Reconciliation of family life and work

ERA
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NEW DIRECTIVE (EU) 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON WORK-LIFE BALANCE FOR PARENTS AND CARERS

- Legal basis in Article 153.1.i of the Treaty on the Functioning of the European Union (TFEU) - Equality of men and women with regard to labour market opportunities and treatment at work.
- Reference to Article 3 of the Treaty on European Union (TEU) and Article 23 of the Charter of Fundamental Rights of the European Union (CFREU).
- Art. 33.2 CFREU: "2. *To reconcile family and professional life, everyone has the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and parental leave following the birth or adoption of a child.*
- Gender equality, women's participation in the labour market, equal sharing of caring responsibilities, closing of the gender gaps in earnings and pay
- Attention to demographic changes and the ageing population. Need for informal care expected.

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- Reference to the European Pillar of Social Rights (Gothenburg, 2017).
- Working time flexibility - to some extent encouraged by the Working Time Directive 2003/88/EC This has an impact on women's employment. Women with children spend less time in paid employment. Moreover, it is clear that having a sick or dependent relative has a negative impact on women's employment.
- Lack of incentives for men to take on family responsibilities on an equal share. The absence of specific rights for men in many laws contributes to this situation. This reinforces stereotypes and gender differences.
- There is evidence that leave and flexible working arrangements make it easier for women to spend sufficient time in paid employment. But this statement certainly needs to be nuanced.

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- It is necessary that there is an equal uptake of rights between men and women.
- But there is also a need for quality, affordable and reliable childcare and care services.
- It is also essential to have high quality disaggregated statistics.
- Problem with the lack of an agreement between the social partners. Difference with Directives 96/34/EC and 2010/18/EU, in which one of the routes provided for in Article 154 of the TFEU was followed. Surely this is why these were soft rules which have allowed for enormous differences in this area between the Member States.
- According to the "recitals" of the Directive, in this case, there was no agreement between the social partners to enter into negotiations.
- This has undoubtedly allowed for a slightly more ambitious Directive.
- Reference to the concept of worker in the EU, by reference to the MS, but taking into account the case law of the CJEU. Directive (EU) 2019/1152 on transparent and predictable working conditions.

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NEW DIRECTIVE (EU) 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON WORK-LIFE BALANCE FOR PARENTS AND CARERS

- A great deal of reference is made to the MS: as regards the definition of family and marital status, and the concepts of "parent", "mother" and "father". Is there really no room for autonomous and EU-specific concepts? It is difficult to accept.
- Reference to the problems of SMEs: avoid imposing administrative, financial or legal constraints.
- Idea regarding the nomenclature of conciliation institutions in the MS: it should not be changed and adapted to the Directive, but it is necessary to take them into account when assessing the degree of compliance with the Directive. Interesting, but may give rise to some controversy.
- Basic: Recital 46: "*allowing one parent to transfer to the other parent more than two months out of the four months of parental leave provided for in this Directive does not constitute a provision that is more favourable for the worker than the minimum provisions laid down in this Directive*". There is a need to combat gender stereotypes, which can only be acceptable to a certain extent.

MINIMUM CONTENT OF THE DIRECTIVE

- Recognition of three types of leave, only the first of which was recognised in the two previous Directives on parental leave:
  - Parental leave.
  - Paternity leave.
  - Carers' leave.
- Recognition of flexible working arrangements for parents or carers.
- Recognition of time off due to force majeure (also recognised in the previous Directives)

SCOPE OF APPLICATION

- The concept of the worker: between national traditions and the case law of the EU Court of Justice - an unstable relationship Some recent examples: *Correia Moreira* ruling (2019), *Yodel* order (2020).
- Chapter on definitions in Article 2: "parental leave" (on the grounds of birth or adoption), "carers' leave", "carer", "relative" (political family members are apparently excluded - should their inclusion be considered as an improvement in domestic legislations?) and flexible "working arrangements" (including flexible working schedules, reduced working hours or remote working arrangements).
- Explicit admission of the application of the principle of proportionality (Art. 2.2., second paragraph)

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PATERNITY LEAVE

- It is referred to in Directive 2006/54/EC, but in non-mandatory terms, albeit incorporating some mandatory rules:
- Art. 16.- ***Paternity and adoption leave*** *"This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence."*
- Art. 4 of Directive 2019/1158
  - Beneficiary: the parent or, where recognised by national law, the "second parent".
  - Minimum leave of ten working days.
  - On the occasion of the birth of the child (difference between "on the occasion of..." and "because of...". The long trail of the *Hofmann* case (1983)
  - The MS will decide whether part of the leave can be taken before birth and whether it can be taken with flexible formulas.
  - It may not be made dependent on previous periods of work or have a certain length of service (unlike parental leave)
  - It is granted regardless of the marital or family status of the working person.

