HCJ 721/94

El-Al Israel Airlines Ltd

v.

1. Jonathan Danielowitz

2. National Labour Court

The Supreme Court sitting as the High Court of Justice
[30 November 1994]
Before Vice-President A. Barak and Justices Y. Kedmi, D. Dorner

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The first respondent, who is employed by El-Al as a flight attendant, has a stable relationship with another man. Under a collective agreement, El-Al gives every permanent employee a free aeroplane ticket, every year, for that employee and his/her spouse (husband or wife). Under a collective arrangement, a free ticket is also given to a companion recognized publicly as the employee's husband/wife. The first respondent asked El-Al to give him a free ticket for his companion, but his request was denied.

Held: (Majority opinion — Vice-President A. Barak, Justice D. Dorner) Not giving the respondent a free ticket for his same-sex companion amounted to discrimination, since a distinction on the basis of the difference between a heterosexual and a homosexual relationship is unjustified in the context of employee benefits.

(Minority opinion — Justice Y. Kedmi) Linguistically, only a heterosexual couple can be called a 'couple'; the concept of the 'couple' linguistically only applies to an union of male and female that can, conceptually, have children. Therefore a distinction between a same-sex companion and an opposite-sex companion is a distinction between persons who are fundamentally unequal, and this does not amount to discrimination.

Petition denied, by majority opinion (Vice-President M. Shamgar and Justice D. Dorner), Justice Y. Kedmi dissenting.

Legislation cited:

Basic Law: Human Dignity and Liberty, 5752-1992, ss. 7, 8.

Contracts (General Part) Law, 5733-1973, ss. 14, 31.

Criminal Law Ordinance, 1936, s. 152(2).
Employment Service Law, 5719-1959, s. 42.
Equal Employment Opportunities Law, 5748-1988, ss. 2, 2(a) 2(c).
Equal Employment Opportunities Law (Amendment), 5752-1992.
Equal Remuneration for Female and Male Employees Law, 5724-1964.
Equal Retirement Age for Female and Male Employees Law, 5747-1987.
Government Corporations Law, 5735-1975, s. 18A.
National Insurance Law [Consolidated Version], 5728-1968, s. 8.
Penal Law, 5737-1977, s. 351(3).
Penal Law (Amendment no. 22), 5748-1988.
Women's Equal Rights Law, 5711-1951, s. 1.

Israeli Supreme Court cases cited:

[1] FH 13/84 *Levy v. Chairman of Knesset Finance Committee* [1987] IsrSC 41(4) 291.

[2] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; IsrSJ 8 13.

[3] EA 2/88 *Ben-Shalom v. Central Elections Committee for Twelfth Knesset* [1989] IsrSC 43(4) 221.

[4] HCJ 114/78 *Burkan v. Minister of Finance* [1978] IsrSC 32(2) 800.

[5] HCJ 453/94 *Israel Women's Network v. Government of Israel* [1994] IsrSC 48(5) 501; [1992-4] IsrLR **Error! Bookmark not defined.**.

[6] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.

[7] HCJ 104/87 *Nevo v. National Labour Court* [1990] IsrSC 44(4) 749; IsrSJ 10 136.

[8] HCJ 507/81 *Abu Hatzira MK v. Attorney-General* [1981] IsrSC 35(4) 561.

[9] HCJ 301/63 *Streit v. Chief Rabbi* [1964] IsrSC 18(1) 598.

[10] HCJ 693/91 *Efrat v. Director of Population Registry at Ministry of Interior* [1993] IsrSC 47(1) 749.

[11] HCJ 1000/92 *Bavli v. Great Rabbinical Court* [1994] IsrSC 48(2) 221.

[12] HCJ 5394/92 *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [1994] IsrSC 48(3) 353.

[13] HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [1981] IsrSC 35(4) 1; IsrSJ 8 21.

[14] HCJ 141/82 *Rubinstein v. Knesset Speaker* [1983] IsrSC 37(3) 141; IsrSJ 8 60.

[15] HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812.

[16] FH 10/69 *Boronovski v. Chief Rabbis* [1971] IsrSC 25(1) 7.

[17] HCJ 30/55 *Committee for Protection of Expropriated Nazareth Land v. Minister of Finance* [1955] IsrSC 9 1261.
[18] CrimA 112/50 *Yosipof v. Attorney-General* [1951] IsrSC 5 481; IsrSJ 1 174.
[19] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [1988] IsrSC 42(2) 221; IsrSJ 8 186.
[20] CrimA 224/63 *Ben-Ami v. Attorney-General* [1964] IsrSC 18(3) 225.
[21] HCJ 720/82 *Elitzur Religious Sports Association, Nahariyah Branch v. Nahariyah Municipality* [1983] IsrSC 37(3) 17.
[22] HCJ 4169/93 — unreported.
[23] HCJ 410/76 *Herut v. National Labour Court* [1977] IsrSC 31(3) 124.

Israel National Labour Court cases cited:

[24] NLC 33/25-3 *Flight Attendants Association v. Hazin* [1973] 4 IsrNLC 365.
[25] NLC 44/85-0 – unreported.

American cases cited:

[26] *Welsh v. United States* 398 U.S. 333 (1970).
[27] *Califano v. Westcott* 443 U.S. 76 (1979).
[28] *Boutilier v. Immigration Service* 387 U.S. 118 (1967).
[29] *Nemetz v. Immigration & Naturalization Service* 647 F. 2d 432 (1981).
[30] *Braschi v. Stahl Associates Co.* 544 N.Y. Supp. 2d 784 (1989).
[31] *Yorkshire Towers Co. v. Harpster* 510 N.Y. Supp. 2d 976 (1986).
[32] *Two Associates v. Brown* 502 N.Y. S. 2d 604 (1986).
[33] *E. 10th St. Assoc. v. Estate of Goldstein* 552 N.Y. Supp. 2d 257 (1990).

English cases cited:

[34] *Dyson Holdings Ltd v. Fox* [1975] 3 All E.R. 1030 (CA).

European Court of Human Rights cases cited:

[35] *Norris Case* 142 Eur. Ct. H. R. (Ser. A) (1988).
[36] *Modinos v. Cyprus Case* 259 Eur. Ct. H. R. (Ser. A) (1993).

Canadian cases cited:

[37] *Schachter v. Canada* (1992) 93 D.L.R. (4th) 1.
[38] *R. v. Turpin* [1989] 1 S.C.R. 1296.
[39] *Vriend v. Alberta* (1994) 6 W.W.R. 414.
[40] *Egan v. Canada* (1993) 103 D.L.R. (4th) 336.
[41] *Haig v. Canada* (1992) 94 D.L.R. (4th) 1.

[42] *Layland v. Ontario (Consumer Protection & Commercial Relations)* (1993) 104 D.L.R. (4th) 214.

[43] *Canada (A.G.) v. Mossop* [1993] 1 S.C.R. 554.

Jewish Law sources cited:

[44] Genesis 1, 27; 1, 28; 2 24; 5 2; 6 19.

For the petitioner — Y. Winder, A. Ben-Israel

For the first respondent — S. Donevitz, O. Kalmaro

JUDGMENT

Vice-President A. Barak

A collective agreement and a collective arrangement confer a benefit on a 'spouse' (husband or wife) or a 'companion recognized as a husband/wife' of an employee. Is this benefit conferred also on an employee's same-sex companion? That is the question before the court in this petition.

The facts and the litigation before the Labour Court

1. The first respondent (the respondent) works as a flight attendant for the petitioner (the El-Al company). Under the collective agreement, every (permanent) employee is entitled to receive free (or discounted) aeroplane tickets for himself and his 'spouse (husband/wife)' once a year. Under a collective arrangement (entitled 'professional guidelines'), aeroplane tickets (as of 1 January 1986) are given to 'a companion recognized as the husband/wife of an employee of the company if the couple live together in a joint household as husband and wife in every respect, but they are unable to marry lawfully.'

2. The respondent applied (on 21 January 1988) to the petitioner with a request to recognize his male companion as his 'companion' for the purpose of receiving an annual free or discounted aeroplane ticket. In his request, the respondent explains that he has a stable and long-term relationship (since 1979) with another man. The relationship involves, *inter alia*, running a joint household and cohabiting in a private apartment purchased jointly. The respondent's request was refused.

3. The respondent applied to the Regional Labour Court. He asked the court to declare him entitled to receive free or discounted aeroplane tickets for his male companion, just as El-Al gives these to its employees' spouses.

According to a procedural agreement, it was agreed that the court would first consider the underlying question whether an El-Al employee is entitled to a free or discounted ticket for a same-sex 'companion'. On this question, the Regional Labour Court (Justice Lubotsky and public representatives Ozeri and Pinchas) held that the provision of the collective agreement (which confers the right to the benefit on a 'spouse') does not confer a right on a companion of an employee, and this does not involve improper discrimination. However, the provision of the collective arrangement conferring a benefit on persons recognized as a couple (despite their being unable to marry lawfully) but not conferring the same benefit on a same-sex couple (who are also unable to marry lawfully) is a discriminatory provision. This discrimination is prohibited by the provisions of the Equal Employment Opportunities Law, 1988. Under the provisions of this law (in s. 2) — as amended in the Equal Employment Opportunities (Amendment) Law, 1992 — an employer may not discriminate against any of his employees in their conditions of employment 'on the basis of sex, sexual orientation, personal status or their being parents.' Because of this prohibited discrimination, the discriminatory provision in the collective arrangement was disqualified. By virtue of the procedural agreement, the Regional Labour Court went on to consider whether the respondent in fact cohabits with his companion.

4. El-Al appealed to the National Labour Court. The National Labour Court (President M. Goldberg, Vice-President S. Adler, Justice Y. Eliasof and public representatives R. Ben-Yisrael, Abrahamovitz, Friedman and Galin) dismissed the appeal.[*] It was held that the respondent does not fall into the category of those entitled to a discount under the collective agreement, since the expression 'spouse (husband/wife)' does not include a same-sex companion. It also held that the respondent does not fall into the category of 'persons recognized as the husband/wife of an employee' in the collective arrangement, since a recognized companion, in the context of the collective arrangement, does not include same-sex companions. Notwithstanding, the court held that this position constitutes improper discrimination on the basis of sexual orientation, contrary to the principle of equality set out in the Equal Employment Opportunities Law, as amended in 1992. This improper discrimination, contrary to provisions of the law, gives the respondent (as of 2 January 1992) a right to demand for himself the benefit that was not conferred on him for discriminatory reasons.

