

# Recent CJEU case law on equality M/F



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ERA Trier, 1 June 2015

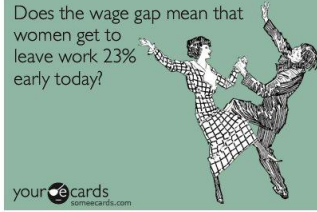
## outline

- Classic trouble:
  - Equal pay
  - Pregnancy & maternity
  - Part-time work
  - Retirement pensions
  - Miscellaneous
- In between: some modern-day problems
- Future trouble?

Here Comes  
Trouble

## Equal pay

Does the wage gap mean that women get to leave work 23% early today?



### ■ Kenny C-427/11, 2013

- Kenny cs claim work of equal value with others, in 'designated clerical positions'
- Prima facie case of indirect pay discrimination:
  - Designated positions: 279 men, 74 women
  - Clerical positions: 761, mostly women
- If pay difference related to equal value job shown: discrimination assumed & employer must show objective justification
- Good employment relations may be taken into account when assessing justification

## Baby trouble

- Saint Prix (2014)
  - Concept of 'worker'
- Tervejs 2014
  - Conjunction parental & maternity leave
- Loredana Napoli 2014
  - Mandatory course not taken due to pregnancy
- Roselle (2015)
  - Pregnancy allowance denied because of job change
- Riezniece (2013)
  - Right to return to own or similar position after parental leave
- Lyreca Belgium (2014)
  - Calculation of compensation for unfair dismissal



## Saint Prix 19/7/2014, C-507/12

- Is a woman who gives up (seeking) work, for reasons related to pregnancy, still a 'worker' in sense of EU law?
- Art. 7(3) Dir. 2004/38: some exceptions for Union citizens who are no longer a worker or self-employed person, e.g. temporarily unable to work because of illness or accident
- No mention of pregnancy + pregnancy to be distinguished from illness. Thus: art. 7(3)(a) of 2004/38 not applicable.
- But: concept of worker must be interpreted broadly given legal purpose (free movement) + classification as a worker under Article 45 TFEU not necessarily dependent on actual or continuing existence of an employment relationship



## Tervejs (C-512/11 & 513/11), 2014

- 2 women on unpaid parental leave get pregnant again, wish to interrupt leave and ask for maternity allowance
- denied (exception in collective employment agreement: allowance only complemented to standard salary if not on unpaid leave)
- AG: relevant directives (recast, pregnancy, parental leave) do not preclude such a rule
- Court:
  - question is: does EU law allow a rule that taking parental leave has negative consequences on pregnancy leave?
  - Requirement makes the employment agreement less effective in its protection of pregnant workers.
  - Contravenes EU law.

## Loredana Napoli C-595/12, 2014



- Cannot take training due to pregnancy that is mandatory to obtain permanent employment. Referred to next course, but schedule uncertain....
- Referring court wants to know:
  - How absolute is protection?
  - Should alternative solution be provided despite financial costs?
- Court: if training is integral part of employment & compulsory to obtain permanent employment: employee can not be asked to just sit and wait.
  - Art. 14(1)(c) + 15 Recast sufficiently clear, precise & unconditional to have direct effect

## Riezniece, C-7/12, 2013

- On return after parental leave: contract terminated + new offer, which R accepts.
- New job equally discontinued quickly because of necessary budget cuts
- Right to return to own or similar job?
- Court:
  - In principle yes: right to return, but whether in fact: is up to national court, which has to:
  - Make sure that (absence due to) parental leave does not influence decision on which jobs will be terminated negatively:
    - Criteria applied have to be identical for all
    - Plus: application may not depend on absence / presence

## Roselle, C-65/14, 2015



- maternity allowance denied because changed work status less than 120 days before
- AG: art. 11(4): 12 months requirement cannot regard just one form of employment. Any other explanation makes it more difficult for women to embrace new career opportunities
- Court:
  - dir. 92/85: max. length of requirement: 12 months
  - Art. 11(4)(2): wording is plural: 'periods of previous employment')
  - Also in light of purpose directive: Belgian law precluded by EU law

## Lyreca Belgium C-588/12, 2014

- Calculation of compensation for unfair dismissal of ft employee on (unpaid) part-time parental leave
  - Calculation must be based on full-time contract.



