

ACADEMY OF EUROPEAN LAW

PROTECTIVE MEASURES FOR PREGNANT WORKERS IN THE WORKPLACE

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Introduction

While it has been twenty years since the Court of Justice of the European Union commenced development of its jurisprudence on the rights of pregnant workers, the area has not yet reached stagnation. The Court has delivered significant and far-reaching judgments in this area in recent years. In addition, proposed legislative changes could potentially extend the rights of pregnant workers. However, the Court continues to distinguish between the rights of pregnant workers who are actually in the workplace in their existing positions and those whose pregnancy has forced them out of the workplace or to alternative duties. This paper will also consider the differing approach of the Court to less favourable treatment of pregnant employees in relation to their conditions of employment and in relation to pay. The issue of protective measures for pregnant workers in the workplace is a contemporary and live issue, in particular as the number of women in employment across EU continues to increase.¹

This paper will provide an overview of the EU legislation and development of the case law in the area, placing particular emphasis on recent case law and possible future issues. It will also make mention of the proposed Directive to amend the Pregnancy Directive and its reform of the existing legislative framework and the new Directive for self-employed workers.

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¹ The number of women in employment across the EU has increased from 51.1% in 1997 58.3% in 2007. See European Commission, *Report on Equality between Women and Men 2009*, (2009) at p. 8.

I am conscious in speaking to you, as national Judges, that as the relevant EU legislation are Directives, you will, for the most part, be applying your domestic legislation or regulations implementing the Directives. However, in doing so, we are, of course, obliged to interpret such implementing domestic law, so far as possible in the light of the wording and purpose of the Directive concerned so as to achieve its result.²

Theoretical Framework Pregnancy and Equality

The Court has had a significant influence in the development of anti-discrimination in the sphere of pregnancy. In *Dekker*, it recognised that pregnancy required a specific approach as it uniquely affected women and could not be compared with the circumstances of a male comparator.³ This overcame the narrow approach of the formal equality approach which is based on strict identical treatment and unable to take account of specific needs and requirements of pregnant employees. It also established that less favourable treatment on grounds of pregnancy was direct discrimination *per se* without the need to provide a comparator as only females can become pregnant. In so doing, the Court utilised the substantive equality notion which was expressly recognised in the later decision of the Court in *Thibault* wherein it stated that “*the result pursued by the Directive is substantive, not formal, equality.*”⁴

² See inter alia , Cases C-397/01 to C-403/01 *Pfeiffer and Ors* [2004] ECR 8835.

³ *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941.

⁴ C-136/95[1998] IRLR 399 at paragraph 26. See also *Mahlburg* C-207/98 [2000] IRLR 276, paragraph 26 and most recently *Herrero* C-294/04 [2006] IRLR 296, paragraph 37.

Legislation

Recast Equal Treatment Directive

The Recast Equal Treatment Directive⁵ was introduced as part of the European Commission's better legislation programme. The gender equality Directives⁶ were recast and consolidated into one single Directive thereby simplifying EU law relating to equal treatment between men and women. The recast concept has been described as "*an opportunity to reshape existing law*"⁷ and its use enabled an amendment and codification of the existing equality Directives into a single legal text. Although the option of including the Pregnancy Directive,⁸ in so far as it related to employment rights (as opposed to health and safety), was put forward by the Commission, ultimately it was not included in the recast Directive.

The Recast Directive contains a number of provisions which specifically concern the rights of pregnant workers. Enacting the principle developed by the Court of Justice,⁹ Article 2(2) (c) of the Directive provides that less favourable treatment on the grounds of pregnancy is a form of discrimination prohibited by the Directive:

“Discrimination shall include . . . any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.”

Recital 23 of the Directive states that such discrimination is direct discrimination. Although this Recital is non-binding, as it reflects the case law of the Court, it must be regarded as having persuasive value. Costello and Davies comment that the:

⁵ Directive 2006/54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

⁶ Equal Treatment Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions as amended by Directive 2002/73/EC, Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating men to the application of the principle of equal pay for and women and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

⁷ Burrows and Robison, “An Assessment of the Recast of Community Equality Laws” (2007) 13(2) ELJ 186 at p. 187.

⁸ Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Directive 92/85/EEC.

⁹ *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941.

“Classification as ‘direct’ appears consonant with an acknowledgement of the seriousness and prevalence of pregnancy discrimination and the fact that most women will become pregnant at some point during their working lives.”¹⁰

It also reflects the reality that to treat a woman less favourably because of her pregnancy was to discriminate against her as a woman and means that such discrimination cannot be justified and issues such as disruption to an employer’s business or costs are entirely irrelevant.

Recital 24 of the Directive acknowledges that it is without prejudice to the provisions of the Pregnancy Directive. Therefore, cases involving the less favourable treatment of a pregnant employee will normally require the Court to examine not only the provisions of the Recast Directive, but also the relevant Articles of the Pregnancy Directive. The Court of Justice has taken a more restricted approach to the issue of pay during pregnancy in circumstances where a woman has left the workplace or has been transferred to alternative duties due to health and safety concerns.

Significantly, the Recast Directive (as had the 2002 Amending Directive) expressly includes ‘pay’ within the definition of working conditions¹¹ and consolidates the Equal Pay Directive and Equal Treatment Directive. Therefore, the distinction between equal treatment and pay may diminish. Burrows and Robison argue that the bringing together of Article 157 TFEU (ex 141) , the Equal Pay Directive and the Equal Treatment Directive may lead to discrimination in pay being assessed in the same way as less favourable treatment during pregnancy and maternity.¹² The issue perhaps will be considered in the future by the Court of Justice.

¹⁰ Costello and Davies, ‘The Case Law of the Court of Justice in the Field of Sex Equality Since 2000’ [2006] 43 CMLR 1567 at 1603.

¹¹ Article 1(c) of the Recast Directive. The 2002 Amending Directive 2002/73/EC amended the Equal Treatment Directive to include ‘pay’ within the meaning of working conditions.

¹² Burrows and Robison, “An Assessment of the Recast of Community Equality Laws” (2007) 13(2) ELJ 186 at p. 198-9.

