

RECONCILIATION OF WORK AND FAMILY LIFE

ERA CONFERENCE ON EU GENDER EQUALITY LAW

3-4 September 2020

Marguerite Bolger L.L.B, M.Litt., SC.

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, paternity 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 Recast Gender Equality, Pregnancy and Parental Leave Directives and the new Work/Life Balance Directive. I will also examine pregnancy, maternity, paternity and parental leave have been protected (or not) 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 (then) 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.

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*.⁷ 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

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-320/01 [2003] ECR I-2041.

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.

1.2 IVF Treatment and Discrimination

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 that the worker had undergone in-vitro fertilisation treatment. 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

“[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.”

1.3 Surrogacy and Discrimination

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*⁸ the Court declined to outlaw as discriminatory on grounds of gender or disability the failure to pay the commissioning during a period of leave to care for her baby. The Court found that the commissioning father was being treated in the same way and that there was,

⁸ Case C-363/12, judgement of 18th March 2014

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.

1.4 *Employees Assisting the Pregnant Employee*

*Hakelbracht and others v WTG Retail BVBA*⁹ concerned an employee who has supported a person in a case of discrimination on grounds of gender and whether they are protected from retaliatory measures by their employer. A worker had been dismissed by her employer after she had advised her employer that their decision not to hire a pregnant woman was illegal. The Court held that the Recast Gender Equality Directive is not limited to persons who have lodged complaints, but extends to persons who have experienced retaliatory measures by an employer in responding to a complaint on grounds of gender.

The Court stated:

*“... the effectiveness of the protection required by [the Recast Gender Equality Directive] against discrimination on grounds of sex would not be assured if it did not cover the measures which an employer might take against employees having, formally or informally, defended the protected person or testified in that person’s favour.”*¹⁰

The CJEU held that employees who defend the protected person are “*ideally placed to support that person and to become aware of cases of discrimination committed by their employer*” and to deprive that worker of protection could result in him/her being discouraged from intervening in such cases.¹¹

⁹ Case C-404/18.

¹⁰ Para. 34.

¹¹ Para. 34.

1.5 *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

1.5(i) *Payment during Maternity Leave*

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.

The same approach was evident more recently in *Maria Cristina Ornano v Ministero della Giustizia and others*¹⁴. Ms Ornano is a judge in Italy who requested the Ministry for Justice in Italy for payment in respect of two periods of compulsory maternity leave that she had taken. Her employer refused. The referring Court asked the CJEU whether workers on maternity leave are entitled to full payment of their salary for compulsory maternity leave under the Pregnant Workers Directive and Recast Gender Equality Directive.

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-336/15.

The Court distinguished between the concepts of “*payment*” in Article 11(2) and (3) and “*full pay*” that is received when the employee is actually working.¹⁵ The Court stated:

*“... the legislature of the European Union wished to ensure that, during her maternity leave, the worker should receive an income of an amount at least equivalent to that of the allowance provided for by national social security legislation in the event of a break in her activities on health grounds”.*¹⁶

The Court concluded that if an employee is on maternity leave and absent from work because of that, the minimum protection in the Pregnant Workers Directive does not require that she receives full pay.¹⁷ The Court fact that the employee in question was not entitled to payment during a period of compulsory maternity leave, unlike her male colleagues who were at work, does not result in discrimination on the grounds of sex.

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*¹⁸ 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’.

¹⁵ Para. 32.

¹⁶ Para. 33.

¹⁷ Para. 34

¹⁸ Case C-147/02 [2004] ECR I-3101.

In *Lewan v. Lothar Denda*¹⁹ 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.²⁰

1.5(ii) Payment during Pregnancy Related Sick Leave

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*,²¹ 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 and 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 unlawful less favourable treatment on grounds of her pregnancy.

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.

The Court 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 by the Court in *McKenna* to sick pay during pregnancy even where the leave was a direct consequence of the pregnancy. The Court stated:

¹⁹ Case C-333/97 [1999] ECR I-7243.

²⁰ See Bruning and Plontenga, 'Parental Leave and Equal Opportunities' (1999) 9 JESP 195.

²¹ Case C-191/03 [2005] IRLR 895.

