in all the codes applies to sex discrimination.

20 S. Day & G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar. Rev. 433 at 438. This article was relied on heavily by the court and the arguments presented in the article are reflected in the judgment.
The Court in *Meiorin* also argued that framing the analysis around the distinction between direct and adverse effects discrimination was "unrealistic" as a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect could be reached in neutral language. "The bifurcated analysis gives employers with a discriminatory intention and the forethought to draft the rule in neutral language an undeserved cloak of legitimacy." The Court considered it difficult to justify different approaches depending on the method of discrimination, because the discriminatory effect is the same irrespective of how the claim is worded. This aspect is highlighted in pregnancy cases in instances where employers argue that uninterrupted job continuity is a BFOR subsequent to being informed that the applicant for the job is pregnant. 

A further, related reason cited for adopting the unified approach is the recognition that the duty to accommodate should also apply in cases of direct discrimination. Cases such as *Saskatoon*, decided subsequent to *Bhinder* and prior to *Central Alberta Dairy Pool*, and the minority judgements in *Bhinder* and *Central Alberta Dairy Pool*, foreshadowed this aspect of *Meiorin*. In *Saskatoon*, the Supreme Court had held that even in cases of direct discrimination there is a duty to find reasonable alternatives to introducing the discriminatory rule. The Court in *Meiorin* noted that in practice there may have been little difference between the two defences and quoted the decision of *Thwaites* as follows:

> whether the operative words are "reasonable alternative" or "proportionality" or "accommodation" the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

The unified approach provides a clear articulation of the principle that in all cases of discrimination employers have a positive duty to accommodate the specific needs of individuals or groups who fall within a prohibited ground of discrimination.

21 Supra note 1 at 19-20 para. 29.
22 See generally Chapter Three.
The judgement in *Meiorin* was, furthermore, developed in response to the severe criticism by Day and Brodsky that the bifurcated approach legitimised systemic discrimination. One of the aspects that they focused on was the effect that the bifurcated approach had on the applicable work-rule. Day and Brodsky had illustrated how the application of the duty to accommodate in cases of adverse effects discrimination legitimised systemic discrimination because, once the employer had proved a rational connection between the work related purpose and the work rule, the rule remained intact, irrespective of whether it had an adverse effect on individuals or groups. The discriminatory effect was mitigated by the duty to accommodate but the work rule was not struck down. In *Meiorin*, the Court referred to the criticism expressed by Day and Brodsky and adopted their analysis into its reasons for revisiting the conventional approach. Revisiting these doctrinal developments the Court observed that:

> Under the conventional analysis, if a standard is classified as being “neutral” at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself remains intact. The attention thus shifts away from the substantive norms underlying the standard to how “different” individuals can fit into the “mainstream” represented by the standard.

The unified BFOR test allows a consideration of whether the workrule or standard should be struck down in all cases of discrimination. To this extent, it assists in not legitimising systemic discrimination. The ability of the new BFOR test to allow workplace rules to be struck down should, however, not be overemphasized. It does not follow from the adoption of the new unified BFOR test that all discriminatory workplace rules that have not met the BFOR defence will be struck down. In *Meiorin* the court states that when the standard is not a BFOR the appropriate remedy will be chosen with reference to the remedies in the applicable human rights legislation, all of which include broad remedial powers. In relation to the applicable workrule or requirement, the standard or rule may be struck down and replaced, or the rule may be left intact and individual or group accommodation required.

The *Meiorin* case involved a discriminatory standard which applicants had to meet in order to qualify for a particular job. Chapter Two illustrates that it is particularly in these types of cases

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25 Day and Brodsky, *supra* note 20 at 461-463.
that striking down the workplace rule is possible and appropriate. The requirement will be replaced by a standard that is reasonably necessary for the performance of the job or by differential standards that ensure full and equal participation. However, this may not be appropriate in other types of cases. The religious discrimination cases led to the development of the bifurcated approach precisely because in those type of cases the appropriate accommodation is individual or group accommodation policies, as opposed to striking down the general workplace rule.

Nevertheless, the import of the Meiorin judgement is that systemic discrimination should be challenged and, wherever practical, workplace standards should be fashioned to incorporate the needs of different individuals. There is therefore a clear obligation in every case to consider what the most effective remedy will be, which includes a consideration of whether there is a systemic issue that should be addressed. In some instances systemic issues will best be addressed by striking down the rule, whereas in others, refashioning the rule or developing accommodation policies will be the most effective. In some cases, individual accommodation will remain appropriate.

A further critical aspect of the Meiorin judgment is the retention of the undue hardship standard as the applicable limit on the duty to accommodate. The crucial difference in the application of the standard is that it now applies to accommodation measures in cases of direct and adverse effects discrimination. Accordingly it will be relevant to have regard to the jurisprudence relating to undue hardship under the justifications for direct and adverse effects discrimination.

In Central Okanagan School District No.23 v. Renaud 27 it was confirmed that the use of the term "undue" indicates that some measure of hardship is acceptable. In Renaud, it was held that "More than mere negligible effort is required to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test."28 The Court in Renaud also rejected the approach in the United States of America, in which more than a de minimis cost constitutes undue hardship. Prior to the decision in Meiorin, it had been suggested

26 Supra note 1 at 25 at para. 40.
that the approach in *Renaud* placed a stricter standard of undue hardship on employers than the approach taken in *Central Alberta Dairy Pool*. The factors referred to in *Meiorin* are consistent with the approach in *Renaud* in which "employee morale" as a factor was narrowed to "substantial interference with the rights of other employees."

In *Meiorin* it was noted that the factors to be taken into account in determining undue hardship are not entrenched except to the extent to which they are expressly included or excluded by statute. The Court referred to the dicta in *Commission Scolaire Regionale de Chambly v. Bergevin* that such considerations should be applied with common sense and flexibility in the context of the factual situation present in each case. The importance of a flexible approach to undue hardship is underscored by cases involving discrimination in remuneration and benefits discussed in Chapters Three and Four. Although the undue hardship standard places a limit on the duty to accommodate, the standard is desirable because it allows for a balancing between the interests of employees to be free from discrimination and employer interests. The undue hardship standard is also the appropriate standard because it places a high value on the right of employees to be free from discrimination.

*Meiorin* addresses many of the criticisms levelled at the Court's bifurcated approach. Echoing Day and Brodsky, the Court went as far as to acknowledge that the conventional approach interpreted human rights legislation primarily in terms of formal equality which undermined the promise of substantive equality and prevented consideration of the effects of systemic discrimination. The *Meiorin* case is one of the very few Supreme Court cases that have dealt directly with sex discrimination and is the first clear adoption by the Supreme Court of the language of formal and substantive equality in a sex discrimination case. Furthermore, the emphasis in the case on the need to challenge male-based workplace norms and systemic issues, and the importance of accommodating difference in the workplace is significant and positive. Ways in which the positive aspects of the Canadian approach can be incorporated into the

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28 Ibid., at 984 paras.a-c.
31 The court did not define formal and substantive equality in precise terms. For a general discussion of the application of formal and substantive equality in the context of sex discrimination in employment in Canada see S. Price, "Accommodating Women in Employment: The Limitations of the Traditional Approach" (1993) 1 CLLJ 140.
developing approach to employer defences in South Africa are considered in the next part of this chapter.
Part Two: South Africa

The purpose of this section is to outline the constitutional and legislative framework in South Africa that provides the formal legal context within which employers will raise defences to discrimination claims, and to suggest an approach to employer defences.

Constitutional and legislative approach to equality

The South African constitutional order is deeply committed to achieving equality. The *Bill of Rights* contains a far-reaching equality clause that reflects a substantive approach to equality by express recognition that everyone has the right to equal protection and benefit of the law and the recognition that equality may require legislative and other measures designed to protect or advance persons or categories disadvantaged by unfair discrimination. The equality clause also provides that “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.” Discrimination on one or more of the listed grounds is unfair unless it is established that the discrimination is fair.

The Court’s approach to unfair discrimination, developed in a number of cases, reflects a commitment to addressing systemic discrimination by the express recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group

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33 Section (9)(1) provides that “everyone is equal before the law and has the right to equal protection and benefit of the law.”
34 Section 9(2) provides that “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.”
35 Section 9(3).
36 The Court’s approach to equality claims under the Bill of Rights is outlined in full in Harken v. Lane No and Others 1998 (1) SA 300 (CC) at para 54. [hereinafter Harken]
disadvantage and that the Constitution permits positive steps to redress the effects of such discrimination.\textsuperscript{37} To ascertain whether discrimination, which relates to "the unequal treatment of people based on attributes or characteristics attaching to them,"\textsuperscript{38} is unfair, requires an understanding of the impact of the discriminatory action to determine whether its overall impact is one that furthers the constitutional goal of equality or not. In determining the impact of the discrimination on the complainants, a number of factors must be considered, including: the position of the complainants in society, and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power under attack and the purpose sought to be achieved by it; and, taking the above and other relevant factors into account, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.\textsuperscript{39}

The constitutional commitment to redressing systemic discrimination and disadvantage is further reflected by the inclusion in the Bill of Rights of a provision mandating national legislation to prevent or prohibit unfair discrimination\textsuperscript{40} and the subsequent enactment of the Equality Act.\textsuperscript{41} The Act itself also reflects a substantive approach to equality. There is recognition in the preamble, for example, that systemic inequality remains deeply imbedded in societal practices and attitudes.\textsuperscript{42} The definition of equality refers not only to de facto and de jure equality but equality of outcomes.\textsuperscript{43} Further, one of the guiding principles in interpreting the legislation is taking into account the existence of systemic discrimination and inequalities, including gender.\textsuperscript{44}

\textsuperscript{37} President of the Republic of South Africa and Another v. Hugo (1997) 6 BCLR (CC) at para 41.
\textsuperscript{38} Prinsloo v. Van der Linde and Another (1997)(6) BCLR 759 (CC); Harksen, supra note 36.
\textsuperscript{39} Harksen, supra note 36.
\textsuperscript{40} Section 9(4).
\textsuperscript{41} The Equality Act has not entered into force.
\textsuperscript{42} In terms of s. 3(b) the Act must be interpreted to give effect to the preamble.
\textsuperscript{43} Section (1)(ix).
\textsuperscript{44} Section (4)(2)(a).
In addition to a prohibition against unfair discrimination a positive obligation is placed both on
the state and private citizens to promote and achieve equality.\textsuperscript{45}

The approach to unfair discrimination in the Act and the structure of the enquiry is closely
modelled on the Constitutional Court’s approach. This is reflected in the definitions of both
“discrimination” and “prohibited grounds” and the approach to a determination of fairness or
unfairness. Discrimination is defined as any act or omission, including a policy, law, rule,
practice, condition or situation which directly or indirectly imposes burdens, obligations or
disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or
more of the prohibited grounds.\textsuperscript{46} Under the definition of prohibited grounds, the listed
prohibited grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin,
colour, sexual orientation, age disability, religion, conscience, belief, culture, language and
birth.\textsuperscript{47} If discrimination on a listed ground is established then it is unfair unless the respondent
proves that the discrimination is fair.\textsuperscript{48} Prohibited grounds, other than listed grounds, are defined
as “any other ground where discrimination on that other ground causes or perpetuates systemic
disadvantage, or undermines human dignity, or adversely affects the equal enjoyment of a
person’s rights and freedoms in a serious manner that is comparable to discrimination on a listed
ground.”\textsuperscript{49} Discrimination that meets one of these conditions is also unfair unless the respondent
proves that the discrimination is fair.\textsuperscript{50} There are no further defences to a claim of unfair
discrimination.

In determining whether the respondent has proved that the discrimination is fair, the court must
take into account the context; a number of outlined factors and whether the discrimination
reasonably and justifiably differentiates between persons according to objectively determinable
criteria that are intrinsic to the activity concerned.\textsuperscript{51} The outlined factors include;\textsuperscript{52} whether the

\textsuperscript{45} Sections 6, 24. Section 25 places a number of specific positive obligations on the state which include, for
example, development of action plans, enactment of further legislation and development of codes of practice to
promote equality, including codes in respect of reasonable accommodation.
\textsuperscript{46} Section 1(viii).
\textsuperscript{47} Section 1(xx)(a).
\textsuperscript{48} Section 13(c)(1).
\textsuperscript{49} Section 1(xx)(b)(i-iii).
\textsuperscript{50} Section 13(c)(ii).
\textsuperscript{51} Section 14(2).
\textsuperscript{52} Section 14(3).
discrimination impairs or is likely to impair human dignity; the impact or likely impact of the discrimination on the complainant; the position of the complainant in society and whether he or she belongs to a group that suffers from patterns of disadvantage; the nature and extent of the discrimination; whether the discrimination is systemic in nature; whether the discrimination has a legitimate purpose; whether and to what extent it achieves its purpose; whether there are less restrictive and disadvantageous means to achieve the purpose; and to what extent the respondent has taken such steps as are reasonable in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds or accommodate diversity. All these provisions of the Equality Act are, broadly speaking, consistent with the Constitutional Court jurisprudence in respect of unfair discrimination.\textsuperscript{53}

The Act provides for enforcement of violations of the prohibition against unfair discrimination through Equality Courts established pursuant to the legislation.\textsuperscript{54} In addition to payment of damages and the granting of interdicts, orders which the court can issue include systemic remedies such as restraining unfair discriminatory practices or directing that specific steps be taken to cease the unfair discrimination, making specific opportunities and privileges unfairly denied available to the complainant, implementation of special measures to address the unfair discrimination and reasonable accommodation of a group or class of persons.\textsuperscript{55}

The Equality Act does not prohibited unfair discrimination in enumerated sectors of society.\textsuperscript{56} However, the Equality Act excludes from its scope situations to which the Employment Equity Act\textsuperscript{57} applies, leaving discrimination in employment to be dealt with under the latter.\textsuperscript{58} The Employment Equity Act is one of the most far-reaching acts passed since the introduction of the

\textsuperscript{53} In terms of s. 3(a) the Act must also be interpreted to give effect to the Constitution.
\textsuperscript{54} See generally Chapter Four of the Equality Act.
\textsuperscript{55} Section 21.
\textsuperscript{56} Under the Canadian human rights codes discrimination is prohibited in specific sectors, for example, employment, provision of services, and housing and accommodation. Under the South African Equality Act examples of unfair discrimination in various sectors such as education and health care are provided in a schedule to the Act, Schedule I. In relation to unfair discrimination, the Act provides that the Schedule is intended to provide an illustrative list of practices within certain sectors that are or may constitute unfair discrimination in order to "address to eliminate these practices [sic] and assist persons in interpreting experiences and practices," s. 29(4). These provisions and the Schedule itself are vague and badly drafted. It is unlikely that the Schedule will assist claimants in establishing claims of unfair discrimination.
\textsuperscript{57} No. 55 of 1998 [hereinafter Employment Equity Act].
new constitutional order in South Africa. The preamble to the Act recognizes that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. The purpose of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce. The focus in this thesis is on the elimination of unfair discrimination.59

The unfair discrimination chapter of the Act provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.60 It also includes a broad prohibition against unfair discrimination in any employment policy or practice on various listed grounds that expressly include sex, gender, pregnancy, marital status and family responsibility.61 Employment policy or practice is defined in a broad and open ended manner and includes, amongst others, selection criteria, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, transfer and dismissal.62

There are two specific enumerated employer defences to unfair discrimination; a defence that shields affirmative action measures from a discrimination claim and the inherent requirements of the job (IRJ) defence.63 Disputes about unfair dismissals64 fall to be decided under the Labour

58 Section 5(3) of the Equality Act provides "this act does not apply to any person to whom and to the extent which the Employment Equity Act, 1988 (Act 55 of 1998) applies."
59 Chapter Two of the Act deals with the prohibition of unfair discrimination and Chapter Three deals with affirmative action.
60 Section 5.
61 Section 6(1).
62 Section 6(1) read together with s. (1).
63 Section 6(2)(a) and (b) provide that "it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act; or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."
64 Section 10(1).
The Labour Relations Act provides that a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy; or if the employer unfairly discriminated against an employee directly or indirectly on any arbitrary ground, including a number of listed grounds which are similar to those in the Employment Equity Act including sex, gender, marital status and family responsibility. The Labour Relations Act also includes the IRJ defence as a defence to unfair dismissal. Unfortunately, as illustrated by the recent decision of Woolworths, the Labour Appeal Court has to date not interpreted and applied the legislative provisions in accordance with the Constitutional and legislative commitment to redressing systemic inequality.

Confusion in the case law dealing with employer defences

The recent case of Woolworths reflects confusion on the part of the Labour Appeal Court in relation to employer defences to discrimination and, in general, a lack of understanding of the constitutional and legislative approach to equality. The confusion is illustrated by the fact that the Court handed down three different judgements in which each judge adopted a different approach. A striking aspect of the judgement is the court's failure to have regard to the Constitution, which it is obliged to do in terms not only of the Labour Relations Act but the

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65 No. 66 of 1995 [hereinafter Labour Relations Act].
66 Section 187(1)(e). Pregnancy is not listed as a ground of discrimination but cases have held that pregnancy discrimination is sex discrimination. See Botha v. Import Export International CC (1999) 20 ILJ 2580 (LC) [hereinafter Botha] and Woolworths (Pty) Ltd. v. Whitehead (unreported) Case no. CA 06/99 Date of decision 3 April 2000 [hereinafter Woolworths].
67 Section 187(2) provides that "a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job."
68 See Woolworths, supra note 66 at para. 123.
69 The case was decided under the residual unfair labour practice jurisdiction provisions of the Labour Relations Act that were subsequently repealed and replaced by the discrimination provisions in the Employment Equity Act.
70 Section 3 of the Labour Relations Act expressly provides that the Act must be interpreted in compliance with the Constitution.
A full exposition of the facts highlights the shortcomings of the court's approach.

Ms. Whitehead, an applicant for employment, was interviewed and offered a permanent position with an employer. The offer was not accepted. Subsequently the employer contacted Ms. Whitehead to enquire whether she would be interested in re-applying for the post, because the position had not been filled. The post had been re-advertised. At the second interview the applicant informed the employer that she was pregnant. No mention was made that a requirement for the job was uninterrupted job continuity. The employer declined to offer her the post. Instead, it offered her a five month fixed term contract, the expiry of which coincided with the point at which she would require maternity leave. Only after offering the applicant the fixed term contract, the employer interviewed and offered the permanent position to another applicant, who was accepted. In these circumstances, the Labour Appeal Court reached the startling conclusion that no unfair sex discrimination on the basis of pregnancy had taken place.

