

Unfair discrimination based on pregnancy within the mining industry

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by

Viglia Bester

10938346

Study leader: Miss A Botes

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Dedication

I would like to express my gratitude towards my mother, Alet Steenkamp and my husband, Dieter Bester as well as Anri Botes, my study supervisor for their contributions to make this study possible. In this dedication I include my sons, Duanne and Ewald.

Summary

This dissertation scrutinises the impact of pregnancy challenges on the mining industry, taking the right of equality and unfair discrimination into consideration.

Pre-employment pregnancy testing is an acceptable practice within the current legal framework whereby the MHSA and section 26 of the BCEA place an obligation on the employer to protect employees before and after the birth of a child. This section provides that no work may be performed by an employee that is hazardous to her health or the health of her unborn child.

The dissertation synthesises and reviews the practical implications of pregnancy and related challenges of underground employees and all the problems surrounding this matter are dissected. The liability of the employer and the failure of the employee to report her pregnancy status to the employer as soon as she becomes aware of it, can be justifiably treated as misconduct.

The justification of the dismissal of an underground employee based on pregnancy is confirmed in light of the legislative obligations placed on the employer. Current legislative measures, which justify an automatically unfair dismissal due to pregnancy, cannot be implemented without considering the *Constitution* and the employers' right to economical sustainability.

A literature study will be done using current and relevant sources such as books, legislation, court decisions, conference papers and journal articles. Methodological issues will also render it necessary to weigh up different rights through literature sources.

Keywords

Pregnancy challenges, mining industry, discrimination, equality, liability, compensation, dismissals, pregnancy testing, employment policy or practice, inherent requirement of a job, economic impact

Opsomming

Hierdie verhandeling ondersoek die impak van swangerskapsuitdagings binne die mynindustrie met inaggenome die reg op gelykheid en die oorweging van onbillike diskriminasie.

Toetsing vir swangerskap voor indiensneming is 'n aanvaarbare praktyk binne die huidige regsraamwerk waarin die MHPA en artikel 26 van die BCEA sekere verpligtinge plaas op die werkgever om sy werknemers voor en na die geboorte van 'n kind te beskerm. Hierdie artikel maak voorsiening dat geen werk verrig mag word deur so werknemer wat enige gevaar kan inhou vir haar of haar ongeboore kind nie.

Die verhandeling sintetiseer en hersien die praktiese implikasies van swangerskapsuitdagings vir ondergrondse werknemers en ondersoek alle probleme wat hiermee ondervind word. Die aanspreeklikheid van die werkgever en die werknemer se versuim om swangerskap te rapporteer na bewuswording kan regtens hanteer word as wangedrag.

Die regverdigingsgronde van ontslag van ondergrondse werkers gebaseer op swangerskap word beaam deur die wetlike verpligtinge wat geplaas word op die werkgever. Huidige wetlike maatreëls wat outomatiese onregverdige ontslag weens swangerskap regverdig kan slegs toegepas word met inagnome van die Grondwet en die werkgever se reg tot ekonomiese volhoubaarheid.

'n Literêre studie is gedoen deur gebruik te maak van relevante bronne soos boeke, wetgewing, hofbeslissings, konferensiebylaes en joernaalartikels. Die metodologiese aspekte het dit genoodsak om verskillende regte op te weeg vanuit literêre bronne.

LIST OF ABBREVIATIONS

BCEA	<i>Basic Conditions of Employment Act 75 of 1997</i>
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	<i>Compensation for Occupational Injuries and Diseases Act 130 of 1993</i>
EEA	<i>Employment Equity Act 55 of 1998</i>
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	<i>Labour Relations Act 66 of 1995</i>
MHSA	<i>Mine Health and Safety Act 29 of 1996</i>
ODIMWA	<i>Occupational Diseases in Mines and Works Act 78 of 1973</i>
OHSA	<i>Occupational Health and Safety Act 85 of 1993</i>
SASLAW	South African Society for Labour Law
SCA	Supreme Court of Appeal
UIA	<i>Unemployment Insurance Act 63 of 2001</i>

Chapter 1: Introduction

On 25 June 1936, South Africa ratified the *International Labour Organisation Convention on the Employment of Women on Underground Work in Mines* of all kind. This Convention prohibited the employment of females for underground work in mines. The Convention was given effect in section 32(2) of the *Minerals Act* 50 of 1991.¹ However, sections 27 to 37 of the *Minerals Act* were repealed with effect on 15 January 1997 by Item 8 of Schedule 3 of the *Mine Health and Safety Act* 29 of 1996.² The implication is that currently there is no prohibition against the employment of women for underground work. Nevertheless, the question within this sector still remains debatable regarding women's personal right to pregnancy when weighed up against the mining industry employers' right to operate for profit. This dissertation intends to address some of the applicable concerns within the mining industry.

One of the stipulations of both the *Mineral and Petroleum Resources Development Act* 28 of 2002 and the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (Department of Trade and Industry, 2002)³ is to promote increased female recruitment and incorporation in the mining industry. Mines in South Africa have pledged their commitment towards complying with said legislation. However, managing the challenges of employing women as a heterogeneous minority within a diverse, male-dominated world with deep-rooted beliefs and practices with respect to women in mining, remains a contentious issue.

Pregnancy poses many challenges to the mining industry. One of these is the pre-employment testing currently applied, specifically aimed at women who work underground. The mining industry justifies this practice based on

1 Hereafter *Minerals Act*.
2 Hereafter MHSA.
3 Hereafter the Mining Charter.

the fact that section 6(1) of the *Employment Equity Act* 55 of 1998⁵ states that discrimination on the basis of pregnancy is specifically prohibited *unless* the discrimination can be justified on the basis of the “inherent requirements” of the job. This situation poses difficulty for the parties concerned and warrants further discussion.

Currently pregnant underground employees must be removed from their underground workplace due to the physical hazards their work poses in terms of the application of the *Basic Conditions of the Employment Act* 75 of 1997⁶. The implication is that the employer is faced with redundant employees. The intention of this study is to discuss the applicability of relevant court cases within the mining industry taking into account this legal framework. Any consideration of the subject matter must include a consideration of the provisions of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*) and other applicable legislation.

The *Constitution* confirms the democratic value of “equality” and stipulates in section 9(3), 9(4) and 9(5) that no unfair discrimination, whether directly or indirectly, is allowed on a number of grounds, but more specifically and relevant to the applicable research question, on grounds of pregnancy. Discrimination is unfair unless it is proven to be fair. Other provisions contained in the *Constitution* that are relevant include for example section 12, which recognises that everyone has the right to bodily and psychological integrity, and that this includes the right to make decisions concerning reproduction and the right to security in, and control over, their body. A case that will also be included in the discussion is *UWA v Johnson Controls*⁷ where the court decided that it is not for an employer or a court to make decisions on whether a woman’s reproductive role is more important than her economic role. Section 22 stipulates that every citizen has the right to choose a trade, occupation or profession freely. Section 23 states that everyone has the right to fair labour practices and section 24 provides

5 Hereafter EEA.

6 Hereafter BCEA.

7 *UWA v Johnson Controls* 499 US 187 1991.

that everyone has the right to an environment that is not harmful to their health or well-being. These constitutional rights will be investigated to determine their impact on specific justifiable reasons for limitations in instances where discrimination against pregnancy can be justified.

In addition to the above, the EEA stipulates in section 6 that no person may unfairly discriminate, directly or indirectly, against an employee on the grounds of pregnancy. Section 6(2) provides for two defences to a claim of unfair discrimination, namely, in the first instance, when affirmative action measures consistent with the purpose of this act is taken, or secondly, and more importantly for purposes of this discussion to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. The mining industry seems to interpret the latter act as allowing an employer to fairly discriminate against a pregnant or breastfeeding employee if such discrimination is on the basis of the inherent requirements of a job.

The above-mentioned discrimination also includes the dismissal of an employee due to pregnancy. The *Labour Relations Act* 66 of 1995⁸ provides in section 186(1)(c) that a dismissal in this regard means that an employer refuses to allow an employee to resume work after she has taken maternity leave, and is considered discriminatory dismissal. Section 187(1)(e) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy. A relevant case in this regard is *De Beer v SA Export Connection CC t/a Global Paws*.⁹

Although this dismissal is due to the maternity leave, it still falls under the umbrella-concept of pregnancy. It is also important to note that due to the fact that breastfeeding falls within the stipulations of the LRA, this area will also be included in the current research. Dismissals under the circumstances of operational requirements, which is regulated by section

8 Hereafter LRA.

9 *De Beer v SA Export Connection CC t/a Global Paws* 2008 29 ILJ 347 (LC) this case will be discussed later in the dissertation.

189 of the LRA, and incapacity, which is dealt with by Schedule 8 of the LRA, will also be addressed.

The BCEA protects pregnant employees and employees who are breastfeeding against the performance of hazardous work. It further places an obligation on the employer to, for at least 6 months after the birth of the child, provide suitable alternative employment. Section 24 of the *Constitution* provides that everyone has the right to an environment that is not harmful to their health or well-being. Section 5 of the MHSAs imposes a general obligation on employers to provide and maintain a healthy and safe work environment. This research will show the impact pregnancy has on the economical sustainability of mines when it is considered that mines may not send a woman underground during pregnancy or breastfeeding due to the legislative limitations placed on them. The result is that mines in effect have a workforce on paper that is not present underground, doing the actual work.

In terms of the MHSAs the employer may not expose employees to underground conditions if they are pregnant based on section 5 of the MHSAs.¹⁰ In light of this the employer's liability needs to be addressed in the instances where a pregnant employee fails to report her pregnant status to the employer. The question to be asked in this regard is whether an employee's failure to report her pregnant status to her employer as soon as she becomes aware of it should be treated as misconduct.

In chapter 2 the *Constitution*, along with the LRA and EEA, will be scrutinised together with relevant case law. The aim of this is to establish a platform that represents circumstances in which discrimination towards pregnancy are justified.

10 S5(1) of the MHSAs provides that as far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees.

In chapter 3 the validity of pre-employment pregnancy testing will be scrutinised and weighed up against its discriminatory nature to judge the possible justification of this practice in the mining industry. The different legislation and case law will also be discussed to determine the discriminatory and equality measures that need to be in place regarding pregnant and breastfeeding employees.

In chapter 4 the LRA, along with relevant case law, will be scrutinised to determine when an employer will be liable in circumstances dismissing a pregnant employee and what compensation, if any, is payable in such circumstances. The chapter investigates whether a dismissal based on pregnancy can be fair and justifiable within the mining industry context of underground working females. The impact of failure to disclose the pregnancy on the employment relationship will also be addressed.

Finally, in chapter 5 a relevant conclusion will be drawn with regard to the legal question, and proper recommendations for the mining industry will be formulated.

The above outline shows that it is the aim of this dissertation to consider the complexities surrounding pregnancy in the mining industry. This includes challenges that pregnancy poses with regard to equality, unfair discrimination and the mining industry's right to operate for profit.

Chapter 2: Pregnancy and unfair discrimination

2.1 Introduction

This chapter aims to define unfair discrimination in light of the *Constitution* and *Harksen v Lane NO & others*.¹¹ The causality of differentiation and discrimination is linked to the listed attributes of the EEA. The fairness principle when considered in light of discrimination is addressed, as well as fairness within the employment context when it comes to the advancement of economic development in terms of the LRA.

2.2 Defining “unfair discrimination”

The *Constitution* provides in terms of section 8(2) that the Bill of Rights binds natural and juristic persons, which includes employers in the mining industry. Section 9(3) sets out the grounds that are seen as discrimination. Against this background, it is important to consider section 36 of the *Constitution*, which allows for the limitation of some rights contained in the Bill of Rights, but under specific conditions:

36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the content that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

36(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

There are also other provisions contained in the *Constitution* that are relevant to the concept of unfair discrimination. Section 12 recognizes that everyone has the right to bodily and psychological integrity and this

11 *Harksen v Lane NO & others* 1998 1 SA 300 (CC) (Hereafter the *Harksen* case).

includes the right to make decisions concerning reproduction and the right to security in, and control over, their body. Section 22 stipulates that “every citizen has the right to choose their trade, occupation or profession freely”. A very important right is protected by section 23, which states that “everyone has the right to fair labour practices”, after which section 24 provides that “everyone has the right to an environment that is not harmful to their health or well-being”.

At the heart of unfair discrimination lies differentiation. Differentiation, in the employment context, simply means that an employer treats certain employees differently from others, or the employer uses policies or practices that exclude certain groups of employees.¹² Differentiation is a precondition for discrimination and is a neutral term and not necessarily negative. It has a pejorative connotation. It only becomes discrimination once differentiation takes place for an unacceptable reason, such as those listed in section 6(1) of the EEA.