“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”.

1.5(ii) Benefits during Pregnancy related Transfer or Leave

The Court has declined to direct payment of salary and benefit to pregnant employees when they are not able to perform their normal duties of employment due to their pregnancy. *Parvianinen*,²² concerned a pregnant airline employee employed as a flight attendant who was transferred to alternative duties due to her 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.²³

The case of *Gassmayr*,²⁴ 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 had regard to its earlier decisions on payment during maternity leave including *Boyle*,²⁵ *Gillespie*²⁶ and *Alabaster*²⁷ 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.

²² 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.

²³ At paragraph 61.

²⁴ C-194/2008, judgment of the Court of Justice of the European Union, 1 July 2010. See also ‘Pregnant workers cannot claim allowances for tasks not performed’ [2010] 274 EU Focus 17-18.

²⁵ [1998] ECR I-6401

²⁶ Case C-342/93[1996] IRLR 214

²⁷ Case C-147/02 [2004] ECR I-3101

These decisions 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 Directive²⁸

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 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.²⁹ 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.³⁰

²⁸ 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.

²⁹ Eventually two member states abstained; the UK because the directive went too far, and Italy because it did not go far enough!

³⁰ 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.

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.*"³¹ This has been refined somewhat by the Court in its judgment in *Danosa*³² where it said that even if the worker had not formally informed her employer of her pregnancy, if the employer learnt of it, the employee 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

³¹ Case C-116/06 *Kiiski* [2007] ECR I-7643.

³² Case C-232/09 [2011] 2 CMLR 45.

direction or supervision of another body of that company and if, in return for those activities, she received remuneration.

In contrast the Opinion of Advocate General Sharpston in *Guisado v Bankia SA et al*³³ found that it was unclear from the facts when Ms Guisado informed her employer of her pregnancy. In those circumstances, the Advocate General was of the opinion that the Pregnant Workers Directive should be interpreted as protecting female workers during the period from the beginning of their pregnancy to the end of the maternity leave, even if they have not yet informed their employer of the pregnancy, and that this “*strikes the balance in favour of the pregnant worker*”.³⁴ In coming to this conclusion, she stated that a pregnant employee will not know that she is pregnant at the beginning of a pregnancy, and when she finds out, there will necessarily be some lapse of time before she informs her employer. The employee at that point falls within the definition of a “*pregnant worker*” pursuant to Article 2(a) of the Pregnant Workers Directive. But Article 10(1) of the Pregnant Workers Directive applies from the “*beginning of [the] pregnancy*”, which is “*a point at which [the pregnant worker] cannot possibly comply with the requirement to inform her employer of her condition*”.³⁵ The Advocate General confirmed that a pregnant worker must not delay unreasonably in informing her employer of her pregnancy following dismissal and making her claim. She observed that an employer who has unwittingly dismissed a pregnant employee, and is made aware of the error soon after the dismissal, has the opportunity to undo the damage that he has inadvertently caused, and this would be in accordance with Article 10 of the Pregnant Workers Directive.³⁶

2.2 Protecting Breastfeeding Workers

*González Castro v Mutua Umivale and others*³⁷ concerned the rights of a breastfeeding worker who performs shift work in part at night. The CJEU held that the failure to assess the risk posed by the work of an employee who is breastfeeding must be regarded as less favourable treatment of a woman and constitutes direct discrimination on grounds of sex, and that the

³³ Case C-103/16.

³⁴ Para. 37 of the Opinion of Advocate General.

³⁵ Para. 34 of Opinion of Advocate General dated 17 September 2017.

³⁶ Para. 42.

³⁷ Case C-41/17.

risk assessment must include a specific assessment taking into account the individual situation of the worker

Ms Castro was a security guard who gave birth in 2014 to a son whom she breastfed and returned to work in 2015. Since 2015, Ms Castro performed her duties in a shopping centre, on the basis of a variable rotating pattern of eight-hour shifts. Ms Castro carried out some work shifts with another security guard, and other shifts at night time alone. Her duties involved doing rounds and having to respond to emergencies, such as criminal behaviour and fire. There was no evidence that her workplace had a suitable location for breastfeeding. Ms Castro requested her employer to consider giving her an allowance for risk during breastfeeding, and applied for a medical certificate that confirmed the existence of a risk to breastfeeding posed by her work. The application was rejected and Ms Castro's employer refused her request to suspend her contract of employment and pay her an allowance for risk during breastfeeding. Ms Castro brought an action against that rejection.