On appeal, the employer conceded that the applicant’s pregnancy was a factor in the decision to offer her a fixed term contract, as opposed to the permanent position, but argued that the failure to hire her was not unfair discrimination because the reason she was not appointed was not because of her pregnancy, but because the person to whom it was offered was a better candidate. In the alternative, it was argued that the applicant did not qualify for the permanent position in any event because uninterrupted job continuity was an inherent requirement of the job.

Judge Zondo, in the majority, dismissed the claim on the basis of causation by finding that the applicant was not appointed to the position, not because she was pregnant, but because a better candidate for the job was appointed and accordingly that there was no causal link between the applicant’s pregnancy and the decision not to appoint her to the permanent position. On the facts, this finding is clearly undermined by the fact that the “better candidate” was only interviewed after Ms. Whitehead was offered the contract post, and not the permanent post. Further, applying

\[^{71}\text{Section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights. The section is couched in peremptory terms and imposes an obligation on all courts.}\]
a causation test misconstrues the nature of the constitutional and legislative approach to unfair discrimination outlined above. Because the claim was dismissed on the basis of causation the judge did not consider or apply the IRJ defence.

The basis of the decision of Judge Willis, also in the majority, is unclear. Willis was also of the view that the matter should be decided without reliance on the IRJ defence, on the basis that the employer had conceded that the requirement of uninterrupted job continuity was not an absolute requirement for the position. Willis noted the employer's concession that the decision not to appoint the applicant to the permanent decision was discriminatory because pregnancy was a factor in the decision, but seemed to think that the concession was not properly made because the applicant's pregnancy was not the reason or cause for the decision not to appoint her. Rather, concurring with Zondo, the reason she was not appointed was that a better candidate for the post was appointed. The judgement then, nevertheless focuses at length on whether the discrimination was unfair in the circumstances. The approach of Willis therefore suggests that in circumstances where the IRJ defence is not applicable, an employer may nevertheless establish that the discrimination was not unfair discrimination. No attempt was made, however, to draw a distinction between circumstances in which the IRJ defence would apply and circumstances in which an employer could not meet the IRJ, but nevertheless could establish that the discrimination was fair. In relation to the enquiry into unfair discrimination, no reference was made to the constitutional approach to unfair discrimination, outlined above. The judge did refer with approval to the amicus brief filed in the case73 suggesting that factors drawn from the Equality Act, which, as suggested above, gives effect to the Constitutional Court's approach, should be taken into account to determine whether discrimination is fair. The judge then, however, proceeded not to apply the factors outlined. Despite the finding earlier in the judgement that uninterrupted job continuity was not an absolute requirement, the judge, when considering fairness, considered job continuity an acceptable contributing factor to the employer's decision to appoint Ms. Whitehead to the permanent position. The thrust of the rest of the judgment appears to be that commercial justifications are also legitimate concerns to be taken into account when determining whether the discrimination was unfair. The judge went as far as to argue that:

72 Ms. Whitehead's claim had been upheld in the Labour Court. An application for leave to appeal the unfavourable decision of the Labour Appeal Court has been filed, but the application has not yet been heard.
a decision in favour of the applicant will favour elites and act to the detriment of the poor because when it comes to executive positions the consequences [of hiring pregnant women] go beyond imposing a burden on employers. They impact negatively on the capacity of the economy as a whole, to grow and, in so doing, its capacity to create new jobs.\textsuperscript{74}

Judge Conradie, in the minority, focused on the employer's defence relating to the continuity requirement. He was not persuaded that uninterrupted job continuity was such a vital requirement that it should have led to the decision not to offer Ms. Whitehead the permanent position. In relation to the finding of the majority judges that Ms. Whitehead had not been appointed because the position was offered to a better candidate, the judge was also not persuaded: the other candidate was only interviewed once Ms. Whitehead declined the offer of a fixed term contract. This approach allowed Conradie to focus on what should have been the only issue at hand, namely whether uninterrupted job continuity was an inherent requirement of the job. Application of this defence to uninterrupted job continuity in circumstances where an applicant for a job is pregnant is discussed more fully in Chapter Three. The undesirable outcome of the case and the failure to interpret the law in terms of the commitment to redressing systemic discrimination underscores the importance of ensuring that courts develop an appropriate test for employer defences. I therefore suggest an approach to employer defences below.

\textbf{Suggested Approach to employer defences}

As outlined above, the \textit{Employment Equity Act} contains a broad prohibition against unfair discrimination in any employment policy or practice on various prohibited grounds. Two specific defences are outlined, namely the IRJ defence and an affirmative action defence. If these defences are met, the discrimination is therefore fair or, put differently, unfair discrimination is not established. As outlined, the approach of Judge Willis in \textit{Woolworths} suggests that an employer may not meet either of these two defences but may nevertheless establish that the discrimination was not unfair, i.e. that the legislation includes a residual fairness defence.

\textsuperscript{73} The brief was filed by the Women’s Legal Centre.
\textsuperscript{74} \textit{Supra} note 66 at para. 146-147.
Although I argued that Woolworths should have been decided under the IRJ, there are circumstances in which a residual fairness defence would be appropriate. Such a residual defence is also in keeping with the structure of the unfair discrimination enquiry under the equality clause of the Bill of Rights and the Equality Act. As evidenced in Willis's approach in Woolworths, there is the danger that a residual fairness defence could be interpreted as being a more generous exception than the inherent requirements defence, because fairness appears to be a more elastic concept. This can be avoided, however, if both defences are properly considered in terms of the constitutional and legislative framework, with its strong commitment to the eradication of patterns of systemic, historic disadvantage. I suggest ways in which this could be done.

As discussed above, the Canadian Supreme Court in Meiorin abolished the distinction between direct and indirect discrimination as a threshold issue for different defences. The lesson from the Canadian experience is that South Africa should decline to draw a distinction between different defences on this basis. This aspect is motivated more fully in Chapters Two to Four. Based on examining fact situations in both Canadian and South African cases in Chapters Two to Four, my conclusions are that a residual fairness defence may assist in resolving discrimination in remuneration and employment benefits, which are listed under the definition of employment policies or practices in the Employment Equity Act. The cases suggest that the IRJ defence would be appropriate in resolving discrimination in employment policies or practices that establish qualifying standards for the job or relate to performance of the job. I have, however, not attempted to provide a comprehensive set of circumstances in which the inherent requirements of the job defence or the residual fairness defence should apply or suggested that there be a strict demarcation between the two defences.

In relation to the IRJ defence, the Canadian BFOR test highlights principles that can and should be followed in South Africa. Aspects of the test for a BFOR developed in Meiorin have already been incorporated into discrimination law in the South African Equality Act. Because the approach to equality in the Equality Act gives effect to the Constitutional Court's approach to equality which courts are obliged to follow in interpreting labour legislation I argue that labour
courts should have regard to the *Equality Act*.\(^7^5\) The *Equality Act* expressly outlines factors to be taken into account when determining fairness. Certain of these factors should be applied under the *Employment Equity Act* and *Labour Relations Act* to determine whether an employer has established that a work requirement is not unfair discrimination because it is an IRJ. These factors are the following:\(^7^6\)

1) whether the discrimination has a legitimate purpose,
2) whether and to what extent it achieves its purpose,
3) whether there are less restrictive and disadvantageous means to achieve the purpose, and
4) whether the respondent has taken such steps as are reasonable in the circumstances either to address the disadvantage which arises from or is related to one of the prohibited grounds, or to accommodate diversity.

With one exception the factors outlined above would appear to conform with the factors comprising the Supreme Court of Canada’s test for a BFOR. The exception is that the *Equality Act* does not include the notion of undue hardship among the factors to determine fairness. The danger is that judges will be too willing to accept that the steps taken to redress disadvantage or accommodate diversity are “reasonable” because of the reasons advanced by employers. Accordingly a clear component of the enquiry should be a heightened standard that reflects that employers may have to suffer some hardship in making such accommodation and that such hardship may be material. It is therefore suggested that South African courts should interpret the IRJ defence so as to place an obligation on employers who wish to show that it is unreasonable to address discriminatory disadvantage or to accommodate diversity, to do so short of undue hardship.

In relation to the residual fairness defence, I suggest that the approach to fairness under the *Employment Equity Act* and *Labour Relations Act* should include the same factors as those under the *Equality Act*, in addition to those applied under the IRJ defence. The greater the extent to

\(^7^5\) *Supra* note 70. Section 3 of the *Employment Equity Act* also provides that the legislation must be interpreted in compliance with the *Constitution*.

\(^7^6\) *Equality Act*, ss. 14(3)(a)-(e).
which these factors are present, the harder it should be for an employer to establish that the discrimination is fair. The additional relevant factors listed are as follows: 77

1) whether the discrimination impairs or is likely to impair human dignity,
2) the impact or likely impact of the discrimination on the complainant,
3) the position of the complainant in society and whether he or she belongs to a group that suffers from patterns of disadvantage,
4) the nature and extent of the disadvantage, and
5) whether the discrimination is systemic in nature.

The arguments to support this approach are developed more fully in Chapters Two to Four, by applying the Meiorin test for a BFOR adopted in Canada and the approach that I have suggested for South Africa to three areas of sex discrimination in employment, namely discrimination in qualifying standards based on physiological differences between the sexes, pregnancy and family status or family responsibility.

77 Equality Act ss. 14(3) (f)-(h).
**Chapter Two: Physiological qualifications for employment**

This chapter examines cases involving physiological qualifications for employment that discriminate against women. An examination of pre-*Meiorin* Canadian cases, *Meiorin*, and the only relevant South African case demonstrates that the application of the *Meiorin* approach in Canada and the approach that I suggest to the IRJ defence in South Africa deliver an outcome that appropriately balances the purposes of discrimination law against legitimate employer concerns.

In Canada many of the early discrimination cases dealt with direct discrimination based on overt prejudice, stereotypes and paternalism where employers argued that only men qualified for certain jobs. In cases involving prejudice, where the employer did not advance any substantive reasons for requiring a man or woman for the job, the BFOR defence was not applied. In other cases, employers argued that the discrimination was justified, based on physiological differences between men and women, and relied on the BFOR defence. Adjudicators tended to dismiss such claims because they were based on stereotyped assumptions and employers were unable to prove that being a man was connected in an objective sense to performing the job concerned. Under the unified approach, all these cases involving prejudice and stereotypes would fall to be decided within the rubric of the BFOR defence.

The inclusion of cases involving overt prejudice within the BFOR defence is a positive development, because it assists in articulating the basis upon which the discrimination is not justified, thereby contributing to the developing understanding in society of discriminatory behaviour. Under the *Meiorin* BFOR test, these cases will fail to meet the first leg of the test that the impugned standard was adopted for a purpose rationally connected to the performance of the job. The failure to meet the test clearly establishes that prejudice is not a purpose rationally connected to performance of the job. I have suggested that the first leg of the IRJ defence in South Africa should require that a standard be adopted for a legitimate purpose. Behaviour grounded in prejudice will fail this test too.
In cases of direct discrimination where the employer does advance substantive reasons for the discrimination, which legs of the *Meiorin* test would be applied would depend on the exact reason advanced by the employer for the discrimination. Some cases may be decided under the first leg of the test, whereas others may meet the first two legs of the test and proceed to the third leg of the test that the standard is reasonably necessary to the accomplishment of a work related purpose. In cases where the stereotyped assumption turns out to reflect very real physiological differences between the sexes, the advantage of the *Meiorin* test is that application of the third leg of the test incorporates the duty to accommodate into the enquiry, even in these cases of direct discrimination, thereby placing a positive obligation on employers to find ways of accommodating women's capabilities.

The only relevant South African case to date also involved direct discrimination based on stereotyped assumptions about the physiological differences between men and women. The reasoning and outcome of the case, which did not uphold a claim of unfair dismissal based on sex, underscores the importance of the *Meiorin* BFOR test and of taking an approach to the IRJ defence that requires the employer to establish that the discrimination is for a legitimate purpose, that the purpose is achieved, that there are no less restrictive or disadvantageous ways of achieving the purpose and that it has taken steps to redress disadvantage or to accommodate diversity short of undue hardship. Application of the approach that I suggest may have resulted in the more favourable outcome of unfair dismissal based on sex.

A specific instance in which application of the duty to accommodate short of undue hardship will be useful in cases of direct discrimination is where an employer expressly requires a male or female for a job, based on privacy and dignity concerns that arise out of physiological differences between the sexes. Although the justifications for the discrimination are not inherently repugnant because they are based on the protection of dignitary interests of persons other than the employee, application of the duty to accommodate short of undue hardship would be useful in setting the appropriate balance in these cases.

Discrimination is, however, not always based on direct, overt discrimination. It also arises in relation to seemingly neutral rules that have a disproportionate impact on a prohibited ground of
discrimination, including sex. A significant focus of the judgement in *Meiorin* was the need to challenge seemingly neutral rules that result in systemic discrimination against women. The case opens the door to a more systemic analysis of discrimination in three ways. Firstly, it highlights that research studies upon which qualifying standards are based should be carefully scrutinized. The unified test also undermines the tendency of the bifurcated approach to legitimize systemic discrimination by declining to strike down discriminatory workplace standards in adverse effects cases. Such workplace standards can now be struck down where appropriate in instances of either direct or adverse effects discrimination. Finally, *Meiorin* challenges male norms and systemic discrimination through the acknowledgment that accommodation may include differential standards reflective of group or individual differences and capabilities.

If differential standards are not appropriate because a lower standard for women would drop below the minimum standard required for the safe and efficient performance of the job, adjusting the duties of the job may have to be considered. The Supreme Court had previously declined to order that employers should adjust the duties of the job, because the claim arose in a case of direct discrimination under the bifurcated approach that precluded application of the duty to accommodate in cases of direct discrimination. Adjustment of the duties of the job may now be applicable to cases of both direct and adverse effects discrimination. If such accommodation is applicable, it is possible that employers would, however, be able to establish that adjusting the duties of the job would constitute undue hardship. Undue hardship is an appropriate standard because it will allow courts to assess legitimate employer concerns in relation to adjusting the duties of the job, whilst recognizing that employers may have to incur a level of hardship towards redressing systemic discrimination against women.

**Direct discrimination**

**Prejudice and stereotyped assumptions**

Many early Canadian cases dealt with direct discrimination in employment based on prejudiced assumptions about the desirability and suitability of employing women in male dominated occupations. In cases involving prejudice, where an employer advanced no substantive reasons
for the discrimination, the BFOR defence was not applied. In *Hartling*, for example, a woman was refused for a job as a police constable, a male dominated occupation, simply because the Chief of Police, on behalf of the employer, preferred to have male constables because such positions had been traditionally occupied by males. The applicable human rights code did include a BFOR defence in respect of sex discrimination. Although *Hartling* was decided prior to *Etobicoke*, in which the Supreme Court first adopted a test for the BFOR defence, the tribunal’s approach to the BFOR defence was similar to the objective component in *Etobicoke* that the requirement or practice be job-related. Because no job related reasons were advanced by the employer for not considering the complainant’s application for a job, the tribunal did not apply the BFOR defence. It simply held that the employer had discriminated against the complainant and proceeded to consider an appropriate remedy.

Under the unified approach adopted in *Meiorin*, the BFOR defence would be applicable in a case such as *Hartling*. It would be one of the few types of cases that would not meet the first leg of the enquiry. As outlined by the court in *Meiorin*, the initial task is to determine what the standard is generally designed to achieve. Once this has been established the employer must demonstrate a rational connection between the general purpose and the performance of the job. In a case such as *Hartling*, an employer would be hard pressed to establish what the standard is generally designed to achieve because no substantive reasons were advanced for the discrimination, other than personal preference. Similarly, under the approach I suggest for South Africa, the employer would fail to establish a legitimate purpose. In the words of the tribunal in *Hartling* “an employer cannot refuse a woman consideration for employment simply because she is a woman and the employer does not view the position as suitable for a female when the job can be done just as well by a female person as a male person.” The reason why such behaviour is proscribed under anti-discrimination law is clearly articulated in *Hugo*, one of the first cases of sex discrimination that came before the South African Constitutional Court:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which

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79 See page 6 above.
80 Supra note 78 at D/494.
81 Supra note 37 at para. 41.
all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

A positive aspect of including cases involving overt prejudice within the applicable defence is that articulating that the purpose of the discrimination is not legitimate because it violates the dignitary interests which discrimination law seeks to protect, contributes to the developing understanding in society of discriminatory behaviour.

There are also early Canadian cases involving direct discrimination based on stereotyped assumptions in which employers did advance substantive reasons for the discrimination. In *Shack*, 82 for example, an employer argued that women were not capable of performance of the duties of the job as a rental clerk at a Hertz franchise. Because the evidence did not establish that women could not perform the physical work involved in stripping down trucks the employer failed to establish a BFOR - being a man was not connected in an objective sense to performance of the job concerned. This case may now meet the first two legs of the *Meiorin* test and proceed to the third leg of the test. Under the first leg of the *Meiorin* test the employer would be required to prove that the impugned standard was adopted by the employer for a purpose rationally connected to the performance of the job. The employer's general purpose in adopting a sex-based standard would have been to identity applicants who could perform the job safely and efficiently. Such a purpose is rationally connected to performance of the job, which involved stripping down of trucks. One is tempted to say that the case should fail at this first stage because there is no rational connection between the standard of being a man and the performance of the job. The court in *Meiorin*, however, emphasizes that the enquiry under leg one is between the purpose for which the standard was introduced and the performance of the job and that the particular standard is considered under the third leg of the test. The purpose for which the standard was introduced would have been to identify employees who could perform the job safely and efficiently. The requirement under leg three of the test that the standard be reasonably necessary to the accomplishment of the work related purpose would appear therefore to include a consideration of whether there is a rational connection between the particular standard, in this

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case being a man, and the work related purpose, identifying employees who could perform the job safely and efficiently.

In focusing, however, on the particular standard adopted by the employer under leg three of the Meiorin test, the employer would however not have been able to prove that the requirement of being a man was reasonably necessary to the accomplishment of a work related purpose. Under South African law, as I have suggested it be interpreted, this kind of case falls into the category of qualifying standards related to job performance and should therefore be governed by the inherent requirements of the job test. According to my construction of that test, an exclusionary standard must achieve the work related purpose. Absent evidence that only men are able safely to strip down trucks, this practice of excluding women would not pass muster.

An advantage of the way in which the enquiry is structured is that a mechanism is provided to deal with cases where it turns out that women are in fact unable to perform aspects of the job. In such cases an employer may have to prove under leg three of the Meiorin test that accommodation of the employee short of undue hardship is impossible in order to establish that requiring a man for the job is reasonably necessary to the accomplishment of the work related purpose. Under the approach that I have suggested for South Africa, in order to establish the IRJ defence, the employer would have to prove not only that the discrimination achieves the legitimate purpose, and that there are no less restrictive and disadvantageous means to achieve the purpose, but that it has taken steps to redress disadvantage and accommodate diversity short of undue hardship. This places a positive obligation on employers to find ways of accommodating differential capabilities of men and women with a view to achieving equality in the workplace.

