H.C. 104/87

Dr. Naomi Nevo

v.

1. National Labour Court

2. Jewish Agency for Israel

3. Jewish Agency National Staff Committee

4. Union of Office Workers - Central Committee

In the Supreme Court sitting as High Court of Justice
[October 22, 1990]
Before: Bach J., Netanyahu J. and Ariel J.

Editor's Summary

Petitioner, Dr. Naomi Nevo, was employed for many years by the Jewish Agency for Israel as a sociologist. On reaching the age of 60, she received a notice from her employers that she was to retire on pension, in accordance with the provision in the Pension Rules relating to Jewish Agency employees. This stated that the retirement age for men was 65 and for women 60.

Petitioner brought an action in the Regional Labour Court asking for a declaration that the above provision was void as being discriminatory. Her action was dismissed and so was her appeal to the National labour Court. Hence, her petition to the High Court of Justice against the National Labour Court and against her employers, the staff committee and the union of office workers.

In allowing the petition and making absolute the order *nisi* against the respondents, the Court held as follows:

1. In accordance with a well-established criterion, as laid down in case law, discrimination is present wherever the principle of equality is infringed, i.e., where persons are treated differently even where there is no relevant difference between them. Accordingly, the distinction between men and women in respect of retirement age in the provision in question must be examined to determine whether it is "relevant", i.e., whether it serves any legitimate purpose.

   The submission of counsel for the Jewish Agency that the provision for early retirement of women conferred benefits on them, enabling them to receive pension monies earlier and taking into account the extra burden that they had to undergo over the years as wives and mothers, was not acceptable.

Nor was it relevant that, as submitted, many women were satisfied with the arrangement for early retirement.

On the contrary, the differentiation in ages of retirement for men and women amounted to discrimination, for the following reasons:

a) the age differential was irrelevant in the context of alleviation from the burden of work, there being no difference between men and women in this respect;
b) earlier retirement for women has a number of negative social, personal and economic implications. *Inter alia,* early retirement may curtail a promising career and entail a lower pension payment then if the woman were allowed to continue to work for a further 5 years;
c) there is no justification in compelling a woman who reaches 60 years of age to retire, since at that age she is relieved of much of the domestic responsibilities which made her working life more difficult in earlier years. On the other hand, allowing a woman the *option to* retire at 60 is acceptable;
d) in 1987, the statute known as the Male and Female Workers (Equal Retirement Age) Law was enacted by the Knesset. This statute came into force subsequent to the judgment of the National Labour Court in the present case and after the instant petition had been submitted to the High Court. Nevertheless, from the wording of the statute and the explanatory notes to the bill that preceded it, it is clear that the legislator regarded earlier compulsory retirement for women as being discriminatory;
e) an examination of the jurisprudence of the Court of the European Community, as well as of English case law, shows that those jurisdictions also regard differentiation in retirement age as constituting discrimination. Moreover, it is stressed in the English cases that intention or motive to discriminate does not have to be proved - suffice it for discrimination to exist in fact.

Nor is there any basis in the contention that early retirement for women assists in renewing the labour force and alleviating unemployment. There is no reason why women should suffer more than men for these reasons.

2. With regard to the statutory position prior to the 1987 statute, a number of provision did include a differentiation between men and women as to retirement age - as for example several sections in the National Insurance Law, the securing of Income Law, 1980 and the Severance Pay Law, 1963. On the other hand, labour legislation prior to 1987 which required equality between the sexes contained no reference to retirement age. Nevertheless, in interpreting the relevant provision in this case, the basic presumption in favour of equality and against discrimination must be applied, in accordance with the provision of section 1 of the Women's Equal Rights Law, 1951 which prohibits discrimination against women in respect of any legal act.

3. The 1987 statute does not operate retroactively. However, it should not be inferred from this that therefore in the period prior to its enactment differentiation in retirement age between men and

women was permissible. At any rate, contrary to the respondents' contention, the statute certainly does not deprive the petitioner of her right to postpone her retirement until the age of retirement for men.

4. The High Court of Justice can justifiably intervene in the decision of the Labour Court in this case, in view of the substantial legal error in that decision and because justice requires such intervention.

5. This is one of the exceptional cases where a court is justified in intervening in the content of a labour agreement for reasons of public policy, in view of the discriminatory provision which affects the rights of women.

6. In view of the above, the Court must act to annul the affect of the discrimination by declaring that the offending provision in the Jewish Agency Pension Rules is totally void.

Israel Supreme Court Cases Cited:

[l] F.H. 10/69 *Boronowski v. Chief Rabbis of Israel,* 25(1) P.D. 7.

[2] Cr. A. 112/50 *Yosifoff v. Attorney General, 5* P.D. 481.

[3] Cr. A. 5/51 *Steinberg v. Attorney General, 5* P.D. 1061.

[4] H.C. 30/55, *Committee for Preservation of Requisitioned land in Nazareth v. Minister of Finance, 9* P.D. 1261.

[5] H.C. 953/87, 1/88, *Poraz v. Mayor of Tel Aviv-Yafo,* 42(2) P.D. 309.

[6] H.C. 85/89 *Beit Herut Workers Cooperative for Agricultural Settlement Ltd. v. GIazmann,* 41(3) P.D. 526.

[7] H.C. 98/69, *Bergmann v. Minister of Finance* 23(1) P.D. 693.

[8] H.C. 153/87 *Shakdiel v. Minister for Religious Affairs,* 42(2) P.D. 221.

[9] C.A. 337 337/61 *Lubinski v. Assessment Officer,* Tel Aviv, 16 P.D. 403.

[10] M.A. 166/84 (H.C. 780/83) *Central Yeshiva 'Tomchei Tmimim' v.State of Israel,* 38(2) P.D. 273.

[11] H.C. 363/87 *Yehuda v. Rosh Ha'ayin Local Council,* 41(3) P.D. 755.

[12] H.C. 525/84 *Hatib v. National Labour Court,* 40(1) P.D. 673.

[13] H.C. 410/76 *Herut v. National Labour Court,* 31(3) P.D. 124.