Pregnancy Directive

The Pregnancy Directive has a different Treaty basis to many of the Directives included in the Recast Directive.¹³ This appears to be the primary reason it was not included in the Recast Directive although it is expressly referred to therein. This omission has been criticised as a missed opportunity to clarify and simplify the interplay between the provisions of Article 141,¹⁴ the Equal Pay Directive and the Equal Treatment Directive, and the treatment of pregnant workers and those on maternity leave, particularly in relation to illness and sick pay.¹⁵ Similarly, it has been suggested that the exclusion of the Pregnancy Directive entrenches the idea that pregnancy and maternity provisions constitute exceptions that should be addressed separately from the issue of gender equality.¹⁶

However, it is undoubted that the primary purpose of the Pregnancy Directive is to encourage improvements in the health and safety of pregnant workers, workers who have recently given birth and workers who are breastfeeding.¹⁷ It provides for two types of substantive protection for such employees: first physical health and safety protections and secondly protection of their employment rights. Nevertheless, as will be seen from the case law, such protection, and in particular, that in Article 10 against dismissal is based upon the health and safety objective. It recognises that special provision and protection has to be made to such workers to ensure equality of outcome or results.

The Directive provides for a number of specific leave periods and other protective measures uniquely designed for pregnant employees. Article 5(3) obliges employers to grant a pregnant worker a leave of absence to protect her health and safety if moving her to an alternative position is not feasible. Article 9 provides that pregnant employees are entitled to

¹³ Article 118a(1) Treaty establishing the European Economic Community by as amended by Article G(33) TEU “ Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.”

¹⁴ Now Article 157 TFEU.

¹⁵ Burrows and Robison, “An Assessment of the Recast of Community Equality Laws” (2007) 13(2) ELJ 186 at 194/5.

¹⁶ Masselot, ‘The State of Gender Equality Law in the European Union’ (2007) 13(2) ELJ 152 at 162.

¹⁷ Article 1

time off, without loss of pay, in order to attend ante natal examinations if such examinations have to take place during working hours. The Directive also provides for the right to maternity leave, which will not be considered in any detail as it is beyond the scope of this paper.

Article 10 provides for probably the most far-reaching of rights: employees cannot be dismissed from the beginning of their pregnancy to the end of their maternity leave apart from for exceptional cases not connected with their pregnancy. Employers are required to provide such dismissed employees with duly substantiated grounds in writing for their dismissal.

Article 11 includes the provision that a pregnant worker has the right to have her working conditions adapted so that they do not present a health and safety risk to her or her unborn child. If the adaptation of working conditions is not possible, then an employer is required to place the employee on protective leave from her employment. Protective leave must also be provided to pregnant employees who would be exposed to prohibited substances or who are required to work night shifts unless it is possible to offer her alternative duties or have her working conditions altered or her working hours altered to day time hours.¹⁸

Article 11 provides for minimum payments in the above situations.

Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union, which is now attached to the Treaty of the Function of the European Union as a consequence of the Lisbon Treaty, has the same legal value as all preceding and current Treaties.¹⁹ The Charter is now legally binding as the Lisbon Treaty entered force on 1 December 2009.²⁰

¹⁸ Article 5(4) of the Pregnancy Directive.

¹⁹ Article 6(1) of the TEU.

²⁰ For a detailed consideration of the Charter of Fundamental Rights of the EU see Craig and de Búrca, *EU Law: Text, Cases and Materials*. (4th ed, 2008, Oxford University Press), pp. 412-8.

However, the Charter does not create new freestanding rights as Article 6 of the Treaty on the European Union requires the Charter to be interpreted in accordance with Title VII of the Charter. Title VII both limits its addressees and the scope and applicability of the Charter. In summary the Charter primarily provides assistance to the interpretation of EU legislation and the implementing and transposing measures of Member States.²¹

Article 33(2) of the Charter provides a right to protection from dismissal for a reason connected with maternity and a right to paid maternity leave. This surpasses the current Pregnancy Directive and is in line with recently passed amendments by the European Parliament to the Proposed Directive to amend the Pregnancy Directive.

The Charter is to be interpreted with due regard to the explanations prepared and updated by the Praesidium of the Convention which drafted the charter.²² The Praesidium asserts that maternity within the meaning of Article 33(2) covers the period from conception to weaning. This explanation would appear to suggest that the Charter goes beyond the terms of the Pregnancy Directive and indeed the Court case law. One academic commentator anticipates “entertaining judicial dicta” on the interpretation to be given to weaning.²³ Article 21(1) of the Charter and its legal status under Article 6(1) TEU were expressly referred to by the Court in a recent decision in support of the existence of a principle of non-discrimination on grounds of age as a general principle of European Union law.²⁴ Henceforth, the Charter may play some role in determining the rights of pregnant workers. However, by reason of the extent to which its legal role is circumscribed it may be a limited one.

²¹ See Articles 51 and 52 of the Charter of Fundamental Rights of the European Union (2000/C 364/01). See also Koukoulis-Spiliotopoulos, ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’, [2008] 1 European Gender Equality Law Review 15 and Ellis, ‘The Impact of the Lisbon Treaty on Gender Equality’ [2010] 1 European Gender Equality Law Review 7.

²² See Article 52(7) and 5th recital

²³ Evelyn Ellis “The Impact of the Lisbon Treaty on Gender Equality” EGELR – no.1/2010

²⁴ *Kucukdeveci v. Swedex GmbH* Case C-555/07, [2010] IRLR 346 at paragraph 22 of the judgment of the ECJ.

Case Law

Pregnancy and less favourable treatment: Setting the Scene

In 1990, in *Dekker*, the Court created a *prima facie* strong level of protection for pregnant employees declaring that less favourable treatment on the grounds of pregnancy was prohibited as a form of direct discrimination on grounds of sex.

The basis for this decision was the fact that only women can be refused employment on grounds of pregnancy. The other noteworthy aspect of this decision was the rejection, in absolute terms, by the Court of the arguments advanced by the employer that it was justified in its non employment of the claimant as it would suffer financial loss for the duration of her maternity leave.²⁵ A later decision applied this reasoning to the duration of a woman's pregnancy.²⁶ The financial interests of the employer were trumped by the protections afforded to pregnant employees. The decision in *Dekker* was later extended to dismissals on grounds of pregnancy²⁷ and to discrimination against a pregnant employee in respect of the terms and conditions of her employment which were also classified as direct discrimination.²⁸ The Court has also made it clear that health and safety considerations cannot be taken into account in a way that is detrimental to pregnant employees.²⁹

The case of *Webb v. EMO (Air Cargo) Ltd*,³⁰ concerned the dismissal of a woman on account of her pregnancy, as she would have been on maternity leave at the same time as the employee for whom she had been employed to replace. The decision of the Court appeared open to interpretation that the termination of a fixed term contract on the grounds of

²⁵ *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941 at paragraph 12.

