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Masters of Philosophy (MPhil) Labour Law Dissertation

**An Evaluation of
“Work-Life” Legislation
in South Africa**

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STATEMENT

This Research Dissertation is presented for the approval of the Senate in fulfilment of part of the requirements for the *MPhil Labour Law* in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of *MPhil Labour Law* dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Abstract

The work-life balance has become a topic that has been hotly debated in both academic and social arenas over the past decade or so. Little has been generated on the topic in South Africa in contrast to abroad where not only extensive debate and research has been undertaken, but legislation has been enacted to assist in the creation or maintenance of a balance between employment and family responsibilities of employees.

This paper set out to explore and evaluate South African labour legislation, to identify what, if any, measures could be employed to effect legislation that would better represent and protect employees with care and family responsibilities in this country. Existing South African legislation was scrutinised to establish what protection was available for employees and also to what extent employees have access to that protection. Guidance was taken from other resources, such as international legislation, guidelines, protocols, conventions, and current South African trendsetting organisations to inform these suggestions. Suggestions were then made based on this research endeavour and will hopefully be seen as realistic and implementable in a South African context, taking into consideration the current economic and social difficulties the country is experiencing.

There is a far way to go for South African legislators when it comes to improving on existing labour legislation, much can be done to assist both parents, but especially working mothers in our country to enable them to lead lives that enrich both their own lives and as well as benefit the economic and social aspects of South Africa's businesses and communities.

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Introduction

In today's labour market, globalised employers find themselves faced with pressure to accommodate employees in a wide range of ways, a relatively recent development in the history of employment as we know it in the world, which brings to light the diversification of the employment pool from which employees now present themselves. The work-life balance is critical to all employed persons and is a fundamental to society as a whole. As the demands of work on the employee reach new levels and employees find themselves struggling to maintain or create a balance between family and work, so the work-life struggle comes into play and legislation either aids or fails the employee in need of life representation in a work-dominated era. It also relates to those who are not employed but affected by the absence of a parent, partner, or family member due to the demands of employment.

Major and Germano¹ list some of the factors they see as influencing the changing nature of work. Because of *globalisation*, which sees organisations that are increasingly under pressure to respond to quickly changing market conditions, employers are increasingly passing this pressure on to their employees, by expecting them to be equally as adaptable and flexible. A rise in the service industry, with all its accompanying demands, has resulted in an "increasing need for a 24/7 workforce".² Technological advances, which are widespread in workplaces and common in homes,³ lead to increased pressure not only on the organisations, in turn increasing demands on employees in terms of creating a workplace where an employee must often be available on an on-going basis.

¹ Major, D. & Germano, L. 'The changing nature of work and its impact on the work-home interface' in Jones, F., Burke, R. J. and Westman, M. (Eds) *Work-Life Balance: A Psychological Perspective* (2006) Press at 17 – 20.

² *Idem* at 19.

³ *Ibid.*

The rise in the service industry on a global level⁴ can also be seen in South Africa. These changes in South Africa are a product of the changes seen elsewhere on a global level, where, global institutions like the World Bank have created an ideological imperative to reduce the costs of “doing business” in line with the economic imperative to cut costs imposed by trade liberalism.⁵ In conjunction with this economic demand is another, being recognised globally—the need for a balance between the work and family lives of employees. Decisions by foreign governments to assist employees in integrating their employment and care-giving responsibilities is a testament to the recognition of these new workplace demands,⁶ and can also be attributed to increased feminisation in the workplace over the past few decades.

Working arrangements have been introduced by a large majority of high-income countries where employees are easier able to change how many hours, when and where they work.⁷ This is the most obvious indicator that, not only do law makers recognise the importance of a *work-life balance* also known as the *work-family balance*, or *work-life integration*,⁸ they also feel that, because of its importance, it needs to be legislated and enforced. The *work-life integration* is clearly defined by Joan Kofodimos:

A satisfying, healthy, and productive life that includes work, play, and love; that integrates a range of life activities and attention to self and to personal and spiritual development; and that expresses a person’s unique wishes, interests and values. It contrasts with the imbalance of a life dominated by work, focussed on satisfying external requirements at the expense of inner development, and in conflict with a person’s true desires.⁹

⁴ Lambert, S. J. ‘Making a Difference for Hourly Employees’, in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009).

⁵ Theron, J. *The shift to Services and Triangular Employment: Implications for Labour Market Reform* (2008) 29 *ILJ* 1.

⁶ Dancaster, L and Baird, M. *Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law?* (2008) 29 *ILJ* 22.

⁷ Hegewisch, A. and Gornick, J.C. *Statutory Routes to Workplace Flexibility in Cross-National Perspective* (2008) at Summary (v).

⁸ Jones, F., Burke, R. J. and Westman, M. (Eds) *Work-Life Balance: A Psychological Perspective* (2006) at 2.

⁹ Kofodimos, J. *Balancing Act* (1993) at p xiii.

Modern employees recognise the importance of balancing the demands of employment and family life. As employees try to find a balance between the two, worldwide legislation seems to be adapting to aid these workers in achieving this end. From a local perspective, however, South African legislation seems to be slow on the uptake, for many reasons, some of which will be explored in this paper.

Research and analysis of the *work-life balance* has emerged over time through developments that can be traced back to the Industrial Revolution. ‘With the rise of paid employment out[side of] the household, the emergence of large-scale organisations and the imposition of middle class norms and values, work and non-work/life evolved as distinct spheres in Western countries during the late nineteenth century and throughout the twentieth’.¹⁰ Some developments that have taken place, aside from the movement of work outside of the home, are that stereotypical gender roles and ideological perspectives of men and women have changed as drastically as the different forms of work have.¹¹

Some of the changes in workforce demographics can be seen in the following summarised developments:

- women’s increasing labour force participation;
- more women in managerial positions, ‘although women are still less likely to hold managerial positions than men’;¹²

¹⁰ Warhurst, C., Eikhof, D. R. And Haunschild, A. (Eds) *Work less, Live more? A critical analysis of the work-life boundary* (2008) at 2. This movement traces itself from the handicraft and domestic production based work where the artisan produced goods from their home-based workshop through to production in large scale organisations that we see today. It was only through this transition that work and life emerged as two distinct spheres.

¹¹ Crompton, R. *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (2006) at 3.

¹² Major & Germano (note 1) at 14.

- part-time employment, which sees more women than men working part-time; attributed to the demands on women who often have a more active role in raising children and running households;
- mothers in the labour force, remaining in the workforce after pregnancy or returning to work soon after the birth of children; and
- men and women with eldercare responsibilities, which sees employees reporting difficulties in balancing work and home responsibilities than those without these commitments.¹³

All of these factors contribute to changing workforces across the world, and assist in creating pressure on legislators to cater to these changes.¹⁴

In today's employment environment, for those who are employed in the primary and manufacturing sectors,¹⁵ the need to work is driven by the most fundamental purpose of work—income. These people are often hourly paid and if they do not work, they do not get paid; they then cannot meet their cost of living, often forcing them to work as many hours as possible in the working week. This leaves a limited amount of time to spend with their families. For those who are not primary sector or manufacturing employees, however, the need to work is still great and there is increasing pressure from organisations to be more productive, more efficient, and more profitable, often in the face of downsizing,¹⁶ leading employees to work longer hours to meet their employers' targets. Such situations are typically beyond the capacity of an employer's staff complement, particularly in an economic climate seeing many employees being retrenched or income not increasing in

¹³ Major & Germano (note 1) 13 – 17.

¹⁴ Ibid.

¹⁵ In South Africa, the Primary sector includes agriculture, forestry, fishing as well as quarrying and mining; the Secondary sector includes manufacturing, construction, electricity, gas and water; this leaves all other forms of industry activities to fall under the Tertiary sector umbrella. *Gross Domestic Product (GDP): 1st Quarter 2011* (2011).

¹⁶ Warhurst, Eikhof, and Haunschild, (note 10) at 5.

line with inflation, thereby reducing the employee's ability to support family and living expenses, to an even more extreme level than previously experienced.

This concept has led to what has now been coined the *long working hours culture*,¹⁷ where employees increasingly work more than 45 hours per week, and then feel guilty about what they perceive to be not enough time spent working. These concepts all form integral parts of the analysis of legislation enacted to provide balance between employment and family. These concepts focus more on psychological and social effects of work, but the nuts and bolts of the situation lie in economic and legislative realities as they exist in South Africa. The employment landscape is currently changing from a predominantly primary sector employer to a tertiary “services” sector one.¹⁸ That said, a large proportion of employment still takes place in an unskilled or semi-skilled environment, where job protection is scarce and unemployment is high.¹⁹

South African employees facing this also face many other factors, including increasingly high costs of living, the HIV/AIDS pandemic, high mortality and illness rates in low-income groups, and informal forms of employment, as well as limited legislation and limited access to legislation designed to assist with family and non-work demands.²⁰ These affect the positions of employees in a country with a high demand for work stemming from high unemployment rates. Due to the demands of caring for sick family members or partners, of caring for children, and—in some cases—caring for children of deceased parents, this difficulty is intensified and the pressure on employees with care responsibilities is increased beyond a point where current legislation reaches This makes

¹⁷ IDS HR Studies *Work-Life Balance* (2000) No 698 November.

¹⁸ Theron (note 5) at 1.

¹⁹ Ibid.

²⁰ Le Roux, R. *The World of Work: Forms of Engagement in South Africa* (2009) *Development and Labour Monograph Series* at 53 and 54.

for a difficult marriage between the ineffective existing legislation and potential legislation that could be enacted to aid in the struggle for balance.

Relatively little has been published on this topic in South Africa, and it seems a more in-depth discovery needs to take place, with global trends in mind, as to what would be workable and realistic, considering the nature of majority employment sectors and other social, political, and economic factors that affect employees. It is important to focus the range of this paper and to understand that, inasmuch as an international comparison may inform the suggestions to be made, they might not, and will mostly not be of actual practical application in the South African environment.

These comparisons will serve more as a research collective from which workable solutions may be picked and chosen. There seems to be a great discrepancy in legislation globally, which further confirms that what works for one does not necessarily work for another, causing difficulty in creating generalised legislation. Furthermore, without enforcement of legislation governing public policy, few organisations are likely to implement measures, let alone action change in this arena of their own accord. Those organisations that do, are exceedingly rare and implement measures only when the express benefit outweighs the cost of such policy decisions.²¹

The purpose of this exploration is to identify what, if any, measures could be employed to effect legislation that would better represent and protect employees with care responsibilities. Guidance from existing resources, such as international legislation, guidelines, and South African role players, will be taken to arrive at these outcomes. The

²¹ Cohen, T. and Dancaster, L. *Family Responsibility Discrimination Litigation – A non-starter?* (2009) 2 *Stell LR* 221 at 238.

first chapter will begin with framing the South African employment environment, beginning with understanding why little or no action has been taken to address increasingly inadequate labour legislation. Employment trends in the sectors, including the informal sector, are explored, with mention made of the economic and social issues facing not only employees, but all South Africans, and how this affects employment trends. With labour unions and other groups creating pressure to change existing legislation, this chapter is integral to framing the focus of the topic and its direction.

The second chapter then highlights existing South African legislation available to address work-life balance, the features of which are analysed to assess the entitlement of certain rights, as well as their accommodation and protection. The topics are: *family responsibility, annual leave, sick leave, maternity, and adoption*; as there is no provision for paternity leave in South Africa, this topic is not featured. Chapter Three continues this scrutiny, to assess accessibility of legislation to employees and to what extent it serves those seeking redress or protection. The Commission for Conciliation, Mediation and Arbitration (CCMA) is included in this assessment, but the content focuses on case law and the development of jurisprudence. The cases address the following aspects of work-life legislation: *family responsibility; family responsibility leave, including discrimination based on it; maternity leave, and dismissals based on “inherent” requirements related to maternity leave.*

Following this foundational process, Chapter Four briefly explores some South African organisations in terms of policies implemented to better cater to their employees' lifestyle needs, which have stemmed from the need for a more balanced life where work and family have equal importance, if not equal representation. This may provide a more

relevant guide for workable legislative suggestions locally. These organisations are contrasted with international trendsetters and how they, in turn, are analysed abroad.

Chapter Five draws from the South African exploration in the previous chapters and looks to international sources for guidance. Information is drawn from International Labour Organisation (ILO) conventions, comparative legislation, and other material, in order to initiate the process of forming ideas as to what may be possible in a local context by learning from other successes and failures abroad, in both Western and Eastern circumstances. This understanding of what is possible is placed in context by Chapter Six, where, following the comparative investigation, an exploration into possible implementation issues as they would occur in South Africa's current employment market will provide a platform from which to launch some workable solutions for the South African context. Some approaches are suggested that are informed by both the history of this country, as well as the social complexities that it currently faces. This is done using statistical material, academic commentary and analysis on current economic and employment situations.

The final chapter deals with making meaningful and realistic suggestions for improvements in South African labour legislation that directly address the work-life imbalance, as well as benefit other labour practices as a by-product. The suggestions are broken down into *the integration of work-life legislation into workplace policy, family responsibility, maternity leave and benefits, paternity leave (and benefits), flexible working arrangements and parental leave, child care and child care subsidies, increased control in non-standard employment sectors, and some non-legislative suggestions*. The entire paper is then summed up in the concluding chapter, with a brief reflection on the initial intent and the final destination that the research for this paper took.

Chapter 1: Employment Environment in South Africa

The intention of this research is to make some legislative suggestions to improve existing labour rights; thus it is integral that the reader be aware of the employment environment as it currently exists in South Africa. This chapter will explore the employment trends and sectors, as well as look at the political motivation behind the lack of action to address increasingly un-representative legislation in this country.

As some of the foundation for the lack of legislative discussion or changes in the arena of the work-life balance, we have to understand the political motivation for the hesitance of legislators in addressing the changing nature of employment in South Africa. It is important to consider these political motivations, because ‘mandates for paid leaves, scheduling flexibility, part-time benefit parity, and other policies might shrink profits, depress wage growth, and hamper new job creation’.²² In a country where the need for job creation and sustainability is high, enacting legislation that would potentially hinder the addressing of these needs would be difficult, if not impossible, and definitely detrimental to the ends the political vehicle wishes to achieve, even if the means seem critical.

Cohen and Dancaster²³ outline the difficulties faced by both the South African government and employers in accommodating the needs of employees as caregivers, and who have failed so far to do so adequately. They say that this has been due to other pressures that have required urgent attention and addressing, such as employment equity demands, broad-based economic empowerment imperatives, the changes in and

²² Feldblum, C. R ‘Policy Challenges and Opportunities for Workplace Flexibility: The State of Play’ (2009) as she discusses the views of Glass, J. *Work-Life Policies: Future Directions for Research* (2009) in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009) at 260.

²³ Cohen and Dancaster (note 21) at 222.

requirements of the Basic Conditions of Employment Act (BCEA), and the Skills Development Act, all of which has meant that catering for family responsibilities has not been a priority up to now.²⁴ In addition, legislation that came into effect after the attainment of democracy in South Africa is now increasingly less representative of the majority of the workforce, as opposed to the representation it had when enacted in the 1990s. This is largely due to a shift in employment trends as well as a rapid growth seen in the informalisation of work relationships, leading to the increase of non-standard forms of employment.

One of the reasons for informalisation is the desire of organisations to reduce ‘human resource management responsibilities and cost’.²⁵ Theron and Godfrey outline the other reason for informalisation as being a response to the need for greater temporal and numerical flexibility to cope with varying demands.²⁶ The informalisation of work-place relationships takes many forms, and can be broken down into *externalisation* and *casualisation*. Externalisation is defined as the transformation of an employment relationship into a commercial contract to provide goods or services which creates a distance between the user of the services (the ‘employer’) and the risk associated with the employment relationship.²⁷ This can take several forms but is essentially broken down into two groups, the first including subcontracting, outsourcing, homeworking, labour broking (also referred to as temporary employment services or TES) by the Labour Relations Act (LRA)²⁸, and franchising. Casualisation is the commodification of the work through which employees are transformed into independent contractors by means of a commercial arrangement, as opposed to there existing an employment arrangement between the two

²⁴ Cohen and Dancaster (note 21) at 222.