[14] H.C. 105/87 *Hebrew University of Jerusalem v. National Labour Court,* 42(3) P.D. 557.

Israel Labour Courts Cases Cited:

[15] N.L.C.H. 45/13-117 *Air Services Ltd. v. Sela, 17* P.D.A. 284.

[16] N.L.C.H. 47/2-11 *'Paz'Oil Company Ltd. v. Yom-Tov,* 19 P.D.A. 164.

[17] N.L.C.H. 33/3-25 *Air Stewards Staff Committee v. Hazin,* 4 P.D.A. 365.

[18] N.L.C.H. 35/4-8 *Israel Ports Authority v. Executive Committee of the Histadrut, 7* P.D.A. 143.

English Cases Cited:

[19] *Reg. v. Birmingham C.C. Equal Opportunities Commissions,*[1989] A.C. 155 (H.L.).

[20] *James v. Eastleigh B.C.* [1990] 2 All E.R. 607 (H.L.).

International Cases Cited:

[21] *Marshall v. Southampton AHA* [1986] 2 All E.R. 584 (C.J.E.C.)

[22] *Defrenne v. Belgium* [1974] C.M.L.R. 494.

A. Feldman, F. Raday - for the Petitioner;

H. Bar-Sadeh - for Respondent Number 2.

JUDGMENT

BACH J,: 1. Dr. Naomi Nevo (hereinafter: the Petitioner) was employed by the Jewish Agency for Israel, which is Respondent Number 2 (hereinafter: the Respondent), as a senior sociologist as from July 1, 1962, and as Director of Sociology in the Settlement Department as from August 1, 1983. The terms of employment of Respondent's employees, including the Petitioner, are set forth in the Jewish Agency Employees' Terms of Employment of February 1966 (hereinafter: Terms of Employment), which is derived from an agreement between the executive of the Respondent in the one hand and the Central Committee of the

Union of office Worker's in Israel together with the Jewish Agency for Israel Staff Committee on the other hand. The Terms of Employment covers the Jewish Agency Staff Pension Rules of August 1, 1953 as well, which set forth the retirement arrangements for Respondent's employees.

In paragraph 6 of the Pension Rules (hereinafter: Paragraph 6) it is stated:

"The age for retirement on pension is 65 for a man and 60 for a woman".

In accordance with this paragraph, the Petitioner was notified that she must retire from work on February 1, 1985, the date on which she would reach 60 years of age.

The Petitioner viewed the aforementioned Paragraph 6 as a discriminatory provision. She applied to the Regional Labour Court in Tel Aviv requesting that it declare that the Paragraph discriminates in an invalid and prohibited manner, and that it order the Respondent to continue to employ Petitioner until age 65, or alternatively, compensate her for the losses suffered as a result of her retirement at age 60.

Petitioner's employment by Respondent continued beyond age 60, following Respondent's agreement to delay Petitioner's retirement until the Regional Labour Court rendered its decision; however, on November 27, 1985, when the Regional Labour Court gave its decision dismissing Petitioner's complaint, her employment was terminated. The Petitioner appealed the Regional Labour Court's judgment to the National Labour Court. That Court, sitting in a seven-judge panel, dismissed the appeal by a majority and held that setting a different retirement age for men and women does not constitute invalid discrimination. Two members of the court expressed the contrary opinion in a dissenting opinion. The petition before us is to annul the majority's decision.

2. The following are the focal points of the dispute in this petition:

a. Does setting different retirement ages for men and women constitute discrimination?

b. How should legislative intent regarding retirement age be interpreted when various social welfare enactments concerning retirement rights distinguish between men and women?

c. What is the impact of the enactment of the Male and Female Workers (Equal Retirement Age) Law, 5747-1987, on this petition?

d. Is it proper for a judicial forum to intervene in the labour agreement which is the subject of this petition?

e. Should the High Court of Justice interfere with the Labour Court's decision in this case?

f. What is the appropriate relief?

We will deal with these issues respectively.

A. Does Setting Different Retirement Ages For Men And Women Constitute Discrimination?

3. When we are called upon to address a claim of invalid discrimination, it is appropriate that we be guided by the words of President Agranat, in F. H. 10/69[1], at page 35, when he addressed the question of when a distinction is discriminatory:

> "One must always distinguish... between invalid discrimination (hereinafter: discrimination) and a permitted distinction. The principle of equality, which is simply the other side of the coin from discrimination, and which the law of every democratic country strives, for reasons of justice and fairness, to realize, means that, as to the object concerned in hand, it is necessary to treat equally people between whom there are no substantial differences which are relevant to their object. If they are not treated equally, then we are confronted with discrimination. In contrast, if the difference or differences between various people are relevant to

> the object in hand, then treating them differently as required by such object will be a permitted distinction, so long as the differences justify this".

Similar statements have been made in numerous cases, including: [2] Cr.A. 112/50, at page 490; [3] Cr.A. 5/51, at page 1068; and [3] H.C. 30/55, at page 1265.

Accordingly, in order to ascertain whether Paragraph 6 is discriminatory, we must examine it in light of the following question: in the instant case, is there a legitimate purpose, as to the realization of which the distinction between the genders is relevant?

There are two purposes in setting a mandatory retirement age for older employees, neither of which can, at prima facie, be invalidated:

A. To enable the employee to rest, in his old age, from his daily toil;

B. To allow the employer to revitalize the ranks of his employees and hire new, younger manpower, to replace those who retire.

Is the distinction between the genders as to retirement age relevant to the realization of these two goals?

4. Learned counsel for Respondent argues that Paragraph 6 constitutes a privilege, in that in practice it confers a benefit upon women. In his opinion, the paragraph also advances the cause of equality between the genders in that it makes things easier for women, since earlier retirement age reduces the extra burden on women, engendered by the fact that the working woman is also a mother and wife. According to his argument, alongside the obligation of retiring at age 60 the privilege of receiving pension payments must be reckoned with. He adds that in his opinion (which he bases on an affidavit submitted by a female employee), many women are content with this arrangement, and many even ask to advance their retirement date immediately upon becoming eligible for full pension benefits.

