BELINDA MARY GREER

INDIRECT DISCRIMINATION IN EMPLOYMENT AND THE HUMAN RIGHTS ACT 1993

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VICTORIA UNIVERSITY OF WELLINGTON

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ABSTRACT

The object of this research paper is to discuss what is meant by the concept of "indirect discrimination" in employment, now that section 65 of the Human Rights Act 1993 has made provision for this to be recognised as unlawful. In particular , I examine how section 65 of the Act might be interpreted and applied by both the Human Rights Commission and the Complaints Review Tribunal in New Zealand.

I argue that despite the enactment of section 65 being a significant step forward in terms of recognition of discrimination, its potential is limited. This is because anti-discrimination legislation is premised upon the principle of formal equality which requires a comparison between persons, usually men and women. The section is also limited in its application. First, the specific nature of the wording used in the section means it fails to address the structural nature of discrimination in the workforce. Secondly, there are evidentiary difficulties in proving a case because such cases are reliant on circumstantial evidence.

The paper concludes that the present Act must be amended to reflect equality of outcome if the *best* opportunities are to be guaranteed for all, particularly in the context of employment.

Word Length

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,800 words.

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I INTRODUCTION

In recent decades there has been a growing recognition in many jurisdictions [1] of the need to broaden the meaning of discrimination to encompass "indirect discrimination". [2] This type of discrimination is, for the most part, a result of unconscious practices or policies, that although neutral on their face, have discriminatory effects on some minorities. New Zealand legislation has made provision for indirect discrimination to be recognised as unlawful. It is hoped this will help bring about a change in the attitudes of society and eliminate the effects of such practices in the employment context.

If anti-discrimination legislation is to be effective in the area of employment, there must be a challenge to the generally profound apathy and/or negative attitudes amongst employers as to what comprises discrimination, particularly in respect of the concept of indirect discrimination. Cotterrell [3] identifies two common attitudes to anti-discrimination law. First, such law is unnecessary because there are already equal opportunities in the workplace. Secondly, where discrimination is occurring, the law does not motivate some employers to act any differently.

These attitudes reflect why equal opportunity employment policies and programmes have been afforded such a low priority. According to the Equal Opportunities Commission (United Kingdom), this is partly due to tough economic times and partly because employers view this type of legislation as excessive and an unnecessary regulatory burden.[4]

Section 65 of the Human Rights Act 1993, [5] provides specific provision for indirect discrimination namely, unlawful discrimination arising from conduct, practices,

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1 United States of America, Canada, Britain, Australia and New Zealand.

2 Indirect discrimination involves practices that are fair in form, discriminatory in impact and cannot be justified.

3 Roger Cotterrell "The Impact of Sex Discrimination Legislation" (1981) Public Law 469, 472-473.

4 Brian Chiplin and Peter J Sloane *Tackling Discrimination at the Workplace An Analysis of Sex Discrimination in Britain* (Cambridge University Press, Great Britain, 1982) 34.

5 The Human Rights Act 1993, which came into force on 1 February 1994.

conditions or requirements which, although on their face appear neutral, put prohibited groups [6] including women, at a disadvantage.

It provides:

> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

This research paper argues that although the enactment of section 65 of the Human Rights Act 1993 is a significant step towards ensuring equal opportunity, particularly in the context of employment, it does not go far enough. The potential of section 65 of the Act is restricted by the general limitation of anti-discrimination law, because that law is premised upon the principle of formal equality, which in cases of sex discrimination requires a comparison with a man or group of men. In addition, application of the section is specifically limited to conduct, practices, requirements or conditions, such as selection criteria for recruitment or promotion, rather than addressing the wider structural discrimination inherent in large corporate organisations. The effectiveness of section 65 of the Act is further limited by evidentiary difficulties of proof in that cases of indirect discrimination are entirely reliant on circumstantial evidence and the inferences that can be drawn from that.

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6 Section 21 of the Human Rights Act 1993, provides certain prohibited grounds of discrimination and includes previous existing grounds, namely: sex, marital status, religious or ethical belief, race, colour, ethnic and national origins and age (in the area of employment). New grounds include: disability, age in all other areas covered by the Act, political opinion, employment status, family status and sexual orientation. Each of these grounds of discrimination applies to the following areas: employment, education, access to public places, provision of goods and services and housing and accommodation. There are numerous general and specific exceptions relating to the grounds in each area. Those concerning employment in particular are found in sections 24-35.

Part II of the paper will first consider the general limitation of anti-discrimination law. This is relevant in understanding why section 65 of the Human Rights Act 1993 will not be effective in bringing about the structural change required in the workplace. In particular, I will argue that anti-discrimination law of this type fails to challenge the existing structure of the workplace and merely removes the structural impediments to equal employment opportunities. This is largely due to the principle of formal equality, upon which such legislation is premised, which requires a comparison between persons. This disadvantages women particularly, in that it assumes identical treatment and recognition of unequal effects will result in the same opportunities for all. Despite these limitations complainants in New Zealand are fortunate in being able to access the law with relative ease. Section 65 of the Act not only provides them with an alternative avenue for redress but also sends a message to society that discrimination is something more than simply overt prejudice.

Part III of the paper will look at the concept of discrimination including the meaning of the word discrimination and the distinction between direct and indirect discrimination together with the characteristics of the latter which might be caught under section 65 of the Act.

Part IV will canvass the purposive approach taken to anti-discrimination legislation particularly by the former Equal Opportunities Tribunal in New Zealand and also in Canada. It is submitted that this approach will influence both the Human Rights Commission and the Complaints Review Tribunal's interpretation of specific wording in section 65 of the Act. Accordingly, Part V assesses how specific wording such as "condition", "requirement", or "practice" has been interpreted in overseas provisions including what particular arguments in defence have been put forward by respondents. Some of these arguments may well be utilised in New Zealand in establishing "good reason" in terms of section 65 of the Act.

Part VI considers the evidentiary difficulties. These include the difficulty in establishing a prima facie case especially where a case of discrimination is dependent upon circumstantial evidence. I will therefore evaluate the method adopted in the

United States to establish a prima facie case of discrimination, because this method provides useful guidance in demonstrating how a case might be established by the Commission or before the Tribunal in New Zealand.

Part VII discusses the burden of proof and the type of evidence which may be presented in support of a case of indirect discrimination. Both issues highlight the problems encountered by complainants in obtaining a successful outcome. In particular, there are difficulties in terms of identification of others similarly affected, reliance on statistical evidence, choice of the relevant labour pool for comparison and subsequent interpretation of the evidence by the Tribunal.

Part VIII then presents a case synopsis to illustrate how section 65 of the Act might be applied to a fact situation, taking into account the method used in the United States to establish a prima facie case of indirect discrimination and the evidence required for the Commission or Tribunal to prove such a case.

I conclude, in Part IX, that the Human Rights Act 1993 must be amended to reflect "equality of outcome" if elimination of discrimination is to be achieved and the structural nature of the workplace challenged and changed. While successful individual cases may alter some employer's attitudes, the ripple effect will be slow moving in both changing present attitudes and eliminating discrimination. It is submitted that a proactive rather than a reactive approach by the law is needed. The initial step must be to amend the Human Rights Act 1993 to make provision for the Tribunal to grant remedial orders to compel employers to implement equal opportunity programmes where discrimination is held to have occurred. Thereafter, the law should provide for mandatory monitoring of the workplace so that not only the same but the *best* opportunities are guaranteed for all. This will require a recognition of both the public and private spheres of women's lives in order to achieve the necessary structural change in the workplace and hopefully, also in our gendered society.

II ANTI-DISCRIMINATION LAW

A Structural Discrimination

In order to discuss section 65 of the Act in terms of its limitations in tackling structural discrimination it is necessary to establish what is commonly meant by structural discrimination, a problem long recognised in the United States.

Structural discrimination, often referred to as institutional discrimination, is an insidious type of discrimination described as follows: [7]

> [B]ehaviour [which] has become so well institutionalized that the individual generally does not have to exercise choices to operate in a [sexist] manner. The rules and procedures of the large organization have already prestructured the choice. The individual only has to conform to the operating norms of the organization and the institution will do the discriminating for [her].

The first important case in the United States in this area was that of *Griggs* v *Duke Power Company* [8], a case in which certain workers were excluded from jobs disproportionately because of the employer's selection requirements of aptitude tests and a high school diploma. In effect, those requirements had a highly adverse impact on particular racial groups. [9] In that case, the Supreme Court upheld the plaintiff's claim of unlawful discrimination on the basis that the aptitude tests and diploma were not requirements related to job performance, stating: [10]

> What is required ... is the removal of artificial, arbitrary, unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

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7 Christopher McCrudden "Institutional Discrimination" (1982) 2 Oxford J Legal Stud 303, 306 in which McCrudden was referring to "institutional racism" as defined by Knowles and Previt in 1969. It is submitted there seems to be no reason why this would not apply equally to "institutional sexism". The distinction made by McCrudden is that structural or institutional discrimination is additional to "prejudicial discrimination" (overt discrimination in New Zealand) and is one reason for exclusion from employment.

8 401 US 424 (1971).

9 Above n7, 329-335 for a detailed discussion of the case and the use of such exclusionary tests.

10 Above n7, 335.

This case was the precedent used subsequently by Britain in broadening its concept of discrimination, namely: the prohibition of indirect discrimination in both the Sex Discrimination Act 1975 and Race Relations Act 1976. The new meaning given to discrimination, unlike the direct (overt) type of discrimination, is premised on a principle of fair equality of opportunity. [11]

> A demand for fair equality of opportunity is more often than not based on a recognition of the structural sources of unequal opportunity and in particular on an acceptance of what has become known as "institutional discrimination".

Despite the recognition of the problems inherent in structural discrimination it appears that indirect discrimination provisions have not had the intended desired effect in altering the status quo. This has been attributed to the fundamental limitation of the principle upon which discrimination legislation is based, namely, formal equality, which requires a comparison of persons usually men and women. It is to this principle that the paper now turns.

B Principle of Formal Equality

Following the broadening of the meaning of the concept of discrimination and the optimism it may have initially generated, there remains a general scepticism concerning the results gained through its inclusion in anti-discrimination law. This is, it seems, largely due to both the adoption of the concept of formal equality as a principle in attempting to eliminate discrimination, particularly in cases of sex discrimination, and also to the evidential difficulties in proving indirect discrimination.

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11 Above n7, 345. In particular, McCrudden's view that the new principle differs from the simple non-discrimination principle in that it allows account to be taken of the effect an employer's actions might have on a particular group. It requires that the employer positively offset the disadvantages of a practice in ensuring the employer does certain things together with refraining from prohibited actions. However, the new concept is used differently in different countries. In the United States its function is largely remedial while in Britain, it is largely preventative.