²⁵ Le Roux (note 20) at 14.

²⁶ Theron, J. & Godfrey, S. *Protecting Workers on the Periphery* (2000) *Development and Labour Monograph Series* at 17.

²⁷ Le Roux (note 20) at 18.

²⁸ Act 66 of 1995.

parties.²⁹ These workers present as seasonal workers, part-time workers, temporary workers, or casual workers who work less than 24 hours for one employer in a one-month period.³⁰

Casualisation and externalisation have contributed to increases in the informal sector. Benjamin argues that work is now more diverse than ever and not performed by workers in standard employment. He argues that this process of informalisation has resulted in fewer workers being protected by labour law.³¹ The third-quarter Labour Force Survey of 2010³² confirms this. Of the 13 million employed persons in South Africa, four million are employed informally, and almost one-third of the total workforce does not receive basic legislative protection.

The same survey (which is discussed in more detail in Chapter 7) presents statistics that show there are many more South African women than men that are employment-eligible. Contrastingly, the actual rates of employment according to sex are very different and translate into one-third of the employment-eligible female population in South Africa being employed (sector notwithstanding), as opposed to the employment-eligible men, who enjoy an almost 50 percent employment rate. This reinforces the generalised view of employers that hiring women as employees may adversely affect the organisation at some stage, due to perceptions regarding time constraints and family demands of the worker. Furthermore, as females are viewed to be the more likely employees to require time to carry out care responsibilities, they are more often than not discriminated against, both

²⁹ Le Roux (note 20) at 19-27.

³⁰ *Idem* at 15.

³¹ Benjamin, P. *Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa: A Discussion Document* (2009) at 845.

³² South African Quarterly Labour Force Survey (QLFS), 3rd Quarter, 2010.

subtly and overtly, by potential and existing employers, which again is indicated in SA employment statistics (and across the world).

In addition to these employment trends, ‘many firms have restructured to reduce standard employment or have adopted strategies to avoid or minimize labour law [and] these strategies include outsourcing, the use of fixed-term contracts, temporary and part-time work and labour broking’.³³ ‘Research shows that labour broking arrangements have become the mechanism most commonly used to deprive vulnerable employees of labour law protections’³⁴ and, as can be seen in current labour dialogue calling for change, the South Africa trade unions are attempting to create a similar reformation in line with recent Namibian labour legislative movements, where, over the past few years, there have been legislative changes and reforms that have had a large ripple effect on the labour broking. This followed a change in legislation that rendered labour broking illegal. This came about in 2007 when the Labour Bill came to include the statement: ‘No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party’.³⁵ This amendment was unsuccessfully contested in the High Court of Namibia in 2008, and remained an unlawful activity.³⁶

When it was again appealed by Africa Personnel Services in the Supreme Court, the previous judgment was overturned and the amendment rendering labour broking unlawful was found to be constitutionally opposed to the right to carry on any trade or business, as it prohibited labour brokers from doing just that.³⁷ This situation mirrors

³³ Benjamin (note 31) at 845.

³⁴ *Idem* at 847.

³⁵ Jauch, H. *Namibia's Ban on Labour Hire in Perspective* (2007) Labour Resource and Research Institute (LaRRI) for The Namibian as it describes what was then soon to be the new clause 128[1] of the Labour Bill.

³⁶ *Africa Personnel Services v Government of the Republic of Namibia* (2008) (2) NR 537 (HC).

³⁷ *Africa Personnel Services v Government of the Republic of Namibia* (2009) (2) NR 596 (SC).

current dialogue in South Africa, where recent developments include ‘the President’s call for 5 million jobs to be created; proposed amendments to our labour laws; the debate [around] decent work; and the [proposed] banning of labour brokers - all of which are government initiatives designed to alleviate our unemployment challenges’.³⁸ This seems to create the impression, if not demonstrate, that we see the need for change to increase worker protections, or at least increase the number of workers who receive protection, from labour and related legislation, and the basic constitutional right to fair labour practices.³⁹

What the informalisation of the workforce has indirectly led to is employees finding themselves in this form of employment are having to rely heavily on sectoral determinations for the provision of appropriate basic conditions of employment and minimum wages, as opposed to collective bargaining, as many of them are not unionised, or the sector they work in does not have a bargaining council or union representation.⁴⁰ In South Africa, there have been a significant number of sectoral determinations made in terms of the BCEA, including, but not limited to, the Civil Engineering Sectoral Determination⁴¹ and the Domestic Worker Sectoral Determination,⁴² yet there are still many employees who fall under the scope of these determinations but remain unprotected and unrepresented for many reasons, in much the same way that employees who are not members of trade unions do not receive the same protection or rights as those who are, despite working in the same workplace.⁴³

³⁸ Cunningham, J. (Ed) *Employment in South Africa: New, mind-boggling research* (2010) Online Publication: South Africa, *The Good News*, http://www.sagoodnews.co.za/newsletter_archive/employment_in_south_africa_new_mind-boggling_research.html, accessed 12 March 2011.

³⁹ Constitution of South Africa, 1996.

⁴⁰ Benjamin (note 31) at 869.

⁴¹ Sectoral Determination 2: Civil Engineering Sector, 2001.

⁴² Sectoral Determination 7: Domestic Worker Sector, 2002.

⁴³ Benjamin (note 31) at 869.

Both of these determinations control sectors that tend to be heavily informalised, with the use of temporary and casual labour being the norm, and thus they are considered important in the context of this paper. Both determinations provide for the usual provision regarding wages, hours of work, and termination of employment, but where the determinations differ from the BCEA is interesting and noteworthy. The Domestic Worker determination provides for a domestic worker to be entitled to five days family responsibility leave per annum,⁴⁴ which is two more days than the BCEA provides for standard employees; and the Civil Engineering determination provides for ‘36 days paid sick leave over 3 years’⁴⁵ which is six days more than the BCEA provides for.⁴⁶ These determinations show that factors pertinent to the sector, or to the form of employment, have been considered in the drafting stages, and with items such as sick leave and family responsibility being addressed more adequately in non-standard forms of employment. It also indicates that legislators have had the mind to address basic conditions of employment in these sectors.

This paper could attempt to address the impact of poverty and a poor education system on employment, as well as the impacts of HIV/AIDS and the social repercussions of the disease, the care responsibilities stemming from ill health generally, and the contemporary “family unit” as it has developed as a result of these factors, but the aim of this journey is limited to analysing existing labour legislation. All that needs to be addressed in terms of HIV/AIDS and the working individual is the following statement by Cawse: ‘With the HIV and AIDS epidemic, South Africa had an estimated 1.2 million

⁴⁴ Sectoral Determination 7 (note 42) at Part E, Section 19.

⁴⁵ Sectoral Determination 2 (note 41) at Section 9.

⁴⁶ Basic Conditions of Employment Act 75 of 1997, s 22 (2) and (3).

AIDS orphans in 2005...the burden of childcare on the surviving women in the family is increasing'.⁴⁷

This chapter's contextualisation creates the framework for investigation into what suggestions could be made for the creation of new—or the improvement of existing—legislation in South Africa, to better protect and cater for employees. Before this can be done, however, an exploration into what already exists must first be completed.

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⁴⁷ Cawse, J. *South Africa: National Overview*, in Hein, C. and Cassirer, N. *Workplace solutions for childcare* (2010) at 325.

Chapter 2: Existing South African Legislation

With a basic understanding of the current employment situation locally, an exploration of the legislation is necessary to adjudicate what is both available or “missing” and how extensive both the provision and protection of rights is. This assessment is undertaken with the subject matter in mind; only legislation that may or does pertain to the work-life balance is included, and is as follows: family responsibility, annual leave, sick leave, maternity, and adoption. Cases and the development of jurisprudence with regard to this legislation will be addressed in chapter three.

In South Africa, currently, the pieces of legislation that cater for employee lifestyle and living needs are limited to the following: the BCEA⁴⁸ and the LRA,⁴⁹ and their respective Codes of Good Practice and Regulations; the Unemployment Insurance Act (UIA),⁵⁰ and the Employment Equity Act (EEA),⁵¹ including Sectoral Determinations. These do not pertain to other international obligations South Africa has committed to, which will be addressed later. The legislation spans from the basic rights of employees when it comes to the demands of life outside of work as well as the protection of these employees while away from work, to how these employees will be remunerated while away from work and the right for their employment contracts not to be amended in this regard by any agreement, individual or collective.

⁴⁸ Act 75 of 1997.

⁴⁹ Act 66 of 1995.

⁵⁰ Act 30 of 1996.

⁵¹ Act 55 of 1998.

1. Accommodation of Family Responsibility

Under the BCEA, provision is made for the regulation of working time. Section 7 states that ‘working time must be regulated by every employer with due regard to the family responsibilities of employees’.⁵² This is also addressed by the BCEA, providing that:

...an employer must grant an employee, during each annual leave cycle... three days’ paid leave...when the employee’s child is born; when the employee’s child is sick; or in the event of the death of... the employee's spouse or life partner...parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.⁵³

This leave does not accrue and is only valid for a 12-month cycle of employment.⁵⁴

Notably, domestic workers are permitted five days of leave in a 12-month cycle, more than employees in standard forms of employment,⁵⁵ as discussed in Chapter One.

Interestingly, legislation fails to address the needs and requirements of fathers in respect of paternity leave, only briefly addressing these requirements in the family responsibility section by providing for such leave ‘when the employee's child is born’.⁵⁶ It also fails to address leave following the death of a family member, such as an aunt, uncle, niece, nephew, or other non-immediate members of the family that may have had close ties to the employee. Finally, it fails to address the needs of the employee to care for adult dependants—as stated, it is only available for the birth or death of a child.⁵⁷

Under the Good of Good Practice: The Arrangement of Working time, 1998, family demands are addressed by the following provision: ‘the design of shift rosters must be

⁵² BCEA (note 46) at s 7 (d).

⁵³ Idem at s 27 (1) and (2).

⁵⁴ Idem at s 27 (6).

⁵⁵ CCMAil (2007) September edition. Available at [www.ccma.org.za/UploadedMedia/CCMAil-September2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-September2007(2).doc). Article by Lisa Dancaster titled: *Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South Africa?* at 6, [www.ccma.org.za/UploadedMedia/CCMAil-September2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-September2007(2).doc), accessed 18/10/2010.

⁵⁶ BCEA (note 46) at s 27 (2)(a).

⁵⁷ Dancaster, L. *Workers with Care Responsibilities: Is work-family integration adequately addressed in South African labour law?* (2009) at slide 12.

sensitive to the impact of these rosters on employees and their families'.⁵⁸ The Code continues by requiring that this information be obtained by the employer by means of employee questionnaires, consultations, and negotiations,⁵⁹ which is certainly impressive for the emphasis it places on the importance of family to the employee, but how well and often this is actually implemented by the employer may reveal a completely different experience for the employee altogether. Another interesting inclusion in this Code is the fact that family responsibilities are placed at the same level of importance as the health and safety of the employee, by placing these as the focus of the objectives of the Code.⁶⁰

Shift work is further regulated in this Code and requires that 'arrangements should be considered to accommodate the special needs of workers such as pregnant and breast-feeding workers, workers with family responsibilities...and also workers' personal preferences for the scheduling of their own free time',⁶¹ which is noteworthy in its highlighting of the importance of employees' free time, and that employers should give that importance.

a. Protection of Employees with Family Responsibilities

The LRA states that 'a dismissal is automatically unfair...if the reason for the dismissal is...that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex ... marital status or family responsibility'.⁶² The EEA also protects against discrimination on the grounds of family responsibility, which is defined as the 'responsibility of employees

⁵⁸ Code of Good Practice, 1998 at s 4.

⁵⁹ Ibid.

⁶⁰ Idem at s 1.

⁶¹ Idem at s 5.6.

⁶² Labour Relations Act 66 of 1995, s187 (1) and (f).

in relation to their spouse, partner, dependent children or members of their immediate family that need their care or support'.⁶³

Under the BCEA, 'discrimination arises if an employee is dismissed or subjected to prejudicial treatment at the workplace as a result of...family responsibilities'.⁶⁴ Examples of this are given by Dancaster and Cohen: 'an employer that declines to promote an employee as a result of...family responsibilities, or dismisses an employee that requires flexible working hours as a result of such family responsibilities, would be discriminating against that employee'.⁶⁵

The Code of Good Practice: The Integration of Employment Equity into Human Resource Policies and Practices, 2005, requires that 'employers should endeavour to provide an accessible, supportive and flexible environment for employees with family responsibilities [which] includes considering flexible working hours and granting sufficient family responsibility leave for both parents',⁶⁶ which is remarkable, as it encourages employers to provide conditions of employment that are an improvement on those provided for by the BCEA. More importantly, this addresses the need for flexible working arrangements, which is an avenue desperate for exploration in South Africa. Most importantly, it states that sufficient family responsibility leave should be granted for both parents. Assuming the employee is not a parent, however, this provision is impressive, as all of these concepts are underpinned by the opening statement that 'employers should endeavour to provide an accessible, supportive and flexible environment for employees

⁶³ EEA 55 of 1998, s1.

⁶⁴ Cohen And Dancaster (note 21) at 222.

⁶⁵ Idem at 223.

⁶⁶ Code of Good Practice: Integration of Employment Equity into Human Resource Policies and Practice, 2005.

with family responsibilities,⁶⁷ which is definitely where South African legislation needs emphasis.

2. Annual Leave

a. Annual Leave entitlement

Under BCEA, the leave entitlement is laid out as follows:

An employer must grant an employee at least...21 consecutive days' annual leave on full remuneration...or...one day of annual leave on full remuneration for every 17 days...[or] by agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid⁶⁸

and this must take place in a "period of 12 months' employment."⁶⁹

b. Annual Leave Protection

A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not...reduce an employee's annual leave...to less than two weeks,⁷⁰

which means that the aim would be to better the employees' annual leave.

3. Sick Leave

a. Sick Leave Accommodation

During every sick leave cycle, an employee is entitled to...paid sick leave equal to the number of days the employee would normally work during a period of six weeks... [and]...during the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked.⁷¹

The sick leave cycle referred to here is 'the period of 36 months' employment with the same employer immediately following an employee's commencement of employment; or

⁶⁷ Code of Good Practice (note 66).

⁶⁸ BCEA (note 46), at s 20 (2).

⁶⁹ Idem at s 20 (1).

⁷⁰ Idem at s 49 (1) (c).

⁷¹ BCEA (note 46) s 22 (2) and (3).

completion of that employee's prior sick leave cycle.'⁷² This basically translates into 30 days of paid sick leave in a three-year cycle for employees in standard forms of employment.

Remuneration or benefits during periods of prolonged illness are addressed in the UIA, stating that, 'subject to the provisions...of this section...illness benefits may be paid to a contributor who is unemployed and who is unable to perform work on account of an illness'.⁷³ The Act goes into more detail by outlining the status of an employee who is ill for prolonged periods: 'A contributor whose services have not been terminated but who is not in receipt of any earnings, or who receives...less than one-third of his normal earnings, and who is unable, on account of...illness...to perform his normal work, shall...be deemed to be unemployed'.⁷⁴

b. Sick Leave Protection

'A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not...reduce an employee's entitlement to sick leave'.⁷⁵ This is noteworthy because there is the option for this form of leave to be increased, and a reduction of sick leave entitlement is specifically prohibited, showing that there is recognition of the need for this leave. It may also suggest that the legislators understood that this leave may be taken in cases where the employee themselves may not be ill (but other family members are for example), but this cannot be assumed, as the legislators' intent is unknown.