²⁶ *Mahlburg* C-207/98 [2000] IRLR 276 at paragraph 27.

²⁷ *Handels-og Kontorfunktionaerernes Forbund i Danmark (acting for Hoj Pederson) v. Foellessforeningen For Danmarks Brugsforeninger* Case C-66/96 [1999] IRLR 55.

²⁸ *Thibault* C-136/95 [1998] IRLR 399.

²⁹ *Mahlburg* C-207/98 [2000] IRLR 276 at paragraph 25.

³⁰ Case C-32/93 [1994] IRLR 482.

pregnancy could be justified as it emphasised in its decision that Ms Webb was employed for an indefinite period and then stated:

“Dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract”.³¹

Concern was expressed at this potential interpretation of the decision.³²

Two later decisions of the Court on requests for preliminary rulings from Denmark and Spain both given on the same day clarified the position.³³ In the first of these, *Tele Danmark*, the employee was employed on a six-month contract and two months into her employment, she informed her employer that she was pregnant and due to give birth in three months. Her employer then terminated her employment. She had not disclosed her pregnancy at the time of her interview or commencement of employment. The Court determined that the actions of the employer amounted to direct discrimination on grounds of sex and there was no distinction in either the Equal Treatment Directive or the Pregnancy Directive between fixed term workers and permanent workers.³⁴ It also rejected arguments advanced that the cost implications for employers were higher in the case of fixed term contracts and that the size of the employer had to be relevant. The Court did not place any weight on the fact that the employee had failed to disclose her pregnancy at the commencement of her employment and had in fact deliberately omitted to do so. The Court summarised the position with clarity:

“Since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite

³¹ *Ibid* at paragraph 26.

³² For example see Bolger and Kimber, *Sex Discrimination Law*, (Round Hall, 2000) at p. 301 and Fenwick and Hervey, ‘Sex Equality in the Single Market: New Directions for the European Court of Justice’ (1995) 32 CMLR 443, at pp. 452-3.

³³ *Tele Danmark A/S v. Handels-og Kontorfunktionærernes Forbund i Danmark (HK)* Case C-109/00 [2004] ICR 610 and *Melgar v Ayuntamiento de Los Barrios* Case C-438/99 [2001] ECR I-6915.

³⁴ Paragraph 33.

period has no bearing on the discriminatory character of the dismissal. In either case, the employee's inability to perform her contract of employment is due to pregnancy.³⁵

Although the questions referred by the Danish Court were more concerned with the Pregnancy Directive, the Court relied significantly on the Equal Treatment Directive. This is a common feature of the Court's judgments and has been noted as such by commentators.³⁶

In the second reference, Ms. Melgar was employed by Spanish public authority as a home help under a number of consecutive fixed term contracts which did not specify an end date. The Dutch Government argued that there should be a distinction between temporary contracts with a specified termination date (where they contended the provisions of Article 10 of Pregnancy Directive would not apply) and those with none (where the provisions of Article 10 would apply).³⁷ Ms. Melgar informed her employer that she was pregnant and despite this, was informed by her employer that her current contract would terminate on 2nd June 1999 (during her pregnancy) and she was offered another contract to start with effect from 3rd June. She refused the new contract, contending that it was not possible for her contract to be terminated during pregnancy. In proceedings in Spain, the Court referred a number of questions for preliminary rulings.

The Court of Justice repeatedly expressed that the prohibition in Article 10 applies to both fixed-term employment contracts and those concluded for an indefinite period.³⁸ It also concluded that the non-renewal of a fixed term contract could not be considered as dismissal for the purposes of Article 10 of Pregnancy Directive. However, in certain circumstances, non-renewal of a fixed term contract could be regarded as refusal of

³⁵ Paragraph 31

³⁶ Costello and Davies, 'The Case Law of the Court of Justice in the Field of Sex Equality Since 2000' [2006] 43 CMLR 1567 at 1612 and Network of Legal Experts, *Report on Pregnancy, Maternity, Parental and Paternity Rights*, (2007) at p. 10.

³⁷ Paragraph 42.

³⁸ Paragraph 44

employment. In accordance with then settled law³⁹ refusal to employ a pregnant worker, otherwise suitable by reason of her pregnancy is direct discrimination prohibited by Equal Treatment Directive.⁴⁰ It would be a matter for the national court to determine whether non-renewal, following a succession of fixed-term contracts, was, in fact, motivated by the worker's pregnancy.

In the same decision, the Court held that Article 10 of the Pregnancy Directive has direct effect. It was not, at the relevant time, fully implemented in Spain.⁴¹ It also held that as Article 10 lays down minimum provisions it does not require Member States to draw up a specific list of exceptional circumstances and does not prevent Member States from providing for higher protection for pregnant workers by laying down specific grounds for when dismissals can take place.⁴² Many Member States take this approach and, in fact, the protection in some Member States is almost absolute.⁴³

These two decisions make it clear that the principle of equal treatment applies to pregnant employees irrespective of the duration of her employment and take a strict view of what constitutes discrimination on the grounds of pregnancy.⁴⁴ They dispelled views expressed in the aftermath of the decision in *Webb* that the termination of a fixed term contract on grounds of pregnancy could be justified. These decisions are particularly significant for many female employees who are more likely to be employed on short term or fixed term contracts in an increasingly flexible labour market.⁴⁵ However, the decisions are onerous for employers and indeed it has been remarked that in light of these decisions, employers are less likely to hire women of a child bearing age generally.⁴⁶ This is a problem and is part of a larger problem with anti-discrimination law. The self-made millionaire, Mr.

³⁹ Dekker and Mahlburg

⁴⁰ Paragraph 46.

⁴¹ Paragraph 34

⁴² Paragraph 37.

⁴³ Network of Legal Experts, *Report on Pregnancy, Maternity, Parental and Paternity Rights*, (2007) at p. 7.

⁴⁴ Ellis, *EU Anti Discrimination Law*, (OUP, 2005) at p. 230.

⁴⁵ EC Commission, '*Equality between Men and Women – 2009*' COM ,(2009) 77 final at p. 3.

⁴⁶ Stott, 'What Price Certainty' [2002] 27(3) ELR 351 at 358.