In particular, the very nature of anti-discrimination legislation is based on a comparison between persons, frequently men and women, "who are assumed to be otherwise similarly situated". [12] In effect, the fundamental principle underlying such legislation is based on a premise of identical treatment for example, with the sexes, as to whether or not men and women have been treated differently in materially the same situation.

Dowd asks the following question: [13]

> To what extent can [indirect discrimination] analysis contribute to the resolution of the gender paradox? ... [For indirect discrimination] ... rests upon demonstrating the comparative disadvantage of one sex to the other. It does not comprehend mutual disadvantage.

She believes the concept of equality used in discrimination analysis does not challenge the existing structures and simply "accepts the basic workplace structure, ... rather than asserting a new structure of rights or a new structure not based on rights". [14]

Ellis also argues that, in practice, the necessity for a male comparator "represents a very serious limitation on the usefulness of [anti-discrimination law] on account of the prevalence of occupational segregation of the sexes" [15] and "equality of opportunity cannot be attained unless it is recognised that society does not allow all its members to compete from an identical base". [16] She states that legal recognition of the concept of indirect discrimination does go some way to acknowledging the differences of experience between men and women which if absent, would mean that the legislation achieved little more than reinforcing existing differentials. [17]

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12 Regina Graycar and Jenny Morgan *The Hidden Gender of Law* (The Federation Press, NSW, 1990) 87.

13 Nancy E Dowd "Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace" (1989) 24 Harv Civ Rights - Civ Lib L Rev 79,137-138.

14 Above n13, 140.

15 Evelyn Ellis *Sex Discrimination Law* (Gower Publishing Co Ltd, England, 1988) 37.

16 Above n15, 81.

17 Above n15, 81.

This does not overcome the problems inherent with comparison, and in particular, the subsequent interpretation of the legislation when dealing with a highly subjective area where perceptions of women and men are likely to be viewed very differently. [18] Differential treatment and unequal effects may be interpreted by some individual Complaints Review Tribunal members as natural occurrences attributable to biological differences and real choices. Analysis of both the facts and the legislation may therefore often simply reflect a reconstruction of a male standard which is objectified as both neutral and universal.

Such an analysis perpetuates the gendered division of work/family roles and stereotypes. The roles inherent in the notion of comparison will be evaluated further in the context of proof later in the paper. Suffice it to say, that in any case of discrimination the complainant must illustrate a parallel situation where another (male) person was treated in a different manner and where this is not possible, will need to rely on a hypothetical comparison and the inferences that can be drawn from that.

The wider issue for consideration at this stage is whether the ideal of formal equality, particularly in employment, really achieves any change in minorities' and in particular, women's disadvantaged position. Certainly, where equality only means adapting to the male norm then its limitations are obvious.

It is suggested by O'Donovan and Szyszczak that: [19]

> As presently constructed, anti-discrimination legislation does not challenge institutions, language, structures, that have so long excluded women. It merely asks that men move over to make a little room for the women who can conform to the male norm. To conform women must become token women, surrogate men, whose role is to confirm liberalism without challenging or changing the status quo.

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18 Nicola Lacey "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" (1987) Law and Soc J 411, 415.

19 Above n12, 101 which quotes Katherine O'Donovan and Erika Szyszczak's in *Equality and Sex Discrimination Law* (Basil Blackwell, Oxford, 1988) 44-45.

In reality, anti-discrimination law by conceptualising the problem as sex discrimination, as opposed to discrimination against women, obscures the real problem because it simply confines its goal to ensuring that sex does not play a part in either the allocation of certain goods in specific areas or in equality of opportunity in the public sphere. [20] In other words, the law fails to recognise that women's role in the private sphere both influences and determines her opportunities in the market. Eliminating differential treatment in the workplace does not alter the status quo and the general oppression of women as a group because the focus is towards biological sex rather than the inextricably intertwined gender roles of her private life. [21]

> It obscures for women the actual causes of their oppression and treats discrimination against women as an irrational and capricious departure from the normal objective operation of the market, instead of recognizing such discrimination as a pervasive aspect of our dichotomized system.

Katherine O'Donovan believes the goal of equal opportunity for both sexes in the market place is a minimal one in that to ensure women get an equal start with their male counterparts would mean that the legislation take into account private domestic roles. [22] She states that "[s]o long as equality remains a formal notion, ... structural obstacles will prevent those for whom opportunities are opened from taking advantage of them". [23] Procedural equality as recognised in indirect discrimination, therefore, goes some way to acknowledging the private sphere of women's lives. [24]

It is submitted that the recognition of the concept of indirect discrimination in anti-discrimination law is a significant step in the right direction. It identifies sex discrimination as a social problem rather than merely an individual one and accepts the matter complained of in the context of patterns of relative treatment of men and women generally. The focus is on the consequential effects measured as relative

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20 Above n18, 415-416.

21 Above n12, 101 where the authors quote Frances Olsen (an American lawyer) "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv L Rev 1497, 1552.

22 Katherine O'Donovan *Sexual Divisions in Law* (George Weidenfeld and Nicolson Ltd, London, 1985) 167.

23 Above n22, 167.

24 Above n22, 179.

effects on men and women in the relevant area affected by it. [25] This of itself gives rise to further problems in proving such cases which will be discussed later in the paper.

However, more importantly, it allows individuals an alternative avenue of redress under the law which in New Zealand does not appear to be hindered by administrative difficulties in terms of accessing the law.

C Access to the Law

It is important not to be disillusioned by the general limitations of section 65 of the Human Rights Act 1993. [26] Clearly it will inevitably take both an awareness and time to transform society's attitudes and practices in order to eradicate indirect discrimination.

Many of the alleged general difficulties in discrimination cases experienced by complainants in accessing the law in Britain have largely been overcome in New Zealand, [27] namely: under-resourcing of the Equal Opportunities Commission; inadequate powers to fulfil its statutory responsibilities; vulnerability to legal challenge in exercising its investigatory powers; correlation between legal representation and plaintiff success; Industrial Tribunal's incompetency in the face of complex and unfamiliar legal provisions; and grievously inadequate remedies.

It would appear that resources are generally adequate in New Zealand in terms of the funding of the Human Rights Commission ("the Commission") to carry out its statutory responsibilities. This undoubtedly contributes to its effectiveness within the areas it operates. In addition, the Complaints Division is given wide powers to hear or obtain information from such persons as it thinks fit. [28] There is no cost to the complainant. Where the Commission has formed an opinion that there is substance to the complaint, and a settlement is not able to be effected, the Proceedings

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25 Above n3, 475.
26 Above n5; see in particular Part I p2 which sets out section 65 of the Act.
27 Above n18, 412.
28 Above n5, section 78(3).

Commissioner can bring proceedings before the Complaints Review Tribunal ("the Tribunal"). [29] Moreover, the remedies that are available include: a declaration that the defendant has breached the Act; an order restraining the defendant from continuing or repeating the breach; damages of up to $200,000.00 which are the same as may be awarded by the District Court and an order to redress any loss or damages suffered by the complainant. The Tribunal may also declare any contract illegal and provide relief for that. Lastly, it may order such relief as it thinks fit. [30]

The latter remedy [31] has, until recently, been used by the Tribunal in the past to require defendants to put in place equal opportunity programmes but this may now be in question following the recent case of *New Zealand Van Lines Limited* v *Proceedings Commissioner* [32] in which Smellie J, overturned the Tribunal's order directing the employer to implement an anti-discrimination programme stating it was without jurisdiction in terms of "other relief as the Tribunal thinks fit".

This is unfortunate in that the effectiveness of a provision such as section 65 of the Human Rights Act 1993 will now also be limited in terms of its remedial effect. Although it will still ensure individual complainants are compensated, where indirect discrimination is proven, such cases will do little to assist the structural oppression of women. The value of such a provision is already presently undermined by the private and confidential nature of the Commission's investigation process. This prevents publication of the names of respondents in those cases where the Commission is of the opinion that either direct or indirect discrimination has occurred and the matter has been settled between the parties.

It remains to be seen whether New Zealand cases will have similar difficulties in proving indirect discrimination, as has happened overseas, but it seems likely that overseas jurisprudence will be relied upon to support a Commission opinion or Tribunal finding that indirect discrimination can be established on the facts. The

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29 Above n5, section 83.
30 Above n5, section 86.
31 Above n5, section 86(2)(g).
32 (1994) 17 TCL 3/1; Unreported, 3 August 1994, High Court, Rotorua Registry, AP83/93.

reason for this is that indirect discrimination is entirely reliant on circumstantial evidence. As most cases before the Commission are settled without ever reaching the Tribunal, there is little precedent in New Zealand to refer to. Accordingly, the paper will consider overseas jurisprudence to illustrate how section 65 of the Human Rights Act 1993 might be interpreted.

Before considering specific overseas provisions it is important to understand the concept of discrimination and particularly, the difference between direct and indirect discrimination. This is necessary because of the differing evidential issues such as the establishment of a prima facie case and burden of proof discussed in Parts VI and VII of the paper.

III CONCEPT OF DISCRIMINATION

A The Meaning of Discrimination

In looking at what is meant by the word discrimination in section 65 of the Human Rights Act 1993, it should be noted that the section refers to prohibited grounds of discrimination. Although the word "discrimination" is not defined in the Human Rights Act 1993, section 2 does provide that "prohibited ground of discrimination" has the meaning given to it by section 21 of the Act. [33] Accordingly, it is useful to also refer to the word "discrimination" as defined in the Concise Oxford Dictionary which states: [34]

> ... a difference between or *between,* distinguish *from* another; make a distinction, esp[ecially] unjustly on grounds of race or colour or sex, ... **against,** select for unfavourable treatment ...

It is evident from this definition why the word "discrimination" was able to be broadened to include the new concept of indirect discrimination. As Ellis [35] suggests, the definition itself connotes two meanings in ordinary usage. The first is that of differentiating between two people and the second, is to make an adverse distinction.

As very few sex discrimination cases have reached the Equal Opportunities Tribunal in New Zealand it is therefore only in overseas case law that the word "discrimination" has been analysed in terms of the law. In *Tomen* v *Ontario Teachers Federation* [36] the Court held that the determination of whether there was discrimination involved a question of law and in doing so accepted the reasoning of an earlier Canadian case which stated: [37]

> The word discrimination ... is a word of some complexity and can have a number of meanings depending on the context in which it is used. In the field of human rights legislation, the term

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33 Above n6.
34 (7 ed, Oxford University Press, New York, 1982).
35 Above n15, 75.
36 (1990) 11 CHRR D/223 Ont.
37 Above n36, para 76.

> embraces a concept which is not necessarily the same as in other fields of endeavour. The meaning of the word "discrimination" or the phrase "to be discriminated against" in the context of this statute is not a word or a phrase which is capable of reduction to further simplicity. It is a word or a phrase which requires interpretation and in my opinion it is a question of law.