5. I am not persuaded by these reasons, nor by their cumulative weight, and I have reached the conclusion that the aforesaid distinction does indeed constitute discrimination.

The reasoning underlying my conclusion follows, and is based in part on the arguments of learned counsel for Petitioner:

A. The distinction is completely irrelevant to the alleviation of burdens. There is no support whatsoever for the proposition that as a rule women, more than men, require alleviation of burdens upon reaching the age of 60. It appears that it is precisely when male and female employees reach this age that the need for the distinction is totally eliminated. The fact that life expectancy for women is higher than that for men perhaps even points to the opposite conclusion.

B. Earlier retirement does not constitute a positive advantage, but on the contrary has many negative consequences:

(l) Retirement from work has many negative personal, mental and social consequences. Frequently, a person who retires from his employment because of his advancing age feels that he is no longer a participant in the productive sector of society. He feels that he has been deprived of the satisfaction of working and receiving compensation for his labour. This feeling is also strengthened by society's attitude, which in many cases treats him as an "old man" who no longer serves any useful purpose. The situation is more acute in our day, where average life expectancy has increased and people remain healthy even at an advanced age. For this reason, the number of years have increased in which an older person, of sound body and mind, is forced, despite his capabilities, to leave his activities in the labour market and gaze, frequently in frustration, on the progression the accordingly of life's activities in which he can no longer take part.

(2) Imposing an earlier retirement age on women also has negative economic consequences:

(a) A woman who has not worked sufficient years to be eligible for full pension benefits loses 5 years in amassing these benefits. This is the Petitioner's situation, where at

the age of 60 she had accrued a pension rate of 55.3% of the salary determinative for pension purposes; whereas were she allowed to retire at age 65, the aforementioned rate would increase to approximately 69.3%.

(b) Women lose five years of salary. A full salary with benefits is much higher than a pension payment.

(c) Frequently, it is precisely at the end of a person's working years that he reaches the height of his career, and also his highest salary. Loss from early retirement arises both from loss of the higher salary itself, and from the fact that the pension allowance - calculated as a percentage of salary at the time of retirement - is lower.

(3) In Positions requiring lengthy academic training, such as that of the Petitioner, entry into the labour market generally occurs at a relatively late age. For the employee to utilize his full potential for advancement, he needs to take advantage of working years later in life.

The problems of extracting the full potential for advancement is particularly acute in the case of women. Many women cannot devote the bulk of their energies to work during the period when they are bearing and raising their children. As a result they lose many years necessary for career advancement. The early retirement requirement is therefore likely to harm women in particular.

(4) Earlier retirement age is also likely to have consequences on career progress in the period preceding retirement. This is because of the employer's tendency to prefer advancement of an employee with a later retirement date.

Let us illustrate this with a practical example: a position of department head becomes vacant in a particular office**,** and two of his deputies are competing for the same position. Let us assume that both of them have equal experience and similar qualifications, and they are both 58 years old. However, one of the candidates is a woman and the other a man. Undoubtedly, the man in this case will have a conspicuous advantage given that the members of the selection committee know that if he is chosen he will be able to fulfil his

position over the course of 7 years, until retirement age, whereas the woman will have to retire after two years, namely, shortly after "learning the ropes" in the new position.

C. It is difficult to appreciate the conceptual reason for this discrimination, particularly when it operates at the age of 60. It is possible to understand and justify a certain difference in approach to employment conditions of men and women at earlier stages of life. During the years when a woman is fulfilling her role as a mother to small children, she is entitled to consideration, primarily regarding hours of employment and vacations, and not requiring has to carry out tasks involving particular physical exertion. However, when a woman reaches the age of 60, and her children in most cases have already left their parents home and established independent lives of their own, it is precisely at this moment that the woman, if she is interested, is able to make more available devote more time to work. *To force* her, because she is a woman, to retire from her work at *this* stage of her life and abandon the realization of her hopes in this area is indeed discrimination, which under modern conditions of life seems unjustified, unreasonable, and unacceptable.

I do not find fault with giving women the *option* to retire; this is likely to be to the advantage of all concerned. But there is no justification for the arrangement whereby the woman is *obligated to* retire, while a man employed in the same job and at an identical age, is entitled to continue working.

D. The fact that creating a gap between the mandatory retirement age for women and the corresponding age for men constitutes unjustified discrimination has in fact also now been recognized by the legislature also with the enactment of the Male and Female Workers (Equal Retirement Age) Law on March 17, 1987 (hereinafter: Retirement Age Law).

The term "retirement age" is defined as follows in section I of this Law:

> "'Retirement age' means the age on attaining which a male or female worker must retire from employment in accordance with the provisions of a collective agreement applying to him or her".

Following this is section 2 of the Law, which states:

> "When a collective agreement prescribes for a female worker a retirement age lower than that prescribed therein for a male worker, then, notwithstanding anything provided in that collective agreement, the female worker shall have the right to retire from employment at any age between her retirement age and the retirement age prescribed for a male worker".

In the explanatory notes accompanying the Male and Female Workers (Equal Retirement Age) Bill, 5747-1987, it is made clear that the purpose of the law is to eradicate the unjust discrimination between the sexes in this area. And it is stated therein, at page 106:

> "The retirement age currently provided in collective agreements creates discrimination between men and women in that a female employee is forced to retire in most cases five years before the retirement age for male employees.
>
> The requirement that she retire earlier directly harms her potential for advancement at work, the salary she receives, and her ability to accumulate pension rights. The aim of the bill is to eliminate the existing discrimination in this matter and prescribe the same retirement age for male and female employees".

Arguably, the legislature in this Law allows for a certain disparity between the sexes and in this mistural creates a certain discrimination to the man's detriment, in that women are granted the option of earlier retirement, which is not granted to men. But this argument is only superficially logical. The primary purpose of this law is indeed to eliminate discrimination in the mandatory retirement age gap, but this fact is not contradicted by the legislature's desire not to deprive women of the right to earlier retirement, to which they are entitled under a collective agreement.