The only relevant South African case to date, CWIU v. Johnson & Johnson (Pty) Ltd, also involved direct discrimination based on stereotyped assumptions about differing physiological capabilities of men and women. It was decided prior to the introduction of the Constitution under the unfair dismissal provisions of the Labour Relations Act. In Johnson, the employer had

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83 (1997) BLLR 1186 (LC) at 1196 G-J [hereinafter Johnson].
84 See note 66 above.
retrenched 20 female staff members who argued that the selection criteria used by the employer were based on the assumption that female workers who were retrenched could not perform the jobs which the male workers with shorter service periods than themselves were doing. As in the Canadian case of Shack, the employer argued that its attitude that women could not perform those jobs was based on its knowledge of what those jobs entailed as well as on evidence that the jobs were too physically demanding for women.

The Court noted that implicit in the employer’s attitude was the assumption that there were jobs for which every male person was suitable and for which every woman would be physically unsuitable and remarked as follows:

Linked to that assumption was the (erroneous) belief on the employer’s part that all women are physically weaker than all men and that all men are physically stronger than all women... Quite frankly I have serious difficulty in thinking what job (other than perhaps the oldest profession) exists under the sun which can be said to inherently require a worker to be a male or female in order to perform.85

Despite these positive views on the capabilities of women, the unfair dismissal claim was rejected on the basis that, because the employer had provided the employees with an opportunity to propose alternative selection criteria that had not been taken up, there was no causal link between the employer views on the requirements of the job and the dismissal. The effect of this approach is to shift the burden of making accommodation onto the employee. The undesirable outcome of the case underscores the importance of ensuring in the approach to the IRJ defence that the onus is on the employer to prove that the selection criteria was an inherent requirement of the job and that undue hardship would result if the employees were accommodated by the use of alternative criteria. On the approach to the IRJ defence that I have outlined, even though the case involved direct discrimination based on stereotyped assumptions, if there was evidence that women could in fact not perform aspects of the job, the employer should have had to establish that accommodation by way of adjusting the duties of the job would result in undue hardship.86

85 Supra note 83 at 1196 paras. g-j.  
86 This aspect is considered further below.
In addition to cases of direct discrimination involving physiological differences between the sexes, as in *Johnson*, a specific instance in which application of the duty to accommodate short of undue hardship may assist in resolving cases of direct discrimination is where an employer expressly requires a male or a female for a job, based on privacy and decency concerns.

**Privacy and decency concerns**

Direct discrimination based on physical differences between men and women has also arisen in circumstances where employers argue that being a man or a women is required for a particular job because performance of the tasks of the job involve considerations of privacy and decency based on societal norms. One of the significant ways in which these cases differ from the cases discussed above is that the female applicant can, apart from the privacy and decency concerns, perform the tasks of the job as well as men. The justifications for the discrimination are not inherently repugnant because they are based on protection of dignity interests of persons other than the employee. One of the areas in which such cases have arisen is elder care or special care homes. In these cases, the employer's general purpose is to create an environment that is conducive to respect for the privacy and decency of its residents. Two recent Canadian cases, which predate *Meiorin*, illustrate why the *Meiorin* BFOR test may assist in resolving these issues.

In the earlier case, *North Central Health District Board* the Saskatchewan Human Rights Commission extended an existing exemption under the human rights code to permit an employer to designate three and a half positions for men only in attendant positions at a special care home in order to give male residents a choice about the sex of their personal care attendant. One of the striking aspects of the decision is that no reference was made to any of the Supreme Court jurisprudence in relation to the BFOR defence. The Commission stressed that these cases are of a particular nature because they fall within a category of exemptions relating to employment that protect the personal dignity and autonomy of individuals who live in institutions and that these

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87 This is not the only type of instance in which considerations of privacy and decency arise. For an overview of the types of cases involving privacy and decency in Canada, see generally A.P. Aggarwal *Sex Discrimination: Employment Law and Practices* (Markham, Ont. Butterworths, 1994) at 249 – 269.

cases are distinguishable from other cases involving personal preference, because the preference of having a personal care attendant of a particular sex involves dignitary rights which are also protected by the code.

The union argued, on behalf of the employees, that the exemption should not be extended. One of the bases the union relied upon was that there was not a significant demand for male attendants from the male residents. The Commission rejected this argument on the basis that it was sufficient that a few employees had requested such care, because of the nature of the dignitary interests at stake. The Commission stressed that the exemption adequately balanced equality in employment and the protection of the dignitary interests of the residents, by designating only a limited number of positions for men which meant that the choice of a male attendant was only available during the day, which was the busiest time for performing intimate duties such as bathing.

In the subsequent decision of Centre d'accueil Villa Plaisance, by contrast, a tribunal held that an employer's decision to issue two job postings only to men in a centre that provides long term care to the aged was discriminatory. The employer advanced similar arguments to those in North Central Health District Board, i.e. that the policy was a BFOR because it allowed residents the opportunity of expressing their preferences, to respect their choice and to ensure that intimate personal care is provided by a person of the same sex. The tribunal held, however, that a BFOR had not been established because there had been insufficient attempts by the employer to assess the actual needs of the residents and because the employer had failed to consider alternative solutions to posting jobs for which only men qualified.

Although application of the tribunal's approach in this case to the facts in North Central Health District Board may not have resulted in a different outcome, the tribunal's approach is preferable, because the tribunal applied a stricter approach to the employer's justifications. In relation to the assessment of the actual needs of residents, the employer had conducted a survey of the preferences of male residents. The tribunal rejected the results of the survey, however, on the basis that the survey had been conducted after the job posting and that the questions had been

posed in a way that elicited a positive response. In requiring that the employer should have considered alternative solutions to the requirement that only men qualified for the designated post, the tribunal effectively applied the duty to accommodate to a case of direct discrimination and, in this respect, foreshadowed *Meiorin*. One of the alternative solutions available may be to adjust the duties of the job so that men perform some aspects of the job and women perform other aspects of the job. Although this aspect was not expressly canvassed in *North Central Health District Board*, it may be that the absence of male attendants 24 hours a day meant that the duties of the job had been adjusted so that as few as possible attendant positions were designated for men only. A further key aspect in *Centre d'acman Villa Plaisance* was consideration of the impact of the “men only” job designation on the representation of men and women employed by the home. Although there were three women residents for every male resident, two out of three attendant positions were reserved for men. This aspect alone seems to justify the different conclusions in the two decisions.

It is likely that employers would meet the first leg of the *Meiorin* BFOR test in these cases. The purpose for which the standard is introduced is to identify employees who could perform the duties of the job in accordance with the privacy and decency concerns of residents of a particular sex. Under leg three of the test, in order to prove that the particular standard, the “men only” designation, is reasonably necessary to achieve this purpose, relevant considerations, as illustrated by *North Central Health District Board* and *Centre d'acman Villa Plaisance* would include the actual needs of residents, whether there are alternative solutions available, for example, adjusting the duties of the job, and the ratio of male and female residents and personal care attendants within the home. In South Africa, on my construction, these cases would fall under the IRJ defence, as they also fall into the category of qualifying standards based on job performance. On the interpretation I suggest, the employer would have to prove that the standard has a legitimate purpose, that the standard achieves the purpose, that there are no less restrictive and disadvantageous means to achieve the purpose and that it has taken steps to address disadvantage or accommodate diversity short of undue hardship. The *Meiorin* BFOR test and the suggested South African approach therefore allow a nuanced approach in terms of which all the relevant interests can be appropriately balanced.
All the cases discussed so far, have involved direct discrimination. Discrimination is however not always based on overt, direct discrimination. It also arises in relation to seemingly neutral rules that have a disproportionate impact on prohibited grounds of discrimination, including sex. This type of discrimination was first recognized in Canada by the Supreme Court in the significant decision of O’Malley in which the court interpreted the prohibition against discrimination to include adverse effects discrimination. A significant focus of the judgement in Meiorin was the need to challenge seemingly neutral rules that result in systemic discrimination against women.

**Scrutinizing seemingly neutral workplace standards**

The Meiorin case highlights the need to challenge seemingly neutral male workplace standards in instances where dominant norms are created by, or favour, men who have traditionally been employed in jobs such as firefighting and who determine the qualifying standards for the job. The workplace rule at issue in Meiorin was an aerobic standard that had been set for firefighters, which is a male dominated occupation.

Mrs. Meiorin had been a forest firefighter for two years and had performed her job satisfactorily. At the beginning of the third year of her employment, new fitness tests were introduced as a job requirement, on the basis of the research findings that had been commissioned by her employer, the government of British Columbia. Mrs. Meiorin failed the aerobic standard of the test and was dismissed. This aerobic standard had an adverse effect on women, because most women have a lower aerobic capacity than men. The Supreme Court adopted the BFOR test described in Chapter One and applied all three legs of the BFOR test, resulting in a finding that the employer did not demonstrate that the aerobic standard was reasonably necessary for the safe and efficient performance of the job and accordingly that the employer had failed to establish a BFOR defence.

Under leg one of the Meiorin test the Court found that there was a rational connection between the government’s purpose in introducing the aerobic standard, which was to enable the

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90 Supra note 9.
government to identify those applicants or employees who are able to perform the job safely and efficiently, and the particularly strenuous tasks expected of a firefighter. Under leg three of the BFOR test, the Court held that the employer had failed to establish that the particular aerobic standard was necessary to the accomplishment of the work related purpose because of the difficulties in the research findings based upon which the aerobic standard was introduced.

One of the ways in which the decision highlights systemic issues is by emphasis on scrutinizing research upon which qualifying standards for employment are based. The employer had in fact taken the laudable step of commissioning research in order to set qualifying standards but there were numerous difficulties with the research. The research methodology used was primarily descriptive, based on the average performance levels of the test subjects. This data was then converted into minimum performance standards without an enquiry as to the minimum standard required for the job. It also did not seem to distinguish between male and female test subjects. It was therefore not possible to say whether men and women require the same minimum level of aerobic capacity to perform safely and efficiently the tasks expected of a firefighter. The Court was of the view that the goal of the researchers should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently and if not, to reflect the disparity in the employment qualifications. The strict scrutiny of the research was critical to the finding that the employer had not established that the aerobic standard was reasonably necessary to the accomplishment of the work related purpose because the research findings had not identified the minimum capacity actually required to perform the job.

A further way in which systemic issues are addressed by the unified approach adopted in Meiorin is that seemingly neutral workplace standards, such as the aerobic standard in Meiorin, that have an adverse effect on women can now be struck down. Under the bifurcated approach the standard may have remained intact and ways found in which women could be accommodated within the male dominated mainstream.
**Striking down discriminatory workplace standards**

One of the most significant aspects of the adoption of the unified approach adopted in *Meiorin* is that it addresses the criticism that the bifurcated approach legitimized systemic discrimination because workplace standards tended not to be struck down in cases of adverse effects discrimination. As outlined above, in cases of adverse effects discrimination, as long as there was a rational connection between the workplace rule or standard and performance of the job, the standard remained intact. If the standard had a discriminatory effect, the employer had a duty to accommodate the individual or group short of undue hardship. As indicated in *Meiorin*, applying the duty to accommodate whilst leaving intact discriminatory standards legitimized systemic discrimination because the focus shifted from the underlying standard to how “different” individuals could fit into the “mainstream” represented by the standard. Accommodation measures were limited to individualized exceptions or group accommodation policies.

A significant aspect of the unified approach is that, where appropriate, discriminatory workplace standards can now be struck down in instances of both direct and adverse effects discrimination. On the particular facts of *Meiorin*, the Court wasn’t able to order that the workplace standard be struck down, because the case arose as a grievance before a labour arbitrator and not as a claim before a human rights tribunal. It was held, however, that the employer was unable to rely on the standard as a basis for the dismissal of Ms. Meiorin. It is clear from the judgement that the Court would have ordered the striking down of the standard if the case had arisen as a claim before a human rights tribunal.

Although not referred to in *Meiorin*, it is interesting to consider an adverse effects case involving qualifying requirements for employment decided by a tribunal approximately 20 years before *Meiorin*, prior to the adoption of the bifurcated approach by the Supreme Court. It illustrates that the bifurcated approach impeded the ability of courts to deliver desirable outcomes and underscores the need for a unified approach in *Meiorin*. *Colfer*[^1] involved discriminatory height and weight requirements to qualify for a position as a police officer. These requirements were discriminatory because they had the effect of excluding virtually all women from employment as police officers.

police officers. The employer failed to establish a BFOR defence because it was unable to prove that the height and weight requirements were rationally related to the job of being a police officer. The employer was therefore ordered to abolish or amend the workplace rule. The striking feature of the tribunal decision is that this order would probably not have been made under the bifurcated approach adopted in *Central Alberta Dairy Pool*.\(^92\) As an instance of a neutral rule having an adverse effect on women it would not have been subjected to a BFOR analysis, the only means by which a workplace rule could be struck down on this approach. As discussed in Chapter One, the development of this aspect of the bifurcated approach was influenced by the nature of the particular discriminatory rules at issue in the religious discrimination cases.\(^93\) In relation to this aspect, the jurisprudence has come full circle, because under the unified approach in *Meiorin* the work rule can one again be struck down. The Court in *Meiorin* also gave consideration to what standards would be appropriate if the discriminatory standard was abolished.

**Accommodating diversity in employment**

**Differential standards for men and women**

The Court in *Meiorin* contemplated that if a standard is struck down, the possibilities would include not only adopting one inclusive standard that men and women can meet, but introduction of differential standards reflective of group or individual differences and capabilities. This acknowledgement that accommodation may include differential standards also assists in challenging systemic discrimination and male norms.

It is not clear, from the order in *Colfer* and the possibility of differential standards raised in *Meiorin*, in what circumstances it would be necessary to introduce differential standards. *Meiorin* is, however, clear that such differential standards do not mean that the lower standard could be below the minimum threshold for what is required to do the job safely and efficiently. In considering the Court of Appeal’s finding that to accommodate women by permitting them to

\(^92\) *Supra* note 14.

\(^93\) See page 17 above.
meet a lower standard constitutes "reverse discrimination," the Court noted that "a different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men."94

If the employee must be capable of performing the job, why then would employers need to introduce two separate standards? Would the preferable option not be to introduce one, lower and inclusive standard that is required for performance of the job, but that men and women could meet? It is likely that employers will mostly introduce one inclusive standard. There is a possibility however that an employer may, for example, want to introduce a standard higher than that which is essential for the work related purpose. In *Meiorin* the Court suggests, by implication, that employers may wish to err on the side of caution where interests such as safety and risk are at stake. If such a standard discriminates on a prohibited ground, the employer may wish to retain the higher standard and introduce a separate, lower standard only for women but which nevertheless meets the minimum threshold for performance of the job.

It is also possible, however, that women may not meet the minimum standard required for the job. Balancing the principle of equal opportunity and employer interests in *Meiorin* would have been more difficult if research had indicated that men and women do have different aerobic capacities and that women's aerobic capacity is generally below the minimum threshold for performing the job of a firefighter safely and efficiently. It may be that women are unable to perform the duties of the particular job safely and efficiently, even if lower standards for women are introduced. In such circumstances, the duty to accommodate may require that the duties of the job or the job description be redesigned. Such changes could take the form of altering the job description so that men could perform some aspects of the job and women could perform other aspects of the job.

**Adjusting the duties of the job**

The adjustment of job descriptions to accommodate different capabilities based on age was considered prior to *Meiorin* in *Large v. Stratford (City)*,95 in which an employer had introduced a

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94 Supra note 1 at 44 para. 81. [emphasis added]
mandatory retirement policy for firefighters. In *Large* the court accepted evidence that most firefighters over 60 are unable to perform all aspects of their duties safely and efficiently. The Court therefore considered whether the duty to accommodate applied in such cases. The duty to accommodate was characterized as the duty to adjust job descriptions to avoid the risk that the mandatory retirement policies sought to address.

The application of the bifurcated approach led the Supreme Court to rule that to require the duties of the job to be adjusted would be an impermissible extension of the principles in *Bhinder*, 6 *Saskatoon* 7 and *Central Alberta Dairy Pool*, 8 because under the bifurcated approach the duty to accommodate was not part of the enquiry of whether a directly discriminatory policy was a BFOR. Under the unified approach adopted in *Meiorin* the duty to accommodate is incorporated into the analysis of whether the standard is reasonably necessary to a work related purpose in cases of both direct and adverse effects discrimination. It is likely therefore that the applicability of the duty to accommodate in cases of both direct and adverse effects discrimination will in the future result in adjustment of the duties of the job being considered as part of the accommodation enquiry. This aspect was, however left open in *Meiorin*, because on the facts it was not necessary to consider adjusting the duties of the job.

Because adjusting the duties of the job was not before the Court in *Meiorin* it was not considered in the enquiry as to whether accommodation would involve undue hardship. 9 It is possible, however, that in such cases employers would be able to establish that adjusting the duties of the job would constitute undue hardship. In cases such as *Large* and *Meiorin*, it may be that it is not possible to redesign the duties of the job without undue risks to safety and health. It may also be

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95 [1995] 3 S.C.R. 733 [hereinafter *Large*].
96 *Supra* note 12.
97 *Supra* note 23.
98 *Supra* note 14.
99 In *Meiorin* the employer argued that because the standard was reasonably necessary for the safety of the individual firefighter, the other members of the crew and the public it would experience undue hardship if compelled to deviate from the standard in any way. This justification was rejected by the Court on the strength of the research findings. The evidence led by the employer in relation to the magnitude of risk involved in accommodating the discrimination suffered by Mrs. Meiorin was dismissed as impressionistic. The Court also considered evidence that accommodating Mrs. Meiorin would undermine the morale of the crews. This was not supported by evidence and the Court pointed out that even if this were to be established, such attitudes could not be determinative of whether the employer had accommodated short of undue hardship. The Court was, however, clear that serious consideration would be given to the objection of employees based on well-grounded concerns that their rights would be affected.
that the size of the workforce is too small to adjust job descriptions without placing undue financial costs on the employer. The retention of the undue hardship standard is, however, important because it provides the means by which courts would be able to balance between the employee’s right to be free from discrimination and employer concerns, such as risks to health and safety as well as financial costs. Ways in which the undue hardship standard will be applied in these circumstances, however, remains untested.