Section 65 of the Human Rights Act 1993 specifically requires treatment which has the effect of treating people differently in a situation which would be unlawful elsewhere in the Act. It is therefore appropriate to describe what is meant by direct and indirect discrimination, as the latter is reliant on an understanding of the former.

B Distinction Between Direct and Indirect Discrimination

Direct discrimination usually involves either overt action or treatment "which in the case of a woman is less favourable than that which is or may be accorded to a man". [38] This requires, as already mentioned above, a comparison with a real or hypothetical person which illustrates that a person of a different sex, race or marital status [39] was treated in a different manner to the complainant.

Indirect discrimination on the other hand involves a requirement or condition, and in New Zealand also includes a policy or conduct, which has the effect of treating a person or group of persons differently although on the face of it appears neutral. In operation, this results in discrimination against one particular person or group of persons on a prohibited ground prescribed in the legislation.

Katherine O'Donovan argues [40] that indirect discrimination is concerned with procedures rather than outcomes or results and as such is an advance on the previous concept because it signifies a new approach to equality. [41]

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38 Above n22, 171.
39 Above n6.
40 Above n22, 179-180.
41 Above n22, 178 where O'Donovan quotes Christopher McCrudden's ideas and explanation of the concept of indirect discrimination.

> The principle on which [it] is based differs from the simple non-discrimination principle (which underlines the idea of direct discrimination) in being positive as well as negative in its requirements and in taking into account some of the prior existing disadvantages which black and women workers bring to the marketplace. ... Also unlike the simple non-discrimination principle, it requires questions to be asked not only about the precise basis on which the good being distributed is deserved but also about the nature of the good being distributed.

This idea has been endorsed in the term "employment equality" discussed in the Canadian case of *O'Connell* v *Canadian Broadcasting Corporation* [42] which cited the Report of the Royal Commission on *Equality in Employment* (1984) where it was stated: [43]

> Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructives. ... Equality in employment is not a concept that produces the same results for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential.

In that case the Tribunal held that the concept of employment equality did not simply mean refraining from policies or practices involving positive discriminatory conduct. It also extended to omissions whereby there was a failure to create the conditions in which employment equality was possible. In other words, traditional sentiment was not to get in the way of job opportunity for women. [44]

This means an employer has a real obligation to ensure the work environment accommodates the aspirations of women seriously so they can share equally in the full range of employment opportunities available to men. [45] In practice, it indicates that a wider perspective of discrimination is adopted which removes the focus from individual comparison to that of "looking at the 'posture and condition' of women as a group compared to men as a group". [46] In doing so it permits scrutiny of women's

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42 (1988) 9 CHRR D/5196.
43 Above n42, para 39508.
44 Above n42, para 39509.
45 Above n42, para 39509.
46 Above n22, 172.

general characteristics as a group which prevents them complying with what appear to be neutral requirements or practices, together with scrutiny of social stereotyping in those circumstances. [47]

However, recognising indirect discrimination will not address the structural nature of discrimination. It will merely assist in eliminating structural barriers rather than bringing about structural change. According to Dowd, indirect discrimination: [48]

> ... basically accepts the existing structure as a given, and accomplishes the goal of equal opportunity by minor tinkering and adjustment, removing unnecessary pieces of the structure if they have a disproportionate discriminatory effect. It can, at best, eliminate unjustified barriers; it cannot mandate a fundamental change in the structure.

Having identified what is meant by direct and indirect discrimination it is helpful now to consider what features and characteristics are common to indirect discrimination.

C Characteristics of Indirect Discrimination

Recognition of indirect discrimination is certainly necessary where employment organisations which either consciously or unconsciously "reward 'sameness' and penalise 'difference' have an adverse impact on workers who have not traditionally been in a position to define organisational culture, and who are thus organisationally defined as 'different'." [49]

Hunter attributes the occurrence of indirect discrimination to the fact that organisations are saturated with male values derived from men's experience, as well as sexual and political values, and this "massively contributes to women's inequality in the workplace". [50] Inequality, she says, arises because men, especially male managers, tend to guard both their status and power and prefer to work with those

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47 Above n22, 172.

48 Above n13, 138-139.

49 Rosemary Hunter *Indirect Discrimination in the Workplace* (The Federation Press, Sydney, 1992) 165.

50 Above n49, 165 see quote which is referenced in footnote 1.

sharing the same values and social qualities as themselves. As a result, they recruit and promote persons conforming to the organisational culture. [51]

It has been argued that indirect anti-discrimination provisions are not an appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's multiple employment practices simultaneously. Nor can just any employment practice be challenged simply because a disproportionate balance of prohibited groups exists in an employer's workforce. [52]

Accordingly, it is in the specific areas of recruitment and promotion that indirect discriminatory employment cases are most likely to arise. Overseas provisions appear to have been drafted more narrowly than in New Zealand so that they generally only apply to a specific condition, requirement or practice and do not include the word "conduct" which, it is submitted, widens what might constitute indirect discrimination within section 65 of the Human Rights Act 1993.

In Canada, the Supreme Court defined a prima facie case in the context of indirect discrimination, as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer". [53] It said such cases included specific recruitment practices instituted by employers such as aptitude and intelligence tests, educational requirements such as high school diplomas, height and weight requirements and practices where employers refused to employ persons with poor credit ratings.

In addition, cases might also include selective placement of job advertisements and career information, word-of-mouth or informal recruitment procedures, all of which are a recognised means of perpetuating the organisation's cultural characteristics. [54] Moreover, interview panels comprised entirely of men are likely to both apply and favour assessment criteria that represent male values and perspectives which may have an adverse effect on women's prospects in being hired or selected for the position when compared with men. [55] Similarly, valuing formal qualifications and/or experiences in paid employment for selection reasons may disadvantage those persons

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51 Above n49, 165.

52 *Pouncy* v *Prudential Insurance Co of America* 668 F 2d 795 (1982).

53 *Ontario Human Rights Commission and O'Malley* v *Simpsons-Sears Ltd* (1985) 2 SCR 536, 558.

54 Above n49, 165-167.

55 Above n49, 167-168.

who are unable to confirm to typical white male work patterns and as such have an adverse effect on women or racial minorities. [56]

Subsequent developments in the United States have now held indirect discrimination to include subjective, discretionary promotion systems. In *Nord* v *United States Steel Corporation* [57] the Court of Appeals held that the evidence supported the district court's finding that the employer had discriminated against a former employee on the basis of sex by failing to promote her to a sales representative position. It noted the district court's finding that the subjective nature of the defendant's promotion policy indicated a built-in mechanism for sex discrimination: [58]

> ... all of the management personnel were male; all of the supervisors were male and a principal factor in determining who received a promotion was the recommendation of a supervisor; there was no practice of posting job openings, rather, all information was conveyed by word of mouth; there was no established procedures or standards governing promotion; [and] employees were not provided with information regarding the necessary qualifications for promotion.

The British courts have also recognised a promotion procedure is capable of being a "requirement or condition", for the purposes of section 1(1)(b) of the Sex Discrimination Act 1975, in having a disproportionate impact on women. In *Watches of Switzerland Limited* v *Savell,* [59] despite the employer having a vague and subjective promotion procedure, namely that available positions were not advertised, persons considered for promotion were not interviewed and there were no written criteria for promotion, the Appeal Court reversed the Tribunal finding that this had had an adverse impact on women. In particular, the Employment Appeal Tribunal in doing so said that to establish a requirement or condition and disproportionate impact on women, Savell had to show that she could not achieve promotion because of the procedure for selection. As there was no evidence before the tribunal to justify that she could not achieve promotion by the employer's procedure, and she had been considered for promotion in 1981, there was nothing to indicate that she would fail to achieve promotion later because of her sex.

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56 Above n49, 170.
57 758 F 2d 1462 (1985).
58 Above n57, 1466-1467.
59 Above n49, 172; [1983] IRLR 141 (EAT).

In assessing the value and influence section 65 of the Human Rights Act 1993 might have in removing structural barriers to equality of opportunity in the New Zealand workplace, the paper will first examine the use made of the now repealed section 27 of the Human Rights Commission Act 1977, together with the general approach taken to anti-discrimination legislation in New Zealand.

IV NEW ZEALAND LEGISLATIVE PROVISIONS

A Purposive Interpretation

The Human Rights Commission Act 1977 and the Human Rights Act 1993, both set out to promote the advancement and provide better protection of human rights in New Zealand in general accordance with United Nations International Covenants on Human Rights. The aim of both was to prevent discrimination in certain areas on specific grounds rather than to punish the wrongdoer.

In interpreting how such legislation should be approached, the former Equal Opportunities Tribunal, chaired by the then Mr R Smellie QC, adopted the purposive approach to statutory interpretation in *H* v *E,* [60] stating:

> Our primary duty must be to discern the intention of Parliament. We bear in mind first, and give great weight to, the provisions of section 5(j) of the Acts Interpretation Act 1924 ... We observe in passing that if any act ever called for a liberal and enabling interpretation, the Human Rights Commission Act 1977 must be it.

The Tribunal concluded: [61]

> ... a literal approach to legislation enacted to promote the advancement of human rights is an unattractive prospect and one which we are not prepared to follow. ... [I]n our view, the treatment of women in the workplace should be no less fair and enlightened than elsewhere in the common law world. Had we felt obliged to record a narrow and restrictive interpretation of this legislation, we would have regarded such a result as out of step with the temperament of modern society.

Whilst that case concerned sexual harassment the general approach has since been approved in *Proceedings Commissioner* v *Air New Zealand.* [62]

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60 EOT 1/84; (1985) 5 NZAR 333, 347.
61 Above n60, 348.
62 EOT 1/87; (1989) EOC 92-258.

The *Proceedings Commissioner* v *Air New Zealand* case was a sex discrimination case brought under section 15(1)(b) [63] of the Human Rights Commission Act 1977. It was alleged that Air New Zealand had omitted to offer or afford to each complainant (17 female cabin crew) the same opportunities for promotions as were made available to men of substantially similar qualifications employed by Air New Zealand in the same or substantially similar circumstances in cabin crew work. However, in alleging sex discrimination the Proceedings Commissioner also relied, in the alternative, on section 27 of the Human Rights Commission Act 1977. Section 27 of that Act provided:

> **Discrimination by subterfuge** - Where a requirement or condition which is not apparently in contravention of any provision of this Part of this Act ... has the effect of giving preference to a person of a particular colour, race, ethnic or national origin, sex, marital status, or religious or ethical belief in a situation where such preference would be unlawful under any other provision of this Part of this Act ..., the imposition of that condition or requirement shall be unlawful under that provision unless the person imposing it establishes good reason for its imposition and shows that its imposition is not a subterfuge to avoid complying with that provision.

