

RECONCILIATION OF WORK AND FAMILY LIFE

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Introduction

In the past, the protection afforded to the birth of children within employment equality law gave rise to conceptual difficulties, sometimes leading to the illogical approach of comparing a pregnant woman to a hypothetical sick male in order to establish whether a woman treated less favourably on grounds of her pregnancy was in fact a victim of unlawful discrimination on grounds of her sex. The law has moved on considerably since that time to recognising the right of a pregnant worker to a workplace free from discrimination on grounds of her pregnancy as of right and to the right to maternity and parental leave with protection upon the workers' return to work at the end of their leave. However the extent of the protection that is afforded to parents in the workplace is not unlimited. Whilst Community law has enthusiastically embraced the concept of pregnancy discrimination as unlawful direct discrimination on grounds of gender, it has been less radical in dealing with the logical implications of that concept, particularly when it comes to protecting workers who are on leave from their workplace as a direct consequence of their status as parents.

In this paper I will examine the protection afforded to pregnant workers by the Equal Treatment and the Pregnancy Directives. I will also examine the new Parental Leave Directive and how the concepts of pregnancy, maternity leave and parental leave have been addressed by the Court of Justice of the European Union.

1. The Equal Treatment Directive and Pregnancy

1.1 *Pregnancy Discrimination as Unlawful Direct Discrimination*

In the decision of *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*¹ the European Court of Justice made a landmark finding that pregnancy discrimination was unlawful direct discrimination on grounds of gender and was therefore contrary to the Equal Treatment Directive. The Court observed:

“that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave”.

The decision was and still is highly significant in outlawing pregnancy discrimination in the workplace, the implications of which still regularly arise before the courts to date as pregnancy discrimination continues to be a very real issue in the lives of working women.

On the same day as the European Court of Justice handed down its decision in *Dekker*,² the Court placed some limitations on the scope of pregnancy discrimination as direct discrimination contrary to the Equal Treatment Directive in its decision in *Hertz v. Aldi*.³ The

¹ Case C-77/88 [1990] ECR I-3941.

² Case C-77/88 [1990] ECR I-3941. See also Bolger and Kimber, *Sex Discrimination Law* (Round Hall, 2000) at pp. 296-298, Ellis, ‘Discrimination on the Grounds of Pregnancy in EEC Law’ (1991) Public Law 159 and Shaw, ‘Pregnancy Discrimination in Sex Discrimination’ (1991) EL Review 313.

³ Case C-179/88 [1990] ECR I-3979.

Court limited the period of protection from dismissal on grounds of pregnancy and/or a pregnancy related illness, to the period of the statutory maternity leave.

Thus, the Court chose to apply a substantive test to pregnancy itself and a comparative test to consequences of pregnancy leading to absence from work⁴.

Since then, the Court has continued in conferring significant protection on pregnant workers and has even gone as far as holding that the protection afforded by Community law cannot be dependent on the presence of the woman in the workplace during a crucial time even where that time coincides with her maternity leave⁵. That protection for pregnant workers has been confirmed as applying to fixed term workers as well as those employed on indefinite contracts⁶. In *Brown v. Rentokil*⁷ the employer had a policy of dismissing any employee after twenty six weeks sick leave but the Court held that the employer was not entitled to commence calculation of that twenty six week period until after the end of the employee's maternity leave where the illness was related to her pregnancy.

The increasingly liberal view of the Court of Justice in relation to the treatment of a pregnant employee can be seen in cases such as *CNAVTS v. Thibault*⁸. The Court found that to deny a female employee the right to have her performance assessed annually discriminated against her because, had she not been pregnant and on maternity leave, she would have been assessed during the year she took the leave and could therefore have qualified for promotion. Similarly in *Lewan v. Lothar Denda*⁹ the Court held that Article 141 precluded an employer from taking periods of maternity leave into account when granting a Christmas bonus so as to reduce the benefit pro rata.¹⁰

⁴ O'Leary S. 'The New Frontiers of Sex Equality Law in the European Union' (1999) ELR 331.

⁵ *Webb v EMO Air Cargo* [1994] ECR I-3567.

⁶ *Tele Danmark* [2001] ECR I-6993; *Melgar* [2001] I-6915.

⁷ Case C-394/96 [1998] ECR I-4185. See also Boch, 'Official: During Pregnancy, Females are Pregnant' (1998) 23 EL Review 488.

⁸ Case C-136/95 [1998] ECR I-2011.

⁹ Case C-333/97 [1999] ECR I-7243.