Sometimes employers are forced to discriminate against employees. This means that a sensible approach to discrimination is to allow for permissible discrimination, for example where an employer, within legally defined limits, is allowed and able to justify such discrimination. This is in instances as provided by section 6(2) of the EEA that are related to affirmative action measures and the inherent requirements of a job.

In the *Harksen* case¹³ the Constitutional Court held:

Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner...If the differentiation has been found to have been on a specified ground, then unfairness will be presumed. If on

12 Dupper OC *et al Essential Employment Discrimination Law* 2nd ed 2007 (Juta Cape Town) 33.

13 *Harksen v Lane NO & others* 1998 1 SA 300 (CC) at 325A.

an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

Thus, if differentiation is on a specified ground that will objectively impair human dignity, then it will amount to discrimination. If differentiation is on an unspecified ground then unfairness needs to be proven by the complainant and should indicate an unfair impact on the individual.

2.2.1 Causality

When a complainant infers discrimination the person should indicate that they have been discriminated against because they, as an employee, possessed one of the listed attributes as set out in section 6(1) of the EEA. There should be a causal link between the discrimination and the listed attributes, as mentioned above.

The English courts rely on the following standard causation test:¹⁴

Cases of direct discrimination can be considered by asking the simple question: would the complainant have received the same treatment from the defendant but for his or her sex? This simple test possesses the double virtue that, on the one hand, it embraces both the case where the treatment derives from the application of a gender-based criterion, and the case where it derives from the selection of the complainant because of his or her sex; and on the other hand it avoids, in most cases at least, complicated questions related to concepts such as intention, motive, reason or purpose, and the danger of confusion arising from the misuse of those elusive terms.

The standard causation test¹⁵ does not resolve the further question: must the impermissible ground be the sole cause of the discrimination, or is it sufficient if it is on one of the grounds? In *Louw v Golden Arrow Bus Services (Pty) Ltd*¹⁶ Mr Louw was employed by a wholly owned subsidiary

14 *James v Eastleigh Borough Council* 1990 1 IRLR (HL) 228 at 194, cited with approval in *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC).

15 Also referred to as the 'but for' test.

16 *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) at 197-198 (Hereafter the *Louw* case).

of Golden Arrow as a buyer in 1984 at a salary of R750 a month. By 1990, his salary had risen to R1 500. Louw did not complain that his increases over those 14 years were too slow. He could not, as the law is not concerned with the size of employees' increments. However, he contended that the company had commenced discriminating against him from 1990 when it appointed a white man, a Mr Beneke, as a buyer on a salary of R2 300 per month and promoted him to warehouse supervisor in 1994. Louw argued that the discrimination grew worse as his salary and that of Beneke were annually increased by the same percentage, resulting in a gap of R2 055 between their salaries by 1998. Louw's case, as outlined in his pleadings, was that at all material times, his work and that of Beneke were of equal value or, alternatively, that the difference in salary was disproportionate to the value of the two jobs. Fundamental to Louw's case was that the reason for the difference between his salary and that of Beneke was that he was black and Beneke, white. However, Louw went further. He did not merely claim that the company had and was continuing to exploit him because he was black. He contended, as a backstop, that the difference in his salary and that of Beneke constituted indirect discrimination on the grounds of race, colour or ethnic origin because the company "applied facts in its pay evaluation that had a disparate impact on black employees". He listed these factors as performance, potential, responsibility, experience, education, attitude, skills, entry level and market forces.

The company contended, quite simply, that there was a difference between the two employees' salaries because their work was not of equal value and that the difference was attributable to a number of considerations, none of which involved race discrimination.¹⁷ The court provides the first step in search of an answer by distinguishing between three possible approaches. The first is to say that any contamination by impermissible unfair discrimination is sufficient to find that the act or omission complained of is caused or attributable to it. The second is to say that an immaterial

¹⁷ See Erasmus N *Unfair Labour Practices* written for the South African Labour Guide at www.labourguide.co.za as visited on 27 August 2012.

contamination is tantamount to no contamination. The third seems to be that there is unfair discrimination to the extent that the discrimination in the case under investigation is caused or contaminated by it. The Labour Appeal Court upheld the LC decision in the *Louw* case¹⁸ and held that in cases concerning automatically unfair dismissals based on alleged discrimination, the courts must identify the main or dominant reason. Grogan¹⁹ states:

If that relates to a legitimate operational purpose, the claim of discrimination fails; a person cannot simultaneously have two dominant reasons for performing the same act.

In *Woolworths (Pty) Ltd v Whitehead*²⁰ during the second half of 1997 the appellant advertised a vacancy for a position it termed “Human Resources: Information and Technology Generalist”. In October of that year the respondent was interviewed for this position. She was offered the job, but turned it down and gave as the reason that she was not happy with the remuneration. In seeking to fill the position the appellant decided to contact the respondent again to see whether her circumstances had changed. It transpired that her circumstances had in fact changed and she was then interested in the position. In her evidence she conceded that when contact was made with her this time she was informed by the appellant that there were other candidates that the appellant would still have to interview before it could make a decision as to who should get the job.

The appellant on behalf of Woolworths (Pty) Ltd, Mr Inskip, was the Senior Executive of the appellant and the person under whom the position fell. He had an interview with the respondent on 17 December 1997. Both in her evidence in chief and under cross-examination, the respondent admitted that by the end of the interview on 17 December, she felt very confident of her prospects of getting the job. Mr Inskip had made it clear that he

18 *Louw v Golden Arrow Bus Services (Pty) Ltd* 2001 22 ILJ 2628 (LAC).

19 Grogan J *Employment Rights* 2010 2nd Impression (Juta Cape Town) 178.

20 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC) (Hereafter the *Woolworths* case).

needed to see other candidates before he could make a final decision with regard to who the appellant would give the job to.

Inskip offered the respondent a fixed term contract that would have expired just in time for her confinement. It is common cause that at that stage Mr Inskip had not yet interviewed Dr Young. When asked why he offered the respondent a fixed term contract even before he could interview Dr Young and decide whether he would offer the job to Dr Young, Mr Inskip testified that he wanted to keep the appellant's options open. The respondent did not accept the offer of a fixed term contract. Subsequently Mr Inskip interviewed Dr Young and Dr Young was appointed to the job.

The appellant's case was argued on the basis that the appellant conceded that it had discriminated against the respondent, but challenged the contention that such discrimination had been unfair. The discrimination did not take the form of the appellant disqualifying the respondent altogether from possible appointment to the position of Human Resources: Generalist. What happened was that the fact that the respondent was pregnant and would, therefore, by virtue of such pregnancy, not be able to meet the appellant's continuity requirement, was taken into consideration together with the fact that there was another candidate, namely, Dr Young, whom the appellant found was a far better candidate than the respondent and would be able to meet the continuity requirement of the appellant's operations.

All three judges of appeal pronounced on the issue of causality. Zondo AJP expressed support for the 'but for' test, which seems to fall under the second approach as set out in the *Louw* case.²¹ Willis JA seemingly rejected the possibility of *ex post facto* unscrambling of events in order to apply the 'but for' test. In contrast, Conradie JA remarked that "once it was common cause that the respondent's pregnancy had operated against her, the appellant became obliged to explain why that was so" and added that

21 In the *Louw* case it was stated that an immaterial contamination is tantamount to no contamination.

“the appellant became burdened with an evidentiary onus which obliged it to present evidence lest it fail to persuade the court of the merits of its case”.²²

It should be noted that the need to ground differentiation as the basis for any claim of unfair discrimination will inevitably result in a claim being categorised as either direct or indirect discrimination. Direct discrimination occurs when a person is treated less favourably simply on the grounds as set out in section 6(1) of the EEA. Indirect discrimination occurs when an ostensibly neutral requirement adversely affects a disproportionate number of people from a specific group, and cannot be justified.²³

In *Ntai v South African Breweries Ltd*²⁴ the court stated that once an applicant proves discrimination on a listed ground, the onus shifts to the employer to prove that such discrimination is fair. A mere allegation of discrimination is not sufficient to establish a *prima facie* case.²⁵ Where the employer remains silent, a negative inference may be drawn.

The causality between discrimination and the attribute of pregnancy is not as clear-cut in the mining industry due to numerous factors such as section 26 of the BCEA, which will be discussed in chapter 4.

2.2.2 Determining the fairness or otherwise of discrimination

An enquiry as to fairness would involve a moral or value judgement that takes into account all the circumstances.²⁶ The basic principles regarding the fairness or otherwise of discrimination firstly involve whether an employee is successful in linking differentiation with a listed ground. This is not only discrimination, but that the discrimination is presumed to be unfair.

22 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

23 Dupper *et al Essential Employment Discrimination Law* 38.

24 *Ntai v South African Breweries Ltd* 2001 2 BLLR 186 (LC).

25 See also *Transport and General Workers Union v Bayete Holdings* 1999 20 ILJ 1117 (LC).

26 See, for example, *Media Workers Association of SA v Press Corporation of SA Ltd* 1992 4 SA 791 (A) at 798H-I.

This means the onus shifts to the employer to attempt to justify the discrimination. Secondly an employee should be successful in linking differentiation with an unlisted ground. This is also regarded as discrimination but, in contrast to discrimination based on a listed ground, there is no presumption of unfairness. This means the employee will have to show that the discrimination is unfair.²⁷

In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*²⁸ the court found that 'fairness' was a means of sorting permissible from impermissible discrimination. In considering what constitutes 'unfairness' in discrimination cases under labour law, the court stated:

The Act provides two complete defences to unfair discrimination on any of the prohibited grounds. By virtue of item 2(2)(b), if the inherent requirements of a job justify an act of discrimination, this is a complete defence to an unfair discrimination claim in terms of item 2(1)(a). Affirmative action measures that satisfy the requirements of item 2(2)(c) also provide a complete defence to unfair discrimination ... Discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.

In *Whitehead v Woolworths (Pty) Ltd*²⁹ the court, when determining unfairness, relied on the following elements:

- (i) the impact of the discrimination on the complainant;
- (ii) the position of the complainant in society;
- (iii) the nature and the extent of the discrimination;
- (iv) whether the discrimination has a legitimate purpose and to what extent it achieves that purpose;

27 Gixana-Khambule BJ *Unfair discrimination in employment*, Dissertation submitted in the partial fulfilment of the requirements for *Master Legum* at the University of PE 2004 19.

28 *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC) (Hereafter *Dingler* case).

29 *Whitehead v Woolworths (Pty) Ltd* 1999 20 ILJ 2133 (LC) (Hereafter *Whitehead* case). Section 6(2) of the EEA sets out the grounds on which discrimination is not unfair. S6(2) states that it is not unfair discrimination to

- (a) Take affirmative action measures consistent with the purpose of this Act; or
- (b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

- (iv) whether there are less disadvantageous means to achieve the purpose;
- (v) whether and to what extent the respondent has taken reasonable steps to address the disadvantage caused by the discrimination, or to accommodate diversity.³⁰

In the *Harksen* case³¹ the court listed various factors that must be considered in determining the unfairness or otherwise of discrimination:

- (i) the position of the complainant in society;
- (ii) the nature of the provision or power and the purpose sought to be achieved by it; and
- (iii) the extent to which the discrimination has affected the rights of the complainant and whether it has led to an impairment of their fundamental dignity.

In the *Woolworths* case³² Willis JA held that:³³

... it is a simple matter for an employer to accommodate the pregnancy of the shelf-packer in a supermarket, the waitress in a restaurant, the receptionist at an hotel, the seamstress working on the production line of a clothing factory. It is not difficult to accommodate the pregnancy of women in the numerous lowly paid, dreary and routine jobs with which women, especially, are burdened. When it comes to executive positions of critical importance, the consequences go beyond imposing a burden on employers. They impact negatively on the capacity of the economy, as a whole, to grow and, in so doing, its capacity to create new jobs To find that the pregnancy of a prospective employee cannot be taken into account in deciding whether or not to offer her employment may seem to be fair to prospective employees but it would certainly be unfair to employers and society as a whole and, by reason of the damaging consequences of such a finding upon society as a whole, ultimately unfair to prospective employees as well. After all, prospective employees need jobs to apply for in the first place.

Section 6 of the EEA protects 'an employee' against unfair discrimination, and section 1 of the EEA defines 'an employee' as follows:

- Any person other than an independent contractor who-
- (a) Works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
 - (b) In any manner assists in carrying on or conducting the business of an employer.

30 *Whitehead v Woolworths (Pty) Ltd* 1999 20 ILJ 2133 (LC) at 2141 D.

31 *Harksen v Lane NO & others* 1998 1 SA 300 (CC). The importance of these factors is that they should inform the meaning we give to the defences available to employers in terms of section 6(2) of the EEA and section 187 (2) of the LRA.

32 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

33 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC) at par 146.

This definition is, for all intents and purposes, the same as that used in the LRA and the BCEA. In addition, section 9 of the EEA expressly includes an 'applicant for employment' in the protection against unfair discrimination.

