INTRODUCTION:

While it has been twenty years since the Court of Justice of the European Union (CJEU) 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 and a number of potentially significant references awaiting determining by the Court of Justice at this time.\(^1\) However, the Court continues to distinguish between the rights of pregnant workers who are actually in the workplace in their existing position and those whose pregnancy has forced them out of the workplace or to alternative duties. The issue of protective measures for pregnant workers in the workplace is a very contemporary and live issue, in particular with the rate of women’s participation in the labour market in the EU continuing to increase and within that trend, mothers of young children are becoming increasingly active in the world of paid work.\(^2\)

This paper will provide an overview of the legislation and development of the case law in the area, placing particular emphasis on recent case law and potential future developments. This paper will also consider the two tier approach of the Court to less favourable treatment of pregnant employees in relation to their conditions of employment and in relation to pay. It will also examine the proposed Directive to amend the Pregnancy Directive and its reform of the existing legislative framework and the new Directive for self-employed workers.

THEORETICAL FRAMEWORK PREGNANCY AND EQUALITY:

\(^1\) Kulikaoskas v Macduff Shellfish Ltd C-44/12 (a reference from the Scottish Court of Sessions), CD v ST (C-167/12) (a reference from the Employment Appeal Tribunal in the UK), and Z, (C-363/12) (a reference from the Irish Equality Tribunal). The first is concerned with whether discrimination by association with a pregnant worker is covered as a matter of EU law and the latter are concerned with whether a woman who has a baby through a surrogacy arrangement is protected by the Recast and Pregnancy Directives.

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. Since only women have the capacity to become pregnant, discrimination on grounds of pregnancy is necessarily discrimination on grounds of sex. 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.” 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.

LEGISLATION:

Recast Equal Treatment Directive:

The Recast Equal Treatment Directive was introduced as part of the European Commission’s better legislation programme. The gender equality Directives 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” 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, in so far as it related to employment rights (as opposed to health and safety), was put forward by the Commission, however, ultimately it was not included in the recast Directive.

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

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5 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
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.
between men and women being a fundamental principle of Community law under the Treaty and the case-law of the Court of Justice.

The Recast Directive contains a number of provisions which specifically concern the rights of pregnant workers in access to employment and working conditions. Expressly providing for the principle developed by the Court of Justice of the European Union, 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”

The non-binding Recital 23 of the Directive provides 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 a very persuasive value. Costello and Davies comment that the “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.” 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, any case involving the less favourable treatment of a pregnant employee will require the Court to examine not only the provisions of the Recast Directive, but also the relevant Articles of the Pregnancy Directive. As the Pregnancy Directive is a detailed Directive providing for a number of rights for pregnant workers, this is likely to occur in all such cases.

As we shall see the Court of Justice has taken a restricted approach to the issue of pay during pregnancy in circumstances where a woman has left her workplace or has been transferred to alternative duties due to health and safety concerns. Significantly, the Recast Directive (as had the 2002 Amending Directive) has expressly included ‘pay’ within the definition of

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working conditions\textsuperscript{11} and has consolidated the Equal Pay Directive and Equal Treatment Directive. The distinction between equal treatment and pay might seem inappropriate. 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.\textsuperscript{12} The issue certainly awaits consideration by the Court of Justice of the European Union. However given the clear underlying economic motivation behind the decision of the Court of Justice in \textit{McKenna}\textsuperscript{13} and the more recent decisions of \textit{Gassmayr},\textsuperscript{14} and \textit{Parviainen},\textsuperscript{15} it is very unlikely that the Court will take a different approach even in apply the provisions of the Recast Directive.

\textit{Pregnancy Directive:}

The Pregnancy Directive was not included in the Recast Directive although it is expressly referred to therein. The primary reason provided by the Commission for its exclusion was that the Pregnancy Directive had a different legal base than the gender equality directives as the Pregnancy Directive was developed on grounds of health and safety concerns.\textsuperscript{16} This omission has been criticised as a missed opportunity to clarify and simplify the interplay between the provisions of Article 141,\textsuperscript{17} 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.\textsuperscript{18} 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.\textsuperscript{19}