Conclusion

This chapter provides support for the adoption of the unified approach in Meiorin and the suggested approach to the inherent requirements of the job defence in South Africa. It has been illustrated that the approaches are appropriate across cases which involve different considerations, namely cases which involve prejudice and stereotypes based on suitability and desirability of women in certain types of occupations, cases involving privacy and decency concerns based on societal norms and cases involving different capabilities and skills arising out of physiological differences between men and women. In relation to all these types of cases the approaches will assist in challenging systemic discrimination and in striking a balance between the right of employees to be free from discrimination and employer concerns. The inclusion of cases involving prejudice within the applicable defence assists in challenging male norms by articulating that prejudice is not a legitimate purpose because of the failure to treat women with equal dignity and respect. Incorporation of the duty to accommodate in cases of both direct and adverse effects discrimination will assist in addressing systemic issues by placing a positive obligation on employers to accommodate diversity in employment. In these types of cases accommodation may include adjusting the duties of the job. Where seemingly neutral standards operate to exclude women, such male-based standards can now also be struck down. The next chapter applies the unified approach adopted in Meiorin and the approach that I suggest for South Africa to pregnancy discrimination cases to assess whether the approaches will also assist in resolving those cases. The most significant aspects of the pregnancy cases discussed in Part One of the next chapter are that they clearly reveal the artificial nature of the distinction between direct and adverse effects discrimination and emphasize the importance of incorporation of the
duty to accommodate short of undue hardship into the applicable defence, in cases of both direct and adverse effects discrimination.
Chapter Three: Pregnancy

Part One: Pregnancy cases involving workplace standards and job performance.

Discrimination against women on the basis of pregnancy continues to be a major barrier to equality in the workplace. An examination of pre-

Meiorin Canadian tribunal cases, a post-

Meiorin decision and South African cases in Part One of this chapter confirms that application of the

Meiorin approach in Canada and the suggested approach to the IRJ defence in South Africa will assist in challenging systemic discrimination against pregnant women based on the norm of a male worker who does not bear children.

In Canada and South Africa cases have dealt with direct discrimination in relation to pregnancy based on prejudice, stereotypes or paternalism. In some instances, where employers have failed to provide any substantive reason for the discrimination, they may now fail to meet the first leg of the Meiorin BFOR test, which requires that the employer establish a rational connection between the work related purpose and the performance of the job, or the first leg of the suggested South African approach, that the discrimination be for a legitimate purpose. As in similar cases involving qualifying standards for the job discussed in Chapter Two, the inclusion of these cases within the BFOR and IRJ defence is a positive development, because it assists in articulating the basis upon which the discrimination is not justified, thereby contributing to challenging male norms and to the developing understanding in society of discriminatory behaviour.

In other cases of direct discrimination involving stereotyped and paternalistic assumptions employers have advanced substantive reasons for not hiring women. Such cases may now require

100 In Canada it was established in Brooks, supra note 3, that pregnancy discrimination constitutes sex discrimination. The Canadian human rights codes generally provide that pregnancy is deemed to be sex discrimination or that sex discrimination includes pregnancy discrimination. In South Africa pregnancy is a listed prohibited ground of discrimination under the Bill of Rights, supra note 32, the Equality Act, supra note 2 and the Employment Equity Act, supra note 57. Under the Labour Relations Act, supra note 65, dismissal on the basis of pregnancy is automatically unfair. Under the residual unfair labour practice provisions of the Labour Relations Act, which have been repealed, pregnancy was not a listed ground of discrimination. It was, however, established in Botha, supra note 66 and Woolworths, supra note 66 that pregnancy discrimination is sex discrimination.
courts to proceed to the second and third legs of the Meiorin test or the requirements under the suggested South African approach that the discrimination is for a legitimate purpose, that the purpose is achieved, that there are no less restrictive or disadvantageous ways to achieve the purpose and that steps have been taken to redress disadvantage or accommodate diversity short of undue hardship. In cases involving stereotypes and paternalism where employers do advance substantive reasons for the discrimination, application of the duty to accommodate short of undue hardship to these cases of direct discrimination, which was precluded under the bifurcated approach in Canada, may result in a preferable outcome because most discrimination in relation to pregnancy arises out of the failure to accommodate the specific needs of pregnant women.

The difficulties under the bifurcated approach arising out of not applying the duty to accommodate in cases of direct discrimination are clearly illustrated by pregnancy cases at the tribunal level in Canada pre-dating Meiorin. There are very few pregnancy cases in which some form of accommodation is not required in order to achieve an appropriate outcome. Where the bifurcated approach was applied, a desirable outcome was not reached. In some cases, tribunals therefore expressly declined to follow the Supreme Court’s bifurcated approach, in order to be able to apply the duty to accommodate short of undue hardship. By applying the duty to accommodate in cases of direct discrimination, these cases foreshadow this aspect of developments in Meiorin.

Because accommodation is required in most pregnancy cases, the bifurcated approach was successfully applied to a number of pregnancy cases where the discrimination was characterized as adverse effects discrimination. One of the significant accommodation measures has included transfer of pregnant employees when the duties of the job pose a risk to health of the foetus or the pregnant employee. The tendency of the bifurcated approach not to result in striking down of discriminatory workplace rules did not negatively impact on these adverse effects cases because where general workplace rules conflict with the specific needs of pregnant women, it is not appropriate to strike down the discriminatory workplace rules. Accommodation policies are the preferable remedy, as opposed to individualized exceptions, because such policies contribute to challenging the norm of the male worker who does not bear children. In relation to transfer of

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pregnant employees, undue hardship is the appropriate mechanism to take into account legitimate employer concerns, which include interference with the rights of other employees.

A further area of accommodation is pregnancy-related leave. The types of cases that have arisen in Canada and South Africa clearly illustrate that the distinction between direct and adverse effects discrimination is not always clear and can be artificial, as the court highlighted in *Meiorin*. In circumstances where an employer refuses to hire a pregnant woman, it can be characterized as direct discrimination, on the basis that only women have the capacity to fall pregnant. The refusal to hire can, however, also be characterized as adverse effects discrimination on the basis that uninterrupted job continuity is a neutral requirement which applies equally to all employees, but which has an adverse effect on pregnant women. In some circumstances, however, it seems clear that the seemingly neutral requirement of uninterrupted job continuity does not apply to all employees and was made up by the employer after being informed that the woman is pregnant. The strength of the unified approach in Canada and the suggested South African approach is that classification of the discrimination as direct or adverse effects discrimination does not result in different defences, with differing results, being applied. It is suggested that uninterrupted job continuity should not be a BFOR or inherent requirement in indeterminate contracts of employment, because full recognition of the social value of childbearing requires that pregnancy is not a consideration when considering whether to employ a woman, whether she is pregnant at the time or may be pregnant in the future.

**Direct Discrimination: prejudice, stereotypes and paternalism**

The recent South African case of *Botha*101 involved direct discrimination based on prejudice. A receptionist was dismissed when she informed her employer that she was pregnant. The employer explicitly expressed the view that he did not want to have a pregnant woman in the office and did not advance any substantive reasons why not being pregnant was a requirement for the job of a receptionist. The case was decided under the provisions of the *Labour Relations Act* that provide that the dismissal of a woman because of her pregnancy or for any reason

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101 *Supra* note 66.
related to her pregnancy is automatically unfair.\(^{102}\) The legislation also provides that the dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job. Because no substantive reasons were offered by the employer for the dismissal, the court did not even consider or apply the IRJ defence.

It is suggested, however that the IRJ defence should have been applied. Under the approach that I have suggested for South Africa, the employer would not have established that the discrimination had a legitimate purpose. In Canada a case such as Botha would now fall to be decided under the BFOR defence. The employer would not have met the first leg of the Meiorin BFOR test because it would have been unable to show that the standard was adopted for a purpose rationally connected to the performance of the job. As argued in Chapter Two, in such cases the employer's behaviour violates the dignitary interests which discrimination law protects because the applicant for employment is not being treated with equal worth and respect. By inclusion of such cases within the rubric of the defence, it is clearly established that the employer's purpose is not legitimate because it violates such interests. This may assist in challenging male norms and to developing an understanding in society of discriminatory behaviour.

In these cases where either the first leg of the Meiorin BFOR test, that the impugned standard was adopted by the employer for a purpose rationally connected to the performance of the job is not met or, the suggested South African test that a legitimate purpose be established for the rule, the enquiry does not proceed to whether any accommodation of the specific needs of pregnant women is required. There are, however also pregnancy cases which involve stereotypes and paternalism which may require courts to proceed to the second and third legs of the Meiorin test or the requirements under the suggested approach in South Africa that the discriminatory workplace rule achieve the purpose of the rule, and whether steps have been taken to redress disadvantage or accommodate diversity short of undue hardship. The evidence and reasoning in the Canadian case of Stefanyszyn v. Four Seasons Management Ltd.,\(^{103}\) illustrates the

\(^{102}\) Supra note 66 and accompanying text.

\(^{103}\) (1986), 8 C.H.R.R. D/3934.
circumstances in which the enquiry may proceed further than simply finding that the employer did not establish a legitimate purpose and suggests why it may be useful to do so.

In *Stefanyshyn*, a cocktail waitress was dismissed when she informed her employer that she was pregnant. It was suggested in evidence that the reason she was dismissed was because she was “single and pregnant and no longer the proper image of the club.” A witness on behalf of the employer also argued that because of “operational requirements” the preference is for cocktail waitresses not to be pregnant. The argument advanced by counsel for the employer was more sanitized and subtle. Counsel argued that a requirement that cocktail waitresses not be pregnant was sensible because, pregnant cocktail waitresses were a rare occurrence, work in a lounge could be dangerous or hazardous for an expectant mother, the smoking in lounges made it an unhealthy situation for a pregnant woman and the late hours usually involved in lounge work were unsuitable for an expectant mother.

The tribunal was not swayed by these arguments. It held that the requirement was not a BFOR on the basis that there was no evidence that the pregnant woman who was dismissed had been unable to perform the duties of the job and that the lack of such evidence raised the spectre of misconceptions and assumptions prohibited by the Act. Although not focused on by the tribunal, the fact that the employee was asked to leave “when she started to show,” clearly indicates that the employer simply did not think that it was sexy to have pregnant cocktail waitresses.

An interesting aspect to consider, however, is the health concerns of the pregnant employee. The tribunal noted, in passing, that in light of society’s apparent concern with smoking there is a certain “ring of truth” to counsel’s argument. This aspect was, however, not given further consideration because the tribunal, correctly, was of the view that there was not enough of a link between these considerations and performance of the job so as to justify firing the employee. The test for a BFOR that the tribunal applied, the *Etobicoke* test, however, did not facilitate taking these considerations into account. A strength of the Meiorin BFOR test and the suggested South African approach is that the enquiry would allow these considerations to be taken into account, if

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evidence was led that these considerations would in fact have had a negative impact on the pregnant employee. The way in which these considerations can be assessed is by incorporation of the duty to accommodate short of undue hardship into the justificatory enquiry as to whether an employer has established a defence. Accommodation could, for example, require adjusting the duties of the job or health related absence from work for a certain period. Accommodation of pregnancy in employment is considered further below.

**Accommodating pregnancy in the workplace**

**Accommodation in cases of direct and adverse effects discrimination**

As has been suggested above, in as much as the workplace has been structured around the male norm, in almost all cases of pregnancy accommodation is required. The needs of pregnant employees vary significantly, depending on the nature of the particular pregnancy and the type of employment. In some instances women have uncomplicated, "light" pregnancies and are able to fulfill the functions of the job until a short period before the birth of the child. In other instances women may be unable to perform all aspects of the job or may be absent for long periods of time, even in the early stages of pregnancy. Accommodation may require minor adjustments to the duties of the job, greater adjustment to the duties of the job involving employee transfer or reassignment, and accommodation in the form of maternity leave. Because accommodation is required in almost all cases of pregnancy discrimination, the problems with the bifurcated approach, in terms of which accommodation short of undue hardship was not applicable in cases of direct discrimination, are highlighted in pregnancy cases at the tribunal level in Canada.

Where the bifurcated approach was applied, this impeded the ability of tribunals to reach a desirable outcome. In the case of Mack,106 for example, an express requirement that the employee not be pregnant, thereby constituting direct discrimination, was upheld as a BFOR for a kitchen helper at a restaurant. The applicant for the job was five and a half months pregnant when she applied for the job. The tribunal accepted evidence from the employer that the job would include hard and heavy carrying work and cleaning duties and believed that the duties of

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the job would have been too physically demanding and potentially dangerous to the complainant, her unborn child and perhaps others. The applicant argued that she had experienced no difficulties in her pregnancy and would be able to perform the relevant duties. The outcome of the case may have been different if the BFOR test developed in Meiorin had been applied, placing the onus on the employer to prove that it was impossible to accommodate the employee short of undue hardship. There was no clear evidence in Mack that the applicant would indeed have been unable to perform aspects of the duties of the job and the employer was not required to indicate whether there would have been alternative ways in which to perform the job. Because application of the bifurcated approach to cases of direct discrimination tended not to result in desirable outcomes, as in Mack, tribunals in some cases, for example, Wiens v. Inco Metals Co., expressily declined to follow the bifurcated approach.

Wiens was decided subsequent to Bhinder, in which the Supreme Court had held that the duty to accommodate did not apply in cases where there was a statutory BFOR defence. The tribunal expressly noted that it preferred the interpretation of the minority in Bhinder that incorporated the duty to accommodate into the BFOR enquiry, and declined to follow the majority approach. One of the bases on which it distinguished the case at bar was that Bhinder was a case of adverse effects discrimination, whereas at issue in this case was a directly discriminatory policy. By applying the duty to accommodate in a case of direct discrimination, the case foreshadowed developments in Meiorin. In Wiens a workplace policy excluded all women of child bearing potential from virtually all job positions within the workplace, on the basis that there were potential health hazards from emission of gases to unborn children of pregnant women. To the extent that the purpose of the rule was to avoid risk and harm, the case is similar to Bhinder. If the BFOR test that had been applied in Bhinder was applied the outcome may also have been to uphold the rule. The application of the duty to accommodate in Wiens allowed the tribunal to take into account and weigh competing considerations: the risk of harm was balanced against equality of opportunity for women. On the facts, the tribunal held that the risk of harm was insignificant and that the employer had failed to establish that undue hardship would result from abandoning its policy of excluding all women with childbearing potential from employment.

\[107\] Supra note 82.
Because accommodation is required in almost all cases of pregnancy discrimination, the bifurcated approach was successfully applied to a number of pregnancy cases, prior to *Meiorin*, where the discrimination was characterized as adverse effects sex discrimination and the duty to accommodate short of undue hardship was applied in order to address some of the specific needs of women at work arising out of pregnancy. Accommodation was held to include providing a flexible work schedule to accommodate medical appointments\(^{108}\) and treatment for fertility, allowing for breaks as necessary, allowing a supportive environment for a woman who is breastfeeding,\(^{109}\) designing special uniforms,\(^{110}\) and being placed on lighter duties.\(^{111}\) One of the significant accommodation measures, which have been applied, is transfer of pregnant employees when the duties of the job pose a risk to the health of the foetus or the employee.

Transfer of pregnant employees

In circumstances where the duties of the job pose a significant risk to the health and safety of the employee and/or foetus, accommodation may require adjusting the duties of the job to the extent that the employee is transferred to another position for a period of time. The first sex discrimination tribunal case that applied the duty to accommodate involved the transfer of a pregnant employee. In *Emrick Plastics*\(^ {112}\) the complainant was adversely affected by a workrule that spray painters would only be assigned spray-painting duties. Accordingly, the complainant and other pregnant women would effectively be excluded from employment because of the risk of harm from paint fumes. The complainant was initially accommodated by being transferred to

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\(^{108}\) In *Quebec v. Lingerie Roxana Ltee* (1995), 25 C.H.R.R. D/487 an employee was dismissed because her employer did not accept accumulated lateness at work due to medical visits required by pregnancy.

\(^{109}\) In *Poirier v. British Columbia (Ministry of Municipal Affairs, Recreation and Housing)* (1997), 29 C.H.R.R. D/87, Mrs. Poirier suffered adverse effects discrimination when her employer introduced a workplace rule that no children were allowed at the workplace. Prior to the introduction of the policy Mrs. Poirier had been breastfeeding her child at work during lunch hours, with the consent of her employer. The respondent did not produce any evidence that it could not accommodate the employee short of undue hardship.


\(^{111}\) In *Lord v. Haldimand-Norfolk Police Services Board* (Ont. Bd. Inq.) (1995), 23 C.H.R.R. D/500, a tribunal found both direct and adverse effects sex discrimination. The employee had suffered adverse effects discrimination because an employer rule that constables not be placed on lighter duties had an adverse effect on pregnant employees. During the first pregnancy, her request for accommodation was refused outright and she was forced to take unpaid leave. During the second pregnancy, the only accommodation offered by the employer was to employ her in a temporary clerk-typist position on the condition that she resign her position on the force and forfeit her seniority, rank and benefits with no offer of re-employment.

the packing area, but subsequently the employer insisted that the complainant take unpaid leave of absence, on the basis that it was concerned about fumes in the packing area. The tribunal held that the decision requiring the complainant to take unpaid leave of absence violated the duty to reasonably accommodate the complainant's special needs and circumstances as a pregnant worker. It was emphasized that impressionistic evidence of risk is not sufficient to justify excluding a pregnant woman from employment and confirmed that accommodation may require transfer of the employee to another available position. At the time of the hearing, the employer had instituted an accommodation policy in respect of pregnant employees.

Transfer of pregnant employees has also arisen in the context of night shift work that affects the health of pregnant employees. In Brown v. M.N.R., Customs and Excise\(^{113}\) the applicable workrule required employees to work night shifts. Mrs. Brown requested that she be accommodated by being exempted from night shifts when she was pregnant and after the birth of her child. The tribunal confirmed the principle that the duty to accommodate applies in such circumstances. In doing so, it rejected the employer's argument that there was no duty to accommodate when the employee is unable to work the night shift because of complications arising out of pregnancy, beyond the employee's entitlement to exchange shifts with other willing employees and the utilization of sick leave by the employee. The complainant was awarded compensation for wages lost due to absence from work arising out of the failure to accommodate her request for day shifts as well as the loss of her annual pay increment due to her absence from work. The employer was ordered to develop and institute a policy on employee transfer. In Brown the tendency of the bifurcated approach not to result in striking down discriminatory standards did not impact negatively on the remedy that was ordered because an accommodation policy was appropriate; it would not have been appropriate to abolish the night shift schedules. Similarly, in Emrick, an accommodation policy was an appropriate remedy. Group accommodation policies are also preferable to individual exceptions because such policies contribute to challenging the norm of the male worker who does not bear children.