Employees are protected against the whole range of possibly discriminatory policies and practices of an employer and in contrast, an applicant for employment is, by definition, only protected against unfair discrimination in the employer's decision about whom to appoint. Thus a prospective pregnant employee can rely on this section of the EEA and cannot upon application for a position be discriminated against only on the basis that she is pregnant.

It is clear that the EEA extends protection to employees and applicants of employment. The fairness enquiry needs to be made to justify the discrimination. With regard to the acceptance of discrimination it will depend if the object is legitimate and the means to achieve the objective is proportional and rational. Therefore the justification of discrimination needs to be addressed.

2.3 Justifying discrimination

Discrimination is reputed to be unfair until the contrary is proved. The EEA provides two grounds on which this presumption can be rebutted.³⁴ Section 6(2) of the EEA states:

It is not unfair discrimination to-

- (a) Take affirmative action measures consistent with the purpose of this Act, or
- (b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

The preamble of the EEA supposes that the benefits granted must be proportional to the goal of achieving equality.³⁵ The provision regarding affirmative action as justifiable ground wants to protect affirmative action

34 Grogan J *Workplace Law* 2011 10th ed (Juta Cape Town) 101.

35 Grogan *Workplace Law* 102.

appointments against attack on the basis of unfair discrimination by non-designated employees.³⁶

2.3.1 An inherent requirement of a job

This defence is available in terms of section 6(2)(b) of the EEA and section 187(2)(a) of the LRA. The phrase ‘inherent requirements of a job’ originates in the *Discrimination (Employment and Occupation) Convention* 111 of 1958 of the International Labour Organisation (ILO). The Committee of Experts has emphasised the need for a strict interpretation of this phrase. This Convention is one of the interpretative guidelines of the EEA.

In *Association of Professional Teachers & Another v Minister of Education & Others*³⁷ the court held that a differentiation based on the inherent requirements of a job “should only be allowed in very limited circumstances and should not be allowed where the decision to differentiate is based on subconscious perception that one sex is superior to the other”.

The phrase ‘inherent requirement of a job’ contains two important words that together determine its meaning. The word ‘inherent’ is taken to mean a permanent and essential quality or attribute. According to Grogan³⁸ ‘inherent’ “suggests that possession of a particular personal characteristic must be necessary for effectively carrying out the duties attached to a particular position”. The word ‘requirement’ carries with it an element of compulsion.

In the *Whitehead* case³⁹ the court summarised its views on Woolworths’ defence that it had discriminated against Ms Whitehead because of the ‘inherent requirements’ of her position in these words:⁴⁰

36 For purposes of this dissertation affirmative action as a defence to discrimination claims will not be discussed as it is not relevant in the context of pregnancy related challenges.

37 *Association of Professional Teachers & Another v Minister of Education & Others* 1995 16 ILJ 1048 (IC).

38 Grogan *Workplace Law* 107.

39 *Whitehead v Woolworths (Pty) Ltd* 2000 21 ILJ 571 (LAC).

40 *Whitehead v Woolworths (Pty) Ltd* 2000 21 ILJ 571 (LAC) at par 37 – 38.

This provision of the Act only excuses discrimination based on 'an inherent requirement of the particular job'. This implies that the job itself must have some particular attribute. This indispensable attribute however must relate in an inescapable way to the performing of the job required. Getting a job done within a prescribed period could well be an inherent job requirement. But to succeed on this ground a party relying thereon must satisfy the Court that time was of the essence... In any event the concept of inherent job requirement implies that an indispensable attribute must be job-related. To suggest that the requirement as in this case, of uninterrupted job continuity, is an inherent job requirement is to distort the very concept. If the job can be performed without the requirement, as it can in this case, then it cannot be said that the requirement is inherent and therefore protected under item 2(2)(c) of Schedule 7 to the Act.

The *Woolworths* judgment was reversed on appeal.⁴¹ The LAC held that the consideration of continuity of employment was compelling enough to prove that Woolworths' overriding consideration was not an aversion to appointing pregnant women. It was therefore not possible to make a finding that Ms Whitehead's pregnancy was the dominant reason for the decision not to offer her a permanent position.⁴²

From what was said in the *Woolworths* case it would seem as if the Labour Court is prepared to recognise some freedom for employers. Every job and every business has an essential core. As long as the requirements bear a connection with the essence of the job and the business (as objectively determined), the employer should be able to raise the defence.⁴³

2.4 Justification for non-employment of pregnant or nursing females

The first possible justification for not employing pregnant or nursing female employees for underground work is that it is in the interest of their own health and/or that of the unborn child. Potentially this can justify not employing them, either on the basis of the inherent requirement of the job

41 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

42 As per Grogan *Employment Rights* 205 only Conradie JA was prepared to make a finding to the contrary. He held that the company had concocted the version about a better candidate, and had in reality decided not to offer Ms Whitehead the position because she was pregnant.

43 Dupper *et al Essential Employment Discrimination Law* 83.

or on the general fairness test of section 6(2) of the EEA. In a well-known decision in *United States International Union: UWA v Johnson Controls*⁴⁴ the court rejected such defence and held that it was not for an employer or a court to make decisions on whether a woman's reproductive role is more important than her economic role. This is a choice to be made by the woman. The employers' fears for potential liability were addressed by the argument that there would be no such liability if the employee made a fully informed decision in this regard. Whether such an approach would be adopted by South African courts remains to be seen. In section 12(2) the *Constitution* states that everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

The fact remains that section 26(2) of the BCEA requires the employer to provide for suitable, alternative employment if it is practicable to do so. In the mining industry surface positions are much fewer than underground positions and not easy to come by. Therefore it is mostly not practicable to provide such alternative employment, in which case an employee becomes redundant.

2.5 Economic Impact on the Employer

The purpose of the LRA, amongst others, is to advance economic development. Therefore fairness in the employment context must be linked to the ultimate purpose for which employers exist, to create and maintain jobs.

In the *Woolworths* case⁴⁵ Willis JA concluded that at this stage of the country's history, to hold that an employer cannot take into account a prospective employee's pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to the South African society. He stated further that it would be inappropriate to ignore the fact

44 *United States International Union: UWA v Johnson Controls* 499 US 187 (1991).

45 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

that, as a general rule, the existence of elites can only be justified if they produce a dividend for society that exceeds the costs that they incur.⁴⁶

In the case of *Botha v Import Export International CC*⁴⁷ the court referred to a decision in *Dekker v Stichting Vormingsentrum VoorJong Volvassenen (VJV-Centrum) Plus*:⁴⁸

It should be observed that only women can be refused employment on the grounds of pregnancy and such a refusal therefore constitute direct discrimination on the ground of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

The next case that was cited in the *Botha* case is a British decision of *Webb v ENO Air Cargo (UK) Limited*⁴⁹ in which it was held that:

Dismissal of pregnant women recruited for an indefinite period cannot be justified on grounds related to her inability to fulfil a fundamental condition of her employment contract. The protection afforded by Community Law to a woman during pregnancy and after child birth cannot be dependant on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed.

Citing the above cases, the court recognised that in those countries, the rationale behind the decision was to encourage women to have more children due to declining birth rates in those countries. In South Africa, however, the court held that this would not be the case due to our escalating population as well as the fact that our economy differs substantially from those of these developed nations. The court in the *Botha* case went on to conclude that, when it comes to executive positions of critical importance, if pregnant female employees were to be granted

46 Ledwaba LJ *Dismissal due to pregnancy* for the degree of *Magister Legum* in the Faculty of Law at the Nelson Mandela Metropolitan University 2006 26.

47 *Botha v Import Export International CC* 1999 20 ILJ 2580 (LC) at par 102 (Hereafter *Botha* case).

48 *Dekker v Stichting Vormingsentrum VoorJong Volvassenen (VJV-Centrum) Plus* 1992 ICR 325 at par 102.

49 *Webb v ENO Air Cargo (UK) Limited* 1993 1 WLR at par 110.

such jobs, it would impact negatively on the capacity of the economy to grow and also on the capacity to create new jobs.

The court held that:⁵⁰

... to find that the pregnancy of a prospective employee cannot be taken into account in deciding whether or not to offer her employment may seem to be fair to prospective employees but it would certainly be unfair to employers and society as a whole and, the reason of the damaging consequences of such a finding upon society as a whole, ultimately unfair to prospective employees as well. After all, prospective employees need jobs to apply for in the first place.

Although the above judgment dealt primarily with discrimination against pregnant female job applicants, it has a bearing on women who are currently pregnant and who are currently in an employment relationship. It clearly highlights that women may not be discriminated against on the basis of pregnancy unless a position in question has not only an impact on the company, but on the economy as a whole.

Ledwaba⁵¹ states that the legitimate interests of the employer should be weighed against the impact his conduct has on the employee's rights and interests in order to prevent a commercial rationale at the expense of the dignity of the employee.

2.6 Conclusion

It is clear that *Constitution* is the supreme authority and that section 9 makes provision for grounds on which any entity or person may not unfairly discriminate directly or indirectly against anyone. Unfair discrimination is differentiation on a specified ground and should be established by the complainant. The test for unfairness focuses on the impact of the discrimination on the complainant and others in his or her situation. There needs to be a causal link between the discrimination and the listed attributes as set out in section 6(1) of the EEA.

50 *Botha v Import Export International CC* 1999 20 ILJ 2580 (LC) at 2587.

51 *Ledwaba Dismissal due to pregnancy* 26.

Once an applicant proves discrimination on a listed ground, the onus shifts to the employer to prove that such discrimination is fair. As in the *Leonard Dingler* case it was found that discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. The *Whitehead* case underlined the elements to determine the unfairness of the discrimination.

Discrimination is justifiable in terms of section 6(2) of the EEA on two grounds namely affirmative action measures and an inherent requirement of a job. As stated in the *Botha* case, however, the economic impact on the employer must also be taken into consideration. In the mining industry the inherent requirements of a job can be taken into consideration when a pregnant applicant is not considered for a position. All is fair in normal circumstances, but one should address the specific challenges related to pregnancy within the mining industry. There are other factors to consider related directly to underground working females such as employment testing, the protection of such employees in the industry and the provisions of the *Mine Health and Safety Act 29 of 1996*.

Chapter 3: Pregnancy related challenges

3.1 Introduction

There are many challenges related to pregnant employees that should be addressed. Firstly, “pregnancy” should be defined to understand its scope. Secondly, employment testing in the mining industry is compulsory due to the inherent requirements of the job and in terms of the MHSA, and should therefore be discussed. A further factor for consideration in the mining industry environment is how pregnant employees are protected during the employment relationship. The impact of the MHSA and the justification for non-employment of pregnant employees will also be addressed in the scope of this chapter.

3.2 Defining “pregnancy”

Section 1 of the EEA defines pregnancy to include intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy. Section 187(1)(e) of the LRA defines pregnancy as “the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy”.

The commissioner of the CCMA in *Masondo and Crossway*⁵² stated that “any reason related to her pregnancy” as held in section 187(1)(e) of the LRA would probably include breastfeeding and family responsibility. In *De Beer v SA Export Connection CC t/a Global Paws*⁵³ the court held:

The phrase “any reason related to her pregnancy” should, in my view, be carefully considered by the courts. No rigid rules can be given by this Court and each matter should be considered on its own facts. ... The phrase “any reason” is not only related to pregnancy related health problems but should also include babies who are ill and need nurturing from their mothers.

52 *Masondo and Crossway* 1998 7 CCMA 6.13.1 (CCMA).

53 *De Beer v SA Export Connection CC t/a Global Paws* 2008 29 ILJ 347 (LC).

It is clear from the preamble of the EEA and case law that pregnancy must not be interpreted in the narrow sense of the word, but includes breastfeeding and family responsibility.

3.3 Employment Testing

The specific context of the mining industry compels all applicants and employees to undergo employment testing due to the obligations stated in section 26 of the BCEA. The LRA acknowledges the need for occupational medical examinations indirectly in the fields of dismissal.⁵⁴ Schedule 8, item 9 of this act refers to a required performance standard against which the ability of an employee must be measured when assessing the fairness of a dismissal. Item 10 of the schedule on the other hand instructs the employer to investigate a number of aspects of a disability causing medical incapacity.

The BCEA requires a pregnant employee to notify the employer of her pregnancy in writing.⁵⁵ In addition, employees engaged in night shift work must be enabled to undergo a medical examination for the account of the employer before the employee starts night work within a reasonable period of the employee starting night work and at appropriate intervals while the employee continues to perform such work.⁵⁶ The confidentiality of any medical examination performed in terms of the BCEA is expressly protected in terms of section 90.⁵⁷

54 Section 188: "A dismissal that is not automatically unfair is unfair if the employer fails to prove that (a) the reason for the dismissal is a fair reason related to the employee's capacity."

