

Gender equality under EU law: how far does it protect pregnancy and maternity

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Overview

1. Over the last 20 years parallel objectives of EU policy have been to 'implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth' (Pregnant Workers Directive) and to implement 'the principle of equal opportunities and equal treatment of men and women in matters of employment' (Recast Directive (formerly Equal Treatment Directive)). This includes providing pregnant workers and new mothers with protection from unfavourable treatment and laying down a minimum period of maternity leave and rights during leave. In the UK, EU law has played a major part in providing pregnant women and new mothers with protection from discrimination.
2. It is no defence for an employer to argue that it is too expensive or inconvenient to employ and retain a pregnant woman even if her pregnancy means that she cannot do the job she is employed to do.
3. The aim is to achieve 'substantive,' rather than formal, equality by reducing de facto inequalities which may arise in society and, ... to prevent or compensate for disadvantages in the professional career of the relevant person' (see *Alvarez v Sesa Start Espana ETT SA*)¹.
4. Achieving substantive equality often involves *more* favourable treatment of women. This is necessary in order to remove the disadvantages associated with pregnancy and absence on maternity leave. For example, a woman must not be disadvantaged because of pregnancy related sickness absence even where a man may be disciplined or dismissed for sickness absence (*Brown v Rentokil Ltd* Case C-394/96 1998).
5. In addition the Recast Directive allows Member States to adopt positive action measures in order 'to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers' (Article 157 relating to equal pay (ex 141)).
6. The difficult question is how long after childbirth is it necessary to protect women, by providing special leave and by removing any disadvantage associated with such leave. Disadvantages include attitudinal ones such as a perception that she will be

¹ C104/09

less committed and that she may have to take time off to care for her child. A long period of leave reserved for women only entrenches the division of labour, stereotypes women as 'carers' and may deprive men of the opportunity of caring, if they are only entitled to a short period. On the other hand, there is ample evidence that women are disadvantaged during pregnancy, maternity leave and on return from maternity leave. Unfavourable treatment relating to pregnancy or maternity leave should be unlawful whenever it occurs, otherwise substantive equality will not be achieved.

7. The need to treat women on leave more favourably may also lead, in some situations, to disadvantaging individual men. In a recent UK decision the Employment Appeal Tribunal held that a decision to give a woman on maternity leave the highest mark for one criteria in a redundancy exercise (because due to her leave she could not be marked at the designated time) was discrimination against a man who was then made redundant because he was marked lower on his actual performance (*Eversheds v De Belin*²). The EAT held that workers on maternity leave can only be treated more favourably (to compensate for any disadvantages suffered as a result of their maternity absence) where the measures taken are 'proportionate'. Otherwise, the treatment would be unfair on a male worker who was disadvantaged because of the more favourable treatment of the woman. Arguably, this is wrong because a comparison cannot be made between a man and a woman on maternity leave as they are not in a comparable situation. It is a fundamental principle of discrimination law that in direct discrimination cases 'like must be compared with like' so a man must compare himself with a woman in a similar situation. Further, a woman in the claimant's situation could not have brought a claim as the treatment would not have been on grounds of sex.
8. One significant barrier to gender equality, in the UK at least, is the substantial caring divide between men and women. The challenge is how to narrow this divide without diluting the essential protection needed for pregnant workers and new mothers for the period leading to and following the birth. In *Alvarez* the CJEU commented that making it harder for fathers to qualify for the leave than mothers 'is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties...' In the UK, there is no equivalent protection from discrimination for fathers taking paternity leave, similar to mothers taking maternity leave, though there are statutory provisions prohibiting detriment or dismissal in these circumstances.

² [2011] UKEAT 0352 6.4.2011

9. There is increasing recognition that there is a need to move the focus to encouraging men to share the caring role by, for example, providing more flexibility about who takes the leave and by introducing non-transferable leave for fathers. In addition, The CJEU and European Court of Human Rights have recently held that conditions which restrict fathers taking leave, where such conditions do not apply to mothers, particularly in situations where the leave can be taken by either mother or father, are discriminatory (see *Alvarez*³).
10. Finally, Member States must interpret their law to be consistent with EU law.⁴

Pregnant Workers Directive 92/85/EEC (PWD)

11. The PWD is a health and safety directive to protect the safety and health of pregnant workers and workers who have recently given birth or who are breastfeeding. It covers:
 - a. *Health and safety* risks at work;
 - b. *Maternity leave* of at least 14 weeks (which is 52 weeks in the UK);
 - c. *The prohibition of dismissal*: Article 10 provides that 'Member States shall take the necessary measures to prohibit the dismissal of workers... during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1) [which is a minimum of 14 weeks] save in exceptional cases not connected with their condition which are permitted under national legislation ...'⁵ It is recognised that the risk of dismissal for reasons associated with women's condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding;
 - d. Maintenance of rights linked to the employment contract, including maintenance of some payment while on maternity leave.