Alan Sugar in the United Kingdom - has claimed that anti-discrimination laws actually work against women securing positions.⁴⁷ He claims that the prohibition on employers enquiring about applicants' having children results in women not getting jobs. Interestingly, the Parliament recently passed an amendment to the Commission's Proposed Directive to extend the ambit of the Proposed Directive to pregnant workers irrespective of the type of contract under which they are employed and appears very much in line with the approach of the Court.⁴⁸

The Court, in *Busch*⁴⁹, confirmed in resolute terms the absolute prohibition against an employer taking pregnancy into account in applying working conditions. This decision has been described as pushing "the principle of non-discrimination to its outermost limits."⁵⁰

Ms. Busch commenced a period of parental leave after the birth of her first child of three years in duration. Shortly after commencing her parental leave, she became pregnant and a number of months later requested that her parental leave be terminated so that she could return early to her position as a full time nurse. She did not inform her employer of her pregnancy when making the application. Her motivation for returning to fulltime employment was due to her desire to obtain maternity allowance which was higher than the parental leave allowance and a supplementary allowance payable by the employer. The day after returning to her position, she informed her employer that she was seven months pregnant. German law prevented the claimant from undertaking part of her duties of employment while pregnant. Upon hearing of her pregnancy, her employer considered that the claimant had been guilty of a breach of good faith implicit in her contract of employment,

⁴⁷ "Women Are Their Own Worst Enemies, Says Lord Sugar" (Guardian 8th November 2009). Available at: <http://www.guardian.co.uk/uk/2009/nov/08/lord-alan-sugar-women-work>.

⁴⁸ Amendment 32 of the European Parliament legislative resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvement in the safety and health and work of pregnant workers and workers who have recently given birth and or are breastfeeding P7_TA(2010)0373

⁴⁹ Case C-320/01 [2003] IRLR 625.

⁵⁰ Barnard, *EC Employment Law*, (3rd ed, OUP, 2006) at p. 450.

and rescinded its consent to her return to work on grounds of fraudulent misrepresentation and mistake as to an essential characteristic.

The national Court considered that the employer could legally contest the validity of its consent to shortening parental leave under the relevant German law but questioned its compatibility with the principle of equal guaranteed by Equal Treatment Directive and sought a preliminary ruling.

The Court of Justice held that it was direct discrimination under the Equal Treatment Directive (now the Recast Directive) for the employer to take the employee's pregnancy into consideration in a refusal to allow her to return to work before the end of her parental leave. It followed that since her employer was not permitted to take pregnancy into account in applying her working conditions (including by implication deciding whether she could return to work early), the employee was not obliged to inform her employer that she was pregnant⁵¹.

The Court also determined that the discrimination could not be justified by the fact that employee was temporarily prevented (by German legislation) from undertaking all of the duties of her employment such as lifting, *etc.* and that this caused financial loss to her employer or by the motivation for the employee's to return to work⁵². Finally, it reaffirmed that direct discrimination cannot be justified on grounds relating to the financial loss of an employer. This decision demonstrates a high watermark of the principle of non-discrimination on grounds of pregnancy and the difficulties faced by employers when dealing with pregnant employees.

⁵¹ Paragraphs 39 and 40

⁵² Paragraphs 41 and 42

Pregnancy and less favourable treatment: Recent case law

There are two recent cases where the Court has considered limits of the Pregnancy Directive and Equal Treatment Directive which are of special interest. First, is *Mayr v. Backerei Und Konditorei Gerhard Flockner Ohg*⁵³ a reference from Austria.

Ms. Mayr was employed by the respondent as a waitress. During her employment, she underwent IVF treatment. After a course of hormone treatment, *in vitro* fertilised ova existed and a follicular puncture was carried out on 8th March 2005. Her doctor certified her sick from 8th to 13th March, which was proposed date of transfer of the fertilised ova to her uterus. She went on sick leave for the period.

On 10th March, she was notified of her dismissal by her employer. The transfer of the fertilised ova took place on 13th March. She challenged the validity of the notice of dismissal on 10th March upon the grounds that since the date of *in vitro* fertilisation she was entitled to the protection of the relevant implementing Austrian law which prohibited dismissal “during pregnancy.”

The question referred by the Austrian Court was:

“Is a worker, who undergoes *in vitro* fertilisation, “a pregnant worker” within the meaning of the [Pregnancy Directive] if at the time she was given notice of dismissal, the woman’s ova had already been fertilised with the sperm cells of her partner and “*in vitro*” embryos thus existed but they had not yet been implanted within her?”

The Court considered the health and safety objective of the Pregnancy Directive and the special protection for woman in Article 10 by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity leave and explaining as its primary reason:

⁵³ Case C-506/06 [2008] IRLR 387.

“ . . . in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant . . . including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy”.⁵⁴

The Court stated, unsurprisingly, that the question as to whether protection against dismissal pursuant to Article 10 extends to a worker in the circumstances stated must be determined in the light of the objectives of the Directive and in particular Article 10. The Court concluded pregnancy had not commenced within the meaning of the Pregnancy Directive as implantation had not yet occurred.

The Court was of the view that if it allowed for an intro vitro fertilised ova not yet planted in the womb to come within the definition of pregnancy, the benefit of the Pregnancy Directive could be extended to situations where the transfer of the fertilised ova to the uterus was postponed, for whatever reason, for a number of years, or even where such a transfer was definitively abandoned.

Whilst the question referred only related to the Pregnancy Directive, the Court also considered protection against dismissal pursuant to the Equal Treatment Directive. This had been raised by the Commission and Greek and Italian Governments.⁵⁵ The Court was aware on the reference that Ms. Mayr was dismissed while on sick leave in order to undergo IVF treatment, but was not aware of the reason for Ms. Mayr’s dismissal. It made it clear that it was for the national court to determine whether the dismissal was “was essentially based on the fact that she was undergoing such treatment”. The Court then continued:

“48. If that is the reason for Ms Mayr’s dismissal, it is necessary to establish whether that reason applies to workers of both sexes alike or, in contrast, whether it applies exclusively to one of them.