55 Section 25 and 26 of the BCEA.

56 Section 17(3) of the BCEA.

57 Section 90(3): "The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only (a) in accordance with the ethics of medical practice; (b) if required by law or court order; or (c) if the employee has in writing consented to the release of the information."

The MHSA requires the mine manager to establish a system of medical surveillance⁵⁸ applicable to the health hazards to which employees are exposed. The programme must assist the mine manager to eliminate, control and minimise the health risk and the hazards to which his employees may be exposed. The medical surveillance must consist of an initial medical examination and other medical examinations at appropriate intervals. The examinations must assist in the prevention, detection and treatment of occupational diseases.⁵⁹

The *Occupational Health and Safety Act* 85 of 1993⁶⁰ sets out a list of medical examinations that employers must perform on their exposed employees and which employees, under regulated conditions, must allow to be performed. The Act instructs every employer to provide every employee with a working environment that is safe and without risk to his/her health.⁶¹ In this endeavour, the employer must⁶² enforce such measures as may be necessary in the interest of safety and health. These include medical surveillance and biological monitoring.⁶³ Consequently pregnancy testing is relevant in the mining industry in order to determine if a female may proceed with underground work.

Employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose.⁶⁴ The confidentiality of this information must be protected by the employer.

58 Section 102: "Medical surveillance means a planned programme of periodic examinations, which may include clinical examinations, biological monitoring or medical tests, of employees by an occupational health practitioner or by an occupational medical practitioner contemplated in s 13."

59 Section 102: "Occupational disease means any health disorder including an occupational disease as contemplated by the Occupational Diseases in Mines and Works Act or by the Compensation for Occupational Injuries and Diseases Act."

60 Hereinafter OHSA.

61 Section 8(1).

62 Section 8(2)(h).

63 Lapere JNR *Occupational Medical Examinations and Labour Law* Submitted in partial fulfilment of the requirements for the degree of *Magister Legum* in the faculty of law at the University of Port Elizabeth 2003 9.

64 Code of Good Practice: Incapacity Rule 14.1.1.

3.3.1 Medical Testing

Section 1 of the EEA defines 'medical testing' to include "any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition". However, section 7 of the same act prohibits medical testing and states that medical testing of an employee is prohibited unless it is permitted by legislation or legislation requires the testing, or it is justifiably due to medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

In considering whether medical testing is justified, Du Toit *et al*⁶⁵ contest that the following are some of the criteria to be taken into account:

Whether the work involves physical activity; whether the test relates to actual and reasonable requirements of the job. Whether persons with disabilities are reasonably accommodated in carrying out the test. Whether applicants have been adequately informed as to the nature and purpose of the test and the fact that the results will be confidential. All applicants, and not only selected groups such as disabled persons, should be subjected to the medical tests. The results of the medical tests should be used for their states purposes only.

Distinguishing, excluding or preferring an employee or applicant on the basis of an inherent requirement of the job does not constitute unfair discrimination in terms of the EEA.⁶⁶

When medical tests are carried out with the consent of the individual it may be regarded as an infringement of his or her right to privacy in terms of section 14 of the *Constitution*, unless it can be shown that the consent given was 'informed' consent.⁶⁷

65 Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S *Labour Relations Law* 3rd ed 2000 (Lexis Nexis Butterworths Cape Town) 452.

66 Section 6(2)(b).

67 Dupper *et al Essential Employment Discrimination Law* 191. 'Informed' consent will mean that the employer has informed the employee of all her rights and the employer has explained why the pregnancy testing is necessary so that the employee can give her consent after considering all relevant information.

Should an employee be tested after giving 'informed' consent, and test positive for an illness or medical condition, he or she may face dismissal provided that the medical condition is such that it renders the employee incapable of continuing with his or her employment. In these circumstances the correct procedure must be followed, which should include an investigation into all alternatives short of dismissal.⁶⁸

The onus is still on the employer to show that a specific physical or mental ability is job-related. The employer need not obtain prior consent from the Labour Court to perform these medical tests. The testing is justifiable in light of the following conditions, namely medical facts, employment conditions, social policy, the fair distribution of employee benefits and the inherent requirements of a job. However, if called upon to justify acting upon or taking a decision based on information revealed by these tests, an employer must be able to indicate that legislation permits such testing or that such testing is justifiable.⁶⁹ In terms of the inherent requirement of working underground it is imperative that an employee may not be pregnant due to the health hazards of such work for the unborn child and the breastfeeding employee.

3.3.1.1 *Fitness to work, pre-employment assessment and selection*

The concept "fitness to work" implies that an occupation has inherent health requirements that should be met by a person in that occupation in order to minimise the risk of injury or illness. The concept of fitness is thus closely associated with the concept of risk.⁷⁰

Occupational health risks fall into two categories. Firstly, there are risks associated with exposure to a hazard in a particular occupation. These hazards include noise, heat, dust, etcetera, with their associated adverse

68 See Item 10 of the Code of Good practice: Dismissal in schedule 8 of the LRA; Basson, Christianson *et al Essential Labour Law* Vol I 3ed (Labour Law Publications Pretoria) 2003 at 216-224.

69 Dupper *et al Essential Employment Discrimination Law* 194.

70 Badenhorst CJ *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference* 2009 70.

health effects on exposed employees; and secondly, risks associated with failure to meet the capabilities (physical or psychological) required of a particular occupation. Certain occupations pose particular demands on the employee's ability to perform the work in a manner that does not increase the likelihood of injury or illness to the employee or to co-workers.⁷¹

The above-mentioned categories of risk imply four occupational categories, the first of which entails those with specific health requirements, but low hazard exposure for example bulk truck drivers, onsetters and banksmen. The second category includes jobs with specific health requirements and high hazard exposure for example rock drill operators and locomotive drivers. The third category is the one with low health requirements, but high hazard exposure for example welding and underground maintenance staff, and finally the category of work with low health requirements and low hazard exposure for example general surface workers, office and administrative staff.⁷²

Medical evaluation of fitness to work has to cover both types of risk. A programme of examinations should ensure that minimum medical requirements are met by employees, and also that any adverse health effects from exposure to hazards in the workplace are detected at an early stage, enabling remedial action to be taken.

3.3.1.1.1 Minimum standards of fitness

The minimum standards of fitness for an occupation includes the capabilities needed to perform the tasks required in the occupation (inclusive requirements), as well as those abnormalities that the employee should not have in order for the job to be performed safely. Even though the employer attempts to reduce or minimise the hazards to which employees are exposed as part of a moral obligation, inherent health and

71 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference 70.*

72 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference 70.*

safety risks will still remain in certain circumstances. The rationale for conducting such examinations is to ensure that people who have a reasonable likelihood of suffering from the hazards of the job or of imposing additional risk on co-workers are identified and managed in such a manner that the risks are minimized.⁷³

Apart from a major “philosophical” shift, the scope of the MHSA has been extended, rather specifically, to medical surveillance.⁷⁴ This was done primarily with regard to “employees exposed to health hazards” and actions applicable to employees rendered unfit as a result of occupational disease.⁷⁵ Medical surveillance, in terms of its intent, is therefore nothing other than a risk-based medical examination or, quite plainly, an assessment of health risk.

At first glance, the MHSA addresses both medical surveillance and standards of fitness with admirable circumspection. However, on closer analysis, there are two issues that appear to have been underestimated or even ignored. The first of these is the fact that hostility of the underground environment, especially in deep-level mines, is not restricted to traditional hazards such as dust, heat and noise, but also to the physically demanding nature of most work routines. Yet, with the exception of heat tolerance screening (HTS), the health risk of over-exertion and/or premature fatigue receives inadequate recognition. Also, the worker cannot get away from his/her working environment – even when resting, workers are still exposed. The second issue is related to the South Africa Government Department of Minerals and Energy Guideline on standards of fitness, in which “fitness” is equated, by implication, to the absence of disease.

Quite obviously, this is not irrelevant, but it ignores the health risk associated with poor nutrition and inappropriate shift systems, for example. In this respect the only directive that may have some relevance in the

73 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference* 70.

74 Section 13 of MHSA.

75 Section 13(6) and (7) of MHSA.

MHSA is section 13(5); which provides that “an occupational medical practitioner must promote the health and safety of employees”.⁷⁶

Against the above background it becomes apparent that in health risk assessments done to exclude the possibility of premature fatigue, over-exertion or repetitive strain injury, where such risks indeed exist, pregnancy and breastfeeding are still neglected. Such assessments should be amended to award the necessary consideration to pregnancy and breastfeeding risks.

In establishing minimum standards for fitness for work, three steps should be followed, namely occupational health risk assessment, man-job specifications, and setting standards for medical surveillance (including physical and functional ability).⁷⁷

The first step must be to conduct an occupational health risk assessment. The objective of an occupational health risk assessment is to identify all relevant health hazards and the degree to which the various occupations are exposed to these hazards. Risk is the product of both the hazard (the capacity to cause harm) and the extent of exposure. A clear understanding of these risks is essential prior to setting medical standards for these occupations. At the end of this occupational health risk assessment process, each occupation should have a clearly defined occupational health risk profile.⁷⁸

The second step is to document the different man-job specifications (also referred to as person-job specifications). This step includes the process of documenting the risks for each occupation. These documents usually comprise a page per occupation, and are kept in a file. Copies of this file are held at the medical station and the Human Resources Department.

76 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference 70.*

77 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference 70.*

78 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference 70.*

These documents are generally referred to as “man-job specifications” for the various occupations, and should cover both the inherent requirements of the jobs and the expected hazard exposure(s).⁷⁹

The third step will be to set in place standards for medical surveillance. Once occupational health risk profiles and man-job specifications are established, the occupational medical practitioner should set medical standards for each of these occupations as determined by the risk profiles. The medical examinations required to identify the relevant exclusions (or inclusions) should be stated, as well as the minimum standard required. The standards of physical ability needed to perform certain jobs safely as well as functional ability should be stated. A test battery to conduct and measure these abilities is necessary to ensure ability to perform work safely and productively.

For the purposes of the mining industry, it seems that testing for pregnancy is necessary to ensure the ability of an employee to perform work safely. As no pregnant employee is permitted to work underground for safety reasons and the employer can be held liable in the event of an accident while an employee is pregnant, the employer is forced to do pregnancy testing.

3.3.2 Testing for pregnancy

Discrimination on the basis of pregnancy is specifically prohibited in terms of section 6(1) of the EEA unless the discrimination can be justified on the basis of the inherent requirements of the job. In addition, medical testing is prohibited in terms of section 7(1) of the EEA unless justifiable on the basis of the inherent requirements of the job.

79 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference 70*.

However, in *Mashava v Cuzen & Woods Attorneys*,⁸⁰ the court decided that an employer should not be allowed to request pre-employment pregnancy testing, not even with reference to the inherent requirements of the job, on the basis that considerations of privacy outweigh the arguments in favour of the inherent requirements of the job.

If an employee is appointed and falls pregnant after the appointment, the employer may not dismiss her on the basis of her pregnancy. Such a dismissal will constitute an automatically unfair dismissal in terms of section 187(1)(e) of the LRA, which states:

- 187(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5⁸¹ or, if the reason for the dismissal is-
- (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;

The defence of the inherent requirements of the job provided for in section 187(2) of the LRA is not available for a dismissal on the basis of pregnancy. An employer will therefore not be able to raise the defence of inherent requirements of the job by for instance stating that the nature of the job requires continuity and that it can consequently not be filled by a pregnant employee who will be absent from work on maternity leave.⁸² The defence is only available where a dismissal is attacked on the basis that the reason for the dismissal is unfair discrimination on certain other listed grounds.

It is fair not to employ a female employee who refuses to undergo a pregnancy test because the employer needs to have clarity on this fact in order to comply with its health and safety obligations and to prevent a contravention of section 26 of the BCEA.

80 *Mashava v Cuzen & Woods Attorneys* 2000 21 ILJ 402 (LC) (Hereafter *Mashava* case).

81 Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

82 See the criticised minority decision of Wallis AJ in *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

Article 9 of the *Maternity Protection Convention* 183 of 2000 of the ILO states that countries that have ratified the convention should introduce appropriate measures to prevent discrimination on the grounds of pregnancy. This includes a prohibition of testing for pregnancy when a woman applies for employment. An exception is made for instances where testing is required by national laws or regulations with respect to work that is prohibited or restricted for pregnant or nursing woman under national laws or regulations, or where there is a significant risk to the health of the woman and child. This convention has not been ratified⁸³ by South Africa. If it had been ratified by South Africa, it may have been influential in the current legal status as it is based on the view that pregnancy testing is unacceptable unless it is authorised by legislation or regulation, and then only in specified circumstances.