The High Court in Spain requested the CJEU to interpret the meaning of "*night work*" under Article 7 of the Pregnant Workers Directive and whether it is possible that the risk assessment of Ms Castro's work provided for under the procedure for obtaining an allowance in respect of risk during breastfeeding under Articles 4 and 7 of the Pregnant Workers Directive was not properly carried out.³⁸

The CJEU, while acknowledging that the scope of the term "*night work*" in the Pregnant Workers Directive is not provided,³⁹ held that employees who do shift work, and which part of the duties are performed at night, must be regarded as a "*night worker*" within the meaning of Directive 2003/88 (the "*Working Time Directive*").⁴⁰ It followed that pregnant workers, workers who have recently given birth or are breastfeeding are covered by that provision. The Court stated that Article 7 of the Pregnant Workers Directive would be deprived of its effectiveness if a breastfeeding worker who carried out shift work was

³⁸ Under Article 7(1) of the Pregnant Workers Act workers that have recently given birth or are breastfeeding are not obliged to perform night work during the period following childbirth, and under Article 7(2), this includes the possibility of a transfer to daytime work, leave or an extension of maternity leave.

³⁹ Para. 42.

⁴⁰ Para. 46.

excluded from its scope, and acknowledged the potential risk to the employee's health and safety if a breastfeeding worker did not benefit from this protection.⁴¹

The CJEU held that the failure to assess the risk posed by the work of an employee who is breastfeeding must be regarded as less favourable treatment of a woman, and constitutes direct discrimination on grounds of sex.⁴² The CJEU confirmed that a risk assessment in this context must include a "*specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk*".⁴³ The CJEU held that in cases where a breastfeeding worker requests leave from work, and adduces factual evidence to suggest that the risk assessment did not include a individual specific assessment of her situation, it is then the duty of an employer to establish that the protective measures advanced are "*technically or objectively feasible and could reasonably be required in the situation of the worker concerned*".⁴⁴ The Court found that the employer in this case did not carry out the specific assessment required.

*Otero Ramos*⁴⁵ concerned whether Article 19(1) of the Recast Gender Equality Directive applies to a situation in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(1) of the Pregnant Workers Directive. The CJEU held that a systematic examination in all aspects of the breastfeeding employee must be carried out and failure to assess a risk posed by work duties will give rise to direct discrimination on grounds of gender.

2.3 *Pregnancy related Dismissal: Article 10*

⁴¹ Para. 51.

⁴² Para. 53.

⁴³ Para. 72.

⁴⁴ Para. 82.

⁴⁵ Case C-531/15.

Article 10 of the Pregnancy Directive 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*⁴⁶ that Article 10 enjoys direct effects and can be relied on in the courts of the Member States.

The ability of an employer to terminate an employee following on the end of her maternity leave was clarified further by the Court in *Nadeen Paquay v Soci V'Architectes Hoet + Minne SPRL*⁴⁷. Pursuant to national law in that case, the applicant was protected against dismissal from the beginning of her pregnancy until the end of her maternity leave. She was dismissed on notice a number of weeks after her return to work. The Court found her dismissal was unlawful as 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.”.

*Guisado v Bankia SA et al*⁴⁸ concerned the legality of an employee’s dismissal while she was pregnant in the context of a collective redundancy. Ms Guisado was made redundant due to her performance and was paid compensation. She was pregnant at the time but had not informed her employer and therefore was not covered by the Pregnant Workers Directive. The Spanish Courts referred the case to the CJEU on the issue of, *inter alia*, whether an employee who is pregnant can be dismissed during a collective redundancy.

⁴⁶ 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.

⁴⁷ [2007] ECR I-6

⁴⁸ Case C-103/16.

