IN THE
SUPREME COURT OF THE STATE OF ISRAEL
SITTING AS THE
HIGH COURT OF JUSTICE

HCJ 1758/11

Before: **Hon. President D. Beinisch (Ret.)**
Hon. Justice N. Hendel
Hon. Justice I. Amit

Petitioners: **1. Orit Goren,**
2. The Women's Lobby of Israel

v.

Respondents: **1. Home Center (Do It Yourself) Ltd.,**
2. The National Labor Court in Jerusalem

Argued: **28 Elul 5771 (27 September 2011)**

Decided: **25 Iyyar 5772 (17 May 2012)**

On behalf of Petitioner 1: Adv. Orna Lin; Adv. Odeliah Ettinger; Adv. Barak Calev
On behalf of Petitioner 2: Adv. Yaniv Wiseman

On behalf of the Respondent 1: Adv. Dror Gal; Adv. Carmit Levi Zamir; Adv. Sima Golin
On behalf of Representatives for Equal Opportunity in the Workplace:
Adv. Tziona Kenig-Yair; Adv. Janet Shalom

Judgment

President Dorit Beinisch (Ret.)

Petitioner 1 (Orit Goren; henceforth, "Petitioner") won a lawsuit against Respondent 1 (Home Center Ltd.; henceforth, "Respondent") under the 1996 Equal Pay Act, upon the determination that the salary she received from the Respondent was lower than that of a male employee who performed the same task, and given that the Respondent could not justify the discrepancy. The issue decided by the National Labor Court, among others, in this case was whether proof of discrimination under the Equal Pay Act automatically gives rise to a cause of action under the 1988 Equal Job Opportunities Act. The main issue arising from this question is the fact that under the Equal Job Opportunities Act, unlike the Equal Opportunities Act, it is possible to award damages without proving actual damage. A majority opinion in the National Labor Court determined that a successful claim under the Equal Pay Act does not automatically give rise to claim under the Equal Job Opportunities Act; hence, this petition.

Facts

1. Petitioner worked as a consultant in the tool department of the Respondent's store at the Ayalon Mall in Ramat Gan from August 25, 1997 until December 27, 1997, where she was paid NIS 17/hr. Along with the Petitioner in the tool department worked Steven Mor, a male, who earned a salary of NIS 5000/month (which amounts to approximately NIS 26/hr.). The two were hired after filling out a questionnaire and an interview by the department head. When asked before their hiring how much they wanted to be paid, the Petitioner requested NIS 3500/month while Mor requested NIS 6000/month. When the Petitioner discovered that Mor received a higher salary than her, she wrote a letter, dated November 16, 1997, to the department head

asking for a raise to the effect of either NIS 5000/month or NIS 26/hr. Her letter went unanswered. On December 14, 1997, the Petitioner wrote another letter to her department head pointing out that to the best of her knowledge other employees in her department earn more money than she does. She requested information regarding the salaries of the other employees in her department and provided notice of her resignation effective December 27, 1997. 2. After her resignation, Petitioner filed a lawsuit against the Respondent in the Labor Court for the District of Tel Aviv, claiming the difference in salary between her and the other employees on the basis of both the Equal Pay Act and the Equal Job Opportunities Act. On April 1, 2004, a panel consisting of Judge M. Nachtomi and Public Representatives T. Braffman and Y. Eldar found in her favor. The panel determined that both the Petitioner and Steven Mor worked as consultants in the tool department in the Respondent's Ramat Gan branch, and that the Respondent did not sufficiently establish either a distinction between the job done by the Petitioner and the job done by Mor; or that Mor had any superior abilities to those of the Petitioner; or that the reason Mor received a higher salary was because he was in line for a managerial position. However, the court determined that the Respondent sufficiently proved that, generally speaking, its male employees do not receive a higher salary than its female employees.

Given the circumstances of the case, the court also had to decide what reference group to use in determining whether the Petitioner was discriminated against.. Should the court compare her salary to all those working in the Respondent's tool departments across the country or should it compare it to the salaries of those working in the Ramat Gan branch? Regarding this question the court looked to Section 2 of the Equal Pay Act which says that any discrepancy in wage should be calculated against employees employed "by the same employer" and "at the same

place of employment." In light of the fact that the Respondent's policy in this case is to leave all salary decisions to the discretion of the manager of each branch, the labor court determined that the Petitioner's loss due to discrimination should be calculated against the salaries of her coworkers at the Ramat Gan branch. Since the Respondent did not provide information regarding the wages of the other workers in the tool department of the Ramat Gan branch, and the court determined that the services provided by the Petitioner were equal to those Mor was hired to do, the court concluded that the Petitioner had sufficiently proven that the disparity in salary between herself and Mor constituted discrimination. The court noted that the fact that the salary offered to the Petitioner was a result of negotiation between her and the department head during which she requested a lower salary than that which Mor requested does not justify the disparity in their salaries. Therefore, the district labor court determined that the Petitioner successfully established a claim under the Equal Pay Act and awarded her NIS 6,944, which is the difference in salary earned between the Petitioner and Mor.

Additionally, the district labor court determined that once it has been found that the Respondent violated the Equal Pay Act, the Petitioner has a legitimate claim under the Equal Job Opportunities Act. The court held that since the Petitioner's salary was set as a result of her salary request and not at the behest of the Respondent, the Petitioner could not be awarded the full amount under the Equal Job Opportunities Act. Therefore, the court set the amount of compensation owed to the Petitioner under the Equal Job Opportunities Act at NIS 6,944, equal to the compensation awarded to her under the Equal Pay Act.

3. The Respondent appealed the decision to the National Labor Court, and the Petitioner filed a counter-appeal. The Respondent claimed that the Petitioner should not be entitled to compensation under either law, while the Petitioner claimed that she should be entitled to higher

damages than those awarded to her under the Equal Job Opportunities Act. In a November 20, 2007 decision, the National Labor Court decided to affirm the lower court's ruling awarding the Petitioner compensation under the Equal Pay Act, but, in a split decision, held for the Respondent with regards to the Equal Job Opportunities Act and reversed the lower court's decision to award damages under the Equal Job Opportunities Act.

The Decision of the National Labor Court

4. Judge V. Wirth-Livnah delivered the decision of the National Labor Court. In the decision, Judge Wirth-Livnah interpreted the relevant provisions of both the Equal Job Opportunities Act and the Equal Pay Act and compared the claims available under both statutes. Regarding the Equal Pay Act, Judge Wirth-Livnah agreed with the ruling of the district court according to which the Petitioner's loss should be calculated against the salaries of those working in the tool department at the branch at which she worked in Ramat Gan, because every branch of the Respondent acts independently, as the manager of each branch determines each employee's salary. Judge Wirth-Livnah added that in this case the information provided by the Petitioner regarding the disparity in salary between her and Mor and the fact that they performed the same task sufficiently fulfilled the Petitioner's burden of proof in establishing her case. With regards to the exceptions to the Equal Pay Act listed in Section 6 of the statute, Judge Wirth-Livnah determined that it is the responsibility of the Respondent to prove that the case falls into one of the exceptions, and in this case, the Respondent did not meet its burden. Judge Wirth-Livnah pointed out that there may be exceptions to the right to equal pay not listed in the Act, and noted that the right to equal pay is not absolute. Therefore, the right to equal pay must be balanced with the right of employers to privately contract and negotiate a salary with its

employees. Thus, Judge Wirth-Livnah determined that if an employer can prove that any discrepancy (so long as it is not extreme) between the salaries of its male and female employees who perform the same task is due solely to the individual salary negotiation the employer has conducted with each individual employee, the right to contract will outweigh the right to equal pay. The employer, however, is required to ensure that the differences in his employees' salary are reasonable. Additionally, Judge Wirth-Livnah pointed out that if the court were to take away an employer's right to contract, there could be a negative effect on women, as it could cause employers to avoid hiring women altogether as a means of avoiding the problem of wage gaps.