Who is a worker

12. The question as to who is a 'worker' was considered in *Danosa v LKB*.⁶ The CJEU said that the concept of 'worker' may not be interpreted differently according to each national law and must be defined in accordance with objective criteria. 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'. Provided this test is met the nature of that person's legal

³ Case C-104/09 30.9.10

⁴ See for example Cases C-397/01 to C-403/01 *Pfeiffer and Ors* [2004] ECR 8835

⁵ PWD Article 10

⁶ *EUECJ C-232/09 11 November 2010*.

relationship with the other party to the employment relationship has no bearing on the application of the directive. Thus, formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker for the purposes of Directive 92/85.

13. In *Danosia* the CJEU held that a company director was a worker where she provided services to a company of which she was an integral part and where she carried out activities under the direction or supervision of another body of that company and in return for her activities she received remuneration. The court went even further saying that 'even if the Board Member concerned is not a 'pregnant worker' within the meaning of that directive the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a Board of Directors who performs duties such as those described... can affect only women and therefore constitutes direct discrimination.'
14. The CJEU make it clear that agency workers would be protected so that where an agency agreement is unilaterally terminated by the principal, before the agreed expiry date, on account of the agent's pregnancy this would be contrary to Directive 92/85.

Knowledge of pregnancy

15. In *Danosia* the CJEU said that even if the worker had not formally informed her employer of her pregnancy, if the employer learnt of it, she would be protected.

Recast Directive: its aims

16. Most pregnancy/maternity discrimination cases have been brought under the Recast Directive (2006/54/EC) (formerly the Equal Treatment Directive). The definition of worker is the same as under the PWD.
17. The aim of the Recast Directive is to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, equality between men and women being 'a fundamental principle of Community law under the Treaty and the case-law of the Court of Justice (CJEU)'.

18. The preamble states:

'It is clear from the case-law of the Court of Justice that *unfavourable* treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive'.

'The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve *substantive equality* (my emphasis) (see also *Alvarez para 34*). This Directive should therefore be without prejudice to Council Directive 92/85 [PWD].⁷

19. In *Land Brandenburg v Sass* the CJEU summarised the ambit of the Equal Treatment Directive (now Re-Cast Directive) as follows:

'a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave.'

'a woman who is treated unfavourably because of absence on maternity leave suffers discrimination on the ground of her pregnancy and of that leave. Such conduct constitutes discrimination on the grounds of sex within the meaning of Directive 76/207.'

'Community law requires that taking such statutory protective leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it and cannot lead to discrimination against that woman.'

20. In *CNAVTS v Thibault*⁸ the CJEU reiterated that the directive allows national provisions which guarantee women specific rights on account of pregnancy and maternity. Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity Article 2(3) of the Directive recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth'.

21. The conferral of such rights is intended to ensure implementation of the principle of equal treatment for men and women regarding both access to employment and working conditions. Therefore, the exercise of the rights conferred on women under

⁷ Para 23 and 24

⁸ Case C-136/95 [1998] ECR I-2011. Thus a woman must not be the subject of unfavourable treatment regarding access to employment or working conditions and the right to have her performance assessed each year, which qualifies her for promotion, forms an integral part of the conditions of the contract of employment.

Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, not formal, equality.

