

**BOARD DIVERSITY:
CAN SEX DISCRIMINATION LAW HELP?**

Alice Belcher, Department of Law, University of Dundee

ABSTRACT

This article is about strategies that could be used to increase the number of women on the boards of large UK companies. There are two main ways in which the issue of women on boards has been tackled elsewhere: shareholder activism, for example in the US, and government imposed quotas, for example in Norway. The article investigates the possibility of using sex discrimination law to advance the position of women. It demonstrates the potential for a sex discrimination test case to be mounted in the UK. There are various problems that any such claim will face, both procedural and substantive, but it is not inconceivable that a case could be won. It is hoped that the credible threat of a sex discrimination claim can be added to pressures already being exerted to help bring about an increase in the number of women on UK boards.

Introduction

Statistics reveal very low proportions of women on UK boards of directors: The percentages of FTSE 100 boards with *no* women between 1999 and 2004 are shown in Table 1.

Table 1: FTSE 100 Boards with no women	
Year	Percentage of companies
1999	36
2000	42
2001	43
2002	39
2003	32
2004	31
Sources: 1999-2003; Singh and Vinnicombe, Summary of the Female FTSE 2003, Cranfield School of Management. 2004; The 2004 Female FTSE Index Both sources can be accessed from the dti's Women & Equality Unit web site.	

In 2003 just 5.3 per cent of directors across 568 UK listed companies were women. Across Europe's leading companies only 5.8 per cent of directors are women and more than half of these companies have no women on the

Board. Table 2 shows European statistics reported by the Ethical Investment Research Service (EIRS).¹

Norway	18.2
Sweden	13.6
Denmark	8.9
Ireland	7.3
Germany	6.4
France	6.2
Austria	6.0
UK	5.8
Finland	5.6
Netherlands	4.7
Switzerland	4.2
Greece	3.7
Belgium / Lux	2.6
Italy	2.6
Spain	2.5
Portugal	1.5
Source: EIRS statistics cited in <i>Business Life</i> , November 2003, 17.	

¹ Statistics are being collected across the world for instance; in 1992 just 4.3 per cent of the seats on the boards of North Carolina's largest companies were occupied by women. By 2000 the percentage of women on the boards of companies in S&P's indices was 9.8. Also in 2000, 89 per cent of the S&P 500 companies had at least one woman on the board: *PR Newswire*, 1 December 2000. This compares favourably with only 58 per cent of the FTSE 100 companies having at least one woman on the board in the same year. However, and again in the year 2000, 67 per cent of the state of Georgia's 228 publicly held companies had no women on their boards: *Atlanta Journal and Constitution*, 18 June, 2000. A survey Fortune 500 found that women held 13 per cent of board seats in April 2003: *Catalyst Census of Women Board Directors*, 2003, available at www.catalystwomen.org. Further US statistics are also available from Caralyst. So, the position for the US as a whole seems better than that in the UK or most of the rest of Europe, but within the US there are states where women still hold very few board appointments. In India the top 30 companies have 351 board positions and only seven of these are filled by women. To make matters worse, three of these positions are held by one woman, so there are only five women in board positions in these 30 companies: *Business Line*, 1 October, 2002.

Although most of the available statistics reveal low numbers of women on boards, the very fact that they have been collected and reported shows that board diversity generally and women on boards in particular are issues of interest and concern. In recent years board diversity has also received increasing attention in the academic literature where there have been treatments of the topic suggesting that, both theoretically and according to the empirical evidence, a diverse board can out perform a less diverse one.² In this article it is assumed that, in accordance with the majority of the literature, the goal of achieving a gender balance is a worthy one.

This article is about strategies that could be used to increase the number of women on the boards of large UK companies. There are two main ways in which the issue of women on boards has been tackled elsewhere: shareholder activism, for example in the US, and government imposed quotas, for example in Norway. These two strategies will be discussed briefly in the next two sections of the article. However, the main thrust of the article is to investigate the possibility of using sex discrimination law, in the form of a test case, to advance the position of women. This locates the article within a wider literature on women's participation in high level decision-making, for instance as members of parliament. In the field of politics, the Labour Party famously attempted to increase the number of women candidates by the use of women-only shortlists. This attempt was thwarted by the use of sex discrimination law. In *Jepson and Dyas-Elliot v The Labour Party*,³ the tribunal ruled that selection of candidates by a political party is covered by Part II of the Sex Discrimination Act 1975 headed up the "employment field". The use of women-only shortlists therefore amounted to unlawful positive discrimination. The response to this ruling was the Sex Discrimination (Election Candidates) Act 2002 which excludes candidate selection from the usual UK sex discrimination rules.⁴ Whilst this article concentrates on a specific form of sex discrimination test case, envisaged in the particular context of women as potential board members, it is also a contribution to the more general debate about how to increase the number of women in high level, overtly powerful jobs. In *Jepson* the UK's sex discrimination law was used by men resisting women-only shortlists. The response to *Jepson* was to treat election candidates as special cases. This response did nothing for the cause of women in areas other than politics. In this article the idea of women continuing to use the UK's sex discrimination law as a weapon is explored. The article explores the current mechanisms for the appointment of directors, then in its main analysis section, it investigates the possibility of a woman making a claim under the Sex Discrimination Act 1975 if she is not appointed to a UK board. Despite the problems that are raised by this analysis, the use of a sex discrimination test

² See for example Bilimoria and Wheeler "Women corporate directors: Current research and future directions" in Burke and Mattis (eds.), *Women in Management: Current Research Issues*, vol. II, (2000) ch.10, 138-163; and Singh, Vinnicombe and Johnson "Women Directors on Top UK Boards" (2001) 9 (3) *Corporate Governance: An International Review* 206-216.