\textsuperscript{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.
\textsuperscript{13} Case C-191/03 [2005] IRLR 895.
\textsuperscript{14} 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.
\textsuperscript{15} 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.
\textsuperscript{16} Article 153 TFEU (ex Article 137 EC).
\textsuperscript{17} Now Article 157 TFEU.
\textsuperscript{19} Masselot, ’The State of Gender Equality Law in the European Union’ (2007) 13(2) ELJ 152 at 162.
The Pregnancy Directive is aimed at improving health and safety of pregnant workers, workers who have recently given birth or workers who are breastfeeding. It provides specific rights to pregnant workers thereby moving away from a comparator at all. It provides for two types of substantive protection for employees: first health and safety protection and secondly protection from less favourable treatment on grounds of pregnancy, including the entitlement of a woman on maternity leave after the end of her maternity leave to return to her job or to an equivalent post on terms and conditions which are no less favourable to her.\(^{20}\) It is aimed at providing substantive equality for pregnant employees thereby recognising that special provision and protection has to be made to such workers to ensure equality of outcome or results. Therefore it is an example of divergence from the strict symmetry of equal treatment as it explicitly provides for special treatment for women where that is necessary because of the women’s special needs in connection with pregnancy and childbirth. The definition of ‘pregnant worker’ within the Directive has been determined by the Court of Justice to pertain to a “pregnant worker who informs her employer of her condition, in accordance with national legislation and or national practice.”\(^{21}\) This has been refined somewhat by the CJEU in its recent judgment in *Danosa*\(^{22}\) where it 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 by the provisions of the Pregnancy Directive. There is currently a reference pending from the Scottish Court of Sessions which has sought clarification as to the lawfulness in European law of discrimination due to the complainant’s association with a pregnant co-worker\(^{23}\), which may lead to the Court of Justice expanding yet again the scope of employees covered by the law on pregnancy discrimination.

The Directive provides for a number of specific leave periods (including maternity leave)\(^{24}\) and other protective measures uniquely designed for pregnant employees. Article 4 requires employers to undertake a risk assessment on the exposure to certain agents, processes or working conditions (non exhaustive list in Annex I of the Directive) and the nature, degree and duration of any exposure and effect of this on pregnancy. Article 5(1) requires an

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20 Article 15 of the Recast Directive. This Article is beyond the scope of this paper.
21 Case C-116/06 *Kiiski* [2007] ECR I-7643.
23 *Kulikaoskas v Macduff Shellfish Ltd* C-44/12
24 Article 8 provides for the right to maternity leave of at least 14 weeks duration during which an adequate allowance shall be payable which will be at least what a person on statutory sick pay would receive under national rules. (Article 11).
employer to adjust the working conditions and or working hours of the pregnant employee in order to avoid risk and exposure. 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 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: pregnant employees cannot be dismissed during the period of their pregnancy to the end of their maternity leave apart from for exceptional cases not connected with their pregnancy. This acknowledges the harmful effects which dismissal may have on the physical and mental state of women who are pregnant. Employers are required to provide employees on maternity leave, who have their employment terminated, with duly substantiated grounds in writing for their dismissal. Article 5 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 adaption of working conditions is not possible then an employer is required to place an 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.\footnote{Article 5(4) of the Pregnancy Directive.} Finally, Article 11 provides that all employment rights relating to the employment contract, including the right to the maintenance of an adequate allowance must be ensured in accordance with national legislation.

Despite providing for robust protection for pregnant employees, the Pregnancy Directive has been criticised as creating a system which treats women as dependent mothers who are unproductive workers thereby deserving of protection.\footnote{Wynn, ‘Pregnancy Discrimination: Equality, Protection or Reconciliation?’ (1999) 62 MLR 435 at 442.}

\textit{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. The Charter provides certain
assurances for pregnant employees. 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.  

The explanatory notes which accompany the Charter clarify 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 well beyond the terms of the Pregnancy Directive and indeed the Court case law. The legal status of the Charter was expressly acknowledged by the Court in a recent decision concerning age discrimination and in fact the Court noted its provisions regarding age discrimination. Similarly the Charter was cited in a recent case concerning a pregnant company director. In the later case, the Court of Justice took a broad approach in confirming that Article 23 of the Charter meant that equality between men and women “must be ensured in all areas, including employment, work and pay”. Therefore, the Charter may play some role in determining the rights of pregnant workers.

CASE LAW

_Pregnancy and less favourable treatment: Setting the scene:_

As we have seen, 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, in

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28 _Kucukdeveci v.Swedex GmbH_ Case C-555/07, Judgment of 19 January 2010 not yet reported.