Currently in the mining industry pregnancy testing is conducted by the employer prior to employment of underground employees. The reasons for this are contained in section 26 of the BCEA and the preamble of the MHPA, which provides that the employer must minimise hazards in the workplace. A pregnant employee cannot perform duties of a certain description, for example rigging or drilling, as it will be hazardous to her own health and that of her unborn child. As part of this practice applicants for employment have to give their consent for these tests to take place before employment is secured. Employees, after being appointed in an underground position, do not undergo regular pregnancy tests. This is problematic for the employer because if the employer does not know about a pregnancy, it will automatically fail to act in terms of the legislation with regard to the safety of the employee and the unborn child.

After establishing the justification of employment testing specifically related to pregnancy testing, one should consider the protection of such employees in these circumstances.

83 Ratification is when the convention is approved and confirmed by the Parliament of RSA and sanctioned in a formal manner in legislation. The definition of ratification was also searched on www.thefreedictionary.com/ratification on 29 August 2012.

3.4 Protection of Pregnant Employees

Labour legislation provides substantial protection for pregnant employees. Together the *Constitution*, EEA, the *Unemployment Insurance Act* 63 of 2001,⁸⁴ BCEA, LRA and the Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child⁸⁵ provide a far-reaching and comprehensive set of rights for pregnant employees. These rights cover the employee from the day she falls pregnant until well after the birth of the child.

The *Constitution* provides in sections 9(3) and 9(4) that no person may be discriminated against or dismissed on account of pregnancy. In the EEA section 6 reiterates the Constitution's prohibition against discrimination on the grounds of pregnancy. In the UIA, sections 34 and 37 provide for the payment of maternity benefits to the employee by the Unemployment Insurance Fund (UIF) for a period of maternity leave. Section 25 of the BCEA requires employers to give pregnant employees at least four months' unpaid maternity leave. This leave would normally commence four weeks before the expected date of birth, but may start earlier if a medical practitioner or midwife requires it.

The employer may not allow or require the employee to restart work before six weeks after the birth of the baby unless a medical practitioner or midwife certifies that she is fit to do so. An employee who suffers a miscarriage during the third trimester or who bears a stillborn child is entitled to six weeks of maternity leave. For the purpose of this dissertation the emphasis will fall on section 26 of the BCEA due to the hazards that exist in the mining sector for underground employees.

84 Hereafter the UIA.

85 Hereafter the Code.

3.4.1 Basic Conditions of Employment Act 75 of 1997

Section 26 states with regard to the protection of employees before and after the birth of a child:

- (1) No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.
- (2) During an employee's pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if-
 - (a) The employee is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and
 - (b) It is practicable for the employer to do so.

3.4.2 Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child

The objective of this code is to provide guidelines for employers and employees concerning the protection of the health of women against potential hazards in their work environment during pregnancy, after the birth of a child and while breastfeeding. The code is issued in terms of section 87(1)(b) of the BCEA and states that the Minister of Labour, after consulting with the National Economic Development and Labour Council,⁸⁶ must issue a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child.

The Code of Good Practice on the Protection of Employees During and After the Birth of a Child has been issued in terms of section 87(1)(b) of the BCEA. It guides employers and employees concerning the application of section 26(1) of the BCEA, which prohibits employers from requiring or permitting pregnant or breastfeeding employees to perform work that is hazardous to the health of the employee or that of her child.⁸⁷

86 Hereafter NEDLAC.

87 Lapere *Occupational Medical Examinations and Labour Law* 83.

The norms established by the above-mentioned code are general. This code sets out the following norms: the legal requirements relevant to the protection of the health and safety of pregnant and breastfeeding employees; a method for assessing and controlling the risks to the health and safety of pregnant and breastfeeding employees and the principal physical, ergonomic, chemical and biological hazards to the health and safety of pregnant and breastfeeding employees, and recommends steps to prevent or control these risks. These are listed in Schedules one to four of the Code and are not exhaustive.

Employers who employ women of childbearing age are required to assess and control risks to the health of pregnant or breastfeeding employees and that of the foetus or child. Employers should therefore identify, record and regularly review the potential risks to pregnant or breastfeeding employees within the workplace and review the protective measures and adjustments to working arrangements for pregnant or breastfeeding employees.⁸⁸

Where appropriate, employers should also maintain a list of employment positions that do not involve risk so that pregnant or breastfeeding employees could be temporarily transferred to such positions. In terms of section 26(2) of the BCEA an employer must offer suitable alternative employment in such conditions. Alternative employment must be on terms that are no less favourable than the employee's ordinary terms and conditions of employment.

The *Constitution* protects the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction⁸⁹ and gives every person the right to health services, including reproductive health care.⁹⁰

88 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference* 70.

89 Section 12(2) of the *Constitution*.

90 Section 27(1)(a) of the *Constitution*.

Employers should inform pregnant and breastfeeding employees about possible hazards and of the importance of immediate notification of pregnancy.⁹¹ Workplace policies should encourage female employees to inform employers of their pregnancy as early as possible to ensure that the employer is able to identify and assess risks and take appropriate preventative measures.

The *Hazardous Chemical Substances Regulations* of 1995 issued under OHS Act apply to all employers who carry out activities that may expose people to hazardous chemical substances. These employers must assess the potential exposure of employees to any hazardous chemical substance and take appropriate preventative steps. This must include information on any potential detrimental effect on the reproductive ability of employees.⁹² The “Physical Hazards” are set out in schedule one of this Code and describe the hazards, risks and how to avoid the risks under those circumstances.⁹³

3.5 Mine Health and Safety Act 29 of 1996

Since the provisions of the MSHA are directly applicable to the mining industry as a specialized sector, it is crucial that any study of pregnancy related matters in the mining industry should consider these provisions.

3.5.1 Provisions of the MSHA

The MSHA⁹⁴ states the objects of the act and includes protection of the health and safety of persons at mines. It requires employers and employees to identify hazards and eliminate, control and minimise the risks related to health and safety at mines. The MSHA⁹⁵ also obliges the

91 In terms of Section 5 of the Code of Good practice on the Protection of Employees during Pregnancy and After the Birth of a Child.

92 Badenhorst *The Southern African Institute of Mining and Metallurgy Hard Rock Safe Safety Conference* 70.

93 See Annexure A.

94 Section 1 of the MSHA.

95 Section 2 of the MSHA.

employer to ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped to provide conditions for safe operation and a healthy working environment; and to ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or of any other person.

The MSHA⁹⁶ states that an employer must maintain a healthy and safe mine environment in that as far as reasonably practicable every employer must provide and maintain a working environment that is safe and without risk to the health of employees. This includes identifying the relevant hazards and assessing the related risks to which persons who are not employees may be exposed to; and to ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety. Numerous other sections in the MSHA provide for obligations for the employer in the mining industry that have to be adhered to.⁹⁷

Various definitions found in the MSHA is important for the purposes of this dissertation. The term “hazard” is defined to mean “a source of or exposure to danger”. The term “health” is defined to mean “occupational health at mines”. The term “health hazard” means any physical, chemical or biological hazard to health, including anything declared to be a health hazard by the Minister. The term “medical surveillance” means a planned programme of periodic examination, which may include clinical examinations, biological monitoring or medical tests, of employees by an

96 Section 5 of the MSHA.

97 Section 7 elaborates on the fact that an employer should as far as reasonably practicable staff the mine with due regard to health and safety; section 8 determines that the employer must establish a health and safety policy and section 10 determines that as far as reasonably practicable an employer should provide health and safety training. Section 11 obliges the employer to assess and respond to risk; section 12 obliges the employer to conduct occupational hygiene measurements and section 13 obliges the employer to establish a system of medical surveillance.

occupational health practitioner or by an occupational medical practitioner contemplated in section 13.⁹⁸

The employer's obligation to provide and maintain a work environment that is safe and without risk to the health of employees includes risks to their reproductive health. These duties are established in terms of both the OHS Act and the MSHA. Key aspects of these acts are that employers must conduct a risk assessment, which involves identifying hazards, assessing the risk that they pose to the health and safety of employees and recording the results of the risk assessment. The employer must implement appropriate measures to eliminate or control hazards identified in the risk assessment. They must supply employees with information regarding risks and train them on the measures taken to eliminate or minimise them. These acts also provide that elected worker health and safety representatives and committees are entitled to participate in the risk assessment and control of hazards. Employees furthermore have a duty to take reasonable steps to protect their own health and safety and that of other employees.

The emphasis of the MSHA Regulations supports one of the central themes of the MSHA itself, namely conducting hazard identification and risk assessments (hereafter HIRAs), which determine the relevant actions to be taken. Section 26 of the BCEA and the Code of Good Practice specifically contemplate conducting HIRAs to determine the way forward.

3.6 Conclusion

It is clear that medical testing is justifiable in the mining industry as set out in the MSHA and BCEA due to the hazards related to the underground working conditions that make it imperative that a pregnant employee may not work in such working conditions. Due to the strenuous legislation set out in the mining industry to safeguard pregnant employees in a hazardous

98 All these definitions are provided for in section 102 of the MSHA.

working environment, the *Mashava*⁹⁹ case will not hold water. As the court in the *Mashava* case erred when it found that an employer should not be allowed to request a pregnancy test as part of the pre-employment medical screening, not even with reference to the inherent requirements of the job on the basis that considerations of privacy outweigh the arguments in favour of the inherent requirements of the job.

Due to the extensive obligations resting on the employer with regard to protecting the pregnant employee against discrimination and safety hazards in the workplace, it is necessary to establish the extent to which an employer can be held liable when he does not adhere to his obligations and to what extent an employee can be held liable for not disclosing her pregnancy status.

99 *Mashava v Cuzen & Woods Attorneys* 2000 21 ILJ 402 (LC).

Chapter 4: Liability of employer

4.1 Introduction

In this chapter the liability of the employer towards pregnant employees on the grounds of unfair discrimination will be dissected to give the reader a broader view of this topic. Due to the onus placed on the employer by the MHPA and section 26 of BCEA, the mining industry functions within a unique legal framework. The aspect of section 6(1) of the EEA with regard to the 'employment policy or practice' will be defined and the dismissal as a general term will be investigated towards the prospects of success for the employer when dealing with pregnant employees. The question concerning compensation when an employer is in fact liable will be defined.

4.2 Liability of the employer

Section 186(2) of the LRA defines the residual unfair labour practice as "any unfair act or omission that arises between an employer and an employee...". In the *Dingler* case¹⁰⁰ the court apparently accepted that this definition might well mean that the absence of employer control over an institution that provides benefits, where that institution is the perpetrator of discrimination, is not necessarily a bar to proceedings.

Section 60 of the EEA envisages that an employer may be held liable for unfair discrimination perpetrated by one of its employees. Section 60 on the liability of employers reads as follows:

- (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

100 *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* 1998 19 ILJ 285 (LC).

- (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened the provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

This provision creates a form of statutory vicarious liability of employers for discrimination perpetrated by its employees. Section 5 of the EEA stipulates that “every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”. This section means that the absence of effort in anticipation of discrimination may constitute liability.

In cases where otherwise suitable applicants have been turned down for reasons that would otherwise amount to unfair discrimination, the employer must prove that the person was indeed incapable of performing the work for which he or she had applied. In *Hoffman v South African Airways*¹⁰¹ the court conceded to the argument that the economic needs of the enterprise were important, but held that the constitutional right of HIV-positive people to be protected against ‘stigmatisation and prejudice’ was of greater social value.

In *Independent Municipal & Allied Workers Union & another v City of Cape Town*¹⁰² the court found that the municipality’s argument that the bias was in the interest of diabetics ‘paternalistic’ and also found the municipality’s evidence in support of the blanket ban unconvincing. Therefore the court found that the blanket ban was not justified by the risk. The *Hoffman* and *City of Cape Town* judgments make it clear that the courts will apply the ‘inherent requirements of the job’ test strictly. It is unlikely that the Labour Appeal Court’s *Whitehead* judgment will remain authority in the light of *Hoffman*.

101 *Hoffman v South African Airways* 2000 21 ILJ 2357 (CC) (Hereafter *Hoffman* case).

102 *Independent Municipal & Allied Workers Union & another v City of Cape Town* 2005 26 ILJ 1404 (LC) (Hereafter *City of Cape Town* case).

It is imperative to ascertain from case law and legal opinions what section 6(1) of the EEA defines as 'employment policy or practice' as it has a direct impact on the determination of whether the discrimination is unfair.

4.2.1 Meaning of 'employment policy or practice'

Section 6(1) of the EEA prohibits unfair discrimination only if the discrimination takes place 'in any employment policy or practice'. Section 1 of the EEA defines employment policy or practice to include, but is not limited to recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal.

This definition is not exhaustive and means that applicants are not precluded from separating the various elements of a system to show that certain individual practices within the system have a disproportionate impact on the group.