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[*] NLC 3-160/53 *El-Al Airlines v. Danielowitz* IsrLC 26 339.

5. The petition before us is directed against the decision of the National Labour Court. El-Al (the petitioner) asks for a ruling that its refusal to give the respondent an aeroplane ticket for his companion does not constitute improper discrimination under the Equal Employment Opportunities Law as amended in 1992. El-Al's contention is that this law — in the 1992 amendment — added an additional type of prohibited discrimination ('sexual orientation') but it did not confer rights to receive benefits that an employee was not previously entitled to receive. The respondent argued before us that there is no reason why we should intervene in the National Labour Court's judgment, which ruled that a cause of action based on discrimination was created by the Equal Employment Opportunities Law, justifying giving aeroplane tickets for the respondent's companion as of the date when the law was amended (on 2 January 1992).

The interpretive construction

6. The respondent (the flight attendant, the employee) may base his argument to receive the benefit (a free or discounted ticket) for his companion on two legal constructions. According to the *first* construction, his right is founded on the collective agreement that gives benefits to 'a spouse (husband/wife)' and on the collective arrangement that gives a benefit to 'a person recognized as the husband/wife of an employee.' According to this construction, the term 'spouse' (in the collective agreement) and the term 'recognized companion' (in the collective arrangement) should be interpreted according to their purpose to include also a spouse of the same sex and a recognized companion of the same sex. The respondent's right to receive the benefit is contractual, and it is founded on the text of the collective agreement and the collective arrangement, just like the respondent's right to receive the benefit for himself. This legal model is interpretive in nature. It is intrinsic to the actual text. In this the respondent's right to receive benefits — for his companion and for himself — derives from the legal meaning of the contractual text that is chosen from among its various linguistic meanings. Naturally this right accrues to the employee when the conditions entitling him to it are fulfilled.

7. The interpretive construction was rejected by the Labour Courts. They held that the (legal) meaning of the term 'spouse (husband/wife)' in the collective agreement does not include same-sex companions. The National Labour Court pointed out that —

> 'In the case before us, the parties to the collective agreement expressly showed that they did not mean a same-sex companion. The collective agreement says "spouse (husband and wife)". The

> words "husband and wife" attached to the term spouse show that the parties used the term spouse in its narrow sense. It follows that this expression in the collective agreement does not include recognized companions and same-sex companions who are indisputably not "husband and wife".'*

With regard to the term 'person recognized as a husband/wife' in the collective arrangement, the National Labour Court held that this does not include persons of the same sex who cohabit. The National Labour Court pointed out that the 'term "recognized companion" does not appear by itself, but it is accompanied by the words "as husband/wife".'* This use of language shows 'that the intention of the drafter was not to include persons of the same sex.'*

The statutory construction

8. *A second* legal construction is also available to the respondent. This construction starts with the premise that the contractual right to receive a benefit is conferred only on a companion who is not the same sex as the employee. According to this construction, the contractual arrangement (the product of the interpretive construction) is a discriminatory arrangement that is contrary to the Equal Employment Opportunities Law (as amended in 1992). The remedy given to the respondent as a result of this discrimination is not to nullify the contractual arrangement — a remedy that he did not request at all — but to make a (judicial) order based on the provisions of the law to correct the discrimination. The respondent will therefore be entitled to the benefit for his companion by combining the discriminatory contractual provision with the corrective statutory provision. This construction is not interpretative. It is extrinsic to the actual text. Its existence derives from the combination of (*A*'s) contractual right and the statutory mandate to prevent discrimination (against *B*). The resulting right of the employee arises on the day that the statutory prohibition against discrimination on grounds of sexual orientation came into force (i.e., on 2 January 1992). It may be called a statutory (or extrinsic) construction. The National Labour Court accepted this construction, and this is what El-Al is attacking before us. Analyzing this legal model must be done in two stages: *first*, whether the contractual arrangement (the product of the interpretive construction) is (improperly) discriminatory because of sexual orientation; *second*, what remedy should be given to an employee who has been the victim of (improper) discrimination on the basis of sexual orientation?

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* *Ibid.*, p. 349.

9. The respondent did not reargue the interpretive construction before us. Indeed, this construction — which, as stated, was rejected by the National Labour Court — is complex (cf., with regard to the term 'spouse', FH 13/84 *Levy v. Chairman of the Knesset Finance Committee* [1]; see also C. A. Bowman, B. Cornish, 'A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances,' 92 *Colum. L. Rev.* (1992) 1164; R. Elbin, 'Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others),' 51 *Ohio St. L. J.* (1990) 1067). We would have been compelled to decide this, had the respondent insisted on his (contractual) right to receive a benefit from the date when these (contractual) rights were created. As we have seen, the respondent accepts the decision of the National Labour Court that his right is based on the argument of discrimination on the basis of sexual orientation, relying on the amendment (of 2 January 1992) to the Equal Employment Opportunities Law. As a result, we do not need to consider the interpretive construction. I therefore presume — without deciding the issue — that the respondent does not have a (contractual) right under the collective agreement and the collective arrangement to receive the benefit for his companion. On this basis, I will now examine the statutory construction, with its two questions (is discrimination present; what is the proper remedy). I shall begin with the first question.

The right to equality and its violation

10. Equality is a fundamental value in Israeli law. 'It is the heart and soul of our whole constitutional regime' (Justice Landau in HCJ 98/69 *Bergman v. Finance Minister* [2], at p. 698 {18}) and 'it is part of the essence and character of the State of Israel' (Vice-President Justice Elon in EA 2/88 *Ben-Shalom v. Central Election Committee for the Twelfth Knesset* [3], at p. 272). '…The rule that one may not discriminate against persons on the basis of race, sex, nationality, ethnicity, country of origin, religion, beliefs or social status is a fundamental constitutional principle which is counted among our fundamental jurisprudential perspectives and constitutes an integral part of these' (Justice Shamgar in HCJ 114/78, Motion 451, 510/78 *Burkan v. Minister of Finance* [4], at p. 806). Considerations of justice and fairness underlie the principle of equality. 'The principle of equality… has long been recognized in our law as one of the principles of justice and fairness…' (Justice Mazza in HCJ 453/94 *Israel Women's Network v. Government of Israel* [5], at p. 521 {**Error! Bookmark not defined.**}). Equality is a central element of the social contract upon which society is based (see HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa; Labour Party in Tel-Aviv-Jaffa Municipality v. Tel-Aviv-Jaffa Municipal Council* [6], at p. 332). Indeed —

> 'Discrimination is a plague that fosters a feeling of unfairness and frustration. It harms the sense of belonging and constructive motivation to participate in, and contribute to, social life. A society that practices discrimination is not a healthy society, nor can a state in which discrimination is practised be called a civilized state' (Justice Bach in HCJ 104/87 *Nevo v. National Labour Court* [7], at p. 760 {150}).

11. The principle of equality is entrenched in Israel in a number of normative structures. *First,* it is a principle of case-law — the product of 'Israeli common law' — that has been recognized and developed by the courts in Israel. This principle reflects on the (objective) intention of every piece of legislation and acts as a criterion for its interpretation. 'The fundamental principle, which constitutes a legislative goal for all the acts of the legislature, is the principle that everyone is equal before the law… legislation should therefore be presumed and interpreted as intending to achieve this purpose, not to undermine it.' (HCJ 507/81 *Abu Hatzira MK v. Attorney-General* [8], at p. 585. See also HCJ 301/63 *Streit v. Chief Rabbi* [9], at p. 612). The case-law principle of equality reflects on the law's 'fundamental concepts' (such as reasonableness, justice, equality and public policy) and constitutes a normative element in establishing the scope of their application (see HCJ 693/91 *Efrat v. Director of Population Register at Interior Ministry* [10]). A discriminatory collective agreement may therefore be contrary to public policy and be disqualified as a result (see *Nevo v. National Labour Court* [7] and L.C.J. 3-25/33 *Flight Attendants' Committee v. Hazin* [24]). The case-law principle of equality is a normative basis for recognizing the right of equality as a human right in Israel. It leads to the formulation of case-law rules based on it — such as the rule of spouses' joint property ownership (see HCJ 1000/92 *Bavli v. Great Rabbinical Court* [11]).

12. *Second,* the principle of equality is incorporated in Israeli legislation. This began with Israel's Declaration of Independence, which provides that the State of Israel shall treat its citizens equally 'irrespective of religion, race or sex'. It continued in legislation that creates equality in specific relationships. Thus, for instance, the Women's Equal Rights Law, 1951, provides that 'women and men shall be subject to the same law for every legal act...' (s. 1). The Employment Service Law, 1959, prohibits discrimination by the Employment Service when referring a person for employment (s. 42). The Equal Remuneration for Female and Male Employees Law, 5724-1964, aims to ensure equality in employees' salaries. Special legislation is intended to allow corrective preferential treatment for women (see section 18A of the Government Corporations Law, 1975).

Another law — which is the relevant one in this case and which we will discuss separately — is the Equal Employment Opportunities Law. This development culminated in the enactment of the Basic Law: Human Dignity and Liberty, which entrenched equality as a super-legislative constitutional right, within the framework of human dignity:

> 'Today the principle of equality can be entrenched in the Basic Law: Human Dignity and Liberty. Such entrenchment implies the elevation of the principle of equality to a constitutional, super-legislative normative status' (*per* Justice Or in HCJ 5394/92 *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [12], at p. 362).

13. Needless to say, equality does not confer an absolute right. The human right of equality — like every other human right — is a relative right. The principle of 'equality is not an absolute but a relative principle' (*per* Justice Or in *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [12], at p. 361); the limits of extending the principle of equality are determined by an (internal) balance between the whole spectrum of human rights and by the public interest (see A. Rubinstein, *The Constitutional Law of the State of Israel*, Shoken, 4th edition, 1991, at pp. 199, 299). The right to equality may be restricted by virtue of other appropriate values (see HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [13], at p. 13 {32}, and cf. s. 8 of the Basic Law: Human Dignity and Liberty). Indeed, sometimes equality is not completely protected. Equality may be lawfully restricted if this is consistent with the values of the State of Israel, is for a proper purpose and if equality is not restricted more than necessary.