⁵⁴ See paragraph 34 and cases cited

⁵⁵ See paragraph 44

49. The Court has already held that, given that male and female workers are equally exposed to illness, if a female worker is dismissed on account of absence due to illness in the same circumstances as a man then there is no direct discrimination on grounds of sex (*Handels- og Kontorfunktionærernes Forbund*, paragraph 17).
50. It is true that workers of both sexes can be temporarily prevented from carrying out their work on account of the medical treatment they must receive. Nevertheless, the treatment in question in the main proceedings – namely a follicular puncture and the transfer to the woman’s uterus of the ova removed by way of that follicular puncture 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* fertilisation treatment constitutes direct discrimination on grounds of sex.
51. To allow an employer to dismiss a female worker in circumstances such as those in the main proceedings would, moreover, be contrary to the objective of protection which Article 2(3) of Directive 76/207 pursues, in so far as, admittedly, the dismissal is essentially based on the fact of the *in vitro* fertilisation treatment and, in particular, on the specific procedures, outlined in the previous paragraph, which such treatment involves.
52. Consequently, Articles 2(1) and 5(1) of Directive 76/207 preclude the dismissal of a female worker who, in circumstances such as those in the main proceedings, is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into the uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.”

Accordingly, the Court held that Equal Treatment Directive precludes the dismissal of a female employee who was at an advanced stage of IVF treatment where the dismissal was essentially based on the fact the woman was undergoing such treatment. This decision is significant in its terms, as it has extended the protection of the Equal Treatment Directive to women who are at an advanced stage of the IVF process.

The judgment raises a number of interesting consequential issues. What exactly does the Court mean when it refers to “an advanced stage in the IVF process”, as it appears that its decision that the protection only applies to women at this stage in the IVF process. Further, what of an employee who informs her employer that she is trying to conceive naturally and took time out on doctor’s advice for that purpose? Are there male specific medical treatments which might give men a similar protection on the reasoning in paragraph 50? It should be noted that the reasoning of the Court appears to be based on a medical treatment, which is female specific, rather than one connected with pregnancy and maternity.

Secondly, the Court has very recently delivered its judgment in a reference from Latvia: *Danosa*⁵⁶ which asked the Court to consider whether company directors are covered by the concept of workers within the meaning of the Pregnancy Directive, and if so, whether Article 10 of the Pregnancy Directive precludes a provision which provides that members of the Board of Directors of a capital company may be removed without any restrictions, in particular, in the case of a woman, irrespective of the fact that she is pregnant.

In considering the first question, the Court recalled its existing settled case law that the concept of ‘workers’ for the purposes of the Pregnancy Directive:

“May not be interpreted differently, according to each national law, and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the person concerned.”

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It then added:

“The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration . . .”⁵⁷

This latter relationship is sometimes referred to as one of “subordination”.

Significantly, the Court took the view that the nature of the person’s legal relationship with the other party to the employment relationship is of no relevance to whether the Pregnancy Directive applies, rather it is whether the person meets the test cited above which is the crucial factor in determining the nature of the relationship.⁵⁸

The respondent and the Latvian and Greek Governments submitted that, in general, in the case of members of the Board of Directors of a capital company, there is no relationship of subordination, as required under the aforementioned case law. They submitted that Board members, such as Ms. Danosa, perform his or her duties on the basis of a contract of agency, independently, and without instructions.

The Court did not accept that general proposition and stated that:

“The answer to the question whether a relationship of subordination exists within the meaning of the above definition of the concept of ‘workers’ must, in each particular case, be arrived at on the basis of all the factors and circumstances characterising the relationship between the parties⁵⁹”

They then continued:

“The fact that Ms. Danosa was a member of the Board of Directors of a capital company is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company; it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties

⁵⁷ Paragraph 39.

⁵⁸ Paragraph 40.

⁵⁹ Paragraph 46

entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed.⁶⁰”

The Court later stated the general proposition in wider terms:

“While it cannot be ruled out that the members of a directional body of a company, such as a Board of Directors, are not covered by the concept of ‘worker’ as defined in paragraph 39 above, in view of the specific duties entrusted to them, as well as the context in which those duties are performed and the manner in which they are performed, the fact remains that Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction, satisfy *prima facie* the criteria for being treated as workers within the meaning of the case-law of the Court, as referred to above.⁶¹”

It ultimately answered the first question put by stating:

“In view of the foregoing considerations, the reply to the first question is that a member of a capital company's Board of Directors, who provides services to that company and is an integral part of it, must be regarded as having the status of worker for the purposes of Directive 92/85, if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the Board Member receives remuneration.

⁶⁰ Paragraph 47

⁶¹ Paragraph 51

It is for the national court to undertake the assessments of fact necessary to determine whether that is so in the case pending before it.⁶²”

The Court, in examining the second question, initially considered the objective of Article 10 of the Pregnancy Directive and, unsurprisingly concluded that:

“In the event that the national court were to decide that, in the case before it, Ms. Danosa falls within the concept of ‘pregnant worker’ for the purposes of Directive 92/85 and that the dismissal decision at issue in the main proceedings was taken for reasons essentially connected with her pregnancy, it should be pointed out that such a decision, whilst taken in accordance with provisions of national law permitting the unrestricted dismissal of a Board Member, is incompatible with the prohibition on dismissal laid down in Article 10 of that directive.⁶³”

Perhaps more interestingly, it then continued to consider the position, if it were determined that Ms. Danosa was not a ‘worker’ for the purposes of the Pregnancy Directive, by reference to the prohibitions in the Equal Treatment Directive. It referred to the provisions of the Equal Treatment Directive and then concluded:

“That objective, which informs both Directive 92/85 and Directive 76/207, could not be achieved if the protection against dismissal granted to pregnant women under EU law were to depend on the formal categorisation of their employment relationship under national law or on the choice made at the time of their appointment between one type of contract and another.⁶⁴”

“As stated in paragraph 33 above, it is for the national court to determine the relevant facts of the dispute before it and to ascertain whether, as is assumed in the questions referred, the dismissal decision was brought about essentially on account of Ms. Danosa’s pregnancy. If so, it is of no consequence whether Ms. Danosa falls

⁶² Paragraph 56

⁶³ Paragraph 62

⁶⁴ Paragraph 69

within the scope of Directive 92/85 or of Directive 76/207, or - to the extent that the referring court categorises her as a 'self employed person' - within the scope of Directive 86/613, which applies to self-employed persons and which, as is stated in Article 1 of that directive, supplements Directive 76/207 as regards the application of the principle of equal treatment for those workers, prohibiting, like Directive 76/207, any discrimination whatsoever, whether direct or indirect, on grounds of sex. Whichever directive applies, it is important to ensure, for the person concerned, the protection granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her pregnancy.⁶⁵”

It is interesting to note, in the context of the earlier remarks in this paper that the above paragraphs were followed with:

“That conclusion is supported, moreover, by the principle of equality between men and woman enshrined in Article 23 of the Charter of Fundamental Rights of the European Union, in accordance with which that equality must be ensured in all areas, including employment, work and pay.⁶⁶”

The above decision is significant in a number of respects. The principles stated appear to apply generally to women who may hold positions on board of companies and other public bodies. It also, again, emphasises the approach of the Court to considering the position of the treatment of pregnant workers, not only under the Pregnancy Directive, but also under the Equal Treatment Directive. Also, many Member States have company legislation with removal provisions similar to those in Latvia. And, finally, it is interest, insofar as it refers to the Charter of Fundamental Rights, in support of the views expressed.