¹⁰ See Bruning and Plontenga, 'Parental Leave and Equal Opportunities' (1999) 9 JESP 195.

Just how far the European Court of Justice has been prepared to go in protecting employees from discrimination on grounds of pregnancy is well illustrated by its decision in *Busch v. Klinikum Neustadt GmbH & Co. Betriebs-KG*.¹¹ Ms. Busch had a baby in June 2000 and took parental leave which was due to be for a period of three years. In October 2000 she became pregnant again and in January 2001 she requested permission to terminate her parental leave early and to return to full time work in April 2001 at which stage she was seven months pregnant. The nature of her work meant that she was prohibited from working at that stage in her pregnancy. Her employer sought to rescind its consent to her return to work on grounds of fraudulent misrepresentation and mistake. The Court of Justice found they were not entitled to do so as they were taking Ms. Busch's pregnancy into consideration when refusing to allow her to return to work before the end of her parental leave and that constituted unlawful direct discrimination on grounds of sex. The Court found that Ms. Bush was not under any obligation to inform her employer that she was pregnant given that the employer could not take her pregnancy into account in deciding whether she could return to work early or not. Neither the financial loss to the employer nor the legislative prohibition on her performing all her duties because of her pregnancy could justify that discrimination. Neither did the fact that her return to work meant that she would receive a maternity allowance higher than her parental leave allowance.

An interesting case showing the extent of the protection afforded in relation to matters that can only affect women, can be seen in the Court's decision in *Sebia Myar v Ckereri Und Konditorei Gerhard* [2008] ECR I-01017. The Court in that case was asked to assess the legality of the dismissal of a female worker where the dismissal was based on the fact of in-vitro fertilisation treatment which the worker had undergone. Whilst the Court declined to extend the Pregnancy Directive to a worker who is undergoing such treatment, the Court did find that Articles 2(1) and 5 (1) of the Equal Treatment Directive precluded the dismissal of a female worker who was at an advanced stage of in-vitro fertilisation treatment. The Court acknowledged that if a female worker is dismissed on account of absence due to illness in the same circumstance as a man, then there is no direct discrimination on grounds of sex, but also pointed out that

¹¹ Case C-320/01 [2003] ECR I-2041.

“[The treatment in question in the main proceedings - mainly follicular puncture and the transfer to the woman’s uterus of the ova removed by way of that follicular immediately after their fertilisation – directly affects only women. It follows that the dismissal of a female worker essentially because she is undergoing that important stage of in vitro treatment constitutes direct discrimination on grounds of sex.”

However a more restrictive approach to the wider context of conception and birth was taken towards a mother who had her baby by way of a surrogacy arrangement. In *Z v A Government Department* (Case C-363/12, judgement of 18th March 2014) the Court declined to find the failure to pay the commissioning during a period of leave to care for her baby, on the same basis as would be paid to a mother on maternity leave, does not constitute discrimination on grounds of sex or disability. The Court found that the commissioning father was being treated in the same way and that there was, therefore, no treatment that applied exclusively to one sex which meant there could be no direct or indirect discrimination on grounds of sex. Neither could there be less favourable treatment on grounds of pregnancy as the commissioning mother had never been pregnant, even where she has breastfed the baby.

1.2 *Pregnancy Discrimination and Pay*

Whilst the Court has taken a strong and progressive approach to protecting pregnant workers from less favourable treatment at work, the protection seems to wane once the woman leaves the workplace on leave even where that leave is intrinsically linked to the fact of her pregnancy which has been recognised by the Court as a uniquely female condition. It seems that she is entitled to equality of outcome for so long as she is in the workplace, but not during any period of leave that she is away from the workplace. The Court’s approach has been described as

*“steering an awkward course between protecting women’s employment throughout pregnancy and acknowledging that those on leave are in a different position to those at work.”*¹²

In *Gillespie v The Northern Health and Social Services Board*¹³ the Court found that an employee on maternity leave was not entitled to her full rate of pay on the basis that women on maternity leave are in a “*special position*” that is not comparable to a man or a woman who is at work.

Where a woman is on extended sick leave necessitated by a pregnancy related illness, in spite of the Court’s recognition that such an illness is different to other conditions, the Court has so far declined to intervene to protect a woman during that time other than from dismissal during the period of the statutory maternity leave. In the case of *McKenna v North Western Health Board*,¹⁴ the Court was asked to consider the situation of a woman who was on long term sick leave throughout her pregnancy due to a pregnancy related illness. During the pregnancy she exhausted her right to full pay and moved to half pay in accordance with her employer’s sick pay provisions. She argued that placing her on half pay constituted unfavourable treatment in respect of her pay and was therefore an unlawful breach of her right to equal pay. She also argued that taking account of her pregnancy related illness in terms of her future right to sick pay, as she was limited to taking a total of one year’s sick pay over a four year period, constituted less favourable treatment on grounds of her pregnancy and was therefore unlawful.