31 The Commission has been very actively involved in the monitoring of the implementation of the EU Charter on Fundamental Rights and has produced annual reports on the influence of the Charter in members states and the judgments of the Court of Justice of the European Union and it has undertaken an information provision exercise. EU Commission, _2011 Report on the Application of the EU Charter of Fundamental Rights_, (Luxembourg, EU Publications Office, 2012) and http://www.non-discrimination.net/content/media/Review%2013%20EN.pdf
this case the refusal to offer employment, 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. A later decision applied this reasoning to the duration of a woman’s pregnancy.

The financial interests of the employer were trumped by the protections afforded to pregnant employees. By treating such discrimination as direct discrimination, the decision in Dekker also makes arguments as to the perception of unreliability or difficulties in employing pregnant women to be entirely irrelevant. The decision in Dekker was later extended to dismissals on grounds of pregnancy and to discrimination against a pregnant employee in respect of the terms and conditions of her employment which were also classified as direct discrimination. 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. The Court of Justice has, therefore, been involved in conferring significant protections on pregnant workers.

On the same day as the European Court of Justice handed down its decision in Dekker, the Court placed some limitations on the scope of pregnancy discrimination as direct discrimination contrary to the Equal Treatment Directive in its decision in Hertz v. Aldi. The Court limited the period of protection from dismissal on grounds of pregnancy and/or a pregnancy related illness, to the period of the statutory maternity leave.

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33 Mahlburg C-207/98 [2000] IRLR 276 at paragraph 27.
34 Handels-og Kontorfunktionaerernes Forbund i Danmark (acting for Høj Pederson) v. Foellesforeningen For Danmarks Brugsforeninger Case C-66/96 [1999] IRLR 55.
35 Thibault C-136/95[1998] IRLR 399. In Thibault the Court of Justice found that to deny a female employee the right to have her performance assessed annually discriminated against her because, had she not been pregnant and on maternity leave, she would not have been assessed during the year she took the leave and could therefore have qualified for promotion.
The case of Webb v. EMO (Air Cargo) Ltd,\(^{40}\) 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 Court held that Community law cannot be dependent on the presence of the women in the workplace during a crucial time even where that time coincides with her maternity leave. The decision of the Court suggested that the termination of a fixed term contract on the grounds of pregnancy could be justified as it emphasised in its decision that Ms Webb was not employed on a fixed term contract but “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”.\(^{41}\) Concern was expressed at this potential interpretation of the decision.\(^{42}\) This interpretation was not the intention of the Court and two later decisions dispelled the concerns.\(^{43}\) 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.\(^{44}\) It also rejected arguments advanced that the cost implications for employers were higher in the case of fixed term contracts and that the size and employer had to be relevant. Finally, it failed to place any weight whatsoever 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 therefore rejected any distinction between contracts of a fixed term nature even where the women concerned received the full benefits of protection but performs none of the work for which she is employed. The Court summarised the position with clarity:

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\(^{40}\) Case C-32/93[1994] IRLR 482.

\(^{41}\) Ibid at paragraph 26.


\(^{44}\) Paragraph 33.
“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 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”.45

Although the questions posed by the Danish Supreme Court were more concerned with the Pregnancy Directive, the Court relied primarily on the Equal Treatment Directive. This is a common feature of the Court’s judgments and has been noted as such by commentators.46

In the second decision, Ms Melgar was employed by Spanish public authority under a number of consecutive fixed term contracts as a home help but no end date was specified. The Dutch Government argued that there should be a distinction between temporary contracts with a specified termination date (where the provisions of Article 10 of Pregnancy Directive does not apply) and those with none (where the provisions of Article 10 would apply).47 Ms Melgar informed her employer that she was pregnant and despite this was informed by her employer that her contract would end during her pregnancy and she would be offered another contract at the time of termination of fixed term contract. She refused the new contract citing that it was not possible for her contract to be terminated during pregnancy. The Court of Justice held that the non renewal could not be dismissal (for the purposes of Article 10 of Pregnancy Directive) but rather in certain circumstances non-renewal or refusal to prolong a fixed term contract could be regarded as refusal of employment on grounds of pregnancy which is prohibited conduct (direct discrimination) for purposes of Equal Treatment Directive.48 Therefore, the Court determined that if an employer unilaterally terminates a contract of employment, whether it is permanent or of a fixed term nature, this breaches Article 10 of the Pregnancy Directive. The Court also determined that Article 10 of the Pregnancy Directive is sufficiently precise so as to be directly effective and although that Article does not require Member States to draw up a specific list of exceptional circumstances, it does not prevent Member States from providing for higher protection for

