



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Recent CJEU case law on equality M/F

ERA Trier, 11 June 2018



Marjolein van den Brink
Utrecht University
m.vandenbrink@uu.nl

outline

- Access to employment
- Pregnancy (dismissal, leave & promotion, burden of proof health risks)
- Right to parental leave
- Calculation of benefits (maternity leave, unemployment, occupational pension)
- Different retirement ages m/f (dismissal, entitlement to benefit)
- Miscellaneous: abuse of rights

Access to work



- **Kalliri** (Greece), C-409/16, 18 Oct. 2017
 - Art. 76/207, rather than 2006/54
 - Required height: 1.70:
 - Indirect discrimination of women
 - Justified?
 - Operational capacity is legitimate aim
 - Suitable? not for some police functions (e.g. traffic control)
 - Less disadvantageous tests possible (e.g. preselection by testing physical ability)

Pregnancy issues 1

- **Porras Guisado**, 22 Feb. 2018 (C-103/16, 2018), dir. 92/85
 - Collective redundancy
 - AG Sharpston:
 - Tension art. 2(a) (def. pregnant worker) + protection against dismissal (art. 10)
 - 'better reading' is 'from beginning of pregnancy' rather than after informing employer
 - Court:
 - PG had not yet informed employer (art. 2(a) dir 92/85), but had informed colleagues & superiors: not a hypothetical issue (admissibility)



"We've decided to give you half maternity leave...you leave but you don't come back."

Porras Guisado continued

- Art. 10 (prohibition of dismissal): to prevent harmful effects on health pregnant worker - incl. that women 'may be prompted to terminate the pregnancy' (para 46), save in exceptional cases
- Collective redundancy is 'exceptional case', and thus allowed, provided that employer substantiates dismissal

Pregnancy issues 2

HB v Cie, T-706/16 P

Tribunal, 26 Oct. 2017



- Annual promotion round officials Commission
- HB absent most of 2013, due to pregnancy & pregnancy-related illness.
- Not promoted: sex discrimination?
- Revolves around: burden of proof
 - Applicant must establish presumption of discrimination
 - Pregnancy as such is not enough

Pregnancy issues 3

health risks, dir. 92/85



- Art. 19(1) dir. 2006/54:
if applicant establishes a presumption of (direct or indirect) discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment
- **Otero Ramos**, 19 Oct. 2017 (C-531/15, 2017)
 - Nurse informs employer she is breastfeeding
 - Employer tells her 'the work does not pose risks'
 - Court:
 - risk assessment includes specific assessment of individual situation (art. 4(1))
 - Failure to assess the risk, amounts to direct sex discrimination (art. 2(2)(c) dir. 2006/54)

Pregnancy issues 3 continued

- **González Castro** (C-4/17, Opinion AG Sharpston, 26 April 2018)
 - Art. 7, 92/85: '... ensure that workers are not obliged to perform night work during their pregnancy'
 - Does working in shifts which is sometimes at night constitute nightwork? (def. in dir 2003/88)
 - AG: yes, if not, result would be that someone working shifts would receive less protection than someone who only works nights (para 48)
 - Presumption of direct discrimination: can be established by demonstrating that risk assessment (art. 4(1)) was not carried out



Parental leave 1 (dir. 2010/18)



- **Vadillo Gonzalez** (C-252/17, 21 March 2018)
 - VG asks for 1 hour leave per day
 - Denied because wife lost job and is at home
 - Spanish court wants to know:
 - Is a national law that does denies paternity leave to an employee because partner (regardless of sex) is unemployed, in conformity with EU-law?
 - is denial of such parental leave to a male employee not contrary to art. 3, 2006/54 (positive action)?
 - Court: inadmissible: not enough information provided

Parental leave 2

- **Dicu** (Romania), C-12/17, Opinion AG Mengozzi, 20 March 2018
 - Are employees entitled to days off for the time spent on parental leave?
 - AG: no
 - Right to paid annual leave is fundamental right (art. 31 Charter)
 - Protects health and safety
 - Previous case law: re absence because of illness or maternity leave
 - But: fundamental difference between sick leave and parental leave
 - Compares parental leave to worker with temporarily reduced working time.

