Latest EU Jurisprudence on Pregnancy and Maternity Discrimination
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Two different approaches

➢ Issues of pregnancy/ childbirth/ breastfeeding in the workplace approached from 2 angles:
  • Equality/ discrimination angle
  • Health and safety angle

➢ The relationship between these 2 angles is not always pure
Relevant EU legislation

- **Equal treatment/ non-discrimination:**
  - Dir. 2006/54/EC (recast directive)

- **Health and safety:**
  - Dir. 92/85/EEC (pregnancy directive)

Equal treatment/ non-discrimination

- No general prohibition of discrimination in founding treaties

- Still 2 specific instances of discrimination prohibited:
  - Discrimination on grounds of nationality (within limits of powers of EC) – art. 18 TFEU (ex art. 12 TEC)
  - Wage discrimination between men and women – art. 157 TFEU (ex art. 141 TEC)
Wage discrimination

➢ Art. 157 TFEU (ex art. 141 TEC):
  - Economic purpose
  - CJEU opted for a fundamental rights approach
  - Bedrock article (not legal basis!) for all EU sex equality measures

Dir. 2006/54/EC

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

➢ General provision: Art. 14:
Prohibition of discrimination on grounds of sex in relation to:

- Conditions for access to employment
- Access to vocational guidance, training, ...
- Employment and working conditions
- Membership of/ involvement in employers/ workers organisations

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Dir. 2006/54/EC

➢ A number of provisions explicitly relate to pregnancy/ childbirth

➢ Some of these provisions have been based on case law of the CJEU
Art. 2:

‘2. For the purposes of this Directive, discrimination includes:

(a) [...];
(b) [...];
(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.'

Art. 15:

‘Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to 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 have been entitled during her absence.'
Dir. 2006/54/EC

➤ Art. 28:

‘Relationship to Community and national provisions

1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.’

Health and safety

➤ Many MS had protective legislation for women workers long before E(E)C came into existence

➤ 1987: European Commission examined this legislation for compatibility with predecessor of recast Directive (76/207)

➤ Commission distinguished between ‘anomalous provisions’, ‘humanitarian provisions’ and ‘health and safety provisions’
Health and safety

- Status of what Commission called ‘health and safety measures’ remained rather unclear

- EU contributed to this situation by the adoption of Dir. 92/85/EEC ‘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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)’

Dir. 92/85/EEC

- Approach = health and safety

- No link with equal treatment directives: i.e. problematic

- Pregnancy/ delivery/ breastfeeding = relevant traits for categorisation, as opposed to a specific derogation from equal treatment directives

- Risk of discrimination of women workers

- Under revision!
2 types of protective measures:

- Restrictive/ negative protective measures: pregnant workers are excluded from certain jobs/ working conditions/...

- Enhancing/ positive protective measures: require employers to give pregnant workers special treatment

Enhancing/ positive protective measures:

E.g.:

- Maternity leave
  - Continuous period of min. 14 weeks before and/or after childbirth (right) – no maximum!
  - Including 2 weeks of compulsory leave before and/or after confinement
  - Payment/ adequate allowance, at least equivalent to allowance in case of illness
Recent case law CJEU

- Recent cases show the problematic relationship between recast and Pregnancy Directives
- Pregnancy Directive is cut off from the equality debate
- Pregnancy Directive allows for parental leave to be labelled as maternity leave, and, in doing so, calcifies unequal treatment of both men and women

Betriu Montull

- C-5/12, Betriu Montull, 13 September 2013
- Spanish State Social Security Scheme:
  - 6 compulsory weeks immediately after childbirth
  - 10 optional weeks that can be shared between parents
- Mr. Betriu Montull: covered by state scheme, but his wife is not!
- Mr. Betriu Montull requests to be allowed the optional weeks
Betriu Montull

➢ Spanish authorities:
  • NO!
    ▶ Right to this leave = independent right of mothers covered by the state scheme
    ▶ Fathers only have a dependent right, no autonomous right to leave (whilst adoptive fathers do have such autonomous right!)

➢ Spanish court says:
  • This is in fact disguised parental leave (Dir. 96/34)
  • Shouldn’t it be given on an equal basis to male and female workers? (Dir. 76/207)

Betriu Montull

➢ CJEU:
  • Dir. 92/85 should be taken into account, even though not mentioned in order for reference!
  • Maternity leave:
    ▶ To protect women’s biological condition
    ▶ To protect special relationship woman-child
“[…] Directive 92/85 does not preclude the mother of the child who has the status of an employed person from deciding that the child’s father, who has the same status, will take all or part of the maternity leave in respect of the period after the period of compulsory leave.” (par. 58)

“[…] Article 2(3) of Directive 76/207 lays down that that directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.” (par. 61)

“A measure such as that at issue in the main proceedings is, in any event, intended to protect a woman’s biological condition during and after pregnancy.” (par. 63)

Is that so? Wouldn’t that part of the leave be compulsory then?
AG Wathelet:

- Cfr. Roca Álvarez (C-104/09; breastfeeding leave)
- “By providing that the mother may, at the beginning of the maternity leave, elect, after the first 6 weeks, for the father to take a designated and continuous part of the subsequent 10-week period of leave, the Spanish legislature detached those 10 weeks of leave from the mother’s biological condition and, consequently, from the purpose of Article 2(3) of Directive 76/207.” (par. 71)

Pending cases on surrogacy

- C-167/12 (British case) and C-363/12 (Irish case)
- Intended mothers requesting maternity leave (Dir. 92/85)
- AG Kokott (C-167/12; 26 September 2013)
  - Dir. 92/85 also protects special relationship woman-child
  - “Where a Member State recognises surrogacy and thus the functional sharing of the role of mother between two women, it must act accordingly and confer on the intended mother the relevant rights relating to maternity leave.” (par. 63)
Pending cases on surrogacy

- AG Wahl (C-363/12; 26 September 2013)
  - “Precisely because of the clearly enunciated objective of protecting the health and safety of workers in a vulnerable condition, I cannot read Directive 92/85 as protecting a right to paid leave of absence equivalent to maternity leave in the case of a mother who has had her genetic child through a surrogacy arrangement.” (par. 48)
  - recast Directive is not applicable either: differential treatment is not based on sex

Conclusion – work in progress

- Plea for detaching pregnancy/maternity leave (health and safety of the mother) from parental leave (in the interest of the child)
- All children have the right to bond with their parents (people who take care of them), also adoptive children, children born to a surrogate mother, ...