In the *Woolworths* case¹⁰³ the court held that a decision of an employer with regard to a single individual can hardly be described as a 'policy or practice'.¹⁰⁴ Willis JA held that the employer could not be said to have adopted an attitude akin to 'we do not want women who are or may fall pregnant to work for us', that the requirement of a 'policy or practice' laid down by section 6(1) of the EEA was not met and therefore not applicable. These comments do not constitute binding precedent, because the EEA was not yet in operation at the time the dispute arose.

103 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

104 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC) at par 597H.

To fall within the scope of the section 6(1) of the EEA prohibition, the policy or practice complained of must be 'on one or more' of the grounds listed in that provision, or on grounds akin thereto. Grogan states:¹⁰⁵

In ordinary language, to discriminate 'on a ground' means that the act in question is done because of the existence of that ground.

The next point of contention to address will be with regard to the future of a pregnant employee in the mining industry to the extent of justifying dismissal.

4.2.2 Dismissal

The EEA includes 'dismissal' in the list of employment policies and practices as defined in section 1 of the EEA. However, section 10(1) of the EEA makes it clear that disputes about discriminatory dismissals should be dealt with in terms of Chapter VIII of the LRA. In this regard, section 187(1)(e) of the LRA declares a dismissal for any reason related to pregnancy to be automatically unfair, as does section 187(1)(f) in relation to discriminatory dismissals in general. Now a woman may not be dismissed in any circumstances merely because she is pregnant.¹⁰⁶ Subsection (1)(e) renders impermissible the dismissal of a woman on maternity leave, currently up to four months under the BCEA. The phrase 'any reason related to her pregnancy' seems to embrace reasonable absences for medical attention, as also changes in her physical configuration, which may dispose certain employers to fire employees engaged in certain types of work.¹⁰⁷ In the mining industry the implications of this has a wide impact. Female employees are employed for underground work and as soon as pregnancy is detected anything related to it causes problems in the

105 Grogan *Employment Rights* 176.

106 See, for example, *Hunt v ICC Car Importers Services Co (Pty) Ltd* 1999 20 ILJ 364 (LC).

107 Examples for application of section 187(1)(e) see *Mnguni v Gumbi* 2004 25 ILJ 715 (LC); *Solidarity obo McCabe v SA Institute for Medical Research* 2003 9 BLLR 927 (LC); *Lukie v Rural Alliance CC t/a Rural Development Specialists* 2004 25 ILJ 1445 (LC).

employment relationship as she can no longer function as an underground worker.

To succeed in a claim for this form of discrimination, the employee must prove that the reason for the conduct complained of relates to her pregnancy.

Grogan states:¹⁰⁸

If the main reason for the dismissal is the employee's pregnancy, the employer cannot rely on an ancillary reason – for example, the employee's alleged deceit in not disclosing her condition.¹⁰⁹ Conversely, a pregnant woman cannot rely on her pregnancy as a defence against conduct that constitutes a disciplinary offence.

Section 187(1) of the LRA states “a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is ...”. In *NUMSA & Others v Fry's Metals (Pty) Ltd*¹¹⁰ the court found that the word “reason” in section 187(1) must be understood to mean “purpose”. What is in issue is not the cause of the dismissal, but the motive of the employer in dismissing the employee. As a result, provided the motive of the employer is not to dismiss because the employee is pregnant or for reasons related to her pregnancy, but rather for reasons related to the consequences such as medical incapacity, or the inability to offer her alternative employment, the dismissal should pass the test set out by the court.

Furthermore, section 187(1)(e) of the LRA states that a dismissal is considered to be automatically unfair if the reason for dismissal is due to the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy. In the case of *Lukie v Rural Alliance CC t/a Development Specialist*,¹¹¹ the employee informed the employer that she was pregnant and wished to take time off for her confinement. Her manager agreed that

108 Grogan *Workplace Law* 190.

109 *Mashava v Cuzen & Woods Attorneys* 2000 21 ILJ 402 (LC).

110 *NUMSA & Others v Fry's Metals (Pty) Ltd* 2003 24 ILJ 133 (LAC).

111 *Lukie v Rural Alliance CC t/a Development Specialist* 2004 8 BLLR 769 (LC).

she could take leave. However, the manager later changed his mind and informed her that she need not return after maternity leave. The applicant did not return to work and claimed to have been automatically unfairly dismissed. The Court held that the applicant had been unfairly dismissed in terms of section 187 (1)(e) of the LRA. She was awarded compensation equivalent to eighty weeks remuneration.

In *Kadiaka v Amalgamated Beverage Industries*¹¹² the court held that under the 'residual' unfair labour practice that discrimination was unfair if it was purposeless, or for a purpose of insufficient importance to outweigh the rights of the job-seeker or employee, or if it was 'morally offensive'. However, the court also found that a temporary moratorium that a company had placed on hiring former employees of a competitor was in the circumstances justifiable because it was for *bona fide* commercial and operational reasons.

Furthermore, section 187(2) of the LRA provides for two defences an employer may use against claims of discriminatory dismissals – the inherent requirements of a job or, in age discrimination cases, that the employee has reached the normal or agreed retirement age. The point is that there are important differences between the wording of section 187 of the LRA and its efforts to regulate discriminatory dismissals and the wording of section 6(1) of the EEA.

Unlike section 187(1)(e) of the LRA, which extends protection against dismissal for 'any reason related to an employee's pregnancy or intended pregnancy', section 6(1) of the EEA limits impermissible discrimination to that of the ground of pregnancy. Therefore it can be legally presumed that the legislature intended section 6(1) of the EEA to have narrower application than section 187(1)(e) of the LRA. The difference has no practical significance, as such a complaint could be linked to discrimination

112 *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC).

on the basis of sex or gender.¹¹³ Grogan¹¹⁴ states that “the same can be said of discrimination for reasons related to an employee’s pregnancy, if indeed, at least by implication, it does not constitute discrimination on the basis of pregnancy itself.”

The question arises whether the impact of section 10(1) of the EEA is to firstly subject disputes about discriminatory dismissal not only to the procedure laid down in the LRA for such dismissals, but that the fairness of the discrimination underlying those dismissals must be adjudged in terms of sections 187(1)(e), 187(1)(f) and 187(2) of the LRA. A second question is whether the fairness of such dismissals must now be adjudged in terms of Chapter II of the EEA, and that only the procedure as laid down in the LRA should still be followed. The wording of section 10(1) of the EEA read with the definition of ‘employment policy or practice’ in section 1 of the EEA seems to favour the second approach. This excludes cases where the employer is frank about the reason for the dismissal, or where the reason is patently obvious¹¹⁵. Whether the reason for the dismissal is in fact related to the employee’s pregnancy is a question of fact or, where the employer claims that other reasons were more pressing it is a question of legal causation.¹¹⁶

In *Mnguni v Gumbi*¹¹⁷ the court held that when the employer dismisses an employee on grounds of pregnancy, the employer is obliged to apply the guidelines applicable to dismissals for medical incapacity.¹¹⁸

The causation test was applied in *Wardlaw v Supreme Mouldings (Pty) Ltd*¹¹⁹ and the court held that the complainant had been dismissed for

113 In *Webb v EMO Air Cargo (UK) Ltd* 1992 4 All ER 929 (HL): “Child-bearing and the capacity for child-bearing are characteristics of the female sex. So to apply these characteristics as criterion for dismissal or refusal to employ is to apply a gender-based criterion.”

114 Grogan *Employment Rights* 213.

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

116 *SACWU v Afrox Ltd* 1999 20 ILJ 1718 (LAC).

117 *Mnguni v Gumbi* 2004 6 BLLR 558 (LC).

118 See Schedule 8 item 10 of the LRA. The first step would be to determine the extent of the incapacity.

misconduct and the proper forum was therefore the CCMA. The court came to the same conclusion in *Vorster v Rednave Enterprises Cc t/a Cash Converters Queenswood*.¹²⁰ In *Uys v Imperial Car Rental (Pty) Ltd*¹²¹ the court agreed that the applicant had been dismissed for misconduct but, unlike the court in *Wardlaw*, proceeded to find that Ms Uys's dismissal was unfair in the ordinary sense.¹²²

In the *Mashava* case¹²³ the court recognised, relying on English case law,¹²⁴ that 'deceit' could provide a ground for dismissal in general, and could also be accepted as the primary ground for dismissal in instances when the underlying reason was the employee's pregnancy. The court found that although the employee's failure to disclose her pregnancy was indeed the true reason why the employer had failed to offer her articles of clerkship, the employee's failure to disclose her pregnancy did not in the circumstances amount to 'deceit' and could therefore not have been considered as misconduct.

Grogan¹²⁵ states:

This approach accords with common sense. If an employee cannot be dismissed because she is pregnant, why should the employer be entitled to dismiss her if she declines to disclose that she is pregnant?

From an ethical point of view, it is submitted that disclosure-without-consent applies. Some authors take the legal view that the employee's right

119 *Wardlaw v Supreme Mouldings (Pty) Ltd* 2004 25 ILJ 1094 (LC) (Hereafter *Wardlaw* case).

120 In *Vorster v Rednave Enterprises Cc t/a Cash Converters Queenswood* 2009 30 ILJ 407 (LC) the court took heed of the LAC judgment in *Wardlaw v Supreme Moulding (Pty) Ltd* 2007 6 NLLR 487 (LAC) and transferred the matter to the CCMA, rather than dismissing the application.

121 *Uys v Imperial Car Rental (Pty) Ltd* 2006 27 ILJ 2701 (LC).

122 As stated by Grogan J *Dismissal* 2011 2nd Impression (Juta Cape Town) 110 "In the light of the appeal judgment in *Wardlaw* the court lacked jurisdiction to make a ruling on the dismissal once it was ruled not to be automatically unfair".

123 *Mashava v Cuzen & Woods Attorneys* 2000 21 ILJ 402 (LC).

124 *Beyer v City of Birmingham District Council* 1997 IRLR 211 (EAT); *Fitzpatrick v British Railways Board* 1991 IRLR 376 (CA).

125 *Grogan Dismissal* 111.

to confidentiality is not absolute and that section 25 of the BCEA supersedes confidentiality.¹²⁶

4.2.2.1 *Discriminatory dismissals*

A discriminatory dismissal is when a person is dismissed based on a discriminatory ground as listed in section 6 of the EEA, which also includes pregnancy.

Section 187(1)(f) of the LRA states

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5¹²⁷ or, if the reason for the dismissal is-
 - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

There is an obvious overlap between this prohibition and section 6 of the EEA. Therefore an employee who is dismissed for discriminatory reasons could seek relief either under the LRA or the EEA. Section 187(1)(f) of the LRA resembles the general protection afforded all citizens by section 9 (equality clause) of the *Constitution*. When interpreting section 187(1)(f) of the LRA and section 6 of the EEA it is clear that section 6 suggests that the list is non-exhaustive with the inclusion of the word 'includes'. The word 'arbitrary' does not appear in the EEA. The exceptions to the prohibition in the EEA also differ from those in the LRA, and the EEA applies to applicants for employment and section 187(1)(f) of the LRA does not. Therefore for a dismissal to fall within the scope of section 187(1)(f) the

126 Thompson, C and Benjamin, P *South African Labour Law* Volume 11 1995 (Juta Cape Town) 8.

127 Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

dismissal must be discriminatory; the discrimination must be based on an arbitrary ground and the discrimination must have been unfair.¹²⁸

The scope of the BCEA and MHPA with regard to the employer's obligation to safeguard its employees when work is hazardous begs the question whether the dismissal of a pregnant applicant for employment in such conditions will also fall under the discriminatory dismissal. As indicated in chapter 3, it is a fact that the obligations that legislation places on the employer outweigh the applicant's right to found its claim on discriminatory reasons.

4.2.2.2 *Operational requirements*

Section 213 of the LRA defines operational requirements as "requirements based on the economic, technological, structural or similar needs of an employer". Section 189 of the LRA regulates the operational requirements involved in the consulting process in section 189(1). Section 189(2) continues to prescribe a meaningful joint consensus-seeking process and attempt to reach consensus on:

- 189(2)(a) appropriate measures-
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;
- (b) the method for selecting the employees to be dismissed; and
- (c) the severance pay for dismissed employees.

In the *Woolworths* case¹²⁹ the court dealt with the question of whether uninterrupted job continuity was an inherent requirement for the position of human resources generalist. The court held that an inherent requirement is one that, if not made, would result in an applicant simply not qualifying for the post. Accordingly, if the job can be performed without the requirement, it cannot be said that it is an inherent requirement.

128 See discussion by Grogan *Dismissal* 111-128.

129 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

Certain jobs underground might be hazardous to an infant during the time that the mother is breastfeeding and should therefore not be performed by the female while breastfeeding. Breastfeeding is only done until the child has reached a certain age or has been weaned, and the mother would therefore only temporarily not be able to perform her job. Thus, the fact that an employee would not be able to perform the job for a limited period of time, would not justify her termination of employment based on operational requirements.