The CJEU confirmed that the Collective Redundancies Directive precludes national legislation that does not prohibit, in principle, the dismissal of a pregnant employee, an employee that has recently given birth, or is breastfeeding, as a preventative measure, but rather provides for dismissal to be declared void when it is unlawful by way of reparation only. The Court stated that the prohibition of dismissal in the Pregnant Workers Directive during the period from the beginning of pregnancy to the end of maternity leave is “*in view of the harmful effects which the risk of dismissal may have on the physical and mental state of workers who are pregnant, have recently given birth or are breastfeeding, including the serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy*”.⁴⁹ The Court found that, in view of this risk, protection by way of reparation cannot replace protection by way of prevention.⁵⁰ The Court held that dismissal is allowed in exceptional cases that are not connected with the pregnant worker’s condition, and only allowed when the employer provides “*substantiated grounds*” for the dismissal in writing to the employee,⁵¹ along with the objective criteria chosen in the collective redundancy procedure.⁵² However the Court held that Article 10 of the Collective Redundancies Directive does not preclude the dismissal of a pregnant worker because of a collective redundancy and does not require that pregnant workers and workers who have recently given birth be afforded priority status for retention and redeployment prior to dismissal.

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 weeks⁵³ during which time the Directive provides an adequate allowance shall be payable

⁴⁹ Para. 46 and confirmed again at para. 62.

⁵⁰ Para. 64

⁵¹ Article 10(2) of the Collective Redundancies Directive.

⁵² See para. 48 and 54 in this regard.

⁵³ 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

which will be at least what a person on statutory sick pay would receive under national rules.⁵⁴

The right to paid maternity leave is also recognised by Article 33(2) of the Charter of Fundamental Rights of the European Union.

The right to a lengthy period of leave on the birth of a baby is almost invariably confined to women only in spite of the fact that only a small aspect of this right 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* case⁵⁵ 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 protection of women in connection with pregnancy and maternity.⁵⁶ The judgment in *Hoffman* deemed the relationship between mother and young children to be special and worthy of protection.

This 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 reasons; to protect the woman's biological condition immediately following the birth of her child and to protect the special relationship between the mother and her newly born child.⁵⁷ Therefore maternity leave can be restricted to the mother and denied to a father without violating the principles of equal treatment in European law.

European Parliament wanted 16 weeks as 14 did not, in their opinion, represent an improvement in any of the Member States other than Portugal.

⁵⁴ Article 11(2) and (3).

⁵⁵ *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."

⁵⁶ 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).

⁵⁷ *Mahlburg Lan Mecklenborg-Vorpommern* (C-207/98) [2000] E.C.R. I-549.

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 adoptive leave to return to her job or to “*an equivalent post on terms and conditions which are no less favourable to her*”. However it seems from the decision of *Estrella Rodríguez Sánchez v Consum Sociedad Cooperativa Valenciana*⁵⁸ that there is no right to apply for reduced hours on a worker’s return from maternity leave as this is a right limited to return from parental leave only. Ms Rodríguez Sánchez worked in a supermarket on weekly rotating shifts. On her return from maternity leave she requested a reduction in her working hours and a change of work pattern to include morning shifts only. Her employer acceded to her request to reduce her hours, but refused to alter her work pattern, as it would result in a surplus of employees on the morning shift. Ms *Rodríguez Sánchez* brought an action challenging that decision, and the case was referred to the CJEU.

The CJEU noted that clause 6(1) of the Parental Leave Directive⁵⁹ encompasses situations where a worker who returns from parental leave requests to change their working hours or pattern. The Court however, distinguished maternity leave and parental leave, and that the Parental Leave Directive sets out minimum requirements for parental leave “*distinct from maternity leave*”.⁶⁰ Parental leave is to allow parents to take care of their child and may be taken until child has reached 8 years. Maternity leave, on the other hand, is intended to protect a women’s biological condition and the special relationship between her and her child over the period of pregnancy and childbirth.⁶¹ It follows, the Court held, clause 6(1) of the Parental Leave Directive cannot be interpreted as covering a situation in which a worker returns from “*maternity leave*” within the meaning of the Pregnant Workers Directive.

⁵⁸ Case C-351/14.

⁵⁹ Clause 6(1) of the Parental Leave Directive states “In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers’ and workers’ needs”.