In this case, Judge Wirth-Livnah determined that because the difference between the Petitioner's salary and that of Mor stood at 35% and because the Respondent failed to provide information regarding the salaries of other employees working at the branch, this is not a situation in which the right to contract trumps the right to equal pay under the Equal Pay Act. Therefore, Judge Wirth-Livnah concluded that the Petitioner sufficiently established a claim under the Equal Pay Act, and upheld the lower court's decision in this regard.

While the other members of the panel joined Judge Wirth-Livnah in her decision, it is important to note that Judge S. Tzur (and employer's Rep. D. Blumberg who joined his opinion) and President S. Adler (with whom employer's Rep. Y. Shilon joined) did not agree with Judge Wirth-Livnah regarding the circumstances in which the right to contract trumps the right to equal pay. President Adler held that an employer acting in good faith cannot take advantage of the weakness or unfamiliarity of female employees of the appropriate wage rates for the job she is seeking when requesting a lower salary than what a male applicant is requesting. Finally, President Adler noted that the difference in bargaining power between the genders cannot serve as a valid justification for a difference in salary.

5. The main disagreement between the judges in the National Labor Court, however, surrounds the question of the relationship between a claim based on the Equal Pay Act and a claim based on the Equal Job Opportunities Act. Judge Wirth-Livnah, together with Judge Tzur and Employee's Rep. D. Blumberg, held that an award under the Equal Pay Act does not automatically trigger a claim for damages under the Equal Job Opportunities Act. In her opinion, Judge Wirth-Livnah focused on the difference between the two statutes. Under the Equal Pay Act, the plaintiff can be awarded damages for the difference in salary up to the 24 months prior to filing a complaint, whereas under the Equal Job Opportunities Act, a plaintiff can be awarded damages as the court sees fit without the need to establish any monetary loss. Judge Wirth-Livnah noted that compensation under the Equal Job Opportunities Act are aimed at educating employers and deterring discrimination. Therefore, judges have wide latitude in determining what the compensation should be. Furthermore, Judge Wirth-Livnah added that the two Acts are different with regards to the evidence a plaintiff must provide in order to establish a prima facie case of discrimination thus shifting the burden of proof over to the defendant. Under the Equal Pay Act, all that is required of a plaintiff filing suit is to provide the court with information regarding a difference in salary between her and a male employee who performs the same task and in the same workplace; whereas a plaintiff filing suit under the Equal Job Opportunities Act must present actual evidence of discrimination, despite the fact that the Equal Job Opportunities Act does not require the plaintiff to prove that the discrimination was intentional. Judge Wirth-Livnah adds that there are various pieces of legislation intended to protect equality in the workplace, among them the Equal Pay Act, the Equal Job Opportunities Act, the 1954 Women in the Workplace Act and the 1998 Law to Prevent Sexual Harassment. The fact that there are different statutes to this effect calls upon us to look upon them as

complimentary of one another as opposed to redundant in which fulfillment of the elements of one claim will automatically fulfill the elements of another. Judge Wirth-Livnah noted that under Section 2 of the Equal Job Opportunities Act, the plaintiff-employee must prove actual discrimination. The importance of this requirement is that any lawsuit filed on the basis of the Equal Job Opportunities Act requires the plaintiff to first and foremost establish that there was gender discrimination, because only proof of discrimination can result in punitive damages.

Judge Wirth-Livnah added that the differences in the evidentiary requirements between the Equal Pay Act and the Equal Job Opportunities Act necessary to establish a cause of action is whether the facts of the case are branded as "discriminatory" and entail punitive damages, which is the case in a Equal Job Opportunities Act lawsuit, but not in a claim filed under the Equal Pay Act. Therefore, Judge Wirth-Livnah concluded that successfully establishing a claim under the Equal Pay Act does not necessarily mean the plaintiff will be successful in a claim under the Equal Job Opportunities Act. Hence, in this case, Judge Wirth-Livnah found that the fact that the lower court concluded that the Respondent's business did not have a discriminatory policy in place meant that it was not deserving of the punitive measures consistent with a claim under the Equal Job Opportunities Act and that the compensation awarded to the plaintiff under the Equal Pay Act sufficed.

6. President Adler, with whom Employees Rep. Y. Shilon joins, disagreed with Judge Wirth-Livnah and held that a successful claim under the Equal Pay Act gives rise to a claim under the Equal Job Opportunities Act. President Adler ruled that an unequal salary demonstrates discrimination in the workplace which violates Section 2 of the Equal Job Opportunities Act. President Adler pointed out that under both statutes the plaintiff must provide evidence of a difference in salary and unequal treatment between herself and a male employee,

thereby shifting the burden of proof to the employer-defendant to prove that he acted legally. Accordingly, an employer who successfully shows that the difference in salary is justified under Section 6(a) of the Equal Pay Act has sufficiently proven that the difference in wage is not a result of the plaintiff's gender as required by the Equal Job Opportunities Act. Therefore, President Adler held that so long as the employer cannot show that the difference in salary is justified under Section 6(a) of the Equal Pay Act, the only conclusion is that the difference in treatment is a result of the employee's gender. Furthermore, President Adler added that neither Acts requires the plaintiff to prove that the discrimination was intentional and that every case is to be decided objectively. Additionally, the situations in which a plaintiff can file a claim under the Equal Job Opportunities Act are no less than those available under the Equal Pay Act, and the defenses available to an employer under the Equal Job Opportunities Act are no more than those available under the Equal Pay Act. Thus, concludes President Adler, the two statutes complement one another when they are interpreted in a consistent manner.

With regards to this case, according to President Adler's approach, the fact that the lower court agreed that the Respondent did not discriminate as a matter of policy is not a good defense against the claims stemming from the two statutes. Paying an employee less than what others, performing the same task, are earning, even if it is against company policy, is a violation of both these laws. Finally, according to President Adler, the question of whether a company policy results in discrimination is a factor in determining the amount of damages to award under the Equal Job Opportunities Act.

The Parties' Claims

7. The main claims of the Petitioner and of petitioner no.2, The Women's Lobby of Israel (henceforth, "the Petitioners") touch upon the nature of the relationship between the cause of action under the Equal Pay Act and the cause of action under the Equal Job Opportunities Act given the circumstances of this case and the evidentiary threshold necessary to prove a claim under the Equal Job Opportunities Act. According to the Petitioners, the fact that the Petitioner's salary was 35% less than that of Mr. Mor is reflective of the deep rooted problem of wage discrimination in the Israeli economy and is sufficient to meet the burden of proof necessary to establish a successful claim not only under the Equal Pay Act, but also under the Equal Job Opportunities Act. The Petitioners further argue that the court cannot deny the Petitioner's compensation under Section 10 of the Equal Job Opportunities Act solely because she could not prove widespread discrimination. According to the Petitioners, the majority ruling in the National Labor Court requiring that a claim of discrimination under the Equal Job Opportunities Act to be "because of" the employee's gender, is, for all intents and purposes, the same as requiring proof that the employer "intended" to discriminate. Such a burden is, according to the Petitioners, unrealistic. The Petitioners point to the decision of the district labor court (upon which the National Labor Court relied) that there was no company-wide policy resulting in discrimination and argue that the decision of the National Labor Court essentially requires proof of widespread discrimination in the workplace as a condition for relief under the Equal Job Opportunities Act. Additionally, the Petitioners argue that when a court determines that there is a discriminatory effect that cannot be explained by relevant considerations, such as the case at hand, it must not be required to rule on whether the source of the result is a deliberate policy of discrimination. The Petitioners also argue that the National Labor Court's interpretation of the

Equal Job Opportunities Act does not fit with its plain language. The statute itself contains no language suggesting that courts should deviate from the established test for determining discrimination, namely, determining whether there is disparate treatment between two entities that are otherwise equal. The Petitioners further allege that the interpretation of the National Labor Court goes against the purpose of the Equal Job Opportunities Act, which is to serve as a deterrent to discrimination. They argue that in Section 10 of the Equal Job Opportunities Act the legislature permitted punitive damages to be awarded without any proof of damages as a deterrent measure. However, they claim, the National Labor Court's decision to refrain from imposing such a penalty by setting a high burden of proof for the plaintiff effectively makes such a claim worthless and creates an incentive for the employer to act with indifference towards the Equal Job Opportunities Act. The Petitioners add that parties may not waive the provisions of either the Equal Pay Act or the Equal Job Opportunities Act; therefore, an employee's agreement to take a lower wage should not be looked at as consent to unequal treatment on the part of the employer.