The matter is explained thus at the end of the aforementioned explanatory notes to the bill, where it is stated:

> "Nevertheless, it is proposed to allow the female employee, to the extent she so desires, to preserve her right to retire from employment before the uniform retirement age, if she has such a right under the collective agreement applicable to her".

The aforementioned Law was passed by the Knesset after the National Labour Court had handed down its decision in this case and after the instant petition was filed. Since it is not stated that the Law has retroactive effect, it does not apply to Petitioner's case. However, it is certainly possible to learn from that Law, and from the reasoning in the explanatory notes to the bill, that the above-mentioned distinction between men and women in a collective agreement constitutes invalid discrimination.

E. The principle that a gap between the mandatory retirement age for men and women constitutes invalid discrimination has been recognized in international case law as well. An instructive and leading example of this can be found in the decision of the Court of Justice of the European Communities in the matter of *Marshall v. Southampton AHA* (1986)[21].

This decision dealt with the appeal of an English woman who had served as senior officer in a public institution and whose employment was terminated the age of 62, against her will, for the sole reason that she was a woman and the retirement age for women was 60, as opposed to the corresponding age of 65 for men. The woman appealed to the court of the European community and argued that terminating her employment constituted gender discrimination, and that it was, *inter alia, a* breach of EC Council Directive 76/ 207.

These provisions include at the outset general guidance, which states:

> "Equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia furthered" *(ibid. [21], at 588).*

Within the framework of this general guidance, and with a view to its realization, Article 5 of the Directive states:

> "1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.
>
> 2. To this end, member states shall take the measures necessary to ensure that ... (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended..."*(ibid. [21] at 589)*.

And after an exacting analysis of all the relevant arguments, the court reaches at the following conclusion:

> "...for an employer to dismiss a woman employee after she has passed her sixtieth birthday pursuant to a policy of retiring men at the age of 65 and women at the age of 60 and on the grounds only that she is a woman who has passed the said age of 60 is an act of discrimination prohibited by art 5(1) of Directive 76/207" (*ibid*., *at 591)*.

6. No doubt it is highly likely that many women are satisfied with the existing situation, and they view the possibility of early retirement on pension as constituting a right. However, as noted above, this right is secured by the *option* to retire on pension at age 60, and the desire to grant this right does not require or justify *forcing* the woman to retire at that age even against her will.

7. Respondent's arguments and the Labour Courts' holdings emphasized that the motivation for including Paragraph 6 in the Pension Rules and including a similar paragraph

in other collective agreements was not to discriminate against women, but, to the contrary, to alleviate their position.

I am prepared to assume that Petitioner's employer did not intend to discriminate against her and the other female employees when it signed the Labor Constitution. However, the Respondent's intentions are not conclusive as to the question that we are called upon to determine, because the test for assessing the existence or nonexistence of discrimination is objective and not subjective. The motive for creating a distinction between men and women is not determinative in the matter addressed, and for the purposes of determining the existence of discrimination, it is necessary to examine the final outcome as it appears in social reality.

English case law concerning gender discrimination has been decided in a similar spirit. In the House of Lords decision in the appeal of *Reg. v. Birmingham C.C. Ex p. Equal Opportunities Commission* (1989) [19], the question of whether arrangements, which resulted in the situation that girls needed better marks than boys to be accepted for certain schools, constituted invalid discrimination.

Lord Goff held in this case, at page 1194, as follows:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned ... is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex".

An even more far-reaching decision, only recently handed down by the House of Lords in England - *James v. Eastleigh B. C.* (1990) [20] - addressed the complaint of a 61 year old man against the local council. The man complained about the fact that he was charged an entrance fee to a public swimming pool, while at the same time, his wife, who was the

same age, entered the pool without charge. The difference arose from the fact that the wife was on pension, while the plaintiff would be entitled to free entrance as a retiree on pension only at the age of 65. The House of Lords found that this distinction constituted discrimination against the man on the basis of his sex. I see no need to comment on the result reached by the House of Lords in this case. However, I wish to rely upon the following principle, set forth in the decision at page 612, as follows:

> "The council in this case had the best of motives for discriminating as they did. They wished to benefit 'those whose resources were likely to have been reduced by retirement' and 'to aid the need [sic], whether male or female'. The criterion of pensionable age was a convenient one to apply because it was readily verified by possession of pension book or a bus pass. But the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex".

8. As to the second purpose in setting a compulsory retirement age, i.e., in order to replenish the ranks of the employees, I do not see that it is in any way relevant to distinguishing between the sexes. The Manufacturers' Association of Israel, which was requested by the National Labour Court to express its opinion in the appeal, claimed that acceptance of the appeal is contrary to the best interests of the national economy because of the unemployment problem. It is difficult to understand why it is necessary to sacrifice particularly the female public in order to achieve this important purpose. In my opinion, it is best that we ignore this rationale.

Consequently, from this perspective as well there is no reason to compel women to retire on pension at an earlier age, so that here again it is obvious that the discrimination is invalid.

9. Discrimination is a menace which engenders a feeling of deprivation and frustration. It impairs both the sense of belonging and positive motivation to participate in the life of society and contribute to it. A society in which discrimination is practiced is an unhealthy one, and a state in which discrimination is practiced cannot be regarded as properly

governed. It is worth noting in this regard the words of my colleague Justice Barak, in H.C. 953/87, 1/88 [5], at page 332:

> "...there is no more destructive force in society than the sense among its members that they are subject to different Standards. The sense of inequality is one of the most oppressive feelings. It harms the forces which unite society. It harms man's self-image".

It appears that there is not always sufficient vigilance regarding discrimination when it works against women. As to this matter, see for example the facts which formed the background for C.A. 89/85 [6], at page 531.

Let us assume, hypothetically, that the early retirement age were to apply to the members of a particular community, for the reason that that community prefers to remain within the family circle and regard participation in the labour market as secondary, and that compulsory retirement constitutes special protection for them because of the great burden they bore during their early years. I have no doubt whatsoever that a generalization of this type, and the resultant determination, would be immediately portrayed as blatant discrimination. Certainly I would in no way need to enumerate the general negative consequences of this distinction to support the determination that we have here is invalid discrimination.