The court in the *Woolworths* case¹³⁰ also held that the financial consideration of the company can never trump the rights of the employee, unless the economy as a whole is affected.

4.2.2.3 Incapacity

Schedule 8 of the LRA provides guidelines that should be followed when dealing with incapacity. Although it is recognized that a breastfeeding employee does not suffer from an illness *per se* because she is breastfeeding, she is not allowed to perform certain work.

Item 10 of Schedule 8 of the LRA provides:

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives short of dismissal are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in

130 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

response and to be assisted by a trade union representative or fellow employee.

Work performance according to a required standard is referred to in the guidelines in relation to cases of dismissal for poor work performance. Du Toit *et al*¹³¹ advocates that the inability of an employee to meet a required standard can constitute a fair reason for dismissal and “by the same token, refusal to appoint or promote a person who does not measure up to an inherent requirement of the job in question is justifiable. If such a combination of factors can be shown, it is a complete defence to a claim of unfair discrimination”.

4.2.3 Remedies for employees in terms of LRA

Section 193 of the LRA addresses remedies for unfair dismissal and unfair labour practice and states that if the Labour Court or an arbitrator appointed in terms of the LRA finds that a dismissal is unfair, the Court or the arbitrator may order the employer to reinstate the employee from any date not earlier than the date of dismissal. It can also order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal. The final option consists of an order to the employer to pay compensation to the employee. The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless the employee does not wish to be reinstated or re-employed; or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; or it is not reasonably practicable for the employer to reinstate or re-employ the employee, and finally, if the dismissal is unfair only because the employer did not follow a fair procedure.

A situation might arise where an underground worker is dismissed because it is not safe to return there, for example in the case of a breastfeeding

131 Du Toit *et al* *Labour Relations Law* 461.

mother, and the court finds that the dismissal was unfair. In such a case, if the employer cannot reinstate or re-employ the employee due to external factors, the employee's best option is to consider proposed compensation. If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may give any other order that it considers appropriate in the circumstances.¹³² The next paragraph will address circumstances where a court decides to make an order for compensation.

4.2.4 Compensation

Compensation with regard to a dismissal should be addressed for the purposes of defining which compensation an employee has the right to in different circumstances.

Section 194 of the LRA states the following regarding the limits on compensation:

- (1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
- (3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

In *Hunt v ICC Car Importer Services Co (Pty) Ltd*¹³³ the facts of the matter were that Noeleene Hunt was offered a position as an accountant with ICC Car Importers Service Company (Pty) Ltd ("ICC"). The terms of the agreement were that she would assist the financial manager. She was to

132 The Court, for example, in the case of a dismissal that constitutes an act of discrimination may wish to issue an interdict obliging the employer to stop the discriminatory practice in addition to one of the other remedies it may grant.

133 *Hunt v ICC Car Importer Services Co (Pty) Ltd* 1999 ILJ 364 (LC).

commence work on 22 January 1996 at ICC's premises from 08:15 until 17:00 Mondays to Fridays, and be on probation for a period of three months. Her commencement salary according to the letter "re-conditions of employment" which, as it was put, "serves to confirm your conditions of employment as agreed to by both parties" was R7 500.00 (per month), but was to be reviewed after the probationary period had expired. She was entitled to 15 working days leave per year. There was no pension or medical aid fund. It reflects the normal terms and conditions applicable to a contract of employment. There was one problem. Ms Hunt wanted to be paid R8 500.00 nett. ICC felt that it could not pay this as it would have to pay her about R14 000.00 gross and deduct PAYE and pay it over to the Receiver of Revenue. So ICC suggested that she finds a company willing to provide them with a tax invoice. They would pay her R7 500.00 for the first three months and increase her salary to R8 500.00 thereafter. In the result, the Closed Corporation provided invoices for "Financial Consulting Services". The invoices included VAT. The Closed Corporation was paid the amount due that is R8 500.00 plus VAT. Sometimes the cheque was deposited into the Closed Corporation's account and the R8 500.00 was paid to Ms Hunt. At other times she deposited the cheque and paid the VAT to the Closed Corporation. Ms Hunt submitted a return to the Receiver of Revenue, which reflected that she operated a business. Certain deductions, in the amount of R18 749.00, were made from the proceeds of this business as reflected on an income statement. Ms Hunt said that these deductions were fictitious and that she did not operate a business.

Prima facie, the dominant impression is that ICC employed Ms Hunt as an employee, but in order to pay her what she wanted they devised this scheme, which is a fraud on the Receiver of Revenue to avoid paying the due tax. The invoice scheme, intended to give the impression that she was an independent contractor, was fraudulent. It was not intended to be the true contract. Ms Hunt became pregnant, and she agreed on three months of unpaid maternity leave. She gave premature birth on 13 September 1996. This disrupted ICC's planning and it resulted in their terminating the

relationship. ICC alleged, but led no evidence, that the real contract was between it and the CC and stated that this had been terminated.

The court ordered the employer to pay the employee an amount of six weeks remuneration for patrimonial loss that the employee had suffered. In addition the employer was ordered to pay six months *solatium*, sentimental damages, for the harm the employee had suffered.

In the *Woolworths* case¹³⁴ the court confirmed the decision of *Johnson & Johnson (Pty) Ltd v CWIU*¹³⁵ that compensation for unfair labour practices was not intended to be patrimonial, but that compensation should be fair and reasonable. The court held that:

In matters of unfair dismissal, once the court has decided that compensation should be granted it is obliged to grant at least the full amount as prescribed for by section 194(1), whereas in an unfair labour practice the court or the arbitrator must grant such amount as it considers to be fair and reasonable.

In the case of *Mankayi v AngloGold Ashanti Ltd*¹³⁶ the Constitutional Court delivered a judgment on whether section 35(1) of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993¹³⁷ extinguishes the common law right of mineworkers to recover damages against mine owners even though they are covered by the *Occupational Diseases in Mines and Works Act* 78 of 1973,¹³⁸ and as such are not entitled to claim under COIDA. Section 35(1) provides that “no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such an employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise, save under the provisions of this Act in respect of such disablement or death.”

134 *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

135 *Johnson & Johnson (Pty) Ltd v CWIU* 1998 12 BLLR 1209 (LAC).

136 *Mankayi v AngloGold Ashanti Ltd* 2011 32 ILJ 545 (CC) (Hereafter *Mankayi* case).

137 Hereafter COIDA.

138 Hereafter ODIMWA.

The applicant, Mr Mankayi, was employed by the respondent mining company AngloGold as an underground mineworker. Mr Mankayi averred that during his employment he contracted occupational diseases in the form of tuberculosis and chronic obstructive airways, which rendered him unable to work as a mineworker or in any other occupation. He instituted an action for delictual damages against AngloGold on the basis that the mine owed him a duty of care arising under both common law and statute to provide a safe and healthy working environment. AngloGold objected to Mr Mankayi's particulars of claim as raising no cause of action because section 35(1) of COIDA precludes common law claims by employees against their employers. Mr Mankayi contended that he is not barred by section 35(1) of COIDA because, although he is an "employee" in terms of section 1 of COIDA, his diseases are covered by ODIMWA, and so section 35(1) of COIDA does not apply to him.

Khampepe J, with whom Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Mogoeng J, Nkabinde J, Skweyiya J, and Yacoob J agreed, concluded that despite the wide ambit of the word "employee" in COIDA, section 35(1) of COIDA plainly does not cover employees who are not entitled to claim under COIDA. She further held that the exclusion of liability in section 35(1) of COIDA is limited to "employees" who are entitled to compensation in respect of "occupational diseases" under COIDA. Khampepe J also concluded that COIDA and ODIMWA do not constitute one single system of compensation as was held in the Supreme Court of Appeal.

The *Mankayi* case has not been tested yet, but one could assume that this matter places an emphasis on section 26 of the BCEA in that an onus is vested on the employer to a duty of care arising under both common law and statute to provide a safe and healthy working environment to each employee. If the necessary duty of care is not taken by the employer in this instance to provide a safe and healthy working environment for pregnant employees, such an employee and her unborn child may have the right to

institute a claim of delictual damages against the employer if the pregnant employee¹³⁹ or unborn child is diagnosed with an occupational disease.

4.3 Conclusion

It is important to define discrimination on the basis of pregnancy. Grogan¹⁴⁰ states that “the same can be said of discrimination for reasons related to an employee’s pregnancy, if indeed, at least by implication, it does not constitute discrimination on the basis of pregnancy itself.” Du Toit *et al*¹⁴¹ advocates that the inability of an employee to meet a required standard can constitute a fair reason for dismissal and “by the same token, refusal to appoint or promote a person who does not measure up to an inherent requirement of the job in question is justifiable. If such a combination of factors can be shown, it is a complete defence to a claim of unfair discrimination”. Provided the motive of the employer is not to dismiss because the employee is pregnant or for reasons related to her pregnancy, but rather for reasons related to the consequences, such as medical incapacity, or the inability to offer her alternative employment, the dismissal should pass the test set out by the court.

It is clear that section 26 of the BCEA is starting to play a much greater role as can be seen in the *Mankayi* case¹⁴² where the Constitutional Court emphasized the fact that the employer has a duty of care responsibility towards employees to provide a safe and healthy workplace. If it can be proved that the employer failed on this onus, delictual damages can be claimed outside the scope of COIDA.

139 It has still not been tested in a court of law but I will presume that if such employee falls within the ambit of MHSA and COIDA that will include her unborn child.

140 Grogan *Employment Rights* 213.

141 Du Toit *et al Labour Relations Law* 461.

142 *Mankayi v AngloGold Ashanti Ltd* 2011 32 *ILJ* 545 (CC).

Chapter 5: Conclusion

5.1 General

This dissertation scrutinised the impact pregnancy challenges have on the mining industry, taking the right of equality and unfair discrimination into consideration.

In the *Harksen* case it was established that if differentiation is on a specified ground that will objectively impair human dignity, it will amount to discrimination. If differentiation is on an unspecified ground then unfairness needs to be proven by the complainant, who has to indicate an unfair impact on the individual. Therefore in cases concerning automatically unfair dismissals based on alleged discrimination, the courts must identify the main or dominant reason for such dismissals.

A distinction was made between direct discrimination when a person is treated less favourably simply on the grounds as set out in section 6(1) of the EEA and indirect discrimination, when a neutral requirement affects a disproportionate number of people from a specific group, and cannot be justified.

A mere allegation of discrimination is not sufficient to establish a *prima facie* case and the onus shifts to the employer to prove that such discrimination is fair. Discrimination will be unfair if it is reprehensible in terms of the society's prevailing norms. The object must be legitimate and the means proportional and rational. Fair discrimination is set out in section 6(2) of the EEA, which includes discrimination on the basis of an inherent requirement of a job. The *Woolworths* case recognised some freedom for employers in appointments to consider the inherent requirement of the job. As long as the requirements bear a connection with the essence of the job and the business (objectively determined), the employer should be able to raise the defence of inherent requirement of the job to justify fair discrimination.

In the *Botha* case it was highlighted that women may not be discriminated against on the basis of pregnancy unless the position in question not only an impact on the company, but on the economy as a whole.

5.2 Pregnancy related challenges

Pregnancy must not be interpreted in the narrow sense of the word, but includes breastfeeding and family responsibility.

Numerous legislation regulate employment testing, one of which is the MSHA. The onus is still on the employer to show that a specific physical or mental ability is job-related. An employer must indicate that such medical testing is justifiable. In terms of the inherent requirement of working underground, it is imperative that an employee may not be pregnant due to the health hazards of such work for the unborn child and the breastfeeding employee. Medical evaluation of fitness to work has to cover two types of risk namely risks associated with exposure to hazards in a particular occupation and risks associated with failure to meet the capabilities required of a particular occupation. In the mining industry the scope of the MSHA has been extended to medical surveillance, which is an assessment of the health risk of employees.

In the mining industry testing for pregnancy would be necessary to ensure the ability of an employee to perform work safely. The employer is necessitated to do pregnancy testing as no pregnant employee is permitted to work underground for safety reasons and due to the fact that the employer can be held liable in an event of an accident while pregnant. Pregnancy testing is done by the employer in the mining industry prior to employment of underground employees. This is due to the obligation placed on employers by section 26 of the BCEA and the preamble of the MSHA, which provides that the employer must minimise hazards in the workplace.

In the mining industry pregnancy testing is justified, but one needs to consider the protection of such employees in these circumstances. The Code provides guidelines for employers and employees concerning the protection of the health of women against potential hazards in their work environment during pregnancy, after the birth of a child and while breastfeeding. The Code is intended to guide all employers and employees concerning the application of section 26(a) of the BCEA.

Employers should identify, record and regularly review the potential risks to pregnant or breastfeeding employees within the workplace. Employers should inform pregnant and breastfeeding employees about possible hazards and of the importance of immediate notification of pregnancy. Employers should also maintain a list of employment positions not involving risk to which pregnant or breastfeeding employees could be temporarily transferred. Section 26(2) of the BCEA requires the employer to provide for suitable, alternative employment if it is practicable to do so. In the mining industry such alternative employment is not practicable in all circumstances due to the limited availability of surface positions.