45 Paragraph 31
47 Paragraph 42.
48 Paragraph 46.
pregnant workers by laying down specific grounds for when dismissals can take place.49

Many Member States take this approach and in fact the protection in some Member States is almost absolute.50

These two decisions make it clear that the principle of equal treatment applies to pregnant employees irrespective of the duration of her employment and took a strict view of what constitutes discrimination on the grounds of pregnancy.51 They dispelled the fears 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 female employees who are more likely to be employed on short term or fixed term contracts in an increasingly flexible labour market.52 However, the decisions are particularly onerous on 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.53 In fact this is a huge problem and is part of a larger problem with anti-discrimination law. The self-made millionaire Alan Sugar - star of the UK version of the Apprentice - has claimed that anti-discrimination laws actually work against women securing positions.54 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 this is very much in line with the approach of the Court.55

This concern is further perpetuated by the wide approach taken by the Court in Busch56 which has been described as pushing “the principle of non-discrimination to its outermost limits.”57

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

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49 Paragraph 37.
54 “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.
56 Case C-320/01 [2003] IRLR 625.
number of months later requested that her parental leave be terminated so that she could return to her position as a full time nurse. She did not inform her employer of her pregnancy at this stage. Her motivation for returning to full time employment was due to her desire to obtain maternity allowance which was higher than the parental leave allowance. The day after returning to her position, she informed her employer that she was 7 months pregnant. Certain provisions of German law prevented the claimant from undertaking certain parts of her duties of employment as she was 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 and rescinded its consent to her return to work. The Court held that it was direct discrimination under the Equal Treatment Directive (now the Recast Directive) for employer to take employee’s pregnancy into consideration in a refusal to allow her to return to work before the end of her parental leave. As such her employer was not permitted to take pregnancy into account in deciding whether she could return to work early, as an employee is not obliged or required to inform her employer that she was pregnant. The Court also determined that 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 work. Finally, it reaffirmed that direct discrimination cannot be justified on grounds relating to the financial loss of an employer. This decision is certainly the high watermark of the principle of non discrimination on grounds of pregnancy and demonstrates, in no uncertain terms, the difficulties faced by employers when dealing with pregnant employees. Ms Busch was afforded protection from non discrimination even in spite of her questionable motives in taking the course of action she embarked upon.

Finally the Court has held in Paquay\textsuperscript{58} that having regard to the aims pursued by Article 10 of the Pregnancy Directive, the prohibition on the dismissal of pregnant women and women who have recently given birth or who are breastfeeding extends to decisions to dismiss and steps taken to prepare for the dismissal (such as searching for a replacement) made during these protected periods.

\textit{Pregnancy and less favourable treatment: Recent case law:}

\textsuperscript{58} Case C-460/06 [2008] ICR 420.
The limits of the Pregnancy Directive and Equal Treatment Directive were considered in two recent decisions by the Court. In *Mayr v. Backerei Und Konditorei Gerhard Flockner Ohg* 59 Ms Mayr was employed by the respondent as a waitress. During periods of her employment she was undergoing IVF treatment. After a course of hormone treatment, she went on sick leave for a week. During this period of sick leave, she was notified of her dismissal by her employer. At the time of the notice of dismissal, she was at an advanced stage in the IVF process, but the fertilised ova had not been transferred to her womb. The question posed by the Austrian Court was whether Ms Mayr was protected by the Pregnancy Directive and Equal Treatment Directive. The Court was of the view that Ms Mayr could not come within the definition of pregnancy in 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 even where the transfer of the fertilised ova into the uterus was postponed, for whatever reason, for a number of years, or even where such a transfer was definitively abandoned. The Court took a broad view of the Equal Treatment Directive, it found that as the treatment Ms Mayr underwent only affects women, her dismissal from employment was essentially because she was undergoing ivf treatment. As such it was decided that her employer had directly discriminated against her on grounds of her sex:

“*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.*" 60

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 hugely significant as it has extended the protection of the Equal Treatment Directive to women who are at an advanced stage of the ivf process. It also establishes that women are

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59 Case C-506/06 [2008] IRLR 387.
60 Para 50
protected under the Equal Treatment Directive in the period prior to when the fertilised ova has been implanted, as it was also noted that the need for protection for the duration of the woman's altered condition exists independently of whether the implantation of the fertilised ovum in the endometrium has already taken place or not.