## And some modern-day trouble:

- Caring fathers: Betriu Montull
- Surrogacy & leave



## Fathers' rights to leave

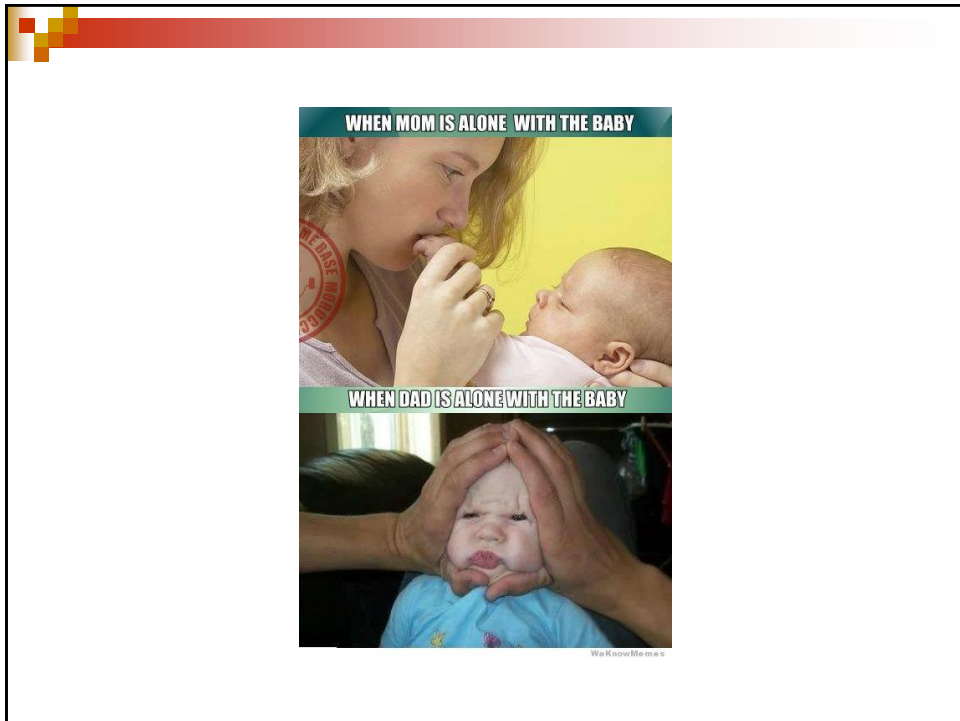
- Roca Alvarez (C-104/9, 2010):
  - working time reduction to care for child denied because wife not an employee
  - Court: direct discrimination: violation EU law
- Betriu Montull (C-5/12, 2013):
  - Fathers only secondary right to 10 weeks parental leave, namely if wife agrees and if wife is employed

## Fathers' rights to leave

- AG in Betriu Montull:
  - as Roca Alvarez: granting a leave to women, but to men only if their wife is an employee too, is discrimination
- However, Court:
  - EU law does not preclude this arrangement:
    - Maternity leave & allowance: specifically to protect biological needs
    - Parental allowance *is not covered by EU law* (only parental leave is; dir. 2010/18 (replaced 96/34))

## Pending: Maistrellis, C-222/14

- Conclusions AG Kokott, 16 April 2015:
  - Parental leave for fathers (judges) only if wife is not unemployed or incapable of taking care of child
  - Violation of parental leave dir. since it more or less deprives men of the entitlement
  - Direct unequal treatment: prohibited unless exception provided: exceptions not applicable



### **Surrogacy cases:**

**CD v ST, C-167/12, 2014 + Z, C-363+12, 2014**

- CD: partner CD genetically related
  - CD breastfeeds for 3 months
  - Paid leave comparable to adoption leave first denied, later granted
- AG Kokott:
  - Adoption leave not applicable, because here intended ties with social mother:
    - Pregnant workers directive: intended mother at least 2 weeks



## Surrogacy continued

- Case of Z:
  - Rare disease (no uterus)
  - Child genetically related to both intended parents
  - Z asks for adoption leave (first denied, than granted)
- AG Wahl:
  - Relevant comparator is not pregnant women, but adoptive parent or other co-parent: EU law not applicable;
  - EU law should add protection for social parents to establish relationship with child

## Surrogacy cases continued

- Court:
  - Recast dir. not applicable: man would have been denied leave too: no sex discrimination
  - Pregnant workers dir. not applicable: gestational link missing
  - To be distinguished from Mayr (C-506/06, 2008) on IVF and the beginning of pregnancy (that could only happen to women)

## Surrogacy continued

- Z also claimed discrimination on the basis of handicap
- Court: protection framework dir.: only if handicap hampers professional activity
  - Cf Ring (C-335/11, 2013)

## Back to classic trouble: part-time work

- Mascellani, C-221/13, 2014
  - Unvoluntary change of contract from part-time to full-time
- Elbal Moreno, C-385/11, 2012
  - Proportionately higher demands for part-timers
- Fernandez, C-527/13, 2015
  - Calculation invalidity pension + part-time factor

## Mascellani, C-221/13, 2014

- Employer terminates part-time contract and replaces by full-time contract
- M protests: difficult to combine work & care
- Court:
  - distinguishes between unvoluntary change from part-time to full-time and v.v. because of financial implications of latter
  - EU law does not preclude

## Elbal Moreno C-385/11, 2012

- Worked 4 hours per week (10%) for 18 years
- Special calculation for part-timers (need to work more years); very difficult to qualify
- Court: very strict test
  - Indirect discrimination (80% pt = female)
  - art. 4 dir. 79/7 precludes proportionally higher demands to qualify
  - Unless objective justification
    - Purpose: financial balance
    - However: basically part-timers excluded entirely
    - Necessity not convincingly argued

## Fernandez, C-527/13, 2015

- Invalidity pension:
  - Calculation permanent invalidity pension
  - Calculation based on contributions last 8 years
  - Corrective mechanism if last months prior to pension, not contributed
  - Correction on basis of reduced (part-time) contributions
- Fernandez: worked nearly 27 years full-time, than 4 years part-time
- Spain: part-timers mostly women: indirect discrimination?