³ [1996] IRLR 116.

⁴ This followed the publication of a report prepared by the UCL Constitution Unit; Russell *Women's Representation in UK Politics: What can be done within the Law?* June 2000.

case remains a possibility. The article concludes with some observations on the use of the language of 'board diversity' and of 'discrimination', including the credible threat of a sex discrimination claim, as a way of exerting pressure on UK companies.

Shareholder Activism

Shareholder proposals, on any topic, reaching the agendas of company annual general meetings (AGMs) are much more common in the US than in the UK. Some of these are championed by individual shareholders, but many are put forward by institutional shareholders. Some resolutions are sponsored by coalitions of institutional shareholders such as the resolution at EMC Corp's 2002 meeting calling for the company to take greater steps to create a more diverse and independent board which was sponsored by a coalition of 20 institutional shareholders. In 1994, Calvert Group of Bethesda, Md., an investment house, launched its first board diversity resolution and in 2003 it launched a record 9 such resolutions.⁵ Not all board diversity proposals are directed at gender inequality. In the US there is an equal concern about the small numbers of ethnic minorities on boards. In 2000 a proposal was put to the AGM of SunTrust, a Georgian-based Fortune 500 company calling for the board nominating committee to locate qualified women and people of colour. This proposal generated 13 per cent of the votes.⁶ The *Social Issues Reporter* publishes annual tables of the top vote-getting social policy resolutions. In 2001 these mostly focused on global labour issues. However, a resolution put at Unocal's meeting called for the board to report on and commit to board diversity and a resolution put to MBNA's meeting called for the board to report on steps to break the glass ceiling.⁷ In 2002 there were more proposals concerning board diversity with 9 of the 2002 resolutions asking companies to make greater efforts to diversify their boards or commit to board diversity. Most shareholder resolutions are put forward to draw attention to an issue with no real prospect of success. However, the EMC Corp coalition-sponsored resolution referred to above was passed with 56 per cent of the votes cast. Following the passing of the resolution in May 2002, the company elected a woman to its board in July 2002.⁸ Institutional shareholders in the UK have to date been more likely to exert influence through their investment policies. Investors holding large blocks of shares are also able to express their views directly to the company's management in private meetings.

Government Intervention

The Norwegian Government has tackled the issue of gender equality on company boards by imposing a quota. Norway has proposed a rule that 40 per cent of board members are to be women by 2005. A bill was presented to the Storting on 13 June 2003 amending company law relating to the composition of boards in all state-owned enterprises and corresponding

⁵ *Dallas Morning News*, 18 May, 2003.

⁶ *Atlanta Journal and Constitution*, 18 June, 2000.

⁷ *Social Issues Reporter*, July, 2001.

⁸ *Providence Journal-Bulletin (Rhode Island)* 16 July, 2002.

company law relating to public limited companies. The rules are expressed in terms of the minimum number of each sex:

“If the board has two or three members, both sexes must be represented

If the board has four or five members, sex must have at least two representatives

If the board has six to eight members, each sex must have at least three representatives

If the board has nine members, each sex must have at least four representatives, and if the board has more than nine members, each sex must make up at least 40 per cent of the representatives.”⁹

The Norwegian Government has been working to improve gender representation on company boards since the spring of 2002. The 40 per cent target was set first for state-owned enterprises and by the time the bill was introduced the percentage of women on the boards of companies owned wholly by the State was 45.7 per cent.¹⁰ The rules applying to state-owned enterprises came into force on 1 January 2004 a date when compliance had already been achieved. The rules applying to public limited companies will not come into force if gender representation is achieved voluntarily. This is to be decided on the basis of statistics provided by the Register of Business Enterprises incorporating changes up to 1 July 2005. If these statistics, which should have been available in August 2005, reveal women to have 40 per cent of the board seats, the detailed provisions will not be brought into force.¹¹ The Norwegian provisions have therefore been described as a target for women’s representation of 40 per cent by 2005. If the target is missed and the rules come into force, they will be monitored and enforced by the Register of Business Enterprises. The Register of Business Enterprises will refuse to register a company board if its composition does not meet statutory requirements. A company which does not have a board that fulfils the statutory requirements may be dissolved by order of the court.¹² The Norwegian provisions make no rules for private limited companies ‘. . . because most of these companies in Norway are small family enterprises where the owners are themselves members of the board’.¹³ The Equal Treatment Directive¹⁴ is applicable to Norway due to its Treaty commitments as a member of the European Economic Area. However, Norway has shown itself to be willing to legislate at the margins in respect of gender issues. It

⁹ Norwegian Ministry of Children and Family Affairs, in English: “Balanced gender representation on company boards – information about the proposed changes”. Accessed at <http://odin.dep.no/bdf/english/topics/gendereq/004051-990347/dok-bn.html> on 3/10/05.