In Emrick and Brown there was evidence that there were suitable positions to which the employees could be transferred. In Emrick the court noted that it was common cause that work

was available for the pregnant employee in the packing area without bumping or otherwise affecting the rights of other employees. There are, however, a number of difficulties that may arise in considering employee transfer. These include that there may not be a position available to which the employee could be transferred. As illustrated by the approach in *Dominion Colour Corp.*, in which a labour arbitrator held that an employer had failed to establish that a pregnant employee could not be accommodated by being re-assigned, the undue hardship standard is a useful and appropriate mechanism to take into account employer concerns. A positive aspect of the approach in *Dominion Colour Corp.* is the recognition that, because accommodation measures are only temporary in pregnancy cases, it should be more difficult for employers to establish undue hardship than in cases of disability discrimination which tend to be of a more permanent nature.

It was also suggested that overriding the seniority rights of another employee by temporarily assigning a pregnant employee to a vacant position would not necessarily constitute undue hardship. In relation to displacement of employees already in a job, it is likely that displacement of a senior employee would be considered undue hardship, but displacement of junior employees would not necessarily constitute undue hardship. Further, creation of a new post for the sole purpose of accommodating a handicapped employee should always be considered undue hardship, but different considerations should apply in pregnancy cases, because of the temporary nature of the inability to do the job and the social value attached to pregnancy.

In both South Africa and Canada, transfer or re-assignment of pregnant employees is also dealt with under employment standards legislation. In both jurisdictions, however, the right to

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115 Transfer or reassignment of pregnant employees, is expressly governed by labour standards legislation in South Africa under the *Basic Conditions of Employment Act*, No. 75 of 1997 [hereinafter *Basic Conditions of Employment Act*] and the *Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child*, Government Gazette vol. 401, No. 19453, 13 November 1998 Regulation Gazette, NO. 6342 No. R.1441, [hereinafter *Pregnancy Code*] issued pursuant to the legislation. The *Basic Conditions of Employment Act* prohibits employers from requiring or permitting pregnant or breastfeeding employees to perform work that is hazardous to the health of the employee or the child and requires that during an employee’s pregnancy and for a period of six months after the birth of her child her employer must offer her suitable, alternative employment on terms that are no less favourable than the employee’s ordinary terms and conditions of employment if the employee is required to perform night work (between 18.00 and 6.00) or her work poses a danger to her health or safety or that of her child, “and it is practicable for the employer to do so,” [emphasis added] ss. 26(1) – (2).
transfer or re-assignment is also subject to limitation; the employee is only entitled to transfer or re-assignment if it is "practicable" for the employer. Although, the statutory protection would assist employees in establishing the duty to accommodate in a discrimination claim, similar concerns would be raised by employers as in relation to the undue hardship standard under discrimination law.

In circumstances where a comparable position is not available to be transferred to, the employee may have to accept a position at lower benefits, possibly involving part-time work, or may be forced to be absent from work. In such situations women are disadvantaged by loss of benefits or remuneration. These aspects lead Swinton\(^\text{117}\) to suggest legislation, as in Quebec,\(^\text{118}\) to provide compensation financed through a workers' compensation system if there is no suitable position to be transferred to. Other than in Quebec, in Canada and South Africa, pregnant employees who are not working due to health risks would be entitled to health or pregnancy related absence from work benefits, either under the provisions of employment insurance legislation or employer benefit plans. There may be instances, if the employee is absent for most of her pregnancy that the applicable benefits will "run out." These aspects are considered further under Part Two of this chapter.

**Pregnancy-related leave**

A further form of accommodation that pregnant women require is pregnancy-related leave. For a period of time, before and after the birth of the child, women may be unable to perform the job

\(^{116}\) In Canada, at the federal level, the need for reassignment or transfer of pregnant women arising out of health risks has been recognized by inclusion of specific provisions in the Canada Labour Code, R.S.C. 1985, C.L-2, ss.204-205 [hereinafter Canada Labour Code]. In such circumstances, upon production of a medical certificate and request by an employee, the onus is on the employer to show that a modification of job functions or a reassignment is not reasonably practicable. An employee whose job functions are modified or who is reassigned is deemed to continue to hold the job that she held at the time of making the request and shall continue to receive the benefits that are attached to that job. It is not clear whether this would be applicable, for example in instances where the only position available to the employee is part-time or at a lower level than when she was not pregnant. Perhaps in those instances it is "not practicable" for the employee to be transferred. If modification or reassignment is not practicable the employee is entitled to leave for the duration of the risk. This period of leave can commence at any time from the beginning of pregnancy for a certain period, which is long enough to take the employee through until maternity leave becomes applicable.


because of pregnancy. Forms of leave include health related absences from work, as well as maternity and parental leave. The absence of sufficient accommodation in respect of leave is a significant barrier to women's full and equal participation in employment. Pregnancy related leave is primarily governed by legislation in Canada and South Africa.\textsuperscript{119} Applicants for employment and those newly employed are particularly vulnerable to discrimination in relation to the need for leave, in circumstances in which they are not protected by employment standards legislation and may therefore seek redress under the provisions of anti-discrimination legislation.\textsuperscript{120}

The types of cases that have arisen in Canada and South Africa under discrimination provisions clearly illustrate that the distinction between direct and adverse effects discrimination is not always clear and can be artificial, as was highlighted in \textit{Meiorin}. In circumstances where an employer refuses to hire a pregnant woman, it can be characterized as direct discrimination, on the basis that only women have the capacity to fall pregnant. The refusal to hire can, however, also be characterized as adverse effects discrimination on the basis that uninterrupted job continuity is a neutral requirement that applies equally to all employees, but which has an adverse effect on pregnant women. In some circumstances, however, it seems clear that the seemingly neutral requirement of uninterrupted job continuity does not apply to all employees and was "made up" by the employer after being informed that the women is pregnant, as stated in \textit{Meiorin}, in order to couch the discriminatory act in seemingly neutral language.\textsuperscript{121} The

\textsuperscript{119} In Canada, employment standards legislation at the federal level under the \textit{Canada Labour Code}, supra note 116 and the provincial level, provides for maternity and parental leave. Under the \textit{Canada Labour Code} the period of leave is currently 17 weeks for maternity leave, s. 206(b) and 24 weeks for parental leave, s. 206(1)(a). In Ontario, the period of leave is currently 17 weeks for maternity leave, and 18 weeks for parental leave under the provisions of the \textit{Employment Standards Act}, R.S.O. 1990, c. E14, ss. 37(1), 40 [hereinafter \textit{Employment Standards Act}]. In South Africa, maternity leave is governed by the \textit{Basic Conditions of Employment Act}, supra note 115. Section 25(1) provides that an employee is entitled to at least four months maternity leave. There is no legislated right to an extended period of parental leave. In Canada, s. 43(1) of the \textit{Employment Standards Act} and ss. 206(1)(1), 209(1)(2) of the \textit{Canada Labour Code} provide that the employee must be reinstated in the same position or a comparable position at the same level of wages and benefits subsequent to the leave period. There is no obligation on the employer to pay the employee whilst on leave. Income replacement is governed by employment insurance legislation.

\textsuperscript{120} In Canada legislation at the federal and provincial level requires the employee to have been in service for a specified period of time to be protected under the legislation. The period is six months under the \textit{Canada Labour Code}, ss. 206(a), 206(1)(1) and 13 weeks under the \textit{Employment Standards Act}, \textit{ibid.}, ss. 206(a), 206(1)(1). In terms of s.19 of the \textit{Basic Conditions of Employment Act}, supra note 115 in South Africa, employees who works less than 24 hours a month for an employer do not fall under the leave provisions of the \textit{Basic Conditions of Employment Act}. There is no other qualifying period for maternity leave.

\textsuperscript{121} \textit{Supra} note 21.
strength of the Canadian approach and the suggested South African approach is that an initial threshold classification of direct and adverse effects discrimination does not result in application of different defences and the duty to accommodate short of undue hardship is incorporated into the enquiry as to whether the employer has established a defence. These aspects are illustrated by three Canadian cases, a recent South African case and a leading European Community case.

In the Canadian case of Davies v. Century Oils,\(^{122}\) Ms. Davies was offered a job as a junior typist, which was withdrawn when she informed the employer that she was pregnant. Subsequent to finding out that the applicant was pregnant, the employer argued that it would not have hired any person if they wished to take a three month holiday or a three month leave of absence within two months of commencing employment, and that the reason the applicant was not hired was not because of being pregnant but her inability to meet the job requirement which applied equally to all employees. The tribunal did not characterize the discrimination as either direct or adverse effects discrimination and in effect applied the duty to accommodate short of undue hardship, even though the relevant Supreme Court authority established in Bhinder - to which no reference was made - that the application of the BFOR defence precluded application of the duty to accommodate. This approach facilitated a desirable outcome because, for the tribunal, evidence that a replacement would have to be hired for the duration of maternity leave, within two months after the pregnant employee commenced employment, and that the employee would have to be retrained upon resuming work, was not sufficient to establish undue impact on the employer and the BFOR defence failed.

In other cases involving the requirement of availability for work or uninterrupted job continuity, in Canada and in other jurisdictions,\(^{123}\) it has been held that pregnancy discrimination is direct


\(^{123}\) In the European Community (EC), pregnancy discrimination is always regarded as direct sex discrimination on the basis that only women have the capacity to fall pregnant. One of the incentives to do so is that under EC law direct sex discrimination cannot be justified. Commentators have, however, suggested that there are justificatory and policy issues relating to accommodating needs of pregnant women, including financial cost to the employer, which arise in the pregnancy cases and that the categorization of all pregnancy cases as direct discrimination does not allow for an open consideration of these issues and has led to inconsistencies in the case law. See C. Docksey, "The Principle of Equality Between Men and Women as a Fundamental Right under Community Law" (1991) 20 llJ at 258 N. Bamforth, "The Treatment of Pregnancy under European Community Sex Discrimination Law" (1995) 1 European Public Law at 59. All the leading EC pregnancy discrimination cases have dealt with the extent of an employer’s obligation to accommodate the needs of pregnant women, even though the cases have been dealt with as
discrimination on the basis that only women have the capacity to fall pregnant. In Jenner an employer argued that a requirement that a snack bar person at a golf course be available for the whole season was a neutral and bona fide requirement that applied to everyone, whether they were pregnant or not. The tribunal, however, held that the question of availability for work was so clearly linked with pregnancy and being a woman that the decision not to hire a pregnant employee amounted to deciding not to hire her because she was pregnant and that the discrimination therefore constituted direct discrimination.

A striking aspect of the decision is that no reference was made to the Supreme Court tests for a BFOR under the bifurcated approach. Although the tribunal had characterized the discrimination as direct discrimination, it in effect applied both the applicable tests under the bifurcated approach for direct and adverse effects discrimination. The employer failed to establish a BFOR defence, applicable to direct discrimination, because the employer had previously employed someone who had to leave before the season was over to return to school and the snack bar operations had continued without interruption when another employee had left before the end of the season. These aspects undermined the importance of availability for the whole season as a BFOR requirement. In these circumstances it would appear that the requirement of "availability for the whole season" was in fact not a requirement that applied equally to all employees and that the employer sought to rely on this requirement to mask the directly discriminatory decision not to hire a pregnant woman.

The tribunal in Jenner also applied the duty to accommodate short of undue hardship, applicable under the bifurcated approach to cases of adverse effects discrimination by finding that with a cases of direct discrimination. In Webb v. EMO Air Cargo (UK) Ltd. C-32/93 [1994] E.C.R. 1-3567 [hereinafter Webb], the ECJ held that this obligation extends, in cases of indeterminate contracts to hiring pregnant women, even if inconvenience would result from the need to take maternity leave. In Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, C-177/99 [1999] E.C.R. 1-3941 [hereinafter Dekker], accommodation extended to not dismissing pregnant women once hired even though their maternity leaves may be costly to the employer as a result of the defect in the applicable insurance scheme. In Dekker the cost of the pregnant employee's full salary during absence from work was placed upon the employer. It was held that not appointing the best candidate for the job because of pregnancy was direct discrimination and could not be justified by financial detriment which the employer may suffer during maternity leave. The relevant national law entitled employees to fully paid maternity leave. The employer argued that because the particular insurance scheme applicable to its employees excluded maternity benefits it could not afford to pay the pregnant employee as well as hire replacement labour i.e. it was "undue" to have to pay two sets of wages/benefits for a period of time.

few minor accommodations such as extra breaks, Ms. Jenner would have been able to perform the duties of the job. In relation to absence from work, the evidence established that she would only have taken three weeks of leave around the birth of the child, that the employer could have hired a replacement during that period and that there was no evidence to suggest that such accommodation would cause undue hardship to the employer.

In contrast to Jenner, in Armstrong v. Crest Realty Ltd.\textsuperscript{125} the discrimination was characterized as adverse effects discrimination on the basis that a requirement that the successful incumbent for a position as a receptionist be able to commit to the position for at least a year without the need for extended leaves or absences applied to all employees. The tribunal held that whilst the requirement of availability was rationally connected to the employer’s business objectives, the employer had failed to accommodate the employee’s potential need for maternity leave. In relation to undue hardship, there was evidence that there was a large pool of temporary replacements available and that the training required in the circumstances would be at insignificant cost to the employer.

The South African case of Woolworths\textsuperscript{126} involves similar issues to those in Davies, Jenner and Armstrong. In the lower court, it had been held that no employee can ever guarantee uninterrupted job continuity and that the decision not to appoint the applicant to the permanent post because she was pregnant was an unfair labour practice under the provisions of the Labour Relations Act\textsuperscript{127} In the Labour Appeal Court the employer advanced two defences to its decision not to hire an applicant who was pregnant. It argued that the reason the applicant was not hired was not because she was pregnant but because a candidate who was better qualified for the job had been appointed. In the alternative, it was argued that the applicant did not meet the requirement of uninterrupted job continuity for a twelve-month period, which applied equally to all applicants for the job. As discussed in Chapter One, there are difficulties with the Court’s approach in Woolworths.

\textsuperscript{126} Supra note 66.
\textsuperscript{127} See page 25 above.
There are a number of striking aspects to the judgment. Firstly, it was conceded that the applicant’s pregnancy was a factor in the employer’s decision not to hire the applicant. Secondly, upon learning of the applicant’s pregnancy, the applicant was offered a fixed term contract that terminated at the approximate date at which the employee was to have commenced maternity leave. Thirdly, the “more qualified” candidate was only interviewed and appointed subsequent to offering the applicant a fixed term contract, as opposed to the permanent position for which she had applied. Fourthly, the requirement of uninterrupted job continuity was not communicated to the applicant during the course of the interview for the job. Significantly, although the Labour Appeal Court rejected the discrimination claim, all the judges were of the view that the requirement of uninterrupted continuity by itself was not a sufficient reason not to have appointed the employee to the permanent post. In these circumstances, the minority judgement of Conradie clearly captures the discrimination against the applicant: the decision not to hire the applicant was directly based upon the fact that she was pregnant. Ex post facto, the employer attempted, in the language of the Court in Meiorin, to mask its discriminatory act under an “undeserved cloak of legitimacy” by arguing that uninterrupted job continuity was a requirement for the post and that there was a better candidate for the job.

The question that arises out of a consideration of these cases is under what circumstances, if ever, an employer should be able to establish that uninterrupted job continuity is a BFOR or inherent requirement of the job in pregnancy cases. A requirement of uninterrupted job continuity conflicts with the accommodation that pregnant women require. The crucial aspect in these cases is whether the same considerations in relation to accommodation apply as in cases where a woman is already employed or whether it makes a difference that the employee is pregnant when she applies for a job or becomes pregnant shortly after commencing employment. Similar considerations would apply in relation to dismissal of newly employed workers who do not qualify for protection under employment standards legislation. Qualification periods in respect of entitlement to maternity leave imply that employers may be entitled to some length of unbroken service at the commencement of an employment relationship.
This aspect was considered by the European Court of Justice in Webb. The Court was asked to consider whether the principle of equal treatment for men and women in an European Community Council Directive precludes the dismissal of a pregnant woman who has been recruited on the basis of a contract for an indeterminate period but for the specific purpose initially of replacing another female employee during the latter's maternity leave. The employee was therefore employed on the assumption that her employment would not be interrupted during the period of maternity leave of the person she was hired to replace. Ms. Webb only discovered that she was pregnant two weeks after commencing employment. There was a substantial period of overlapping maternity leave between Ms. Webb and the person she was replacing. No doubt this presented considerable inconvenience to the employer, who would presumably have had to interview and train a further replacement employee.

It was held that dismissal of a woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfill a fundamental condition of her employment contract arising out of pregnancy and that the protection offered by community law during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. The Court stressed that the employee was only unable to perform part of the contract and that temporary inability to fulfill the term of a contract arising out of pregnancy discovered very shortly after conclusion of the contract cannot be compared to incapability for medical or other reasons. The Court declined to decide whether inability to perform would be relevant in fixed term contracts.

A narrow reading of the case leaves open the possibility that different considerations may apply in cases where a woman who applies for a job is aware that she is pregnant prior to the conclusion of the employment contract, as in the cases discussed above.

A related aspect is whether pregnancy is viewed as a choice, over which women have control. This makes a difference in relation to the question whether pregnancy can be a factor when considering an application for the job where the woman is pregnant already or becomes pregnant.

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128 Supra note 123.
129 Dir. 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as regards access to employment, vocational training and working conditions.
130 See generally Legal Education and Action Fund (LEAF) factum in Brooks, supra note 3 at paras. 30 – 33.
shortly after commencing employment. Although to some extent women can have control of whether they fall pregnant, contraception can be unreliable and women may fall pregnant even when they have not made an active choice to do so. The facts in Webb illustrate that it is arbitrary to draw a distinction between cases where women are aware that they are pregnant when they apply for a job and instances when they are unaware of pregnancy. A woman can fall pregnant at any time. Whilst childbearing is to some extent the choice of individual women, in so far as it can be controlled, it is also a social imperative with social value.

Taking all these considerations into account, it is suggested that uninterrupted work continuity should not be a BFOR or inherent requirement of the job in pregnancy cases involving indeterminate contracts of employment. There is no doubt that pregnancy may cause great inconvenience to employers, who are recruiting someone for a job, depending on exactly how far advanced the women’s pregnancy is. At one extreme a woman could be unavailable almost immediately, at the other within about 8 months. But as suggested in the lower court decision in the Woolworths case, no employee can guarantee uninterrupted job continuity. Secondly, employers should take a long-term view, although absence due to pregnancy may be for a few months, the employment relationship could be for many years. Further, accommodating absence from work due to pregnancy is part and parcel of hiring women. Full recognition of the social value of childbearing requires that pregnancy is not a consideration when deciding whether to employ a woman, whether she is pregnant at the time or may be pregnant in the future, irrespective of how inconvenient it may be to the employer. If employers do accommodate pregnant employees’ requirement for leave, the question arises as to who will carry the costs of maternity benefits for the employee. This aspect is considered in the next part of this Chapter.