Whilst the Court acknowledged the special nature of pregnancy related illness, it held that this could be accommodated by denying an employer the right to dismiss a female worker suffering from such an illness. This was in spite of the fact that, as acknowledged by the Advocate General, the application of the sick leave scheme constituted a disadvantage that could only

¹² Costello C. And Davies F. ‘The Case Law of the Court of Justice in the Field of Sex Equality Since 2000’ (2006) 43 CMLR 1567 at 1569.

¹³ Case C-342/93 [1996] ECR I-475.

¹⁴ Case C-191/03 [2005] IRLR 895.

affect women as they alone could be subject to incapacity to work due to pregnancy related illness.

The Court clearly chose to continue with their conservative approach to payment during periods of leave due to pregnancy as commenced in *Gillespie*. The economically motivated reasoning apparent in *Gillespie* was thus also applied to sick pay during pregnancy even where the leave was a direct consequence of the pregnancy. The Court stated:

“If a rule providing, within certain limits, for a reduction in pay to a female worker during her maternity leave does not constitute discrimination based on sex, a rule providing, within the same limits, for a reduction in pay to that female worker who is absent during her pregnancy by reason of an illness related to that pregnancy also cannot be regarded as constituting discrimination of that kind”.

A somewhat more progressive approach towards issue of payment during maternity leave can be gleaned from the Court’s decision in *Alabaster v. Woolwich plc, Secretary for State for Social Security*¹⁵ where the Court held that a pay rise awarded during the maternity leave must be included in the calculation of her statutory maternity pay which was linked to her previous level of income during a period prior to the commencement of the maternity leave. The Court held:

‘To deny such an increase to a woman on maternity leave would discriminate against her, since, had she not been pregnant, she would have received the pay rise’.

Two more recent decisions of the Court concerning the pay and benefits to which pregnant employees are entitled to, when they are not able to perform their normal duties of employment due to their pregnancy, having been placed on alternative duties or on leave, were decided in a similar manner to *McKenna*. The first of these, *Parvianinen*,¹⁶ concerned a pregnant airline employee employed as a flight attendant who was transferred to alternative duties due to her

¹⁵ Case C-147/02 [2004] ECR I-3101.

¹⁶ C-471/08, judgment of the Court of Justice of the European Union, 1 July 2010, [2011] 1 CMLR 175. See also ‘Pregnant workers cannot claim allowances for tasks not performed’ [2010] 274 EU Focus 17-18.

pregnancy which did not pay supplemental allowances amounting to approximately 40% of her salary. The Court held that employers are not required to maintain pay supplements which are dependent on performance by the employee of specific functions during a temporary transfer due to pregnancy.¹⁷ In this regard reliance was placed on Article 11(4) of the Pregnancy Directive which provides that:

“Member States may make entitlement to pay or the allowance ... conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.”

However the Court did find that a pregnant worker who is granted leave from work or is temporarily transferred to another job because of her pregnancy, must remain entitled to remuneration including her basic monthly pay plus specified supplementary allowances related to her job such as those calculated on the basis of seniority or professional qualifications. Such a worker cannot be paid any less than other workers who are employed to perform the same job and must be entitled to any compensatory supplementary allowances relating to the new position subject to eligibility requirements.

The case of *Gassmayr*,¹⁸ concerned the remuneration paid to an employee during pregnancy and maternity leave when the woman was granted leave from her position on medical advice. Ms Gassmayr was a junior doctor who received an on call allowance in addition to her basic salary but this ceased upon her commencing her period of enforced maternity leave due to health and safety reasons. The Court determined that Article 11(1)-(3) were sufficiently precise to be directly effective.¹⁹ Article 11(1) provides that, as regards pregnant workers in the cases referred to in Article 5 (pregnant workers whose conditions of employment have been temporarily adjusted, who have been temporarily transferred to another job or, as a last resort, who have been granted leave from work) income must be guaranteed in accordance with national legislation and/or national practice. Article 11(2) provides for the maintenance of employment rights and an adequate right to pay for workers on maternity leave. Article 11(3)

¹⁷ At paragraph 61.

¹⁸ C-194/2008, judgment of the Court of Justice of the European Union, 1 July 2010 (not yet reported). See also ‘Pregnant workers cannot claim allowances for tasks not performed’ [2010] 274 EU Focus 17-18.