Calculation of benefits 1



- **DW** (Latvia), C-651/16, 7 March 2018
 - Maternity benefit
 - Worked 11 of 12 months of reference period for an EU-institution.
 - Calculated as if unemployed (although contributions not required)
- Court:
 - obstacle to freedom of movement
 - Argument govt that unlikely to dissuade because only temporary impediment irrelevant: barriers not assessed in terms of durability
 - Justification?
 - Stability of social security system is legitimate aim, but: authorities must show in each individual case that measure is appropriate to achieve aim. Ic: analysis is lacking.

Calculation of benefits 2



- **Kleinsteuber**, C-354/16, 13-7-2018
 - Full-time & part-time employment periods recalculated into one uniform activity rate.
 - Clause 4 Framework Agreement + art. 4 dir. 2006/54: discrimination?
 - No statistical differences
 - Actual years of service = objective criterion
 - Calculation method suggested by Ms K may artificial increases and overestimation of her activity
 - No discrimination

Calculation of benefits 3



■ *Espadas Recio*, C-98/15, 9 Nov. 2017

- Contributory unemployment benefit
 - But: contributions paid because of national law, therefore not part of 'employment conditions'
- Vertical & horizontal part-time contracts
 - Days worked calculated, rather than hours worked
 - Contrary to dir. Art. 4(1) 79/7?
 - All vertical part-timers adversely affected
 - Majority of all part-timers (vertical and horizontal) are women: direct discrimination
 - Justified? Govt: system based on contributions (proportionality)
 - Court: measure not appropriate to ensure correlation between contribution & benefit (for vertical part-timers)

From the past: different retirement ages m/f 1



■ *Maturi et al. v Opera di Roma*, C-142/17 and C-143/17, 7 Feb. 2018

- Until 2010: female dancers retired at 47, male dancers at 52
- 2010: uniform retirement age: 45
- Transitional option [2 years]: could continue to work till original retirement age (renewable annually)
- Court: distinction between payment of pension & (automatic) termination of contract
 - Ic: termination of contract (art. 14(1)(c) 2006/54: no direct or indirect discrimination
 - No apparent reasons for difference m/f
 - Wish to avoid exposing workers to sudden change, cannot justify direct discrimination

From the past: different retirement ages m/f 2

- **MB**, C-451/16, Opinion AG Bobek, 5 Dec. 2017
 - Specific period between entry into force UK Gender Recognition Act (2004) and access to marriage same sex couples (2014)
 - MB did not change legal gender: did not want divorce for religious reasons
 - Therefore denied retirement at 60.
- **AG**:
 - marriage is only an issue for trans women; does not play a role re retirement age for cisgender women
 - case is not about marriage; only about benefits (79/7)
 - Concerns a limited number of individuals
 - Difficulty arises because of a derogation of the equal treatment principle; will disappear

To conclude

- **Kratzer**, C-423/15, 28 July 2016 (dirs. 2000/78 & 2006/54)
 - Kratzer applies for trainee position and writes that '*owing to the death of his father, he had dealt with a very large medical law file and, therefore, had extensive experience in that field*'.
 - When not invited: complains and asks compensation for age discrimination;
 - Complains also about sex discrimination because only women hired.

Kratzer continued



- Court:
 - an application that aims at obtaining the formal status of an applicant rather than obtain an employment position falls outside directives
 - Finding of an abusive practice requires:
 - Objective element: combination of objective circumstances shows that despite formal compliance, objective of directives was not achieved
 - Subjective requirement: objective factors must show that essential aim is to obtain an undue advantage
 - For the national court to verify

Thank you
m.vandenbrink@uu.nl