14. The factual premise is that people are different from one another. '...No person is completely identical to another' (Justice S. Levin in HCJ 141/82 *Rubinstein v. Knesset Speaker* [14], at p. 148 {67}). Every person is a world in himself. Society is based on people who are different from one another. Only the worst dictatorships try to eradicate these differences. Moreover, the presumption behind the Basic Law: Human Dignity and Liberty is that every person is free to develop physically and spiritually as he sees fit (see HCJ 5688/92 *Wechselbaum v. Minister of Defence* [15]). This underlying freedom is the basis for the principle of equality. It means equality before the law and the law being impartial to the differences between people. It means equality in applying freedom. It means equality in opportunities. This equality presumes a normative arrangement that is applied uniformly to all individuals, irrespective of the factual difference between them. However, the principle of equality does not presume only one rule for

everyone. Indeed, the principle of equality does not rule out different rules for different people. The principle of equality demands that the existence of a rule that treats people differently is justified by the nature and substance of the issue. The principle of equality therefore presumes the existence of objective reasons that justify a difference (a distinction, dissimilarity). Discrimination — which is the opposite of equality — exists therefore in those situations where a different law for people who are (*de facto*) different from one another is based on reasons that are insufficient to justify a distinction between them in a free and democratic society. In Justice Or's words, discrimination is 'different treatment without an objective justification' (*Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [12], at p. 360). President Agranat discussed this and pointed out:

> 'The principle of equality, which is merely the opposite of discrimination and which, for reasons of justice and fairness, the law of every democratic country aspires to achieve, means that people must be treated equally for a particular purpose, when no real differences that are relevant to this purpose exist between them. If they are not treated equally, we have a case of discrimination. However, if the difference or differences between different people are relevant for the purpose under discussion, it is a permitted distinction to treat them differently for that purpose, provided that those differences justify this. In this context, the concept of "equality" therefore means "relevant equality", and it requires, with regard to the purpose under discussion, "equality of treatment" for those persons in this state. By contrast, it will be a permitted distinction if the different treatment of different persons derives from their being, for the purpose of the treatment, in a state of relevant inequality, just as it will be discrimination if it derives from their being in a state of inequality that is not relevant to the purpose of the treatment' (FH 10/69 *Boronovski v. Chief Rabbis* [16], at p. 35).

Therefore a particular law will create discrimination when two individuals, who are different from one another (factual inequality), are treated differently by the law, even though the factual difference between them does not justify different treatment in the circumstances. Discrimination is therefore based on the factors of arbitrariness, injustice and unreasonableness. Justice Witkon discussed this and pointed out:

> 'What is discrimination? Not every distinction between different groups of people is called "discrimination"; the concept of discrimination includes the idea of unfairness in treating equals unequally' (HCJ 30/55 *Committee for Protection of Expropriated Nazareth Lands v. Minister of Finance* [17], at p. 1265).

Discrimination — which, as stated, is the opposite of equality — means unfair, unjust and arbitrary treatment (see CrimA 112/50 *Yosipof v. Attorney-General* [18], at p. 490 {183}).

15. As we have seen, the contractual regime at El-Al gives a male or female employee a right to receive a benefit (a free or discounted aeroplane ticket) for a wife or husband or recognized companion (male or female), provided that they are of the other sex. Does this constitute discrimination against a companion of the same sex? As we have seen, the test for equal and discriminatory treatment is the question whether the difference in sex is relevant to the issue. This relevance is examined on the criteria of arbitrariness, fairness and justice. The basis for giving a benefit to an employee for a spouse or a recognized companion lies in the attitude that there are reasons for giving a benefit — such as an aeroplane ticket — to an employee for the person with whom he lives and shares a common household, from whom he is separated when he leaves on his flights and to whom he returns when he finishes his work. This is the criterion that both a spouse and a recognized companion have in common. The purpose of the benefit is not to strengthen the institution of marriage. Indeed, El-Al gives the benefit to an employee living with a recognized companion, even when that recognized companion is lawfully married to someone else. The idea underlying the giving of the benefits is therefore cohabitation for a certain period (specified in the collective arrangement), which is evidence of a firm social unit based on a life of sharing. In this context, it seems clear to me that denying a same-sex companion this benefit amounts to discrimination and a violation of equality. Indeed, the only reason for denying the benefit to a same-sex companion is sexual orientation. There is no other reason. This difference is not at all relevant to the issue before us (supporting a firm social unit, based on a life of sharing). In the case before us, we are dealing with a distinction that is arbitrary and unfair: is parting from a same-sex companion easier than parting from a companion of the opposite sex? Is living together for persons of the same sex different, with regard to the relationship of sharing and harmony and running the social unit, from this life of sharing for heterosexual couples?

16. One might argue that a life of sharing and harmony between persons of opposite sexes (whether as husband and wife or as recognized companions) is so different in its character from a life of sharing and harmony between persons of the same sex that any legal regime giving a benefit to the former relationship does not discriminate against the latter relationship. Although this argument seems to me problematic, I am prepared to reserve judgment, since the question that we must ask is not whether one relationship (a life of sharing and harmony between persons of opposite sexes) is different on any criteria from the other relationship (a life of sharing and harmony between persons of the same sex). As stated, I am prepared to assume that in various social contexts this difference does indeed exist. The question that we must ask is whether the difference in the relationship is relevant to the issue before us. The 'issue before us' is the social unit, the life of sharing and harmony that justify, in El-Al's opinion, giving a benefit to a (permanent) employee in the form of an aeroplane ticket which will enable him to take with him the person with whom he cohabits. In this respect, the difference between a life of sharing between persons of different sexes and a life of sharing between persons of the same sex is clear and blatant discrimination.

Discrimination on the basis of sexual orientation

17. We have seen, therefore, that giving a benefit to a (permanent) employee for a spouse or recognized companion of the opposite sex and not giving the same benefit for a same-sex companion amounts to a violation of equality. What is the nature of this discrimination? Indeed, all discrimination is prohibited, but among the different kinds of discrimination there are varying degrees. The severity of the discrimination is determined by the severity of the violation of the principle of equality. Thus, for example, we consider discrimination on the basis of race, religion, nationality, language, ethnic group and age to be particularly serious. In this framework, the Israeli legal system attaches great importance to the need to guarantee equality between the sexes and to prevent discrimination on the basis of sex (see HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [19]; *Poraz v. Mayor of Tel-Aviv-Jaffa* [6]). It may be said that the discrimination in the appeal before us is based on improper considerations of sex. Conversely, it may be argued that discrimination on the basis of sex does not exist, since the same benefit is conferred on (permanent) male and female employees. This argument, in itself, does not strike me as convincing. However I do not need to decide the issue, since there can, I think, be no doubt that the discrimination in this case is based on the 'sexual orientation' of the (permanent) employee. This discrimination — against homosexuals and lesbians — is improper. It is

contrary to equality. This emerges clearly from the provisions of the Equal Employment Opportunities Law. This law, as amended in the Equal Employment Opportunities Law (Amendment), states (in s. 2):

> '(a) An employer shall not discriminate between his employees, or between candidates for employment on the basis of their sex, sexual orientation, personal status or their being parents with respect to any of the following:
>
> (1) giving employment;
>
> (2) conditions of employment;
>
> (3) promotion in employment;
>
> (4) training or professional studies;
>
> (5) dismissal or severance pay.
>
> (b) For the purposes of subsection (a), making irrelevant conditions shall also be regarded as discrimination.
>
> (c) Discrimination shall not exist under this section when it is required by the character or nature of the job or position.'

In explaining the provision about the prohibition of discrimination on the basis of sexual orientation, the chairwoman of the Labour and Welfare Committee, Mrs O. Namir, pointed out:

> 'I hope that adopting the proposed law will contribute towards treating men and women equally, regardless of their sexual orientation, allowing them to live according to their sexual orientation as equal citizens in every respect, and affording them the legal protection enjoyed by every other group.'

This provision does not deny the differences between human beings. These differences are natural. This provision states that the different sexual orientation of persons shall not be relevant in employment, unless this is required by the nature of the job. Indeed, with regard to conditions of employment, the employer must be impartial to his employees' sexual orientations. He must determine the conditions of employment only in view of the criteria required by the nature of the job. Therefore if a benefit is conferred on an employee having a long-term and permanent relationship with a woman, that benefit should be conferred on an employee who has a long-term and permanent relationship with another man. Thereby the employer implements the principle of equality. Thereby he is prevented from invading the privacy of the employee (cf. s. 7 of the Basic Law: Human Dignity and Liberty). Conferring a benefit on a permanent employee for his recognized companion and not conferring it on a permanent employee for a

same-sex companion (who complies with all the requirements of a recognized companion apart from the requirement of sex) amounts to discrimination in conditions of employment because of sexual orientation. This discrimination is prohibited. Consider *A*, a permanent employee of El-Al, who shares his life for several years with a woman *B*. They cohabit and run a common household (as required by El-Al for complying with the conditions of a recognized companion). *A* is entitled to an aeroplane ticket for *B*. Now consider *A* who lives in the same way with a man *C*. They too cohabit and run a common household. *A* is not entitled to an aeroplane ticket for *C*. How can this difference be explained? Does the one carry out his job as an employee differently from the other? The only explanation lies in *A*'s sexual orientation. This amounts to discrimination in conditions of employment because of sexual orientation. No explanation has been given that might justify this discriminatory treatment. There is nothing characterizing the nature of the job or the position that justifies this unequal treatment (see s. 2(c) of the Equal Employment Opportunities Law). To be sure, it is possible that El-Al thinks that a (permanent) employee who lives with a (same-sex) companion behaves 'improperly'. It is possible that someone at El-Al thinks that this joint lifestyle should not be encouraged. We need not examine this argument on an ethical level. Whether or not we agree with it, it does not amount to a justification that negates the existence of the discrimination. Indeed, the discrimination is not determined merely by the will and intention of the person creating the discriminatory norm. It is determined by the effect that it has in practice (see *Nevo v. National Labour Court* [7], at p. 759; *Bavli v. Great Rabbinical Court* [11]). Occasionally we can justify a violation of equality — which, as we have seen, is not an absolute but a relative right — on the basis of a proper purpose. Such grounds must be very substantial and relevant. A very great weight rests on someone who tries to discharge this burden. In the case before us, the burden has not been discharged. No attempt has even been made to discharge it. All that we have heard is that same-sex companions who cohabit are not like companions of different sexes who cohabit. Thereby they indicated to us the difference that exists between the different situations. In doing so they did not negate the discrimination, and they certainly did not point to a proper purpose that might justify it (see M. N. Cameli, 'Extending Family Benefits to Gay Men and Lesbian Women,' 68 *Chi-Kent L. Rev.* (1992-93) 447.