¹⁰ Ministry Press release dated 13 June 2003, <http://odin.dep.no/bdf/english/topics/gendereq/004051-990347/dok-bn.html>.

¹¹ At 3 October 2005 statistics were not available.

¹² Norwegian Ministry of Children and Family Affairs, in English: “Balanced gender representation on company boards – information about the proposed changes” <http://odin.dep.no/bdf/english/topics/gendereq/004051-990347/dok-bn.html>.

¹³ *ibid.*

¹⁴ Council Directive EEC 76 / 207.

currently has an action pending in the EFTA Court in respect of its policy of reserving a number of academic posts exclusively for women.¹⁵

The use of targets or quotas is problematic for the UK because of the way in which the Equal Treatment Directive¹⁶ is implemented in the UK in the Sex Discrimination Act 1975 as amended. The 1975 Act effectively outlaws positive discrimination.¹⁷ However, targets for increasing the proportion of women in sectors where they are underrepresented have been held to be compatible with EC law when introduced elsewhere in the EC.¹⁸ Legally binding target-setting as a method of moving towards gender equality on UK boards is not out of the question as a matter of law.¹⁹ However, it is probably out of the question in the UK as a matter of politics. If it is unlikely that the UK will consider changes in its sex discrimination law to achieve a gender balance via a form of positive discrimination, this article's investigation of the potential for the UK's current sex discrimination law to be used to achieve the same objective is important.

The Appointment of UK Directors

A survey for Enterprise Network reported in 2000 that 74 per cent of non-executive directors (NEDs) were selected through personal contacts. In 2003 Higgs found only four per cent had a formal interview and only one per cent had answered an advertisement.²⁰ There are several consultancies specialising in finding NEDs and fees typically range from £5,000 to the equivalent of one year's director's fees. Higgs consulted and then reported on the role and effectiveness of NEDs. Responses to Higgs' consultation paper included the opinion that: 'Recruitment is easy as all the head hunters have long lists of available Non-Executive Director candidates.'²¹ However it was also suggested that: "Most Nomination Committees rely on head

¹⁵ Action brought on 22 April 2002 by the EFTA Surveillance Authority against the Kingdom of Norway (Case E-1/02). Brought on the basis that "by maintaining in force a rule which reserves a number of academic posts exclusively for women, [the Kingdom of Norway] failed to fulfil its obligations under Articles 7 and 70 of the Agreement on the European Economic Area and Articles 2(1), 2(4) and 3(1) of the Act referred to in point 18 of Annex XVIII to the Agreement (Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions)."

¹⁶ *ibid.*

¹⁷ Except in relation to election candidates as noted earlier. Positive discrimination is, of course, used as a way of promoting equality in other jurisdictions, e.g. the US.

¹⁸ *Re Badeck and others* [2000] All ER (EC) 289.

¹⁹ It should be noted that the UK has recently obtained a derogation from the Equal Treatment Directive, regarding religious discrimination, in the form of a particular provision of Article 15 of Council Directive 2000/78/EC in respect of the recruitment policies put in place for the new police service of Northern Ireland and the recruitment of teachers to schools in Northern Ireland.

²⁰ Higgs, *Review of the Role and Effectiveness of Non-executive Directors* (January, 2003) The Stationary Office London, para. 10.5, available at www.dti.gov.uk/cld/non_exec_review.

²¹ Responses to Higgs' consultation paper can be found on the dti website at www.dti.gov.uk/cld/non_exec_review/higgsresonse_page1.htm.

hunters to search for non-executives. My experience is that these head hunters have limited vision as to suitable candidates.”²²

The Higgs Report itself says nomination committees should insist that their consultants look beyond the ‘usual suspects’.²³ It also resulted in some changes to the Code on Corporate Governance including a new Principle that: “There should be a formal, rigorous and transparent procedure for the appointment of new directors to the board.”²⁴ However, there was no recommendation that board appointments should be advertised. Instead the new version of the Code demands that “external advice or open advertising”²⁵ be used. The Higgs Report has been followed by the Tyson Report²⁶ which looks at ways of engaging with “broader pools of talent”, including more women, when appointing directors.

A Possible Sex Discrimination Claim

This analysis imagines a well-qualified woman who is not appointed to a board of directors. She brings a claim of indirect sex discrimination. This work asks whether such a claim could succeed. The analysis is conducted at two levels. Firstly, there is the question of whether an employment tribunal has jurisdiction to hear such a claim at all, dealt with in the next subsection. Secondly, there are the substantive issues that could arise if such a claim were heard, dealt with in the following subsection. Once the test-case has got through the procedural hurdles the substantive issues appear to present fewer problems. However, success on the substantive issues will depend to a large extent on choosing a test case where the facts map easily onto the statutory wording of the ingredients of the claim.