Finally, the Petitioners argue that under the circumstances, this Court should not reject the petition because it was filed three years after the decision in the National Labor Court. The Petitioners claim that the public interest in eliminating discrimination against women and blocking their path up the corporate ladder and the need to permit the use of the Equal Job Opportunities Act to advance this objective outweigh the interest of the Respondent's reliance on the decision of the National Labor Court. The Petitioners conclude that the Petitioner never gave up her right to compensation and the reason for her delay in filing is due to her lack of financial resources.

8. The Respondent argues that the petition should be dismissed outright due to the long period of time it has taken the Petitioner to file, and thus, the Court cannot accept her factual or legal arguments because of the prolonged time lapse. The Respondent also claims that this case does not justify review by this Court, sitting as the High Court of Justice, based on the rules set forth by Court precedence. The Respondent argues that the claims of the Petitioners regarding the proper interpretation of the relationship between the Equal Pay Act and the Equal Job Opportunities Act with regards to the plaintiff's burden of proof does not justify this Court's intervention in a decision of the National Labor Court. Furthermore, the Respondent argues that the effect of reducing the burden of proof required under the Equal Job Opportunities Act to that of the Equal Pay Act, as the Petitioners request, is contrary to the legislative intent. The Respondent points to the fact that the 1996 amendment to the Equal Pay Act expanding the grounds on which a plaintiff may file a claim entered into force eight years after the Equal Job Opportunities Act was enacted. Therefore, had the legislature intended for the burden of proof required by the Equal Pay Act to be sufficient for a successful claim under the Equal Job Opportunities Act, it would have explicitly said so in the amendment, but it did not. The Respondent adds that the two laws complement one another in that while the focus of the Equal Pay Act is the difference in salary between a male and female employee, the Equal Job Opportunities Act focuses on the cause of the difference in salary.

Additionally, the Respondent argues that the Petitioners' argument suggesting that the majority opinion in the National Labor Court decision requires a plaintiff to prove intent to have a successful claim under the Equal Job Opportunities Act should be rejected. The Respondent argues that the Petitioners confuse between the lack of a requirement to prove intent and the requirement to show a causal connection to prove the existence of discrimination. The

Respondent adds that the difference in salary between the Petitioner and Mor was a result of, among other things, the salary requests they made to the department head during the course of negotiating their salary. The Respondent adds that granting a specific salary request is not one of the things forbidden to an employer under the Equal Job Opportunities Act, as opposed to the Equal Pay Act which grants am employee the right to equal pay to other employees performing the same task or a job of the same value, even if the difference in pay does not stem from the gender of the employee.

Another point raised by the Respondent concerns the fact that the discrimination prohibited by the Equal Job Opportunities Act is discrimination based on the employee's membership in a specific protected class (for example, religion, gender, race, etc.). Thus, claims the Respondent, in order for an employee to prove discrimination on the basis of his/her membership in a protected class, (s)he must establish that the employer in question has a policy which results in discrimination against that particular class. In this case, the Respondent claims that it has sufficiently proven that it does not discriminate against its female employees, and even in the same tool department in which the Petitioner and Mor both worked, there were male employees who earned less than Mor. Under these circumstances, the Respondent argues that the earnings difference between the Petitioner and Mor is not enough for a successful claim under the Equal Job Opportunities Act, even though she was granted damages for her claim by the National Labor Court under the Equal Pay Act.

9. In addition to the claims of the parties in this case, we also received an amicus brief filed by the Equal Opportunities Commission of the Ministry of Industry, Trade and Labor. In light of the commission's interest in this case and its role in the statute involved, we decided to allow its intervention into the proceedings. The commission claims that significant wage gaps between

men and women are common in both the public and private sectors. It argues that both the Equal Pay Act and the Equal Job Opportunities Act should be interpreted in light of the existing realities in which significant wage gaps are a commonplace in society. It further argues that the difficulty in proving the existence of discrimination has led us to the point where the Equal Pay Act test is simply a showing of a wage gap between employees and does not require any showing of intent, and that under the Equal Job Opportunities Act, in certain circumstances, the burden of proof is shifted to the employer. The commission claims that the majority opinion in the National Labor Court has serious implications as to the implementation of the Equal Job Opportunities Act, which go against the prevailing theory as to the ability of the plaintiff to prove discrimination under the Equal Job Opportunities Act.

Given the circumstances, the commission argues, the Court should adopt a middle ground between the majority opinion in the National Labor Court and the dissent. It argues that when an employee successfully establishes a difference in salary between her and another employee, despite the implementation of an equal employment policy, the burden of proof would then shift to the employer to prove that there was no discrimination on the basis of gender. If the employer cannot withstand this burden, it would be assumed that it is a case of gender discrimination.

Analysis

10. Before discussing the main question presented by this case regarding the relationship between the Equal Pay Act and the Equal Job Opportunities Act, we will first address the issue raised by the Respondent with regards to the dismissal of the petition. The two issues presented by the Respondent's claim are (1) whether the amount of time that has elapsed between the date of the decision of the National Labor Court and the filing of this petition has any bearing on

whether this Court may hear this case; and (2) whether this Court, in its capacity as the High Court of Justice, can review a decision by the National Labor Court.

Regarding the delay in filing, it seems hard to dispute the fact that filing a petition more than three years after the judgment of the National Labor Court poses a significant hurdle to the Petitioners. Such a delay can be grounds for immediate dismissal when filed with the High Court of Justice. When determining whether such a delay is grounds for dismissal we analyze the delay in three ways: (1) subjectively; (2) objectively; and (3) the effect upon the rule of law if such a claim is allowed to proceed. *See* HCJ 170/87 Assulin v. Mayor of the City of Kiryat Gat [1988] IsrSC 42(1) 678, 694-95. The subjective test looks to the behavior of the petitioner to determine whether, during the elapsed time, the evidence shows that the petitioner gave up his right to contest the ruling. The objective test asks whether the delay has any impact on the rights or interests of any administrative bodies or third parties. The final test requires the Court to determine whether the delay negatively impacts the rule of law. This is done by balancing the aforementioned considerations consistent with the relative weight of each circumstance. The balance is especially cognizant of the private or public interests impacted by the objective test and the impact on the rule of law. *See* AA 7142/01 Haifa Local Committee for Planning and Building v. Organization for Protecting the Environment, [2002] IsrSc 56(3) 673, 679.

In this case, it seems that the Petitioner's delay in filing is evidence of her willingness to forgo her rights in the case, and that the Respondent may have legitimately relied on the decision of the National Labor Court, which is up for review now by this Court. However, due to the importance of the question arising from this petition, which concerns the relationship between various pieces of legislation and the prohibition against gender discrimination in the workplace, we conclude that we should review this petition despite the delay in filing. *See* HCJ 244/00

Organization for Democratic Discourse v. Minister of National Infrastructure IsrSc [2002] 56(6) 25, 80 - 81. The importance of our decision concerning the parties in this case may have a considerable impact on the rights and obligations of all employers and employees. Additionally, we should add that the Petitioner through her learned attorney, Adv. Orna Lin, has left to this court's discretion whether it should adjudicate the case of the Petitioner or merely address the underlying legal question.

Furthermore, it is well known that this Court, when sitting as the High Court of Justice, will only intervene in a decision of the National Labor Court when the decision contains a clear legal error, whose correction justice demands. *See* HCJ 525/84 Hatib v. National Labor Court [1986] IsrSc 40(1) 673, 693; HCJ 3512/04 Shezifi v. National Labor Court [2004] IsrSc 59(4) 70, 74. In light of the importance and implications present in the questions arising from this case, we decided to adjudicate this case.