The judgment of the Court of Justice raises a number of interesting and thought provoking issues. It remains to be seen what exactly the Court meant when it referred to “an advanced stage in the ivf process”, as it appears its decision that the protection of the Equal Treatment Directive only applies to women at this stage in the ivf process. It appears that the judgment held that the protected period could only begin from the moment of transfer of the embryos. However, this finding indicates that women who subsequently are not pregnant have been protected for the period between the transfer of the ova and their finding that they are not pregnant. It remains unclear whether an employee who informs her employer that she is trying to conceive naturally comes within the protected period of pregnancy and whether any less favourable treatment during this period amounts to a breach of the Recast Directive. Are there any male specific medical treatments which may give rise to a protection as the judgment of the Court was based on the medical treatment which was female specific, as opposed to any connection with pregnancy and maternity?

Finally, the Court has recently delivered its judgment in a reference from Latvia: Danosa which asked the Court to consider whether company directors are covered by the concept of workers within 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. Ms Danosa had been removed from her position on the Board of Directors of a public limited company when she was 11 weeks pregnant. Article 223 (4) of the Latvian Commercial Code allows for board members to be

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61 Sahota v The Home Office (2009) UKEAT/0342/09/LA, [2010] 2 CMLR 771, [2010] ICR 772, the UK EAT took the opportunity to attempt to provide guidance on the practical application of Mayr and in particular the period of time a woman involved in IVF who is not actually pregnant, may be entitled to protection within equality law. The EAT concluded from Mayr that not only the period from implantation of one or more fertilised ova in the woman's uterus, but also the earlier period that from the time that the ova were removed from her body for fertilisation and immediate re-implantation, were covered (as held in Mayr), but the period from the removal of the ova, or subsequent in vitro fertilisation, would only be covered if the procedures had been undertaken with a view to immediate implantation, given the potential long period of time between the freezing of spare fertilised ova and a subsequent attempt at implantation. The period of storage of the fertilised ova could not be regarded as a protected period since there was no way of knowing whether or when the ova would be used for further treatment.

withdrawn from their position at any time and Ms Danosa argued that this was contrary to Article 10 of the Pregnancy Directive as the Article of the Latvian Commercial Code did not provide for any restriction on removal in case of pregnant workers. This case required the Court of Justice to examine the concept of ‘worker’ within the Pregnancy Directive and its limits. Significantly the Court found that the concept of “worker” pursuant to 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. The Court found that the essential features of an employment relationship covered under the Directive was that “for a certain period of time a person performs services for and under a direction of another person in relation for which he/she receives remuneration”. Thus Ms Danosa who was a member of a company’s Board of Directors was a worker under the Directive provided her activities were carried out under the direction or supervision of that company and if, in return for those activities, she received remuneration. 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. This decision provides an expansive definition of ‘worker’ and may be broader than the definition of worker within the legal systems of many member states.

Pregnancy and less favourable treatment: Pay and sick leave:

The strong protection for pregnant employees against any less favourable treatment in the workplace is not subject to a countervailing protection for pregnant employees who are absent from the workplace due to pregnancy illness or who have been transferred to alternative duties or placed on a period of leave during pregnancy. This is particularly evident from the jurisprudence of the Court around the areas of pay and sick leave for such employees, a view which has been re-enforced by recent decisions of the Court. In addition, the Court has used the concept of a comparator which is not utilised in its analysis of less favourable treatment of pregnant employees in the workplace. The approach of the Court has been aptly captured as:
“steering an awkward course between protecting women’s employment throughout pregnancy and acknowledging that those on leave are in a different position to those at work”.  

In *McKenna v North Western Health Board* the Court was required to consider whether a 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 pregnancy related illness as the same as other illnesses, where the sick absence was caused by pregnancy related complications. 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, 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.”

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, it was not concerned with equal pay. However, 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 during 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

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65 Paragraph 58.
66 The Advocate General took a different approach finding that as duration of sick pay entitlement was at issue, it was an Equal Treatment case.
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. 67 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. 68

The reasoning of the Court in *McKenna* is squarely within the position taken in *Gillespie* 69 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. As a result of this decision and that of *Hoj Pederson* 70 the only entitlement for women with pregnancy related sickness is to the same contractual pay as any other employee but not full pay where other employees would not receive it. This is in spite of the recognition by the CJEU in *McKenna* that pregnant related illness is special in nature. They are of course protected from dismissal during pregnancy and maternity leave. The decision in *McKenna* would suggest that in pay discrimination claims involving pregnant workers, the Court may indeed turn to a comparison with the pay received by a worker absent from work on sick leave.