The remedy for a violation of the right to equality

18. I have therefore reached the conclusion that the legal regime created by the collective agreement and the collective arrangement, with regard to the benefit conferred on an employee to receive a (free or discounted) aeroplane

ticker for a spouse or recognized companion (of the opposite sex), discriminates against an employee living with a same-sex companion. Now we must turn to the second question requiring a decision, namely the remedy to which an employee who has suffered discrimination is entitled. Case-law has established that a discriminatory contractual regime may support a claim that the provision in the contract is contrary to public policy and is therefore invalid (see *Flight Attendants Association v. Hazin* [24]). This invalidity may cause the whole contract to be invalid. In most cases, there is no reason to invalidate the whole contract, and it is sufficient to invalidate the illegal part by severing it from the lawful part (see ss. 14 and 31 of the Contracts (General Part) Law, 1973). Thus, for instance, in *Nevo v. National Labour Court* [7] the contractual regime provided that the 'retirement age for a pension is 65 for men and 60 for women' (*ibid.* at p. 753). The Supreme Court held that this amounts to discrimination against women. It was held that the proper remedy — which the petitioner sought in that case — is striking out the invalid part. The result is that the part of the employment agreement providing that 'the retirement age for a pension is 65' remained valid. The Court thereby used a technique of severance. This technique is not possible in the case before us. Indeed, had the collective agreement and collective arrangement provided that a permanent employee is entitled to a benefit for whoever is his companion, except a companion of the same sex, it would have been possible to strike down the limiting provision, and so re-establish equality. But the contractual text in our case is different. It does not allow operating on the body of the text and severing the healthy part from the unhealthy part. What, then, is the remedy to which the petitioner is entitled?

19. As we have seen, a possible remedy is voidance of the contractual arrangement regarding the benefit. The result, from the respondent's perspective, will be a case of 'Let me die with the Philistines' (Judges 16, 30): the respondent will not receive a benefit, but neither will recognized companions of the opposite sex. This outcome is not reasonable in the circumstances. Why should recognized companions of opposite sexes suffer a material loss? What wrong have they done? The National Labour Court rightly pointed out that the petitioner himself did not seek this remedy.

20. The appropriate remedy in this situation is to confer the benefit also on same-sex cohabitees. This remedy is recognized in the comparative literature. It was developed mainly in the case of laws that are contrary to the principle of equality laid down in a constitution. In American constitutional literature it is called the 'extension' of the existing text. In Canadian constitutional literature it is called 'reading into an arrangement' or 'reconstruction' of the text. These terms are not accurate ones. The judge

does not change the existing text, nor does he reconstruct it nor add to it. The judge does not do anything to the existing text. What the court does is different. It determines that as long as the existing text remains as it is — and as stated the judge does not do anything to it — similar benefits must be given to an additional group that is not mentioned in the text. Conferring this benefit derives directly from the principle of equality, which is a normative principle to which the text is subservient and to which it must conform. It can be seen then that the court does not implant an additional organ into the body of the text infected by improper discrimination. The court determines, however, that by virtue of the principle of equality — as long as the discriminatory contractual arrangement remains unchanged — a relief of conferring a benefit also on the victims of discrimination is required in order to remove the discrimination.

21. As we have seen, this relief is recognized by American constitutional law. In the case of *Welsh v. United States* (1970) [26] a statute exempted a person from military service because he was opposed to war for reasons of religion or faith. The petitioner asked for an exemption for reasons of conscience. A number of judges held that the exemption for reasons of religion or faith extends also to an exemption for reasons of conscience. Justice Harlan, however, disagreed. In his view, an exemption for reasons of conscience was not included in the statute. In this the statute violated the provisions of the Constitution. The proper remedy, in the judge's opinion, was not nullifying the exemption for reasons of religion or faith but granting an exemption, based on the Constitution itself, for reasons of conscience. Justice Harlan writes, on page 361:

> 'Where a statute is defective because of underinclusion there exist two remedial alternatives; a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion…'

He continues at p. 364:

> 'While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered by the legislative pronouncement on severability.'

Since that case, American courts tend to grant this remedy (see R. Bader-Ginsburg, 'Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation' 28 *Clev. St. L. Rev.* (1979) 301; B. K. Miller, 'Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v.*

Mathens,' 20 *Harv. C.R.-C.L.L. Rev*. (1985) 79. This remedy appears to the court natural and appropriate and preferable to nullification. One of the cases involved a statute that gave assistance to needy families. The statute provided, *inter alia*, that the support would be given to a family where the mother did not work and the father had worked previously but was now unemployed. A family where the father did not work and the mother had worked previously but was now unemployed was not included among the recipients of the support. The court held that the statute unlawfully discriminated against families where the father did not work whereas the mother had worked but was now unemployed. Against this background arose the problem of the remedy: whether to nullify the support for the family that was entitled (because of the discrimination inherent in the arrangement) or to extend the application of the statute to a family that was not included in it. It was held that the family which was the victim of discrimination should be added (*Califano v. Westcott* (1979) [27]).

22. The Supreme Court of Canada has a similar approach. It often tends to 'read in' to the statute provisions that will negate the unconstitutional nature of the statute. Justice Lamer wrote in *Schachter v. Canada* (1992) [37], at p. 12:

> '…extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance, the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in, the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.'

23. These remedies are appropriate in the constitutional sphere. They promote the purpose underlying the constitutional arrangement. They make it unnecessary to nullify legislation. The use of this remedy is not mechanical. We must consider in each case whether extension is possible. We must examine whether it is simple to implement, and whether it does not involve excessive intervention in the legislative fabric. We must consider the budgetary ramifications. Indeed, a benefit conferred by law to a marginal group does not justify granting a constitutional remedy by extending the

remedy to a large and significant group. Neither should we adopt this technique to impose obligations on sectors of the population in whose favour the law has discriminated by not imposing these obligations on them.

24. These remedies — which were developed in the constitutional sphere — can be applied in the field of collective agreements and collective arrangements. They create a contractual regime that is subject to a supreme normative principle of equality. This principle derives its supremacy (with respect to collective agreements and arrangements) from the Equal Employment Opportunities Law. This principle of equality applies — by virtue of the express provisions of the Equal Employment Opportunities Law — also in private law. It is not merely a principle of public law. It obliges every employer not to discriminate against any of his employees in the fields of private law. Indeed, with regard to the prohibition of discrimination because of sexual orientation — just as with regard to other kinds of discrimination — the law establishes a mandate that obliges the employer. By virtue of this normative mandate — which is of supreme status with regard to collective agreements and arrangements — the employer is forbidden to discriminate against any of his employees with regard to conditions of employment. When a contractual arrangement drawn up by him involves prohibited discrimination, the contract is tainted with illegality. It may be voided by virtue of the provisions relating to invalid contracts. To prevent it being voided, we may demand — as an alternative remedy — that the employer refrains from the prohibited discrimination. This is achieved by compelling the employer to confer the benefit on the employee who is the victim of the discrimination. This does not change the agreement between the parties. We do not thereby read into the contract what is not there. We thereby merely remove the discrimination and comply with the normative mandate not to discriminate. Indeed, the basic fact is the discriminatory contractual arrangement. The contents of this are determined by the parties to the contract, and they control it and can change it. As long as the discriminatory contractual arrangement remains unchanged, the supreme normative mandate — which derives from cogent law — exists alongside it and compels the employer to act with equality. Indeed, just as by virtue of the normative supremacy of the constitution (or the entrenched Basic Law) the scope of applicability of a provision of a law may be extended, so too can the normative power of the law extend the scope of applicability of provisions in a collective agreement or a collective arrangement. By virtue of this normative supremacy, the contractual regime must modify itself to comply with the principle of equality (in our case, the prohibition against discrimination in conditions of employment because of sexual orientation).

This modification does not require cancelling the existing contractual arrangement. This modification is achieved by conferring a benefit — which originates not in the contractual arrangement but in the principle of equality that extends the contractual arrangement to equivalent situations — on the class that is the victim of discrimination. This extension is suitable for the contractual model. It adds a small group of beneficiaries and does not therefore impose a significant budgetary burden. Justice is done, and justice is seen to be done.

The petition is denied. The case is remanded to the District Labour Court, as stated in the judgment of the National Labour Court. The petitioner shall pay the costs of the first respondent in a total amount of 10,000 NIS.

Justice Y. Kedmi

The question we must decide in this case is: does the concept 'spouse' used in the employment agreements include same-sex companions or not? My esteemed colleague, the Vice-President, answered this in the affirmative. Unfortunately, I cannot agree with that conclusion. The following are my main reasons:

1. 'Spouse': the conceptual significance in the social sphere

(a) The linguistic concept of spouses, who together form a 'family', expresses, in the social sphere, an union of two individuals of opposite sexes to form a 'couple'; a 'couple', in this context, has since the origin of man until the present represented a joining of two individuals of *opposite* sexes. This is the case here and throughout the world, and the Book of Books gives decisive proof of this: 'And God created man in His image, in the image of God He created him; male and female He created them' (Genesis 1, 27 [44]).

This is the case with man and it is the case with the animals, and the story of Noah's ark leaves no doubt about this: 'You shall bring two of each into the ark to preserve with you; they shall be male and female' (Genesis 6, 19 [44]).

There is of course nothing to prevent the term 'couple' expressing a 'quantity' of two individuals; but we are not dealing here with the quantitative meaning of the concept but with its substantive meaning in the social sphere.

To give the concept 'couple', in the context discussed here, a different meaning from the linguistic meaning that it has always had is impossible. 'A different meaning' of this concept would deprive it of its essence; once again we are not speaking of a 'couple' that builds a family, incorporating a

'husband' and a 'wife', but a 'couple' that expresses a 'quantity' of two individuals who have come together, whatever their sex is.