When a court encounters a distinction between groups, it must scrutinize closely whether this distinction is based on stereotyped general perceptions, which are based on nothing but prejudice.

Upholding the discriminatory retirement age distinction between men and women may reinforce the view that women cannot be equal in the labor market, and in practice this may impair equality of opportunity for women.

I find the above sufficient to determine that Paragraph 6 is a discriminatory paragraph, and accordingly reverse the decision of the majority in the National Labour Court.

However, the labour Court's main line of reasoning in determining that the paragraph is not discriminatory was based on legislation which in its opinion amounted to constitutional approval, direct or indirect, of the distinction between women and men in all matters related to compulsory retirement age.

We will now address this reasoning.

B. *How should the legislative intent regarding retirement age be interpreted, in light of the legal situation existing at the time the decisions were given in the Labour Courts?*

10. First we shall review the legal situation regarding retirement age, as it was when the Petitioner's matter was addressed by the labour courts, i.e., prior to the enactment of the Retirement Age Law.

In legislation expressly providing for retirement age for employees, no distinction whatsoever was made between the sexes. Thus, in paragraph 18(a) of the State Service (Benefits) Law [Consolidated Version], 5730-1970, a uniform retirement age of 65 was set for all employees in the civil service; in paragraph 18(a)(l) of the Courts Law [Consolidated Version], 5744-1984, the retirement age for judges was set at 70 with no distinction between the sexes; and in paragraph 13 of the Israel Defence Forces (Permanent Service) (Benefits) Law [Consolidated Version], 5745-1985, the uniform retirement age was set at 40.

On the other hand, in the social welfare legislation a distinction is made between the sexes as to the age at which entitlements to various benefits begins or ends: the age of 65 for men and 60 for women. In the National Insurance Law [Consolidated Version], 5728-1968, this distinction is repeated several times: Section 12 (a) regarding qualification for old-age pension, section 127C(a) regarding entitlement to unemployment allowance, section 127U regarding entitlement to general invalidity insurance, section 127Y(c) regarding non-cessation of invalids' entitlement to special services, section 127AP regarding entitlement to vocational rehabilitation and section 127AU(a)(1) regarding entitlement to vocational training. In section 2(a)(4) of the Assurance of Income Law 5741-1980, the distinction exists regarding entitlement to assurance of income, and in section 7A of the Invalids

(Pensions and Rehabilitation) Law [Consolidated Version], 5719-1959, regarding entitlement to pension supplements. This is also the case in section 33A of the Fallen Soldiers' Families (Pensions and Rehabilitation) Law, 5710-1950, regarding the obligation of an employer to continue to employ a worker beyond retirement age, and in section 11(e) of the Severance Pay Law, 5723-1963, regarding dismissals beyond the age of 60 in the case of a woman, and 65 in the case of a man.

There is another reference to the age distinction of 60 for a woman and 65 for a man, not in the area of social welfare legislation, in section 3(a) of the Emergency Labour Service Law, 5727-1967, regarding retirees who are liable to Labour service during emergency situations.

In the legislation which addressed the requirement of equality between the sexes up until the enactment of the Retirement Age Law, retirement age was not cited among the areas in which equality is required. The Male and Female Workers (Equal Pay) Law, 5724-1964, only dealt with pay; section 42(a) of the Employment Service Law, 5719-1959, provides that the Employment Service shall not discriminate between the sexes in referrals to places of employment; the Employment (Equal Opportunities) Law, 5741-1981, dealt solely with equality in acceptance has emplagment and in creational training, and its replacement (which was enacted after the beginning of the litigation in the Petitioner's matter) - the Employment (Equal Opportunities) Law, 5748-1988, provides that an employer shall not discriminate against women in hiring, work conditions, job advancement, training or continuing education and in dismissals or severance pay. Retirement age, accordingly, did not fall within the areas in which the legislator expressly required equality.

In those sectors where the legislature did not prescribe a retirement age, the matter was determined in Labour agreements between employees and employers. Regarding Histadrut employees it was provided in 1983 that the retirement age between the sexes would gradually be equalized. Nonetheless, it may be said that as a rule the distinction between the sexes regarding retirement age existed in most of the labour agreements at the time that Petitioner's matter was considered by the labour courts.

11. On the basis of the above, the two labour courts, the regional and the national, held that the distinction between the sexes regarding retirement does not fall within the realm of discrimination.

Their conclusions were three-fold:

a. The legislature regulated the provision of benefits linked to retirement on pension in accordance with the non-uniform retirement age set forth in the relevant labour agreements. Thus the legislature made it clear that it agreed with the distinction provided for in those agreements.

b. The fact that in the laws in which the legislature regulated retirement age, it established a uniform retirement age, indicates that its failure to deal with the retirement age as to other sectors was intentional.

c. In the statutes relating to equality between the sexes (until the Retirement Age Law) there was no reference to retirement age. Hence, the legislature did not view the distinction between the sexes in this matter as amounting to discrimination.

I quote from the opinion of the National Labour Court*:

> "It is a basic assumption that a distinction in a statute is 'reasonable', and does not contradict public policy or create invalid discrimination, so why should an identical provision in a collective agreement or collective arrangement be viewed as creating invalid discrimination?"

12. Respectfully, I do not accept these conclusions.

I accept the statement of the Labour Court that it is a basic assumption that the legislature does not discriminate. Accordingly, where there is a doubt as to the right interpretation uncertainty, the enactment must be understood in light of that basic assump-

* N.L.C.H. 41/73-3, 18 P.D.A. 197, 221.

tion. That is, that interpretation must be applied which accords with the basic principle of equality and lack of discrimination and with the Women's Equal Rights Law, 5711-1951, which gives legislative force to this basic right, specifically, as to women.