⁶⁵ Paragraph 70

⁶⁶ Paragraph 71

Pregnancy and less favourable treatment: Pay and Sick Leave

There is a view, possibly justified, amongst some commentators, that those who are absent from the workplace due to a pregnancy related illness or placed on a period of leave during pregnancy, or who have been transferred to alternative duties do not benefit from similar protection to those who remain in their own jobs in the workplace. I want to consider a few decisions of the Court relating to the areas of pay and sick leave for such employees.

The Court has been said in such cases to be:

“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”.⁶⁷

In *McKenna v. North Western Health Board*⁶⁸, a reference from Ireland, the Court was required to consider whether a general sick pay scheme, which conferred an entitlement to full pay for a period and thereafter reduced the sick pay to half pay was prohibited discrimination, where it treated absence caused by pregnancy related complications or illness in the same as absence caused by other illnesses. The Court rejected the argument that an employee on pregnancy related sick leave should not have their sick pay reduced and/or their future rights to sick pay adversely affected as a result of pregnancy related sick leave during the period of the pregnancy or the statutory maternity leave. The Court distinguished between protection against dismissals and reduction in pay:

“...so far as dismissals are concerned, the special nature of a pregnancy-related illness may only be accommodated by denying an employer the right to dismiss a female worker for that reason. By contrast, so far as pay is concerned, the full maintenance thereof is not the only way in which the special nature of a pregnancy related illness may be accommodated. That special nature may, indeed,

⁶⁷ Costello and Davies, ‘The Case Law of the Court of Justice in the Field of Sex Equality Since 2000’ [2006] 43 CMLR 1567 at 1603.

⁶⁸ Case C-191/03 [2005] IRLR 895.

be accommodated within the context of a scheme which, in the event of the absence of a female worker by reason of a pregnancy-related illness, provides for a reduction in pay.”⁶⁹

The Court found that women on maternity leave deserve special protection but cannot be compared to men who are actually working. It rejected the argument that as the case was concerned with sick leave, the case was an equal treatment case was not concerned with equal pay.⁷⁰ The Court rejected this argument on the basis that the sick pay rules determined automatically the rate of pay when on sick leave, meaning that it was an equal pay case and Community law did not require the maintenance of full pay for a female employee who was absent during her pregnancy by reason of an illness related to her pregnancy.

The Court reasoned that it was lawful for a female employee to suffer a reduction in her pay during an absence due to her pregnancy related illness provided she is treated in the same manner as a male worker who is absent on the grounds of illness. The Court in *McKenna* however, did state that the payment made to such employees cannot be so low as to undermine the objective of protecting pregnant workers.⁷¹ The Court found that such a worker was sufficiently protected from discrimination on grounds of pregnancy by virtue of the fact that she could not be dismissed on grounds of that pregnancy related sick leave, at least during the pregnancy and statutory maternity leave.⁷² The reasoning of the Court is squarely within the position taken in *Gillespie*⁷³ wherein the Court held that an employee on maternity leave (and therefore absent from the workplace) is not entitled to retain her full rate of pay as women on maternity leave are in a special position which is not comparable to a man or woman at work.

⁶⁹ Paragraph 58.

⁷⁰ Advocate General took a different approach finding that as duration of sick pay entitlement was at issue, it was an Equal Treatment case.

⁷¹ Paragraph 67.

⁷² Paragraph 68.

⁷³ Case C-342/93[1996] IRLR 214.

As already stated, both the Equal Treatment Amendment Directive and the Recast Directive have included pay within the meaning of working conditions such that the distinction made in *McKenna* between pay and conditions may require reconsideration. However, two leading equality experts have concluded that in practical terms, as the difference in approach of the Court to pay during pregnancy related illness appears motivated by economic considerations, that it is unlikely that the Court will alter its stance on the issue.⁷⁴ Monaghan argues that even if *McKenna* remains good law:

“It should anyway be subject to comparable limitations as those applied in the case of full pay during maternity leave exemption so that if earnings related, sick pay must take account of pay increases and all the benefits earned whilst actually at work.”⁷⁵

Two very recent decisions of the Court, both decided on 1st July, 2010, concerning the pay and benefits to which pregnant employees are entitled, when they are not able to perform their normal duties of employment due to their pregnancy (having been placed in alternative duties or on leave), were decided in a similar manner to *McKenna*. The first of these, *Parvianinen*,⁷⁶ a reference from Finland, concerned a pregnant employee of Finnair, employed as a flight attendant, who was transferred to alternative duties in accordance with Articles 5(1) and 5(2) of the Pregnancy Directive during her pregnancy as her duties exposed her to physical agents which could cause damage to her unborn child.

As a result of her transfer to office duties, she was no longer entitled to all her prior supplemental allowances amounting to approximately 40% of her salary which was made up of allowances to reflect seniority and status and also compensation for unsociable working hours or having to work long shifts. Ms. Parvianinen was permitted to retain the portion of

⁷⁴ Bolger, ‘Protective Measures for Pregnant Workers’ [2009] 6(3) IELJ 74 and Monaghan, *Equality Law*, (OUP, 2007) at p. 308.

⁷⁵ Monaghan, *Equality Law*, (OUP, 2007) at p. 309, footnote 195.

⁷⁶ C-471/08, judgment of the Court of Justice of the European Union, 1 July 2010 (not yet reported). See also ‘Pregnant workers cannot claim allowances for tasks not performed’ [2010] 274 EU Focus 17-18.

her allowance which reflected her seniority in employment, having been employed by the airline for ten years. She challenged the reduction in pay. The question referred concerned the proper interpretation of Article 11(1) of the Pregnancy Directive and in particular whether an employee transferred to other lower paid work pursuant to Article 5(2) is entitled to be paid as much as she received on average prior to transfer.