In Hebrew the concepts of 'husband' and 'wife' are inseparably associated with the concept of 'family'; you cannot have a 'family' unless two companions of different sexes are its basis ('a heterosexual couple').

(b) The relationship that turns two individuals — of opposite sexes — into a 'couple', in its linguistic-social meaning, is characterized by the decision of the two to have a joint lifestyle; 'joint', in this context, *inter alia* and especially, expresses family life whose primary purpose — and from a conceptual viewpoint it is impossible otherwise — is to bring children into the world: 'And God blessed them, and God said to them: be fruitful and multiply and fill the earth…' (Genesis 1, 28 [44]).

Thus it is no coincidence that the concept 'couple' is, in Hebrew, derived from the root meaning 'intercourse'; the 'couple' and 'intercourse' are one, and only where these exist can we speak of a 'family'.

Admittedly not every couple is 'capable' — or wishes — to bring children into the world, and not every 'couple' becomes such in order to bring children into the world. But these 'exceptions' in this context cannot undermine the fundamental conceptual meaning of the concept 'couple'; therefore a precondition for two people being a 'couple' is that they are of different sexes.

(c) The heterosexual 'couple' is what creates the basic family unit; and, as stated, there is no 'family' in the social meaning of the word, unless a heterosexual couple forms the basis of it.

It is indeed possible to change the meaning of basic concepts such as 'couple' and 'family'. However the change must primarily be a conceptual change of basic epistemological meanings; the language that has existed from ancient times does not recognize a 'couple' and a 'family' that are not heterosexual, except as an exceptional phenomenon that requires a descriptive supplement alongside the use of these concepts, which lose their original meaning where we do not refer to a joining of the two sexes.

(d) It is indeed possible for 'two persons' of the same sex to adopt for themselves external characteristics that describe a 'couple' and a 'family' as stated, and to imitate — in so far as they can — the behaviour pattern of 'spouses' and even to establish in practice a 'family'. But they do not become a 'couple' and a 'family' in the fundamental meaning of these terms in our language; and language is, in the end, the mirror that reflects our society.

In order for two people to become a 'couple' that establishes a 'family', in the conceptual-epistemological meaning of our language — and it is a

common language that forms the basis of our existence as a society — it is an essential and necessary condition that the two individuals who comprise a 'couple' come from opposite sexes.

In this regard, it is irrelevant that two individuals of the same sex, who join into a 'couple', do so because their natural sexual orientation does not allow them to be 'spouses' in the conceptual sense accepted in our language, namely that of persons of the opposite sex. It is not the 'capacity' to be a spouse, in the said basic epistemological meaning, that matters, but the sex of the partner. The criterion for two persons to be a 'couple' — according to the epistemological meaning of the concept — does not lie in the lifestyle led by the two persons but, primarily, in their being of different sexes.

(e) The aforesaid should not be regarded as a position deriving from a conservative religious outlook: religion did not dictate the meaning of the concept 'couple' in the epistemological sphere, but life itself dictated it; and the reality that reflects life is what lies at the basis of the expression 'couple' and this is what gave it the aforesaid meaning in the social sphere.

(f) It should be emphasized:

(1) The concept 'couple' — whose components are a 'husband' and 'wife' — is not necessarily connected with the institution of marriage. Use can be made of the concept 'couple' both with regard to a 'married couple' and an 'unmarried couple', so long as the joining of the spouses makes them a 'couple' within the meaning set out above.

(2) There is nothing to prevent adjectives being added to the concept 'couple' in its basic social meaning, such as married and unmarried; the adjective 'married' does not affect the basic meaning of the concept 'spouse' which expresses, in the context under discussion, two individuals of opposite sexes forming a social unit, based on sexual collaboration, whose nature is determined by its original purpose.

(3) In consequence — and more will be said about this below — there is no reason why 'recognized companions' should not be regarded as 'spouses', since they comply with the basic condition of an union of two persons of different sexes into a family unit, within the basic meaning of this expression as aforesaid. Recognized companions are not a 'married' couple but they do constitute a 'couple' and a 'family'; as such, there is no fundamental conceptual difficulty in applying to them legal arrangements prescribed for a 'married' couple, and treating them, socially and linguistically, as a 'couple' in every respect.

(4) In these circumstances, in the language of human beings — all human beings — the word 'couple', in a social context, expresses an union of two

individuals of opposite sexes, for a 'joint life' in the primary meaning of the word as aforesaid; and if we wish to change the meaning of the concept, we must do so, first and foremost, in the sphere of the basic linguistic concepts of our language and determining this change, expressly, in legislation relating to this issue. Without an express determination, the law gives expression to the linguistic meaning of the concepts to which it refers, unless it states the contrary.

The law speaks in human language, since it is intended for human beings; wherever we wish to deviate from human language and speak in the 'language of the law' — this should be done in accordance with an express, clear and unambiguous provision of the legislator. In the present context, this must be a provision that deliberately changes the linguistic significance of the term 'couple' in the social context and gives this concept, for the purpose under discussion, *another* meaning, materially different from its meaning in current usage.

2. *Marriage and the institution of recognized spouses*

(a) As a rule, wherever we speak of a 'couple' — in the social sphere — the initial impression created in the conscience of the listener or the reader is one of a 'married' couple; for 'marriage' is what grants legal — and social — recognition to the joint life of the 'spouses' as a family unit, in the aforesaid primary meaning.

(b) However, as stated, it is not the external, formal framework of marriage that gives a 'couple' its traditional, *literal* meaning as aforesaid: a 'couple' in the sense discussed here, may be 'married' or 'unmarried', but it must always be a 'couple'; and you do not have a 'couple' in the meaning discussed here unless the two individuals who form it are of opposite sexes. Linguistically, there is no 'other' couple in the social sphere; and language is what underlies human communication, and it is the means whereby people express their thoughts.

So marriage, as a legal institution, does not give the linguistic term 'couple' its content and conceptual meaning; it merely adds to it social recognition as a family unit in the community, and grants the two individuals forming it — the man and the woman — rights and duties in the legal sphere.

(c) For this reason — and this too has already been said — wherever a 'couple' complies with the basic definition of the concept — namely, wherever we are speaking about an union of two individuals of different sexes for a joint lifestyle as a family unit within the meaning set out above — there is no logical difficulty in regarding them as a 'married couple' for the purpose of duties and rights that the law prescribes for a 'married' couple;

regarding the two as a 'couple' forms the basis whereby the law confers rights and imposes duties on a married couple.

By contrast, wherever we are speaking of two persons who have joined together for a joint lifestyle as a 'pair' that is not a 'couple' within the aforesaid basic linguistic sense, logic does not allow us to regard them from a legal viewpoint as if they were a 'couple', because they constitute something 'else'. The 'married' couple and 'recognized companions' are a 'couple', whereas two persons who have joined for a joint lifestyle and are of the same sex are not a 'couple' but a 'pair of friends'.

3. The collective agreement and the collective arrangement

(a) Now let us turn from the general to the particular. The *collective agreement*, whose provision we are interpreting, speaks of a 'spouse (*husband/wife*)' (emphasis added); the term 'spouse' should be given the traditional linguistic meaning, whereby it refers to individuals of different sexes forming a 'couple' as set out above.

The addition 'husband/wife' is not intended to tell us that we are referring to spouses of *different sexes*, since for this we do not need any addition, and use of the term 'spouse' is sufficient. The addition is intended to clarify that this agreement refers to spouses who are *married* to one another, for they alone are called 'husband' and 'wife'; the supplementary addition *in the collective arrangement* referring to a 'companion recognized as a *husband/wife*' proves that this is indeed the case. Had it not been for this supplement, the words 'husband/wife' in the collective agreement could have been interpreted as restricting 'spouse' to a 'married' couple only, and it would have been necessary to clarify that they are referring also to a 'couple' that is not married but which is merely recognized publicly as such.

(b) The addition of 'recognized companion' in the collective *arrangement* does not break away from the framework provided in the collective *agreement*: both refer to a 'couple' and 'spouses' in the basic social meaning of the concept 'couple', as aforesaid; distinguishing between 'couples' on the basis of marriage has more than a hint of discrimination. A married couple and an unmarried couple are fundamentally 'equal', in so far as the meaning of the concept 'couple' is concerned; distinguishing between them on the basis of 'marriage', which merely constitutes a formal, external mark of the framework of their joint lifestyle as a 'couple', amounts to improper 'discrimination' and not a permitted 'distinction'. This is sufficient to justify the supplement in the collective arrangement, which intends to prevent improper and forbidden discrimination between 'couples'.

(c) By contrast, introducing a pair made up of two individuals of the same sex ('a same-sex couple') into the said provisions of the agreement and the arrangement amounts to planting a foreign type of plant — something that is not a 'couple' — in a field that contains only couples, whether married or unmarried.

A same-sex 'couple' is not a 'couple' within its basic linguistic meaning, and it should, in my opinion, be referred to, linguistically, as a 'pair'; the argument that it is a victim of discrimination in comparison with other 'couples' is unfounded: the married and unmarried couples are couples, and distinguishing between them constitutes discrimination, whereas the 'pair' is not a 'couple', and distinguishing between it and a 'couple' (married or merely publicly recognized) is not discrimination. So long as the linguistic and social meaning of the concept 'couple' is unchanged, a 'pair' will not become a 'couple': the latter 'combine into one' ('Wherefore a man shall leave his father and mother, and shall cleave to his wife, and they shall become one flesh,' Genesis 2, 24 [44]), whereas the former will always remain two.

4. The interpretive aspect

(a) The means of communication between human beings is language, and a precondition for understanding between persons having a discussion is that the words, expressions and concepts that form the language have a stable linguistic meaning.

(b) As stated, the law speaks to human beings in human language: and the word is, first and foremost, the basis for interpretation of its provisions. The concepts 'couple' and 'spouses' and the linguistic relationship between them and 'family' are primarily linguistic concepts, whose meaning — in so far as the social sphere is concerned — is, as stated above, an union of two individuals *of opposite sexes* to share their lives in a family unit, when this sharing is characterized, *inter alia*, by intimacy designed, conceptually, to ensure the continuation of life.