¹⁹ This finding was anticipated by Ellis, *EU Anti Discrimination Law*, (OUP, 2005) at p. 246.

provides that, as regards workers on maternity leave referred to in Article 8, the allowance referred to in Article 11(2)(b) is to be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health. The Court noted its earlier decision in *Parvianinen* and held that the same applies to Article 5(3) of the Pregnancy Directive for employees who have been placed on leave. The Court had regard to its earlier decisions on payment during maternity leave including *Boyle*,²⁰ *Gillespie*²¹ and *Alabaster*²² and concluded that where a worker is absent from work because she is on maternity leave, the minimum protection required by the Pregnancy Directive does not require full payment or the payment of the on-call duty allowance during maternity leave.

These decisions provide useful guidance to employers and establish that while they remain obliged to provide minimum conditions for pregnant employees, they are not compelled to continue paying those workers in the same way that they did prior to the pregnancy if the same tasks can no longer be performed even if this is caused by the pregnancy or placing of employee on health and safety leave.

2. The Pregnancy Directive²³

The introduction of the Pregnancy Directive was significant in recognising the entitlement of protection for pregnant workers as of right rather than as a part of sex equality. It guarantees respect for the principle of equal treatment as laid down in the Equal Treatment Directive, and adopts a dual approach towards achieving that goal, protecting female workers on one hand and upholding the principle of equal opportunities for men and women on the other. As such, it is an example of a divergence from the strict symmetry of treatment model of equality, in that it explicitly provides for special

²⁰ [1998] ECR I-6401

²¹ Case C-342/93 [1996] IRLR 214

²² Case C-147/02 [2004] ECR I-3101

²³ Council Directive 92/85/EEC Pregnancy Directive [1992] OJ L348/1. For more detail on the Pregnancy Directive, see Barnard, *EC Employment Law*, (3rd ed, OUP, 2006) at pp. 454-459.

treatment for women where that is necessary because of women's special needs in connection with pregnancy and childbirth.

The Pregnancy Directive, was introduced by the Commission pursuant to the health and safety framework of Article 118A (now 138) rather than the more established scheme of employment equality law pursuant to Article 119 (now 141). This was likely done to avail of the majority voting procedures provided for by Article 118A, thereby avoiding rejection for lack of unanimity.²⁴ Whilst this political expediency did enable the Directive to be adopted, the result was a compromise where the interests of business were balanced against the right to equality.²⁵

Although the intention of ensuring the implementation of the Pregnancy Directive is to be applauded, it is regrettable that the main rationale of the Directive has emerged as protection of women's health, thus hinting at the paternalism of protective legislation, rather than the protection of women's rights and the requirements of equal treatment between women and men in relation to paid work. In fact one of the few improvements made in the final Directive from the draft proposal, was the omission of the Commissions' reference to the "*delicate and vulnerable*" condition of women following childbirth, which could only be described as an unfortunate and regrettable choice of words illustrating the overt paternalism of the Directive.

2.1 Defining a Pregnant Worker

The definition of 'pregnant worker' within the Directive has been determined by the Court of Justice to pertain to a "*pregnant worker who informs her employer of her condition, in accordance with national legislation and or national practice.*"²⁶ This has

²⁴Eventually two member states abstained; the UK because the directive went too far, and Italy because it did not go far enough!

²⁵ For a discussion on this point see Ellis, "Protection of Pregnancy and Maternity." (1993) 22 *Industrial Law Journal* 63 at p. 67. See also Mancini and O'Leary, "The New Frontiers of Sex Equality Law in the European Union" (1999) 24 *European Law Review* 331, at p. 341.

²⁶ Case C-116/06 *Kiiski* [2007] ECR I-7643.

been refined somewhat by the Court in its recent judgment in *Danos*²⁷ where it said that even if the worker had not formally informed her employer of her pregnancy, if the employer learnt of it, she would be protected by the provisions of the Pregnancy Directive. The Court also found that the concept of ‘worker’ may not be interpreted differently according to each national law, but must be defined in accordance with objective criteria which distinguished the employment relationship by reference to the rights and duties of the person concerned. The Court found that the essential features of an employment relationship covered under the Directive was that

“for a certain period of time a person performs services for and under a direction of another person in relation for which he/she receives remuneration”.

Thus the complainant who was a member of a company’s board of directors was deemed to be a worker under the Directive provided her activities were carried out under the direction or supervision of another body of that company and if, in return for those activities, she received remuneration.

