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Reconciliation of work and family life

EU GENDER EQUALITY LAW

SEMINAR FOR MEMBERS OF THE
JUDICIARY

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Outline

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2. EU policies, legislation and case law
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 - the Parental leave Directive
 - indirect sex discrimination
 - EU Charter
 - Protection in relation to pregnancy and maternity versus parenthood
 - Protection of women
 - Parental rights
 - Again protection of women
 - Rights in case of surrogacy
 - The European Pillar of Social Rights and the agreement on the work-life balance proposal (COM (2017) 253)
3. Some concluding observations



Context

Gender Employment Gap in the EU 2017 (20-64):

- Employment rate: male 78.0 %; female 66.5%
- FTE: male 75.6%; female 57.5%
- Share of part-time employment: male 8.8%; female 31.7%

Working women spend on average 22 hours per week in unpaid work, while working men spend fewer than 10 hours

Gender Pay Gap: women's gross hourly earnings were on average 16.2 % below those of men in 2016

Gender Pension Gap (40% on average in the EU)

Sources:

- Employment and Social Developments in Europe 2018, Statistical Annex, p. 176
- European Commission, 2018 Report on equality between women and men in the EU
- Eurofound (2015) Policies to improve work-life balance
- Eurostat: Gender equality



Main EU instruments

- Pregnancy Directive 92/85
- Parental Leave 2010/18
(repealed Directive 96/34)
- Prohibition of direct and indirect sex discrimination:
 - Equal pay and equal treatment at work (Art. 157 TFEU; Recast 2006/54)
 - Statutory Social Security (79/7)
 - Self-employment (2010/41)
 - Goods and service (2004/113)



Main EU instruments

- EU Charter:
 - Chapter on equality: Articles 20-26
 - Reconciliation of family and professional life: Article 33(2)



Pregnancy Directive 92/85

- Aim: encourage improvements of health and safety of:
 - Pregnant workers
 - Workers who have recently given birth or
 - Are breastfeeding (Art. 2)
- Some relevant cases: *Mayr* (C-506/06); *Danosa* (C-232/09); *CD* (C-167-12)



Pregnancy Directive 92/85

- 14 weeks maternity leave (Art. 8)
- Payment or adequate allowance (Art. 11): *McKenna* (C-191/03); *Rosselle* (C-65/14)
- Leave in relation to surrogacy: *CD* (C-167/12) and *Z.* (C-363/12)
- Period of parental leave preceding maternity leave: *TSN* (C-512/11)
- Holidays: *Merino Gómez* (C-342/01)



Protection against dismissal in relation to pregnancy

- Protection against dismissal from beginning pregnancy until end of maternity leave (Art. 10); *Brown* (C-394/96), *Melgar* (C-438-99)
- Applies also to fixed-term contracts: *Tele Danmark* (C-109/00)
- Collective redundancies: *Porras Guisado* (C-103/16)



- Art. 15 Recast Directive 2006/54
 - Return to own or equivalent job
 - Benefit from improvement in working conditions
 - *Thibault* (C-136/95); *Napoli* (C-595/12)
- Proposal withdrawn (COM 2008, 637)



Direct discrimination

- Direct discrimination is defined as: 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'
- Prohibition of less favourable treatment in relation to pregnancy and maternity (e.g. Art. 2(2)(c) Directive 2006/54)
- Case law: eg. *Dekker* (177/88); *Lewen* (C-333/97); *Melgar* (C-438/99); *Gassmayr* (C-194/08), *Parviainen* (C-471/08)
- In relation to parental leave: *Maïstrellis* (C-222/14)



Parental Leave 2010/18

- Framework Agreement
- Applies also to part-time workers, fixed-term workers and temporary agency workers
- Individual right, 4 months, unpaid
- In principle non transferable
- Case law: e.g. *Meerts* (C-116/08); *Lyreco* (C-588/12); *Praxair* (C-486/18); *Gómez-Limón* (C-537/07)
- Art. 16 Recast Directive 2006/54



Indirect discrimination

- Indirect discrimination is 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'
- Mobility: *Danfoss* (109/88)
- Comparability: *Österreichischer Gewerkschaftsbund* (C-220/02)
- Consistent and systematic manner in the light of the aim: *Leone* (C-173/13)
- In relation to parental leave: e.g. *Lewen* (C-333/97); *Rieznice* (C-7/12)