It is therefore clear that, although pregnant employees are treated differently when it comes to the positions they fill or to the medical tests they have to undergo, the differentiation will not be unfair. The reason for this would be that the employers are required by law or various Codes to protect these pregnant employees, and therefore the different treatment is ultimately for the pregnant employee's benefit.

5.3 Liability of the employer

Section 60 of the EEA envisages that an employer may be held liable for unfair discrimination perpetrated by one of its employees. This institutes a form of statutory vicarious liability. The *Hoffman* and *City of Cape Town* judgments make it clear that the courts will apply the inherent requirements of the job test strictly. It seems unlikely that the *Whitehead* judgement in the Labour Appeal Court will remain the authority.

In cases of dismissal, the reason for dismissal remains a factual question when the pregnancy of the employee comes into play. Where the employer claims that other reasons were more pressing than the pregnancy factor, it will be a question of legal causation. The provision that a dismissal is not automatically unfair if the reason for the dismissal is based on the inherent requirements of the particular job applies only to discriminatory dismissal. An employee who is dismissed for discriminatory reasons could seek relief either under the LRA or the EEA.

It remains that legislative obligations placed on an employer outweigh the applicant's right to found its claim on discriminatory reasons. Such legislative obligations are placed on the employer in the mining industry by the MHSA and section 26 of the BCEA.

Due to the obligations placed on the employer for a safe working environment, the employer has the duty to inform female employees that they should report pregnancy. The legislative obligation placed on the employer towards a safe working environment by the MHSA and BCEA justifies the fact that female applicants are regularly tested for pregnancy. If the employer follows the proper procedures and gives the proper notifications, then an employee who refuses to inform the employer of her pregnancy can be charged for misconduct and the proper disciplinary hearing process can commence.

In the scenario where the employer is in a situation where numerous underground females are pregnant, the employer will have certain options to consider with regard to redundant employees. In light of the *Woolworths* case the employer can never trump the rights of an employee, unless the economy as a whole is affected. Firstly, when considering dismissal due to operational requirements the employer must be aware that if the employee would not be able to perform the job for a limited period of time, for instance while pregnant or breastfeeding, this would not justify her termination of employment based on operational requirements. Secondly, when considering dismissal due to incapacity, *Du Toit et al* indicated that

refusal to appoint or promote a person who does not measure up to an inherent requirement of the job in question is justifiable. Therefore if these factors can be shown, it is a complete defence to a claim of unfair discrimination.

In the scenario where an employer has redundant underground workers due to pregnancy, it would be reasonable, when taking all factors into consideration, to consider dismissal due to incapacity. As a pregnant female will not be able to work for 9 months while pregnant, 4 months on maternity leave, of which 1 month will be taken while pregnant under normal circumstances and then a further 6 months for breastfeeding, even more if the employee so decides, this sets the employer back with an underground position for a minimum of 18 months.

Should an employer wish to dismiss an employee, the motive should not be related to her pregnancy, but rather to other consequences. Such consequences might include medical incapacity or the inability to offer the employee alternative employment. In these circumstances the dismissal should pass the test set out by the courts.

When it comes to compensation section 194 of the LRA determines that the compensation must be just and equitable in all circumstances, either 12 months due to unfair dismissal or 24 months due to automatically unfair dismissal (when it is considered a discriminatory dismissal). The recent *Mankayi* case raised eyebrows due to the finding that an employee who has been involved in an accident or who has contracted a disease while working in the mining industry still has the right to claim for damages in terms of the common law. This can have a major impact on the mining industry. The matter of an employer's liability towards the unborn child in a case where a female employee does not disclose her pregnancy status, continues to work underground and be diagnosed with an occupational disease, has not been tested with relevance to the unborn child.

It is pertinent from the discussion above that pregnant employees hold numerous challenges for the employer within the mining industry. In considering the correct approach to addressing these challenges, numerous factors should be considered and contemplated.

Legislation places many more obligations with regard to pregnant employees on the employers within the mining industry sector than on any other sector. Due to the nature of underground work greater emphasis is placed on distinction between employees based on the inherent requirements of the job and the safety aspect. This distinction is not necessarily unfair or discriminatory in nature as the employers within the mining industry have certain obligations towards the safety of pregnant and breastfeeding employees. Therefore, this safety aspect as enforced on employers by legislation weighs much more than the right not to be submitted to medical testing, or to be transferred to alternative employment, or if redundant to be dismissed in a just and fair manner.

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Annexure A

Schedule 1: Physical hazards

HAZARD	WHAT IS THE RISK	HOW TO AVOID THE RISK
Vibration and mechanical shocks	Long-term exposure to vibrations may increase the risk of miscarriage and stillbirth. Exposure to shocks or whole body vibrations in the later stages of pregnancy can result in premature labour.	It is advised that pregnant workers and those that have recently given birth avoid work that is likely to involve uncomfortable, whole body vibrations, especially at low frequencies, or where the abdomen is exposed to shocks or jolts.
Extreme heat	The exposure of pregnant and breastfeeding employees to extreme heat may lead to dizziness and faintness, particularly in the case of women performing standing work. Lactation may be impaired by heat dehydration.	Employers should limit the exposure of pregnant and breastfeeding workers to extreme heat. Arrangements for access to rest facilities and refreshments should be made in conditions of extreme heat.
Extreme cold	Work in extremely cold conditions such as cold storage rooms has been associated with problems in pregnancy.	Employees must be supplied with thermal protective clothing and their exposure to cold limited in terms of regulation 2 of the Environmental Regulations for Workplaces, made under the Occupational Health and Safety Act (OHSA).
Noise	Prolonged exposure to noise can elevate the blood pressure of pregnant women and lead to	Employers should ensure compliance with regulation 7 of the Environmental

	tiredness.	Regulations for Workplaces, OHSA.
<i>Ionising Radiation</i>	<i>Significant exposure to ionising radiation is known to be harmful to the foetus. Working with radioactive liquids or dusts can result in exposure of the foetus (through ingestion or via contamination of the mother's skin) or a breast-fed baby to ionising radiation .</i>	<p><i>Work procedures should be designed to keep exposure of pregnant women as low as reasonably practicable and below the statutory dose limit for a pregnant woman.</i></p> <p><i>Pregnant women or breastfeeding mothers should not work where there is a risk of radioactive contamination.</i></p> <p><i>Employers of registered radiation workers, including radiographers, must comply with the regulations controlling the use of electronic products issued under the Nuclear Energy Act 131 of 1993.</i></p>
<i>Non-ionising (electromagnetic) radiation</i>	<i>It has not been established that the levels of non-ionising electromagnetic radiation likely to be generated by video display units (VDU's) or other office equipment constitutes a risk to human reproductive health.</i>	<p><i>Women who are pregnant or who are planning children and are worried about working with VDU's should discuss their concerns with an occupational health practitioner.</i></p> <p><i>The following practical measures can be adopted to limit exposure to electromagnetic fields in offices (emfs):</i></p> <ul style="list-style-type: none"> <i>Workers should sit at arm's length from the computer (70cm)</i>

		<p>and about 120cm from the backs and sides of co-workers' monitors.</p> <ul style="list-style-type: none"> • Workers should have regular breaks from VDU work, as this reduces exposure time. • Radiation-reducing glare screens (or shields) can reduce the electrical component of the emfs. However, shields that distort the image on the monitor should not be used
Work in compressed air and diving	<p>People who work in compressed air are at risk of developing the bends. It is not clear whether pregnant women are more at risk of getting the bends but potentially the foetus could be seriously harmed by gas bubbles.</p>	<p>Pregnant workers should not work in compressed air because of potential harm to the foetus from gas bubbles. For those who have recently given birth there is a small increase in the risk of the bends. The Diving Regulations, 1991, under OSHA, must be complied with.</p>
Physical and mental strain	<p>Excessive physical or mental pressure may cause stress and give rise to anxiety and raised blood pressure during pregnancy.</p>	<p>Employers should ensure that hours of work and the volume and pacing of work are not excessive and that, where practical, employees have some measure of control over how their work is organised. Seating should be available where appropriate.</p>

		<i>Longer or more frequent rest breaks will help to avoid or reduce fatigue.</i>
Physically strenuous work	<i>Employees whose work is physically strenuous should be considered to be at increased risk of injury when pregnant or after the birth of a child.</i>	<i>Heavy physical exertion, including the lifting or handling of heavy loads, should be avoided from early pregnancy onwards.</i>
Prolonged sitting and standing	<i>Sitting or standing for long periods during pregnancy can have serious health consequences. Standing for long unbroken periods can result in complications during pregnancy such as deep vein thrombosis, varicose veins, premature labour and even miscarriage.</i>	<p><i>Workstations should be adjustable to allow for necessary changes in posture.</i></p> <p><i>Pregnant employees who sit for long periods should be provided with a proper chair with lumbar support rest to prevent lower back pain. A footrest could alleviate pain and discomfort in the case of both sitting and standing workers.</i></p> <p><i>Pregnant employees who work in a stationary position should be given frequent rest breaks. Mobility during breaks should be encouraged to help prevent swelling of the ankles and improve blood circulation.</i></p> <p><i>Where work organisation permits task rotation, this should be done to allow the worker to do tasks that involve standing, sitting and moving.</i></p>
Anaesthetic gasses	<i>Exposure to anaesthetic gases during pregnancy can lead to miscarriage.</i>	<i>Exposure to high concentrations of anaesthetic gases</i>

		<i>should be avoided during pregnancy.</i>
Carbon monoxide	<i>Risks arise when engines or appliances using petrol, diesel and liquefied petroleum gas are operated in enclosed areas. Carbon monoxide can result in the foetus being starved of oxygen.</i>	<i>Occupational exposure to carbon monoxide should be avoided during pregnancy and breastfeeding.</i>
Antimitotic (Cytotoxic) drugs	<i>Exposure to antimitotic drugs, which are used for treating cancer, damages genetic information in human sperm and egg cells. Some of these drugs can cause cancer. Absorption is by inhalation or through the skin.</i>	<i>Workers involved in the preparation and administration of antimitotic drugs should be afforded maximum protection. Direct skin contact can be avoided by wearing suitable gloves and gowns. Pregnant employees potentially exposed to cancer drugs should be offered the option of transfer to other duties.</i>
Ethylene oxide	<i>Ethylene oxide is used mainly in sterilising procedures in hospital. Exposure may occur when sterilised goods are transferred to the aerator after the cycle is complete and when changing the gas tanks.</i>	<i>Health risks can be minimised by reducing worker exposure during transfer when the steriliser door is opened. Pregnant employees exposed to ethylene oxide above the acceptable level should be transferred to other duties.</i>
Lead	<i>Exposure of pregnant and breastfeeding employees to lead affects the nervous system of young children and is detrimental to child development.</i>	<i>Contact with lead should be avoided during pregnancy and breast feeding. The Lead Regulations issued under OHSA must be complied with. These Regulations specify levels at which</i>

		<i>employees must be withdrawn from exposure to lead.</i>
Mercury and mercury derivatives	<i>Organic and inorganic mercury compounds can have adverse effects on the mother and foetus.</i>	<i>Women of childbearing age should not be exposed to mercury compounds.</i>
Polychlorinated Byphenyls (PCBs)	<i>PCBs can cause deformities in the child. Maternal exposure before conception can also affect foetal development as PCBs can be passed on to the foetus through the mother's blood.</i>	<i>No pregnant women should be exposed to PCBs at work.</i>
Organic solvents	<i>Exposure to organic solvents including aliphatic hydrocarbons, toluene and tetrachloroethylene can lead to miscarriage and have a detrimental effect on the foetus.</i>	<i>Pregnant women should be protected to exposure against these organic solvents.</i>
Pesticides and herbicides	<i>Exposure to certain pesticides and herbicides is associated with an increased risk of miscarriage and can adversely affect the development of the child.</i>	<i>Exposure to pesticides and herbicides should be avoided or minimised</i>
Alcohol	<i>Foetal alcohol syndrome can lead to physical and mental abnormalities in children. Workers in the beverage, catering and associated industries, including wine farming, are particularly at risk.</i>	<i>Where appropriate, employees should be informed of and counselled in the hazards associated with foetal alcohol syndrome.</i>
Tobacco smoke	<i>Tobacco smoke contains carbon monoxide and carcinogenic and other harmful substances. Smoking and the inhalation of environmental smoke affects foetal blood supply</i>	<i>Care should be taken to ensure that women employees are able to work without being exposed to tobacco smoke.</i>

	<i>and can lead to retarded growth and development and more early childhood diseases. Smoking carries an increased risk of cancer and cardiovascular disease.</i>	
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