2.2 Protective Provisions

The first group of provisions in the Directive are designed to protect women from hazardous or dangerous work during pregnancy and after childbirth, and the second give women rights to maternity and sick leave and protect their employment rights during the relevant periods. It is not a fully harmonising Directive and it does not attempt to require uniform rights of maternity leave for all women in all of the Member States. Article 3(3) explicitly states that it may not have the effect of reducing the level of protection of women compared with the situation which exists in each Member State on the date on which the Directive is adopted, thereby clearly focusing on the creation a minimum level of protection below which the Member States cannot fall.

²⁷ Case C-232/09 [2011] 2 CMLR 45.

Articles 3 to 7 contain the protective provisions of the Directive. Article 3 requires the Commission to draw up guidelines on the industrial processes considered hazardous for the purposes of the relevant workers, and Article 4 requires employers to assess the extent to which women are subject to such risks. As a result of this assessment, employers are required to adjust the working conditions of women to avoid exposure to these risks, or to provide the woman with leave during the period of danger.²⁸ Member States are required, under Article 7 to take measures to ensure that women are not obliged to perform night work during their pregnancy and for a period following childbirth. A pregnant or nursing worker²⁹ has the right to have her working conditions adapted so that they do not present a risk to a pregnant woman or if this is not feasible, the right to additional leave.³⁰

2.3 *Pregnancy related Dismissal: Article 10*

Article 10 provides that pregnant workers cannot be dismissed during the period from the beginning of their pregnancy to the end of the maternity leave, save in exceptional circumstances not connected with their condition which are permitted under national law or practice. If such a worker is dismissed in that period, they must be provided with “duly substantiated” grounds in writing and Member States must provide a remedy for pregnant workers who are dismissed. The Court confirmed in *Jiménez Melgar v. Ayuntamiento De Los Barrios*³¹ that Article 10 enjoys direct effects and can be relied on in the courts of the Member States.

²⁸ Article 5.

²⁹ The protection applies to a nursing mother for a finite period of time only.

³⁰ Article 11.

³¹ Case C-438/99 [2001] ECR I-6915. See also EU Focus, ‘Case Note: Non-Renewal of Fixed Term Contract because of Pregnancy may be Direct Discrimination’ (2001) EU Focus 14.

The ability of an employer to terminate an employee following on the end of her maternity leave was recently clarified further by the Court in *Nadeen Paquay v Soci V'Architectes Hoet + Minne SPRL* [2007] ECR I-6. Pursuant to national law in that case, the applicant was projected against dismissal from the beginning of her pregnancy until the end of her maternity leave which ended on the 31st of January 1996. She was dismissed by letter dated the 21st of February 1996 at a time when the period of protection had ended and was given notice of six months running from the 1st of March 1996. The employer ended the contract on the 15th of April 1996 and made a monetary payment for the balance of the notice period. The national referring court found, as a matter of fact, that the decision to dismiss her was taken before the end of the period of protection against dismissal. The employer sought to rely on performance issues which, as a matter of fact, the national court found had not been established. The question for the Court therefore was whether Article 10 of the Pregnancy Directive should be interpreted as prohibiting not only notification of a decision to dismiss on grounds of pregnancy and/or the birth of a child during the period of the protected leave but also the taking of such a decision to dismiss in preparing the permanent replacement of such a worker before the expiry of that period.

The Court found that Article 10

“must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that Article but also the taking of preparatory steps for such a decision before the end of that period.”.

An issue will inevitably arise from that decision as to whether the same approach must be taken where an employer decides to terminate a female worker's employment due to redundancy rather than due to the performance issues which arose in Ms. Paquay's case. Particularly where a redundancy is part of a collective redundancy, there are a number of steps which must be taken by an employer before the redundancy can properly and lawfully be put into effect. Clearly a female worker cannot be dismissed by reason of redundancy or otherwise during her maternity leave. However at what point can the employer commence the process of consultation etc which may ultimately result in a decision to terminate her

employment by reason of redundancy. In the current economic climate issues around redundancy are becoming increasingly commonplace and it remains to be seen whether the law will take a different view of preparatory steps for a dismissal where those steps consist of engaging in consultation in relation to a proposed redundancy, as versus the preparatory steps in seeking to replace the employee to be dismissed, as arose in the *Paquay* case.