11. The main question before us is whether proving the elements of a claim under the Equal Pay Act will give rise to a claim under the Equal Job Opportunities Act. In other words, whether proving a difference in salary between a male and female employee performing the same, or substantially the same, task or one equal in value in the same workplace can serve as a basis for a claim under both statutes. In order to answer the question we will look to the language and purpose of the two statutes and determine the relationship between them.

First, the relevant language of Section 2 of the Equal Pay Act which stands at the center of this claim:

> **The Right to Equal Pay**: 2. A male and female employee who perform the same task, or substantially the same task or one which is worth the same, at the same place of employment have the right to equal pay…

Once it has been proven that the employees work at the same workplace (this element has been discussed in the decision of the National Labor Court, but is not relevant to the question before us), the burden of proof shifts to the defendant to prove that the difference in salary is justified under Section 6 of the Equal Pay Act, which states:

> **Difference in Salary**: 6(a) The provisions of Section 2 meant to prevent discrimination in pay, does not prohibit wage differences based on the character or nature of the work under consideration, including productivity, quality of work, seniority at work, training or education, or geographic location of the work, which do not constitute gender discrimination.
> (b) In an action under this Act, the Labor Court has determined that when, in the dispute in question, the employees perform the same or essentially the same task or a task of equal value, the burden of proof shifts to the employer to prove that the difference in salary is justified under subsection (a)

The Equal Job Opportunities Act prohibits gender discrimination in the workplace. The basic point of the law is in Section 2(a) of the Equal Job Opportunities Act which states:

> **The Prohibition of Discrimination**: 2(a) An employer may not discriminate between employees or between job seekers on the basis of their gender, sexual orientation, marital status, pregnancy, infertility treatment, in vitro fertilization treatments, parenthood, age, race, religion, nationality, country of origin, worldview, their political party, reserve duty, their potential to be called to reserve duty or duration of reserve service… regarding any of the following work decisions:
> (1) hiring;
> (2) work conditions;
> (3) promotions;
> (4) professional development;
> (5) dismissal or severance pay; and
> (6) retirement benefits.

Subsection 2(a) is qualified by subsection 2(c) of the Equal Job Opportunities Act which states, "There is no discrimination under this Act, when it is required by the nature or character of the task or the position." Regarding the burden of proof in claims filed under the Equal Job Opportunities Act, Section 9 states:

> **Burden of Proof**: 9(a) In an action filed by a prospective employee or an employee filing a claim under Section 2, the employer must prove that he acted in accordance with Section 2 when:
> [(1)]Regarding hiring, promotion, working conditions, professional development, severance pay - if the employer established conditions or qualifications, and the employee proves that he or she fulfills the said requirements;
> [(2)]Regarding dismissal - if the employee proves that his conduct did not amount to grounds for dismissal.

12. In this case, the Petitioner has proven, as the National Labor Court determined, that her salary was 35% lower than that of Mor – a male employee who performed the same task as the Petitioner. Given the circumstances and the fact that the Respondent did not justify the disparity under Section 6 of the Equal Pay Act, the Petitioner successfully proved her claim under the Equal Pay Act. The question in this case is now whether the disparity automatically gives rise to the conclusion that the Petitioner was discriminated against unlawfully by the Respondent (regarding her salary) because of her gender under Section 2(a) of the Equal Job Opportunities Act. To decide this, we must look to the purpose of each law to determine the relationship between them.

13. Both the Equal Pay Act and the Equal Job Opportunities Act were enacted for the purpose of advancing equality in the workplace by prohibiting an employer from discriminating on the basis of irrelevant or illegitimate considerations. The principle of equality and the prohibition against discrimination is an essential principle in our legal system and is a

prerequisite for any democracy based on fairness and justice. As Justice M. Landau noted with regards to the principle of equality, "This notion, which is unwritten, is the essence of our entire constitutional system of law." HCJ 98/69 Bergman v. Minister of Finance and State Comptroller [1969] IsrSc 23(1) 693, 698. This Court has upheld this principle on more than one occasion, and has even determined that this principle enjoys constitutional protection. *See* HCJ 6427/02 The Movement for Quality Government in Israel v. The Israeli Knesset [2006] IsrSc 61(1) 619, 688 - 89 (2006). Regarding the essence of this principle and the prohibition of discrimination in our system of law, then-Deputy President A. Barak stated:

> [P]eople are different from one another. '...No person is completely identical to another'…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.... 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.

HCJ 721/94 El Al Israel Airlines Ltd. v. Danielowitz [1994] IsrSc 48(5) 749, 760 - 61.

The principle of equality and the prohibition of discrimination have been applied in different ways in the labor market, and have been explicitly mentioned in labor legislation. This is because of the presumption that labor relations is one of the main areas of society in which members of certain groups in society are prone to unjust discrimination affecting their economic and social status on the basis of unjustified stereotypes or prejudices. Preventing discrimination in the labor market will therefore prevent unjust prejudice based on assumptions which are irrelevant to the position in question. Furthermore, it stands to reason that in the long run, a ban on discrimination in the labor market, as has been implemented, will undermine stereotypes and prejudices that largely form the basis for illegal discrimination in society. As then-Justice E. Matza appropriately states,

> [D]iscrimination against women in the employment and economic sectors has a cumulative effect on their negative image, as a class which is supposedly inferior, in other spheres as well. Thus, for instance, the lack of proper representation of women in various fields and various workplaces contributes to fostering a negative image of their ability to manage their lives independently. It follows that discrimination against women in economic spheres in its own way nurtures the long-term entrenchment of distorted social outlooks.

See HCJ 453/94 The Women's Lobby v. The Minister of Transportation [1994] IsrSc 48(5) 501, 524 (henceforth, "In Re The Women's Lobby"). In order to achieve these objectives

and prevent illegal discrimination, the two statutes at issue here restrain an employer's general right to contract and limit his discretion in managing his business.

14. The Equal Pay Act was enacted to decisively combat one of society's greatest expressions of illegal discrimination, namely, compensating men and women differently for the same, or substantially the same, task or for a job of equal value. The statute was first enacted in 1964 and then reenacted in 1996. Section 1 of the Equal Pay Act explains the law's purpose,

> **Purpose**: 1. The goal of this law is to advance the principle of equality and prevent gender discrimination with regards to wage or any other aspect of the workplace.

The right to equal pay arises when the employees perform the same, or substantially the same, task or one of equal value. The law establishes a legal presumption of gender discrimination when there is a difference in salary between a male employee and a female employee. It is important to note that despite the amount of time that has passed since the law was enacted, gender discrimination with regards to wages is, unfortunately, still in practice. A 2010 Knesset survey, released by that National Center for Statistics on September 7, 2011 stated that women earn on average 66% of what men earn a month and 84% of what men earn per hour. *See* http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201115219.