The Court held that employers are required to pay allowances relating to professional status, in particular seniority, length of service and qualifications but are not required, during the temporary transfer of an employee during pregnancy (pursuant to Article 5(2) of the Pregnancy Directive), the pay supplements which are dependent on performance by the employee of specific functions and which payments are made to compensate for the disadvantage related to that performance.⁷⁷ In this regard, reliance was placed on Article 11(4) of the Pregnancy Directive which provides that:

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

The finding of the Court is subject to the principle that the payment must not be lower than that paid to other employees employed to complete the same job and must not ignore the fact that the employee is continuing to work and must not undermine the protection of the health and safety of the pregnant employee.⁷⁸ It followed in the Court’s view that following a temporary transfer in accordance with Article 5(2) that a pregnant worker is not entitled under Article 11(1) to the average pay received prior to transfer⁷⁹.

⁷⁷ At paragraphs 60 and 61.

⁷⁸ This is in line with the judgment of the Court in *McKenna v North Western Health Board* Case C-191/03 [2005] IRLR 895 at paragraph 67.

⁷⁹ Paragraph 62

The second case, *Gassmayr*,⁸⁰ a reference from Austria, concerned the remuneration paid to an employee during pregnancy and maternity leave when the woman was granted leave during pregnancy from the position due to medical advice in accordance with Austrian law implementing Article 5(3).

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 leave due to health and safety reasons. In response to the first question the Court determined that Article 11(1)(3) were sufficiently precise to be directly effective.⁸¹

The other questions concerned whether Articles 11(1) to (3) must be interpreted and maintaining a right to the payment of an on- call allowance during a period of absence while pregnant pursuant to Article 5(3) and while on maternity leave.

Article 11(1) provides that, as regards pregnant workers in the cases referred to in Article 5 (pregnant workers whose conditions of employment have been temporarily adjusted, who have been temporarily transferred to another job or, as a last resort, who have been granted leave from work) income must be guaranteed in accordance with national legislation and/or national practice.

Article 11(2) provides for the maintenance of employment rights and right to an adequate allowance for workers on maternity leave.

Article 11(3) provides that, as regards workers on maternity leave referred to in Article 8, the allowance referred to in Article 11(2)(b) is to be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health.

The Court noted its decision and reasoning in *Parvianinen* and held that the same applies to employees who have been placed on leave pursuant to Article 5(3) of the

⁸⁰ C-194/2008, judgment of the Court of Justice of the European Union, 1 July 2010 (not yet reported). See also 'Pregnant workers cannot claim allowances for tasks not performed' [2010] 274 EU Focus 17-18.

⁸¹ This finding was anticipated by Ellis, *EU Anti Discrimination Law*, (OUP, 2005) at p. 246.

Pregnancy Directive from which it concluded that the exclusion of an on –call duty allowance from the pay of a pregnant worker temporarily granted leave is not contrary to Article 11(1)⁸².

In relation to those on maternity leave the Court referred to its earlier decisions to the effect that a person on maternity leave is not entitled pursuant to Article 141 EC or Article 11(2) and (3) of the Pregnancy Directive to receive an amount equal to full pay. The minimum guaranteed by the Pregnancy Directive is an income equivalent to the sickness allowance under national law for absence from work for illness which must be adequate within meaning of Article 11(3).⁸³

It followed that there is no entitlement to an on-call allowance during maternity leave.⁸⁴ The Court also emphasised that Article 11 only provides minimum protection and it is open to national legislation to provide a more favourable pay scheme but permissible to exclude an allowance such as the on call allowance.⁸⁵

These decisions establish that pregnant employees remain entitled to receive certain minimum amounts not entitled to receive the same amount as they did prior to the pregnancy, if they remain at work but tasks attracting allowances can no longer be performed or if they are on leave (pre or post birth) in accordance with the Pregnancy Directive. The decisions may be considered to take into account the economic consequences for an employer to a greater extent than the decisions already referred to relating to discriminatory treatment.

Remedies

In another recent decision, the Court considered discrimination in remedies and effective judicial protection for pregnant employees.

⁸² Paragraph 75

⁸³ Paragraphs 80 to 85 and decisions referred to therein

⁸⁴ Paragraph 86

⁸⁵ Paragraph 91

In *Pontin v. T-Comalux*,⁸⁶ the Court was asked for a preliminary ruling on whether the Equal Treatment Directive or the Pregnancy Directive precluded national legislation which prohibited the dismissal of pregnant workers and workers who had recently given birth or were breastfeeding, but restricted their remedies to an action for nullity and reinstatement and excluded an action for damages. The claimant had brought proceedings seeking a declaration that her dismissal by the defendant was null and void because she was pregnant.

The Luxembourg court held that it did not have jurisdiction to hear the application, as she should have applied to the president of the Court. Rather than appeal, she brought an action for damages for wrongful dismissal. The employer contended that Luxembourg law relating to actions for damages did not apply to a pregnant worker and as it was now more than fifteen days since her contract was terminated, she could no longer bring an action for nullity and reinstatement before the president.

The Luxembourg Court referred the question to the Court. The Court of Justice strongly indicated that the relevant legislation breached the principles of effectiveness and equivalence. It held that the Code, which denied a dismissed pregnant employee the option to bring an action for damages whereas such an action was available to any other employee who had been dismissed, constituted less favourable treatment of a woman related to pregnancy; especially where the Code did not comply with the principle of effective judicial protection of an individual's rights under Community law.

Proposed Amended Pregnancy Directive

In October 2008, the Commission introduced a Proposed Directive to amend the Pregnancy Directive.⁸⁷ Principal amongst its proposals was to extend the minimum period of

⁸⁶ Case C-63/08[2010] CMLR 2.

⁸⁷ COM (2008) 637 final.

maternity leave from fourteen to eighteen weeks (six weeks of which have to be taken after the birth of the child) and to include a principle of full payment of monthly salary received by employee prior to maternity leave subject to a ceiling which can be imposed by Member States.

It also proposed to include a provision in line with *Pacquay*⁸⁸ that preparation for dismissal of a pregnant employee during maternity leave for dismissal after her return is prohibited. Significantly, it also proposed an amendment to Article 10 to provide that the obligation on employers to provide written grounds substantiating the reason for dismissal to a period of 6 months after return from maternity leave, but only if the women requests this. In Ireland, data has discovered that women are experiencing issues in employment upon their return to employment post maternity leave.⁸⁹

The proposed Directive also included other amending provisions beyond the scope of this paper.