(c) The same is true of interpretation of the law, and likewise with regard to interpretation of a legal document: a 'couple' requires the union of two individuals of opposite sexes; this is true even when the two are incapable in practice or unwilling — for whatever reason — to be intimate for the purpose of ensuring the continuation of life.

(d) Indeed, one of the fundamental rules of statutory interpretation is that the law is interpreted in order to achieve the purpose for which it was legislated; *mutatis mutandis*, a legal document is interpreted so as to achieve the intention of the parties to it.

Where the language is clear, we would fail in our duty if we were to deviate from the agreed linguistic meaning by which people plan their lives, and give the concepts used by the law or the agreement a different meaning from the one that they have in the world of language.

5. The Equal Employment Opportunities Law – discrimination

(a) I wholeheartedly agree with the illuminating remarks of my esteemed colleague — the Vice-President — with regard to the significance of the principle of equality and the duty to realize and apply it.

However, as my esteemed colleague noted — when citing *Boronovski v. Chief Rabbis* [16] and *Committee for Protection of Expropriated Nazareth Lands v. Minister of Finance* [17] — you cannot violate the principle of equality unless you have 'equals'; where you have persons who are *not equal*, treating them differently compared with others who are *different from them* should not be regarded as improper discrimination, but merely as a permissible distinction.

(b) My esteemed colleague found that *same-sex* couples are 'equal' to heterosexual couples; from here, it was naturally easy to reach a conclusion of 'discrimination' between the two types of 'couples', where one is entitled to a benefit and the other is not.

I do not accept this position. In my opinion — following what I have said until now — we are dealing with two 'couples' that are completely *different* in nature; the one — the heterosexual (whether married or unmarried) — is a 'couple', whereas the other — the homosexual — is merely a 'pair'; therefore conferring a benefit on the one does not constitute discrimination when not conferring the benefit on the other.

(c) The common denominator that makes the two 'couples' — the homosexual and the heterosexual — 'equals' for the purpose of the principle of equality, lies, according to my esteemed colleague, in the fact that the characteristic marks of the joint lifestyle of the two are equal; both run a common household, both form a family unit, and both live within a social framework based on a life of sharing and harmony; *prima facie*, they only differ from one another in one external-formal factor, which is merely that the homosexual couple cannot marry.

My esteemed colleague adds: 'the inability to marry' is a factor that *also* distinguishes married spouses from 'publicly recognized' companions; and this distinguishing factor did not prevent a total comparison between the latter and the married spouses.

(d) According to my thinking, a sharing and harmonious relationship — as pointed out by my esteemed colleague — is insufficient to make a

homosexual couple a 'couple' within the meaning that this concept has in our language in the context discussed here, because it lacks an element essential to 'being a couple', namely that the spouses must be of opposite sexes. The formal 'inability' to marry — by a formal marriage — does not put the homosexual couple in the same category as the heterosexual 'publicly recognized' unmarried couple; the latter is a 'couple' within the linguistic meaning of this concept, whereas the former is not.

The distinction between the heterosexual couple — including 'publicly recognized companions' — and the homosexual couple is based on the fundamental nature of the concept 'couple'; the first is a 'couple' because it is comprised, as stated, of two individuals of opposite sexes, whereas the second is otherwise; the fact that the homosexual spouses maintain a social framework 'similar' in its external characteristics to that of the heterosexual couple — the natural family unit — does not make them a heterosexual couple.

As stated, an essential factor — which is an indispensable condition in this context — for converting two individuals enjoying a life of sharing and harmony into a 'couple', within the meaning of the term in the Hebrew language, lies in them being 'of one flesh' and their being able — conceptually — to fulfil the precept of 'being fruitful and multiplying'. The 'married' couple and the 'publicly recognized' couple meet this basic requirement, and they are therefore 'equal' for the purpose of examining an allegation of discrimination; whereas the homosexual couple, which does not meet the said basic requirement, is different from them in the said respect.

(e) My esteemed colleague is aware of a substantive difference that distinguishes, conceptually, between the two 'couples' as stated, but according to his approach this difference has no implication for the case before us; this is because in his opinion El-Al decided to confer a benefit on its employees 'in the form of an aeroplane ticket enabling the employee to take with him the person with whom he *shares his life*' (emphasis added), and for this purpose there is no difference between the two couples.

Even this narrow and restrictive approach to the problem before us does not, unfortunately, enable me to agree with my colleague. Admittedly we are concerned with the interpretation of El-Al's decision. However, this decision does not speak of granting an aeroplane ticket to a person who '*lives together with the employee*' (emphasis added) but to '*the employee's spouse*' (emphasis added); the linguistic difference between the two speaks for itself. As I have already stated, in my opinion the concept 'couple' in our language — in the social sphere considered here — expresses the union of

two individuals who share their lives, which makes them physically into 'one flesh' in the primary sense of the expression; 'He created them male and female… and He called their name man…' (Genesis 5, 2 [44]); whereas the union of two individuals that *ab initio* cannot, physically, become 'one flesh' as stated, and who *conceptually* cannot achieve the said purpose, creates a couple quantitatively (since there are two), but not qualitatively (since the two cannot become one, within the framework of the commandment of being fruitful and multiplying).

(f) In my opinion, all we have before us is the language of the collective agreement — and in the supplement found in the collective arrangement — namely: 'spouse (husband/wife)' in the agreement, and 'the person publicly recognized as husband/wife of the company's employee' in the arrangement; I do not think that we may read instead of these: 'whoever lives together with the employee' and even not 'whoever forms a family unit with the employee'.

We are not dealing with a 'life of sharing' or a 'family unit', but with spouses within the basic conceptual meaning that this concept has in our language; these are always heterosexual, as long as language does not change its meaning.

5. With regard to the allegation of discrimination between a 'homosexual couple' and a 'heterosexual' couple, there is no place in my opinion for considerations of social justice; the distinction between these two does not lie in the employees' sexual orientation, but in the distinction between a 'couple' and a 'family' and those who do not constitute either a 'couple' or a 'family', within the meaning given to these terms in our language. Even single employees — whether 'heterosexual' or 'homosexual' — have close friends with whom they would like to spend their vacation abroad; yet no-one claims that they are discriminated against in that they are refused the benefit merely because they do not commit themselves to a formal framework of 'a joint lifestyle' with those friends.

El-Al saw fit to confer a benefit on 'spouses' that constitute a 'family' within the meaning thereof in the language which we use to communicate with one another; this does not constitute discrimination on the basis of 'sexual orientation', since we do not regard the homosexual spouses as included in the linguistic concepts 'couple' and 'family'. We have here a distinction between a 'spouse' and someone 'who is not a spouse', and it may be argued that from a sociological and social viewpoint there is discrimination between 'couples' and those who are not 'couples'; however, discrimination on a basis of 'sexual orientation' is not present here.

6. *More regarding the distinction between 'couples'*

(a) Heterosexual couples share a complete mutual commitment to sharing and stability, each to the other and both to the framework of the couple, in all spheres of life. The law gives validity to this commitment, since society, as such, has a profound interest in preserving the framework of the couple — which forms the basis of the organizational structure of human society — and ensuring its stability.

Society has adopted in this respect the approach that regards spouses becoming 'one flesh' — that is capable, conceptually, of achieving the mission of 'being fruitful and multiplying' — as a condition for making two people who unite for a life of sharing into a 'couple'; language expresses this with the meaning it attaches to 'couple' and 'family'. At the same time, society created rules to give a seal of social recognition to the framework of the 'couple', and it protects it and intervenes when a couple wishes to dissolve the framework, and it even seeks to prevent the dissolution whenever possible.

The said protection and intervention are achieved with legal tools; and the law — following language, which reflects social consensus — attaches the said meaning to 'couple' and 'family', but not to the homosexual couple.

(b) The recognition of the heterosexual couple that is 'publicly recognized' as a 'couple', even though it does not have all the legal guarantees of mutual commitment and stability, derives from the existence of the basic social requirements for the existence of a 'couple' — namely, an union of two individuals of opposite sexes as 'one flesh', who are able, conceptually, to ensure reproduction — and when these exist, there is no social justification for ignoring the *de facto* existence of the family unit and the spouses comprising it; on the contrary, it must ensure that the mutual commitment and stability of the unit are protected, even without the formal status of marriage.

The rules granting 'mutual benefits' to publicly-recognized heterosexual couples just like to married couples — in the circumstances provided by law — are based on a desire to give expression to the mutual commitment and ensure the stability of the family unit created by the publicly recognized 'couple', not necessarily by formally entering into the institution of marriage.

(c) This case of the homosexual couple is different: on the one hand, the substantive condition of different sexes is not met, and without this, one cannot speak physically of 'one flesh' and conceptually of reproduction and continuation of life, and therefore it does not constitute the same fundamental unit that lies at the basis of the organizational structure of human society; on

the other, the partners do not have the same mutual commitment to the stability and continuity of the partnership that might induce society to recognize them as a 'special' couple and fit them in alongside the 'typical' couple at the basis of the social structure.

When society reaches the conclusion that a homosexual unit should also serve as a basic 'unit' of the social structure alongside the heterosexual couple, and when it determines rules for its creation, formal recognition of its existence and the guarantee of the mutual commitment between its constituents to partnership and stability, then the linguistic-conceptual meaning of the term 'couple' and 'family' in this context will change, and the homosexual couple will be included in the new linguistic framework alongside the heterosexual couple.

But as long as there is no such social consensus, the homosexual couple is not included within the framework of a 'couple' in our language, and it is not recognized as one of our society's nuclear units; consequently its formation, the mutual commitment of its constituents to the partnership and its stability, and the rights and duties of those involved in it are naturally not regulated by our law.

(d) The change required here is therefore a basic conceptual change in our social outlook regarding the substance of the basic social unit, counted among the elements of our society's organizational basis. The expression of what appears to be 'tolerance' towards exceptional cases and an attempt to prevent apparent social discrimination against those exceptional cases on the basis of what is exceptional about them cannot replace the fundamental conceptual change necessary for equating the homosexual couple with the heterosexual couple.