In finding that the women had been denied equal promotional opportunities which were made available to their male counterparts, the Tribunal rejected the differences in ranks between the complainants and the males as being, in law, differences that were not material. However, in addition, the Tribunal stated that even if it were wrong in treating the case as one falling directly within the provisions of section 15(1)(b) it was satisfied that all the elements of section 27 had been met and stated: [64]

> There can be no doubt but that the Airline's seniority system and the criteria which require promotion from rank to rank in accordance with seniority within rank, are requirements which have had the effect of giving preference to males in a situation where such preference would be

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63 Section 15(1)(b) of that Act provides:

> (1) It shall be unlawful for any person who is an employer, or any person acting or purporting to act on behalf of any person who is an employer, -
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> (b) To refuse or omit to offer or afford any person the same terms of employment, conditions or work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description; ...

64 Above n62, 70.

> unlawful under section 15(1)(b). That being the case, the onus is on Air NZ to justify the imposition of those requirements in terms contemplated by section 27 of the Act.
>
> We would accept that the imposition of those criteria is not a deliberate subterfuge to avoid complying with the provisions of section 15(1)(b) but we are not persuaded that there is any good reason for the imposition of those requirements. Accordingly, we find, in the alternative, that Air NZ has committed a breach of section 15(1)(b) in respect of each complainant by virtue of the provisions of section 27 of the Act.

It has been argued [65] that a defence under section 27 of the Human Rights Commission Act 1977 would be available where the institution could show that the imposition of a requirement or condition was not a subterfuge to avoid complying with a provision elsewhere in the Act. A defence would therefore only have meaning if the section is interpreted to mean conditions or requirements positively imposed. This seems to imply a deliberate action on the part of the employer to impose a requirement or condition, to avoid what appears overt discrimination elsewhere in the Act. The defence supposedly would therefore only cover situations where there is no deliberately imposed requirement or condition such as with an omission or where it was imposed unconsciously and for good reason but had the effect of discriminating against the complainant.

Overseas jurisdictions have taken a similar approach to human rights legislation in adopting the idea of indirect ("adverse effect") discrimination. Canada, in particular, in seeking to prevent discrimination has also adopted the purposive approach to such legislation by rejecting the need to prove intent in all discrimination cases. There the Court has held that discrimination should be interpreted more widely than simply intentional discrimination: [66]

> Generally human rights legislation has been given a broad interpretation to ensure that the stated objects and purposes are fulfilled. A narrow restrictive interpretation which would defeat the purposes of the legislation, that is, the elimination of discrimination, should be avoided.

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65 Paul Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum" in *Education and the Law in New Zealand* (Legal Research Foundation, April 1993).

66 *Odeon Theatres Ltd* v *Saskatchewan Human Rights Commissioner* (1985) 6 CHRR D/2682, D2686.

The emphasis on discriminatory effects has been held to be central to the purpose of the Ontario Human Rights Code in *Ontario Human Rights Commission and O'Malley* v *Simpsons-Sears Ltd* in which the Supreme Court stated: [67]

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, ... and it is for the courts to seek out its purpose and give it effect ... It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

B Section 65 of the Human Rights Act

The difference between section 27 of the Human Rights Commission Act 1977 and the recently enacted section 65 of the Human Rights Act 1993, is that the latter appears to have tightened up the former provision and is now also drafted more simply. Section 65 of the Human Rights Act 1993 should therefore be more useful in that it includes any "conduct or practice", in addition to any requirement or condition, which has the effect of treating any person or group of persons differently in a situation which would be unlawful elsewhere in the Act on one of the prohibited grounds.

Certainly it would seem that section 27 of the Human Rights Act 1977 was seldom relied upon in cases before the Commission under the Human Rights Commission Act 1977. Of the ten complaints investigated during the period 1978 to 1993 where that section was "notified", five were in the employment area, two of which were on the ground of sex, two on the ground of religion and one of the ground of age. [68]

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67 Above n53, 547.

68 Figures provided by Human Rights Commission on 13 May 1994. "Notified" means formal notification of the complaint to the parties concerned.

It will be interesting to see how section 65 of the Human Rights Act 1993 will be interpreted and what use will be made of it. However, it is a provision which is likely to be pleaded in the alternative when the Commission is notifying parties to the complaint of the alleged breaches under the Act. If the complainant is to be successful under this section, the Commission must be satisfied that there has been less favourable treatment on one of the grounds specified in the Act which has the effect of discriminating against that person or group of persons and would otherwise be discriminatory elsewhere in the Act.

In comparison, most overseas provisions have drafted complicated formulas in respect of indirect sex discrimination which have imposed some difficulties in interpretation. Despite these difficulties those indirect discrimination provisions generally constitute the most significant parts of the Acts they are found in. [69]

It is submitted that such provisions, although defined by the narrowness of the statutory formula, are relevant in assessing how section 65 of the Human Rights Act 1993 might be interpreted by both the Commission and Tribunal in New Zealand. In particular, those provisions may provide valuable guidance as to what "condition", "requirement" or "practice" means under section 65 of the Act. Furthermore, the interpretation of "justifiability" in Britain, "business necessity" in the United States and "bona fide occupational requirement" in Canada, argued as a defence to the imposed condition, requirement or practice, may also assist in predicting what might constitute "good reason" in New Zealand. The paper now examines the interpretation accorded those overseas provisions.

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69 Above n15, 81; see Sex Discrimination Act 1975 (UK).

V OVERSEAS TREATMENT OF INDIRECT DISCRIMINATION PROVISIONS

A United Kingdom

First, the United Kingdom provision in the Sex Discrimination Act 1975 may provide useful precedent as to the meaning of a "requirement" or "condition".

In that Act, indirect discrimination is said to occur where a person discriminates against a woman in any circumstances relevant for purposes of any provision in the Sex Discrimination Act 1975 if (Section 1(1)):

> (b) he applies to her a requirement or condition which he applies or would apply equally to a man but: -
>
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
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> (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
>
> (iii) which is to her detriment because she cannot comply with it.

A requirement or condition under that Act means that the application of any requirement or condition is something which *must* be complied with rather than being a mere preference. In other words, the requirement or condition must be a necessary criterion but if it is simply the practical outcome of any preference, such as word-of-mouth recruiting, it will not be caught by the section, although it may be discriminatory. [70]

The British Tribunal has held the following circumstances to amount to indirect discrimination in employment: a condition that employment applicants pass a

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70 Above n15, 82.

language test; [71] an employer's prohibition of trousers for women staff; [72] and a requirement of prior management experience as a condition for a grant. [73]

However, the provision has not been without its difficulties and it is to these difficulties that the paper next looks, particularly the issue of justifiability, in assessing what might constitute "good reason" in terms of section 65 of the Human Rights Act 1993.

1 Compliance

The difficulties of interpretation in Britain have mostly revolved around certain specific wording in the provision. The first of such wording is the words "can comply". In *Price* v *Civil Service Commission.* [74] Ms Price filed a complaint that she had been unlawfully discriminated against because she was told that in applying for a post as executive officer she was over the upper age limit of 28 years. She alleged that in imposing such an age limit for entry as an Executive Officer she was indirectly discriminated against as fewer women than men could comply with such a requirement because they were otherwise engaged in child rearing activities. The Tribunal held that as it was physically possible for women to comply with the condition there was no case to answer.

Ms Price appealed that decision and the issue to be decided by the Court was whether the Tribunal was correct in its interpretation of the words "can comply" in section 1(1)(b) of the Act. The EAT allowed the appeal because in its view it was necessary to see whether women could comply in practice, stating: [75]

> Such a [narrow] construction appears to us to be wholly out of sympathy with the spirit and intent of the Act ... It should not be said that a person "can" do something merely because it is theoretically possible for him to do so. It is necessary to see whether he can do so in practice.

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71 *Ullah* v *British Steel* [1979] IRLR 213.
72 *Kingston and Richmond Area Health Authority* v *Kaur* [1981] ICR 515 (EAT); IRLR 337, 339.
73 *Ojutiku and Oburoni* v *Manpower Services Commission* [1982] ICR 661 (CA).
74 [1978] ICR 27 (EAT).
75 Above n74, 31.

> Applying this approach to the circumstances of this case, it is relevant in determining whether women can comply with the condition to take into account the current usual behaviour of women in this respect, as observed in practice, putting on one side behaviour and responses which are unusual or extreme.

It would appear that the fact no women could comply with a requirement or condition will not constitute a bar to a claim of indirect discrimination. [76]

2 Justifiability

Secondly, and more importantly, the word "justifiable" has been interpreted in the Britain in significantly different ways. In *Steel* v *Union of Post Office Workers* [77] the test of justifiability was held to mean it must be "necessary" for some purpose of the employer rather than simply convenient. Subsequently, this test was initially modified by applying the test "reasonably and with common sense" [78] and then rejected, being replaced instead with a test which involved looking at all the circumstances of a particular case to determine whether the requirement was "right and proper" in the circumstances. [79] Later cases appear to have reverted to a more objective approach which requires evidence "to the satisfaction of the Tribunal that the requirement is 'necessary' to achieve a legitimate demand of the employer". [80]

3 Detriment

Lastly, it is unclear what the third element actually means but it has been suggested that it may be ambivalent. Does it require the woman to show she had been disadvantaged in some way by not being able to comply or does it mean that her inability to comply can of itself constitute detriment? [81] It may be, as McCrudden

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76 Above n15, 83.
77 [1978] ICR 181 (EAT).
78 *Singh* v *Rowntree Mackintosh Ltd* [1979] ICR 554, 557 (EAT).
79 Above n73.
80 Above n15, 89.
81 Above n15, 90.

suggests, simply a bar to complainants not personally adversely affected by the requirement or condition. [82]

Section 65 appears to have avoided this problem by simply requiring that any condition or requirement "has the effect" of treating a person or group of persons differently. It is submitted that the New Zealand wording places a lesser burden on complainants than those in Britain who may have to prove detriment.

B United States

As will be noted, much of the law in relation to indirect discrimination has been developed and influenced by American legal precedent which is why the paper focuses so much on case law from the United States and Canada.

1 Doctrines of Disparate Treatment and Disparate Impact

Existing provisions in the United States covering both direct and indirect discrimination are to be found in Title VII of the Civil Rights Act 1964. Title VII prohibits discrimination on the basis of sex, race, colour, religion or national origin in any employment condition, including hiring, transfer, promotion, admission to training programmes, firing and compensation. [83]

Section 703(a), (h) of the Civil Rights Act 1964, as amended in 1972, provides:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex or national origin; or

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82 Above n7, 355.

83 Rita Mae Kelly *The Gendered Economy: Work, Careers, and Success* (Sage Publications Inc, California, 1991) 14.

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex, or national origin. ...
>
> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, colour, religion, sex, or national origin.

Not surprisingly, Title VII did not transform the workplace into one of equality as was hoped and as was the statute's purpose. In interpreting Title VII the United States Supreme Court has recognised the two concepts of discrimination for enforcing equality in the workplace namely, direct and indirect discrimination. These are commonly referred to as the "disparate treatment" and "disparate impact" doctrines.