22. There are two main exceptions. Both relate to pay.
23. The first is that women absent with pregnancy-related sickness are entitled to the same contractual sick pay as any other employee,⁹ but not full pay where other employees would not receive it (*McKenna*).¹⁰
24. The second exception is that women on maternity leave are not entitled to full pay during their leave (*Gillespie*¹¹). However, workers are entitled to have any pay increase received before the start of her maternity leave taken into consideration in the calculation of the earnings-related element of her statutory maternity pay (*Alabaster*¹²). The same pay rise as any other worker receives (for example during maternity leave), which will usually will only be implemented in full on return to work.
25. There is less clarity about entitlement to a bonus during the maternity leave period. In *Lewen v Denda*¹³ the CJEU held that Article 157 precludes an employer from entirely excluding women on parental leave from the benefit of a Christmas bonus, without taking account of the work done in the year in which the bonus is paid or of periods of maternity leave during which they were prohibited from working, where that bonus is awarded retroactively as pay for work performed in the course of that year. However, where a bonus is subject only to the condition that the worker is in active employment when it is awarded and it does not constitute retroactive pay for work performed, it would not be a breach of the Directive to deny the bonus to a woman on parental leave.

Positive action

⁹ see *Høj Pedersen* Case C-66/96 [1998] ECR I-7327 where the applicants were deprived of full pay when absent due to pregnancy related illness before the start of maternity leave. The CJEU held this was contrary to Article 119 and the Equal Treatment Directive to withhold full pay from a pregnant woman who became unfit for work before the commencement of maternity leave by reason of a pathological condition connected with pregnancy.

¹⁰ *McKenna v North Western Health Board* Case C-191/03 [2005] IRLR 895, where the CJEU said that although workers were not necessarily entitled to full pay during pregnancy related sickness absence the payment must not be lower than that paid to other employees employed to complete the same job and must not undermine the protection of the health and safety of the pregnant employee.

¹¹ *Gillespie v Northern Health and Social Services Board* [1996] IRLR 214 ECJ).

¹² *Alabaster v Woolwich plc and Secretary of State for Social Security* Case C-147/02 [2004] ECR I-3101

¹³ Case C-333/97

26. The Recast Directive provides that Member States may maintain or adopt positive measures with a view to ensuring full equality in practice between men and women in working life (Article 3). Paragraph 22 of the preamble states that

‘In accordance with Article 141(4) of the Treaty [now 157], with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. ... Member States should, in the first instance, aim at improving the situation of women in working life’.

Parental Leave Directive 2010/18/EU in force 8.3.2010 (PLD)

27. The aim of the PLD, which provides for four months parental leave, is:

- Supporting work-life balance
- Promoting women’s participation in the labour force and the sharing of care responsibilities between women and men (8, 12)
- Taking account of the special needs of parents with children with disabilities or long term illness

European Convention on Human Rights: Article 8 and 14

28. In *Markin v Russia*¹⁴ the ECHR the court held that a law giving women 3 years’ parental leave and men only 3 months was discrimination and contrary to Article 8 (right to family and private life) and Article 14 (non discrimination). The ECHR did not accept that the different treatment was justified by the special social role of mothers in the upbringing of children. It said that as far as the role of taking care of the child *after maternity leave* is concerned, both parents are similarly situated and ‘Society has moved toward a more equal sharing between men and women of responsibility for the upbringing of their children and that men’s caring role has gained recognition’.¹⁵

¹⁴ [2010] ECHR 1435

¹⁵ The ECHR said that ‘a difference is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised’. And ‘the advancement of the equality of the sexes is today a major goal in the member States and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention’. See also *Weller v Hungary* where it was held that the denial of parental allowances to natural fathers, when mothers, adoptive parents and guardians were entitled to them, was discrimination on the ground of parental status.

Charter of Fundamental Rights of the European Union

29. In *Danosa* the CJEU also relied on the principle of equality between men and women enshrined in Article 23 of the Charter of Fundamental Rights of the European Union which provides that equality must be ensured in all areas, including employment, work and pay.

Principles laid down by the CJEU on equal treatment

30. Maternity leave is intended to protect a woman's biological condition during and after pregnancy and to protect the special relationship between a woman and her child over the period which follows pregnancy (see *Thibault and Gassmayr*¹⁶).

31. The CJEU has consistently held that women should not be disadvantaged in the labour market because of childbirth (ie while pregnant or on maternity leave), irrespective of the cost or inconvenience to the employer. This includes:

- a. being protected from any risk to their health;¹⁷
- b. protection from discrimination relating to recruitment, promotion, access to appraisals,
- c. access to benefits during maternity leave
- d. protection from dismissal on grounds of pregnancy or maternity leave,
- e. maintenance of employment rights, including an adequate allowance, during maternity leave.¹⁸

32. In *Griesmar*¹⁹ the CJEU said that it was settled case-law that, for the purpose of applying the principle of equal pay, the situation of a male worker is not comparable to that of a female worker where the advantage granted to the female worker alone is designed to offset the occupational disadvantages, inherent in maternity leave, which arise for female workers as a result of being away from work. Thus, a man cannot claim that it is discrimination where he is denied, for example, a bonus which a woman receives on her return from maternity leave. His situation is not and cannot be comparable.