Principle of equal treatment in the Charter

- Value of parental leave as a social right. Art. 33(2)
- CJEU in *Zoe Chatzi (C-149/10)*: 'observance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognised as fundamental by Article 33(2) of the Charter of Fundamental Rights' (cons. 63).
- Application in horizontal relationships: e.g. *Bauer (C-569/16)* and *CRESCO (C-193/17)*



CJEU on protection of mothers vs rights of fathers

- Protection of motherhood after birth: *Hofmann (184/83)*
- Reconciliation and link with equality between men and women: *Hill (C-243/95)*; *Gerster (C-1/95)*
- Own rights of fathers: *Roca Álvarez (C-104/09)*
- Only derived rights of fathers: *Betriu Montull (C-5/12)*



CJEU in surrogacy cases

- MS are not required to provide maternity leave to commissioning mothers, even if she does breastfeed the baby: *C.D.* (C-167/12) and *Z.* (C-363/12)
- No direct or indirect sex discrimination. Comparable situation of commissioning father and commissioning mother



European Social Pillar Principles

9. Work-life balance

Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.



The agreement on a directive on work-life balance for parents and carers (repealing Directive 2010/18/EU)

- COM (2017) 253 final and additional measures. Agreement between the European Parliament and the Council on 6 February 2019
- Some starting points
 - Incentives for men to take up leaves
 - Leaves not only to care for children, but also ill or dependent relatives



Two new leaves

Individual rights:

- Paternity leave for fathers (or when recognised equivalent second parents) at the occasion of the birth of the child: 10 working days, paid at the level of sick leave
- Carers' leave for workers providing personal care or support to a relative or person living in the same household, in need of significant care or support due to a serious medical reason (as defined by MS): 5 working days a year. Unpaid.



Parental leave

Main changes:

- Individual right of four months, non-transferrable for at least two months
- Up to the age of 8 years at least
- Repeal of Directive 2010/18
- Payment or allowance to be defined by the MS for two months
- No change regarding time off on grounds of force majeure



Flexible working arrangements

- Flexible working arrangements for workers with children up to at least 8 years and carers
- Flexible working arrangements = adjust working patterns:
 - remote working arrangements
 - flexible working schedules or
 - a reduction of working hours



Flexible working arrangements (cont.)

- Right to request such flexible working arrangements for workers with children up to given age (8 years) and carers for caring purposes
- Employers have to consider and respond to requests and justify any refusal
- The duration might be subject to a reasonable limitation. If the duration is limited, right to return to the original working pattern at the end of the agreed period
- Request to return to original working pattern in case of change in circumstances before the end of the agreed period: the employer has to consider and respond to such request
- Period of qualification possible (not longer than 6 months)



Miscellaneous

- Employment rights: Return to own job or equivalent post and benefit from improvements
- Prohibition of discrimination on the ground of applying for or taking leave or having exercised right to flexible working arrangements
- Protection from dismissal and adverse treatment
- Burden of proof in case of presumption of dismissal
- Penalties (including e.g. fine)
- Equality bodies
- Etc.



Some concluding observations

- Step-by-step process, important role of the CJEU (e.g. pregnancy)
- Declining scale of rights
- Potential role of the Charter
- Protection of motherhood vs parenthood: divergences in case law
- Comparability issues
- No changes to Pregnancy Directive 92/85



Work-life balance directive

- Paid paternity and paid parental leave could be an incentive for fathers
- Care leave for the first time in EU legislation
- Rights to flexible work arrangements are stronger than up to now
- Consistency with equal treatment provisions (e.g. burden of proof, protection against dismissal)



Some remaining issues

- The Pregnancy Directive remains unchanged
- Combatting gender stereotyping (see e.g. art. 5 CEDAW)
- Longer leaves, in particular carers' leave
- Stronger right to flexible work arrangements, also right to extend working hours
- Legislative proposals on childcare facilities
- Addressing consequences of leaves for entitlements to (statutory) social security and (occupational) pensions, also in case of a temporary reduction working hours
- Valuing care and addressing risks related to care....



Further reading

Publications of the European network of legal experts in gender equality and non-discrimination:

<https://www.equalitylaw.eu/>



Thank you for your attention!