⁷² BCEA (note 46) at s 22 (1).

⁷³ Unemployment Insurance Act 30 of 1966, s 36 (1).

⁷⁴ Idem at s 36 (1) (b).

⁷⁵ BCEA (note 46) at s 49 (1) (e).

4. Maternity

a. Maternity Leave Entitlement

Section 25 of the BCEA states ‘an employee is entitled to at least four consecutive months' maternity leave’.⁷⁶ This section goes even further to recognise the need for leave in the event of a miscarriage or a stillbirth, and directs that ‘an employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth’.⁷⁷

Remunerated income during maternity leave is also addressed, and the section refers to the UIA, stating that ‘a female contributor who is unemployed may be paid benefits ... in respect of her pregnancy and confinement for a period not exceeding twenty-six weeks, from the date on which she is deemed to have become unemployed, whether or not she is capable of and available for work’.⁷⁸ The UIA even conveys that these benefits are a right of the employee:

a contributor who is pregnant is entitled to the maternity benefits...for any period of pregnancy or delivery and the period thereafter...when taking into account any maternity leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the maternity benefit may not be more than the remuneration the contributor would have received if the contributor had not been on maternity leave [and]...for purposes of this section the maximum period of maternity leave is 17,32 weeks [and]...a contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a maximum maternity benefit of six weeks after the miscarriage or stillbirth.⁷⁹

b. Maternity Protection

Both the LRA and BCEA provide for the protection of employees prior to and after the birth of a child. The BCEA states that ‘no employer may require or permit a pregnant

⁷⁶ BCEA (note 46) at s 25 (1).

⁷⁷ Idem at s 25 (4).

⁷⁸ UIA (note 73) at s 37.

⁷⁹ Idem at s 24.

employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child'.⁸⁰ This has been further addressed by the drafting of the Code of Good Practice on the Protection of Employees during pregnancy and after the birth of a child under the BCEA. The BCEA assists by catering for employees in such circumstances, and provides 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...no less favourable than her ordinary terms and conditions of employment, if...the employee is required to perform night work...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.⁸¹

Where the BCEA addresses work that the employee must perform while pregnant and after the birth of a child, the LRA addresses the treatment of that employee in terms of their employment contract and states 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'.⁸² Furthermore, the definition of a dismissal expressly refers to maternity leave in that a 'Dismissal means that...an employer refused to allow an employee to resume work after she...took maternity leave in terms of any law, collective agreement or her contract of employment'.⁸³

Added to this is the exclusion of changing the basic conditions of employment by collective agreement, where maternity leave is highlighted as one of the core basic conditions of employment that may not be altered even by collective agreement: 'A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of

⁸⁰ BCEA (note 46) at s 26 (1).

⁸¹ Idem at s 26 (2) (a) and (b).

⁸² LRA (note 62) at s187 (1) and (e).

⁸³ Idem at s186 (1) and (i).

this Act and the collective agreement does not...reduce an employee's entitlement to maternity leave...⁸⁴

c. Equal Opportunities during Maternity Leave

When reviewing Section 7 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, 2005, Commencement of Work, reference is made to employees who are on maternity leave at the time of new positions being advertised within an organisation: ‘when advertising positions employers should...where possible...place their job advertisements so that it is accessible to groups that are under-represented...[and] employees who are on maternity leave should be informed of positions advertised in the workplace’.⁸⁵

Section 11.3 of the same code states that, when on maternity leave, the employee should be afforded protection: ‘maternity leave should not result in the loss of benefits for employees upon return to employment’.⁸⁶ Lastly, the Promotion of Equality and Prevention of Unfair Discrimination Act⁸⁷ states that ‘no person may unfairly discriminate against any person on the ground of gender, including...discrimination on the ground of pregnancy’⁸⁸ providing further protection for pregnant employees in a more generalised manner.

⁸⁴ BCEA (note 46) at s 49 (1) (d).

⁸⁵ EEA 55 of 1998, *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices* (2005), s 7.3 Commencement of Employment.

⁸⁶ *Idem* at s 11.3, During Employment.

⁸⁷ Act 4 of 2000.

⁸⁸ *Idem* at s 8 (f).

5. Adoption

Interestingly, leave taken for the adoption of a child is seen in the eyes of legislators as being worthy of income replacement, in much the same way as maternity leave remuneration is granted to a mother who has endured natural childbirth:

a female contributor who is unemployed may be paid benefits...for a period not exceeding 26 weeks, commencing not earlier than the date of application to a children's court in terms of section 18 (2) of the Child Care Act 74 of 1983, for the adoption of a child who...is under the age of two years, whether or not she is capable of and available for work.⁸⁹

When it comes to adoption, only one parent, or 'party' is allowed to claim benefits under the UIA:

only one contributor of the adopting parties is entitled to the adoption benefits... only if...the child has been adopted in terms of the Child Care Act, 1983 (Act 74 of 1983) [and]...the period that the contributor was not working was spent caring for the child [and]...the adopted child is below the age of two.⁹⁰

In this way, we see a parallel between the lack of paternity leave for "natural" fathers and the lack of leave for one of the parents of an adopted child, whether the father or mother. If scrutinised, the requirement for fathers to take "paternity leave" as provided for under family responsibility leave would apply to adoptive circumstances as well.

This brief outline of existing labour legislation addressing family and care obligations in South African, has provided a good foundation from which to proceed with comparative analysis and legislative suggestion. It is already becoming obvious where South African labour legislation fails to address needs of employees and where improvements could be made in this regard (these recommendations are made in chapter seven). In order to understand the accessibility of this existing legislation though, a deeper

⁸⁹ UIA (note 76) at s 37A.

⁹⁰ Idem at s 27.

evaluation of how employees have used the legislation to seek protection or redress would inform our analysis going forward.

Chapter 3: Access to Existing Legislation

This chapter will continue to scrutinise existing South African legislation, to assess its accessibility to employees and to what extent the legislation has served those seeking redress or protection. The content focuses on case law and the development of jurisprudence, using landmark judgments and highlighted quotes to paint a realistic picture of the accessibility of these statutes to employees.

Most employees will, at some stage in their lives, be faced with managing caregiving for elders, their children, their family or themselves. Currently, the societal conflicts between family and employment demands has not been remedied and is increasing in intensity and scope where almost every demographic and occupational group.

⁹¹ In South Africa, there has been little conversation and debate around the provision of legislation to cater to employees with care responsibilities and

one of the reasons why the work-family debate may not have emerged to any great extent in SA is the fact that SA women have, to a certain degree, been able to shift some of their care responsibilities either onto domestic workers or unemployed relatives. This is in contrast to many western countries where there is an absence of relatively inexpensive domestic labour. In the absence of good quality state funded child care facilities, the choice for SA women has been to either accept poor quality care or opt out of paid employment to assume the care themselves.⁹²

Having access to labour legislation is one thing, but in order for it to afford an employee with proper protection, there has to be recourse and the possibility of defending your rights in a court of law, or at least at the CCMA. Unfortunately, the 'South African experience has revealed that th[ese] legislative provision[s] remain grossly underutilised

⁹¹ Kossek, E. E. & Distelberg, B. *Work and Family Employment Policy for a Transformed Labour Force: Current Trends and Themes*, in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009).

⁹² CCMAil (note 55).

and ineffective'.⁹³ There are the usual concerns around high legal costs, accessibility to legislation as well as unavailability of legal aid that all contribute to this ineffectiveness; and additionally, many wealthy organisations have access to both capital and leading legal counsel, exacerbating the situation. However, these issues apply to all areas of discrimination and there is jurisprudence developing in these areas despite the same disincentives; where family responsibility jurisprudence is not.⁹⁴

The main problem is that fundamentally, there is no one generic working arrangement that can be applied to suit all employees seeking balance and the employees in question require specific, customised arrangements to be developed. Resultantly, it is often very difficult to pinpoint the necessary requirements for the different groups of employees,⁹⁵ a situation which worsened by lack of employer buy-in in the development and implementation of these arrangements. This combined with the fact that legislation is lacking that addresses family responsibility adequately, and the fact that trade unions are failing to intervene in any way, means that the impetus for change is lacking, and thus change is not taking place as it desperately needs to.⁹⁶ It is for this reason that the groups in our society that require the most protection and greatest access to legislation are left to enforce it alone, for their individual compensation, which is not in line with the right against discrimination that should make for systematic change and not personal redress.⁹⁷

⁹³ Cohen and Dancaster (note 21) at 238.

⁹⁴ Cohen and Dancaster (note 21) at 230.

⁹⁵ Ibid.

⁹⁶ Idem at at 239.

⁹⁷ Smith, B. *Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict* (2006) 28 *Sydney Law Review* 689.

1. Family Responsibility

One of the more important court rulings, in my opinion, was the *Co-operative Workers Association & Another v Petroleum Oil & Gas Co-operative of SA & Others*⁹⁸ of 2006, which saw the courts not only recognising the vulnerable position of employees with family responsibilities, but more importantly, protected and defended this position. The case centred on a collective agreement that was initiated by several trade unions after the merger of several organisations that saw the employees of the new organisation given different remuneration based on the employees' family responsibility. Employees' medical aid contributions were consolidated into their remuneration and thus, those with dependants benefited significantly in comparison to the employees without dependants because their total remuneration was increased.

The employees without dependants did not object to the situation, but objected to the apparent unintended consequences of the benefits that those other employees received. The courts highlighted the fact that employees with family responsibilities are indeed vulnerable in their position and Judge Pillay found that the preferential treatment was a 'result [of] special measures [that] are applied to workers with family responsibilities to adjust for the hardships of having such responsibilities, without affirmation of their special status, there can be no equality amongst the workforce'.⁹⁹ By making use of the EEA and some international guides, such as the ILO's Conventions 156 and 111 (*Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* and *Discrimination* respectively) to inform the ruling, it was found that the actions that were taken should be seen as a 'legal and moral response to the social needs of a vulnerable group of employees'.¹⁰⁰

⁹⁸ (2007) 28 ILJ 627 (LC).

⁹⁹ *Co-operative Workers Association & Another v Petroleum Oil & Gas Co-operative of SA & Others* (2007) 28 ILJ 627 (LC) at 637.

¹⁰⁰ *Ibid.*

By highlighting this position of the employee with care or family responsibilities and acknowledging that there exists a hardship in having family or care responsibilities, the South African courts show that they do indeed identify and wish to protect this position, and as Pillay said, see that the responsibilities of family and care are considered burdens on employees. It is important to remember this case and the justification given to the defence of the employee's position when tracking the rulings with relation to family responsibility and leave provision in South African history, because many of the rulings take a lesser standpoint, and some of them are even slightly shocking in their reasoning when it comes to the protection of employees with these responsibilities.

2. Family responsibility Leave

The BCEA allows family responsibility leave to any employee who works at least four days a week for that employer,¹⁰¹ which limits the access to this legislation for many. It goes on to say that employees such as domestic workers and the like would have no access to this leave should they work for more than one employer during a week, which is often the case. It is also limiting that a father only has paternal rights to leave for the birth of his child as it is provided for within the family responsibility leave section of the BCEA, meaning that South Africa has no specific paternity leave legislation, but allows leave for such within the ambit of "family responsibility".

Although this provision in itself is limiting, it does not limit that employee's right to negotiate that paternity leave taken with his employer may be treated¹⁰² as another form of leave, but such would be at the discretion of the employer, if an agreement can be made in terms of paternal leave between the two parties. There would also be conflict if the

¹⁰¹ BCEA (note 46) at s27.

¹⁰² Juta's Pocket Companion. *Understanding the Basic Conditions of Employment Act* (2009) at p71.

employee had already made use of his three days' family responsibility leave by the time his child was born, leaving him with no choice but to take unpaid or annual leave to be with his partner and family during this period. With this in mind, it could be assumed that there would be substantial jurisprudence on the matter of either family responsibility or paternity leave as it is included under family responsibility, but as can be seen by jurisprudence below, this is not the case at all. In fact all litigants have been female and all have had to do with the provision (or lack thereof) of basic rights with regards to employment, and not the interpretation of those rights by employers.

A 1998 CCMA award helped to create jurisprudence concerning family responsibility discrimination. In *Masondo v Crossway*,¹⁰³ the employee was found to have been automatically unfairly dismissed on the basis of her family responsibility and was awarded 12 months' remuneration as compensation. This award was based solely on family responsibility discrimination and the fact that the appellant was unfairly required to work night shifts, where other employees with new born children were not required to do so. After she resigned and referred her case to the CCMA, it was found that she was constructively dismissed and thus compensated.

Although this award centred on family responsibility, others that have crossed-over into the family responsibility domain, such as *Swart v Mr Video (Pty) Ltd*.¹⁰⁴ Although the case was won on the basis of age discrimination, the commissioner found that discrimination had also taken place on the basis of marital status and family responsibility. The employee was granted three months' remuneration as compensation and re-employment or, alternatively, six months' remuneration if re-employment was not

¹⁰³ (1998) 19 *ILJ* 171 (CCMA).

¹⁰⁴ *Ibid.*

possible,¹⁰⁵ due to the fact that she was not considered for a position based on the fact that she was told she was too old and also that she was married with two children, and therefore not suitable for employment with Mr Video.

These two awards demonstrate that family responsibility discrimination is taking place in South Africa, but the issue does not lie in whether it is occurring or not, but rather why nothing more is being done about it or action being taken by wronged employees.

The complete absence of legal precedent and the resultant failure of the EEA to address family responsibility discrimination signify that either employees are entirely satisfied with their current working arrangements or, the more likely option, that the EEA does not provide an adequate vehicle to address their needs.¹⁰⁶

It is also important to note that the EEA definition of *family responsibility* is laid out as: ‘the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need care or support’.¹⁰⁷ This definition has not been challenged in the CCMA or any court to date, despite the fact that some feel that the definition is limited, not including the likes of aunts, uncles, nieces, nephews, or other members of family that may require care or support from the employee.

Employers are free to discriminate on the basis of the fact that the BCEA provides for leave in this regard only when it involves the death of a spouse or partner, parent, adoptive parent, grandparent, child, adopted child, grandchild, or sibling,¹⁰⁸ meaning that, if support was required by any member of the employee’s family as described in the EEA, the employer could refuse leave to that employee because the BCEA provision does not

¹⁰⁵ Ibid.

¹⁰⁶ Cohen and Dancaaster (note 21) at 227.

¹⁰⁷ EEA (note 63) at s1.

¹⁰⁸ BCEA (note 46) at s27.

list the death of an aunt, uncle, niece, nephew, or any other member of the direct family not listed in the BCEA as being just cause for leave to be granted. In this way the two acts create confusion, and some organisations then opt to take the option that would require the employee taking unpaid leave as opposed to paid family responsibility leave for such instances.

3. Maternity Leave

In 2006, *Wallace v Du Toit*,¹⁰⁹ which was first heard in the CCMA and then in the Labour Court (LC), a pure test of discrimination and unfair dismissal pertaining to maternity took place under Judge Pillemer. It involved an au pair who had never concluded a contract of employment with her employer, having her employment terminated once she informed her employer she had fallen pregnant. The respondent employer believed her role as an au pair would be compromised if she herself became a parent. She was allowed to work until she went on maternity leave, but thereafter would no longer be employed. The judgment was important, as it not only awarded compensation for the unfair dismissal as it stands under the LRA, but also for the emotional loss experienced by the employee through the discrimination as it stands under the EEA:

As there was no cap under the EEA what was awarded under each Act then took on greater significance. In the present case the court did not intend to award more than 24 months' remuneration in all, and so made a single award in relation to the solatium element under the LRA and the damages claim under the EEA. An amount of R24 000 was regarded as a fair solatium for the impairment of the applicant's dignity and self-esteem, in addition to compensation for patrimonial loss based on 12 months' remuneration.¹¹⁰

The pregnant female employee had no dispute with the amount of maternity leave owed to her, nor of her working conditions during her pregnancy, as can be seen in the

¹⁰⁹ (2006) 27 ILJ 1754 (LC).