In other words: when a question of interpretation comes before this Court, it is entitled, and even obligated, to uphold the basic freedoms and to interpret the legal issues that come before it in their light. In the words of Justice Landau, in H.C. 98/69 [7], at page 698: "It is... only right - precisely in the borderline cases where a statutory provision can be construed in two ways - that we prefer the construction that upholds the equality of all persons before the law over one that sets it at naught". And as Justice Barak stated in H.C. 153/87 [8], at page 274: "Between two possible interpretations, we must choose that which guarantees equality in the optimal sense, and reject the interpretation that contradicts equality".

Furthermore, the Women's Equal Rights Law states in section 1:

> "A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceeding, against women as women, shall be of no effect".

Retirement from work constitutes a legal proceeding. As a consequence of this act, the status of a person is changing, and his rights and duties are altered (and see Justice Witkon's broad interpretation of the term "legal act" in section 1 of the Women's Equal Rights Law in C.A. 337/61 [9], at page 406). Accordingly, we should not prima facie draw inferences as to the matter before us from statutory provisions which refer to the distinction between men and women in other matters unrelated to retirement age. I would also not assign great weight to the argument that the Women's Equal Rights Law cannot be given special status, and that therefore subsequent enactments may contradict it:

> "The basic conception is, that in enacting a new statute, it is the legislature itself that must repeal or narrow down the old Statute. If the legislature has not done so, the assumption is that it wanted to give

effect to both statutes, simultaneously the other, each according to the scope required by its terms".

So held Justice Barak in H.C. 953/87, 1/88 [5], *supra,* at page 334, in addressing the meaning of the Jewish. Religious Services Law [Consolidated Version], 5731-1971, as against the Women's Equal Rights Law which preceded it.

This statement is true whenever we consider two statutes which may contradict each other. But in our case we must give even more weight to the Women's Equal Rights Law. This statute reflects an important and fundamental value, a principle which shapes life in our state as a well-ordered state. The Women's Equal Rights Law proclaims a value which should encompass our entire legal system. Accordingly, where a matter which contradicts that statute is not *expressly* stated, the interpretation of the statute compatible with the principle of equality between the sexes must be preferred.

This statement is all the more true in the case before us, where it is merely sought to draw an *inference* from other statutes which contradicts the Women's Equal Rights Law.

We will now address the labour courts' reasoning anew, against the background of the principles we outlined above.

It should not be inferred from the legislature's silence regarding labour agreements which create a distinction in retirement age that it intended to approve this discrimination. This also applies to silence on the part of the legislature regarding retirement in statutes relating to women's rights. The fact that the legislature set a uniform age whenever it dealt expressly with retirement age can perhaps be interpreted in two ways, but I think the preferable conclusion is that this fact also points more in the direction of negating sex discrimination in this area.

This is particularly so in light of the enactment of the Retirement Age Law, which clearly takes exception to that discrimination.

Section 12 of the National Insurance Law [Consolidated Version], which sets forth the age of entitlement to old-age pension, is the enactment closest to our issue. This paragraph does *obligate a* woman to retire at age 60, but rather permits receipt of the pension from this age onwards. The distinction protects women in practice from the creation of a double injustice. For in the existing situation, if the entitlement to old-age pension were determined in an equal manner (that is, starting at age 65), the woman who retires in accordance with labour agreements would suffer a shortfall for 5 years. This paragraph, accordingly, *permits* the woman to retire safely at age 60, but it does not require this.

It is to be noted and emphasized that the same argument was considered at length in the decision in *Marshall* [21], *supra.* There too the authorities relied upon welfare legislation, according to which a woman was eligible for pension at age 60, while a corresponding age of 65 was established for men. It was argued that it should be deduced therefrom that the existence of a gap regarding mandatory retirement age between men and women does not constitute invalid discrimination.

The court rejected this claim, holding, *inter alia,* at page 599:

> "... a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex. . . ".

Accordingly, it was held that a woman's *obligation* to retire at age 60 should not be inferred from such legislation.

A similar claim was also raised before the House of Lords in the *James* [20] decision, *supra,* and there too it was held that the notion that discrimination is permitted should not be inferred from the existence of various statutes establishing benefits for women from age 60 and for men only from age 65, and in the absence of an express statutory provision permitting as much, discrimination of this nature is forbidden. The decision held at page 613, as follows:

> "Statutory pensionable age is still used in some other statutory contexts ... as the basis of entitlement to enjoy certain other benefits or concessions... But it is impossible to infer from these or any other specific statutory provisions requiring or authorising discrimination in defined circumstances the existence of a general exception to the prohibition of sex discrimination in the provision of goods, facilities and services imposed by s. 29 of the Sex Discrimination Act 1975 such that discrimination in favour of women and against men between the age of 60 and 65 is always permitted. In the absence of express statutory authority derived from some other enactment, such discrimination is prohibited".

In sum:

It is true that the statutory provisions which indicate on their face the legislature's recognition of differences between men and women for specific purposes, including the age at which they are entitled to pension, cannot be ignored. However, it should not be deduced, by way of interpretation, that the legislature has thereby granted permission for establishing a gap between man and woman regarding compulsory retirement age. For this, explicit legislation would be required. No such legislation exists, but on the contrary, wherever the compulsory retirement age is referred to in connection with a specific category of employees, a uniform age is provided, and it is now explicitly prescribed in the Retirement Age Law that this type of gap is invalid and should not be put into practice.

C. *Significance of the Retirement Age Law*

13. Thus we arrive at the question: *how does the Retirement Age Law directly impact upon our issue?*

We already noted above that the Retirement Age Law was enacted on March 17, 1987 (namely, after the National Labour Court handed down the decision in this case, and after the petition was filed), and as the text of the Law does not indicate a date on which it comes into force, it is in effect from the date of its publication (March 26, 1987), and onwards.

Learned counsel for the respondent (who submitted his brief after the Law was enacted) argues that this Law answers the question presented in this petition, and that accordingly consideration of the petition is unnecessary because it is solely theoretical. He bases his statement on two decisions of this Court: M.A. 166/84 (H.C. 780/83) [10] and H.C. 363/87 [l l].

Respectfully, I do not accept this argument. In the two decisions noted, statutes were considered which retroactively settled the problem on which this petition was based. In those cases, since the legislature had dealt with the matter, there was no further room for the involvement of this Court. In the case before us, the legislative arrangement does not apply retroactively to the Petitioner, so that her problem remains as it was. Accordingly, this proceeding is not superfluous.