3. Maternity Leave

Articles 8, 9 and 11 of the Pregnancy Directive contain provisions safeguarding women's employment rights during pregnancy and childbirth and in the period thereafter, which are the core entitlements relating to maternity. Amongst the most important provisions is in Article 8 which provides for the right to maternity leave of at least 14 weeks³² during which time the Directive provides an adequate allowance shall be payable which will be at least what a person on statutory sick pay would receive under national rules.³³

Maternity rights are almost invariably confined to women only in spite of the fact that only a small aspect of those rights could be for medical purpose i.e. the limited periods of leave which a woman is required to take either before or after her date of confinement. The Court of Justice in the *Hoffman* case³⁴ recognised at an early stage in the development of maternity rights, that maternity leave fell within the scope of Article 2(3) of the then Equal Treatment Directive which leaves Member States with a discretion in relation to social measures to guarantee the

³² Article 8 provides that 'Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks...'. The European Parliament wanted 16 weeks as 14 did not, in their opinion, represent an improvement in any of the Member States other than Portugal.

³³ Article 11(2) and (3).

³⁴ *Hoffman v Berner Ersatzkasse* (C184/83), [1984] E.C.R. 3047. See to similar effect the earlier decision of *Commission v. Italy* (C-163-83) [1983] E.C.R. 3273 where the CJEU found that an Italian law which gave a woman (but not her husband) the entitlement to the equivalent of maternity leave when they adopted a child under six to be justified by the "legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new born child in the family during the very delicate initial period."

protection of women in connection with pregnancy and maternity.³⁵ It is clear from the judgment in *Hoffman* that the relationship between mother and young children was deemed by the Court to be special and worthy of protection.

The view of confining maternity leave to women continues to emanate from the Court of Justice which has held that maternity leave protection is necessary for two main reasons. Firstly, it aims at protecting the woman's biological condition immediately following the birth of her child, and secondly at protecting the special relationship between the mother and her newly born child.³⁶ Therefore maternity leave can be restricted to the mother and denied to a father without violating the principles of equal treatment in European law.

A slightly less restrictive approach was taken by the Court of Justice in *Lomers*³⁷ where it held that a Dutch policy offering subsidised childcare to female employees in order to address under-representation was lawful provided that the same facilities were offered to men taking care of children by themselves or in exceptional circumstances. In a similar approach in *Alvarez*³⁸ the Court of Justice struck down as discriminatory a Spanish law which granted time off work to breastfeeding mothers but also allowed the same time to be taken by non breastfeeding mothers in order to care for their children. The failure to allow the latter, i.e. non breastfeeding mother's time off, to be equally taken by the fathers of the children was found to constitute unlawful discrimination on grounds of gender. However the Court specifically upheld the arguments made by the Irish government that time off for breastfeeding mothers exclusively without granting it to non breastfeeding mothers or to fathers, was entirely legitimate as it was to facilitate something that could only be done by women.

The Recast Directive recognises the need to protect a woman returning to work from maternity leave. Article 15 guarantees the right of a woman returning to work from maternity and

³⁵ Now Article 28 of the Recast Gender Directive. Directive 2006/54/EC of the European Parliament and of the Council of 5 July on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast).

³⁶ *Mahlburg Lan Mecklenborg-Vorpommern* (C-207/98) [2000] E.C.R. I-549.

³⁷ C-476/99 [2002] E.C.R. I-2891.

³⁸ (C-104/09) [2010] E.C.R. I-08661.

adoptive leave to return to her job or to “*an equivalent post on terms and conditions which are no less favourable to her*”.

4. Paternity Leave

There is no right to paternity leave as such in European law, in spite of soft law and policy aspirations towards a greater level of involvement for fathers in taking time off work to care for their children. Article 16 of the Recast Directive does require Member States who recognise paternity leave in their national law to take the necessary measures to protect against dismissal due to exercising such rights and to ensure fathers are entitled to return to work at the end of the leave. However this is expressed to be without prejudice to the right of Member States to recognise “distinct” rights to paternity and adoptive leave.

Whilst any recognition of paternity rights are to be welcomed, the limited manner in which Article 16 recognised them has been criticised as potentially perpetuating a distinction between maternity leave and paternity leave to the detriment of gender neutral parental rights making their way into working life.³⁹

5. Parental Leave

5.1 The Parental Leave Directives

³⁹A. Numhauser-Henning, “EU Sex Equality Law Post Amsterdam” in H. Meenan (ed), *Equality Law in an Enlarged European Union; Understanding the Article 13 Directive* (Cambridge: Cambridge University Press 2007) pp. 145-177 at p. 159.