¹¹⁰ *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd* (2006) 27 ILJ 1754 (LC) at 1757.

next case, but filed due to the fact that her right to employment following her pregnancy was taken away from her, and, thankfully, the courts recognised the need to compensate for both the loss of potential earnings and the impact on the employee's personal dignity. However, this trend has not been continued by the courts, and as we see further on in *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd)*,¹¹¹ some courts fail to address the impact of harassment or discrimination on employees when awarding compensation.

In stating that an employee is entitled to "at least" four consecutive months' leave, the BCEA allows for maternity leave to be extended beyond this minimum period, but only by agreement between the employer and employee, if the employer is open to allowing more time to be taken in this regard¹¹² and if the employee could afford to take this leave, as there is a financial implication in doing so. This provision is very accommodating, but not realistic, as often the employee's maternity benefits are less favourable than those she would have been receiving if she was at work, which means that often employees may opt to work as long as possible, until very close to their due dates, and often return back to work earlier than the end of the four-month period. As the BCEA does not oblige the employee to take the full four months' leave,¹¹³ an employee is entitled to return to work as soon as six weeks after the birth if she feels fit to do so. This flexibility is only restricted by the requirement for certification by a medical doctor or midwife to permit the employee to resume work any time prior to six weeks after the birth of her child.¹¹⁴

¹¹¹ (2010) 31 *ILJ* 180 (LC).

¹¹² Juta's Pocket Companion (note 102) at p59.

¹¹³ Juta's Pocket Companion (note 102) at p59.

¹¹⁴ *Idem* at 60.

Taking the above into consideration, *Mnguni v Gumbi*,¹¹⁵ a case regarding dismissal relating to pregnancy was heard in the LC in 2004, where the employee was eight months pregnant at the time of her dismissal. The employer was found to have failed to accommodate the employee in terms of her fatigue related to pregnancy and had summarily dismissed her, which the court found to be directly related to the fact that the employee was eight months pregnant at the time. The employee referred her dispute to the CCMA, and when it was heard on appeal in the LC, she was awarded the maximum compensation under the LRA, which was landmark, indicating the court's opinionated stand when it comes to the role employers have to play in equal employment, as seen in the following statement by Judge Francis:

I have no doubt that it is often a considerable burden to an employer to have to make the necessary arrangements to keep a woman's job open for her while she is absent from work to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace,¹¹⁶

which in itself indicates that, besides the legal requirement of this protection, there is also a solid grounding in social rights.

Social rights in this regard also take into consideration the fact that health and welfare play a large role in raising children. The Code of Good Practice on Protection of Employees during Pregnancy and after the Birth of a Child, 1998, pays necessary attention to this, as it specifically highlights the needs of breastfeeding employees by allowing two breaks of 30 minutes during the working day for breastfeeding or expressing milk, limited to the first six months of the child's life.¹¹⁷ The Code also requires employers to allow employees to attend antenatal and postnatal clinics,¹¹⁸ but does not specify how much time this should be and whether or not it is limited. Sickly babies or post-birth complications

¹¹⁵ (2004) 25 *ILJ* 715 (LC).

¹¹⁶ *Mnguni v Gumbi* (2004) 25 *ILJ* 715 (LC).

¹¹⁷ Juta's Pocket Companion (note 102) at p65.

¹¹⁸ *Idem* at 64.

would require the employee to be away from work even more, leading to the next case in point.

More recently, in 2008, the LC gave a ruling, in *De Beer v SA Export Connection CC t/a Global Paws*,¹¹⁹ based on the BCEA provision for the protection of employees during their pregnancy; how discriminated is prohibited for any reason relating to pregnancy. Two female employees had become pregnant at the same time while working for the respondent. One had planned her pregnancy and was given four months' maternity leave, in line with legislation, while the other had accidentally become pregnant and was forced to agree to one months' maternity leave as "punishment" for the employer's inconvenience.

When the appellant tried to apply for more leave in order to care for the twins to whom she gave birth, one of which was sickly and had colic, she was offered only two weeks, which she duly declined; following this her employment was terminated. It was found that the respondent company had acted unlawfully in requiring the woman to agree to less maternity leave than she was legally entitled to, and furthermore, that the dismissal was automatically unfair as it pertained to reasons related to her pregnancy and maternity leave. But this case goes further than the facts, it shows that the employer, besides acting in an unlawful manner as described above, also took no measures to comply with the Code of Good Practice on Protection of Employees during Pregnancy and after the Birth of a Child 1998, by failing to make provision for the employee to care for her sickly child/ren.

¹¹⁹ (2008) 29 ILJ 347 (LC).

This case is noteworthy in highlighting the discrimination women experience in the workplace. The most disturbing element is that fact that this case was quite recent and is perhaps a sign that this sort of discrimination is taking place in employment relationships throughout South Africa currently, especially in workplaces where the employees do not have the education or resources to seek recourse or defend themselves from unfair treatment as the litigants above did. This suspicion is further reinforced by the *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd)*¹²⁰ case, which, when it was heard in the LC in 2010, focused more centrally on the harassment and victimisation of the employee in the workplace when it came to pregnancy, which as Le Roux *et al* states ‘is a good example of a hostile environment associated with harassment related to pregnancy’.¹²¹

In this case, the appellant received 12 months’ remuneration for being unfairly dismissed for a reason relating to her pregnancy, but the court failed to make a ruling or compensate for the harassment that took place, which surely had as deep an impact on her well-being as the dismissal did. This all makes for a grim picture of the average employee’s access to protection from existing legislation, and explains why there seems to be little jurisprudence to pave the way. This also highlights the fact that those who can afford to challenge unfair treatment in the workplace in court or at the CCMA do not receive the compensation they sometimes deserve. Employees who are treated unfairly but do not have time or the financial resources to challenge the unfair treatment, results in employers “getting away with it” treating others in the same way. Additionally, the majority of employed persons are either uninformed or uneducated as to their basic rights, and thus also receive no benefit from the legislation.

¹²⁰ (2010) 31 *ILJ* 180 (LC).

¹²¹ Le Roux, R., Rycroft, A. and Orleyn, T. *Harassment in the Workplace: Law, Policies and Processes* (2010) at 74.

It would seem that jurisprudence and, more specifically, courts in South Africa do not take kindly to employers who employ unfair labour practices, discrimination, and dismiss employees unfairly. There seems to be a general intolerance of these types of conduct and business practices. That being said, the courts do not always get it right and the next case is one such example.

4. Dismissals for “Inherent requirements” Related to Maternity

In the next set of cases, the initial judgment (handed down by Judge Waglay in the LC)¹²² harshly criticised the employer for attempting to justify unfair labour practices through what the employer deemed “inherent requirements”. It seemed that the courts were trying to address the issue of employers perpetuating unfair labour practices; but was short-lived once the appeal was heard in the LAC.

Ms Whitehead had applied for a position at Woolworths but before she could take up her position, she was informed that she would not be hired. She claimed this decision was based on the fact that she had informed them she was pregnant, and thus it constituted an unfair labour practice, as it amounted to discrimination on prohibited grounds: pregnancy.

Judge Waglay agreed with this and dismissed the respondent’s claim that the actions were driven by the fact that continuous employment was an “inherent requirement” of the job and was thus justifiable.¹²³ The applicant was awarded R200 000 for both the loss of income, calculated as the income she would have received for two-thirds of the year

¹²² *Whitehead v Woolworths (Pty) Ltd* (1999) 20 *ILJ* 2133 (LC).

¹²³ *Whitehead v Woolworths* (note 122) at 2142.

she would have been employed at Woolworths as well as her costs. This judgment seemed highly satisfactory given the circumstances of the discrimination and defence claimed by the respondent; it then went to the LAC, where the earlier decision was overturned in favour of Woolworths.

The decision made by the LAC favoured the employer, and business practice outweighed employee suffering in all counts. The LAC decided the employer had every right to make continuous employment an inherent requirement of the post, and justifiably terminated the soon-to-be employment of Ms Whitehead. Judge President Zondo even went so far as to say that the ‘employer did not act unreasonably, for it took into account perfectly rational and commercially understandable considerations’.¹²⁴ This seems to be somewhat of a slap in the face of the employee who was clearly discriminated against for being pregnant, but if future litigants ever needed encouragement not to seek redress for unfair labour practices, it came with the final judgment - Ms Whitehead was ordered to pay the costs of the appeal, including the costs of two legal counsellors.¹²⁵

Where the court could have adjudged considering discrimination as prohibited under the LRA, the EEA also makes provision for labour courts to have the power to remedy claims of unfair discrimination (as demonstrated in the above case) by ‘awarding compensation and damages, and ordering the employer to take steps to prevent such discrimination from recurring in the future’.¹²⁶ If this was being done in courts, discrimination would be less likely to continue occurring.

¹²⁴ *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) at 573.

¹²⁵ *Idem* at 604.

¹²⁶ Cohen, T. & Dancaster, L. ‘Flexible Working Arrangement for Employees with Family Responsibilities – The Failings of the Employment Equity Act’ (2009) in Dupper, O. & Gerber, C. *Equality in the workplace: reflections from South Africa and beyond* at 217.

5. Paternity and Family Responsibility Definitions

Interestingly, though, is not what has been dealt with in these cases, but what has not. As mentioned earlier, no male litigants have taken their cause up with the appropriate bodies for paternity leave outside of family responsibility leave, nor have employees challenged the limiting definitions of *family members* under the BCEA as compared to the EEA. This shows the issues could be further tested, additionally paving the way for courts and legislators to modify—if not improve—legislation that does little to assist the work-life balance.

This chapter has highlighted the need for a better definition for *dependants* of employees; that male employees need to be better catered for by being provided leave for care responsibilities; and that flexible work and leave options need to be explored in South Africa. These would all address the current lack of legislative protection the majority of South Africans experience, because as much as legislation attempts to provide basic rights to employees, it often fails those who most need it.

Chapter 4: South African Trendsetters

This chapter outlines what measures some South African organisations are implementing to better cater for their employees lifestyle needs. These organisations have been deemed local “trendsetters”. These organisational policies and practices, are then contrasted with similar trendsetting organisations abroad and how these international organisations are analysed in their own contexts. The organisations used as local comparators include Old Mutual, BMW South Africa, Discovery Health, and Sanlam.

In a survey by Bond *et al* in the United States (USA), published in 2005, employers were questioned as to why they implement family-oriented policies. The results showed that 39 percent claimed to do so to aid employees and their families, and 19 percent did so for reasons related to a more altruistic organisational culture. However, as with any business, cost is generally an underlying motivation for most policy changes, and in line with this, 47 percent did so to recruit and retain employees, 25 percent reported doing so for productivity and job commitment reasons, six percent did so, as they saw it helpful in reducing absenteeism, lowering costs, and due to the need for flexible scheduling.¹²⁷ Similarly, the average employee who is also a caregiver in South Africa has to rely on the willingness of their employers in order to achieve a better balance between their employment and family responsibilities.

Neal *et al* highlight three types of family-friendly workplace practices that seem to be working, not only because the organisations provide them, but because employees are actually making use of them. They take form in *policies*, such as flexible working

¹²⁷ Bond, J. T., Brownfield, E., Galinsky, E. & Kim, S. S. *The National Study of Employers* (2005).

arrangements; *services*, such as resources and information; and *benefits*, which can include subsidies.¹²⁸ It is important to note, that the larger the organisation, the higher the likelihood of it offering these family-friendly measures to employees.¹²⁹ The most important aspect of the definition of work-family is its recognition as a wide concept, not only focussing on parental roles.¹³⁰ Some of the practices that recognise this wider role include: recognition of non-work roles outside of parenting and can take form in many ways; such as the accommodation of elder care, community service activities, personal health care and fitness, the military, political and religious activities, domestic partnerships, and household care.¹³¹

When it comes to South Africa some of these practices can be observed in organisations. There is information about organisations that provide such measures to employees, but as to the use of these policies, services and benefits, information is scarce. Therefore, for this paper, only those measures that are made available will be discussed as there is little to no information about to what extent South African employees make use of what is offered.

Recently, more companies are considering the provision of [early childhood development facilities] ECD at the workplace...Two of the cases that follow come from the financial sector [one is] Old Mutual in Cape Town...A key motivating factor in the financial sector is the retention and attraction of skilled professional employees. Senior leaders in the organizations were key drivers of these initiatives, often due to their personal experiences as fathers of young children.¹³²

It must be noted that all the organisations analysed are private sector companies and, as far as the public sector is concerned, very little has been done or is being done to

¹²⁸ Neal, M. B., Chapman, N. J., Ingersoll-Dayton, B & Emlem, A. C. *Balancing Work and caregiving for children adults and elders* (1993).

¹²⁹ Hammer, L. B., Cullen, J. C & Shafiro, M. V. *Work-family best practices* in Jones, F., Burke, R. J. and Westman, M. (Eds) *Work-Life Balance: A Psychological Perspective* (2006).

¹³⁰ Kossek and Distelberg (note 91).

¹³¹ Ibid.

¹³² Cawse (note 47) at 332.

try to cater for employees' work-life balance needs. The only information that can be noted as complimentary to the public sector is the fact the 'retirement benefits, medical care and housing is [currently] provided for the majority of public sector workers, [as] compared to 40 percent in the private sector'.¹³³

Working Mother Magazine, which started in the USA 25 years ago, releases an annual Top 100 list of organisations that are 'recognised for their commitment to best WorkLife practices',¹³⁴ which creates some level of competition and a benchmark. Among those listed are some multinational organisations that we find here in South Africa such as KPMG, PricewaterhouseCoopers, Deloitte, Ernst & Young, Goldman Sachs, Johnson & Johnson and Kellogg's.¹³⁵ Most of these are financial and investment organisations and some of their international practices are implemented locally, but not to an extent where they are regarded as industry leaders. Instead we hear about Discovery, Sanlam, and Old Mutual as providing best-practice benchmarks in South Africa.

At Discovery Health South Africa, the focus is on employee well-being, based on recognition of the importance of family in this well-being. The organisation has many offices around the country, at the larger offices and head office, which is situated in Johannesburg, they offer a Vitality Healthstyle Programme as well as a wellbeing programme called 'Your Counsellor' to all discovery employees and family where round the clock telephonic assistance assists with stress, legal and financial queries as well as family and health matters. This service is free, as is the on-site doctor along and

¹³³ Erasmus, B. & Schenk, H. *South African Human Resource Management: Theory and Practice* (2009) at 484 in summary of findings from Paycon (2006), Bussin (2007), P-E Corporate Services (2006) and Piliso (2007).

¹³⁴ Kossek and Distelberg (note 91).

¹³⁵ Working Mother Magazine, Top100 Companies for Women to Work for, October 2010, Online edition, <http://www.workingmothermediainc.com/?service=vpage/17>, accessed 28/03/2011.

membership to the sports and social club, which organises events and get-together's aimed at employees and their families to play, have fun and relax.¹³⁶

The organisation also maintains day-to-day support for employees designed to 'ensure they don't have to run around to get those regular time-consuming errands out of the way'.¹³⁷ Some of these services include the Discovery crèche for children aged three months to three years; and a vehicle service, paying of traffic fines, renewing third party disks and a drop-off and collection point for vehicle registrations.¹³⁸ These services may not be required by any legislation, but are provided at a cost to the organisation to benefit the employee, especially those with younger children.