## Fernandes continued

- AG: method of calculation affects many more women: not justified
- Court:
  - Choice for period of reference of 8 years is free / so allowed
  - Indirect discrimination?
    - Statistics regard part-timers in general; not applicable to very specific group
    - Plus: calculation can sometimes benefit part-timers
  - Method allowed / no discrimination

## Other classics: old age pensions

- Soukupova, C401-11, 2013
  - Early retirement allowance denied
- Kuso, C-614/11, 2013
  - Question re *ratione temporis* principle
  
- And some modern-day trouble:
  - Leone & Leone, C-173/13, 2014
    - A father claiming early retirement



## Soukupova, C-401/11, 2013

- Early retirement support denied
- Reason: had already attained 'normal retirement age' – *for women*
- Thus: had she been male, she would have qualified
- Court: 'normal retirement age' cannot be different on the basis of sex



## Kuso, C-614/11, 2013



- Kuso: wishes to continue working at 60 but denied – different ages m/f
- Contract concluded prior to Austrian accession to EU, but ended after accession
- Referring court: *ratione temporis*?
- CJEU: termination of contract is relevant: different retirement ages precluded by EU law

## And modern day trouble: a caring (?) father



- Leone & Leone (C-173/13, 2014):
  - French law pension before retirement age possible for parents of  $\geq 3$ , if break taken of 2 months for each child
    - mothers automatically eligible because of compulsory maternity leave
    - indirect discrimination of fathers?

## equal pay: equal situations?

- C-173/13, 17 July 2014, *Leone v Garde des Sceaux*
  - French law pension before retirement age possible for parents of  $\geq 3$ , if break taken of 2 months for each child
    - mothers automatically eligible because of compulsory maternity leave
    - indirect discrimination of fathers?
      - the principle of equal pay set out in Article 119 of the Treaty, like the general principle of non-discrimination of which it is a particular expression, presupposes that male and female workers whom it covers are in comparable situations (see Case C-218/98 *Abdoulaye and Others* [1999] ECR I-5723, paragraph 16)

## Leone & Leone continued



- AG Jaaskinen:
  - Follows *Griesmar*, C-366/99, 2001
    - For purpose of equal pay: men not comparable to women where the advantage granted to the female worker alone is designed to offset the occupational disadvantages, inherent in maternity leave, which arise for female workers as a result of being away from work
    - Maternity related benefits: special biological ties etc.; compensatory in nature
    - Parenting related benefits: both men and women can be parents: different treatment not justified

## Leone test as proposed by AG:

- similarly situated?
  - answer depends on whether the benefit for women is intended to offset career disadvantages incurred by
    - 1. pregnancy and maternity, or by
    - 2. parenting
      - if 1: not similarly situated: no discrimination
      - if 2: women and men should be treated equally
- Ic: men and women not similarly situated



## Leone & Leone continued

- The Court however:
  - Indirect discrimination since women will qualify automatically, whereas men have a choice
  - Not justified, since means does not really serve purpose (compensate for career disadvantages)





## miscellaneous

- Gewerkschaftsbund, C-476, 2014
  - Pro rata principle & employer's benefit
- X v Min. of Soc. Affairs & Health, C-318/13, 2014
  - Lumpsum calculation & life expectancy
- Meister, C-415/10, 2012
  - Job application & proving discrimination

## Gewerkschaftsbund C-476/12

- Child-related benefit granted by employer
- Is pro-rata calculation okay?
- Court:
  - Kind of pay; no statutory benefit / social security
  - Pro-rata in line with art. 157(2) TFEU



## X v Min of Soc Affairs & Health C-318/13, 2014

- Calculation of lumpsum using life expectancy statistics
- Had X been female, almost 300,000 more
- Court: distinction unjustified – statistics may not be true for the individual



## Meister, C-415/10, 2012



- Rejected job applicant no right to see file of accepted applicant
- However: refusal employer to provide information, may be taken into account when deciding on presumption of discrimination

## New challenges?



- Dropping sterilisation requirement
  - Pregnant *workers* directive, but in French:
    - *Travailleuses enceinte*
    - will pregnant trans\*men be protected?
  - Recast equal treatment:
    - Pregnancy discrimination equated to women's discrimination
    - Can pregnancy discrimination still be tackled as women's discrimination?

Thank you  
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"YOU MAY BE THE BEST MAN FOR THE JOB, BUT I  
HAVE A DOZEN WOMEN WHO ARE BETTER QUALIFIED."