7. Different conceptual attitudes in different cases

(a) According to my approach, there is no reason to attach an 'independent' and different meaning to the concepts 'couple' and 'spouse' in different contexts of sharing lives in society. I do not accept the approach that says that these concepts should be examined separately in the field of labour relations, in the field of social legislation, in the field of residency and citizenship, in the field of property law and obligations, in the field of taxation, etc..

In my opinion, as stated, in current circumstances, from the linguistic-social viewpoint, the words 'couple' and 'spouse' have only one conceptual meaning, namely two individuals of opposite sexes who have united into a framework of a joint life, which is based on the physical ability to become 'one flesh' and the conceptual ability to fulfil the commandment of being

fruitful and multiplying; the removal of this two-fold characteristic from the framework of the definition of the concept 'couple' amounts to a nullification of the meaning that this concept has in the language of consensus that we use as an organized society.

(b) Destroying the linguistic-conceptual meaning in one sphere naturally leads to departing from it in other spheres, and the social framework built on an existing agreed meaning is undermined. The term 'couple', in this context, will lose its conceptual meaning in our language, and the focus of this meaning, which today derives from the heterosexuality of the spouses, will become a personal decision to have a life of quasi-family sharing at a particular time, where the sex of the spouses will be left to one side. There is nothing to prevent this result being reached, if it is deemed correct to go in this direction. However, this must be done by giving a 'different' meaning to the linguistic concept 'couple'; this is not for us to do, but for whoever is authorized to change the Hebrew language, even if only in the legal sphere.

(c) Let me not be misunderstood: my approach does not seek to challenge the increasingly prevalent social recognition of the sexual orientation of individuals who wish to build their lives with persons of the same sex, nor do I wish to place obstacles in the path of those individuals to prevent their self-fulfilment in accordance with their orientations. All that I want is to refrain from the destruction of a conceptual 'barrier', linguistic chaos and communication that suffers from 'misunderstandings', by deviating so sharply from the meaning of basic concepts, which are the foundation of society and facilitate its operation in the way that we currently live.

For generations the concept 'couple' has been used in the social context to express a heterosexual couple. It was used in this way both orally and in writing, and it was used in this way in determining social arrangements and legal norms. If we try to introduce a change in this matter, this ought to be done in a straightforward way and not in a roundabout fashion; for we are dealing with human language, and we are obliged to respect it and protect the stability of its contents.

8. Summary

(a) A 'heterosexual' couple — whether married or unmarried — is a 'couple' within the conceptual meaning of the word, whereas a 'homosexual' couple is not.

(b) For this reason, we are not dealing conceptually with 'equal' couples, and therefore the distinction made between the heterosexual couple and the homosexual couple is merely a 'distinction', and not 'discrimination'.

(c) There is no basis for partial and limited recognition of the institution of the 'homosexual' couple; yes — with regard to labour agreements; no — in other areas, such as taxation, personal status, citizenship, giving testimony, etc..

A change in the meaning of the concept of 'spouse' must be general and all-encompassing, and it ought to be done in a way that everyone is aware of the new meaning given to it and its ramifications.

(d) An employer may offer a 'benefit' only to heterosexual couples without being guilty of discrimination, because the homosexual couple is not a 'couple', and the distinction between employees who are 'spouses', in the said basic linguistic sense, and employees who are not, is a 'distinction' and not 'discrimination'.

(e) The discrimination that the respondent alleges in this case, is merely an 'appearance of discrimination', and it derives from what clearly appears to be 'social injustice'. However, every distinction in distributing benefits to employees involves 'social injustice'; the principle of equality as a defence against discrimination was not intended to address this.

Were my opinion accepted, the petition would be granted and the judgment of the National Labour Court's decision would be reversed.

Justice D. Dorner

1. The French philosopher, Michel Foucault, discussed the influence of social norms — reflecting what is accepted, 'normal', and what changes from time to time and from society to society — on the application of transcendental and formal laws (legal norms).

> '…le pouvoir de la Norme… est venu s'ajouter à d'autres pouvoirs en les obligeant à de nouvelles délimitations; celui de la Loi… et du Texte…
>
> …le pouvoir de la norme fonctionne facilement a l'intérieur d'un système de l'égalité formelle, puisque a l'intérieur… la règle, il introduit… des différences individuelles' (M. Foucault, *Surveiller et Punir* (1975) 186).

In translation:

> '… the power of social norms joins with other forces — the law and the text — and imposes on them new limitations…
>
> … the power of social norms acts well within a system of formal equality, since it introduces… individual differences into… the rules.'

It seems to me that we cannot decide the petition before us without referring to the changes that have taken place with regard to social norms in Israel respecting homosexuality.

2. The respondent demanded that the petitioner recognize the man with whom he shares his life as a 'spouse' for whom he is entitled to receive an aeroplane ticket as of 1989, by virtue of the collective agreement. The Labour Court accepted the claim on the basis of the Equal Employment Opportunities Law (Amendment). The law, which came into effect on 2 January 1992, added to s. 2(a) of the Equal Employment Opportunities Law (hereafter — 'the Equal Opportunities Law') a prohibition against discrimination against employees because of their sexual orientation. The Labour Court held that the law changed the existing law and gave the respondent a right that he did not have before it was enacted, and that therefore he is entitled to receive the aeroplane tickets from the date that the amendment came into effect.

My colleague, Vice-President Barak, presumed — in the absence of any contrary argument by the respondent — that the respondent's right does not derive from the collective arrangement itself. In Justice Barak's opinion, the respondent's right derives from the amendment, which reflects the principle of equality and the prohibition of discrimination against employees on the grounds of their sexual orientation.

My colleague, Justice Kedmi, is of the opinion that the expression 'spouse' cannot be given a different meaning in different laws. In his view, this expression has only one meaning: a man and a woman who unite for a joint life. This definition is accepted both from a linguistic viewpoint and a social viewpoint. It follows that without an express provision in the law that a same-sex life-partner is a 'spouse', a life-partner of the same-sex should not be given the benefits to which a 'spouses' is entitled on the basis of a provision prohibiting discrimination against the employee himself because of his sexual orientation.

3. I agree with the result reached by the Vice-President. However, in my opinion, the respondent's right does not derive only from the Equal Opportunities Law, but also derives from the general principle of equality that has, for some time, been a part of our labour law.

In my view, the original version of the Equal Opportunities Law reflected the principle of equality but did not establish it. Thus, for instance, in *Nevo v. National Labour Court* [7], a provision that provided a different retirement age for men and women was disqualified on the basis of the principle of equality. This disqualification was based on the legal position prior to the

Equal Retirement Age for Female and Male Employees Law, 5747-1987, which made the retirement age the same for women and men, while preserving the right of women employees to early retirement. Cf. also the remarks of Justice Mazza in *Israel Women's Network v. Government of Israel* [5], at pp. 521-522 {**Error! Bookmark not defined.**}.

Similarly, the amendment also did not change the existing law about equal rights for homosexuals, but merely gave expression to them. Consequently, had the respondent insisted on his original claim to receive the benefits for his spouse since May 1989, which was before the enactment of the amendment, I would have granted his request. Conversely, if not for the development of social norms in Israel which no longer totally oppose homosexual relations, it is possible that the Equal Opportunities Law would have been interpreted narrowly, similarly to the interpretation of my colleague, Justice Kedmi, which would not give the respondent the benefits that he claimed.

4. The principle of equality does not operate in a social vacuum. The question whether a certain case involves discrimination between equals, or whether it merely involves different treatment of different people, is decided on the basis of the accepted social outlooks. Justice Wilson discussed this in the Canadian case of *R. v. Turpin* (1989) [38], at p. 1331:

> 'In determining whether there is discrimination on grounds relating to personal characteristics of the individual or group, it is important to look… to the larger social, political, and legal context…
>
> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality.'

See also the remarks of Lord Denning in *Dyson Holdings Ltd v. Fox* (1975) [34], at p. 1033.

5. In the past, intimate relations between members of the same sex — relations that are considered a sin by all the monotheistic religions — constituted a criminal offence. Legitimacy was also given outside the criminal law to a distinction based on sexual orientation. Homosexuals (including lesbians) were fired from their jobs, were not accepted for positions requiring a security clearance, and were forbidden to raise their children. In the United States they were classified as psychopaths and were not allowed to immigrate into that country (The Editors of the Harvard Law Review, *Sexual Orientation and the Law*, 1990, at pp. 44, 65, 119, 132, 139, 150, 153).

This treatment has changed gradually. Legal literature criticized the definition of homosexual relations as a criminal offence, as well as discrimination against homosexuals in all areas of life, including areas of employment (R.A. Posner, *Sex and Reason*, Cambridge, 1992, at p. 308). Movements advocating the equality of rights for homosexuals were established. The trend today — which began in the seventies — is a liberal treatment of the sexual orientation of an individual, which is considered to be his private matter.

These changes in social outlook were given expression in law in the Western world, and homosexual couples have achieved equality, in accordance with the social norms in each country.

6. In European countries, there is no longer a criminal prohibition of homosexual relations. Legislation in the field of public law and labour relations in France, Denmark, Sweden and Norway prohibits discrimination because of sexual orientation. Laws in Sweden, Holland and Norway equate the rights and duties of homosexual couples with the rights and duties of heterosexual couples, including tax benefits and property division arrangements upon separation. The law in Sweden also recognizes the right of inheritance of a homosexual spouse (see L.R. Helfer, 'Lesbian and Gay Rights as Human Rights: Strategies for a United Europe' 32 *Va. J. of Int'l L.*, 1991-92, 157, 168). Homosexuals have achieved the most recognition in Denmark. The law in that country allows 'marriage' between two persons of the same sex by registering their life-partnership relationship. This registration entitles homosexual spouses to social rights granted to married couples (M.H. Pedersen, 'Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce' 30 *Jour. of Family L.*, 1991-92, 289).

Article 8 of the European Convention for the Protection of Human Rights also provides protection for homosexual relationships as part of the protection given to the right to privacy (see decisions of the European Court of Human Rights in the *Norris Case* (1988) [35]; and *Modinos v. Cyprus* (1993) [36]). Recently, a proposal was made to amend the Convention to expressly prohibits discrimination of any kind because of sexual orientation (Draft Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms).