The child care facility greatly benefits the working parent, providing facilities close to the workplace. In line with the recognised importance of childcare services, the American Psychological Association annually awards the Psychologically Healthy Workplace Award to companies who employ work-family best practices in the USA, and has repeatedly and specifically focussed on companies that make childcare 'carefree for employees'.¹³⁹

Differently to Discovery, Sanlam offers different services at the Head Office in Cape Town. These services include the Mall@Work, which is designed to address employees' everyday needs through shopping, pharmacy, banking, optometry, cellular

¹³⁶ Discovery Health Website, *Discovery Lifestyle Services*, <http://www.discovery.co.za/portal/loggedout-individual/life-careers>, accessed 28/2/2011.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Hammer, Cullen and Shafiro (note 129) at 264.

telephone, and laundry services.¹⁴⁰ These are services aimed at easing employee responsibilities, but are not policy decisions. They benefit the employee in terms of time, not monetary value.

Old Mutual is similar to Sanlam and Discovery Health, but their services include better annual leave than is prescribed in the BCEA. They pride themselves on the fact that annual leave can be individual-specific with 22 days annual leave available to employees. Both organisational sick leave and family responsibility leave is more generous than the provisions of the BCEA and this carries over to maternity leave as well. ‘Women with...one year’s service may apply for up to six months’ partly paid maternity leave’.¹⁴¹ Most employees, including administrative staff work a 40-hour week, although as part of company culture, senior executives, management and professionals work much longer hours. Both sales representatives and business consultants work flexitime and many employees have internet access from home enabling home/distance working.¹⁴²

Old Mutual also places focus on employee well-being by offering ‘preventive health and birth control programmes, as well as access to comprehensive programmes that strive to offer employees access to the tools and support required to lead rewarding and fulfilling lives. The programme provides access to professional counselling on a range of issues focussing on alcohol and drug abuse; difficulties with children, marital or family distress; emotional difficulties; stress overload; and HIV related issues, all of which are available to family members of employees.’¹⁴³ They also boast on-site facilities, such as squash courts, soccer fields, tennis courts, hockey fields, and a gym that, in conjunction

¹⁴⁰ Sanlam Intranet. *People Portal* (2011).

¹⁴¹ Old Mutual website. *Life and Health Benefits* (2011), <http://www.oldmutual.co.za/about-us/careers-centre/life-at-old-mutual/benefits/life-and-health-benefits.aspx>, accessed 28/2/2011.

¹⁴² Cawse (note 47) at 339.

¹⁴³ Old Mutual website (note 141).

with the Sports Science Institute, offers professional training, nutritional advice, and sports therapists.¹⁴⁴

Old Mutual provides services to better employee well-being, but also benefits and paid leave above the legislative requirements and this would fall into the policy category of *best practices*. Old Mutual in conjunction with the South African Revenue Services (SARS) is currently exploring options to include a pre-tax benefit for employees who make use of paid on-site child-care services. This is a remarkable initiative as it sees a private sector organisation seeking assistance from government departments to aid employees with children, who would directly benefit through real savings.¹⁴⁵

If we have to evaluate these three as to which one presents the most attractive option to working parents or employees with care responsibilities, we can again refer to *Working Mother Magazine* and its rating of criteria on which they base their Top 100 organisations for women to work for: 'flexible scheduling, because it is essential for working mothers; advancement of women, because it is critical for women in the workplace; and childcare options, because without them, parents can't work'.¹⁴⁶ Although these criteria are mainly focussed on the needs of women, the need for flexibility and childcare options are essential to all parents and caregivers alike; when applied in the South African context, policy flexibility and leave options as offered by Old Mutual seem to cater to those employees in need, as does the Discovery Health service, to some degree, in providing childcare up to the age of three years for children of employees.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Working Mother Magazine, *Making it*, October 2003, <http://www.workingmothermediainc.com/?service=vpagel/17>, accessed 28/03/2011.

When looking at organisations that have implemented work-life or work-family policies and practices for a different reason than stated by those organisation above, we look to BMW South Africa. BMW has two main sites in South Africa, a factory, a marketing and services division.¹⁴⁷ Due to trade union and employee pressure BMW SA have implemented childcare solutions in conjunction with the trade union, National Union of Metal Workers South Africa (NUMSA) and a childcare consultant. BMW provide something different; there are ‘two early learning centres for children ages 3 – 6 years [and] both provide some emergency back-up care and care during school holidays’, The schools provide all meals for the children, are open Monday to Friday, 7am to 5pm, and are within walking distance of the workplace. BMW also provides health care for the children, where all medical records are retained and immunisations are provided.¹⁴⁸

When it comes to the provision of these on-site childcare facilities, we see an organisation taking the initiative to explore measures that are in line with international trends and activities. The facilities start-up costs were covered by BMW and parent donations; equipment and furniture sourced by the principal and recruitment of staff performed by the existing Human Resources department. The fees are reasonable at R380 and R340 per month for salaried staff and hourly paid workers respectively; this is about six percent of their salaries. The facility is subsidised substantially by BMW, including teachers’ salaries, cleaning and security services; only the food and day-to-day costs are covered. ‘The schools are registered pre-primary schools and regularly inspected by the DSD [Department of Social Development] and the DOE [Department of Education] and by the Independent Schools Association of Southern Africa (ISASA)’.¹⁴⁹

¹⁴⁷ Cawse (note 47) at 333.

¹⁴⁸ Idem at 334.

¹⁴⁹ Cawse (note 47).

Dex and Smith outline some of the factors they believe drive organisations in implementing or not implementing family-friendly policies; they outline these as *institutional pressures, resource constraints, and individual incentives*.¹⁵⁰ Employers implement policies to attract and retain employees due to the policies' incentives, which especially applies to positions that require skilled and qualified categories of people for the organisation's equal employment benefit, such as women with children.¹⁵¹ When referring to resource constraints, it points to the fact that, if an employer is a smaller organisation having difficulty coping with employee absences and changed working practices, the organisation cannot equate the cost of family-friendly policies with the impact on business continuation, and so would be discouraged from implementing such policies and practices, even if it is to the detriment of their staff retention or recruitment activities.

The final idea of the institutional pressure, is what can be seen in South Africa by many similar types of organisations implementing similar family-friendly policies to attract and retain employees, as well as compete in their specific market sector with regards to what employees and clients see as best practice. This is driven by the organisation wanting to be seen as the "better employer" in the sector, or those whose trade union representation encourage family-friendly policy. Another reason may be employers who have a higher contingent of female workers and what they term the *bandwagon effect* of human resource policies that come with equal opportunity policies and a company ethos of high commitment by management to employees.¹⁵²

¹⁵⁰ Dex, S. and Smith, C. *The nature and patterns of family-friendly employment policies in Britain* (2002).

¹⁵¹ Dex and Smith (note 150).

¹⁵² Dex and Smith (note 150).

Chapter 5: Comparative legislation

The focus of this paper up to this point has been to set the scene as it currently exists in South Africa, including employment trends, South African trendsetters, existing labour legislation, and employees' access to it. From this point onward, the focus will be to make recommendations on how this legislation may be improved or new legislation enacted altogether. Jurisdictions used as comparators include India, the UK, and the USA, as South Africa as a country often looks to the USA and UK for guidance or benchmarks, and that India finds itself in a similar circumstance to South Africa (explored below). Other material consulted includes ILO conventions, Southern African Development Community's (SADC) Protocols, and others; to populate a wider base from which South African legislation can be compared and evaluated. The destination is realistic and implementable suggestions for South African Labour legislation, based on international successes and failures in both similar and vastly different contexts to ours.

Dancaster and Baird state that countries within the 'European Union (EU) are compelled by EU directives to implement certain work-family measures in public policy'.¹⁵³ In much the same way that as a member country of the ILO or SADC would, the South African government also has certain expectations and obligations placed on it. With reference to the work-life balance and necessary legislation to support this concept, Dancaster outlines some of these obligations as the need to increase 'involvement in work-family integration at national policy level [which arise] from the [South African] ratification of the Convention on the Elimination of all forms of Discrimination against Women, the Beijing Platform, the SADC Declaration on Gender and relevant ILO Conventions'.¹⁵⁴

¹⁵³ Dancaster and Baird (note 6) at 23.

¹⁵⁴ CCMAil (note 55) at 5.

These ratifications and other involvements are definitely a step in the right direction, but Dancaaster also highlights that, despite these actions, the South African government has not yet ratified the ILO Workers with Family Responsibilities Convention,¹⁵⁵ which could be used as a tool to guide legislative requirements in relation to the care responsibilities and family representation in the lives of South African workers. This because care and family responsibility is no longer “the feminists” battle, it is society’s battle,¹⁵⁶ and the sooner government realises this and begins to move in the same directions as some of the material that will be analysed, the sooner the worker and, particularly the female worker, in South Africa will be assisted.

1. Maternity

In this section India is used as a comparator for the reason that India find itself in much the same situation with high levels of poverty and unemployment, and is also faced with widespread illness including HIV/AIDS and legislation that is increasingly less representative of the majority of the labour force.

In 2007 the Indian Maternity Benefit (Amendment) Bill¹⁵⁷ was published to improve the coverage of the existing Maternity Benefit Act of 1961,¹⁵⁸ and to increase the benefits that female employees receive in respect of pregnancy or birth of their child. One of the most striking features of this bill is that it outright addresses the issue of under-representation of the workers, and states the following in its objects and intent:

¹⁵⁵ CCMAil (note 55) at 5.

¹⁵⁶ Botez, L. *Moms in Canada: Reconciling work and family life* (2010) General Article in the International Labour Office. *Decent work for domestic workers* (2010) 68 *World of Work Magazine*, at 23 while quoting the statements of Christine Simard of Quebec on her thoughts about reconciling work and family life.

¹⁵⁷ Maternity Benefit (amendment) Bill, 2007.

¹⁵⁸ Maternity Benefit Act, 1961.

With the gradual extension of coverage under the Employees' State Insurance Act, 1948 (ESI Act) which also provides for maternity and certain other benefits, the area of application of the Maternity Benefit Act, 1961 has shrunk to some extent...The Act is, therefore, still applicable to women employees employed in establishments which are not covered by the ESI Act, as also to women employees, employed in establishments covered by the ESI Act, but who are out of its coverage because of the wage-limit.¹⁵⁹

The bill acknowledges the changing workforce and conditions, and addresses those who remain unprotected, stating as much in the last sentence.

The bill continues to address current circumstances that workers experience, and states in relation to current economic times that every woman who is entitled to receive benefits in relation to maternity will also be entitled to receive a medical bonus from her employer of 1000 Rupees if no free pre- or post-natal care is provided by the employer, this amount has been raised from the 250 Rupees amount stated in the 1961 Act, as it was seen by government as 'inadequate...in the present economic scenario' and which will now be subject to revision from time to time.¹⁶⁰

In South Africa, no such changes or proposals have been made to improve or extend the scope of current legislation for female employees in these situations. Furthermore, there is no provision for analysing economic circumstances of the country to improve the payment of benefits; our UIA only allows for percentages of existing income to be paid out, no matter what the financial and economic implications of that amount, however large or small it may be for the employee.¹⁶¹

¹⁵⁹ Maternity Benefit Bill (note 157).

¹⁶⁰ *Idem* at ss 4, 5 and 8.

¹⁶¹ More information about maternity benefits under the UIA can be found in Chapter Two of this paper.

a. Working Conditions

The ILO Maternity Protection Convention regulates work for mothers, both before and after the birth of their child. The Convention requires that the employer ensures no work performed by the woman that places the baby or her at risk, including during her pregnancy and while she is breastfeeding.¹⁶² This is similarly addressed and regulated in South Africa by the Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child, 1998.

b. Leave

The C183 Convention¹⁶³ also sets a minimum of 14 weeks (three months) for maternity leave, with a compulsory six weeks' leave for the employee directly following the birth of the child. No amount of prenatal leave may affect postnatal leave.¹⁶⁴ South African maternity leave under the BCEA provides for the same compulsory six weeks' leave following the birth of a child, but actually provides for more maternity leave in total than the Convention does, being four months in South Africa. In cases of illness or complications related to pregnancy or birth, the Convention allows for each country to deal with this under existing laws and policies,¹⁶⁵ which South Africa does not specifically highlight, but that sick leave may account for in this regard.

c. Benefits

The Convention¹⁶⁶ also requires that women who are absent from work on leave, receive cash benefits.¹⁶⁷ Similarly, the SADC's Protocol on Gender and Development requires that benefits be provided for both men and women during maternity and paternity

¹⁶² ILO Maternity Protection Convention (note 162).

¹⁶³ ILO Maternity Protection Convention (note 162).

¹⁶⁴ *Idem* at article 4.

¹⁶⁵ ILO Maternity Protection Convention (note 162) at article 5.

¹⁶⁶ ILO Maternity Protection Convention (note 164).

¹⁶⁷ *Idem* at article 6.

leave.¹⁶⁸ South Africa provides for benefits to be paid to the female employee as per the UIA, but it does not provide for benefits for male workers or fathers, as there is currently no paternity leave allowing the father to claim such benefits.

d. Protection and Non-Discrimination

The ILO Maternity Protection Convention outlines that a woman is entitled to employment protection, and has the right to return to a position that is the same or equivalent to her position prior to her taking maternity leave. It also prohibits discrimination against pregnant or new mothers, including access to employment and the requirement of pregnancy tests as a condition of employment under most conditions.¹⁶⁹ Furthermore, the ILO Convention on Termination of Employment¹⁷⁰ prohibits the dismissal of workers due to pregnancy or family responsibility, or for reasons to do with absence from work during maternity leave. Similarly, the SADC Protocol requires that measures prohibiting the dismissal or denial of recruitment on the grounds of pregnancy or maternity leave be implemented, and requires the protection of both men and women during paternity and maternity leave.¹⁷¹

South Africa also prohibits discrimination against women in this way, under the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, 2005, and, in the same way, the protection of employment for women under the LRA. Again, as there is no paternity leave provided for in South African legislation, there can be no comparison of the prohibition or protection of male employees in relation to their paternity.

¹⁶⁸ SADC Protocol on Gender and Development, 2008, article 19.4.

¹⁶⁹ ILO Maternity Protection Convention (note 164) at article 8 and 9.

¹⁷⁰ ILO Termination of Employment Convention C158, 1982.

¹⁷¹ SADC (note 168) at article 19.3 & 19.4.

e. Breastfeeding

Under the C183 Convention, breastfeeding women are entitled to one or more daily breaks or a daily reduction of hours of work to breastfeed, and these breaks or reduced hours shall be counted as working time and thus remunerable.¹⁷² In South Africa, we provide for breastfeeding breaks under the Code of Good Practice on Protection of Employees during Pregnancy, 1998, but there is no mention of whether these breaks are considered to be part of working hours each day and thus remunerable.

2. Paternity Leave

South African legislation does not provide for paternity leave other than the time that is allocated within the scope of family responsibility leave and, although this has not been challenged in court, there is enough international provision for this leave for South African fathers to begin to expect change in this arena. In the United Kingdom, paternity leave is provided, and allows for two weeks' leave to be taken within 56 days of the child being born.¹⁷³ There are currently plans to extend this once the maternity leave provision has been extended to 12 months, up from the current nine months.¹⁷⁴

3. Parental Leave

There is no provision for parental leave in South Africa other than the leave provided for under maternity leave and that under family responsibility leave, which does share the intent of the European Union's (EU) Directive on Parental Leave. This directive clearly distinguishes between maternity, paternity and parental leave. In addition, it prohibits the exclusion of employees based on the form of their employment agreement, by stating that it 'applies to all workers, men and women...[and] shall not exclude from the

¹⁷² ILO Maternity Protection Convention (note 164) at article 10.

¹⁷³ United Kingdom Employment Rights Act, 1996, s 80.

¹⁷⁴ Dancaster (note 60) at slide 17.

scope and application of this agreement workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment...with a temporary agency.¹⁷⁵ This is an important inclusion for the protection of employees in non-standard forms of employment; and will be addressed in more detail later in this paper.