**Conclusion**

As in Chapter Two inclusion of cases involving pure prejudice within the rubric of the applicable defences will assist in challenging male norms by articulating that the employer’s behaviour

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131 Different considerations may apply in short, fixed terms contracts. In Jenner, supra note 124, which involved a short, fixed term contract, however, a tribunal held that an employer had not established that being available for a whole season as a snack bar counter person at a golf course was a BFOR, because the pregnant woman could be replaced for three weeks when she would be absent for childbirth.
violates the dignity of the pregnant employee. The pregnancy tribunal cases clearly illustrate the artificial nature of the distinction between direct and adverse effects discrimination and why it is desirable for the applicable defences not to be based on this distinction. In particular, it is critical that the duty to accommodate applies in cases of both direct and adverse effects discrimination, because in as much as the workplace is structured around the norm of a male worker, accommodation is required in almost all instances of pregnancy discrimination. Two significant accommodation measures are transfer of pregnant employees due to health concerns and pregnancy-related leave. In relation to all accommodation measures undue hardship is an appropriate tool to evaluate employer concerns because it allows a sufficiently high value to be placed on women's childbearing role in society. The next part of this chapter examines application of the BFOR test in Meiorin to cases involving discrimination in benefits and pay. I suggest that in those cases, the residual fairness defence be applied in South Africa and that considerations of fairness should be built into the Meiorin test in Canada.
Part Two: Pregnancy cases involving benefits and pay

As illustrated in Part One of this chapter, the Canadian BFOR test in Meiorin and the suggested approach to the South African IRJ defence successfully deal with cases involving pregnancy and meeting the qualifying standards for a job or performing the duties of the job. In those areas the emphasis is on ensuring that pregnancy is not a barrier for women to participation in employment. One of the primary reasons advanced by the Court in Meiorin for adopting the unified test for a BFOR was that the conventional approach legitimized systemic discrimination. There are, however, aspects of systemic discrimination suffered by women when they fall pregnant that are different to the issues of participation in and exclusion from employment addressed by the court in Meiorin. Women in employment suffer general systemic economic disadvantage arising out of pregnancy that is not borne by men, who do not have the capacity to become pregnant.

During the time when women are on pregnancy-related leave, even though they are still employed, their overall income tends to be significantly reduced and their employee benefits are often negatively affected, at a time when they incur extra financial obligations due to the arrival of a new family member. Although these aspects in both Canada and South Africa are governed by employment standards and employment insurance legislation, pregnant employees may also turn to discrimination law for redress. Part Two of this chapter outlines the systemic economic hardship faced by women in employment arising from pregnancy and examines Canadian cases involving discrimination in pay and benefits.\textsuperscript{132}

The leading Canadian case on discrimination in pregnancy benefits, Brooks,\textsuperscript{133} was a case of direct discrimination. The significance of the decision lies in the recognition of the social value of childbearing and that it is unfair to place all the costs of procreation on women. The BFOR defence, which was applicable to cases of direct discrimination under the bifurcated approach was, however, not applied in Brooks, which may suggest that the BFOR defence is not the appropriate defence to deal with discrimination in benefits, because the BFOR defence to date

\textsuperscript{132} There are no equivalent cases in South Africa.  
\textsuperscript{133} Supra note 3.
has been applied to workrules and qualifying standards related to performance of the job. The defence applicable to cases of adverse effects discrimination involving performance of the job under the bifurcated approach - the duty to accommodate short of undue hardship - has, though, been applied by the Supreme Court to a case involving discrimination on the ground of religion in pay. It is suggested that a consequence of the adoption of the unified approach is that cases involving discrimination in benefits and pay will now fall to be decided under the BFOR defence. Tribunals and lower courts have, however, battled to apply the Supreme Court's approach in Brooks and the duty to accommodate short of undue hardship to pregnancy cases involving discrimination in benefits and pay. The non-application of the BFOR test in Brooks and the difficulties experienced by tribunals in these cases suggests that there may be different considerations that apply.

Based on these considerations, I argue that the enquiry in these cases should be about what economic costs it is fair to place on an individual employer to redress the systemic disadvantage of women in employment arising from their childbearing capacity. In both Canada and South Africa, the enquiry should be structured so as to assist courts in determining what costs it would be fair to place on the employer. I suggest ways in which this could be done. For South Africa, this can be achieved by application of the residual fairness defence, as opposed to the inherent requirement of the job defence, to cases involving discrimination in benefits and pay. The factors to determine fairness outlined in the Equality Act, incorporating the Canadian undue hardship standard into the factors, should be applied. In Canada, I suggest that the Meiorin BFOR test is sufficiently flexible to incorporate considerations of fairness into the enquiry, by application of certain of the factors drawn from South African Equality Act and application of the approach to pregnancy discrimination in Brooks, in balancing the employee's right to be free from discrimination and legitimate employer concerns under the undue hardship standard. The suggested approaches in both jurisdictions permits the striking of the appropriate balance between redressing systemic economic disadvantage and legitimate employer concerns, towards achieving a society based on equality for men and women.
Pregnancy and systemic economic disadvantage

Pregnant women suffer tremendous economic hardship arising out of pregnancy related absence from work. In both Canada and South Africa, legislation has been enacted to address policy issues that arise in relation to absence from work due to pregnancy. Employees absent for lengthy periods of time due to illness, disability, pregnancy and parental leave receive some income replacement while they are not working, under the provisions of employment insurance legislation. There are, however, inadequacies under the legislation in both jurisdictions that exacerbate women’s disadvantage in employment. Under both jurisdictions, the maximum amount payable is roughly half of previous earnings to a fixed maximum. Because of the low level of the benefit, poorer women are frequently unable to take the full period of maternity leave that they are entitled to under employment standards legislation, because they cannot afford the time off. The applicable eligibility requirements compound the hardship suffered by lower income women. Although the eligibility requirements in Canada have recently been changed to increase coverage, the requirements nevertheless continue to exclude women working in temporary, seasonal and or unstable employment situations, who tend to be women of colour and aboriginal women. In South Africa, eligibility continues to be based on number of weeks

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134 In Canada, the applicable legislation is the Employment Insurance Act, R.S.C. 1996, c.23. An employee is currently entitled to 15 weeks of maternity benefits, s. 12(3)(a), 10 weeks of parental benefits for either parent, s. 12(3)(b) and 15 weeks of sickness benefits in addition to maternity or parental benefits, s. 12(3)(c). A maximum of 30 weeks of combined maternity, parental and sickness benefits is available, s. 12(5). In the 2000 Budget Speech, the federal government announced its intention to increase available benefits. Online: http://www.hrdc-drhc.gc.ca/ei/common/budget2000.shtml. Parental leave will increase to 35 weeks and combined maternity, parental and sickness leave benefits to a maximum of 50 weeks. The Canada Labour Code, supra note 115 will be amended so that the period for job protection under the parental leave provision will correspond to employment insurance benefits. It is not clear whether provincial employment standards legislation will be amended to guarantee job security for the extended period of parental benefits. The net effect of the proposed amendments is that female employees may be absent from work and receive benefits for as long as a year when taking maternity and parental leave. In South Africa benefits available under the Unemployment Insurance Act, No. 30 of 1966, ss. 34, 37 are similar to those in Canada.


136 Under the Employment Insurance Act, supra note 134, s. 14(1) the amount payable is 55% of weekly insurable earnings.

137 The eligibility requirements in Canada have been changed from being based on the number of weeks worked to the number of hours worked within a certain period to increase coverage. The eligibility requirements are currently 700 hours in the 52 weeks preceding the maternity leave in terms of s.7(1)(2)(b) of the Employment Insurance Act, supra note 134. In the 2000 federal budget, the government indicated that the eligibility requirement will be reduced to 600 hours, which may alleviate some hardship, supra note 134.
worked, as opposed to number of hours worked, which has the effect of excluding from coverage most domestic workers, who form a large part of the paid labour force of black women. There are two further notable differences between the South African and Canadian legislation. In South Africa the total period of coverage is for a far shorter period of time and women who earn above a certain amount are not eligible for any benefits.

In addition to legislation governing income replacement, employment standards legislation in Canada, at the federal and provincial level, also governs the policy issues that arise in respect of employee benefits during pregnancy. The legislation provides that coverage under employer benefit plans continues during maternity and parental leave and that the employer must continue to maintain pension plan contributions, health insurance premiums and other benefit plan contributions during this period, unless the employee elects not to pay her share of the contribution. It also provides that seniority rights continue to accrue during maternity and parental leave. In order to qualify for protection under employment standards legislation, however employees have to meet qualifying periods in the legislation. Employees not covered by the legislation are therefore particularly vulnerable and employers do not always comply with the legislation. There are no corresponding provisions in South Africa. In these circumstances, pregnant employees may turn to discrimination law for redress if their entitlement to benefits is negatively affected by pregnancy or to address inadequacies in income replacement.

**Direct discrimination in benefits**

The most significant Canadian case dealing with discrimination in benefits on the basis of pregnancy, *Brooks*, was a case of direct discrimination. At issue in *Brooks* was an employer group insurance plan that, among other forms of coverage, provided weekly benefits for loss of pay due to accident or sickness. Employees received coverage under the plan as part of their contract of employment. The amount of coverage was not based on the amount of time worked.

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138 *Unemployment Insurance Act*, supra note 134.
139 Commission on Gender Equality “Audit of Legislation that Discriminates on the basis of Sex/Gender” online: http://www.cge.org.za/publications/employ.htm.
141 Section 42(4) of the *Employment Standards Act*, *Canada Labour Code*, ibid.
142 Supra notes 137, 138.
Women were excluded by the plan from claiming any benefits for a seventeen-week period around pregnancy. The exclusion operated regardless of whether the pregnant employee was absent for pregnancy or non-pregnancy related health reasons. For part of the seventeen-week period during which pregnant women were ineligible some coverage was available under employment insurance legislation but these benefits did not constitute an exact substitute for the coverage otherwise provided by the employer insurance plan.  

The key arguments advanced by the employer were that the plan was not discriminatory, firstly, because pregnancy is neither a sickness nor an accident and therefore need not be covered by a sickness or accident plan, secondly, that pregnancy is a voluntary state and like other forms of voluntary leave should not be compensated and thirdly, that the plan was not discriminatory but under-inclusive, in that it exempted certain disabilities from coverage.

*Brooks* was an extremely significant development in discrimination law because of the Court's general approach to pregnancy developed in response to the employer's arguments. Firstly, the Court overturned earlier case law that had held that pregnancy discrimination is not sex discrimination. The Court held that the discrimination at issue is sex discrimination because only women have the capacity to become pregnant. Secondly, the Court departed from the equal treatment model applied in some jurisdictions, which compares treatment of pregnant women with treatment of other employees absent from work for lengthy periods of time due to illness or disability.  

In *Brooks* it was emphasized that pregnancy is not a sickness or a disability, but that it is nevertheless as valid a health related reason as any to be absent from the workplace. The recognition of the social value of pregnancy led the Court to an understanding that it is unfair to place all the economic and social costs of pregnancy upon one half of the population. It was also emphasized that the removal of unfair disadvantages imposed on groups in society is a key purpose of anti-discrimination legislation.

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143 The level of benefit was lower and coverage was for a shorter period of time. There was also a two-week period during which the pregnant employees received no coverage under either the employer plan or the legislative scheme.

That those who bear children and benefit society as a whole should not be economically or socially disadvantaged seems to bespeak the obvious... It is unfair to impose all of the costs of pregnancy upon one half of the population.¹⁴⁵

By holding that pregnancy is not properly characterized as a sickness or an accident, the approach in *Brooks* therefore departed from the formal model of equality, expressly rejected in *Meiorin*, by not applying a model of equal treatment in terms of which “likes are treated alike.” Commentators have argued that the *Brooks* case has however “not taken hold” in the jurisprudence and that there has been a retreat from *Brooks* in subsequent cases by reverting to comparing pregnant employees with other employees absent from work due to disability or illness.¹⁴⁶ One of the reasons may be that on the facts in *Brooks*, the pregnant employees were in fact claiming equal treatment: the employees were claiming the same benefits that the employer had extended to other employees absent from work for health related reasons. The argument in *Brooks* was not that the benefit provided by the employer to other employees absent from work was not sufficient to accommodate the specific needs of pregnant women, but rather that pregnant women had been excluded from receiving the benefit that other employees received.¹⁴⁷

A further significant feature of the decision in *Brooks* is that the BFOR defence, applicable to cases of direct discrimination under the bifurcated approach was not applied. One of the reasons may be that, at the time, the relevant human rights code may not have included a BFOR defence.¹⁴⁸ It may also have been that it did not seem that the BFOR defence was the appropriate

¹⁴⁵ Supra note 3 at 1243 paras. h-j.
¹⁴⁶ See Day and Brodksy, “Women’s Inequality and the Canadian Human Rights Act” September 1999 online at: http://www.swc-cfc.gc.ca/publish/research/chra-day-e.pdf at 149.
¹⁴⁷ Similar issues were raised in the subsequent case of *Crook v. Ontario Cancer Treatment and Research Foundation* (1998), 30 C.H.R.R. D/104 in which the reasoning in *Brooks* was applied. In *Crook*, an employee, who had not requested maternity leave, was denied sick leave benefits in the period immediately after childbirth. The employer argued that the denial of sick leave benefits during this period was not discriminatory because all employees on leave of absence were denied sick leave benefits. The tribunal rejected this argument on the basis that the appropriate comparator was not all employees on leave of absence, but employees absent for health related reasons and held that the denial of sick leave benefits was discriminatory. The tribunal referred to the dicta in *Brooks* that pregnancy related health absences are not optional or voluntary and comparisons with voluntary leaves should be avoided. Further, it noted that in *Brooks* the Supreme Court was unequivocal on the distinct status of pregnancy and that the purpose of human rights law requires the remedying of disadvantage imposed on pregnant employees.
¹⁴⁸ Under the *Manitoba Human Rights Code* the term bona fide qualification was referred to in the general prohibition against discrimination in employment, and not explicitly as a defence. The provisions were subsequently replaced with the extensive provisions outlined in note 158 below which expressly provide that the BFOR defence applies to other aspects of employment policies or practices, including discrimination in benefits and pay.
defence to apply, because all the cases that had dealt with the application of the BFOR defence, and the test that had been developed, focused on whether there was a rational connection between the workplace rule and performance of the job. These were not the concerns at issue in Brooks. Under the bifurcated approach, the defence applicable to adverse effects discrimination cases involving performance of the job, namely the duty to accommodate short of undue hardship, has, however been applied to discrimination in benefits and pay by the Supreme Court. The cases discussed below illustrate, though, that lower courts and tribunals struggled to apply the principles developed by the Supreme Court to these cases.

**Accommodation in benefits and pay**

The duty to accommodate short of undue hardship has been successfully applied by the Supreme Court, prior to Meiorin, to a case involving adverse effects discrimination in pay in the context of religious discrimination. In Chambly,\(^\text{149}\) three teachers grieved under the provisions of a collective agreement because they were not paid when they took the day off to observe a religious holiday, Yom Kippur. The Court was of the view that the calendar which set out the work schedule was discriminatory in its effect, because teachers who belong to Christian majority religions did not have to take any days off, resulting in loss of pay, for religious purposes. The employer argued that it had accommodated the employees by permitting them to take a day off without pay. It was emphasized by the Court that just as direct discrimination resulting in loss of pay would not be tolerated, adverse effect discrimination resulting in loss of pay would not be tolerated unless an employer takes reasonable steps to accommodate the affected employees, because "fairness in the workplace is the desire for all."\(^\text{150}\)

The Court outlined the factors relevant to the duty to accommodate short of undue hardship and emphasized that they should be applied with flexibility in the context of the factual situation in each case. One of the aspects was that the financial consequences of accommodation will vary: "what may be eminently reasonable in prosperous times may impose an unreasonable financial

\(^\text{149}\) Supra note 30.

\(^\text{150}\) Ibid., at 544 para. e.
burden on an employer in times of economic restraint or recession." In considering whether the employer could accommodate the employees short of undue hardship, the Court took into account the terms of a collective agreement that provided that employees could be absent, yet paid, for "valid" reasons. A further factor was that paid absences in the past had included the celebration of Yom Kippur. From these factors, the Court inferred that to replace the teachers and to compensate them for their absence was not an unreasonable burden. In addition, there was no proof by the employer that to pay the salaries of the Jewish teachers would impose an unreasonable financial burden upon it.

Similar arguments to those applied in *Chambly* have been advanced in the context of adverse effects pregnancy discrimination in benefits. In these cases, as in *Chambly*, employers have granted pregnant employees time off work or leave, but the leave has resulted in loss of benefits. As noted, the Court in *Chambly* emphasized that the adverse effect was that Jewish teachers had to take time off, which resulted in loss of pay, whereas Christian teachers did not because of the way in which the calendar was structured. Similarly, in pregnancy cases, it has been argued that because workplaces are structured according to the norm of a male worker, this has an adverse effect on women who have to take leave because they are pregnant, resulting in loss of pay and benefits, while men do not have to take leave because they do not have the capacity to fall pregnant.

Labour arbitrators and tribunals have, however not applied the reasoning in *Chambly* to pregnancy cases involving discrimination in benefits. The cases have involved accrual of vacation or sick leave as well as seniority and entitlement to other benefits. No cases have dealt directly with payment of actual wages or salaries. There are two principal, inter-related bases upon which the claims have been rejected. The first basis relies on the "ill-male comparator": in circumstances where pregnant employees are treated the same (or better) than other employees on long leave due to illness or disability, it has been held that discrimination has not been established. The second basis is that, because the employment relationship is based on rendering of services in exchange for wages, employees are not entitled to benefits and pay when they are

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151 *Ibid.*, at 546 paras. e.g.
on long leave. On this argument, it is only if employers chose to provide benefits and pay to employees absent from work, as in Brooks for example, that this must be done in a non-discriminatory manner and, further, non-discrimination in this context means that all employees on long leave must be treated the same. The effect of this approach is to reject claims of adverse effects discrimination in benefits and pay.

In Canadian Airlines the claim was rejected on the first basis outlined. At issue was the impact of maternity leave on an entitlement to vacation leave. The general employer rule was that after 60 days of long leave employees would accrue a vacation entitlement at a fraction of that which would apply had they been at work. As an exception to the general rule, vacation leave would not be reduced for the first 18 weeks of maternity leave. The complainants argued that maternity leave should not result in any reduction in vacation leave. The arbitrator rejected the claim by comparing the treatment of pregnant employees with other employees absent from work. In comparison with such employees, pregnant women received favourable treatment. Because there was no prima facie finding of adverse effects discrimination, the arbitrator did not apply the duty to accommodate short of undue hardship and suggested that it was beyond the reach of discrimination principles to "make whole" an employee on maternity leave by treating her for pay and benefit purposes as if she was still at work.