Procedural Issues

If a company law text book is consulted about the appointment of directors it appears that they are voted into office by the shareholders at the annual general meeting (AGM). However, in practice most directors are co-opted by the board between AGMs and confirmed in their office by the shareholders’ vote. There are therefore three potential decisions that could be challenged under the Sex Discrimination Act 1975. It may be that the recommendation of the nomination committee could be challenged in the same way as the decisions of local Labour Party selection committees. There are a set of provisions in section 13 of the 1975 Act that catch the discriminatory acts of bodies or authorities that act as a filter through which applicants must pass. If a woman will only be considered by the board and proposed to the shareholders as a director on the recommendation of the nomination committee, this could be the place for a woman to launch her action.

²² *ibid.*

²³ Higgs (2003) *op. cit.*, para. 10.19.

²⁴ Code provision A.4.

²⁵ Code provision A.4.6.

²⁶ Tyson *The Tyson Report on the Recruitment and Development of Non-Executive Directors* (June, 2003), London Business School, available at www.dti.gov.uk/cld/non_exec_review.

In *Jepson and Dyas-Elliot v The Labour Party*,²⁷ the tribunal ruled that selection of candidates by a political party is covered by Part II of the Act headed up the ‘employment field’. However, a recent Scottish case shows how this sort of claim can be thwarted. In *Secretary of State for Scotland and the Advocate General for Scotland v Mann and McCourt*²⁸ the actions of a returning officer in the first election for the Scottish Parliament were challenged as discriminatory. The Employment Appeal Tribunal (EAT) held that a returning officer is an authority or body under section 13 and that membership of the Scottish Parliament constitutes an occupation. However, the judgment states: “acts and omissions of the returning officer are fenced by a criminal provision . . . the Westminster Parliament intended . . . to exclude him from attack within the civil justice system.” Therefore, the EAT held that the employment tribunal system had no jurisdiction to hear the case. This case opens the way for arguments about alternative methods of challenge to be presented as a way of escaping the clutches of discrimination law. If company law is the right way to challenge the choice of a company director, perhaps the employment tribunal could be convinced that, as in *Mann*, it should deny itself jurisdiction to hear the case.

Another reason why a claim of this sort may not succeed is the definition of bodies to which it applies. Section 13 of the Sex Discrimination Act 1975 applies only to: “. . . an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade”. The nomination committee is always constituted as a sub-committee of the main board of directors. There is therefore an argument that it has no decision-making powers and cannot be viewed as “an authority or body”. Decisions of the board of directors may more easily be seen as decisions of “an authority or body”, however, it may be difficult to separate the decisions of the board from decisions of the company itself. The board is not a filter through which an applicant must pass before presenting themselves to their prospective employer, as it is the board that makes the employment decision when a new director is co-opted.

It may be, however, that the board’s decision to co-opt could be challenged as a decision of the company as ‘employer’. Under section 6 (1) of the Sex Discrimination Act 1975 it is unlawful to discriminate against a woman in relation to employment:

“(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or . . .

(c) by refusing or deliberately omitting to offer her that employment.”

Employment is defined in section 82 (1) of the Act as “employment under a contract of service . . . or a contract personally to execute any work or labour”. This is the sort of claim envisaged in the substantive analysis conducted in the next subsection. The main difficulty with this claim is that the office of director does not automatically involve a contract of service, *i.e.* an employment contract. A woman has already brought a successful claim of sex discrimination on the grounds that she was not offered the same

²⁷ [1996] IRLR 116.

²⁸ EAT/56/00.

opportunities to rise to the position of director as a male colleague; *Love v Federal Mogul Aftermarket UK Ltd.*²⁹ However, this claim was based on the denial of an “opportunity for promotion” and the tribunal did not have to consider whether the office of director as such was covered by the Act. The tribunal only needed to establish that Love was in employment as defined and, presumably, that the phrase “access to opportunities for promotion” in section 6(2)(a) of the Sex Discrimination Act 1975 covered opportunities to rise to the position of director.

In a test case on the failure to appoint a woman as director, the tribunal would have jurisdiction to hear the claim if a director is employed under a contract of service *or* a contract personally to execute any work or labour. Executive directors are generally viewed as having employment contracts and as such the actions of their employers (the company) would appear to be actionable under the Sex Discrimination Act 1975 within the category “employment under a contract of service”. As a fall-back position, if the tribunal did not recognise an executive director’s position as being “employment under a contract of service”, failure to appoint to the position of executive director would also be actionable if executives have contracts “personally to execute any work or labour”. Non-executive directors do not have employment contracts although they do receive remuneration from the company. Failure to appoint a woman as a non-executive director would only be actionable if non-executives have contracts “personally to execute any work or labour”.