Parental leave is provided for in this directive up to the time the child of the employee turns eight, and is set at a minimum of four months over that time, which must be shared at least in part by both parents.¹⁷⁶ South Africa has no similar provision in any legislation for leave to be taken by parents during the course of employment to care for children, by either the mother or father. Should a parent require time off to care for a child in any way, they would be required to use family responsibility leave set at three days per year, or as occurs in many situations, the parents would be forced to use sick leave days in order to have time away from work.

In a study of 20 countries worldwide, Hegewisch and Gornick outline some ways employees with family responsibilities can be supported by alternative working rights:

1. Gradual return to work on part-time basis after the birth or adoption of a child;... for a set period of time with the right to return to the same or equivalent job..., with some financial compensation to make up for loss of earnings
2. Parental leave for parents of younger or disabled children once the employee has returned to work, which may be taken as a reduction in work hours, or in blocks. Such arrangements are also job-protected and generally include an allowance for loss of earnings.
3. Reduced hours or other alternative work arrangements for parents of younger or disabled children, without compensation and, though not in all countries, without a right to previous work hours.
4. The right to refuse overtime or shift patterns that are incompatible with care responsibilities.¹⁷⁷

¹⁷⁵ European Union Council Directive on Parental Leave 2010/18/EU, 2010 at clause 1.

¹⁷⁶ European Union (note 175) at clause 2.

¹⁷⁷ Hegewisch and Gornick (note 7) And Dancaaster, L. *Family Responsibility Discrimination Litigation – A non-starter?* (2009) 2 *Stell LR* 221 at 237.

Compared with the above, only the right to refuse to work overtime exists in South Africa in the BCEA; other Codes only require the consideration of employee fatigue, rest periods, and work arrangements as necessitated by pregnancy or breastfeeding.

Considering ‘the content and weak enforceability of the Codes...they fail to provide any significant additional rights for employees who are caregivers’,¹⁷⁸

4. Family Responsibility

The definition of *dependent* pertaining to employees applying for family responsibility leave is important, in that it can essentially provide the employee with the opportunity to care for any family member or dependent, or alternatively, adversely limit this opportunity. The South African definition is limited to the definition as it stands in the EEA,¹⁷⁹ (see chapter two). Under the Employment Rights Act of the United Kingdom,¹⁸⁰ the definition of a employees’ dependent is, ‘a spouse or civil partner, a child, a parent, a person who lives in the same household as the employee’.¹⁸¹ When we turn to the USA, the requirements for family leave are laid out as reasons related to the birth of a child; placement of adopted or foster children; or to care for spouses, children or parents with serious health conditions,¹⁸² which is much more limited in its scope.

Besides children, parents, and spouses of employees, no other family members are catered for through family responsibility leave in the USA. In light of this, South Africa, although it does fall short, does have a slightly wider inclusion of members of the employee’s family than the USA.

¹⁷⁸ Dancaster, L. *Family Responsibility Discrimination Litigation – A non-starter?* (2009) 2 *Stell LR* 221 at 237.

¹⁷⁹ EEA (note 63).

¹⁸⁰ United Kingdom (note 173).

¹⁸¹ United Kingdom (note 173) at s 57a.

¹⁸² US Family and Medical Leave Act, 1993, part 825.

In the ILO Convention on Night Work, provision is made for employees who are required to perform night work, in that the employer is required to implement specific measures to assist those employees in meeting their family and social responsibilities.¹⁸³ This is not reflected in South African legislation in the same way, there is only a provision in the LRA for the consideration of family responsibility when ‘regulat[ing] the working time of each employee’,¹⁸⁴ but under the Night Work¹⁸⁵ section of the BCEA, there is no mention made of family or care responsibility considerations that the employer is required to make.

Under the ILO Convention for Part-Time Work, it requires measures to be taken to facilitate freely chosen and productive part-time work which satisfies both employers and employees, including attention in policies to the needs and preferences of specific groups of workers with family responsibilities.¹⁸⁶ No provision is made for similar situations in South Africa; there are provisions for shift work as they pertain to family responsibility considerations, but not specifically for part-time work.

As mentioned above, one of the ILO Conventions South Africa has not yet ratified is the Workers with Family Responsibilities Convention. Its application to both male and female employees is specifically highlighted by stating that it ‘applies to men and women workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibilities of preparing for, entering, [and] participating in [employment].’¹⁸⁷ It also states that it applies ‘to...workers with responsibilities in relation

¹⁸³ ILO Night Work Convention C171, 1990, article 3.

¹⁸⁴ BCEA (note 46) at s 7 (d).

¹⁸⁵ *Idem* at s 17.

¹⁸⁶ Part-Time Work Convention C175, 1994, article 9.

¹⁸⁷ ILO Workers with Family Responsibilities Convention C156, 1981, article 1 (1).

to other members of their immediate family who...need their care or support'.¹⁸⁸ In South Africa, the EEA defines *family responsibility* in exactly the same way as this Convention, despite not having ratified it.

One area where South Africa has failed in terms of the SADC Protocol on Gender and Development, is Article 16, which requires that time-use studies will be conducted by 2015, and policy measures will be adopted to ease the burden of the multiple roles played by women.¹⁸⁹ So far this has not taken place and if it had, perhaps the current situation would not only be identified, but addressed.

As a nation, South Africa is prone to looking to first-world countries as a comparator. The USA, as the world leader in most arenas, is often the first port of call. Contradictory to this, Heymann¹⁹⁰ found, through the Project on Global Working Families, that USA underperformed on most comparable forms of family-friendly policy and legislation. The study surveyed 173 countries worldwide and found, as summarised by Firestein:¹⁹¹ only four did not offer guaranteed paid leave to women in connection with childbirth—the United States, Liberia, Swaziland, and Papua New Guinea; at least 76 countries protected working women's rights to breastfeeding, but the US did not; at least 96 countries mandate paid annual leave, the US does not; and at least 84 countries have a fixed length of workweek, but the US does not, and does not limit mandatory overtime, either.

¹⁸⁸ *Idem* at article 1 (2).

¹⁸⁹ SADC (note 168) at article 16.

¹⁹⁰ Heymann, J. *The Work, Family and Equity Index: Where does the United States Stand Globally?* (2004).

¹⁹¹ Firestein, N. *Union Strategies for Work-Family Issues: Collective Bargaining and Public Policies*, Chapter 3 in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009) while summarising Heymann's report on the Project on Global Working Families.

a. Force Majeure

The EU's Directive on Parental Leave 'entitle[s] workers to time off, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure...urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable'.¹⁹² In South Africa there exists no similar provision for emergency situations, and when employees are faced with sudden illness or care emergencies of family and children or when substitute caregivers are unavailable,¹⁹³ there seems to be no relief. Ordinary family responsibility leave will have to be taken (without notice), or the employee is forced to miss work, and possibly face disciplinary actions or other repercussions.

5. Child Care

As the UN Convention on the Rights of the Child, 1989, states that parents and legal guardians are primarily responsible for the development, upbringing and best interests of the child, and this should be their basic concern.¹⁹⁴ For this reason, it provides that 'States Parties shall...ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child',¹⁹⁵ and recognises the importance of having both parents involved in raising children. The Convention elaborates by discussing how governments of state parties should not only be involved, but assist in, this social responsibility by rendering appropriate assistance to parents and guardians in their child-rearing responsibilities; ensuring the development of institutions, facilities and services for childcare. Furthermore, ensuring that children of working parents benefit from such facilities for which they are eligible.¹⁹⁶

¹⁹² European Union (note 175) at clause 7.

¹⁹³ Dancaster (note 60) at slide 7.

¹⁹⁴ United Nations General Assembly Convention on the Rights of the Child, 1989 at article 18 (1).

¹⁹⁵ United Nations (note 192) at article 18 (1).

¹⁹⁶ Idem at article 18 (2) and (3).

In South Africa, no legislation addresses the roles of parents in respect of their children with regard to their employment. There is also nothing regarding government's dual responsibility in childcare, or developing institutions of this nature, for the purpose of assisting workers.

6. Flexible Working Arrangements

South African legislation does include, to some extent, a provision for flexible working arrangements in the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, 2005. Requiring that 'employers should endeavour to provide an accessible, supportive and flexible environment for employees with family responsibilities [which] includes considering flexible working hours and granting sufficient family responsibility leave for both parents'.¹⁹⁷ This provision does not outline how these working arrangements should be structured, which could make for poor implementation by employers. As Dancaster points out, it has been 'argued that there is a need for serious debate on the introduction of a separate legislative right to request flexible working arrangements in South Africa',¹⁹⁸ which would not only address the ordinary needs of employees, but also those who are faced with addressing caregiving needs as demanded by the HIV/AIDS crisis in the context of South Africa.¹⁹⁹

Hein and Cassirer summarise some ILO recommendations for better care responsibilities (including childcare requirements) assistance. These include emergency or sick leave taken to care for sick children or other relatives; reduction of long hours and overtime; flexitime options focussing on arrival and departure time flexibility; possibilities of switching temporarily to part-time or reduced hours of work; compressed work weeks;

¹⁹⁷ Code of Good Practice (note 66).

¹⁹⁸ Dancaster (note 60) at slide 21.

¹⁹⁹ Ibid.

teleworking; or shift switching possibilities.²⁰⁰ In South Africa, these measures would have to be employed electively by the organisation, at the request of the worker, mainly because no legislation exists to govern these types of arrangements directly, therefore suggestions must be taken from bodies like the ILO.

If one has to look at the body of law in South Africa as compared with some generally accepted international standards, for the most part what we do have is in line with what is recommended elsewhere. More specifically our basic provisions exceed what is offered in the USA on many levels. But in terms of what is missing in South Africa, or what could be improved, analysis of the gap seems daunting in that there is much more that South Africa could be doing to improve or enhance existing legislation. This comparison is especially stark when placed in context with the EU directives and UK legislation, not so much with maternity provisions, but with what happens after the birth of a child for both parents in SA and the members of a family. These issues must be considered when making suggestions for improvements and inclusions into law, and are addressed in the next chapter.

²⁰⁰ Hein, C. and Cassirer, N. *Workplace solutions for childcare* (2010) at 12.

Chapter 6: Implementation Issues and Approaches

Now that a broader foundation has been developed as to the possibilities of labour legislation in South Africa, it is important to address possible implementation issues. Some approaches are suggested to overcome these issues, informed by both the country's history as well as the social complexities that it faces currently. The suggestions are made by drawing on statistical evidence and academic analyses of current economic and employment situations.

One of the driving forces of the changing employment relationship is that employees are becoming more demanding, while becoming less willing to sacrifice balance between their work and families. This is in contrast to what employees in their parents' generation would have "put up with".²⁰¹ There are many factors that result in the poor implementation of family-friendly policies, both on a national and corporate level. Thompson *et al* outlines them as the generalisation of work being masculine and family being feminine; the lack of national leadership and policy on work-family issues; the difficulties of flexibility; and the workplace clash between culture and family-friendly programs.²⁰²

The above points are definitely true in South African, with particular resonance with the first two points. Foundationally, it is the gender role assumptions that drive much workplace policy, and until this strong premise is addressed through societal changes or legislation, necessary change will not occur.

²⁰¹ Loughlin, C & Barling, J. *Young Workers' Work Values, Attitudes and Behaviours* (2001) *Journal of Occupational and Organizational Psychology* 74 at 544.

²⁰² Thompson, C. A., Thomas, C. C. & Maier, M. *Work-Family Conflict: Reassessing Corporate policies and Initiatives* (1992) in Zekaran, U & Leong, F. (eds) *Woman power: Managing in Times of Demographic Turbulence* (1992) at 69.

Fredman outlines importantly that, ‘women’s continued primary responsibility for child-care, together with intense pressure to contribute to the household income, leaves them with comparatively few options for paid work’.²⁰³ In South African situation, many women are employed in non-standard forms of employment due to their care responsibilities, and this in itself makes for a difficult marriage between paid work and care responsibilities, discussed later in this paper. This also highlights the need for non-standard forms of employment to be better legislated and controlled, as a baseline measure for better employee protection. Fredman continues that it is important for employees to be able to navigate the fine line between paid and unpaid work without repercussions; only once this is achieved will men be able to share dual responsibilities on both fronts and not primarily in paid work. She says that this seems further away than ever before because the “male breadwinner” model remains and women operate on unequal terms in the workforce.²⁰⁴

Historically, debates placing the work-family issue in the spotlight centred on childcare as experienced by the employee. More recently, concerns about an ageing population and the demands placed on employees by the responsibility of caring for the elderly have widened the debate.²⁰⁵ Another concern for South Africans is the HIV/ AIDS pandemic, which affects a large percentage of the country’s population in some way, and ‘the care needs of those infected with and/or orphaned by HIV/AIDS presents an enormous challenge for those required to act as caregivers along with the demands of employment, particularly full-time employment’.²⁰⁶ It is for this reason that any legislative changes that

²⁰³ Fredman, S. *Women At Work: The Broken Promise Of Flexicurity* (2004) 33 *ILJ* 299 at 299.

²⁰⁴ *Ibid.*

²⁰⁵ Dancaster (note 60) presentation at slide 3.

²⁰⁶ Dancaster (note 60) presentation at slide 4.

are suggested be focussed on the needs of the working population as a whole; not only those who have children, but also on those who have dependants of any form.

It is crucial that family-friendly policies and programs actually address and assist employee needs, because if they do not, they will not be used or achieve their objectives.²⁰⁷ Equally, ‘employers favour work-life balance [legislation] if it promotes the flexibility of labour supply and enables them to retain valued staff’.²⁰⁸ One of the greatest challenges to making such legislation, policies, and practices available to workers is that those who require it the most—the low-income employees with great, if not greater care responsibilities and who do not have the means nor access to assistance in the form of childcare or domestic help—are generally those ‘least likely to benefit from working conditions conducive to work-family or work-life supports’,²⁰⁹ as these workers are, more often than not, hourly paid.

However, it is important to remember that it is not only those employees with children who require assistance, more consideration needs to be given the wider needs of employees, and the need for balance for the individual, despite their family situation.²¹⁰ Enchautegui-de-Jesus highlights the four most pressing challenges that workers face when it comes to creating work-life balance: ‘difficulty in securing child care and supervision; obstacles to take time off from work; work schedules that conflict with family and

²⁰⁷ Burke, R. J. *Organisational culture: a key to the success of work-life integration*, in Jones, F., Burke, R. J. and Westman, M. (Eds) *Work-Life Balance: A Psychological Perspective* (2006) at 236.

²⁰⁸ Dean, H. And Coulter, A. *Work-Life Balance in a Low-Income Neighbourhood* (2006) at 4.

²⁰⁹ Lambert (note 4).

²¹⁰ Jones, F., Burke, R. J. and Westman, M. ‘Work and Life: The road ahead’ (2006) in Jones, F., Burke, R. J. and Westman, M. (Eds) *Work-Life Balance: A Psychological Perspective* (2006) at 290.

transportation needs; and rigidity of supervisors regarding workers' family emergency needs'.²¹¹

According to the third-quarter Labour Force Survey of 2010,²¹² of the almost 13 million employed persons in South Africa, almost four million are employed informally, or as in this breakdown: as domestic workers in private households, as agricultural workers, and in the informal sector. Meaning that almost one-third of our total workforce in South Africa is employed in the low-income or 'working-poor strata'²¹³ and thus do not receive basic protection from labour legislation as discussed above.

Importantly, according to the Labour Force Survey, the population of women who are eligible to work (between 15 and 64 years old) is 16,537,000, and the same population in men is only 15,536,000, meaning that there is a greater number of women employable in South Africa than men, but the actual employment rates according to gender are very different. Of the females above, 8,752,000 are classified as not economically active, as in they are either not working or are discouraged work-seekers; 2,183,000 are currently unemployed. This results in 5,601,000 females being employed in South Africa across all sectors, only one-third of the employment-eligible female population (33.87%).²¹⁴

Contrastingly, of the employment-eligible male population of 15,536,000; 7,373,000 are actually employed across all sectors, translating into an almost 50 percent employment rate, but logically, 33 percent of 16,537,000 and 50 percent of 15,536,000

²¹¹ Enchautegui-de-Jesus, N. *Challenges Experienced by Vulnerable Workers: Issues to consider in the Policy Conversation*, in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009) at 209, discussing the hourly workers situation.