¹⁶[2010] EUECJ-C-194/08 July 2010

¹⁷ PWD Articles 3-7

¹⁸ PWD Article 11

¹⁹ [2001] EUECJ C-e66/99 and *Abdoulaye and Others* [1999] ECR I-5723

Recruitment

33. The ECJ held in *Dekker*²⁰ that it was a breach of the ETD for an employer to refuse to appoint a suitable female applicant because of the possible adverse consequences of her pregnancy. It was irrelevant that the employer would suffer possible adverse consequences arising from employing a woman who is pregnant at the time of the application. The same decision was reached in *Tele Danmark*²¹ when the CJEU said that 'a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer would suffer. This would apply even if the woman could not be employed in the post concerned for the duration of her pregnancy.
34. In *Herrero*²² the CJEU held that an employee who successfully applied for a permanent posting whilst on maternity leave was entitled to have her continuous service for seniority and other contractual purposes run from the date she was hired. The CJEU held that the fact that other people, in particular men, may, on other grounds be treated in the same way as Ms Herrero had no bearing on an assessment of her position since the deferment of the date on which her career was deemed to have started stemmed exclusively from the maternity leave to which she was entitled.

Dismissal

35. Article 10 of the PWD prohibits dismissal during pregnancy or maternity leave because of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy. The only exception is where there are 'exceptional' cases not connected with her condition, provided the employer gives substantiated grounds for the dismissal.
36. The Recast Directive provides similar protection. In *Paquay*²³ the CJEU held that where the decision to dismiss on grounds of pregnancy/maternity was taken during maternity leave, or preparatory steps for such a decision were taken, but the dismissal decision was notified to the worker after leave, it was still prohibited by the Directive.

²⁰ *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen (VJV-Centrum) Plus* Case C-177/88 [1990] ECR I-3941

²¹ Case C-109/00 [2001] ECR I-6993

²² *Sarkatzis Herrero v Instituto Madrilen0 de la Salud*

²³ *Paquay v Societe d'architectes Hoet + Minne SPRL* ([2007] CJEU C-460 (11.10.07))

37. The protection from dismissal has been considered by the CJEU in many cases and has broadly established that:

- a. The protection from dismissal applies to both employment contracts for an indefinite period and fixed-terms contracts. In *Melgar*²⁴ the CJEU held that where non-renewal of a fixed term contract is motivated by the worker's pregnancy this constitutes direct discrimination contrary to the Equal Treatment Directive (now the Recast Directive).
- b. A woman is not obliged to inform her employer, or potential employer, that she is pregnant. In *Busch*²⁵ the Court ruled that a woman was entitled to return early from maternity leave while pregnant and in order to have maternity leave in relation to the second pregnancy and was not obliged to tell her employer that she was pregnant. The fact that she was unable to carry out all her job functions on her return or that she returned only to qualify for an enhanced payment did not exclude her from protection.
- c. Protection applies to women undergoing IVF treatment . In *Mayr*²⁶ a woman was certified sick for one week during which the fertilised ova was to be transferred to her uterus. She was dismissed during the week she was off, but before the transfer of the fertilised ova took place. The CJEU held that this treatment only applied to women and the dismissal of a female worker because she was undergoing that important stage of in vitro fertilisation treatment was direct discrimination on grounds of sex.
- d. A pregnant worker cannot be dismissed because of pregnancy related sickness absences, even if another worker could fairly be dismissed for sickness in similar circumstances (see *Brown v Rentokil Ltd*²⁷). Dismissal of a woman at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy is direct discrimination on grounds of sex.

Pay

38. Pay under Article 141 (157) includes both contractual and statutory pay. It has been described by the CJEU as all consideration which workers receive directly or indirectly from their employers in respect of their employment (*Abdoulaye*).