Furthermore, it is important to note that lower wages is only one method of discrimination against women in the labor market. Others include not hiring women, sexual harassment, the inadequate representation of women in senior positions and the mistreatment of pregnant women and mothers. Throughout the years, the Knesset has attempted to deal with these various expressions of gender discrimination whether through the two laws at issue in this case or by other pieces of legislation (*see*, *e.g.*, The 1951 Equal Rights for Women Act, the 1954

Women in the Workplace Act, and the 1998 Law Against Sexual Harassment in the Workplace). This Court has also acted to protect the rights of women and to prevent discrimination against them (*see*, *e.g.*, HCJ 153/87 Shakdiel v. The Minister of Religious Affairs [1988] IsrSc 42(2) 221; In Re The Women's Lobby; HCJ 2671/98 The Women's Lobby in Israel v. The Minister of Labor and Welfare [1988] IsrSc 52(3) 630). Regarding the laws in place to advance equality between men and women we quote the words of then-Justice M. Cheshin in HCJ 2671/98 at 657 - 58:

> We reviewed statutes and established rules based on our interpretation of the law. The common denominator of these rules was and is the pressing social need to recognize the equal status of women and to strengthen this notion of equality. These laws are progressive and the rules are no different. When seen from afar, these laws and rules may seem strange and indirect, but I assume that a day will come when these laws will seem like child's play, laws which are praised by the great ones of today. Here we have a woman's right to "equal pay for the same job" as per Section 2 of the Equal Pay Act, does this law not state the obvious? Does it matter whether 500 boxes are packed by a man or a woman? Was this legislation not obvious and self evident even before its enactment? Had this law not been passed would we have not established it as a rule stemming from the (constitutional) principle of equality? The same can be said about the Equal Job Opportunities Act. There is no law which states that which we already know, namely that it is wrong to discriminate against women for no reason other than her gender. This can be said for these two laws and any other law enacted with the same purpose. These statutes have been enacted solely to explain illegal discrimination which has taken root in society, and the instructions therein are only to spell out to the masses what norms should prevail. The legislator explicitly warns us of the need to eliminate illegal acts that have taken hold and place women in the place they should have been in to begin with. The legislator has not declared new norms that are not self evident, rather, it has taken its time to spell out what exactly our legal and societal norms should be. After having done that, the legislator correctly sanctions anyone who violates the law. These laws are like rays of light, and the light in this case is equality, or, more specifically, gender equality in all matters. If we go from one ray of light to another, the doctrine of equality will reveal itself in all its glory.

Unfortunately, even today, the second decade of the 21st century, we still need legislation to protect women from gender discrimination. I would have hoped that today we would be in the

era in which these laws would be, as Justice Cheshin described, "child's play;" however, this era is still far, perhaps even very far, away from us.

15. The Equal Job Opportunities Act is broader than the Equal Pay Act and was enacted to deal not only with gender discrimination, but with other forms of discrimination as well (such as age, sexual orientation, race and religion). Likewise, the purpose of the Equal Job Opportunities Act is to prevent discrimination not only in pay, but in other aspects of the workplace as well (like hiring, work conditions and promotions). These two statutes have different definitions for what constitutes illegal discrimination. The Equal Pay Act looks to the end result by requiring only a showing of difference in pay between a male employee and a female employee in order to have a successful claim. Under Sections 2 and 6 of the Equal Pay Act, the labor court adjudicating such a claim must see if there is a difference in salary between the female plaintiff and a male employee to whom she is comparing her salary and who performs the same, or substantially the same, task or a one of equal value. Once this is successfully established, the burden of proof shifts over to the employer to prove that the difference in salary is justified under Section 6(a) of the Equal Pay Act. As President Adler pointed out in his decision, the list provided in Section 6(a) is not exhaustive. However, any considerations not listed in Section 6(a) of the Equal Pay Act must be of the same kind as those listed and must be ones that demonstrate a difference in the "nature or the character" of the job in question. If the employer cannot meet his burden of proof, the court must conclude that the plaintiff has a valid claim under the Equal Pay Act.

I must note that I cannot accept the opinion of Judge Wirth-Livnah - who on this point was a lone opinion – arguing that the employer's freedom to contract is a consideration which may, under certain circumstances, justify a difference in salary between a male employee and a

female employee, even when it is not in the framework of one of the considerations listed in Section 6(a). Through the considerations outlined in Section 6(a), the legislature determined what the balance should be between the freedom to contract and the protection of equality by listing relevant considerations which can justify a difference in salary between a male and female employee performing the same task. Due to the importance of the principle of equality in our legal system and the need to prevent unjust gender discrimination, I believe that the freedom to contract cannot, on its own, be a legitimate consideration justifying a difference in wage between a male and female employee. Recognizing the freedom to contract by itself as a legitimate defense to a claim of gender discrimination may lead to its utilization as a fig leaf to cover up real discrimination, completely undermining the purpose of the Equal Pay Act. Allowing this as a defense ignores the fact that there are actual gaps between the genders in the labor market with regards to salary demands and salary negotiation. *See* Sharon Rabin-Margaliot, *The Market Explanation to Wage Differences: In Light of the Home Center (Do It Yourself) Ltd. v. Orit Goren*, 50 HAPRAKLIT 501, 512 – 20 (5770) (henceforth, "*Market Explanations*").

In order to deal with the difficulty women have in the labor market, the legislature decided to limit the employer's freedom to contract in order to advance the principle of equality. In the absence of any other considerations affecting the worker in question (as outlined in Section 6 of the Equal Pay Act), the employer may not differently compensate a male and female employee who are performing the same task. Therefore, the legislature made a value judgment to limit the contractual freedom of an employer in order to reduce gender discrimination in the labor market. To further this goal, taking into account the imbalance of power inherent between employees (especially females) and employers, the legislature lightened the burden imposed on the employee-plaintiff by shifting the burden of proof onto the employer under Section 6 of the

Equal Pay Act. Accepting the idea that the freedom to contract may justify a wage gap is contrary to the fundamental purpose of the Equal Pay Act, which is reducing the impact of gender discrimination on market forces in determining the salaries of women.

Additionally, I reject the argument of Judge Wirth-Livnah according to which allowing the right to equal pay to supersede the freedom to contract will cause employers to avoid hiring women. By instituting such a policy, an employer will violate the Equal Job Opportunities Act, which prohibits an employer from considering gender in making personnel decisions. Such an employer would be liable to both civil and criminal penalties. Therefore, the method by which we can prevent gender discrimination in the labor market is by enforcing the laws in place to that effect and not by avoiding these laws by taking into account market conditions.

16. Unlike the Equal Pay Act, a claim under the Equal Job Opportunities Act requires the plaintiff to establish causation. Illegal discrimination under the Equal Job Opportunities Act is discrimination committed "because of" the plaintiff's identity as a member of a protected class. In order to prove a claim of discrimination under the Equal Job Opportunities Act, a plaintiff must prove that the employer acted discriminatorily when making one of the employment decisions listed in Section 2(a) of the Equal Job Opportunities Act. We must point out that the Equal Job Opportunities Act does not require the plaintiff to prove the defendant acted intentionally to be successful in her claim.

Regarding a policy requiring different retirement ages for men and women, Justice G. Bach stated:

> I am prepared to assume that Petitioner's employer did not intend to discriminate against [the petitioner] 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.

HCJ 104/87 Nevo v. National Labor Court, IsrSc [1990] 44(4) 749, 759.

Therefore, an employer taking into account one of the considerations listed in Section 2(a) of the Equal Job Opportunities Act when making an employment decision can trigger liability. Even without any intent to discriminate, taking into account an employee's gender, age, religion or any of the other protected classes listed in Section 2(a) of the Equal Job Opportunities Act is prohibited, unless the nature or character position in question reasonably requires such discernment as provided by Section 2(a) of the law. Furthermore, in light of the difficulty in proving that the employer took into account the employee's membership in a protected class in making a personnel decision, Section 9 of the Equal Job Opportunities Act allows the employee to merely prove that he or she meets the qualifications of the position in question in order to shift the burden of proof onto the employer to rebut the claim of discrimination and prove that his decision was not based on any illegal consideration. *See* HCJ Rehearing 4191/97 Recanat v. National Labor Court [2000] IsrSc 54(5) 330, 351 – 52; Sharon Rabin-Margaliot, *The Elusive Case of Employment Discrimination – How to Prove its Existence*, 44 HAPRAKLIT 529, 539 – 43 (5758 - 5760).

In short, in a claim filed under the Equal Pay Act, one needs to establish that there is a difference in salary between herself and a male employee performing the same (or substantially the same) task (or a task of equal value), and if the employer cannot prove that the difference in

salary is justified, the plaintiff will be successful. However, to file a claim under the Equal Job Opportunities Act, the plaintiff must prove that the employer took into consideration the plaintiff's membership in a protected class when making the employment decision in question. In other words, the Equal Pay Act creates a legal presumption of discrimination if the plaintiff can prove that there is a difference in salary between her and a male employee and the employer cannot legally justify the difference. Such a legal presumption does not exist under the Equal Job Opportunities Act, and therefore, the burden upon a plaintiff in such a claim is much heavier. However, the Equal Job Opportunities Act does not require proof that the employer intended to discriminate, only proof that there is causation between the employer's consideration of the plaintiff's membership in a protected class under Section 2(a) and the employment decision in question.