²¹² South African Quarterly Labour Force Survey (note 32).

²¹³ Perry-Jenkins, M. *Making a Difference for Hourly Workers: Considering Work-Life Policies in Social Context*, in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009) at 219.

²¹⁴ South African Quarterly Labour Force Survey (note 32).

means that a greater portion of the female population are employed in 1.7 million less jobs across a 14 percent population difference. Not only are there more employment-eligible females than men, there are more of these women who are unemployed.²¹⁵ As females are the employees most likely to have care responsibilities, the Labour Force Survey reinforces a generalised view that employers shy away from hiring women as employees due to their family demands which may potentially affect the employer.

Research²¹⁶ shows that the increase in non-standard employment relationships in South Africa has led to the deprivation of many employees of basic labour law protection, but these changes are also affecting employees engaged in formal employment relationships, even though labour legislation typically catered for these employees.²¹⁷ Basically when it comes to evaluating possible legislative changes going forward, the changing nature of employment relationships would have to be addressed to better cater for all workers. Benjamin calls for the scope of legislative protection to be expanded in much the same way as the ILO is calling for “decent work” for all, through employment and income opportunities; rights at work and international standards; social protection and security; and tripartism and social dialogue. These principles would aid the response to the challenges of providing decent work for employees in non-standard forms of employment or who are exploited as is common in South Africa.²¹⁸

Taking this situation into consideration, as well as the high levels of unemployment and broken families in South Africa, it is understandable that the AIDS pandemic can be seen as a major contributor to difficulties South Africans face. With poverty being undeniably linked with the spread of HIV and AIDS, many families are tasked with the

²¹⁵ South African Quarterly Labour Force Survey (note 32).

²¹⁶ ‘Research commissioned by the department [of labour] has revealed the extent to which the growth of non-standard employment has eroded the quality of labour protection’ from Benjamin (note 31) at 846.

²¹⁷ Ibid.

²¹⁸ Benjamin (note 31) at 847.

exhausting responsibility of caring for the sick and dying.²¹⁹ These factors exacerbate the difficulty of implementing legislation, as with high unemployment levels and poverty, the desperation for work, and a typically dispensable workforce means that, even if legislation is provided, it might not be effective, due to the desperate need to work and earn as high an income as possible, meaning that leave options are often seen as privileges, and are not used out of the greater need to work.

For fathers in some Nordic and European countries, implementing paternal leave and other measures involving family responsibilities was based on a feminist recognition of the need for fathers to have a more active involvement in fatherhood.²²⁰ But in South Africa, with 48 percent of children having absent, living fathers, these Nordic principles would not have the same effect locally. Nine million South African fathers are not present in their children's lives and so, not without generalising, it can be assumed that legislative changes or company policies would not help change this situation, despite it not being clear if this situation is based on choice or circumstance.²²¹

Considering the use of maternity leave in South Africa, the fact that many women opt to return to work sooner than their allotted four months' leave, drives home the need for benefit provisions that allow the female employee to remain at home to care for children without losing out on part or all of their income in the process. In a study by Marshall, it was found that 'lower individual earnings were associated with a quicker

²¹⁹ Allsopp, M. and Thumbadoo, Z. *Child and Youth Care in Post-Apartheid South Africa: Innovative Responses to the Challenges of Poverty and AIDS* (2002) 43 at 1 & 3.

²²⁰ Brandth, B and Kvande, E. *Flexible work and Flexible Fathers* (2001) *Work, Employment and Society* 15, 2:251 – 67.

²²¹ Holborn, L. and Eddy, G. *First Steps to Healing the South African Family* (2011)

return to work [after the birth of a child]...[as] women with lower earning (and possibility lower savings) may not be financially able to stay at home'.²²²

This chapter has briefly outlined some of the issues that may be experienced when trying to enact legislative change in the labour context of South Africa. Some avenues to overcome this have been hinted at, but the next chapter will resolve to address all of these items in great detail with realistic and contextualised suggestions for improvement.

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²²² Marshall, K. *Benefiting from extended parental leave* (2003) 4 *Perspectives on Labour and income* 3.

Chapter 7: Suggestions for South African Legislative Changes

The chapter's suggestions are aimed at being both realistic and meaningful to the work-life balance or lack thereof in the South African context. All of the topics from the previous chapters are included, but this chapter also seeks to address some of the side issues that may not directly affect, but play a role to some extent in, the work-life experience of many South African employees, as there is a benefit to the work-life balance through them, albeit in the form of a by-product benefit. The suggestions are broken down into: integration of work-life legislation into workplace policy, family responsibility, maternity leave and benefits, paternity leave and benefits, flexible working arrangements and parental leave, child care and child care subsidies, increased control in non-standard employment sectors, and non-legislative suggestions.

South Africa finds itself in a somewhat unique situation where, with the perceptions of being leaders and trendsetters for the African continent, we are somehow expected to employ best practice with regard to legislation, social responsibility, and similar avenues of comparison. In reality, though, our relatively new constitution and accompanying legislation is still trying to find its feet, with much not yet explored or tested in courts. There is still some way to go in the interpretation and implementation of existing law, but this does not negate the fact that improvements and amendments can and should be made when protection is lacking. The suggestions are inspired and informed by local and international authors, Directives, Conventions, and legislation.

Despite internal pressures (from trade unions, employees, academics, and others) to improve labour legislation, South Africa does have other obligations in this regard in the form of ILO Conventions, UN General Assembly Conventions, and SADC Protocols that

have been ratified. The Conventions ratified by South Africa as they pertain to family responsibility and the like are: the ILO Convention on Discrimination Pertaining to Employment and Occupation, 1958; the UN General Assembly Convention on the Elimination of All Forms of Discrimination against Women, 1979; the ILO Convention on Equal Remuneration, 1951 (concerning equal remuneration for work of equal value); and the SADC Protocols on Gender and Development, 2008.

What some of these conventions and protocols have identified is the need for balance between the family life and work obligations of employees, as well as between the employee and organisation. As Feldblum states, ‘workers do want to work, but they cannot stop the rest of their lives from happening while they do so [and] obviously, one cannot expect workplaces to lose their basic reason for existence: to produce work’.²²³

Dancaster and Cohen highlight some policy aims that could drive legislative changes to create more flexible working arrangements in South Africa. These include the high unemployment rate; the need to develop skills through lifelong learning initiatives; providing measures for female employees; assistance with care for families, particularly in light of the HIV/AIDS crisis; and the need to provide measures to accelerate affirmative action.²²⁴ But, ultimately, it seems that, “without government regulation, it is unlikely that the right to request flexible working arrangements will be implemented to any...extent in South Africa”,²²⁵ considering that employers are generally not implementing measures above legal requirements, and trade unions are not creating a demand for this flexibility in their collective bargaining capacity.²²⁶

²²³ Feldblum (note 22) at 252.

²²⁴ *Idem* at 237-238.

²²⁵ *Idem* at 238.

²²⁶ *Ibid.*

Crompton outlines three major categories of work-life policies that are best appreciated by the families that benefit from them: an allowance for leave or absence from work for family reasons - emergency leave, maternity or paternity leave, or career breaks (sabbaticals); allowance for changes in work arrangements for family reasons - flexitime, job-sharing, and homeworking; and finally, the provision of practical help when it comes to caring - workplace nurseries or help with childcare or eldercare costs.²²⁷ As Dupper et al point out, typically, 'family caregivers are usually women and in many cases women of working age'²²⁸. This often removes them from the workforce for periods of time, simultaneously removing their ability to 'make provision for their own old age...in many cases the fact that a woman is...[caring for young and] elderly family member[s] leads to the detriment of her own financial security in old age'.²²⁹

Change 'needs to be supported by more knowledge and information, based on theory and research, into what interventions are effective in what circumstances',²³⁰ it would be important to first ask some questions around what policies, laws, and practices could address the current situation in South Africa:

- What measures would best support the balance between employment and care responsibilities in a South African employment context, and which employees would these measures seek to assist?
- Should changes be designed to reflect the different types of employment, or should a blanket approach be employed to begin with?

²²⁷ Crompton (note 11).

²²⁸ Dupper, O., Malherbe, K., Shipman, B. & Bolani, E. *The case for increased reform of South African family and maternity benefits* (2009) *UWC: Law, Democracy & Development* at 11.

²²⁹ *Ibid.*

²³⁰ Jones, Burke and Westman (note 208) at 291.

- Would employees make use of policies and legislation available to them if it was implemented by the state and their organisations (note: the basis of this question justifies the next)?
- Should any change be preceded by an evaluation of employee needs through a survey or suggestion program?

1. Integration of Work-Life Legislation into Workplace Policy as a Legal Requirement

One of the first points of call for legislators would be to ensure that the legislative changes made to address and support the work-life balance would have to be included in the policies of organisations, in much the same way that the that the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practice, 2005, was designed to ensure that employment equity was integrated into the core documentation and intent of organisations.

Substantiation for this is noted by Jones *et al*, that one of the core issues around failures in implemented policies and practices in the rest of the world were often due to the fact that they were not considered a central part of the human resource policies of organisations;²³¹ and, more importantly, ‘duties fall on employers, not because of their immediate control over the time and commitment of an individual worker, but because of the civic responsibility which attaches to those with power’.²³²

2. Family Responsibility

²³¹ Jones, Burke and Westman (note 208).

²³² Fredman (note 204) at 299.

Suggestions for the improvement of family responsibility recognition and the provision of leave needs to be addressed in a number of ways. Firstly, as highlighted in several chapters, the definition of *family responsibility* under the EEA fails employees by its limitations. In a country where the family unit has come to take many varying forms, expanding this definition would be critical to providing better coverage for those who would require care and support from the employee.

‘The restrictive qualifications [of family responsibility leave] preclude a large number of employees from accessing it’.²³³ Therefore, it is suggested that the definition of *family responsibility* be broadened so as to resemble the UK definition, which makes provision for members of households, and all members of family, immediate or extended. In addition, it may assist employees for the definition of *family responsibility* to be included in all pieces of labour legislation and not only the EEA. In this way, there can be no cross-referencing to different parts of legislation to find protection for the same right.

Secondly, the conditions under which family responsibility leave can be taken must be amended and ‘the scope of circumstances...should be broadened’.²³⁴ Currently, leave can only be taken for the birth or illness of a child, or the death of a family member,²³⁵ which again limits leave and makes no provision for emergency situations that arise in the course of normal family interactions. Additionally, a provision for force majeure should be provided, similar the EU Directive on Parental Leave;²³⁶ to cater for emergency situations without impacting too negatively on the employer.

²³³ Dancaster, L. *Legislative options for the combination of work and care in South Africa* (2008) at slide 21.

²³⁴ *Ibid.*

²³⁵ BCEA (note 46) at s 27.

²³⁶ European Union (note 175) at clause 7.

Finally, the period of leave itself should be extended; three days per 12-month cycle is inadequate, as discussed previously. If the Sectoral Determination for Domestic Workers, 2002, can allow five days' family responsibility leave, it indicates that legislators believed this was appropriate in certain circumstances. If leave could be extended to, say, 10 days per annual cycle for standard forms of employment under the BCEA, this would create a minimum amount of leave that would be better than current leave provisions. Each sector would then be able to determine their own period of leave should they so require, above this minimum.

3. Maternity leave and Benefits

'The inadequacy of statutory maternity leave in South Africa, both in terms of its duration and entitlement to payment, requires reassessment in the context of improved international maternity leave provisions',²³⁷ and when it comes to the loss of partial or total income for women on maternity leave, it seems that if benefits were increased by the UIA,²³⁸ these women would be able to remain at home for longer rather than return to work due to income loss during this period. Currently, the UIA limits maternity leave to 121 days, and the Income Replacement Rate for this leave is set at between 38 percent and 60 percent, depending on the employee's rate of pay and whether or not they were receiving pay from their employer.²³⁹

If, at least, the first two months of the maternity leave could be fully insured by the fund, and then the last two months insured at a lower rate than the maximum of 60 percent, this would allow the majority of women to remain at home without concern for the loss of earnings during a minimum period of two months. As for the period allocated for maternity

²³⁷ Dancaster (note 233) at slide 22.

²³⁸ UIA (note 76).

²³⁹ UIA (note 76) at Chapter 3 and Schedule 2.

leave, South Africa is in line with international standards with four months maternity leave. As Dancaister highlights, considerations for increasing this leave period should be made, but if maternity leave is not extended or it is not financially or economically viable to do so, then paternity leave and a form of parental leave should be considered,²⁴⁰ highlighted below.

4. Paternity Leave

If paternity leave was incorporated into legislation, there would have to be benefit associated with this leave, as total household earnings would be affected. Seeing as the father is less likely to take as much leave as the mother, the insurance could be limited to, say, one month, the first month following the birth of the child, and the lost income could be replaced at a 70 percent rate or less, as the mother would be receiving 100 percent income replacement for this same first month (as suggested above).

This does not mean that there should be no leave after this period, but weighing the need for income replacement during this most vulnerable period for the employees, the ability of the fund to support this sort of payment rate must be paramount and cannot be ignored when making suggestions. That being said, it is obvious that a separate provision should be enacted to address paternity leave; it should be removed from the scope of the family responsibility and ‘should be considered as a leave in its own right or it should form part of a “fathers only” quota in parental leave’.²⁴¹ Statistically, with so many South African children not having active male parenting, the provision for paternal leave and “fathers’ only” parental leave, may well address some social issues.

²⁴⁰ Dancaister (note 233)

²⁴¹ Dancaister (note 233) at slide 21.

If there were no male parent, this leave should be “trade-able” for leave for the mother, but qualifications for this could be addressed in the BCEA. As Fredman points out, ‘the gendered nature of non-standard work will only be overcome when it brings real rewards, so...women enter the workforce on equal terms, and men are [able] to share the dual responsibilities of paid and unpaid work’.²⁴² This would only be created through legislation addressing the need for paternity and male parental leave.

5. Flexible Working Arrangements and Parental Leave

As discussed in Chapter Six, there exists a need for flexible working arrangements to be more clearly defined and structured, and possibly legislated in a separate form. Dancaster states, ‘there is also the need to consider and debate the introduction of the legal right to request flexible working arrangements as a measure to assist employees in the combination of work and care’.²⁴³ This would require legislators to expand the current provision which is more of a statement of intent than an actual enforceable law and to tease it out to provide structured flexible work options for employees.

‘Parental leave...to care for the early childhood development of an infant should be considered for inclusion in the [BCEA]’ and should be available to both parents. This would require either flexible working arrangements or actual remunerated leave in blocks made available to the employee, with notice provided to the employer, to limit business interruptions. As mentioned above, there should be some sort of fathers-only provision that would encourage the paternal involvement.

6. Child Care and Child Care Subsidy

²⁴² Fredman (note 204) at 299.

²⁴³ Dancaster (note 233) at slide 23.

Family support assists some working parents in caring for their children, but many employees in both developing and industrialised countries rely heavily on carers outside of the family. For this reason it is essential for both employees and employers that quality, affordable childcare is available,²⁴⁴ and ‘in the absence of good quality state funded child care facilities, the choice for SA women has been to either accept poor quality care or opt out of paid employment’.²⁴⁵ There have been concerns in South Africa recently, around the poor quality of child care facilities, resulting in the death, injury, and abuse of children placed in the care of unregistered child care facilities, and which has been extensively highlighted by the media over the past year. Parents are forced to place children at these facilities due to the affordability and location of the facilities, in relation to their incomes and location, respectively.