²⁴ *Melgar v Ayuntamiento de Los Barrios*

²⁵ *Busch Klinikum Neustade* [2003] ECR I-2041 CCEJ,

²⁶ *Mayr v Backerei Und Konditorei Gerhard Flockner Ohg* Case C-506/06 [2008] IRLR 387

²⁷ Case C-394/96

39. Employees on maternity leave are not entitled to full pay during maternity leave (*Gillespie*) but are entitled to receive the benefit of any pay rise awarded on their return to work. In addition any such pay rise must be reflected in any earning related maternity pay (*Alabaster*).
40. In *Abdoulaye and others*²⁸ male workers argued that paying an allowance to women when taking maternity leave was discrimination as the birth of a child affects the whole family. The CJEU held that women on maternity leave are in a different situation to men so the principle of equal pay did not apply. Thus it was not a breach of Article 141 (157) to make a lump-sum payment exclusively to female workers who take maternity leave where that payment is designed to offset the occupational disadvantages which arise for those workers as a result of their being away from work.
41. A worker who is suspended for health and safety reasons is entitled to be paid the equivalent to her average earnings but not any on-call duty allowance which is paid for those actually at work (*Gassmayr*²⁹). A similar decision was reached in *Parviainen*³⁰ when the CJEU held that a woman temporarily transferred on account of her pregnancy to a job in which she performed different tasks was not entitled to the pay she received on average prior to that transfer. She was entitled, however, to retain allowances relating to her seniority, length of service and her professional qualifications.
42. The Recast Directive now includes pay as well as unfavourable treatment related to pregnancy or maternity in relation to access to employment, working conditions, dismissal (Articles 1 and 14(1)). Arguably, when a woman is paid less because of her pregnancy, when she is still at work, this would be a breach of the Directive without the need for her to show that a man doing equal work was paid more.
43. A woman on maternity leave is entitled to return to her job or an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence (Article 15 Recast Directive). If she is not allowed to return to the same job for a reason relating to her pregnancy or maternity leave absence that would be discrimination.

²⁸ *Abdoulaye v Regie Nationale des Usines Renault* [1999] EUECJ C-218/98

²⁹ *Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] EUECJ C-194/08 (1 July 2010).

³⁰ *Parviainen v Finnair Oyj* [2010] EUECJ C-47/08 (1 July 2010)

Other terms and conditions

Appraisal

44. In *CNAVTS v Thibault*³¹ the CJEU held that it was direct discrimination to deprive a woman of the right to an assessment of her performance, and, consequently, to the possibility of qualifying for promotion because she was absent on maternity leave.
45. Denial of access to promotion because of being on maternity leave would also be discrimination as held by the UK Employment Appeal Tribunal in *Visa International Service Association v Paul* [2004] IRLR 42 EAT.
46. In *Land Brandenburg v Sass*³² the CJEU held that all rights connected with the employment contract must be ensured during all of statutory maternity leave, where that leave is to protect women as regards pregnancy and maternity. It was for the national court to determine if the leave had the purpose of protecting women. Thus, the failure to include the worker's maternity leave as qualifying service for the purposes of re-grading was a breach of the Re-Cast Directive.

Other benefits

Access to Nursery places

47. In *Lommers*³³ Mr Lommers challenged his employer's decision to provide 128 nursery places for women or men in the case of an emergency. The reason for priority being given to women was the under-representation of women: of 11,251 employees only 2,792 were women and women were under-represented at senior levels. The Court recognised that the provision of nursery places to women only might help to perpetuate a traditional division of roles between men and women even though its purported aim was to abolish a de facto inequality.
48. Taking into account the fact that not all women had access to a nursery places, so men were not treated less favourably than all women, and men could get a place in an emergency, for example, if they were lone parents, the CJEU held that the scheme was proportionate in order to address the under-representation of women. This was a type of positive action that was allowed.

Pension credits for women but not men

49. In *Griesmar* a man argued that it was discrimination to award a pension credit to women not men. The purpose of the credit was to offset the occupational

³¹ [1998] EUECJ C-136/95 (30 April 1998)

³² CJEU [2005] IRLR 147

³³ *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] EUECJ C-476/99

disadvantages which arose for women as a result of being absent from work during the period following childbirth, but it was conditional only on having a legitimate, natural or adopted child, not on taking maternity leave. The CJEU held that this measure infringed the principle of equal pay as it excluded male civil servants from entitlement to the credit even where they assumed the task of bringing up their children.