17. Another important distinction between the Equal Pay Act and the Equal Job Opportunities Act is the remedy prescribed by the legislature for the violation of the laws. Under the Equal Pay Act, punitive damages may not be awarded, and Section 8(a) of the law limits the time in which an affected employee can file a claim for back pay to 24 months. By contrast, under Section 2 of the Equal Job Opportunities Act, a labor court may, pursuant to Section 10(a)(1) of the law, award damages as it sees fit given the circumstances, even in the absence of any proof of loss. These damages serve as a deterrence and are not available under the Equal Pay Act. Under Section 10(a)(2) of the Equal Job Opportunities Act, a labor court may even, under certain circumstances, issue an injunction or a direct order if it determines that a monetary award is not sufficient. Additionally, under Section 15(a) of the Equal Job Opportunities Act, a person in violation of the statute may be fined up to double the fine established by Section 61(a)(3) of the 1977 Penal Code.

18. The purpose of the Equal Pay Act is to deal with one of the more common expressions of gender discrimination in the workplace; therefore, the plaintiff has a considerably lighter burden of proof. However, the law limits the damages that can be awarded in such a case. The purpose of the Equal Job Opportunities Act is to deal with different types of discrimination that affects different classes of people and requires proof of causation between the illegal consideration taken into account and the employment decision in question. Additionally, the Equal Job Opportunities Act permits an award of damages even without any proof of economic damages on the part of the plaintiff and allows for punitive measures to be taken against the discriminating employer.

19. In this case, the Petitioner's claim under the Equal Pay Act is not in question considering the salary difference between her and Mr. Mor who performed the same task as the Petitioner. The issue we must decide is whether this claim is enough for the Petitioner to also have a claim under the Equal Job Opportunities Act. The majority opinion in the National Labor Court decided this question in the negative, when determining that it is not one of the circumstances in which a plaintiff can shift the burden of proof over to the employer in accordance with Section 9 of the Equal Job Opportunities Act. The National Labor Court determined that in order to shift the burden, the plaintiff must bring evidence that the employer discriminated against or treated his employees unequally. Furthermore, Judge Wirth-Livnah determined that the employee must provide evidence adequately demonstrating discrimination on the part of the employer. The mere fact that the plaintiff has a successful claim under the Equal Pay Act does not fulfill this requirement.

By contrast, the dissenting opinion of President Adler held that a successful claim under the Equal Pay Act suffices to create a prima facie case of discrimination under the Equal Job

Opportunities Act. Because the employer could not successfully rebut the claim of the employee under Section 6(a) of the Equal Pay Act, it stands to reason that the cause for the pay difference is the employee's gender. We will now determine whether this is so.

20. In light of the differences between the two laws, a successful claim under the Equal Pay Act will not automatically trigger a claim under the Equal Job Opportunities Act. Each statute is meant to safeguard against different forms of discrimination in the workplace; each have different ways of testing whether discrimination has occurred; and each provide for different penalties for their respective offenders. It seems, therefore, that allowing for the laws to overlap would be inconsistent with the respective purposes of the statutes and the problems they are designed to address. The Equal Pay Act deals with one common example of gender discrimination in the workplace and the cause of action created by the law fits this type of discrimination. This cause of action is not the same as that of the Equal Job Opportunities Act, which sets a higher bar for establishing a successful claim against an employer and relates to various types of employment decisions. However, the Equal Job Opportunities Act recognizes, so to speak, the difficulty an affected employee may have in demonstrating the considerations taken into account by the employer, and allows, under certain circumstances, for the burden of proof to be shifted over to the employer to prove that he did not act out of wrongful discrimination. The question is, what is the evidentiary minimum necessary to shift the burden of proof over to the employer under the Equal Job Opportunities Act, and whether a successful claim under the Equal Pay Act fulfills this requirement.

21. Section 9 of the Equal Job Opportunities Act deals with the circumstances by which a plaintiff may shift the burden of proof over to the defendant. Under Section 9(a), the burden may be shifted if the plaintiff can prove that he fulfills the conditions and requirements set by the

employer to be considered for the employment decision in question. The burden placed upon the plaintiff is relatively light. A close reading of Sections 2 and 9 of the Equal Job Opportunities Act leads to the conclusion that a plaintiff claiming discrimination on the basis of his membership in one of the protected classes listed in Section 2 must prove that he fulfills the conditions and requirements set forth by the employer for the employment decision in question in order to shift the burden onto the employer to prove that his decision was not influenced by any wrongful considerations.

22. The circumstances established by Section 9 of the Equal Job Opportunities Act are only one example of where the burden of proof may be shifted, and I accept the argument made by the Equal Opportunities Commission that there may be other circumstances in which the burden of proof may be shifted as well. Because the question of whether or not the employer discriminated against the plaintiff is not necessarily related to whether or not the employee was fit for the position in question, Section 9 of the Equal Job Opportunities Act is not a complete list of methods by which a plaintiff can shift the burden of proof. Therefore, in light of the difficulty in proving the considerations of the employer in making his decision, it stands to reason that the burden should be shifted in a case where the employee can prove that the employer had discriminated against him in the past. Furthermore, because of the power imbalance inherent in an employer/employee relationship, the burden upon the plaintiff should not be particularly high. Hence, the establishment of a prima facie case of discrimination will depend on the independent circumstances of each case.

Therefore, I do not believe that the opinion of the National Labor Court requiring the plaintiff to prove discrimination on the part of the employer, as is the opinion of the National Labor Court, is correct. As will be explained below, it is sufficient for the plaintiff to prove that

there is a significant wage gap between her and a fellow male employee in order to shift the burden of proof to the employer under the Equal Job Opportunities Act.

Additionally, the plaintiff can also shift the burden by demonstrating a policy of discrimination on the part of the employer based on the criteria outlined by Section 2 of the Equal Job Opportunities Act. The evidence provided may have the same effect if it can prove that the result of any decision or policy undertaken by the employer has a discriminatory effect, even if it is not based on one of the prohibited considerations. The evidence the plaintiff must provide in order to meet the requirements of this evidentiary test must relate to the relationship between the employer and the plaintiff employee in comparison to the employer's relationship with the other employees who are not members of the same protected class as the plaintiff. The evidence should also compare the employer's behavior towards employees who are members of the plaintiff's protected class to his treatment of employees who are not members of the class in question. Once the plaintiff has successfully demonstrated disparate treatment, the burden of proof will shift onto the employer to prove either that the disparity in treatment stems from the nature of the position under Section 2(c) of the Equal Job Opportunities Act, or that it stems from a reason unrelated to any of the illegal considerations listed in Section 2(a) of the Equal Job Opportunities Act. It is important to note that the Equal Job Opportunities Act explicitly lists the considerations which an employee may not take into account when making certain employment decisions. If he can prove that the discriminatory result was not based on any wrongful considerations, he will successfully establish that he did not discriminate "because of" any wrongful considerations. As President Barak stated regarding age discrimination in the Recanat Further Hearing:

> As a general rule, the burden of proof is imposed upon the employee-plaintiff claiming discrimination. This burden is met when the plaintiff proves that the employer mandates retirement when employees reach a certain age (this is direct discrimination). The burden may also be met by establishing that a regular practice of the employer results in age discrimination (this is indirect discrimination). In the first case, it is enough to prove that company policy dictates different retirement ages for different workers. Proving the existence of such a rule, irrespective of the position of the employee, will prove the existence of discrimination "because of" age. In the second case, the official policy is indiscriminate and does not mandate different retirement ages for different employees. However, the requirements of the job set by the employer effectively results in different retirement ages for different employees. By establishing this practice, the employee meets his burden of proof demonstrating the existence of discrimination "because of" age. Needless to say, such a case is only indirect, but enough proof to show that the employer discriminates "because of" age (Section 2(a)). At this point, a court must determine whether the difference in retirement ages is a result of the nature of the position in question (Section 2(c)). The burden of proof will shift to the defendant (usually the employer, *see* Section 9(a) of the Equal Job Opportunities Act) to prove this is the case. Note that with regards to the substantive law, whether discrimination exists is linked to the nature of the job in question. In terms of the procedural law, a distinction is made regarding the burden of proof.