Both municipal and provincial officials have called for more stringent enforcement of registering and healthcare standards of facilities, with regular checks by department officials being called for, to ensure compliance with at least the minimum legal standards.²⁴⁶ ‘This lack of adequate childcare has important implications for women’s labour force participation and gender equality, as well as for workplace productivity, economic development, child development and the well-being of families and society as a whole’.²⁴⁷ The details of these facility requirements cannot be detailed in this paper, but for the purposes of relevance to this research, these facilities are crucial to employees with childcare responsibilities.

Hein and Cassirer also highlight the societal benefits of quality childcare facilities, as promoting both gender equality and the rights and development of children, and

²⁴⁴ Hein, C. and Cassirer, N. *Executive Summary: Workplace solutions for childcare* (2010) ILO at 1.

²⁴⁵ CCMAil (Note 55).

²⁴⁶ Regchand, S. *Creche owner charged with culpable homicide* (2008) IOL News Online, Available at: <http://www.iol.co.za/news/south-africa/creche-owner-charged-with-culpable-homicide-1.412520>, accessed 26 March 2011.

²⁴⁷ Hein and Cassirer (note 244) at 1.

contributing to the national economy by breaking cycles of poverty inter-generationally.²⁴⁸ All of which have much larger ramifications than apparent to the employee, the family unit, the organisation, and even society; through better labour force participation, job creation, equality between genders, and interrupting the poverty cycle by including basic educational levels that play a part in that circumstance.

One of Hein and Cassirer's suggested childcare solutions is to have childcare facilities on or near the work premises catering for preschool children. Usually set up by employers, but also by trade unions, employers' organisations or specialised childcare organisations.²⁴⁹ Alternatively, linking workers with the available facilities in the close community, 'because workers may prefer childcare...close to home,' employers can assist by negotiating discounts, providing support to improve facility quality or reserving places for children of the organisations employees.²⁵⁰

Other ways they suggested were the provision of financial support, whereby 'workplace actors' assist in developing financial support so working parents may choose their own childcare providers and governments assist through tax sheltering of care expenses. The financial support from employers can be seen as minimal, as with tax sheltering; or substantial, as with patrol contributions to childcare funds, which is usually independent of the organisation, but seen as a subsidy. Controls can be implemented to ensure funds are used for approved quality facilities such as the issuing of vouchers, direct payments to facilities, or reimbursement based on receipts.²⁵¹ Additionally, the provision of 'advice and referral services linked to the workplace have become quite

²⁴⁸ Hein and Cassirer (note 201) at 8 – 10.

²⁴⁹ Hein and Cassirer (note 244) at 3.

²⁵⁰ Hein and Cassirer (note 244) at 3.

²⁵¹ *Idem* at 4.

common...help[ing] workers to find appropriate childcare'. Basic information is provided to employees' on childcare facilities in their locality and thus valuable time is saved.²⁵²

Dickens outlines that, in the United Kingdom, 'childcare facilities at the workplace or financial help with childcare'²⁵³ is at a low level; the same can be said for South Africa. It is proposed as part of the need for better childcare facility standards, that government departments should find a way to subsidise these facilities as part of the process through which legal requirements could be better enforced.

If an employer could demonstrate employment trends in line with the requirements of the EEA, the employment of both females and employees with family responsibilities, this could be done in one of two ways. Firstly, the government could allocate an amount per employee with children for the cost of placing those children in childcare facilities; this amount could be shared between employer and employee (with the greater portion being allocated to the employee) and would have to be seen as supplementary to the actual costs of employment. It would be used as encouragement for employers to employ equitably, as well as assist the employee in funding childcare while the employee is working. These contributions could be allocated to a childcare fund as described above, or could be controlled through reimbursement of receipts or proof of direct payments to facilities.²⁵⁴ Additionally, government could elect to provide tax benefits, or what Hein and Cassirer²⁵⁵ term *tax sheltering*, to employers that provided such services or employed a more demographically representative workforce.

²⁵² Ibid.

²⁵³ Dickens, L. *Equality and Work-Life Balance: What's Happening at the Workplace* (2006) 35 *Industrial Law Journal* (445).

²⁵⁴ Hein and Cassirer (note 244) at 3.

²⁵⁵ Hein and Cassirer (note 244).

Secondly, subsidise the employer directly. This option may apply to larger organisations in principle, where the subsidy paid by the government to the organisation must be used in totality for the provision of facilities either on or near the workplace. The facility would have to comply with all legal requirements, and could possibly cater to non-employee children, but used primarily by the employees of the organisation as justification for the subsidy, and as a tool to ensure safe and standardised care for the children of the organisation's employees. Furthermore, if this was supported by unions or employees' organisations, the provision of these services and facilities could be made financially sensible and more freely available. It may also be one of the few areas where employers and employee representative groups may see eye-to-eye, due to the benefits for all parties.

7. Increasing Control in Non-Standard Employment Sectors

a. Equal Work, Equal Pay, Regulated Remuneration, and Basic Conditions of Employment

Where bargaining council agreements or sectoral determinations exist for certain sectors, employees are protected inasmuch as they receive the prescribed minimum wage or income for work that they perform. But where these are not present or no minimum wage is applicable, employees have no statutory protection when it comes to rates of pay.²⁵⁶ A common experience in certain sectors, is that two employees may work in the same workplace, performing the same function, but earn different incomes, due to the fact that one is the employee of the organisation and the other is the employee of a temporary employment service (TES) or a subcontractor to the organisation. Those employees who are paid less are driven to work longer hours and more often, limiting the time they are able to dedicate to family responsibilities. This also places them in a situation where leave,

²⁵⁶ Benjamin (note 31) at 866.

although provided, may not be viable, as they would be forced by finances to continue working.

As discussed in Chapter Two, although some sectoral determinations exist, many employees in South Africa still do not receive protection or basic employment provisions from these, and where employees are not unionised or represented by collective agreements or bargaining councils, they do not enjoy basic labour rights. Benjamin suggests that the Minister of Labour should be 'empowered to issue a sectoral determination that applies to low-skilled employees who are not covered by any other sectoral determination or...bargaining council agreement [and] be empowered to issue a sectoral determination in respect of those parts of sectors with bargaining councils to which the...agreement is not extended'.²⁵⁷

Benjamin recommends that legislative changes should enable TES employees to gain organisational rights and bargain collectively with both the TES and client; also that sectoral determinations should allow representative trade unions to obtain organisational rights at workplaces in sectors; and determining factors for representivity should include employees placed by labour brokers for the purpose of extending bargaining council agreements.²⁵⁸

If this was implemented, the playing field for workers who find themselves in the informal or non-standard forms of employment, would be levelled. Creating a minimum standard in terms of basic conditions of employment for the sector, whether or not an employee was employed directly or through a TES, would provide basic provisions, such as leave in all its forms, employment protection, and equal wage to employees. The

²⁵⁷ Benjamin (note 31) at 869.

²⁵⁸ *Idem* at 870.

principle of ‘equal work, equal pay’ should apply to labour broker employees, the rationale for which, ‘is that legislation should permit the beneficial flexibilities for both employers and employees that flow from permitting temporary work agencies but that these should not be used as a vehicle for reducing conditions of employment or for labour law avoidance’.²⁵⁹

In this way, TESs would cease to be viewed so negatively, and employment through this medium would not only be encouraged, but would be fair. Current debate around the necessary control of TESs, centres on the disparity in pay for equal work. Seeing as many believe that TESs do increase employment rates and make work accessible to those who may not have the means to find it otherwise, this control would place employees on an equal footing and offer them at least a minimum of protection of regulated remuneration, if not protection in other avenues. This protection could be a base from which to expand protection and workers who would then be able to access leave and other provisions they may be in need of in the future.

b. Labour Brokers / Temporary Employment Services

With labour broking or TESs making up the bulk of the informal sector as highlighted by Benjamin in Chapter Two, he suggests requirements to help to address the abuse taking place. Organisations wishing to operate as labour brokers / TESs should, be required to register with the Department of Labour; register a legal entity under the Companies Act; have written contracts with employees and keep record of all employees; have a registered place of business; meet auditing requirements; keep records of transactions; and disclose fees charged by employment agents.²⁶⁰

²⁵⁹ Ibid.

²⁶⁰ Benjamin (note 31) at 858.

Some of these regulatory controls might provide a more structured environment for employees of labour brokers, where control would aid in providing better protection, somewhat negating the call for outlawing labour brokers all together. Through more structure and enforcement, the needs of the employees may be better met through standardised contractual agreements, and hopefully more involvement from the Department of Labour. Labour brokers should be required to register as an immediate measure and contracts with brokers who do not register within this transitional period would be rendered invalid; this would result in full client liability as the contract between the two (client and unregistered broker) would be unlawful. More active roles could also be given to trade unions and employer's organisations through the establishment of a regulatory structure, to ensure better governance of the sector.²⁶¹

With this kind of involvement, control in the sector would not only be regulated through legislation, but also by the key role players, and would make the regulation required more representative of those in the sector, hopefully creating better protection for employees. All of these recommendations are more focussed on the control of the labour brokers or TESs within the sector. Where even more control is required is where the employee becomes directly affected; TES employees should have the following basic rights: they should remain employees even when they are not placed with a client; the employee should be provided with documented information about each placement; they should have written contracts concluded with the TES; employees placed indefinitely should enjoy unfair dismissal protection in terms of the termination of their services with the client; and probationary periods should be regulated in relation to these unfair dismissals.²⁶²

²⁶¹ Benjamin (note 31) at 858.

²⁶² *Idem* at 865.

This would mean that the employees would be notified of placements, hopefully translating into better arrangements for childcare or other family responsibilities. By having unfair dismissal protection, employees would also have protection if dismissed for reasons related to pregnancy or family responsibility.

c. Subcontractors and outsourcing

In order to prevent 'outsourcing' and "subcontracting" being used as a mechanism to disguise control over the employment relationship, it is proposed that legislation should spell out the parameters...[where] a firm can be held to be the "joint" employer...Precedent for such...already exists in our law [in] Section 89 of COIDA [Compensation for Occupational Injuries and Diseases²⁶³]...a person (referred to as a mandatory) who enters into an agreement with a contractor to execute or supervise any work under the control or management of the mandatory jointly and severally liable for the contractor's compliance with COIDA in respect of the contractor's employees'.²⁶⁴

The same applies in the Occupational Health and Safety Act,²⁶⁵ where, in the absence of a contract stating otherwise, the employees of the subcontracting organisation are seen as the employees of the main contractor, or employer, when it comes to the acts and omissions of those employees that may or do cause damage, loss, or harm to property, equipment, the environment, and people. In much the same way, should one of the parties to the employment of the workers act unlawfully or contradict labour law provisions, both parties would be held jointly responsible for those actions and the remedy. This would mean, in turn, that employees would have better recourse in unfair situations, including those that affected their positions as caregivers.

The recommendation made by Benjamin regarding temporary employment services, subcontracting, and outsourcing of work is that the TES, the client, or the

²⁶³ Act 130 of 1993.

²⁶⁴ Benjamin (note 31) at 861.

²⁶⁵ Act 85 of 1993, ss 37 and 38.

‘employer’ should be held jointly and severally liable for compliance to both legislative and contractual provisions. ‘In order to allow for effective exercise of this right, an employee should be able to institute proceedings against both the TES and the client or both in the CCMA, the LC or any other court having jurisdiction’.²⁶⁶ ‘Employees should be able to argue that an entity other than their direct employer is jointly and severally liable for compliance with the employer’s obligations under labour law if that entity exercises a significant degree of control over that employer’.²⁶⁷ By this, in the same manner as described above, the stakeholders of the sector would be required to ensure compliance, both as a means to protect themselves from contractors or organisations that fail to comply and thus impact on their liability, as well as to protect themselves from non-compliance, both legal and contractual.

Furthermore, where and when trade unions do get involved in workplace affairs for the implementation of existing legislation or bargaining for better workplace norms, if and where they are recognised, they ‘generally act as positive mediators in helping translate legislative intent into workplace practice’.²⁶⁸ Meaning that, should an employer or sector fail to interpret the legislation as the employees of that sector feel it should be interpreted, the trade unions assist in this regard. With specific focus on the work-life balance, unions should assist in legal interpretation and bargaining for improved measures for workers with care responsibilities.

8. Non-Legislative Suggestions

Other than legislation, it would also be important to create some sort of market-related evaluation of organisations that implement measures to support the work-life balance. Print media or existing organisational rating mechanisms should be expanded to include an evaluation of family-friendly policies and practices. Organisations would be

²⁶⁶ Benjamin (note 31) at 861.

²⁶⁷ Ibid.

²⁶⁸ Dickens (note 253) at 445.

encouraged through social perception to improve policies and practices, to be seen as a competitor to similar organisations or as the “preferred” employer, by attracting highly sought-after staff more easily. ‘For an organisation to be successful in an increasingly competitive global market-place, it needs to simultaneously meet the needs of its bottom line and the needs of its employees’.²⁶⁹ If these organisations are rewarded through external evaluation of not only the availability, but also the employee’s access to and use of these policies, healthy competition would be encouraged between organisations to implement new and improve existing policies and practices that support work-family balance.²⁷⁰

Conclusion

The purpose of this exploration and evaluation of South African family responsibility legislative representation and protection, was to identify what, if any, measures could be employed to effect legislation that would better represent and protect employees with care responsibilities. Considering employment in South Africa, guidance

²⁶⁹ Burke (note 205) at 255.

²⁷⁰ Davis, K. D. & Mitchell, K. S. (2009) *Limited, Mismatched and Unequal; Work-Life Policies and Practices in the United States*, in Crouter, A. and Booth, A. (Eds) *Work-Life Policies* (2009).

was taken from existing resources such as international legislation, guidelines and local role players, to arrive at these outcomes.

Throughout this paper, it has become evident that there is indeed a need for labour legislation in South Africa to be amended and improved in a number of ways, including the manner in which it addresses and caters for workers with care and family responsibilities. By evaluating what legislation is available and how it protects and assists the South African worker, through case law, it is obvious that even where the law exists, the access to it and the manner in which it is used to address injustices is limited.

By comparing and analysing some international labour standards and jurisdictional legislation, light was shed on the possibilities that exist elsewhere that assist in the balance between paid work and life responsibilities for employees. It has become clear that, for all the needs of the workers that may exist, business continuation for the employer has priority, as without the employer there would be no work in the first place. This has weighed heavily on some of the considerations and suggestions made, and concerns about the viability of state-sponsored subsidies, unemployment fund pay-outs, and insured remuneration rates have been included and addressed.

The employer also finds an ever changing labour market, social pressures and the need to remain globally competitive a challenge, in much the same way that these social pressures, global competitiveness and market place employment affect the worker. Some of these issues were highlighted through evaluating the current employment environment in South Africa, with regard given to impacts such as poverty; the new form that the family unit has taken over time; unemployment and the HIV/AIDS pandemic; all of which creates

difficulty, and as research has shown, a one-size-fits-all approach often falls very short of the required mark.

Some South African organisations' work-life policies and practices were reviewed for the purposes of observing what is possible in a South African context, without the legislation to enforce it. Understandably, but unfortunately, these were limited to private sector employers and implemented more for the benefit of the organisation itself than solely for the benefit of the employees, given in the current economic environment in which organisations are having to operate. However, this information did assist in the purpose of this paper and, better still, had these practices been evident in other sectors and industries, it may have been easier to recognise a home-grown solution to our diverse and complex labour issues.

Suggestions were identified and made, taking into consideration contextual implementation issues and an attempt at a realistic and balanced application. Perhaps these suggestions stand to inform the topic of labour legislation as it pertains to the work-life or work-family balance, or lack thereof, in South Africa. It can only be hoped that, if and when the need for change is addressed more seriously and possible changes are explored, those changes and improvements are made with the same deep consideration of balance as was attempted in this paper.

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