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PARENTAL LEAVE

- This was the right provided for in Directives 96/34/EC and 2010/18/EU. Similar regulation, with few novelties.
- Four months before the child reaches a certain age, up to the age of eight. Each parent must enjoy his or her right effectively and on an equal basis.
- Two months' non-transferable leave
- Establishment by the MS of a reasonable period of notice, taking into account the needs of both parties.
- Possibility of making the right subject to a requirement of period of work qualification or length of service, which shall not exceed one year. Problem of the successive fixed-term contracts. Reference to Directive 1999/70/EC, in particular clause 5 of the Framework Agreement.
- Possibility of postponement (not refusal) by an employer for reasonable reasons arising from the proper functioning of the company, with written justification.
- Flexible forms of enjoyment (confusion with the right under Article 9, which is bound to raise problems and some questions for a preliminary ruling). This is a possibility, not a requirement for MS. In this case, companies must study the requests taking into account their own needs and those of the workers, but in this case there is a possibility of refusal, which must be in writing and within a reasonable period of time.
- In addition, before the postponement of the full-time parental leave, the company must offer, as far as possible, a flexible form of enjoyment.
- Mandate to the MS to study specific needs of adoptive parents, parents wth a disability or parents with children with a disability or long-term illness.

CARERS' LEAVE

- Five working days per year. The MS must specify its scope and conditions, including appropriate substantiation. Permits may be distributed on the basis of one-year periods, or per person in need of support, or per case.

- In other words, it is an institution that is not very well defined, as the first experience of an issue of growing importance, that of family care, in a world where ageing is a very important social issue.

TIME OFF FROM WORK DUE TO FORCE MAJEURE

- Hardly anything new, apart from the wording, in relation to Directive 2010/18/EU.
- These absences have not yet given rise to any judicial doctrine on the part of the CJEU. They refer to urgent family reasons that result in illness or accident that make the immediate attendance of the worker indispensable. This feature, as will be seen below, has been of some interest in the *Fetico* case (2019).

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PAYMENT OR ALLOWANCE

- This is one of the great new features of the 2019 Directive. In the 2009 Framework Agreement that led to the 2010 Directive it was just an admonition. That was the wording of the second subparagraph of clause 5(5):
- *"All matters regarding income in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law, collective agreements and/or practice, taking into account the role of income – among other factors – in the take-up of parental leave".*
- Under the new Directive, payment or allowance must be guaranteed during paternity leave and during the non-transferable period of parental leave. This mandate creates a compelling need to identify which particular domestic institution will take the forms of which leave, in particular where they are taken in flexible forms and can be confused with the flexible working arrangements in Article 12.

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PAYMENT OR ALLOWANCE

- Therefore, carers' leave does not have to be paid, nor does the time off from work due to force majeure. It appears that there is room for more extensive parental leave in which additional periods are not paid, or are paid at a lower rate than the minimum periods guaranteed by the Directive.
- *According to* Article 8.2, in the case of paternity leave, such payment or allowance "shall *guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the workers' activities on the grounds connected with the worker's state of health, subject to any ceiling laid down by national law. Member States may make the right to a payment or allowance subject to periods of previous Employment, which shall not exceed six months immediately prior to the expected date of birth of the child*". This is the same substantive rule as Directive 92/85/EEC provides for maternity leave (Article 11(3)). Although in Article 11(4) the maximum period required is twelve months immediately prior to the expected date of birth.
- As regards parental leave, the minimum threshold is more flexible. It only says, by way of indication, that the Member States shall define payment or allowabce "in such a *way as to facilitate the take-up of parental leave by both parents*". This calls for the need to break deep-rooted social habits of feminization of such leave.

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FLEXIBLE WORKING ARRANGEMENTS

- This is undoubtedly one of the most interesting new features of the Directive. It is a new perspective of the rights to conciliation, understood as rights of presence and not as rights of absence. As such a right has not been created until now, the Parental Leave Directive does not cover a request for a change from variable to fixed working hours on the occasion of part-time parental leave (Case C-366/18 *Ortiz Mesonero,* judgment of 18 September 2020).
- It is aimed at working people with children up to eight years of age, as well as carers of people in need of assistance.
- Article 9 of the Directive allows these arranegments to be subject to a reasonable limitation.
- They do not constitute pure subjective rights. The company must study and respond to requests within a reasonable period of time, taking into account its own needs and those of the workers. They must also justify both refusals and postponements.
- A right of return to the orignal working pattern is recognised at the end of the agreed period. There is also a right to request an early return by the worker where justified on teh basis of a change in circumstances, a request which companies must consider in the light of their own needs and those of the workers.
- In addition, the MS may make these rights subject to prior periods of work qualification or length of service, which shall not exceed six months, with the safeguard of successive fixed-term contracts, under the terms of the Framework Agreement on fixed-term work.