As discussed above, 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 is now impossible to make. 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 is motivated by economic considerations, as such it is unlikely that the Court will alter its stance on the issue. 71 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*

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67 Paragraph 67.
68 Paragraph 68.
70 Case C-66/96, [1998] ECR I-7327. The employees in this case were deprived of full pay when absent due to pregnancy related illnesses before the commencement of their maternity leave. The Court of Justice held it was contrary to 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.
leave exemption so that if earnings related, sick pay must take account of pay increases and all the benefits earned whilst actually at work.”

Two very recent decisions of the Court concerning the pay and benefits to which pregnant employees are entitled to, 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, Parviainen, concerned a pregnant airline employee employed as a flight attendant who was transferred to alternative duties 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 supplemental allowances amounting to approximately 40% of her salary which was made up of an allowance to reflect compensation for unsociable working hours or having to work long shifts. Ms Parviainen was permitted to retain the portion of her allowance which reflected her seniority in employment, having been employed by the airline for ten years. The Court held that employers are not required to maintain, 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 compensation for the disadvantage related to that performance. 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. However the Court did find that a pregnant worker

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73 C-471/08, judgment of the Court of Justice of the European Union, 1 July 2010, [2011] 1 CMLR 175. See also ‘Pregnant workers cannot claim allowances for tasks not performed’ [2010] 274 EU Focus 17-18.
74 At paragraph 61.
75 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.
who is granted leave from work or is temporarily transferred to another job because of her pregnancy, must remain entitled to remuneration including her basic monthly pay plus specified supplementary allowances related to her job such as those calculated on the basis of seniority or professional qualifications. Such a worker cannot be paid any less than other workers who are employed to perform the same job and must be entitled to any compensatory supplementary allowances relating to the new position subject to eligibility requirements.

The case, *Gassmayr*, 76 concerned the remuneration paid to an employee during pregnancy and maternity leave when the woman was granted leave from the position entirely due to medical advice. Ms Gassmayr was a junior doctor who received an on call allowance in addition to her basic salary but this ceased upon her commencing her period of enforced maternity leave due to health and safety reasons. The Court determined that Article 11(1)-(3) were sufficiently precise to be directly effective. 77 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 an adequate right to pay 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 earlier decision in *Parviainen* and held that the same applies to Article 5(3) of the Pregnancy Directive for employees who have been placed on leave. The Court had regard to its earlier decisions on payment during maternity leave including *Boyle*, 78 *Gillespie* 79 and *Alabaster* 80 and concluded that where a worker is absent from work because she is on maternity leave, the minimum protection required by the Pregnancy Directive does not require full payment or the payment of the on-call duty allowance during maternity leave.

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76 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.
77 This finding was anticipated by Ellis, *EU Anti Discrimination Law*, (OUP, 2005) at p. 246.
78 [1998] ECR I-6401
79 Case C-342/93[1996] IRLR 214
80 Case C-147/02 [2004] ECR I-3101
Therefore, these decisions provide useful guidance to employers and establish that while they remain obliged to provide minimum conditions for pregnant employees they are not compelled to continue paying those workers in the same way that they did prior to the pregnancy if the same tasks can no longer be performed even if this is caused by the pregnancy or placing of employee on health and safety leave. It is certainly arguable that this equates such periods as unproductive periods much like is the case with maternity leave periods which are beyond the remit of this paper. The case law continues in a similar vein from McKenna and treats pregnant employees absent from the workplace, even when this is entirely due to their pregnancy, in an entirely different manner to pregnant employees in the workplace. 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. However the Court has so far refused to intervene to protect a woman on pregnancy related sick leave save as to ensure that she cannot be dismissed during pregnancy and the period of statutory sick pay. The decisions may be considered to take into account the economic consequences for an employer.