Accrual of holiday and other rights during maternity leave

50. A worker must be able to take the paid annual leave to which she is entitled under the Working Time Directive during a period other than the period of her maternity leave (*Merimo Gomez*³⁴). The CJEU also said that rights connected with the employment contract of a worker must be ensured in a case of maternity leave

Changing parental leave to take maternity leave

51. In *Kiiski*³⁵ the CJEU held it was a breach of Article 2 of Directive 76/207 (now the Recast Directive) for an employer to refuse to alter an agreed period of child-care leave (parental leave) when she requested maternity leave as it deprived her of maternity leave. This applied during the period of at least 14 weeks preceding and after childbirth.

Fathers' rights to leave³⁶

52. Men are not entitled to an equivalent to 'maternity leave.' It is not discrimination to refuse a man equivalent paternity leave .

53. In *Alvarez* the mother and father were entitled to parental leave but only provided 'they are both employed' so that the father was only entitled to the leave in place of the mother if the mother was employed. Originally, the leave was for breastfeeding but this no longer applied as the leave could be taken by either parent. However, employed mothers were always entitled to leave, irrespective of whether the father was employed, whilst employed fathers were only entitled if the child's mother was also employed.

54. The CJEU said that the different qualifying conditions was 'liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in

³⁴ *Merino Gomez v Continental Industrias Del Caucho Case C-342/01 2004*).

³⁵ *Kiiski v Tampereen Kaupunki* [2007] EUECJ C-116/06 (20 September 2007)

³⁶ See also para 28 above

relation to the exercise of their parental duties (see also *Lommers para 41*). This could mean that a self-employed mother would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden. As a result this was not a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus to prevent or compensate for disadvantages in the professional careers of the relevant persons (para 38). It was therefore a breach of the Directive.

Remedies

55. The Re-cast Directive provides that 'Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination is the refusal to take his/her job application into consideration' (see *Marshall v Southampton and South-West Hampshire Area Health Authority CJEU*).
56. In *Pontin*³⁷ the CJEU held that where a pregnant employee was denied the option of bringing an action for damages, which was available to any other employee who had been dismissed, this was less favourable treatment of a woman related to pregnancy. The CJEU also said that a 15 day limitation period for bringing a claim did not appear to meet the requirement that procedural rules for discrimination claims were no less favourable than those governing similar domestic actions nor the requirement that it must be practically possible to exercise rights under EU law.
57. The removal of legal aid and introduction of fees for lodging a claim in the Employment Tribunal will need to be scrutinised to assess whether they comply with the requirements of the Directives.

Conclusions

58. Key principles of EU law are:
 - a. The aim is substantive equality. In order to redress inequalities and disadvantages suffered by pregnant women and new mothers, they may need to be treated **more favourably**;
 - b. The CJEU has distinguished between pay during pregnancy/maternity absence (such as pregnancy related sickness, maternity leave), which is not guaranteed (except for a minimum amount, such as maternity pay) and other working conditions, including access to promotion, appraisals, training, where a woman must not be disadvantaged;
 - c. A woman on maternity leave is not in a comparable position to other workers. Thus, where male and female workers are in different situations this excludes any breach of the principle

³⁷ *Pontin v T-Comalux Case C-63/08 [2010] CMLR 2*

of equal pay, for example where a woman is paid a maternity bonus, but a man does not receive a comparable payment;

- d. The conditions for access to leave, at least where it can be taken by either the woman or the man, should be equal;
- e. Positive action is allowed where there is under-representation of women (or men); this may include giving preference to women in relation to nursery places;
- f. Any compensation for discrimination must be effective.

59. What remains to be seen, in the UK at least, is the extent to which, and over what period before and after the birth, the courts will protect pregnant women and new mothers (in order to remove any disadvantages associated with pregnancy/maternity) when to do so would disadvantage men. This is likely to turn on the question of how long a woman needs to be protected for physiological and biological reasons connected with childbirth and breastfeeding, when a woman's position cannot be compared to a man's, and at what stage a child can be equally well be cared for by the father or partner.

60. The emphasis is likely to shift towards encouraging equality of leave between women and men, and conditions of leave – except for the period of leave reserved for women for biological and physiological reasons. According to the CJEU in *Land Brandenburg v Sass* this is a matter for the national court.

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