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PROTECTION OF RIGHTS ACQUIRED AND IN THE PROCESS OF BEING ACQUIRED

- Art. 10.- This refers to all leaves of the Directive as well as time off from work due to force majeure. Both - rights acquired or in the process of being acquired - shall be maintained until the end of the leave or time off. Same as expressed in clause 5.2 of Directive 2010/18/EU, Art. 10.1 adds *in fine* that "at the *end of such leave or time off from work, those rights, including any changes arising from national legislation, collective agreements or practice shall apply"*.
- As regards leave accrued prior to part-time parental leave, Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols,* judgment of 22 April 2010
- This rule is entirely mandatory, as the CJEU has held (Case C-116/08 *Meerts,* judgment of 22 October 2009 and Case C-174/2016 *H. and Land Berlin, judgment of* 9 September 2017). This is a principle of social law which is of particular importance.

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PROTECTION OF RIGHTS ACQUIRED AND IN THE PROCESS OF BEING ACQUIRED

- A reduced compensation payment for dismissal in the event of part-time parental leave - or, hypotetically in the event of paternity or carer's leave - is not possible. Case *Meerts: "That body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the basis of the salary relating to his employment contract."*
- The same doctrine in Case C-588/12, *Lyreco Belgium,* judgment of 27 February 2014.
- More recently, in C-486/18 *Praxair* of 8 May 2019, which extends the same doctrine to the calculation of an allowance for leave of absence resulting from collective redundancy: "*Clause 2(6) of the Framework Agreement on Parental Leave must be interpreted as precluding, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker being determined at least in part on the basis of the reduced salary he receives when the dismissal takes place*'.

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PROTECTION OF RIGHTS ACQUIRED AND IN THE PROCESS OF BEING ACQUIRED

- In addition, as expressed *in fine in* Article 10(2), persons who terminate their parental leave are entitled to benefit from any improvement in working conditions to which they would have been entitled if they had not taken such leave.
- There is no specific case law on this matter, but it is a rule similar to that introduced by judicial doctrine regarding maternity leave. In this regard, Case C-147/02 *Alabaster,* judgment of 30 March 2004, using the principle of equal pay under Article 157 TFEU, states that
- *"Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted as as requiring that, in so far as the pay received by the worker during her maternity leave is determined at least in part on the basis of the pay she earned before her maternity leave began, any pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave must be included in the elements of pay taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is back-dated to the period covered by the reference pay'.*

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REINSTATEMENT AT THE END OF THE LEAVE

- On this issue there has been a small but very significant difference between Directive 2010/18/EU and Directive (EU) 2019/1158.
- Clause 5.1 of the agreement to the 2010 directive states: "*at the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship*".
- Article 10(2) of the new Directive *states*: "*Member States shall ensure that, at the end of leave provided for in Articles 4, 5 and 6, workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled had they not taken the leave.*
- The right therefore concerns paternity leave, parental leave and carers' leave .
- But the right is no longer to occupy the same job, unless it is not possible, in which case an equivalent or similar post is suitable, but to the same or an equivalent post.

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REINSTATEMENT AT THE END OF LEAVE

- In this respect, it is surely necessary to qualify the doctrine of the *H and Land Berlin* case, which required verification that a return to the position previously held was impossible.
- The doctrine of that case must be upheld insofar as it is not sufficient for the person concerned to be offered an inferior position, even if he or she had previously held that position.
- In addition, in view of the circumstances, a material breach of the duty of reinstatement may be established. For example, if it is found that the readmission post offered was due to be abolished (Case C-7/12 *Riežniece,* judgment of 20 June 2013).
- Moreover, it is not possible to make re-entry conditional upon holding a new selection procedure, as this would render nugatory the right of a worker, as it would be delayed and become conditional and insecure (*H and Land Berlin*).
- The doctrine of Case *H and Land Berlin* is very important because it states that this right is not made dependent on the leave being longer than that provided for in the Directive. In that case, the parental leave had been extended for just under three years. This affects patterns of employment relationships that reinforce gender stereotypes.