Thus, there is a paradox between the levels and types of protection afforded to less favourable treatment on grounds of pregnancy by European law. On the one hand it is apparently acceptable to require strong protection from dismissal on grounds of pregnancy even though such a worker cannot satisfy the non-pregnant norm of a worker who is permanently and reliably available to an employer. At the same time the law does not protect a worker on maternity leave from a reduction in her income as a result of having to take that leave, even though that is a direct consequence of the pregnancy. Much of this paradox is sourced in the Court applying the Pregnancy Directive to the treatment of employees during maternity leave rather than the Equal Treatment Directive. The Court, in focusing on the Pregnancy Directive in addressing maternity rights such as leave and pay, has permitted stereotypical thinking by employers and by society that the care of new babies is the responsibility of the mother rather than of both parents. This has implications going beyond maternity rights when one considers how assumptions about responsibility for children can permeate from early childhood to later years and how imposing responsibilities for babies exclusively on their mothers can impact on women’s careers throughout the entirety of their parenting lives which
has been recognised to a limited extent by some of the Member States where protection from pregnancy related discrimination.  

Pregnancy and remedies:

The Recast Directive provides that Member States are required to introduce in their legal systems such measures as are necessary to ensure real and effective compensation or reparation as is for the Member States to 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. In a recent decision, the Court considered procedural issues concerning litigation for pregnant employees and more particularly appropriate remedies in the context of effective judicial protection for pregnant employees. In *Pontin v. T-Comalu*, 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 but which 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 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 15 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

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81 EU Commission, *Tackling the Pay Gap in the EU* (Luxembourg: EU Commission, 2011) at p. 2 notes that the impact of the gender pay gap means that women earn less over their lifetimes; this results in lower pensions and a risk of poverty in old age. In 2005, 21 % of women aged 65 and over were at risk of poverty, compared to 16 % of men.

82 Article 18 of the Recast Directive.

83 Case C-63/08[2010] CMLR 2.
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 DIRECTIVE:**

*Amended Pregnancy Directive:*

In October 2008, the Commission introduced a Proposed Directive to amend the Pregnancy Directive.\(^\text{84}\) Essentially it proposes to extend the minimum period of maternity leave from 14 to 18 weeks (6 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 proposes to include a provision in line with *Paquay\(^\text{85}\)* that preparation for dismissal of a pregnant employee during maternity leave for dismissal after her return is prohibited. Significantly, it also proposes 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. This could deal with the difficulties which mothers returning to the workplace could experience in being treated as the same as a male comparator with no accompanying protections (although some Member States provide for protection for a period after return from maternity leave such as for a period of time or until the child reaches a particular age).\(^\text{86}\) In Ireland, data has discovered that women are experiencing issues in employment upon their return to employment post maternity leave.\(^\text{87}\)

The proposed Directive also includes provision on the right for women when coming back from maternity leave or while still on maternity leave to ask their employer to adapt their working patterns and hours and the right to return to the same job or an equivalent post. The Proposed Directive provides that pregnant employees are entitled to choose when the non compulsory part of the maternity leave is to be taken. Therefore, Member States would be required to remove their requirement for women to take a portion of maternity leave prior to the birth of the child. It also proposes an addition to Article 11(2)(c) to make it clear that

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\(^\text{85}\) Case C-460/06 [2008] ICR 420.
there is a right to return to the same position or a new position on the same terms and conditions or terms and conditions which are no less favourable and this includes a right to benefit from any increase or improvements in working conditions to which the employee was entitled to during her absence. The Directive proposes that a new Article 11(5) be inserted which provides that a worker during maternity leave or upon her return from maternity leave has a right to ask her employer to adapt her working patterns and hours to the new family situation and the employer is required to consider this. The Proposed Directive leaves it for each Member State to provide for rules on this provision. It also includes introduces provisions for victimisation, burden of proof and penalties (which may not be limited by cap on compensation and must be proportionate, effective and dissuasive).

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 8 June 2009. The Proposed Directive hit a deadlock and the meeting was told that “further negotiations are necessary, in particular on the length of maternity leave and the connected issue of counting other family-related leave as maternity leave in certain cases, the obligatory portion of maternity leave and the maternity allowance.” This proposed Directive comes after the Commission received an impact report on how best to proceed with amendments to the Pregnancy Directive which concluded that the option of extending the duration of maternity leave and offering better compensation was considered to be a good way to improve the ability of women to reconcile childbearing with remaining in the labour market. It would give the mother longer to recover from giving birth and to bond with the child.88

The Commission’s proposals have 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 200989 which would extend the minimum period of maternity leave to 20 weeks, of which the first six would have to be remunerated at full normal pay, with the following 14 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 6 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 Womens Committee of the Parliament were considered by the Parliament on 20 October 2010 where it appears that 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 14 weeks to 20 weeks, which is an additional 2 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 Directive that workers would receive 100% of their salary for the first 6 weeks of maternity leave and thereafter, there was a non binding provision on member states to ensure that full pay was provided for the remainder of the maternity leave and this was to be at a minimum of the level of sick pay. The Parliament also accepted the amendment to the Directive proposed by the Women’s Rights and Gender Equality Committee of the Parliament Committee that two weeks’ fully paid paternity leave be provided to fathers.