FH 4191/97 Recanat, IsrSc 54(5) at 351 - 52.

23. Regarding the issue at hand, I have come to the conclusion that a successful claim under the Equal Pay Act suffices to fulfill the evidentiary threshold necessary to shift the burden of proof over to the employer in a claim filed under the Equal Job Opportunities Act. Once the plaintiff has proven that a male coworker receives a higher salary while performing the same, or substantially the same, task or one of equal value in the same workplace, and the employer cannot justify the difference in salary based on the nature of the task performed (under Section 6

of the Equal Pay Act), the plaintiff will have established a prima facie case of gender discrimination. Note that there is no dispute with regards to the understanding that Section 2(a) of the Equal Job Opportunities Act forbids an employer from taking into account the gender of an employee when determining her salary. When an employee successfully establishes a claim under the Equal Pay Act, the implication is that she was discriminated against by her employer on the basis of her gender, which is demonstrated by the wage gap between her and a male employee, which could not be adequately justified by the employer under Section 6(a) of the Equal Pay Act. These circumstances will shift the burden of proof onto the employer to prove that the wage gap is a result of the nature of the position in question under Section 2(c) of the Equal Job Opportunities Act or that the reason for the difference in salary is unrelated to any of the considerations prohibited by the Equal Job Opportunities Act. In other words, the employer must prove that there is no causal relationship between the wage gap and the gender of the employee, and thus, the difference in salary is not "because of" the plaintiff's gender. If the employer can successfully prove that the plaintiff's gender was not taken into account when determining her salary, the plaintiff will not have a successful claim under the Equal Job Opportunities Act. By contrast, if the employer cannot meet his burden of proof, the court will have no choice but to determine that the employee-plaintiff has a valid claim under both the Equal Pay Act and the Equal Job Opportunities Act.

24. In the case before us, it is undisputed that the Petitioner has a successful claim under the Equal Pay Act. Given the circumstances, the burden of proof now shifts over to the Respondent to prove that there is no causal connection between the gender of the Petitioner and the 35% difference in salary between her and Mor, meaning that her gender was not taken into consideration when determining her salary. The factual background outlined by the district labor

court indicates that the Respondent successfully proved that there is no general company policy regarding pay which results in discrimination against women; however, it did not provide the salaries of the other workers working in the tool department of the Ramat Gan branch, which is where the Petitioner worked. This information is important in light of the fact that at the time, individual salaries were not determined by the Respondent's corporate administration, but rather by the managers of each individual branch. Therefore, the only claim of the Respondent is that the reason for the Petitioner's lower salary is because of the fact that she asked for a lower wage when negotiating her salary (the Petitioner asked for NIS 3,500/month, while Mor requested NIS 6,000/month; the Petitioner was given a salary of NIS 17/hr – which equals NIS 3,264/month – and Mor received a salary of NIS 5,000/month).

An employer proving that the salaries of his workers is a result of negotiations between the parties and that he treats both male and female employees the same with regards to their salary will meet his burden of proof under the Equal Job Opportunities Act, so long as he can demonstrate a company policy regarding wages that is uninfluenced by gender or any of the other classes protected by Section 2(a). When wages are negotiated by the parties, we cannot necessarily say that the employee's gender was taken into consideration or that the employee was discriminated against "because of" her gender, though whether the inherent inferiority of the employee was taken into consideration by the employer is a factor, among others, that must be taken into account by the court. Moreover, it is important to note that in this case there may be a difference between a claim filed under the Equal Pay Act which merely tests whether there is a difference in salary between male and female employees, and whose purpose is to deal with, among other things, the weaker bargaining power of women in the job market and a claim filed under the Equal Job Opportunities Act, which tests the legality of the considerations taken into

account by the employer when making employment decisions (including salary decisions). *Compare* The 1954 Women in the Workplace Act, *and* The Equal Job Opportunities Act; HCJ 554/05 Ashkenazi v. Police Superintendent [2005] IsrSc 60(2) 299, 306. To quote the words of S. Rabin – Margalit:

> The Equal Job Opportunities Act is based on causation. A successful plaintiff will need to prove that the employer took a wrongful consideration – the fact she is a woman – into account when determining her salary. The causation element must be proven, in other words, she must prove that the reason her salary is lower is because she is a woman. As has been mentioned, the Equal Pay Act is not based on causation. Therefore, there may be instances in which liability exists under the Equal Pay Act, but not the Equal Job Opportunities Act. In those instances in which a difference in salary between male and female employees is established, but it cannot be proven that the employees' gender was the cause, or one of the causes, influencing the difference in pay, there will be liability pursuant to the Equal Pay Act, but not necessarily under the Equal Job Opportunities Act. This would explain why the Equal Pay Act was enacted in 1996, despite the fact that the Equal Job Opportunities Act, which also prohibits discrimination with regards to wages, had already been in effect for almost a decade (1988).

Rabin-Margaliot, "*Market Explanations*" at 504 - 05.

Furthermore, the more significant the difference in pay between a male and a female employee, the more significant the burden of proof upon the employer to show that the employee's gender was not a consideration in determining what to pay her, and that the only reason for her lower salary is because she asked for a lower one during salary negotiations. In other words, employee differences in bargaining power may explain differences in salary; however, the more significant the difference, the more difficult it will be for the employer to prove that the difference is wholly based on the employees' bargaining power and not even partially based on a consideration prohibited by Section 2(a) of the Equal Job Opportunities Act. Additionally, because the Petitioner did not provide evidence to its effect in the district labor

court, I should note that I am not answering the question of whether the practice of salary negotiation is one that (indirectly) discriminates against women.

25. In this case, due to the significant difference in salary between the Petitioner and Mor, the claim that the Petitioner asked for a much lower salary is not good enough of a claim on the part of the Respondent to meet his burden establishing that the Petitioner's gender was not taken into account when deciding how much to pay her. When there is a 35% difference in salary between a male and female employee performing the same task and the Respondent cannot provide a relevant consideration justifying the pay difference, the claim that there was a difference in their respective salary requests is not strong enough to absolve the employer under the Equal Job Opportunities Act. Proving this claim without any other evidence on the part of the employer is not enough to rebut the presumption that the Petitioner's gender was taken into account when deciding her salary.

Additionally, as the district labor court held, the fact that the Respondent does not have a policy which results in discrimination is a consideration that can be taken into account when determining the amount of damages to be awarded under the Equal Job Opportunities Act. However, this has no bearing on the proof of the claim itself, once we have determined that the plaintiff's salary is to be measured against the employees working at her branch and not the general pool of employees working for the Respondent.

26. Therefore, we rule in favor of the Petitioner, and overturn the decision of the National Labor Court. The Petitioner has a valid claim under the Equal Job Opportunities Act in light of the gender discrimination and the Respondent's failure to meet his burden of proof. Additionally, any obligation the Petitioner may have to return the compensation she received from the Respondent under the Equal Pay Act is void. However, I would not award any damages

to the Petitioner under the Equal Job Opportunities Act, due to her delay in filing her petition and her attorney's request that the determination of damages that the Petitioner may be entitled to be left to the discretion of this Court. Also, I see no reason to take a position regarding the damages she was awarded by the district labor court. This means that the Petitioner's reliance on the decision of the National Labor Court means that the Respondent need not compensate her under the Equal Job Opportunities Act. Thus, any obligation the Respondent may have towards the Petitioner under the Equal Job Opportunities Act is void.