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DISCRIMINATION

- Article 11: "*Member States shall take the necessary measures to prohibit less favourable treatment of workers on grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or time off from work provided for in Article 7, or that they have exercised the rights provided for in Article 9*".
- Is there a new cause of discrimination, or is it sex-plus discrimination? However, the prohibition of less favourable treatment already existed in clause 5.4 of the 2009 Framework Agreement.
- Close relationship between Directive 2006/54/EC and Directive (EU) 2019/1158. As expressed in its recitals. Also with Directive 92/85/EEC.

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PROTECTION AGAINST DISMISSAL

- It is in art. 33.2 of the CFREU.
- On this issue, great progress has been made in relation to Directive 2010/18/EU. Like its predecessor, the 2019 Directive does not cover either cases of time off due to force majeure. It does cover paternity, parental and carers' leave, as well as time off from work in the area of flexible working arrangements.
- Jurisprudence in relation to previous versions of the directive is relatively protective, although the normative threshold of protection was lower than that of Article 10 of the Maternity Directive
- Possibly, the doctrine that has emerged around dismissal in relation to maternity is now much more guiding.
- E.g. Case C-103/16, *Porras Guisado,* judgment of 22 February 2018:
- *"...Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited.*

  Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.

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PROTECTION AGAINST DISMISSAL

- However, if the dismissal is unrelated to the leave (not motivated by its request or enjoyment) it is not covered by the Directive. Subject to:
- Performance appraisal can be a legitimate criterion for including someone on parental leave in the group of people affected by a dismissal. However, it could be contrary to the EU rule that the person exercising the right should be placed at a disadvantage. For example, because the period assessed corresponds precisely to the take-up of parental leave (*Riežniece* case).
- In other words, both *Porras Guisado* and *Riezniece* fall within the scope of the selection criteria. Some of this doctrine can be sensed in Article 10.2 of the Directive:
- " *Member States shall ensure that, at the end of leave provided for in Articles 4, 5 and 6, workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled had they not taken the leave."*

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REVERSAL OF THE BURDEN OF PROOF

- Art. 12.3: " *Member States shall take the measures necessary to ensure that where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6 establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it shall be for the employer to prove that the dismissal was based on other grounds".*
- In fact, this rule was already incorporated, as far as parental leave is concerned, in Article 19(3)(a) of Directive 2006/54/EC.
- Topic from Directive 97/80/EC of 15 December 1997.

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HORIZONTAL PROVISIONS

- Articles 13 ff. establish rules that strongly evoke those of Articles 19 ff. of Directive 2006/54/EC. They are summarised below:
  - Effective, proportionate and dissuasive sanctions. Not necessarily punitive damages (Case C-407/14, *Arjona Camacho,* judgment of 17 December 2015, in relation to Article 18 of Directive 2006/54/EC.
  - Protection against adverse treatment or consequences Case C-185/97, *Coote,* judgment of 22 September 1998.
  - Equality bodies. The same as those in Directive 2006/54/EC.

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LEAVE OVERLAP

- Maternity and parental leave are qualitatively different, even in relation to the part of it that can be transferred to the other parent (Case C-5/12 *Betriu Montull*, judgment of 19 September 2013). Consequently, a woman returning from maternity leave and requesting a working time adjustment on her return cannot be covered by the parental leave rules (Case C-351/14 *Rodríguez Sánchez, judgment of* 16 June 2016).
- A period of work between parental leave and a new period of maternity leave is not required for payment (Cases C-512/11 and C-513/11, *Terveys- ja sosiaalialan neuvottelujärjestö,* judgment of 13 February 2014)
- During parental leave, no entitlement to annual leave is accrued (Case C-12/17, *Decu,* judgment of 4 October 2018).
- Time off from work due to force majeure do not result in alternative weekend rest days or alternative holiday days (Case C-588/18, *Federation of Independent Trade Workers,* judgment of 4 June 2020).

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MEN AND WOMEN ARE IN A COMPARABLE POSITION TO RAISE CHILDREN

- Reference to Case C-104/09, *Roca Álvarez,* judgment of 30 September 2010
- Case C-222/14, *Maïstrellis,* judgment of 16 July 2015 " *The provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, must be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child'.*
- The very long shadow of Case 184/83 *Hofmann*, judgment of 12 July 1984
- The possible immediate solution: Case C-463/19, *Syndicat CFTF du personnel de la Caisse primaire d'assurance maladie de la Moselle,* Advocate General's Opinion of 9 July 2020
- The limits of maternity leave and child-raising leave need to be rethought and redefined.

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