The disparate treatment doctrine prohibits practices motivated by discriminatory *intent* by guaranteeing similar treatment for those who are similarly situated. [84]

The courts adopted the new meaning of discrimination in 1971, namely; "disparate impact", as being employment practices which, while neutral in their treatment of different groups, fell more harshly on one group than another and which the employer could not justify by business necessity. As a consequence, previous male biased job requirements, fair in form but discriminatory in operation, could now be evaluated in terms of prohibited practices. [85]

Assumptions about women being similarly situated were questioned during the 1980s and in particular, why only women who could act like men were held to be similarly situated. [86] It was argued at that time the standards used in comparing individuals in

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84 Above n83, 14.
85 Above n8.
86 Above n83, 15.

discrimination cases were male ones of aggressiveness, dominance and competitiveness. [87]

> Women, when they cannot or will not conform to male patterns of behaviour, remain outside the scope of its protection. ... Because these jobs are associated with the traits and lifestyles of men, employers fail to hire women who cannot or will not adopt "male" standards of behaviour. Men therefore continue to dominate these positions, which, in turn, continue to be viewed as male and adapted to men. Women, meanwhile, remain trapped in the "pink collar" ghetto of the labor market.

Subsequently, the doctrine of "disparate impact" was expanded to include subjective, discretionary promotion systems that have a disparate impact on certain groups. [88]

In determining what criteria might be lawful the courts in the United States have adopted a business necessity test which states: [89]

> The touchstone is business necessity. If an employment practice which operates ... cannot be shown to be related to job performance the practice is prohibited.

The courts were later required to interpret the meaning of "business necessity" and "job relatedness". These are worth evaluating for they may also be relevant in determining what the words "good reason" mean under section 65 of the Human Rights Act 1993.

2 Business necessity

The scope of "business necessity" as a test has, it appears, been interpreted in a narrow manner by the courts which have required a balancing approach to be taken between the disparate impact of an employer's practice and the benefits of that

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87 Above n83, 15 where Kelly quotes Eichner in "Getting Women Work that Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII" (1988) 97 Yale LJ 1400, 1404.

88 *Watson* v *Fort Worth Bank and Trust* 108 S Ct 2777 (1988).

89 Above n7, 335 see in particular the test adopted in *Griggs* v *Duke Power Co;* Above n8, 431.

practice. [90] The reason for this is that the case of *Griggs* v *Duke Power Company* itself did not establish judicial standards for determining whether a practice is or is not a business necessity. [91] In particular, the Court failed to identify what business purposes would fall within the business necessity defence, what quantum and nature of proof was needed to show the nexus between the business purpose and means for achieving that purpose, and how necessary the business purpose must be. [92]

This has since been interpreted by lower courts as requiring the employer to satisfy the court on two accounts. First, that the condition or practice has been validated and secondly, that there was no acceptable alternative having a less exclusionary effect. [93]

Validated conditions or practices would involve employers ensuring that those conditions or practices are related to the job requirements. That would require the employer to specify the particular trait or characteristic which the condition or requirement is being used to identify or measure, that the trait or characteristic is an important element of work behaviour and moreover, to demonstrate by professionally accepted methods that the requirement or condition is predictive or correlated significantly with the work behaviour elements identified in the middle step. [94]

C Canada

Again, it is useful to examine the approach taken by the Canadian courts in that section 7(b) of the Canadian Human Rights Act 1985 RSC refers to discriminatory practices such as a policy or practice. Section 65 of the Human Rights Act 1993 has now incorporated the word "practice" in its coverage. Furthermore, what is considered a "bona fide occupational requirement" defence in Canada may have applicability to the "good reason" defence in the New Zealand provision.

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90 Marcus B Chandler "The Business Necessity Defense to Disparate-Impact Liability Under Title VII" (1979) U Chic LR 911.

91 S Wyatt McCallie "Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach" (1974) 84 Yale LJ 98.

92 Above n90, 916-917.

93 Above n7, 356.

94 Above n7, 362 see footnote 284, *Craig* v *County Los Angeles* 626 F 2d 659 (1980) (CA).

Section 7(b) of the Canadian Human Rights Act 1985 RSC provides that:

> It is a discriminatory practice, directly or indirectly ...
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

Section 10 of the Act reads:

> It is a discriminatory practice for an employer ...
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer, or any other matter relating to employment or prospective employment.
>
> That deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

The term "prohibited ground of discrimination" which appears in both sections 7 and 10 of the Canadian Human Rights Act 1985 RSC is defined in section 3 of that Act. It includes discrimination on the grounds of "sex" as does the New Zealand provision.

1 Bona Fide Occupational Requirement

The Canadian Human Rights Act 1985 RSC also provides a number of statutory exceptions in employment contexts, which are set out in section 14 of that Act. The issues surrounding interpretation of those statutory exceptions have not been dissimilar to the issues which have arisen in the United States.

Pursuant to section 14(a) of that Act the defendant may argue as a defence that the practice is a "bona fide occupational requirement". Such a bona fide occupational

requirement imposed by the employer would include a requirement that the policy or practice is implemented for either the safety of workers or the public. What might be considered justifiable as a bona fide occupational requirement has been interpreted by the Canadian Court as involving the balancing of the rights of the parties to the discrimination in placing a duty on the employer to accommodate the needs of the employee short of undue hardship. [95]

> In cases of "adverse effect" discrimination there is said to be no question of justification raised "because the rule, if rationally connected to the employment needs no justification." The threshold question is whether the practice or rule is one of "business rationality" or "business necessity". If it is, the employer is bound to undertake some measure of accommodation to meet the special needs of the employee who is the victim of the discriminatory practice or rule. He is not, however, required to go beyond what in the circumstances is "reasonable accommodation". He is not bound to jeopardize his own business nor to engage in undue expense in the process of accommodating the employee. If reasonable accommodation does not meet the need of the employee to protect his rights, then he may have to choose between his employment or his ... principles.

The next question is how one goes about establishing a prima facie case of indirect discrimination in New Zealand. Because section 65 of the Act requires the effect to have been one where such treatment would be unlawful under any provision elsewhere in the Act, it is necessary to first consider how a prima facie case of direct discrimination is established.

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95 Above n42, para 39478.

VI ESTABLISHMENT OF A PRIMA FACIE CASE

A prima facie case of direct discrimination can be established by evidence which comprises both oral testimony and witness statements or similar fact evidence (the usual mode of adducing evidence in human rights cases) or alternatively, through circumstantial evidence. In the United States the Courts have held that statistical evidence alone may be sufficient [96] but generally cases are established there by a combination of oral testimony and statistical evidence. New Zealand has to date rarely relied on statistics as has been done in the United States.

However, many complainants are unable to show direct evidence that they have been treated less favourably because of their sex or race, particularly in employment, because they must rely entirely on circumstantial evidence to prove discrimination. In such situations, discrimination can be established by inferences drawn from circumstantial evidence taking into account all the facts, each of which by itself might be insufficient to permit an inference, but considered together may justify it. Often it is necessary to refer to overseas precedent to establish whether or not discrimination can be established on the facts.

In the United States, the courts initially developed a method to analyse and prove cases of direct discrimination because of the difficulty in establishing "intent". [97] Although this method is no longer used in establishing cases where direct evidence of discrimination is available, it is used for cases reliant on circumstantial evidence. Accordingly, it is useful to examine this method, particularly as cases of indirect discrimination are only established on the basis of circumstantial evidence.

In particular, a plaintiff had to establish a prima facie case that she had been discriminated against by her employer, for promotion, by demonstrating the following: [98]

(1) that the complainant (she) was a member of a protected class;

(2) that she was qualified for the position;

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96 Above n52; *Equal Employment Opportunity Commission* v *Akron National Bank* 497 F Supp 733 (1980) in which the Court held that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination.

97 Lynn Smith (Ed) *Righting the Balance: Canada's New Equality Rights* (The Canadian Human Rights Reporter Inc, Saskatchewan, 1986) 284-289.

98 *McDonnell Douglas Corp* v *Green* 411 US 792 (1973).

(3) that she was not promoted into a job for which she was qualified; and

(4) that the position was given to a male.

The cases below illustrate how this method was applied to cases of direct discrimination.

In *Willis* v *Watson Chapel School District* [99] a female teacher, repeatedly denied promotions to administrative positions, established a prima facie case of sex discrimination in that she demonstrated she was a member of a protected class, she applied for and qualified for each position at issue and in every case a male was hired to fill the position. Furthermore, the males who were hired were recommended to an all-male school board by a male superintendent who, it was clear, used subjective criteria in determining who he should recommend.

In *Ezold* v *Wolf, Block, Schorr and Solis-Cohen* [100] the Court held that a law firm's denial of partnership to a woman was unlawful discrimination in that the plaintiff made out a prima facie case of promotion discrimination by showing that both her evaluations by partners working closely with her and a memorandum summarising her reviews established her qualification for partnership but that several male associates with lesser evaluations were made partners.

In *Smart* v *Columbia Gas System Service Corporation* [101] a female employee was denied promotion to the position of senior financial tax analyst because of her sex and not because a male had arguably better qualifications. The Court found she had been eliminated from the promotion process, despite having expressed her interest and undertaken training, before the male was even considered. In making its finding the Court said the successful male's "subsequent superlative performance in the job is simply beside the point". In all, five female candidates were each denied in-depth examination of their qualifications given to even the unsuccessful male candidates.

In *Downey* v *Isaac* [102] a promotion action challenged by an unsuccessful female college graduate, with various qualifications, was held not to be unlawful sex discrimination. The Court concluded that while the complainant met a threshold

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99 50 EPD 38,958 (1988).
100 55 EPD 40,497 (1990).
101 42 EPD 36,901 (1986).
102 38 EPD 35,573 (1985).

showing of sex discrimination, sex was not a factor in the decision not to promote her. The employer "demonstrated by persuasive testimony and evidence that the plaintiff was less qualified by training and experience". [103] There was no evidence that the claimant was treated in any manner different from other applicants for promotion.