Finally, because of the delay in filing her petition, we will not award any costs or attorney's fees to the Petitioner.

The President (Ret.)

Justice I. Amit

I concur and would like to add the following:

1. The decision of the National Labor Court is not appealable and can only be reviewed by this Court as a petition to the High Court of Justice, similar to a petition regarding the decision of a Rabbinical Court. Since this case involves a petition and not an appeal, the Respondent cannot claim that the plaintiff's delay in filing makes the decision of the National Labor Court absolute barring the High Court of Justice from hearing the case. However, because filing a petition is the only remedy available, someone requesting that the decision of the National Labor Court be reviewed should do so soon after the decision is handed down. The extensive case law behind the issue of dismissal for claims not immediately filed, some of which were quoted by President Beinisch in paragraph 10 of her opinion, deal with administrative decisions, while this case involves a judicial decision. (As a side point, the distinction between different types of decisions

is covered in Section 15(d) of the Basic Law: The Judiciary. Section 15(d)(2) authorizes the High Court of Justice to issue orders to authorities and public officials, Section 15(d)(3) authorizes the Court to issue orders to other courts, tribunals and other bodies and individuals who act out of judicial or quasi-judicial authority. Section 15(d)(4) authorizes the Court to issue orders to religious courts.) As a general rule, I believe that this Court should show restraint when so much time has passed from the time of the original decision in another court. This Court should exercise its power of review only in rare situations such as where it is discovered, after the fact, that the decision of the National Labor Court has broad ramifications unforeseen at the time of the decision, or where there is a strong public interest justifying a hearing despite the time lapse. *See* HCJ 3514/07 Mivatchim Mossad LiBituach Sociali Shel Ovdim Ltd. v. Feurst [May 13, 2012] at Para. 28 (unpublished). I should add that this case should not be viewed as precedentially groundbreaking.

2. Regarding the main issue of this case, I agree with my colleague that a successful claim under the Equal Pay Act will not necessarily be successful under the Equal Job Opportunities Act. This can also be inferred from the language of Section 6(a) of the Equal Pay Act:

> Section 2 does not prohibit a difference in salary or other compensation stemming from the nature of the work involved, including quality of work, seniority, training or education, or geographical location of the workplace, *so long as there is no discrimination on the basis of gender* (emphasis added – I. A.).

It is not enough for the employer to provide a relevant justification for the difference in salary; we must examine the justification provided to ensure that the justification is not a cover for gender discrimination. Similarly, if the employer cannot justify the difference in pay, it does not necessarily mean that the difference is due to gender discrimination. The issue of

discrimination is to be examined within the framework of the Equal Job Opportunities Act and not the Equal Pay Act.

In short – the plain language of the laws themselves, the difference in how the claims are defined by the respective laws, the different purposes of the laws, the need for establishing causation under the Equal Job Opportunities Act, the different remedies provided, and the need for the Equal Pay Act to be enacted after the Equal Job Opportunities Act was already in effect, despite the fact that not compensating two employees equally can lead to claim of illegal discrimination in "work conditions" – all point to the conclusion reached by my colleague.

3. As mentioned in Section 6(a), an employer can justify a pay difference based on the nature of the task being performed; however, pre-employment salary negotiations are not included in this exception. *See* Rabin-Margaliot, "*Market Explanations*" at 503.<<this is the format for imbedded citations in English>> Women ask for lower salaries for different reasons, some of which perpetuate the reality in the workplace and stereotyping for which the Equal Pay Act was put in place in order to fix. Expanding the list of justifications listed in Section 6(a) by recognizing the negotiating patterns of the employer and his freedom to contract as additional justifications for pay differences between men and women is not evident in the plain language of the law and can lead to an incorrect interpretation of the law. In other words, in Section 6(a) the legislature formulates a balance in the form of a limited list of justifications involving the nature of the job in question. Expanding this list may cause a law meant to protect equally to widen the gap between men and women or lend legal legitimacy to discriminatory practices. *Cf.* Guy Mundlek, *Are Anti-Discrimination Laws Doing Their Job? in* IS THE LAW IMPORTANT? A SERIES OF BOOKS IN MEMORY OF HAIM Y. ZADOK, 223, 228 (2010)).

4. This case illustrates the lack of overlap between the two laws and why a successful claim under the Equal Pay Act does not necessarily mean there is an automatic claim under the Equal Job Opportunities Act. While the different wage demands of the Petitioner and Steven Mor do not constitute a justification under Section 6(a) of the Equal Pay Act, it does not fall into the realm of wrongful discrimination under Section 2(a) of the Equal Job Opportunities Act, because the pay difference does not stem from the gender of the two workers, but from the different wage demands. I should also note that the Equal Job Opportunities Act requirement to prove causation makes it harder on the plaintiff, which is the advantage of the Equal Pay Act in this case.

Justice Amit

Justice N. Hendel

I agree with the impressive ruling and overall reasoning of my colleague, President D. Beinisch. I would like to strengthen the conclusion that the disparity in bargaining power among employees cannot justify the difference in pay, especially where the disparity is so significant. The radical feminist approach provides further support for our conclusion. This approach determines the status of women in the workplace based on their relative strength in a gender biased society. This approach does not focus solely on women who have made it to the top of the social ladder; it emphasizes the difficulty of all women, especially those far down from the top of the social or economic pyramid –.. According to this approach, the number of female CEOs and Knesset members may blind us, although not deliberately, from the more subtle forms of gender discrimination. As my colleague the President noted, due to the 35% difference in pay, the fact that the Petitioner was willing to work for a lower salary does not prove that she did not experience inequality. However, this fact reflects the relative bargaining positions of the

Petitioner and the employer, and mainly the Petitioner's bargaining position vis a vis other male employees. According to the radical feminist approach, the reason she requested a relatively low salary is a result of the social debasement of women with regards to their professional aspirations and stature in the labor market. Catherine MacKinnon, "*Reflections on Sex Equality under Law*," 100 Yale L.J. 1281, 1298 (1991); *see also* Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 Signs 137, 167 – 68 (1976)). As Prof. Catharine MacKinnon, one of the prominent advocates identified with the radical feminist movement, states:

> In money economies, income means survival; its treasure and resources also contribute to freedom, human flourishing, enjoyment of life's possibilities. From a social standpoint, income also provides an index of relative social worth…
>
> Without pay equity, sex equality means little in capitalist societies in an increasingly capitalist world. Catherine MacKinnon, SEX EQUALITY 178 (2007).

In other words, income in market economies is equal to survival, freedom, personal prosperity and the ability to enjoy the range of possibilities that life offers. Without equal pay, gender equality loses its meaning in an increasing capitalistic world. For many of us, income is a measure of social status. Even those who disagree with this assertion will agree that job security and level of income are connected to and certainly affect human dignity.

Additionally, relative bargaining power not only highlights the differences between men and women, but also that of other protected classes in society.

In this case, it was proven that an employee, performing the same task as the Petitioner for the same employer, received a higher salary with no relevant justification. It seems that my colleague, the President, has adopted a balanced solution based on existing legislation. The

Petitioner must prove that she was discriminated against "because of" her gender. Shifting the burden of proof onto the Respondent to establish that he did not take into account any wrongful considerations – in this case, gender – when deciding how much to compensate her, provides the employer with an "equal opportunity" to disprove the allegation. It is within the ability of the employer, in terms of his position and power, to show that he did not take into account any wrongful considerations when determining wages. In this case, the Respondent did not produce evidence proving its justification that it is the store's policy to determine salaries based on the salary expectations of the employees. The Respondent, therefore, did not meet his burden of proof. In this sense, the law creates an overlap between the evidentiary standard and the substantive law under the Equal Job Opportunities Act. The burden shifting requirement pursuant to Section 9(a) of the Equal Job Opportunities Act fits well within the imbalance of power between the employee-claimant and the employer who must prove the absence of discrimination.

Justice Neal Hendel

Decided as per the opinion of President D. Beinisch (Ret.)

25 Iyyar 5772 (17 May 2012)