There are therefore two issues to investigate: Do executive directors have employment under a contract of service? Do directors (both executive and non-executive) have contracts personally to execute any work or labour? The question of whether directors can claim employment status for the purpose of benefiting from employment protection legislation has been addressed in several cases: *Buchan v Secretary of State for Employment*;³⁰ *Fleming v Secretary of State for Trade and Industry*;³¹ *Secretary of State for Trade and Industry v Bottrill*³² and *Connolly v Sellers Arenascene Ltd.*³³ These cases show that in determining the issue of employment status, tribunals should apply the established common law tests for distinguishing employees from independent contractors; tests such as the control test, the economic reality test and mutuality of obligation.³⁴ The problem giving rise to all these cases is the position of a controlling shareholder who is also an executive director. These cases show that whilst it cannot be taken for granted that an executive director will be found to have a contract of employment, the sort of executive director’s position to which a woman bringing a sex discrimination test case would be aspiring is unlikely to fall outside the employment status. The sort of position that this article has in mind is one where there would clearly be a mutuality of obligations in the form of work to be done for a salary and the

²⁹ (unreported) 1999.

³⁰ [1997] IRLR 80.

³¹ [1997] IRLR 682.

³² [1998] ICR 564.

³³ [2001] ICR 760.

³⁴ See Wardman ‘Directors and Employee Status: An examination of relevant Company Law and Employment Law Principles’ *Company Lawyer*, (2003), 24, (5), 139-143.

controlling shareholder issue would not arise. There are, however, other reasons why it might be better for a test case to be brought in relation to a non-executive directorship. In particular, it may be easier to argue that the claimant is qualified for the post if a non-executive vacancy is used as the non-executives are supposed to bring independence and, to some extent, an outsider's views to the board. It would correspondingly be harder for the company to establish that industry experience is a genuine occupational requirement in the case of a non-executive director.³⁵

If the test case is to focus on a non-executive directorship, then the relevant issue is whether non-executive directors are covered by section 82 (1) of the Act because they have contracts "personally to execute any work or labour". It may seem obvious that this is so. The company expects non-executive directors to attend board meetings in person, no doubt this can be viewed as work, and pays them for their efforts. There would appear to be no problem in demonstrating mutuality of obligations. However the issue may not be whether non-executives "personally execute any work or labour" but whether they do so under a "contract". The issue is whether the relationship between the non-executive director and the company is contractual or statutory. This issue has been explored in the context of the relationship between general practitioners and health authorities in a number of cases.

In the case of *North Essex Health Authority v David-John*³⁶ a General Practitioner claimed unfair dismissal and racial discrimination. The Employment Tribunal held that the GP was an employee under section 230 of the Employment Rights Act 1996 and was in 'employment' as defined in section 78 of the Race Relations Act 1976.³⁷ The Employment Tribunal therefore held that it had jurisdiction to go ahead and hear the substance of the unfair dismissal and race discrimination claims. The Health Authority appealed on the grounds that these findings were incorrect as a matter of law. The EAT held that the relationship between a GP and a Health Authority is purely statutory and not contractual: It is based on the National Health Service (General Medical Services) Regulations 1992.³⁸ The terms of service impose obligations on a GP in respect of patients, but these are statutory not contractual. Therefore the GP was not an employee under section 230 of the Employment Rights Act 1996. Also, because of the purely statutory nature of the obligations, the GP did not have a *contract* "personally to execute any work or labour" under section 78 of the Race Relations Act 1976.³⁹ The Employment Tribunal did not have jurisdiction to hear the unfair dismissal or race relations claims. What the tribunal should

³⁵ See next subsection for a discussion of this and other substantive issues.

³⁶ (unreported) 15 August 2003 EAT Appeal No EAT/0232/03/ILB.

³⁷ "Employment" is defined in s.78 of the RRA 1976 in identical terms to the definition found in s.82 of the Sex Discrimination Act 1975.

³⁸ These were the regulations applying at the time of Dr David-John's case. At the time of writing GPs are talking about their "new contract" – which no doubt has terms and obligations different from those laid down in the 1992 regulations, but is unlikely to be contractual in the sense required by the ERA.

³⁹ This is the equivalent of s. 82 of the Sex Discrimination Act 1975.

have done was to ask the question whether, in all the circumstances, the relationship was in fact contractual or purely statutory.⁴⁰

It was held in *Newtherapeutics Ltd v Katz*⁴¹ that the appointment of a person as a director of a company does not in itself form any contract between the person and the company. This case involved an application for leave to serve a writ on a director of an English registered company, the director being domiciled outside the jurisdiction in the US. Leave was sought under R.S.C., Ord., 11 to serve the writ and the court held that a claim against a director of a company based merely upon the fact of his appointment and in the absence of a specific contract of employment did not fall within the ambit of R.S.C., Ord., 11, r. 1(1)(d) (i) and (iii) which refers to a claim to “enforce . . . a contract, or to recover damages . . . in respect of the breach of contract.” Knox J. held that “I should be extending Ord., 11, r. 1(1)(d) (i) and (iii) to treat it as covering an appointment to office.” It is submitted, however that the facts of *Newtherapeutics Ltd v Katz* will be fairly easily distinguished from the facts that will pertain to the appointment of most non-executive directors of large UK companies and certainly to the target of any test sex discrimination case. The claim against such a company will not be based “merely upon the fact of the appointment”. Many of a director’s obligations are set out in companies legislation or are matters of common law and are therefore not negotiable, however, the Combined Code on Corporate Governance requires the nominating committee to “. . . evaluate the balance of skills, knowledge and experience on the board and, in the light of this evaluation, prepare a description of the role and capabilities required for a particular appointment”.⁴² Also, the Combined Code requires the terms and conditions of appointment of non-executive directors to be made available for inspection.⁴³ It is submitted that to the extent that there are any company- or post-specific understandings between the company and its non-executives these should be viewed as being of a contractual nature and as standing in addition to the general statutory obligations. Given the Combined Code provisions, there will always be some company- or post-specific terms and conditions involved in relation to listed companies. In this way *Newtherapeutics Ltd v Katz*, where the relevant claim was based merely on the appointment as a director, can be distinguished. In this way the GP – Health Authority position can also be distinguished. For a GP the relevant regulations constitute the whole of the legal relationship with the Health Authority (including the basis for calculating remuneration) whereas, for the non-executive director, statute and case law set out an irreducible minimum set of obligations which can be, and usually are, supplemented by contractual commitments between the director and the company. It is on the basis of a claim by a potential non-executive director; a post falling within the definition of employment by virtue of it being a contract personally to