It would appear that the prima facie method established in *McDonnell Douglas Corporation* v *Green* [104] was "never intended to be rigid, mechanised or ritualistic [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it [bore] on the critical question of discrimination". [105]

As a consequence, the United States Supreme Court has now restricted use of the method to cases where the plaintiff is unable to produce direct evidence of discrimination. However, if the plaintiff is relying on circumstantial evidence, a prime facie case can be established by showing the following:

(1) she belongs to a minority (because of that individual's race, colour, religion, sex or national origin);

(2) she applied and was qualified for the job in which the employer was seeking applicants;

(3) despite her qualifications she was rejected; and

(4) after her rejection the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

In *Mitchell* v *Baldrige, Secretary of Commerce* [106] the Court of Appeals held that the issue in a case of an allegedly discriminatory failure to promote is not the objective superiority or inferiority of the plaintiff's qualifications but rather whether the defendant's selection criteria are non-discriminatory. In applying the *McDonnell Douglas* prima facie case formulation to the District Court's facts it held the plaintiff did make out a prima facie case of discrimination. Mitchell was black and Hispanic, Mitchell applied for a position of computer systems analyst, the selection panel rated Mitchell as qualified but Mitchell was rejected for the position and ultimately, a white

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103 Above n102, 39,554.
104 Above n98.
105 *United States Postal Service Board of Governors* v *Aikens* 460 US 711 (1983).
106 36 EPD 35,109 (1985).

male was chosen. It held the District Court had based its dismissal of Mitchell's discrimination charges on its findings that the people selected for the vacancies at issue were better qualified than the plaintiff but in doing so incorrectly assumed that the plaintiff had to prove as part of the prima facie case that he was as qualified or more qualified than those selected.

The courts have also recognised that a discriminatory atmosphere at the plaintiff's employment could serve as circumstantial evidence of individual discrimination. In *Parker* v *Secretary, United States Department of Housing and Urban Development* [107] the Court of Appeals remanded that case back to the District Court for more detailed findings of fact. But in doing so it held that the lower Court had applied incorrect legal standards regarding proof of pretext and that evidence relevant to demonstrating pretext for an employer's adverse action might include showing that "materially similarly situated" white or male employees did not receive the same adverse action received by a coloured employee, by showing facts as to the employer's treatment of the employee during the term of employment, and by the employer's general policy and practice with respect to employment of minority groups, including women, against whom discrimination was prohibited.

In *Conway* v *Electro Switch Corporation* [108] the Court held that circumstantial evidence that the employee's position was never listed and that the female employee had never been considered for the supervisory position, even though by most accounts she was hard working, competent and a loyal employee (amongst other circumstantial evidential facts), supported the jury inference that the employer fostered an atmosphere of discrimination that affected its personnel decisions. [109]

> A claim of discrimination need not be proven solely through direct evidence; circumstantial evidence may support an inference of discrimination. ... Indeed, discrimination can often be of such a subtle, insidious character that a plaintiff may only be able to offer circumstantial evidence to buttress his or her claim. As this court has ruled, circumstantial evidence of a discriminatory atmosphere at a plaintiff's place of employment is relevant to the question of motive in considering a discrimination claim. While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add "colour" to the employer's decision making processes and to the influences behind the actions taken with respect to the individual plaintiff.

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107 52 EPD 39,499 (1989); 891 F 2d 316, 322 (1989).
108 825 F 2d 593 (1987).
109 Above n108, 597.

In a subsequent case, *Townsend* v *Washington Metropolitan Area Transit Authority,* [110] the District Court held that irregularities in the selection process by the defendant and a generally discriminatory atmosphere demonstrated that the allegedly superior qualifications of a successful male candidate were a pretext to deny promotion to a qualified female employee because of her sex. In that case the female plaintiff, after answering cursory questions, was eliminated from further consideration without being granted another interview, despite her evaluations and recommendation by the rating panel. Two males were selected. At that time women made up only 5% of the upper level positions in the department and there was a common feeling amongst women that they were being bypassed for promotion despite their qualification. The Court stated: [111]

> ... the plaintiff has shown by a preponderance of evidence that, *at the time of the selection process*, WMATA did not fairly and objectively compare the plaintiff's qualifications for the CDS position with those of Wilson and Lamb. ... Because WMATA never engaged in that kind of analysis at the time, WMATA's insistence that a careful weighing of the applicants' qualifications would prove that its failure to promote the plaintiff was nondiscriminatory is merely a *post hoc* rationalization that "carries the seeds of its own destruction." (*Bishopp* v *District of Columbia* 788 F. 2d 781, 789 ... 1986).

The United States Supreme Court held: [112]

> [T]he prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

To establish a case of indirect discrimination under section 65 of the Human Rights Act 1993, the complainant must show that a neutral employment practice, requirement, condition or conduct had the effect of treating either a person or group of persons differently on one of the prohibited grounds listed in section 21 (which treatment would be considered unlawful elsewhere in the Act). The respondent must

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110 54 EPD 40,323 (1990).

111 Above n110, 64,507.

112 Above n97, 286 see quote citing *Texas Department of Community Affairs* v *Burdine* 450 US 248, 254 (1981).

then establish "good reason" why such a conduct, practice, condition or requirement was imposed.

It seems likely that the method adopted in the United States to establish a prima facie case based on circumstantial evidence will provide guidance in cases of indirect discrimination in New Zealand. However, even accepting the presumption of a prima facie case using this method, there remain evidential difficulties in demonstrating this which I will now elaborate on.

VII EVIDENTIAL ISSUES

The evidentiary difficulties in proving a case of indirect discrimination impose a further major limitation to the effectiveness of section 65 of the Human Rights Act 1993. The specific issues to be discussed in this Part of the paper include the burden of proof and the type of evidence that might be presented in such cases.

A Burden of Proof

In cases of direct discrimination the burden of proof remains on the complainant at all times. However, if the complainant is reliant on circumstantial evidence and a prima facie case is established then the burden of proof shifts to the respondent-employer.

If the employer is able to offer sufficient evidence to rebut the presumption of a prima facie case "the factual enquiry" then reverts back onto the complainant again to prove, by a preponderance of evidence, that this is not the true reason but a pretext for the discriminatory reason. [113]

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. ... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

Reasons proffered by the employer to negate the prima facie presumption of discrimination, have been summarised by Smith: [114]

> ... lesser comparative qualifications, attitude problems, effeminism, personal differences with a supervisor or other employees, lack of diligence, inability to command respect and maintain discipline, political considerations, budgetary constraints, and instances or misconduct and disloyalty ... lack of reliability, misconduct, failure to take a polygraph examination, lack of friendship with the employer, poor responses in oral interviews, unsatisfactory performance on psychological tests, and age.

Proof of pretext by an individual complainant might include facts about the employer's treatment of the plaintiff during his/her employment, and evidence as to

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113 Above n97, 286; see also Above n112, in particular, *Burdine* 254-254.

114 Above n97, 291 where Smith quotes Barbara L Schlei and Paul Gossman in *Employment Discrimination Law* (2ed, United States, 1983).

the employer's general policy and practice with respect to minority employment. It is therefore up to the complainant to persuade the Court, by a preponderance of evidence, that the action or policy was likely to be motivated by a discriminatory reason or that the employer's explanation is unworthy of credence. [115]

In cases of indirect discrimination no proof of intent is required [116] and once a prima facie case is established the burden of proof shifts to the respondent.

In discussing the onus of proof in indirect discrimination the Canadian Court has approved of McIntyre J's statement: [117]

> [T]here must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination.

As mentioned, indirect discrimination involves practices that are fair in form but discriminatory in operation. Accordingly, there will be no direct evidence and the complainant must rely entirely on circumstantial evidence. In America and Canada, once the complainant has established a prima facie case, the burden of proof shifts to the employer-respondent to prove the practice or requirement is "job related" or justified by "business necessity" by persuading the Court of this by a preponderance of evidence: [118]

The Arizona Court has stated, in relation to the defendant's burden of proof: [119]

> In disparate impact suits, the burden is placed on the defendant to establish the defence of business necessity and it is a much heavier burden than merely articulating a legitimate non discriminatory reason for hiring decisions.

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115 Above n97, 288.
116 Above n52.
117 Above n42, para 39473 and the quote of McIntyre J in *O'Malley;* Above n53.
118 Above n42, paras 39447 and 39478.
119 Above n83, 200 see Kelly's quote cited in *Arizona Department of Law* v *Amphitheatre School District.*

This lessens the complainant's onus of proof and is particularly helpful as the evidence necessary to prove discrimination is not always accessible to the complainant because the knowledge is often in the respondent's possession. [120]

Any practice, however, must be shown to have a causal connection with the imbalance. [121] How then does the complainant go about obtaining the evidence necessary to do this? Evidence commonly relied upon includes anecdotal, documentary, comparative and statistical evidence, but such evidence is unfortunately not without its inherent difficulties which, as will be seen below, can work against women complainants. It is submitted these difficulties are, apart from the limitations of the formal equality principle the legislation is premised on, the other major impediment to the effectiveness of provisions such as section 65 of the Human Rights Act, particularly for women.

B Evidence Presented

Under Part III of the Human Rights Act 1993, complaints of unlawful discrimination are investigated by the Complaints Division of the Human Rights Commission in the first instance. The aim of the investigation is to ascertain the truth of the facts in a private and confidential manner. The Complaints Division is able to hear or obtain information as it thinks fit [122] and it is not necessary for it to hold any hearing. [123] In most cases respondents are co-operative and willing to assist and in doing so, produce the necessary documents freely to the Commission. The process is aimed at avoiding the adversary system of the courts and the strict legal rules of admissibility of evidence.

In investigating any complaint the parties are given the opportunity to state their version of the facts and this is subsequently corroborated by witness statements. In the case of unlawful discrimination in employment, the complainant will need to produce evidence that he/she has been discriminated against by showing, in the case of an alleged failure to promote, that he/she was treated differently to another in similarly situated circumstances. In cases of indirect discrimination this can only be done by using circumstantial evidence from which an inference can be drawn. As

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120 Chris Ronalds *Anti-Discrimination Legislation in Australia* (Butterworths Pty Ltd, Australia, 1979) 142.

121 Above n52.

122 Above n5, section 78(3).

123 Above n5, section 78(4).

will be seen below it is often difficult for the complainant to do this in that there are technical difficulties in terms of the identification of others who may have been similarly affected or who for one reason or another may not wish to come forward and provide evidence.

1 Oral Testimony

In employment cases in particular, it is crucial to ensure that there is evidence in the form of oral testimony to support the complainant's allegations. Such oral testimony would include others of the same protected group who have been affected in a similar way to the complainant. It is evidence which establishes the complainant's allegations, without any reliance upon documentary evidence, indicating discriminatory behaviour or practices which may only be held by the respondent. Witnesses can confirm the respondent-employer's practices or conduct as having adversely affected them by showing a pattern of discrimination over time, particularly in relation to hiring or promotion procedures. This is important in cases where the respondent is a small company and too small for adequate comparison or statistical study, or involves highly trained applicants for high-level positions. [124] Absence of oral witness testimony, corroborating the complainant's allegations, can work against a successful outcome.

In *Equal Employment Opportunity Commission* v *Sears, Roebuck and Co* [125] despite being a graphic example of occupational segregation, where women were denied the opportunity of being hired and promoted to higher paid commission sales positions, as illustrated by undisputed statistical evidence, the Court held that Sears had not discriminated unlawfully. The basis for the decision revolved around the perceived choices and aspirations of women in that workforce, namely: that women were much less likely than their male counterparts to be interested in those positions.