⁶⁰ Para. 43.

⁶¹ Para. 44.

4. Paternity Leave

There is *currently* 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.

The new Directive on Life Work Balance⁶² (due to be implemented in the Member States by 2022) recognises paternity leave as an individual and non-transferable right for a parent, other than the mother of the child, to take at least 10 days around the time of the birth of the child during which time they must be paid an allowance at least at the level of sick pay by the Member State.

5. Parental Leave

4.1 The Parental Leave Directives

The first Parental Leave Directive⁶³ 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

⁶² Directive 2010/18/EU. The Council adopted the proposal for the Directive on 13th June 2019.

⁶³ Council Directive on the Framework Agreement & Parental Leave concluded by UNICE, CEP and The ETUC (Directive 96/42/EC).

requirements which did not particularly impact in many of the Member States as many already had parental leave provisions.

That Parental Leave Directive was replaced by the 2010 Directive.⁶⁴ The right to parental leave was 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.

A significant entitlement conferred by this Directive is that employees returning from parental leave to have the right to ask for changes to their working hours and/or patterns for a specified period. 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 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.

Further changes will occur when the new Directive On Work/Life Balance is transposed in March 2022. The Directive lays down minimum requirements related to paternity leave, parental leave and carers' leave, and to flexible working arrangements for workers who are parents, or carers.⁶⁵ It maintains the rights laid down in the Pregnant Workers Directive

⁶⁴ Council Directive 2010/18 EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by Unicef, Uapme, Ceep and Etuc and Repealing Directive 96/34/EC.

⁶⁵ Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2017/0085 (COD)), Brussels 24 May 2019, para. 16.

1992 but intends to adopt a broader approach to modernising the existing EU legal framework in the area of family-related leave and flexible working arrangements.

The Directive strengthens the existing right of four months parental leave, by ensuring that two of the four months are non-transferable between parents.

Employees providing personal care to a relative or person living in the same household are given the right to take five working days of carers' leave per year and will be entitled to request flexible working arrangements, similar to the existing right of parents.

5.1 Caselaw on Parental Leave

5.1(i) The Scope of the Directive

The Court of Justice has provided some helpful clarification on the scope of parental leave. For example in *Commission v Luxembourg*⁶⁶ 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*⁶⁷ 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 different nature to what the court referred to as the collective interest of the nation in relation to national service⁶⁸. Therefore the situations were not comparable and the claim that a failure to take parental leave into account in calculating

⁶⁶ (C-519/03), [2005] E.C.R. I-03067.

⁶⁷ (C-220/02), [2004] E.C.R. I-5907

⁶⁸ At paragraph 64

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.⁶⁹ 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*⁷⁰ 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.

5.1(i) Parental Leave and calculating financial entitlements

The treatment of parental leave in calculating the value of a termination package was considered by the Court of Justice in the case of *Meerts v Proost NV*.⁷¹ 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 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

⁶⁹ 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.

⁷⁰ (C-149/10), [2010] E.C.R. I- 08489

⁷¹ (C 116/08), [2009] E.C.R. I-10093, [2009] All E.R. (D) 259.

found included the right to notice.⁷² 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”.⁷³

The need to avoid an employee on parental leave suffering financial detriment can also be seen in the decision of *Lyreco v Rogiers*⁷⁴ 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 further confirmation by the Court of the protection to be afforded an employee on parental leave is apparent in the Latvian decision of *Nadežda Riežniece v Zemkopības ministrija (Republic of Latvia), Lauku atbalsta dienests*⁷⁵. 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 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.

⁷² 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.

⁷³ At paragraph 43.

⁷⁴ C-588/12

⁷⁵ (C-7/12), Judgment of the Court (Fourth Chamber) 20 June 2013.

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.