The Parliament passed an amendment to the Proposed Directive which extends 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 6 months post maternity leave when these were requested by the employee.

The Parliament also passed an amendment to the Proposed amending Directive to permit pregnant employees who have been excluded from the workplace by their employer to consult a doctor of their own and if this doctor certifies the employee as fit to work, then the
employer is required to allow her back into employment in her prior position or pay her a salary equivalent to her full salary until the commencement of her maternity leave. This is a very noteworthy provision which, if passed in the final Directive, will provide valuable rights to employees excluded from the workplace during pregnancy by their employer. As we have seen, the current provisions of Article 11(1) merely provide that for pregnant workers excluded from the workplace, income must be guaranteed in accordance with national legislation. The new amendment, however, fails to deal with the non entitlement of such employees to payment of benefits contingent on performance during this period.

In keeping with the strengthening of the protections for pregnant employees in the amendments passed by the Parliament, the Parliament also passed an amendment to the proposed amendment of Article 11 of the Directive published by the Commission to permit a woman returning from maternity leave to discuss with her employer the impact of any restructuring or substantial reorganisation within her employment on her work situation and indirectly her work situation.

The proposals are facing strong opposition from a number of Member States primarily on grounds of cost and to a lesser extent, on grounds of limiting parental rights to mother rather than to fathers and creating obstacles to the recruitment of women in the workforce. The Proposed Directive was reviewed by the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs) in June 2011 where divergent views on the Directive were expressed. It appears that the views of the social partners will obtained an additional impact assessment to address the impact of the Proposed Directive on businesses and to better evaluate the benefit of the provisions and to examine specific provisions such as the right to return to work part-time, right to time off for breast feeding and further paid special leave. The position of the Council is awaited.

DIRECTIVE FOR SELF EMPLOYED INDIVIDUALS

A New Directive on self-employed workers and assisting spouses was passed by the European Council 24 June 2010. It repeals the previous Directive 86/613/EEC. For the

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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 14 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 self employed workers 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 less than effectual prior Directive and to encourage women to be engaged in entrepreneurship. A further 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 a farm or a local doctor's practice. These assisting spouses are traditionally completely dependent on their self-employed partner. As such, they are at a high risk of poverty in the event of divorce, their partner’s death or bankruptcy.

CONCLUSIONS:

The recent opening of the European Institute for Gender Equality is likely to herald much research in the area of pregnancy and employment. It may emerge that measures may be adopted to encourage the sharing of leave between parents apart from the period of leave reserved for women for biological and physiological reasons. While the protection for pregnant employees in the workplace from any discriminatory or detrimental treatment remains strong, this is in stark contrast to the position of employees absent from the workplace or who are unable to perform their duties of employment for reasons entirely connected with their employment. The decision of the Court in Mayr suggests that

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93 IP/10/1029.
94 Ibid.
95 See http://www.eige.europa.eu/.
96 Case C-506/06 [2008] IRLR 387.
contemporary and interesting issues regarding the precise application of the Recast Directive to pregnancy will emerge in the near future. Indeed a number of interesting references are pending before the Court of Justice at this time. The very recent judgment of the Court in *Danosa*\(^97\) suggests that the ambit of employees/workers protected by the Pregnancy Directive will continue to be considered by national courts and perhaps the Court itself. It will be interesting to see the influence of the provisions of the Charter of Fundament Rights on the case law of the Court. The Court may also have to determine whether the inclusion of pay in the working conditions provision of the Recast Directive means that any less favourable treatment regarding pay during pregnancy or maternity leave will be automatically unlawful. Further, it appears that the Proposed Directive to amend the Pregnancy Directive will continued to be explored by the Council of the European Union and it will be interesting to see the outcome of same. Therefore, despite twenty years of jurisprudence from the Court, there will be interesting times ahead.