The proposed Directive was forwarded to the Council in October 2008, and it was considered and debated by Council in March 2009. It was also discussed at Council on 8th June 2009. There the Proposed Directive hit a deadlock.

The Commission's proposals have also been subjected to prolonged scrutiny within the Parliament. Initial proposals were made by the Women's Rights and Gender Equality Committee of the Parliament Committee in April 2009⁹⁰ which would extend the minimum period of maternity leave to twenty weeks, of which the first six would have to be remunerated at full normal pay, with the following fourteen weeks paid at 85% of normal pay. The proposals also include a minimum of two weeks' paid paternity leave, and extend the period during which reasons would have to be given automatically for dismissal of up to

⁸⁸ Case C-460/06 [2008] ICR 420.

⁸⁹ See Equality and Rights Alliance Press Release March 2010.

⁹⁰ Note that the Committee considered the Proposed Directive in light of a Working Document prepared by Estrela ('the Estrela Report') of January 2009.

six months after return from maternity leave. These proposals were, in turn, referred back at a plenary session of the Parliament in May 2009. The draft report of the Women's Committee, published in November 2009, suggests radical changes to the proposed Directive including extending its provisions to self employed women (but only those who work on a self employed basis for a employer) and a right to work part time for a year on return from maternity leave with the right to resume full time work in her previous job being preserved.

The significant amendments to the Proposed Directive advanced by the Women's Committee of the Parliament were considered by the Parliament on 20th October, 2010, where it appears the Parliament took a strong approach to the protection of pregnant women and extended a number of the provisions of the proposed Directive. The Parliament voted in favour of extending the minimum maternity leave from fourteen weeks to twenty weeks, which is an additional two weeks than that contained in the Commission's Proposed Directive. Significantly, the Parliament adopted a proposal that, workers on maternity leave should be paid their full salary which must be 100% of their last monthly salary or their average monthly salary. This amendment reflects the later amendment in the current Directive proposed by Parliament that the reference to payment of an adequate allowance during maternity leave be altered to "equivalent allowance". This exceeds the Commission's proposal in the draft Directive.

The Parliament passed an amendment to the Proposed Directive, which would extend the protection of Article 10 of the Directive to the period from the beginning of pregnancy to at least six months following the end of the maternity leave, thereby going further than the proposed amendment to the Directive in the Commission's Proposed Directive which only required duly substantiated reasons in writing during the period of six months post-maternity leave when these were requested by the employee.

The Parliament also passed further amendments aimed at strengthening the protections for pregnant employees. Now that the Parliament has adopted its position on the Commission's proposals, the next step will be for the Member States to discuss all the issues concerned in the Council of Ministers. The outcome is awaited.

Directive for Self-Employed Individuals

A New Directive on self-employed workers and assisting spouses was passed by the European Council 24th June, 2010 which requires implantation by August 2012.⁹¹ It repeals the previous Directive 86/613/EEC.⁹² For the first time, it entitles self-employed women, assisting female spouses and life partners (if recognised as such under national law) of self-employed workers to maternity benefits of at least fourteen weeks. It creates autonomous social protection rights (such as social security rights *e.g.* pensions) for assisting spouses and life partners (if recognised as such under national law) of self-employed workers, if the self-employed worker benefits from social protection. While the Directive provides equivalent access to maternity leave for self-employed pregnant individuals as for employees, this is on an entirely voluntary basis. In other words, it is up to Member States to grant these benefits on mandatory or voluntary basis, for example, if a request is made by a self-employed individual with no automatic benefits accruing or on an automatic basis. Member States have two years within which to transpose the Directive, with a further two years being provided where justified by particular difficulties.

The primary reason for this Directive was to deal with the prior Directive which is not considered effective and to encourage women to engage in entrepreneurship.⁹³ A further

⁹¹ Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self employed capacity. For more detail see Cadenau, 'Self Employed Women: A Revision of Directive 86/613 in light of the Lisbon Strategy' [2008] 2 European Gender Equality Law Review 5.

⁹² Directive 86/613/EEC was excluded from the Recast Directive as it *concerned "a specific category of persons and therefore would require a more specific approach."* See the Commission Options Paper of July 2003 at p.9. See also Burrows and Robison, "An Assessment of the Recast of Community Equality Laws" (2007) 13(2) ELJ 186 at p. 195.

⁹³ IP/10/1029.

reason justifying the new Directive is that around 11% of self-employed workers in Europe rely on the help of spouses and partners who work on an informal basis in small family businesses, such as on a farm or a local doctor's practice. These assisting spouses are traditionally completely dependent on their self-employed partner and the economic and physical vulnerability of pregnant self employed workers, spouses and life partners of self employed workers is expressly recognised in Recital (18) to the Directive.

Conclusions

The recent opening of the European Institute for Gender Equality is likely to herald much research in the area of pregnancy and employment.⁹⁴ While the protection for pregnant employees in the workplace from any discriminatory or detrimental treatment appears strong, the position of employees absent from the workplace or who are unable to perform their existing duties for reasons connected with their pregnancy may be less certain. The jurisprudence demonstrates a tension between ensuring adequate protection for pregnant workers and those who recently gave birth and not making its consequence financially intolerable for employers. This tension reflects the wider issue primarily for policy makers as to the balance to be struck to provide proper protection for pregnant workers and those who recently gave birth whilst at the same time avoid prejudicing the employment prospects of women of child bearing age.

The decision of the Court in *Mayr* suggests that contemporary and interesting issues regarding the precise application of the Recast Directive to pregnancy will emerge in the near future.

⁹⁴ See <http://www.eige.europa.eu/>.

The very recent judgment of the Court in *Danosá*⁹⁵ suggests that the classes of women protected while pregnant and post birth by the Pregnancy Directive and Equal Treatment (Recast) Directive will continue to be considered by national courts and the Court of Justice.

The influence of the provisions of the Charter of Fundamental Rights on the case law of the Court and national courts remains to be seen. Further, the Proposed Directive to amend the Pregnancy Directive, when enacted and implemented, and the Self Employed Directive when implemented will undoubtedly give rise to further issues to be considered and decided by national Judges with assistance from time to time of the Court of Justice. Hence despite twenty years of jurisprudence from the Court of Justice, there remain interesting times ahead!

⁹⁵ C-232/09, Judgment of the Court, 11 November 2010.