As stated, the legislature did not make any statement as to how to act during the period preceding the effective date of the Retirement Age Law. On the one hand, it could be inferred from the fact that the legislature established an effective date from that point onwards, that in so doing the legislature answered the question in the negative. According to this interpretation, a woman's right to choose when to retire between the ages of 60 and 65 should not be applied retroactively. This possibility is certainly reasonable, since retroactive application is likely to bring with it uncertainty and disorder in the economy. Likewise, since this law is a result of a social process, it is only reasonable to fix a point in time when the social change, on account of which the law was enacted, "crystallized", so to speak.

On the other hand, it could be argued that this statute is merely the unavoidable result of a social and legal situation. For, as shown above, the same result would have been reached even if it had not been enacted (I will not enter here into the question of whether the Retirement Age Law really institutes the desired equality. For purposes of this issue, it is sufficient that women were given the opportunity to retire at an age equal to the retirement age for men). Moreover, it is unsatisfactory that the statute which eliminated discrimination against women on retirement is that which will deny relief to the Petitioner; while if the statute had not been enacted, the Petitioner would have been entitled to it.

In practice, a problem of interpretation arises here, the method of clarifying which we have already considered in the previous section: when several possible reasonable interpretations arise, we prefer that which upholds basic rights over the option which limits them. Accordingly, I find that the enactment of the Retirement Age Law does not negate the Petitioner's right to retire at an age equal to the retirement age for men.

It could be queried whether we are not thus undermining the purpose of the law. For there is no doubt that along with the goal of achieving equality in retirement, the legislature apparently sought to achieve another goal: application of the change in an organized fashion, with the aim of preventing uncertainty, legal claims, excessive monetary expenses, and so on.

I therefore wish to make it clear that my holding herein is merely that the Retirement Age Law does not preclude the Petitioner, who claimed her right to retirement on the basis of equality before she left her job, and before the Retirement Age Law was enacted, from being entitled to that right.

I do not see the need, within the context of this petition, to express an opinion regarding the potential influence of this decision on the situation of other women in positions similar to that of the Petitioner, in that they too were forced to retire on pension at age 60. The same applies to the question of whether women, who reconciled themselves to the situation and retired without resorting to litigation, will now be able to request cancellation of the arrangement which has entered into affect for them.

I will note only the existence of a precedent for limiting the application of a fundamental decision regarding women's equal rights in the case law of the Court of the European Community:

Judgment was given in favour of the plaintiff in the case of *Defrenne v. Belgium* (1974) [22], which also concerned discrimination between men and women, being an equal pay for equal work claim. However, the Court placed a time limit on the effect of the rule which it laid down in this decision, holding that the Court would not entertain claims submitted for

the balance of salary for periods preceding the date of the decision (see regarding this matter E.C. Landau, *The Rights of Working Women in the European Community* (Luxembourg, 1985) 23-26).

However, as noted above, I do not intend to decide this issue, which does not concern the Petitioner.

D. *Will The High Court of Justice intervene in the Labour Court's decision in this case?*

14. In H.C. 525/84 [12], President Shamgar dealt at length with the topic of the High Court of Justice's intervention in the decisions of the Labour Court, reviewing the development of the case law on the topic. In summing up his remarks, the President reaches the conclusion that the test is two-fold (see page 695 of the judgment):

(l) Whether substantial legal error has been disclosed in the Labour Court's judgment;

(2) That justice requires intervention in the Labour Court's decision.

I have no doubt that the present case justifies our intervention. The determination that the said distinction does not fall within the definition of discrimination is a substantial legal error. Justice requires the intervention of this Court, since Petitioner was denied the basic rights of equality and freedom of occupation.

E. *Is it appropriate that a judicial forum intervene in the labour agreement which is the subject of this petition?*

15. Collective labour agreements and collective labour arrangements are the outcome of negotiations between employee representatives and employers. As a contract, they reflect the will of the parties, and accordingly, in light of the principle of freedom of contract, the court should abstain from intervening in its content as far as possible. There is considerable intricacy in a collective agreement or arrangement, and the various terms constitute a part of

a whole in which every detail is part of a system of balances and compromises at which the parties arrived in their deliberations. Moreover, since agreements of this nature affect a broad community, the fact that many parties rely upon its content must be considered.

In the National Labour Court's judgment it is stated that the specific provision we are dealing with here "is the result of collective negotiations between two of the central organizations in labour relations in Israel - the General Federation of Labour (Histadrut) and the Manufacturers' Association, and the Terms of Employment obligating the Jewish Agency and its employees is also the result of a bilateral arrangement, to which the largest employee organization in the State is a party". These remarks show clearly the extent of the effect of the agreement with which we are dealing. I will accordingly repeat the Labour Courts ruling (N.L.C.H. 45/117-13 [15], at page 289; N.L.C.H. 47/11-2 [16], that the Court will intervene as little as possible contents of collective agreements or arrangements.

I think that this case is among the few in which the Court will intervene in the contents of a labour agreement, despite the principles noted above.

In N.L.C.H. 33/25-3 [17] the National Labour Court held that courts are authorized to intervene in the contents of a collective agreement for "public policy reasons" pursuant to section 64 of the Ottoman Civil Procedure Law. In our case, the relevant section is section 30 of the Contracts (General Part) Law 5733-1973 (hereinafter: the Contracts Law), which states: "A contract the making, contents or object of which is ... contrary to public policy is void". Section 31 of the Contracts Law provides that section 19 of that Law should apply to section 30. Section 19 states that "Where a contract is severable, and the ground for rescission relates only to one part thereof, such part alone shall be capable of rescission.