⁴⁰ Other cases on the issue cited in *North Essex Health Authority v David-John* are: *Wadi v Cornwall and Isles of Scilly Family Practitioner Committee* [1985] ICR 492 and *Ealing Hammersmith and Hounslow FHS v Shukla* [1993] ICR 710.

⁴¹ [1991] Ch 226.

⁴² *Combined Code on Corporate Governance*, provision A.4.2 (Financial Reporting Council, July 2003).

⁴³ *ibid.*, Code Provision A.4.4.

execute work or labour, that the substantive issues are examined in the next subsection.

An alternative approach would be to challenge the decision that the shareholders make when they vote on the appointment at the AGM.⁴⁴ However, the shareholders are not usually offered a choice of candidates. They are usually faced with a resolution that *x* should be appointed to the board. The nature of their discriminatory act is therefore problematic. Also there are general rules of company law to be considered. For instance: ‘. . . the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner’s personal advantage’; *Peters’ American Delicacy Co. v Heath*.⁴⁵ There are, however, some circumstances where company law demands that members vote ‘*bona fide* in the interests of the company as a whole.’ There is some authority suggesting that the appointment of a director may be such a circumstance but this is a moot point. The proposition can be traced to the speech of case of Jenkins LJ in the case of *Re H.R. Harmer Ltd.*⁴⁶ This case involved a family company where the father controlled a majority of the shares. Jenkins L.J. stated:

“There were in the course of the history of this unfortunate matter a remarkable number of appointments of directors and retirements of directors brought about in one way or another by the father. . . . It cannot be denied that the holder of the majority in voting power of the shares in a company may, broadly speaking, appoint any person he thinks fit as director, and the appointment cannot be challenged merely on the ground that he might have found some more suitable person than the person he selected, or that the person he selected was his friend; but I take it that the majority shareholder’s power of appointing directors must within broad limits be exercised for the benefit of the company as a whole and not to secure some ulterior advantage.”

He also stated:

“. . . the facts of this case are by no means usual, and I would not have it go forth that every time a majority shareholder appoints directors of his own choosing, he has done something wrong, or something which can be challenged by a dissatisfied minority, but if he goes on, having seen to it that the requisite majority is obtained, to state his motives for having Mr A rather than Mr B, and says: “Mr A will always vote in the way I tell him to,” then it seems to me it is impinging on dangerous ground.”

⁴⁴ The Companies Act 1985 says little about the appointment of directors and leaves this matter to the articles. If Table A articles are adopted, Art.78 empowers the members the appoint by an ordinary resolution (51 per cent). In practice many directors are co-opted by the board before having their appointment confirmed by a vote at the AGM.

⁴⁵ (1939) 61 CLR 457, at 504.

⁴⁶ [1959] 1 WLR 62.

The dictum has been expressed in short as “the majority shareholder’s power of appointing directors must within broad limits be exercised for the benefit of the company as a whole and not to secure some ulterior advantage”. However, when this phrase is quoted in context, it becomes clear that the case could be distinguished relatively easily. Also, the Company Law Steering Group (CLSG) considered this principle, but only as applying to the alteration of articles or class rights. The Group’s recommendation is that the area should be left for the courts to develop, but that the test itself should be codified as: “. . . whether the majority honestly believe that their vote is best calculated to promote the success of the company for the benefit of its members as a whole.”⁴⁷ The company law position must either be that the shareholders’ right to vote can be exercised for the owner’s personal advantage (*per Peters’ American Delicacy Co. v Heath*) or that the shareholders must vote in the way that they honestly believe is best calculated to promote the success of the company for the benefit of its members as a whole (per the CLSG formulation of the test). Neither of these company law positions requires a shareholder to pay attention to board diversity in a direct way. If board diversity is demonstrated to be associated with corporate success, and the duty to vote *bona fide* in the interest of the company applies in the circumstances, an argument in favour of shareholders having a duty to choose greater diversity over less diversity could be made. However, another part of the speech in *Re H.R. Harmer Ltd* should also be remembered: “the appointment cannot be challenged merely on the ground that he [the majority shareholder] might have found some more suitable person than the person he selected.”⁴⁸

Substantive Issues:

The current definition of indirect sex discrimination in the context of the employment field is set out in section 1(2)(b) of the Sex Discrimination Act 1975. A person discriminates against a woman if

“he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –
 which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
 which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
 which is to her detriment.”