In that case, evidence of structural disadvantage was transformed into evidence of "choice" against women. The Equal Employment Opportunity Commission ("EEOC") argued that the disproportionate number of women in commission sales jobs was due solely to direct discrimination. Sears' expert witness, Rosalind Rosenberg (a feminist historian) argued that the disparity shown by the statistical evidence could be justified on the ground that women's attributes, namely their nurturing, caring and non-competitive traits meant women's interests were not

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124 *Blake* v *Mimico Correctional Institute Ontario* (1984) 5 CHRR D 2417 para 20097.

125 628 F Supp 1264 (1986).

identical to those of men and those differences accounted for the statistical disparity between the numbers of women and men in commission sales positions.

EEOC on the other hand, through another expert historian, Alice Kessler-Harris, argued that women had the same interests as men but submitted that to argue that women's occupations in the workforce were a product of women's "choice" was both the employer's excuse and manipulation of her workforce experiences. [126] It is apparent that the absence of oral testimony by any one of Sears' female employees, as supporting evidence of discrimination, was fatal to the case.

Similarly, in an earlier class action case [127] where the EEOC alleged racial and sexual discrimination against a meat packing company, the Court held that statistical evidence may be buttressed with direct evidence of discriminatory policies and procedures and individual instances of discrimination. However, in that case, the employer persuaded the Court that women were not automatically excluded from jobs which required heavy lifting by demonstrating that women were generally uninterested in those jobs. This, together with the absence of any testimony by a female employee that she was denied a transfer request for a job for which she was qualified, was sufficient to rebut the EEOC's prima facie case of classwide discrimination that the employer had assigned jobs and maintained segregated departments based upon sex.

2 Similar Fact Evidence

Similar fact evidence is a useful tool often used in cases before the Commission. In the case of indirect discrimination, testimony obtained from past employees may well assist in establishing evidence of an employer's conduct, requirements or practices having had a discriminatory effect.

Normally, similar fact evidence is not considered admissible in a court because its prejudicial effect is seen to outweigh its probative value. However, pursuant to section 106 of the Human Rights Act 1993, the Tribunal may receive as evidence "any statement ... that may in its opinion assist it to deal effectively with the matters before it whether or not admissible in a Court of Law". The Commission appears to be of the view that admissibility in the Tribunal is the yardstick to be used when forming an "opinion" on a complaint. If a particular testimony is questionable then,

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126 Above n12, 104.

127 *Equal Employment Opportunity Commission* v *H S Camp and Sons Inc* 542 F Supp 411 (1982).

in weighing up the prejudicial and probative value, the test of "striking similarity" might be used as a guideline. Such a test has been stated as follows: [128]

> If there is "striking similarity" between the complainant's account and accounts relating to other occasions so as to make it "highly likely" the complainant is telling the truth, those other accounts may be admitted.

It therefore seems possible that similar fact evidence about an employer's past conduct or particular practices could be useful as evidence where present discriminatory practices or conduct are in issue.

3 Statistical Evidence

Statistics also may be useful as a form of circumstantial evidence from which inference of discriminatory conduct or practices may be drawn. [129] In effect they show patterns of conduct rather than specific occurrences. However, statistical evidence is not a perfect tool for precise proof or disproof of the existence of a discriminatory practice or conduct. It therefore should be combined with other evidence and testimony which describes the specific instances of discrimination and reinforces the allegations by illustrating the behaviour and conduct that gives rise to the statistical figures. [130]

> It is within the rubric of "circumstantial evidence" that statistical evidence in human rights cases should be considered. Like all circumstantial evidence, statistics are to be considered along with all surrounding facts and circumstances.

Statistical evidence is used commonly in the United States and more recently to prove such discrimination in Canada. However, with the concept of discrimination becoming increasingly sophisticated, the nature of the statistical evidence has become complex and its probative value often a battle between experts. [131] It has been argued in the United States that too heavy a reliance on statistical evidence will divert a finding of liability away from the "preponderance of evidence" rule and impose a more stringent standard of proof than is required in other types of civil litigation. [132] It

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128 *R* v *Hsi Eng Feng* [1985] 1 NZLR 222 cited in *R* v *S*, Unreported, 17 August 1987, Court of Appeal, CA 208/87.

129 Above n97, 292-294; Above n52, 796.

130 Above n124, para 20096; see also *International Brotherhood of Teamsters* v *United States* 431 US 324 (1977) a class action law suit under Title VII of the Civil Rights Act 1964.

131 Above n97, 296.

132 Above n97, 296.

appears direct discrimination cases can be proved by a "gross statistical" disparity alone. [133] In cases of indirect discrimination, statistics that are "markedly disproportionate" [134] or are "significantly discriminatory" are sufficient. [135]

A complainant might use statistics to show seemingly inoffensive employment practices are different from what they appear, for example, sexual disparities in hiring and promotion procedures; that subjective and discretionary decisions by employers are made in a discriminatory manner; that tests and requirements imposed by the employer have a discriminatory impact; and that an employer's discriminatory reason for rejecting an applicant is a cover-up for a discriminatory reason. [136]

A respondent might also use statistical evidence to rebut the complainant's prima facie case by showing that the requirement or practice at issue is a bona fide occupational requirement, is job-related or that discrimination is justified. [137]

Where the disparate impact doctrine has been used in the United States to establish an individual action, rather than a class action, the complainant has been required to show that she personally was the victim of discrimination by the general practice which allegedly resulted in a discriminatory impact on the protected group. [138] Statistics may provide her with evidence of the disparities between the number of women employed in a particular job and the number of qualified women in the labour market. But that statistical evidence must bear a relationship to the specific charge that is being tried. [139]

The inherent difficulty, alluded to earlier in the paper, is that the statistical pool to be relied upon as the choice of the base group for comparison will ultimately cause differences in outcome. Consequently, the determination of the relevant labour group as a pool of comparison is particularly crucial. [140]

In Britain at least, the choice of labour pools for comparison is a question of fact for the Industrial Tribunal to determine. Unfortunately, this will depend on the

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133 Above n97, 294.
134 Above n97, 294; Above n8, 424.
135 Above n97, 294 see *Dothard* v *Rawlinson* 433 US 321, 329 (1977).
136 Above n124, para 20097.
137 Above n124, para 20098.
138 *Coe* v *Yellow Freight System Inc* 646 F 2d 444, 446 (1981); cf Above n124, para 20103 where employer-respondent might rebut a prima facie case established by statistics by showing the complainant was not personally discriminated against.
139 Above n138, 452.
140 Above n127, 542.

Tribunal's own subjective views as to what are the relevant comparison groups. If this view differs from that of the complainant, when compiling statistical evidence, then she may fail to prove indirect discrimination "even though had the appropriate comparison been made, the statistics might have supported the complaint". [141] Statistics therefore, may relate to the population at large, a particular workplace or to the workforce in issue. [142]

Fortunately, New Zealand has not yet had to contend with the issue of statistical evidence but it is probable that statistical evidence will be relied upon increasingly, particularly in cases where emphasis has been placed on subjective evaluation processes instituted by the respondent-employer which often have the effect of favouring the incumbent class (males) at the expense of the minority (females).

However, statistics should be regarded as merely one form of circumstantial evidence from which inferences of discriminatory conduct may be drawn. In particular, statistics are not irrefutable and like other evidence can be rebutted.

I now provide a case illustration to exemplify how section 65 of the Act might be applied to a fact situation by demonstrating the presumption of a prima facie case and the evidence needed to establish that.

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141 Colin Bourn and John Whitmore *The Law of Discrimination and Equal Pay* (Sweet and Maxwell, London, 1989) 38.

142 Above n141, 38.

VIII CASE ILLUSTRATION

The following synopsis illustrates the type of situation which is likely to fall within section 65 of the Human Rights Act 1993, including the need at times to rely on overseas jurisprudence to support the establishment of a prima facie case on the facts where the case is partially dependent on circumstantial evidence.

(a) The Facts

The complainant was a female manager in a large corporate organisation. She alleged that despite showing an interest in a newly created senior management position she was denied promotion because she was a woman. That position was within the head office of the organisation which had other offices throughout the country. The respondent was head of one of the divisions in the Head Office. At no time was the complainant asked to submit her curriculum vitae or an application after having informed the respondent, who was responsible for selection, that she believed she was the most qualified and experienced person in that organisation for the position. Following the appointment of a male to the position, recruited from outside the organisation, the complainant's responsibilities were effectively reduced although her salary remained the same. She eventually resigned.

In support of her allegations, the complainant also named several other women whom she believed had been treated in a similar discriminatory manner. She alleged that the respondent disliked women and had failed previously to promote other female employees.

Evidence was collected about the complainant's experience and skill base, including favourable performance appraisals and assessments by supervisors of her previous positions, both permanent and relieving, over the time she had worked for the organisation.

The respondent and his employer ("the respondents") argued in defence that the successful male who had ultimately been appointed to the position had both the necessary experience together with special skills in one particular area regarded important for the job. The complainant's experience in the same area was limited to two brief periods of relieving in that particular area. The respondents also argued that

the male's subsequent superlative performance in the job indicated he was the best person for the job.

Evidence was also obtained from the other named women who were allegedly treated in a similar manner. In each case, the individual respondent had played some part in who was appointed to the vacant positions but all positions involved a promotion for those women. None were appointed although they had also expressed interest in the positions.

It became evident from the evidence that there was no formalised procedure for advertising vacant positions within the higher levels of the organisation. Usually the personnel department would be notified of a position becoming available by the head of the division concerned. There were no written or standard guidelines concerning requirements or qualifications for job applicants. If a particular candidate was thought acceptable for the position, the personnel department would refer the name of the person to the divisional head where the person worked, who would then decide whether to make a recommendation or not.

Opportunities for promotion were therefore communicated solely by word of mouth. An employee would not be considered for promotion unless recommended by the head of the division. Any employee desiring to be considered for a particular position was nevertheless expected to communicate this desire to the head of the division where the position had arisen.

The evidence also indicated that promotion decisions were actually made by the all male divisional heads in consultation with personnel. In making a decision of whether to promote a particular employee, consideration was given to their ability to get along with others, customer relations and past performance. No transparent objective criteria were used at the time of selection to assess the candidates. None of the women were given an interview although nor were some men.

It was contended by the respondents that they were aware and familiar with the women's work and skills. However, there was a common feeling among all the

women, including both former and current employees, that women were being bypassed for promotion despite their qualifications. Moreover, there were no women in the upper level positions although there was a clear occupational segregation of women in the lower level jobs.