It is appropriate to quote the following statement from N.L.C.H. 33/25-3 *[17], supra,* at page 378:

> "...If in a regular contract the court will invalidate a provision which contains 'discrimination' which is contrary to 'public policy'- all the more so in the case of a collective agreement. Just as in the administrative law area the Supreme Court did not hesitate to invalidate 'discrimination',

> there is likewise no room for such hesitation where a collective agreement is concerned. In its contractual part, the collective agreement is nothing but a contract between the parties; in its normative part - it is closer to legislation, by imposing norms on the individual through an external source, a source which represents the individual's interests, but not the individual *qua* individual. If in a regular contract a provision which the individual explicitly agreed to would be invalidated because of 'public policy', it is that much more appropriate to invalidate for the same reason this type of provision when it applies to the individual because of his being a member of a larger group...".

In H.C. 410/76 [13], at page 130 *et seq.,* Deputy President Landau (as he then was) adopted this rule (although the case ruled otherwise on the merits).

I consider it right to apply this ruling to the matter before as also. Paragraph 6 creates a discriminatory arrangement which impairs the rights of women to participate equally in the domain of labour. Accordingly I believe that this paragraph is contrary to public policy, and therefore it is right for this Court to intervene and nullify it.

It should be further noted, that if the aforementioned applies as to collective labour agreements, which were duly signed and registered, then this statement is certainly correct regarding other labor agreements, such as the "Terms of Employment" which is the subject of our present discussion.

Respondents' counsel argues that work and retirement conditions are areas which the employees and employers must shape in the course of their negotiations, and if indeed a social change has occurred which justifies a change in the retirement age of women, the Petitioner should have waited until the signing of a new labour agreement, which would reflect the change.

This argument cannot justify acquiescence in a discriminatory distinction for so long as it is contained in an existing agreement. The judge who wrote the minority opinion in the National Labour Court commented on this topic as follows*:

> "Notwithstanding the importance of the parties' positions in labor relations, I reject reliance on this agreement as a basis for justifying distinctions in retirement age. If the courts in the United States would have taken this approach when they came to determine the justification for discrimination between whites and blacks, it is doubtful whether this discrimination would have been invalidated even to this day".

16. To conclude the elucidation of this point I see the need to mention in this context once more the provisions of section 1 of the Women's Equal Rights Law, which, as noted, states:

> "A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceeding, against women as women, shall be of no effect".

If this is the legislature's guidance regarding the interpretation and application of a statute, it is all the more necessary to act in this manner regarding the application of a labour agreement and the determination of its validity.

F. *What is the appropriate relief?*

17. The National Labour Court held in its judgment that, even had it reached the conclusion that Paragraph 6 is discriminatory, it would have been precluded from granting the Petitioner relief. The court based its decision, *inter alia,* on the fact that a condition for declaratory relief is that "the situation as to which a declaration is sought is clear and unambiguous" (N.L.C.H. 35/98-4 [18], at page 158), a condition which in the court's opinion does not exist herein.

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* 18 P.D.A. at page 229.

The court raised the question of which is the optimal state of equality - making the retirement age of men equal to the retirement age of women (that is, 60) or the opposite? The ambiguity raised by this question was one of the reasons for the National Labour Court's decision that declaratory relief should not be granted. At first sight, we are also confronted with this dilemma. For who can assure that it is more correct to make the retirement age of women equal at 65 than to make the retirement age of men equal at 60; or should it be held, as it is now set forth in the Retirement Age Law, that the retirement age of 60 is optional for women?

True, we described the negative consequences of early retirement at the outset of the judgment, but at the same time we have not ignored the fact that there are those who view early retirement (women as well as men) as an arrangement which benefits the worker.

But it seems to me, after additional consideration, that this problem may be overcome without particular difficulty.

The accepted age for retirement on pension today is 65. This is the age fixed in the agreement in question as the retirement age for men, and the Petitioner seeks to eliminate the discrimination which acts against her in Paragraph 6 and make her situation equivalent to that of men in all matters related to the compulsory retirement of employees.

As we have found that there is indeed invalid discrimination as to this point, and that this discrimination is not based in a statutory provision, we must act to eliminate it and grant the Petitioner the requested relief.

18. In light of everything stated herein, I would recommend to my esteemed colleagues that we make the order nisi absolute, in the sense that it is declared that that part of Paragraph 6 which sets forth a different compulsory retirement age for women is null and void .

The parties are required to engage in negotiations on the practical effects of this judgment regarding Petitioner's rights. If an agreed-upon solution in this matter is not found

within a reasonable time, the Petitioner may once again apply to the Regional Labour Court regarding this matter.

Respondent shall pay costs to the Petitioner in the sum of 6,000 NIS, as of today.

NETANYAHU J.: It saddens me that in the Israel of our day it was not clear and self-evident that forcing the retirement of a woman from her work at an earlier age than a man constitutes discrimination.

Ever since the generation of the founders and pioneers, women have taken, and continue to take in our day, an equal part with men in endeavour in all areas of life, and do not lag behind men in doing so, despite the additional burdens women bear as wives and mothers.

In my view, the discrimination is reflected not only in the financial loss she suffers from her retirement at a younger age, but also, and in my opinion, primarily, in that she is precluded, at precisely the age where she is more free to do so, from achieving, fulfilling, and flourishing in the realization of her various talents and skills.

I associate myself with the opinion of my colleague Justice Bach that Paragraph 6 of the collective agreement is invalid as being discriminatory.

ARIEL J.: I agree. In H.C. 953/87, 1/88 [5], cited by my colleague the Hon. Justice Bach, I was given the opportunity and privilege to make, *inter alia,* the following statement, at page 342:

> "The equal status of women within the context of the principle of the equality of the sexes is not merely formal, and it should and must extend in a practical and real manner across all fields of our lives".

Hence, it is clear that I am in agreement with the conclusions reached by my esteemed colleague, in consideration of the reasons presented by him.

As to our intervention in the ruling of the National Labor Court, I am persuaded that in this case intervention in the National Labour Court's decision is also justified by the position I expressed in H.C. 105/ 87 [14], at page 567-568, regarding the need to confine this Court's intervention in judgments of labour courts solely to cases in which intervention is necessary to do justice, since we are involved here with a ruling with impact upon the law in general.

Judgment given on October 22, 1990. Decided as stated in the judgment of Bach, J.