This definition was substituted by S.I. 2001/2660 reg 3 in place of the definition set out in the original 1975 statute; a definition that remains in place for sex discrimination outside the field of employment. This earlier definition states that a person discriminates against a woman if

⁴⁷ Final Report para 7.58.

⁴⁸ Who should bring such a claim and in what capacity is also a problem. The most obvious scenario is for a minority of shareholders to challenge the decision of a majority on the grounds that the majority have not voted *bona fide* in the interest of the company as a whole and they have a duty to do so. The potential woman director would therefore need to be championed by the minority shareholders.

“he applies to her a *requirement or condition* which he applies or would apply equally to a man but –

which is such that *the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it*, and

which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

which is to her detriment *because she cannot comply with it.*”

The italics show how the old definition differs from the new.⁴⁹ The proposed test case for a woman not appointed as a non-executive director must be analysed using the new definition, but some of the relevant authorities are, of course, cases decided under the earlier wording. Where the change in the definition might affect the authority of earlier cases the impact of the new wording will be noted.

When searching for a new non executive director, companies often require someone with several years experience as an executive director. This practice will, given the current numbers of women executives, have a disparate impact. Also, it has been found that companies often use consultants to search for new directors. This mechanism has been used in the knowledge that the lists of potential directors held by such consultancies are disproportionately male. The condition that potential directors are recommended by consultancy *x*, where the list of names available is disproportionately male could therefore satisfy the indirect discrimination provision. Where a consultancy is not used, directors have often been appointed because they are personally known to other members of the board. This requirement would be a problematic one to be used as a test case for discrimination in the appointment of a director following the difficult case of *Jane Coker and Martha Osamor v The Lord Chancellor and the Lord Chancellor's Department*⁵⁰. *Coker* arose out the Lord Chancellor's appointment of a male special adviser, Garry Hart, a senior partner in Herbert Smith a firm of solicitors, who was personally known to him. When making the appointment, the Lord Chancellor did not advertise the post, and there was no open competition. He did not look outside his circle of acquaintances. The case was decided on the assumption that the Lord Chancellor had applied the “requirement or condition” (old wording) that the candidate be personally known to him. The point at issue on appeal was whether that condition had a disparate impact, as defined in the old wording. The court held that there was no disparate impact in the particular circumstances. It also opined that, in general, when appointment is through personal knowledge, disparate impact would not be demonstrated. The reasoning appears to have been as follows: Ask “what proportion of qualified women was excluded from consideration by the application of the condition that the person should be personally known to the Lord Chancellor?” – answer “100 per cent.” Ask “what proportion of qualified men were excluded from consideration by the application of that condition?” – answer “almost 100 per cent.” Can there be a significant difference between 100 per

⁴⁹ The old definition now appears as section 1(1)(b) of the SDA 1975.

⁵⁰ [2002] IRLR 80.

cent and almost 100 per cent? – answer “no”, therefore impact was not disparate. This case has been criticised and a similar case may produce a different result in the future, not least because of the opportunity offered by the changing of the disparate impact provision. Therefore, the decision in *Coker* may not remain a valid precedent.

For a test case perhaps the easiest provision, criterion or practice to attack might be the requirement for executive experience on another board. The Company could, however, argue under section 1(2)(b)(ii) of the Sex Discrimination Act 1975 that this is a justifiable requirement. The test for justification is a proportionality test developed by the EJC in the case of *Bilka-Kaufhaus GmbH v Karin Weber Von Hartz*.⁵¹ Under this test a practice is capable of justification by reference to a legitimate objective where the means chosen are appropriate and necessary to that end. Put another way; an exclusion must be based on objectively justified factors unrelated to any discrimination on the grounds of sex and this may include economic grounds.

The Irish case of *Patricia Conlan v University of Limerick and Minister for Enterprise, Trade and Employment (notice party)*⁵² has some parallels. This case concerned an advertised post of Professor of Law in the University of Limerick. The advertisement specified that the candidate would hold “a higher degree, preferably at doctorate level . . . have several years experience at a senior academic level and be a leading published researcher in a specialist field of law.” The plaintiff complained that the requirement to have several years’ experience at a senior academic level amounted to indirect sex discrimination. She argued that there would be very few women qualified for the position as there were very few women at a senior academic level. The University’s case was that the requirements were justified as they were essential in the circumstances. The Labour Court found the requirement to be objectively reasonable and essential. On appeal, although the High Court found that the Labour Court should have looked only at whether the requirement was essential, rather than “reasonable and essential”, it confirmed the finding in favour of the employer. This is an Irish case, but suggests that a company requiring new directors to have executive experience may be able to justify that requirement under the *Bilka-Kaufhaus* test. However, companies may find it more difficult to convince a tribunal that executive experience is essential in view of the suggestions of the Tyson report. Finding non-executive directors by looking only in the pool of executive directors of other UK plcs is the practice that is being attacked by Tyson’s recommendations that boards should look at broader pools of talent.