2 Process

The evidential issues raised in this synopsis are essentially those caused by a lack of direct evidence that the individual respondent had discriminated against the complainant in her non-promotion to the senior management position. This was compounded by a reluctance of the former women employees to get involved for fear of jeopardising their present employment and damaging their reputation in the market place. There were other difficulties in obtaining evidence from the respondent's male colleagues within the higher levels of the organisation, concerning perceptions and comments allegedly made to the women that the respondent did not like women working for him. In addition, the respondents could provide no documentation or material relating to the appointment at issue (other than the successful male's curriculum vitae) and simply produced a score sheet, collated some time after the event, insisting that the subsequent careful weighing of the applicant's qualifications proved that its failure to promote the complainant was non-discriminatory.

In assessing the circumstantial evidence, it is useful to look at overseas jurisprudence to determine whether or not a prima facie could be established on the facts. It would seem that in drawing an inference from all the facts, there would be sufficient evidence to form an opinion that the respondents had, on the balance of probabilities, [143] discriminated against the complainant pursuant to section 22(1)(a), (b) (c) and (d)

143 Civil standard of proof required in New Zealand cases before the Commission and Tribunal.

of the Human Rights Act 1993. [144] As will be noted, much of the case-law already discussed in this paper would be relevant.

It seems clear from the evidence that the respondents used a subjective evaluation procedure in its promotion practices which was discriminatory in its effect. In the United States the plaintiff's burden would be established by showing by a preponderance of evidence, that the sex discrimination practice was the respondent's standard operating procedure. In other words, the regular practice rather than the unusual. [145] Accordingly, the burden would then shift to the respondents to articulate some legitimate non-discriminatory reason for the failure to promote the complainant. If the respondents were not capable of meeting this burden because they could not produce evidence to support an assertion that the complainant lacked the special skills required in one particular area of the job then their reason could be argued to be a pretext for the real reason for her non-promotion. Certainly the oral testimony of the other women, as similar fact evidence, would support an opinion of discrimination on the basis of sex.

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144 Section 22(1) of the Human Rights Act 1993, provides:

(1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer, -

(a) To refuse or omit to employ the applicant on work of that description which is available; or

(b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

(c) To terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or

(d) To retire the employee, or to require or cause the employee to retire or resign, -

by reason of any of the prohibited grounds of discrimination. ...

145 Above n130.

(c) Section 65

It would appear that section 65 of the Human Rights Act 1993, would be satisfied on the ground that the promotion procedure is capable of being a requirement or condition [146] for the purposes of that section and the defendants had offered no good reason for the imposition of such a requirement or condition. Alternatively, it seems both the promotion procedure as an employment "practice" and the "conduct" of the individual respondent would fit comfortably within the latter terms.

The alleged discrimination by the individual respondent in failing to either interview or assess the complainant at the time of selection and in particular, by not fairly or objectively comparing her qualifications for the position with that of the successful male would, it is submitted, be sufficient to form an opinion, on the balance of probabilities, that if not deliberate, the respondent's conduct certainly had the effect of discriminating against the complainant. Moreover, the respondents would need to ensure they provided sufficient evidence to support their actions in order to establish a good reason in terms of that section.

146 Above n59, *Watches of Switzerland.*

IX CONCLUSION

While it is accepted there are serious limitations inherent in a provision such as section 65 of the Human Rights Act 1993, it seems probable more use will be made of it in future than was made of the repealed section 27 of the Human Rights Commission Act 1977. The section should assist complainants in both individual and group actions [147] to obtain redress for discriminatory actions and practices against employers and for that reason, has some potential. Its remedial effect, apart from prevention, has been reduced by the Court's prohibition in allowing the Tribunal to make an order that equal opportunity programmes be put in place where such discrimination has occurred. [148] The recent ruling significantly undermines the legislature's recognition that discrimination involves something more than simply prejudicial behaviour. With respect, this decision endorses the structural nature of discrimination in the workplace.

Moreover, the present provision fails to challenge the structural nature of discrimination. Structural change itself will only come about by implementing stronger legislative measures that focus on equality of outcome, rather than procedural equality, and acknowledge the public and private spheres of women's lives in particular. This will require more than simply a change in the workplace structure but a change that carries over into the social and cultural areas of their life.

Any affirmative restructuring of course, must address the workplace structure to ensure not only the same opportunity for all but the best opportunity for all, [149] by recognising each individual's difference and accommodating that within a more humane structure. [150]

> [Any] restructuring [must reach] beyond gender issues: it is not simply a matter of adding women to work and men to family, or integrating the values of each sphere to reflect the other,

147 Above n5, section 83(2).
148 Above n32.
149 Above n13, 139.
150 Above n13, 171.

> but requires rethinking and changing work and family and their relationship to each other by imagining that relationship without the framework of gender.

Dowd suggests this could be done by requiring " that legislation neither be based upon nor promote or perpetuate social/cultural constructs of gender" [151] and would require legislation that extended the stereotyping concern to a broader concern and deflected the focus away from assumptions about the construction of the structure to the impact of the existing reality of that structure. [152]

It is submitted that section 65 of the Human Rights Act 1993 is a significant step in the right direction and may not pose the problems of interpretation that have arisen overseas. However, this forward step now needs to be matched by legislative changes that both amend the remedial effects of the section together with providing legal recognition that discrimination, particularly against women, is a structural problem within our gendered society.

This might be achieved in several ways. First, the present Act must be amended to permit the Tribunal to grant orders compelling respondents to implement equal opportunity programmes to prevent further discrimination occurring.

Secondly, the legislation must refocus away from the formal notion of equality of opportunity to that of equality of respect. [153] This would allow every person to be entitled to be treated in a manner that recognised each individual's worth. [154]

> Equality of respect and treatment theories ... open possibilities for change that go beyond the market system and they thereby serve ... "to bring to life latent needs which society has repressed, valid for every aspect of the relation of the individual to his work, to social production, and to society as a complex environment of natural and cultural relationships".

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151 Above n13, 167.
152 Above n13, 167-168.
153 Above n13, 140.
154 Above n13, 140 see footnote 202, Elshtain "The Feminist Movement and the Question of Equality" (1975) 7 Polity 452, 454.

Thirdly, the legislation should be used to mandate the integration of minorities, such as women, into the workforce by making provision for the Commission to monitor [155] the workplace in ensuring employers make the necessary structural modifications to allow occupational desegregation.

Monitoring is useful in both measuring and remedying discriminatory practices because statistical collection and analysis does not seem to be sufficient [156] to convince employers to change their existing workplace structures. Although equal opportunity programmes serve a purpose in ensuring employers are familiar with specific provisions in the legislation, monitoring allows all parties to assess the reasonableness and effects of characteristics used by employers in reaching decisions. [157] This should avoid indirect discrimination occurring through ignorance at least.

A monitoring role will also require a reappraisal of social attitudes. It may mean some employers have to implement positive discrimination programmes to achieve certain goals to reduce the effects of both past discrimination and current practices. It will involve a sharing of expectations and a recognition of family responsibilities and other commitments in the private sphere of all workers' lives. Only strategic planning will dismantle the gendered structure of the workplace and remove the present impediments to the *best* opportunities for all. It is the beginning step to structural change which should lead to an acknowledgment of the more widespread nature of the gendered structure of our current society.

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155 Section 13 of the Privacy Act 1993 permits the Commissioner to both audit and monitor agencies to ensure compliance with the Act. It is submitted a similar provision in the Human Rights Act 1993 is necessary if the legislation is to be realistically effective.

156 Above n4, 127.

157 Above n4, 128.

BIBLIOGRAPHY

Colin Bourn and John Whitmore *Discrimination and Equal Pay* (Sweet and Maxwell Ltd, Great Britain, 1989).

Brian Chiplin and Peter J Sloane *Tackling Discrimination at the Workplace An Analysis of Sex Discrimination in Britain* (Cambridge University Press, Great Britain, 1982).

Marcus B Chandler "The Business Necessity Defence to Disparate - Impact Liability under Title VII" (1979) 46 U Chi LR 911.

Roger Cotterrell "The Impact of Sex Discrimination Legislation" (1981) Public Law 469.

Marilyn J Davidson and Cary L Cooper *Shattering the Glass Ceiling The Woman Manager* (Paul Chapman Publishing, London, 1992).

Linda Dickens "Equality Cases not heard by Tribunals" (1994) 23 Indust LJ 77.

Nancy E Dowd "Work and Family: The Gender Paradox and The Limitations of Discrimination Analysis in Restructuring the Workplace" (1989) 24 Harv Civ Rights - Civ Lib L Rev 79.

Evelyn Ellis *Sex Discrimination Law* (Gower Publishing Co Ltd, England, 1988).

Equal Opportunities Commission *Towards Equality: A Casebook of Decisions on Sex Discrimination and Equal Pay 1976-1981* (Equal Opportunities Commission, Manchester, 1981).

Alan David Freeman "Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine" (1978) 62 Minn L Rev 1049.

Regina Graycar and Jenny Morgan *The Hidden Gender of Law* (The Federation Press, NSW, 1990).

B Hepple and M Szyszczak (eds) *Discrimination: The Limits of Law* (Mansell, London, 1992).

Tamara K Hervey "Structural Discrimination Unrecognised: Jones v University of Manchester" (1994) 57 Mod L Rev 307.

Rosemary Hunter *Indirect Discrimination in the Workplace* (The Federation Press, Sydney, 1992).

Rita Mae Kelly *The Gendered Economy Work, Careers, and* Success (Sage Publications Inc, California, 1991).

Nicola Lacey "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" (1987) Law and Soc J 411.

Legal Research Foundation *Education and the Law in New Zealand* (Legal Research Foundation, New Zealand, 1993).

Christine A Littleton "Reconstructing Sexual Equality" (1987) 75 Calif L Rev 1279.

Christopher McCrudden "Institutional Discrimination" (1982) 2 Oxford J Legal Stud 303.

C A MacKinnon *Feminism Unmodified Discourses on Life and Law* (Harvard University Press, Cambridge, 1987).

B W Napier "Statutory Interpretation and Indirect Discrimination in the Court of Appeal" (1989) Cambridge LJ 187.

Katherine O'Donovan *Sexual Divisions in Law* (Weidenfeld and Nicolson Ltd, London, 1985).

Barbara F Reskin and Patricia A Roos *Job Queues, Gender Queues, Explaining Women's Inroads into Male Occupations* (Temple University Press, Philadelphia, 1990).

Chris Ronalds *Anti-Discrimination Legislation in Australia (*Butterworths Pty Ltd, Australia, 1979).

Marian Sawer (Ed) *Program for Change* (Allen and Unwin Pty Australia Ltd, North Sydney, 1985).

Lynn Smith (Ed) *Righting the Balance: Canada's New Equality Rights* (Canadian Human Rights Reporter Inc, Saskatchewan, 1986).

Marina C Szteinbok "Indirect Proof of Discrimination Motive in Title VII Disparate Treatment Claims After *Aikens* (1988) 88 Colum LR 1115.

S Wyatt McCallie "Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach" (1974) 84 Yale LJ 98.

Greer, Belinda Mary

Indirect discrimination in employment and the Human Rights Act 1993