7. Article 15(1) of the Canadian Charter of Rights and Freedoms, which is a part of the Constitution Act, provides protection for the right of every person to equality. In case-law this section has been interpreted as prohibiting discrimination on the basis of sexual orientation (*Vriend v. Alberta* (1994) [39]; *Egan v. Canada* (1993) [40]; *Haig v. Canada* (1992) [41]). By contrast,

claims of homosexual couples for rights conferred on married couples were rejected. It was held that, since the purpose of marriage is raising children, the different treatment of the homosexual couple is not a breach of the charter (*Haig* [41], at p. 340; *Layland v. Ontario (Consumer & Commercial Relations)* (1993) [42], at p. 231).

8. In the United States the change has been more moderate. In some States there is still a criminal prohibition — which is not enforced — against having homosexual relations. As recently as 1967, the United States Supreme Court held that, since the homosexual has a psychopathic personality, as defined in the Immigration and Naturalization Act, his immigration into the United States was prohibited, and he was liable to immediate deportation (*Boutilier v. Immigration Service* (1967) [28]). Six years later, however, in 1973, the American Psychiatric Association rejected the definition of homosexuality as a psychiatric disorder, and, in 1981, the rule in *Boutilier* [28] was reversed. It was held that because homosexuality is not a psychiatric disorder, it does not indicate bad character, and therefore it does not constitute grounds for rejecting a naturalization request (*Nemetz v. Immigration & Naturalization Service* (1981) [29]).

During the 1980s, 139 judicial districts (States and local authorities) enacted laws prohibiting discrimination on the basis of sexual orientation in employment, housing and education (Note: 'Constitutional Limits on Anti-Gay Rights Initiatives' 106 *Harv. L. Rev.* (1992-93) 1905, 1923-25). The municipal laws of 12 municipalities allowed homosexual couples to register at the municipality as domestic partners, for the purpose of receiving social rights given to families (Bowman and Cornish, *supra,* at p. 1168).

At the same time, the courts in several States have recognized the rights of a same-sex spouse on the basis of the 'functional test'. According to this standard, recognition of the homosexual couple depends on the purpose of the law conferring rights on a 'family' or 'spouse'. The homosexual spouse will enjoy the rights conferred by law, if this is consistent with the law's purpose.

Thus, for instance, the New York State Court of Appeals recognized the life-companion of a deceased tenant as a protected tenant by virtue of his being the spouse of the deceased. It was held that, in view of the purpose of the tenant protection law, the difference between a heterosexual couple and a homosexual couple is irrelevant. If the life-companion were not recognized as the spouse, the purpose of the law would be frustrated, in that a remote relation would be entitled to the accommodation, whereas the person who shared his life with the deceased would be expelled from the apartment where

he had lived for years (*Braschi v. Stahl Associates Co.* (1989) [30], at pp. 788-789; see also *Yorkshire Towers Co. v. Harpster* (1986) [31]; *Two Associates v. Brown* (1986) [32]; *E. 10th St. Assoc. v. Estate of Goldstein* (1990) [33]).

The accepted outlook in the United States was summarized in the article of Bowman and Cornish, *supra*, at pp. 1175-77, as follows:

> '… there is a general tendency to look at the characteristics of the particular relationship to determine whether it qualifies as a family for the purposes of the particular statutory scheme, especially when a statute uses a term such as "family", "spouse", or "parent" without defining it.
>
> …
>
> … Courts have identified certain elements as indicia of a "family-like" relationship, including financial commitment, exclusivity of the relationship, the reliance members place on each other, the length of the relationship, and the presentation of the relationship to the outside.'

9. The law in Israel regarding homosexuals reflects the social changes that have occurred over the years.

Male homosexual relations were, in the past, included in the offence of deviations from nature, an offence punishable by 10 years' imprisonment (section 351(3) of the Penal Law, 5737-1977, which was a new version of section 152(2) of the Criminal Law Ordinance, 1936, enacted by the Mandate). This prohibition was never enforced. As early as the year 1963, in CrimA 224/63 *Ben-Ami v. Attorney-General* [20], at p. 238, the court held that this offence has no basis in our present reality. Speaking for the court, Justice H. Cohn said:

> 'Unnatural sexual relations, and homosexual relations, when done in private between consenting adults, are not acts involving moral turpitude, nor do they indicate that the persons who do them are criminals deserving of punishment. These are offences that we inherited from ancient systems and past generations and they have no place in the criminal law of a modern state… 'Nature', as such, no longer needs the protection of the criminal law. What needs, and is therefore entitled to, their protection are the human body and human dignity and liberty… one of the basic rights of the citizen is that the State will not interfere in the private life and his behaviour behind closed doors…'

Nonetheless, for many years the offence remained the law and was not repealed. Even in 1980, when the draft Penal Law (Amendment no. 14), 5740-1980 — which, according to its explanatory notes, was intended to replace the provisions of the Mandatory law with legislation suitable to the reality of our times — was tabled in the Knesset, it was suggested that the prohibition against homosexuality remain. Notwithstanding, it was proposed that the punishment for this offence be reduced to one year's imprisonment. The explanatory notes said: 'The question whether in our time there is a justification for the interference of the criminal law in sexual acts done between consenting adults in private is a controversial one' (*ibid.,* at p. 392).

This proposal did not reach the Knesset, and the criminal prohibition was repealed eight years later in the Penal Law (Amendment no. 22), 5748-1988.

This formal repeal reflects the current position of Israeli society that the law (as opposed to religion) should be indifferent to the sexual orientation of a person, so long as he does not harm anyone. There is widespread consensus that homosexuals should not be restricted or subject to discrimination (Rubinstein, *The Constitutional Law of the State of Israel*, *supra*, at p. 334). The amendment to the Equal Opportunities Law reflects this approach. M. Virshowski MK referred to this during the debate proposing the law at first reading:

> '… with this we are in fact establishing the rules accepted today in the enlightened world and allowing people to live in accordance with their sexual orientations, and not to suffer for them or be oppressed because of them' (Knesset Proceedings 119, 1991, at p. 1034).

10. In our case, it is clear that there is a difference between a homosexual couple and a heterosexual couple. However, a 'difference' justifying different treatment must be relevant (*Boronovski v. Chief Rabbis* [16], at p. 35; HCJ 720/82 *Elitzur Religious Sports Association, Nahariyah Branch v. Nahariyah Municipality* [21], at p. 21; HCJ 4169/93 [22]).

The proper test is therefore to consider the relevance of the sexual orientation to the benefit conferred on the spouse. The functional test meets this requirement. According to this test, no distinction should be made between homosexual couples and heterosexual couples, if the spousal relationship between the spouses of the same sex meets the criteria that realize the purpose for which the right or benefit is conferred. By contrast, when the sexual orientation is relevant to realizing the purpose of the benefit, for instance if the purpose is to encourage having children, withholding the benefit from a same-sex spouse will not constitute discrimination. Justice

L'Heureux-Dubé discussed this distinction in the judgment of the Canadian Supreme Court in *Canada (A.G.) v. Mossop* (1993) [43], at p. 560:

> '… "family status" may have varied meanings depending on the context or purpose for which the definition is desired… the Tribunal concluded that the potential scope of the term "family status" is broad enough that it does not prima facie exclude same-sex couples. In making this finding, the Tribunal used the proper interpretational approach, considered the purpose of the Act and the values at the base of the protection of families.'

Cf. also NLC 54/85-0 [25]. In that case it was held that a recognized partner is exempt from paying insurance premiums under s. 8 of the National Insurance Law [Consolidated Version], 5728-1968, exempting 'a married woman whose husband is insured' from making insurance premiums. Justice Goldberg, who wrote the judgment, explained that in view of the purpose of the law to place a recognized partner on an equal footing with the 'lawful wife', and in view of the definition in the law of the expression 'his wife' including a 'recognized partner', the recognized partner must also be regarded as a 'married woman'.

11. Public authorities are first and foremost subject to the principle of equality, but this principle also applies in the field of labour relations in general (see, for instance, S. Almog, 'A Guide to Labour Law' *The Employee's Guide*, 1994, 35-36). The employer's contractual freedom retreats when faced with the employee's right to equality (*Flight Attendants Association v. Hazin* [24]; HCJ 410/76 *Herut v. National Labour Court in Jerusalem* [23]; *Nevo v. National Labour Court* [7], *ibid.*). The legislation prohibiting discrimination in labour relations reflects this principle, but did not create it. See also F. Raday, 'The "Privatization of Human Rights" and the Misuse of Power' 23 *Mishpatim*, 1994, at pp. 21, 41.

12. In our case, the aeroplane ticket was not meant for a spouse who is married to the employee, and in any event the purpose of the benefit was not to encourage a lifestyle within a traditional family framework. The benefit is given to the employee for the spouse with whom he shares his life *de facto*. Indeed, although the petitioner did not intend the arrangement to apply to same-sex spouses, the sex of the spouse is not relevant to the purpose of giving the benefit.

Benefits for a spouse are a significant part of employees' salaries. Professor Elbin's calculations found that in the United States 27% of employees' salary is made up of benefits (in his article, *supra,* at pp. 1068-1069).

In Israel, benefits (including 'related conditions') may lead even to the doubling of the salary (see the monthly periodical *Calculation*, M. Katzin, ed., October 1994, 50). A significant part of these benefits — such as pension plans and life insurance — are given for the spouse, including the recognized partner, and to deny benefits to a spouse with whom a homosexual lives is tantamount to reducing his salary. Consequently, denying these benefits is discrimination against the employee himself. Professor Elbin said of this:

> 'Unable to marry, gay couples are generally excluded from the benefits afforded married couples in our society, including benefits commonly accorded spouses in employee and public benefit programs. For gay employees, the result is total compensation lower than that of other married co-workers performing the same job.
>
> Domestic partner provisions lessen the economic discrimination that results from the ban on same-sex marriage.
>
> …
>
> … An employer who does not offer domestic partner benefits is, in fact, paying *less* in total compensation than he should be because employees with domestic partners are not being compensated equitably' (*supra*, at 1068-69, 1082).

In the case before us, denying the benefit to the respondent would lead to a reduction of his salary in the amount of the price of the ticket, and there is no justification for this.

For these reasons, I agree that the petition should be denied.

Petition denied, by majority opinion (Vice-President A. Barak and Justice D. Dorner), Justice Y. Kedmi dissenting.

30 November 1994.

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