The first Parental Leave Directive⁴⁰ was a framework agreement concluded by the three principle cross industry organisations providing for an entitlement to a period of unpaid parental leave to enable parents to take care of young children as well as limited urgent family leave (not limited to parent child relationships) known as force majeure leave. The Directive had a difficult history having been first proposed by the European Commission in 1983 but was blocked due to the then requirement for unanimity. The Directive that was eventually passed in 1996, with a period of 2 years for implementation, set out fairly minimum requirements which did not particularly impact in many of the Member States as many already had parental leave provisions.

That Parental Leave Directive has been repealed as of 8 March 2012 and replaced by the 2010 Directive.⁴¹

The purpose and scope of the new Directive is provided in clause 1.1. to “*facilitate the reconciliation of professional and parental responsibilities for working parents ... taking account of the increasing diversity of family structures while respecting national law, collective agreements and or practice*” which is clearly aimed at member states to improve their existing provisions pertaining to child-rearing situations. The right to parental leave is extended from 3 to 4 months for each child but crucially, remains unpaid. The entitlement is given to both parents of a child or an adopted child up to a maximum age of 8 years. The Directive sets out the general principle that the leave is an individual right and should not be transferred from one parent to another and in order to encourage a more equal take up of leave by both parents, at least one of the months is non-transferrable.

The new Directive provides that there shall not be an upper limit on the compensation payable in the event of a breach of the principle of equal treatment.

⁴⁰ Council Directive on the Framework Agreement & Parental Leave concluded by UNICE, CEP and The ETUC (Directive 96/42/EC).

⁴¹ Council Directive 2010/18 EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by BusinessEurope, Ueapme, Ceep and Etuc and Repealing Directive 96/34/EC.

Whilst the new Directive envisages a wide application of the right to parental leave to all employees including part time, fixed term and temporary agency employees (taking account of the increasing atypical nature of employment), it does maintain the possibility of a qualification period of a maximum of one year.

A significant new entitlement is that of employees returning from parental leave to have the right to ask for changes to their working hours and/or patterns for a specified period. Interestingly employees and employers are encouraged to maintain contact during parental leave and to arrange suitable reintegration measures on return to work. The Directive also provides for the right of an employee to return to the same job or if this is not possible to an equivalent position.

The new Directive does not make any significant changes to the entitlement to force majeure leave and continues to allow that to be granted by Member States on an unpaid basis.

5.2 Parental Leave and the Court of Justice

There has not been a great deal of judicial consideration of the Directive. However the Court of Justice has provided some helpful clarification on its scope. For example in *Commission v Luxembourg*⁴² the Court held that the period of parental leave may not be reduced where it is interrupted by another period of leave such as maternity leave which has a different purpose from parental leave. The Court of Justice has made clear that parental leave and maternity leave are different: parental leave enables either parent to look after the child whereas maternity leave applies to mothers only after birth. A less helpful decision on the part of the Court of Justice arose in *Osterreichischer Gewerkschaftsbund*⁴³ where a distinction was drawn between an employee on parental leave and an employee on leave in order to perform national service. The Court found that the interest of the worker in the family in the case of parental leave were of a

⁴² (C-519/03), [2005] E.C.R. I-03067.

⁴³ (C-220/02), [2004] E.C.R. I-5907

different nature to what the court referred to as the collective interest of the nation in relation to national service⁴⁴. Therefore the situations were not comparable and the claim that a failure to take parental leave into account in calculating the period of service for the purpose of a termination package, did not constitute indirect discrimination of women. The decision has been criticised and it has been argued that the Court should have considered whether the failure to take the leave requirement itself into account worked to the disadvantage of women in which case what the Court should have considered was whether there was any objective justification for the practice.⁴⁵ The decision could also be criticised for failing to recognise the collective interests of the State in ensuring the care of children and family members rather than perceiving that as an individual right.

A further failure to take a child centred approach to the scope of protection afforded by the Directive occurred in the Court's decision in *Chatzi v. Ypourgos Oikonomikon*⁴⁶ where the Court held that the Parental Leave Directive could not be interpreted as conferring an individual right to parental leave on the child nor did it confer entitlement to a number of periods of parental leave equal to the number of children born. The Court of Justice noted that parental leave is not provided to each child individually so that their parents can care for the child (as had been argued on behalf of the mother of twins who had claimed an entitlement to parental leave for each child) but rather for parents to properly care for their children. The Court's decision is relevant in confirming the overall legislative intention behind the Directive as parent rather than child focused.

The need to protect an employee's rights during parental leave

The treatment of parental leave in calculating the value of a termination package also fell to be considered by the Court of Justice in the case of *Meerts v Proost NV*.⁴⁷ The employee in that case was working reduced hours in her full time job as she had taken parental leave when her employment was terminated without notice. The compensation to which she was entitled

⁴⁴ At paragraph 64

⁴⁵ C. Costello and G. Davies "The Case Law of the Court of Justice in the Field of Sex Equality Since 2000" (2006) 43 C.M.L.R. 1567 at p. 1608.