Vancouver School Board is an example of a case in which the claim was rejected on the second basis outlined. It involved a work rule that did not allow the accrual of sick leave during maternity leave. The claim was rejected on the basis that discrimination was not established, because the core assumption underlying the employment relationship is that an employee will render services in exchange for wages and benefits and during an absence from work the employee is not rendering services. A similar approach was taken in an Ontario Court of Appeal

152 For a general discussion of these cases see R. Brown "Human Rights in Employment: Of Participation and Compensation" (1996) 4 CLELI 1-426 at 283.
154 A similar approach was followed in Dumont-Ferlatte in which 103 complainants challenged provisions in public service collective agreements which prevented women absent from work on maternity leave from accruing annual and sick leave credits as well as retaining entitlement to a monthly bilingual bonus. Dumont-Ferlatte v. Canada (1997), 27 C.H.R.R. D/365.
case, *ONA v. Orillia Soldiers Memorial*. The approach differed to the extent that there was a finding of adverse effects discrimination and the duty to accommodate was applied, but the claim was also denied on the basis that requiring service in exchange for benefits is a reasonable and bona fide requirement. The Court thus foreshadowed the *Meiorin* BFOR defence by incorporating the duty to accommodate into the BFOR defence. In applying the duty to accommodate, however, the Court was of the view that accommodation only refers to what is required to ensure participation in employment and not issues of compensation, i.e. relating to benefits and pay.

All these cases appear to have misapplied the Supreme Court jurisprudence. The approach in *Canadian Airlines*, which relied on the “ill-male comparator” is not in accordance with the approach in *Brooks*, which emphasized that the treatment of pregnant employees should not be compared with the treatment of other employees absent from work. The decisions of *ONA* and *Vancouver School Board*, appear to have misapplied the law in *Chambly*, because in *Chambly*, the duty to accommodate short of undue hardship applied to adverse effects discrimination in respect of loss of pay arising from the need for leave, related to a prohibited ground of discrimination, even though pay is service driven.

In contrast to these cases, the reasoning in the only arbitration case that upheld an adverse effects claim involving benefits, *Fleetwood*, reflects the approaches in both *Brooks* and *Chambly* by comparing an employee absent due to disability with employees who were at work, not others on long leave, and application of the duty to accommodate short of undue hardship. In *Fleetwood*, the complainant had sustained workplace injuries as a result of which he was absent for lengthy periods from work. The absences from work resulted in loss of leave entitlement. The employer, relying on cases such as *Vancouver School Board*, argued that the loss of vacation leave did not constitute a loss or an adverse effect, because vacation leave is not a right but a benefit that is earned by actually working. The arbitrator rejected this argument and held that it is not relevant whether the employee was prevented from accruing vacation entitlement or whether already accrued rights were affected. The prorating provision is a “restriction or penalty” and

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accordingly falls within the definition of adverse effects discrimination in O'Malley because the complainant experienced a reduction in the vacation to which he would have been entitled had he not been off with the injury. The employer also relied on Canadian Airlines to argue that the comparator should be other employees on unpaid leave or absent for health-related reasons and not employees at work. The arbitrator however, correctly held that the appropriate group is the group of employees in the bargaining unit as a whole on the basis that to limit the comparator to others on long leave is to apply the similarly situated test that was rejected in Brooks.

The application of the duty to accommodate to discrimination in benefits and pay in Chambly, and incorporation of the duty to accommodate short of undue hardship into the BFOR defence in Meiorin, would seem to have the consequence that the BFOR defence now applies to these cases, irrespective of whether the discrimination is direct or adverse effects discrimination. The applicability of the BFOR test to these cases is further supported by the express provisions of some of the human rights codes. Indeed, if the Brooks case were decided under the current provisions of the relevant code, the BFOR defence would have been applicable because the code provides that the BFOR defence applies to all aspects of employment policies or practices, including discrimination in benefits and pay.

It is suggested, however, that the non-application of the BFOR defence in Brooks and the reluctance of tribunals to apply the duty to accommodate short of undue hardship to cases of adverse effects discrimination involving benefits, reveals that there are considerations that arise in these types of cases that differ from cases where the enquiry focuses on work rules relating to performance of the job. An approach to discrimination in benefits and pay is therefore suggested,

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158 Various of the human rights codes expressly provide that the BFOR defence also applies to other aspects of employment policies or practices, including discrimination in benefits and pay. The codes all differ in respect of the exact phrasing of the defence, the extent of the prohibition against discrimination and the link between the two. In Meiorin for example the relevant code provided that a person must not refuse to employ or continue to employ a person or discriminate against a person regarding employment or any term or condition of employment ...(on the various prohibited grounds) and that the subsections do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement. Section 14(1) of the Manitoba Human Rights Code provides that “no person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation. Under s. 14(2) any aspect of employment is defined to include any form of remuneration or other compensation received directly or indirectly in respect of the employment or occupation, including salary, commissions, vacation pay, termination wages, bonuses... and employer contributions to pension funds or plans, long terms disability plans and health insurance plans.
within the framework of the BFOR test adopted in *Meiorin*, that would take into account the different considerations arising in these types of cases.

**Incorporating considerations of fairness**

The different considerations that apply in these cases would appear to be that accommodation of discrimination in pay and benefits could place tremendous financial costs on employers and that it may be unfair to place all the costs of accommodating pregnancy on individual employers. The arbitrator in the *Fleetwood* case captured the issues at stake when commenting on whether application of the duty to accommodate short of hardship may result in imposing obligations on employers to “top up” income received under employment insurance in, amongst others, pregnancy cases:

> Is it fair to ask employers to fund equality to this extent? As a society our shared sense of fairness is constantly changing or evolving. For example, in many workplaces, employees on maternity leave are now entitled to accrue vacation. Presumably this indicates not only an evolving understanding of human rights requirements but also an evolving sense of public responsibility for the needs of women giving birth such as was discussed in the *Brooks* decision and referred to in *Canadian Airlines.*

The notion of fairness is also reflected in *Chambly* and in the *Brooks* decision. As articulated in *Brooks*, it would be unfair to place all the costs of pregnancy on women. This does not answer the question, however, of who should bear these costs and in what proportion? The difficulty is that the focus of the BFOR enquiry is what costs it is justified to place on an individual employer. This does not readily allow a consideration of the socialization of the costs related to pregnancy. It may be unfair to require all employers to treat all employees who are absent from work due to pregnancy for pay and benefit purposes as if they are working, thereby placing all the costs of pregnancy on individual employers. On the other hand, there may be circumstances in which it is fair to place some of the costs of pregnancy on employers. Fairness may, for example, require that a large employer be required to top up wages for pregnant employees living below the poverty line when they are pregnant, because of the low level of income replacement received under employment insurance. In other instances, for example, where to

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159 *Supra* note 157 at 145.066-145.067.
provide fully paid maternity leave would pose an unreasonable financial burden on the employer, it may be unfair to do so. It is therefore suggested that a highly contextual enquiry, as suggested in *Chambly*, is appropriate in these cases and that considerations of fairness should be built into the enquiry.

In South Africa, I suggest that these cases should, accordingly, be decided under the residual fairness defence and that the Canadian undue hardship standard should be incorporated into the court’s approach to the fairness defence in South Africa. As outlined in Chapter One, it is suggested that the following factors should apply to a determination of whether the discrimination was fair:

1. whether the discrimination has a legitimate purpose,
2. whether and to what extent it achieves its purpose,
3. whether there are less restrictive and disadvantageous means to achieve the purpose,
4. whether the respondent has taken such steps as are reasonable in the circumstances either to: address the disadvantage that arises from or is related to one of the prohibited grounds, or to accommodate diversity, short of undue hardship,
5. whether the discrimination impairs or is likely to impair human dignity,
6. the likely impact of the discrimination on the complainant,
7. the position of the complainant in society and whether he or she belongs to a group that suffers from patterns of disadvantage,
8. the nature and extent of the disadvantage, and whether the discrimination is systemic in nature.

As has been illustrated in Chapters Two and Three, factors 1-4 are the South African equivalent of the *Meiorin* BFOR test in Canada and are also the factors which are applied to the IRJ defence in South Africa.

In Canada, I have suggested that a consequence of the adoption of the unified approach in *Meiorin* is that the BFOR defence now applies to these cases. It is suggested that additional considerations of fairness can be built into the enquiry by incorporation of factors 5-8 of the South African approach. These factors can be incorporated into the general approach to
discrimination when balancing the employee's right to be free from discrimination and employer concerns under the undue hardship standard.

In applying the BFOR defence in Canada and the fairness defence in South Africa to these cases, the crucial aspect is what the level and nature of the accommodation is that pregnant women require in relation to wages and benefits and how undue hardship will be determined. As suggested, the focus of the undue hardship enquiry should be what costs it is fair to place on the employer. These costs should be weighed against not only the purpose of the particular term and condition of employment, but also the purpose of anti-discrimination law. As argued above, in these cases undue hardship on the employer must be balanced against the disadvantage suffered by employees when they are pregnant and the fact that women are performing a social function when they bear children.

In relation to the interests of the employee to be free from discrimination the key consideration should be the impact of the discrimination on the complainant. As highlighted in Meiorin, the principal concern under the Charter is the effect of an impugned law and the approach under human rights law should be the same. Similar considerations would apply in South Africa in that it is desirable that the approach under discrimination law be consistent with the Constitutional Court's approach to equality under the Bill of Rights. A consideration of the impact on the complainant is therefore one of the factors suggested for incorporation into the fairness defence in South Africa and the BFOR defence in Canada.

In addition, in determining fairness more attention should be paid to the actual position of the particular complainant in society to assess the impact of the discrimination. Under the South African approach, the relevant factors to take into account include the particular position of the complainant in society, whether the complainant is a member of a historically disadvantaged group, the nature and extent of the disadvantage, and whether the discrimination is systemic in nature. It was argued above\textsuperscript{160} that poor women and women of colour suffer disproportionate financial hardship when they bear children. Attention to the position of the particular complainant in society would allow such aspects to be taken into account when determining what

\textsuperscript{160} See page 71.
costs it is fair to place on an employer. This factor should also be built into the enquiry in Canada.

A contextual, case by case approach also allows the flexibility to take into account the type of term and condition of employment. Depending on the particular case it may, for example, be fair to draw a distinction between seniority benefits and vacation leave, or between pay and benefits. A further factor to be taken into account would be the length of time for which the employee is absent from work, given that the needs of pregnant women may vary significantly. A related consideration would be what benefits and income replacement, if any, the particular employee is receiving during pregnancy. As indicated above, for example, not all employees meet the eligibility requirements for employment insurance.

In assessing undue hardship on the employer, the factors that should be taken into account in Canada and South Africa have been established in the Canadian cases of *Central Alberta Dairy Pool* and confirmed in *Meiorin*. It is also useful to have regard to the interpretation of the factors developed in the *Manitoba Guidelines* on accommodation. In assessing the costs of accommodation, relevant factors include: the size of the business, the economic position of the employer, what the cost would be of accommodating the employee and the costs already incurred by the employer relating to accommodating absence from work, for example premiums paid under employment insurance. A relevant consideration would also be whether the employer requires replacement labour during the employee's absence and the costs of replacement labour. The mere fact that employers incur additional costs should not in itself be sufficient to meet the undue hardship standard. The Court has repeatedly held that the use of the term undue infers that some hardship is acceptable. A further aspect that may impact on undue hardship is an informed assessment of the costs of accommodating not only the individual complainant but also all those possibly requiring accommodation. Clearly, the relevant costs will not be the costs of accommodating every woman employee at a given time. Not all women bear children and

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161 *Supra* note 14.
women do not all fall pregnant during a given financial period. The costs would be determined by the average rate of pregnancy and costs relating thereto.

The critical consideration is that whatever economic costs are incurred by the employer must be weighed against the disadvantage suffered by the employee. In pregnancy cases the costs to employers must be weighed against the societal interest/importance of women’s role in reproduction and measured against the undue hardship standard in order to remedy the unfair economic disadvantage of women arising out of their childbearing capacity.

Conclusion

Part One of this chapter focused on discrimination based on performance of the job and pregnancy. The cases reveal that the BFOR defence in Meiorin is well suited to resolving these cases and offers a motivation for the approach that I have suggested to the IRJ defence in South Africa. Part Two of this chapter illustrated that pregnant women suffer systemic economic disadvantage when they have children. This disadvantage is not experienced by men, who do not have the capacity to become pregnant. Because of the considerations that arise in these cases I have suggested ways in which the BFOR test in Canada and the fairness defence in South Africa could be structured to assist courts in resolving these cases by striking a balance between legitimate employer concerns and remedying systemic economic disadvantage. The next, and final chapter, assesses whether application of the BFOR test in Meiorin and the IRJ and fairness defences in South Africa would also assist in resolving discrimination on the basis of family status or family responsibility. To date, there have been relatively few Canadian cases involving family status and there are no equivalent South African cases. Application of the defences and the extent to which this area of systemic discrimination against women will be addressed therefore remains untested.
Chapter Four: Family Status/Responsibility

This chapter focuses on discrimination on the prohibited ground of family status or family responsibility. Although both men and women can be discriminated against on this basis, the focus of this chapter is on discrimination against women arising out of their disproportionate role in childrearing.163

In Canada, cases have arisen which involve direct discrimination on the basis of family status that established that stereotyped assumptions about women’s abilities to perform the duties of the job, based on whether or not they have children are not justified. These cases fall within the plain meaning of the prohibition against discrimination on the basis of family status under the Canadian human rights codes. The word “status” implies that the family status ground was included in human rights codes to prohibit direct discrimination based on stereotyped assumptions related to whether a person is in a “parent and child relationship.” These cases of direct discrimination based on stereotypes would now fail to be decided under the BFOR or IRJ defence which is a significant development, because if women in fact have difficulty meeting the requirements of the job because of childcare responsibilities, an employer would be required to prove that accommodation of such responsibilities would result in undue hardship.

A leading Canadian human rights tribunal decision, Brown,164 interpreted the prohibition against discrimination on the basis of family status in a broad and purposive manner to include not only direct discrimination based on stereotyped assumptions but adverse effects discrimination in circumstances where work rules conflict with family responsibilities. The tribunal applied the duty to accommodate short of undue hardship and established that accommodation may include

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163 One of the prohibited grounds of discrimination in South Africa under s. 6(1) of the Employment Equity Act, supra note 57 and s. 187(1)(e) of the Labour Relations Act, supra note 65 is family responsibility. Section 1 of the Employment Equity Act defines family responsibility as “the responsibility of employees in relation to their spouse or partner, their dependant children or other members of their immediate family who need their care or support.” In Canada, the various codes prohibit discrimination on the basis of family status. See, for example s. (1) of the Ontario Human Rights Code, supra note 6. Family status is defined under s 10(1)(e) of the code as “the status of being in a parent and child relationship.”

164 Supra note 113. See also the discussion of this case in Chapter Three at 58.
employee transfer in circumstances where a work schedule has an adverse impact on an employee with childcare responsibilities. Application of the bifurcated approach did not hinder achievement of a desirable outcome because the discrimination at issue was adverse effects discrimination and the appropriate remedy was a group accommodation policy, rather than striking down the workplace rule.

*Brown* is, however, the only human rights tribunal case that has applied the duty to accommodate short of undue hardship to discrimination on the basis of family status. There are many other aspects of accommodating conflicts between work schedules and family responsibilities that have not come before courts and tribunals in Canada or South Africa. Three of the key Canadian religious discrimination cases, under the bifurcated approach, involved the duty to accommodate employees against whom work schedules discriminated on a prohibited ground of discrimination. In this chapter I suggest ways in which these cases may pave the way for similar arguments in relation to discrimination on the basis of family responsibility. I also make reference to both a United Kingdom and an Australian decision as further examples of the types of accommodation that may come before courts.

There are also aspects of systemic discrimination in the workplace on the basis of family responsibility that involve questions of economic disadvantage arising out of women's disproportionate role in childrearing. Similar issues arise as in the pregnancy cases involving economic disadvantage and I suggest the same general approach to the BFOR defence in Canada and the fairness defence in South Africa. Considerations that differ from those in the pregnancy cases are highlighted. One of the key differences is the size of the accommodation pool. Ideally, men and women should be able to participate meaningfully in family life but in considering whether the costs of accommodation would place undue hardship on the employer, specific attention must be paid to alleviating the disadvantage women bear because of their disproportionate role in childcare.
**Direct Discrimination: stereotyped assumptions**

Most of the Canadian family status cases have involved direct discrimination based on stereotyped assumptions about women’s ability to meet the requirements of the job because of family commitments, and have established that such stereotypes are not justified. In *Broere v. WP London and Associates*, for example, an employee’s employment was terminated shortly after she returned to work after maternity leave. The termination was in the context of extensive lay-offs prompted by legitimate business reasons. The tribunal held that although there was no direct policy that marital status or family status would be a factor in considering which employees to layoff, there was an inference that age and number of children was a factor in deciding who was to be laid off because the employer was looking for a “long term commitment.” The assumption was that employees with young children are more likely to leave the workforce sooner. The tribunal held that it was sufficient to find liability that discrimination on family status was only one of the factors relevant to the employer’s decision to establish the discrimination claim. In *Bouchard*, a tribunal held that the employer had assumed that the complainant would be less available simply because she was a mother whereas the requirements of availability were not established by the employer, nor was her availability verified. The complainant successfully established discrimination on sex and civil status under the Quebec Code, in the absence of a family status ground.

These cases fall within the plain meaning of the prohibition against discrimination on the basis of family status under the Canadian human rights codes. The word “status” implies that the family status ground was included in human rights codes to prohibit stereotyped assumptions related to whether a person was in a “parent and child relationship.” The cases establish that stereotyped assumptions about women’s abilities to perform the job, based on whether or not they have children are not justified and that women should be given a fair opportunity to compete and apply for jobs on the same basis as persons without family responsibilities, most of who are men.

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166 *Quebec (Commission des droits de la personne) v. de Petite-Riviere-Saint-Francois (Municipalite)* (1994), 19 C.H.R.R D/189.
167 See the definition of family status in the *Ontario Human Rights Code*, supra note 163.
As in cases involving discrimination based on stereotypes in respect of physiological differences between the sexes and pregnancy, these cases will now fall to be decided under the BFOR defence in Canada. Both Bouchard and Broere would meet the first two legs of the Meiorin test and proceed to leg three of the test. To establish a BFOR defence, the employer would have to prove under leg three of the test that the requirements of availability in Bouchard and long term commitment in Broere were reasonably necessary to the accomplishment of the work related purpose. A positive aspect of the approach is that if the employee, or applicant for employment, in fact had family commitments, the employer would have a duty to accommodate those commitments, short of undue hardship. In South Africa, the employer would have to establish that the discrimination achieves a legitimate purpose and that steps have been taken to redress disadvantage and accommodate diversity short of undue hardship. Because many workplaces continue to be structured according to the norm of a male worker who does not have childcare responsibilities, women are often unable to meet aspects of the requirements of the job resulting from the failure to accommodate their family responsibilities.