More recently the Court considered how a payment to compensate dismissal should be calculated for a worker who had reduced her hours by taking parental leave. *RE v Praxair MRC SAS*⁷⁶ concerned whether the Parental Leave Directive permits an employee's compensation for dismissal or redeployment leave allowance to be based on the salary that the employee is on when taking part-time parental leave. The CJEU held that the calculation of compensation for dismissal and redeployment allowance paid to a full-time employee on part-time parental leave at the time of her dismissal must be calculated on the basis of the employee's full-time salary. This is to ensure that employees are not discouraged from taking parental leave, and to remove any benefit to employers when considering whether to dismiss employees on parental leave rather than other employees. Clause 2.6 of the Parental Leave Directive provides that rights acquired, or in the process of being acquired, are to be maintained until the end of the period of parental leave. The CJEU held that this clause cannot be "*interpreted restrictively*"⁷⁷ and that the term "*rights acquired or in the process of being acquired*" covers all rights and benefits "*whether in cash or in kind, derived directly or indirectly from the employment relationship*".⁷⁸

The CJEU also held that using the employee's reduced salary to calculate dismissal payments and redeployment allowance is potentially indirect discrimination under Article 157 TFEU. This is because it disadvantages more women than men due to the fact that more women than men choose to take part-time parental leave.⁷⁹

⁷⁶ Case C-486/18; 8 May 2019.

⁷⁷ Para. 49.

⁷⁸ Para. 50.

⁷⁹ Para. 66.

5.1(iii) Parental Leave and Probation

*H v Land Berlin*⁸⁰ related to the right of an probationary employee on parental leave. Ms H was a German civil servant who was promoted to a new post on probation. Shortly thereafter she went on pregnancy related sick leave, then maternity leave, followed by parental leave. She failed to successfully complete her statutory two year probation due to the fact that she had not actually been at work and she was therefore reinstated to her former junior post. The CJEU confirmed that “with a view to enabling new parents to interrupt their professional activities to devote themselves to their family responsibilities”,⁸¹ clause 5 of the Parental Leave Directive ensures that new parents will return to the same or similar job at that end of the leave period. The maintenance of rights acquired, or in the process of being acquired at the start of the parental leave, must be guaranteed even if parental leave exceeds the 4-month time limit, referred to in clause 2(2).⁸² The Court confirmed that clause 5 of the Parental Leave Directive cannot be interpreted restrictively,⁸³ and the fact that Ms H was on sick leave from the moment she took the new position does not affect the fact that the new post had become hers.⁸⁴ The CJEU found that, as a consequence of taking parental leave, Ms H was not given the opportunity to demonstrate her suitability to result in her being permanently promoted.⁸⁵ This would likely dissuade a worker from exercising the right to parental leave and undermine the effectiveness of the Parental Leave Directive.⁸⁶ Echoing the comments of the Advocate General in his Opinion,⁸⁷ the Court stated that the Parental Leave Directive does not authorise derogations from the guaranteed rights.⁸⁸

The CJEU held that clause 5(1) requires an employee returning from parental leave to return to a similar job, which included “at the very least”, the same degree of status, level of remuneration and management tasks.⁸⁹ Finally, the Court held that at the end of Ms H’s parental leave, she should receive an actual probation period with the same duration that she would have received had she not taken parental leave.⁹⁰ The Court held that a requirement that Ms H would be assigned a similar post conditional upon a new selection

⁸⁰ Case C-174-16.

⁸¹ Para. 36.

⁸² Para. 39.

⁸³ Para. 44.

⁸⁴ Para. 45.

⁸⁵ Para. 53.

⁸⁶ Para. 54.

⁸⁷ Opinion of Advocate General Mengozzi dated 26 April 2017, para. 30.

⁸⁸ Para. 59.

⁸⁹ Para. 76.

⁹⁰ Para. 78.

procedure beforehand cannot be required, and this “*would render nugatory the right of a worker*”.⁹¹

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 also been criticised for failing to restructure gender relationships in spite of the father’s right to share equally in the burden of family life.⁹² 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.⁹³ The recognition of the right to paternity leave in the new Directive is welcome but is very limited in time and payment and is therefore unlikely to be of much significance in addressing the need for the burdens of family life to be shared more equally between men and women.

Conclusions

It is a fundamental requirement of any legal system which aspires to ensure both equality of opportunity and equality of outcome that such worker parents must be protected and should

⁹¹ Para. 79.

⁹² 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

⁹³ European Opinion Research Group, *European Attitudes to Parental Leave*, (Brussels: European Opinion Research Group, 2004).

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.