To summarise: Despite statistics that reveal massive under-representation of women on UK boards, a sex discrimination claim would not be straightforward. It has been argued that a claim could be made out most easily by attacking the decision of the board to co-opt as a decision of the employer under section 6 (1) (a) of the Sex Discrimination Act 1975. The main procedural challenge to this claim could be that the appointment of a director is a matter of company law and company law should be used to

⁵¹ (Case 170/84) [1986] ECR 1607, [1986] IRLR 317.

⁵² [1999] 2 ILRM 131.

challenge it.⁵³ There are also substantive issues, but it is submitted that a carefully prepared case arising out of circumstances auspicious to the claim could succeed.

Conclusions

The legal analysis offered in this article suggests that a test case based on UK sex discrimination law is likely to face obstacles. However, the language of discrimination is already being applied to the issue of board diversity. At the 2003 AGM of SouthTrust, Alabama's largest bank, a shareholder voiced concerns about the fact that the bank had no females in corporate management and only one on the board. It was suggested that the bank may be making itself vulnerable to a discrimination lawsuit similar to the one concerning discrimination against salaried black workers settled by Coca-Cola in 2000. The Coca-Cola suit was filed in April 1999 and claimed that the company discriminated against salaried black employees in pay, promotions and evaluations, settled in 2000 at a cost to Coca-Cola of \$192.5 million.

This article has discussed in detail the idea of mounting a sex discrimination test case as a way of changing the behaviour of companies selecting directors. It has also mentioned three other approaches; legislation requiring a quota to be attained; investor activism at AGMs and; encouraging boards to look at broader pools of talent. There are problems with the legislative solution in the UK context in terms of political acceptability and compatibility with EC law. Under any of the other approaches, which are not mutually exclusive, change may only be achieved if attitudes change, and attitudes can depend very much on the way language is used.⁵⁴ The first point to be made concerning the language of board diversity is a positive one. The use of the term 'board diversity' is itself an indication that the issue is a live one. The association of a board diversity problem with the threat of an expensive discrimination suit at the SouthTrust AGM is an explicit recognition of that lack of diversity may be discriminatory. The setting up of organisations to advance women in the business world also makes the issue more visible.⁵⁵

⁵³ In *Secretary of State for Scotland and the Advocate General for Scotland v Mann and McCourt* the EAT refused to hear a sex discrimination case because the mechanisms provided by the Scotland Act 1998 should have been used.

⁵⁴ The comments on the use of language which follow are intended to indicate positive and negative gendered aspects of the language currently used in relation to boards of directors. A detailed review of the literatures on, for instance, language and decision making or language and the construction of reality is not intended. One philosophical example claim is however offered: 'Language offers a mechanism for putting myself into the world, as Heidegger might phrase it, and for making the world part of me; and language very likely determines the way in which experience will be registered and later recalled.': Spence "Turning Happenings into Meanings: The central role of the self" in P.Y. Eisendraith and J.A. Hall (eds.) *The Book of the Self: Person, Pretext and Process* (1987), 134.

⁵⁵ For example, in the UK Cranfield School of Management has a Centre for Developing Women Business Leaders, in the US and Canada Catalyst is a non-profit research and advisory organisation – www.catalystwomen.org.

However, if language has the potential influence behaviour there is certainly room for improvement in the way language is used in and around UK boardrooms. If it is true that “codes of established narratives . . . define our capacities to tell our individual stories”,⁵⁶ the UK needs to escape from boardroom narratives of directors who are men and non-executives who are executives of other plcs. The strength of these narratives is illustrated by the fact that the Tyson Report, which to many outsiders seems to suggest the obvious, was needed at all.⁵⁷ The use of gender-free language is insisted upon in many universities, but a request for a gender-free language rule at a recent corporate governance conference was met with the question “what would that mean?”⁵⁸

To conclude, this article illustrates how the issue of the lack of women on boards has become more prominent over recent years. Statistics are now being gathered across the world and efforts are being made in various ways to address the problem. This article has demonstrated the potential for a sex discrimination test case to be mounted in the UK. There are various problems that any such claim will face, both procedural and substantive, but it is not inconceivable that a case could be won. It is hoped that the credible threat of a sex discrimination claim can be added to pressure from shareholders and from government commissioned reports by Higgs and Tyson to bring about an increase in the number of women on UK boards. However, it may be that change will only happen when “codes of established narratives” are changed, and with them attitudes.

⁵⁶ Benhabib *The Claims of Culture: equality and diversity in the global era*, (Princeton, Princeton University Press, 2002), 15.

⁵⁷ The Tyson Report makes recommendations for voluntary change by UK listed companies. It encourages them to look outside the normal pool of potential non-executive directors which has been limited to those already in very senior positions in other UK listed companies. It suggests looking in the public sector and internationally for potential non-executives.

⁵⁸ A suggestion made by the author at the Annual International Conference on Corporate Governance held at the Henley Management College, autumn 2002.