**Accommodating family responsibilities**

In Canada, there have been very few cases that have involved the duty to accommodate short of undue hardship on the ground of family status. The leading tribunal case is Brown, in which the tribunal was able to apply the duty to accommodate short of undue hardship under the bifurcated approach, because the discrimination was adverse effects discrimination.

In Brown, the tribunal noted the role that women play in childrearing and interpreted the prohibition against family status in a broad, purposive manner:

> We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find both parents in the work environment, often with different rules and requirements. More often than not we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment.

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168 See also the United Kingdom decision of London Underground Ltd v. Edwards (2) IRLR 157 (EAT) in which it was held that the failure to accommodate a single mother’s child care responsibilities in designing a shift schedule was sex discrimination.
requirements...there is clear recognition within the context of "family status" of a parent’s right and a duty to strike that balance coupled with a clear duty on the part of the employer to facilitate and accommodate that balance within the criteria of Central Alberta Dairy Pool. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of "family status" as a ground of discrimination.\textsuperscript{169}

The case established that the duty to accommodate short of undue hardship on the basis of family status includes transfer of an employee in circumstances where a work schedule has an adverse effect on employees with childcare responsibilities. On the particular facts of the case, the accommodation measure was transfer of an employee from night to day shifts subsequent to the birth of her child.\textsuperscript{170} Evidence was accepted that Mrs. Brown was unable to obtain any childcare for her child at night. The tribunal characterized the discrimination as adverse effects discrimination on the basis that the neutral night shift work-scheduling requirement that applied to all employees had an adverse effect on Mrs. Brown upon the prohibited ground of family status. As discussed in Chapter Three the tribunal held that the employer had failed to accommodate Mrs. Brown during her pregnancy. Similarly, the employer had failed to establish that it had accommodated Mrs. Brown subsequent to the birth of her child. One of the orders made by the tribunal was that the employer had to develop a policy on employee transfer. Even if tribunal had been able to strike down the discriminatory work schedule under the bifurcated approach, it would not have been the appropriate remedy, because of the nature of the workplace rule.

The Brown case, while succeeding in accommodating the individual needs of the complainant is problematic for women. The tribunal grounded the sex discrimination complaint in the idea that women have “natural nurturing demands.” This characterization reinforces stereotypes of all women as mothers and as primary caregivers, which has traditionally operated to exclude women from the labour market. Nevertheless, it is a significant decision because a positive obligation was placed on the employer to accommodate childcare responsibilities.

\textsuperscript{169} Supra note 113 at D/59, D/60.
\textsuperscript{170} See also the discussion of this case in Chapter Three at 58.
In contrast to Brown, an employee unsuccessfully sought similar accommodation in the earlier case of Toronto Star Newspapers Ltd and Southern Ontario Newspaper Guild.\footnote{171} The complainant was required to work rotating shifts as a general assignment reporter and sought to change the nature of her work on the basis that her child would not get proper care if she worked rotating shifts. The shifts involved four weeks of day shifts, three weeks of evening shifts, and approximately every five months, a week of midnights shifts. The arbitrator dismissed the grievance, taking the view that there was no "special need" that had to be accommodated, because the child was a healthy normal child. As Price points out the assumption was that stronger evidence than the ordinary difficulties that parents with young children face must be provided to establish adverse impact for discrimination based on sex or parental status.\footnote{172}

The decision in Brown is preferable to the approach in Toronto Star and is in accordance with the emphasis in Meiorin on challenging male norms and the need to challenge systemic discrimination in the workplace. A positive aspect of the unified approach adopted in Meiorin is that the duty to accommodate also applies to direct discrimination. There may also be direct discrimination cases based on stereotyped assumptions in which application of the duty to accommodate short of undue hardship will assist in challenging male norms by requiring that women's childcare responsibilities are accommodated in the workplace.

In South Africa there is a legislative framework for the type of accommodation required in the Brown case under the provisions of employment standards legislation. These provisions will assist employees in establishing a discrimination claim if employers do not comply with the provisions.\footnote{173} The wide definition of the prohibited ground of family responsibility would suggest that a similar approach as in Brown will be followed in South Africa.\footnote{174}

\footnote{171} (1990), 12 L.A.C. (4th) 273.
\footnote{172} S. Price, supra note 31 at 152-153.
\footnote{173} \textit{S7} of the Basic Conditions of Employment Act provides that employers must regulate the working time of each employee with due regard to the health and safety of employees, the Code of Good Practice on the Regulation of Working Time and the family responsibilities of employees. In terms of s. 6 these provisions do not apply to senior managerial employees, travelling sales staff and employees who work for less than 24 hours a month for an employer. The Code of Good Practice on the Regulation of Working Time provides that the design of shift rosters must be sensitive to the impact of rosters on employees and their families and arrangements should be considered to accommodate, amongst others listed, the special needs of workers such as breastfeeding workers and workers with family responsibilities. Government Gazette vol.401, No. 19453, 13 November No. R.1440.
\footnote{174} Supra note 163.
In relation to the application of the undue hardship standard, similar issues may arise in relation to transfer of employees on the basis of family responsibility as in the pregnancy cases.\textsuperscript{175} There may, for example, not be a day shift to which an employee can be transferred. In the family responsibility cases, if there is no alternative shift the employee would, however, not be able to take long periods of leave with guaranteed job security, pursuant to employment standards legislation, as in the pregnancy cases. She would be forced to continue working the night shift or to discontinue employment.

There are, however, many other aspects of discrimination arising out of family responsibilities that have not come before courts and tribunals in Canada or South Africa. Almost all the accommodation required in relation to childcare needs is in relation to work scheduling. The nature and extent of the accommodation required varies from the period of parental leave immediately after maternity leave, through the pre-school years and whilst children are at school. There tends to be a greater need for accommodation in the earlier years of raising children. Accommodation of family responsibility typically only requires an extended period of absence from work in the period immediately subsequent to maternity leave, in the form of parental leave. In Canada, mothers and fathers are entitled to parental leave under the provisions of employment standards legislation.\textsuperscript{176} In South Africa, there are no equivalent legislative parental leave provisions.

Parents may also require a certain number of family responsibility leave days. They may require days off work in certain instances to deal with a specific family responsibility, such as attending at the birth of a child or attending to a sick child. In South Africa, in relation to accommodation of family responsibility leave, the \textit{Basic Conditions of Employment Act} provides that employees who have been in employment with an employer for longer than four months and who work for at least four days a weeks for that employer are entitled to take three days paid family

\textsuperscript{175}See discussion page 58.
\textsuperscript{176}Supra note 119. At the federal level, under the \textit{Canada Labour Code}, either parent is entitled to 24 weeks of parental leave subsequent to maternity leave. Under the Ontario \textit{Employment Standards Act}, the period of parental leave is currently 18 weeks.
responsibility leave when the employee’s child is born, when the employee’s child is sick or in the event of death within the family.\footnote{Section 27(2).}

In the absence of such legislative provisions in Canada, and in relation to further family responsibility leave in South Africa, employees are generally required to use vacation leave for such purposes. A court may find, in certain circumstances, that there is a duty on employers to build a certain number of family responsibility leave days into policies governing absence from work. Similar arguments for accommodation have been successfully advanced in religious discrimination cases in Canada. In \textit{Central Alberta Dairy Pool},\footnote{Supra note 14.} the complainant requested leave to observe two religious holy days. The employer granted leave on the one day, but denied leave for the other, on the basis that attendance on that day was a BFOR because it fell on a Monday, a busy day for the employer. The tribunal held that the employer had failed to prove that it had accommodated the employee short of undue hardship.

In \textit{Central Alberta Dairy Pool} the Court was not asked to consider whether accommodation required paid or unpaid leave. This aspect was considered in the \textit{Chambly} case in which an employee requested leave in respect of a Jewish religious holiday. The employer granted the day’s absence, but without pay. The Court held that there was a failure to accommodate short of undue hardship by not allowing paid leave. In determining undue hardship, the Court had regard to the terms of the collective agreement that provided for paid special leave. It may not be possible to establish the need for paid leave in all circumstances but \textit{Chambly} and \textit{Central Alberta Dairy Pool} pave the way for establishing the need to accommodate employees by allowing paid family responsibility leave days.

Apart from night shift work, there are many aspects of the “normal” 9 to 5 working day that do not accommodate parenting needs. These aspects have not come before tribunals in Canada.\footnote{For a general discussion of the types of accommodation women require and useful statistical information on these aspects, see Price, supra note 31.} It is useful to draw a distinction between accommodations in terms of which the total number of hours worked by the employee remains the same and accommodations which result in fewer hours.
hours worked because accommodation which results in fewer hours worked may have a greater impact on the employer's business concerns.

In some instances, the accommodation required is to repackage the job in such a way that the employee works the requisite hours but is accommodated by, for example, allowing flexibility in relation to hours of work and possibly in relation to place of work. Flexibility may include working compressed hours. The advantage of flexibility is that employees are able to shape a workday to coincide with domestic demands. Throughout the period of employment when employees are raising children, and in relation to most employees with children, there is a need for flexibility in work scheduling to, for example, attend sports meetings at school, transport children to extra-mural classes and to attend at doctor's visits. Flexibility does not involve loss of wages and benefits to the employee and in most instances will not place such inconvenience on the employer so as to cause undue hardship. Another form of accommodation is job-sharing which does not generally place a burden on employers but does result in less benefits and wages to the employee.

A further accommodation that may be sought by women employees is alteration from full-time work to part-time work. There have been no cases in Canada or South Africa in this regard, but cases have arisen under anti-discrimination laws in the United Kingdom and Australia. In the United Kingdom decision of Home Office v. Holmes a woman requested that her terms and conditions of employment be altered from full-time to part-time on the basis that the full-time requirement constituted indirect (adverse effects) sex discrimination. The Court noted that despite the changes in the role of women in modern society, it is still a fact that the raising of children tends to place a greater burden on them than it does men. The employer was unable to show that the actual duties of the job required the employee to work full-time. The Court noted that there might be concerns that if the claim were allowed many men and women would bring similar claims, which would be unfair to employers, but emphasized that each case should be

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180 Dowd identifies work/family conflict as including issues relating to insufficient time to balance work and family as well as issues in relation to use and control of time. N.E. Dowd, "Work and Family: The Gender paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace" (1989) 24 Harvard CRCLRV 79 at 86.

181 S. Price, supra note 31 at 161.

assessed on its own merits. It is not clear what factors the tribunal took into account but the complainant was a single mother with two children who had been forced to take long periods of unpaid leave due to childcare responsibilities.

In the Australian decision of *Hickie v. Hunt*\(^\text{183}\) a partner in a law firm argued that her firm had failed to accommodate her in the period subsequent to maternity leave during which she was working part-time. The firm made no effort to support the employee in maintaining her practice during the period when she was working a three-day week. Assumptions were made about her abilities to maintain her practice and accordingly a large part of her practice was transferred to another employee without her agreement. In turn, the low level of her practice impacted on the decision not to renew her contract as a partner. The Commission held that working full-time had therefore become a requirement of the job, which indirectly discriminated against the employee on the basis of sex, because this requirement was one with which a substantially higher proportion of men could comply.

Under the BFOR test in *Meiorin* and the suggested approach to the South African inherent requirements of the job defence, a similar approach could be followed. An employer may have to establish that accommodating the employee by adjusting the duties of the job from full-time to part-time would place undue hardship on the employer. The difficulty with part-time work is that it mostly results in less wages and benefits and marginalization in the workforce. The desire for part-time work is often, although not always, as a result of failure to accommodate the needs of families in full-time employment which creates pressure to downscale to part-time employment. An aspect to consider is that women may prefer to push for accommodation within a full-time post that would alleviate the pressure to accept a part-time post. Again the religious discrimination cases in Canada may pave the way for such an argument.

In *O’Malley*, a new workplace schedule that was introduced conflicted with an employee’s religious commitments. As a result, the employee was forced to accept part-time employment,

with a reduction in earnings and benefits. On the evidence the employer did not show that undue hardship would result if accommodation had been made. There was no evidence regarding the problems or expense that the employer would have experienced by rearranging working periods for the benefit of the employee and the employer was ordered to compensate the employee for the difference between the full-time and part-time salaries.

In relation to types of accommodation that result in fewer hours worked, such as part-time work, other hours of work arrangements, or extended periods of parental leave, issues involving systemic economic disadvantage arise because accommodation frequently results in reduced income. It is therefore suggested that the same contextual, case-by-case approach suggested in the previous chapter be applied to these cases, i.e. under the BFOR defence in Canada and the general fairness defence in South Africa.

There are, however, a number of differences between family responsibility cases and pregnancy cases to take into account when balancing employee and employer interests and determining fairness. One of the differences between pregnancy cases and family responsibilities is that, subsequent to parental leave, most employees would not be totally absent from work for a continued period. In these instances employees would put in less time, often over a longer period. A further factor, which distinguishes family responsibility from pregnancy cases, is the group that requires accommodation. Are men and women entitled to accommodation? This may significantly increase the size of the “accommodation pool.” In principle a male caregiver involved in family responsibilities would be able to claim accommodation, which should be assessed in the context of the case. In an ideal workplace men and women should be able to participate meaningfully in employment and in the family. However, in weighing the costs of accommodating employees, specific attention must be paid to the need to alleviate the disadvantage women bear because of their existing disproportionate role in child-care.

Additional considerations to be taken into account include the length of time accommodation is required, the availability of day-care and state contributions to day care, applicable childcare rebates, the nature of the accommodation sought, the type of job, and the type of benefit: pension
benefits, seniority, and wages may for example all be assessed differently depending on the facts of the case.

Discrimination law on the basis of family responsibilities is relatively unexplored in Canada and South Africa. A brief examination of aspects of workplace discrimination on the basis of family responsibility reveals that it is possible to place workplace scheduling requirements under closer scrutiny in order to challenge a further aspect of systemic discrimination experienced by women in employment. It remains to be seen how the defences will be applied and to what extent family responsibilities will be accommodated in employment.
Conclusion

Systemic sex discrimination remains deeply embedded in social practices. In Canada the Supreme Court's approach to discrimination in employment had previously been severely criticized for legitimizing rather than addressing systemic issues. The unified BFOR test in Meiorin was adopted to address these concerns. In South Africa, the Labour Appeal Court has to date failed to interpret employer defences in a manner consistent with the constitutional and legislative commitment to redressing systemic disadvantage.

Drawing on the South African legislative and constitutional framework and the Canadian experience, I have suggested an approach to employer defences for both countries. Because no reference was made in Meiorin to the rich body of sex discrimination tribunal decisions, and there is scant judicial authority in South Africa, I chose three areas of systemic discrimination against women in employment and applied the suggested approaches to those three areas. My conclusion is that the examination of the case law offers clear support for the suggested approaches.

For Canada, the conclusion is that the Meiorin BFOR test does indeed remedy the earlier problems with employer defences and that it should assist in redressing systemic issues. In relation to discrimination in benefits and pay arising out of women's role in reproduction and their disproportionate role in childcare, drawing on Canadian law and the South African legislation, I have suggested that additional considerations of fairness be incorporated into the existing BFOR test.

For South Africa, I have suggested that almost all the aspects of the Canadian BFOR test are already incorporated into the Equality Act and that labour courts should have regard to the Equality Act when interpreting employer defences. In respect of discrimination in benefits and pay, I have suggested that it would be appropriate to apply a residual fairness defence that arguably is already included in labour legislation. In respect of discrimination in qualifying standards for employment and workplace rules and practices pertaining to job performance, the IRJ defence is applicable and appropriate. A number of specific ways in which the approaches
will assist in challenging male norms and systemic discrimination are highlighted by an examination of the case law.

Male norms will be challenged in each area of discrimination by inclusion of cases involving direct discrimination based on pure prejudice within the applicable defences by establishing clearly that prejudice is not a legitimate purpose because it violates dignitary interests. Male norms and systemic discrimination are further challenged in cases of both direct and adverse effects discrimination by placing a positive obligation on employers to take steps to accommodate women, short of undue hardship. In cases involving qualifying standards for the job accommodation may include adjusting the duties of the job, both in cases of direct discrimination which involve privacy and decency concerns, and cases of direct and adverse effects discrimination where women's capabilities differ from those of men. The extent to which application of the undue hardship standard will place a limit on this form of accommodation is untested.

The pregnancy cases clearly illustrate why applying different remedies to cases of direct and indirect discrimination in Canada led to undesirable results, because the initial classification of the discrimination is often artificial. Not only is the artificial nature of the distinction revealed but, in as much as the workplace is structured around the norm of a male worker, almost all cases of pregnancy discrimination involve some form of accommodation. Significant accommodation measures include transfer of the employee due to health concerns and pregnancy leave. In relation to transfer of pregnant employees, the undue hardship standard, properly applied, is an appropriate mechanism to balance employer concerns and employee interests. In relation to pregnancy-related leave, I argued that full recognition of the social value of reproduction suggests that uninterrupted job continuity should not be a BFOR or IRJ in indeterminate contracts of employment. Accommodation in relation to pregnancy also arises in discrimination in pay and benefits. Because of the nature of the considerations that arise, namely the costs of remedying systemic economic disadvantage, I have suggested that it would be desirable to structure the enquiry to incorporate fairness as a means of striking the appropriate balance between redressing economic disadvantage and employer concerns and outlined a number of relevant factors. Accommodating family responsibility remains relatively unexplored. From
applying the suggested approaches to fact situations that may arise it would appear that the Meiorin test and the approach that I have suggested for South Africa would assist in resolving these cases, but it remains untested.

A further way in which the Meiorin BFOR test addresses the criticism that the bifurcated approach legitimised systemic discrimination is by allowing seemingly neutral workplace rules to be struck down, where appropriate. Chapter Two reveals that it is particularly in cases involving qualifying standards for the job that it would be appropriate to strike down the standard. In relation to pregnancy and family responsibility, other than appointments and dismissal, the preferable remedy is group accommodation policies, as opposed to individualized exceptions because such policies assist in challenging the norm of a male worker.

It is hoped that courts in South Africa will have regard to the significant Canadian decision of Meiorin in developing an approach to employer defences, to ensure that the approach gives effect to the firm commitment in the South African constitutional order and legislative framework to redressing the systemic disadvantage of women.