⁴⁶ (C-149/10), [2010] E.C.R. I- 08489

⁴⁷ (C 116/08), [2009] E.C.R. I-10093, [2009] All E.R. (D) 259.

pursuant to national law was calculated on the basis of her part time salary rather than her full time salary. The Court found that rights to which the employee had been entitled when she started her parental leave could not be lost or reduced at the end of the leave which the Court found included the right to notice.⁴⁸ Otherwise the Court pointed out that entitlement to rights and benefits would be compromised with the result that workers might be discouraged from taking their leave and employers might be encouraged to dismiss workers on parental leave rather than other workers which would run counter to the aim of the Framework Agreement. Thus the Directive required compensation of a worker on a part time parental leave could not be calculated on the basis of the reduced salary. In doing so, the Court of Justice was keen to emphasise that the maintenance of rights for parents until the end of parental leave constitutes “a particularly important principle of Community social law which cannot therefore be interpreted restrictively”.⁴⁹ The need to avoid an employee on parental leave suffering financial detriment can also be seen in the decision of *Lyreco v Rogiers*⁵⁰ a reference from Belgium involving an employee with a full-time contract who took parental leave by working reduced hours for a period of time, during which the employer terminated her employment contract without compelling or sufficient reason to do so. According to Belgian law, the employee was entitled to a fixed sum of compensation equal to six months’ salary. The question arose whether the fixed-sum award must be determined on the basis of the reduced salary earned by the worker at the date of his dismissal due to part-time parental leave, or the full salary based on the employee’s regular full-time contract. The Court held the calculation must be on the basis of full-time salary.

A more recent confirmation by the Court of the protection to be afforded an employee on parental leave is apparent in the recent Latvian decision of *Nadežda Riežniece v Zemkopības ministrija (Republic of Latvia), Lauku atbalsta dienests*⁵¹. The employee was assessed in a redundancy process during her absence due to parental leave on the basis of her last annual performance appraisal whilst her colleagues who were in the workplace were assessed on a more recent period with different objectives. The Court found that there was nothing unlawful about the assessments but that the assessment of the employee on parental leave must be based

⁴⁸ Clause 5.2 of the new Parental Leave Directive provides that rights acquired by an employee as at the date of the parental leave are to be maintained until the end of the parental leave. This was also provided in clause 2.6 in the initial Parental Leave Directive.

⁴⁹ At paragraph 43.

⁵⁰ C-588/12

⁵¹ (C-7/12), Judgment of the Court (Fourth Chamber) 20 June 2013.

on identical criteria to what is applied to employees in active service. If the assessment placed employees on parental leave at a disadvantage then this could constitute indirect discrimination. The Court also held that the Parental Leave Directive prohibits a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.

These decisions are welcome in recognising the important of protecting a worker on such leave and in so doing, in protecting the right to take parental leave without putting the employee's other employment rights at risk. However the significant limitation of the Directive is its failure to give rise to any entitlement to paid parental leave. Concern has been raised that this renders it more likely that the partner with the lower income (usually women) will take the unpaid leave thereby reinforcing the stereotype of women as a primary carer in the family. The Directive has been criticised for failing to restructure gender relationships in spite of the father's right to share equally in the burden of family life.⁵² In the EU, despite the availability of a right to parental leave, research suggests that fathers are not exercising this right for a number of reasons including lack of knowledge about rights, fears about the impact of taking leave on their career prospects and assumptions that women should be the primary carer and have primary role in parental responsibilities.⁵³

Conclusions

⁵² J. Hunt and C. Wallace "Reconciliation between Working & Family Life in the EU-Reshaping Gendered Structures?" [2004] 26(3) *Journal of Social Welfare and Family Law* 325 at pp. 333-4

⁵³ European Opinion Research Group, *European Attitudes to Parental Leave*, (Brussels: European Opinion Research Group, 2004).

At a time when many workers are experiencing reductions in their benefits, protective measures for parents in the workplace may come under increasing pressure. However it is a fundamental requirement of any legal system which aspires to ensure both equality of opportunity and equality of outcome that such workers must be protected and should not be made to suffer as a result of being a parent. This protection must apply both in the workplace and during any period of time that they may be out of the workplace due to their pregnancy or maternity or parental leave.

Community law has achieved a considerable amount of that protection to date, but there is still a great deal of work which remains to be done.