

**RECONCILIATION OF WORK AND FAMILY LIFE: PROTECTIVE MEASURES  
FOR PREGNANT WORKERS, MATERNITY LEAVE AND PARENTAL LEAVE**

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**CLAIRE BRUTON LL.B (DUB), LL.M (LOND), BARRISTER-AT-LAW**

**INTRODUCTION:**

The issue of the reconciliation of professional, private and family life is firmly set on the social agenda of the European Union. The Council has attempted to create a life-cycle approach to work should be promoted through - among other means - a better reconciliation of work and private life and the provision of accessible and affordable childcare facilities and care for other dependants in the quest for the much sought after work life balance. Indeed the Commission has undertaken to strive for improvement in the area in its strategy for 2010-2015 citing in particular the progress it made in the context of its Parental Leave Directive.<sup>1</sup>

Member States take a wide range of measures with the aim of facilitating the reconciliation of work and private life, e.g. legislation regarding part-time work, various forms of leave, flexible working time arrangements, the provision of childcare services and financial benefits.

The European Commission accurately summarised the dilemma for parents who wish to participate in the labour market in its 2007 report on the Gender Agenda:

*“The way we live our lives has transformed dramatically in the last 30 years. New parents expect to share the upbringing of their children and both women and men want to work more flexibly and provide more support for older relatives. But life around us has not caught up and we are still living with the consequences of an unfinished social revolution. We are still faced with many workplaces, institutions*

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<sup>1</sup> Communication from Commission, *Strategy for Equality between men and women 2010-2015*, COM (2010) 491 final.

*and services designed for an age when women stayed at home. In other areas of modern life, inequalities underpins life and death issues.”<sup>2</sup>*

This paper provides an overview and analysis relevant EU legislation and the case law of the Court of Justice of the European Union in particular as regards pregnancy and maternity rights, parental leave, paternity leave and other family-related leaves. 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.

In the context of pregnancy, the CJEU 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.<sup>3</sup>

## **PREGNANCY AND MATERNITY LEAVE:**

### **Legislation:**

#### *Recast Equal Treatment Directive:*

The Recast Equal Treatment Directive<sup>4</sup> was introduced as part of the European Commission’s better legislation programme. The gender equality Directives<sup>5</sup> were recast and

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<sup>2</sup> Equal Opportunities’ Commission, *Gender Agenda*, (2007).

<sup>3</sup> The number of women in employment across the EU has increased from 51.1% in 1997 to 58.3% in 2007 and 62.5% in 2010. See European Commission, *Report on Equality between Women and Men 2009*, (Luxembourg, Publications Office of the European Union, 2010) at p. 8 and European Commission, *Report on Progress of Equality between Women and Men 2011* (Luxembourg: Publications Office of the European Union, 2011) at p. 5.

<sup>4</sup> 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).

<sup>5</sup> Equal Treatment Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions as amended by Directive 2002/73/EC, Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the

consolidated into one single Directive thereby simplifying EU law relating to equal treatment between men and women. The Pregnancy Directive remained outside of the consolidated 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 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,<sup>6</sup> 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”*

A good example of the application of this principle can be seen in *CNAVTS v Thivault*<sup>7</sup> where the Court 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 have been assessed during the year she took the leave and could therefore have qualified for promotion.

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. 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

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principle of equal pay for men and women and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

<sup>6</sup> *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941.

<sup>7</sup> (C-136/95) [1998] E.C.R. I-2011

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 working conditions<sup>8</sup> 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.<sup>9</sup> 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 *McKenna*<sup>10</sup> and the more recent decisions of *Gassmayr*,<sup>11</sup> and *Parviainen*,<sup>12</sup> it is very unlikely that the Court will take a different approach even in apply the provisions of the Recast Directive.

#### *Pregnancy Directive:*

The Pregnancy Directive<sup>13</sup> 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.<sup>14</sup> This omission has been criticised as a missed opportunity to clarify and simplify the interplay

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<sup>8</sup> 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.

<sup>9</sup> Burrows and Robison, "An Assessment of the Recast of Community Equality Laws" (2007) 13(2) ELJ 186 at p. 198-9.

<sup>10</sup> Case C-191/03 [2005] IRLR 895.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> Directive 92/85/EEC - pregnant workers of 19 October 1992 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.

<sup>14</sup> Article 153 TFEU (ex Article 137 EC).

between the provisions of Article 157,<sup>15</sup> 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.<sup>16</sup>

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 guarantees respect for the principle of equal treatment as laid down in the Equal Treatment Directive (now the Recast Directive) and adopts a dual approach towards achieving that goal protecting female workers on the one hand and upholding the principle of equal opportunities for men and women on the other. It expressly allows for substantive equality by explicitly allowing for special treatment for women where required by reason of a woman's special needs in connection with pregnancy and childbirth.

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.<sup>17</sup> Further 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. The Directive provides for a number of specific leave periods (including maternity leave)<sup>18</sup> and other protective measures uniquely designed for pregnant employees. The first part of the Pregnancy Directive provides for protective provisions for pregnant employees and is designed to protect women from dangerous or hazardous work during pregnancy and after child birth and to protect women who take sick leave, etc where their employment rights are protected. Article 4 requires employers to undertake a risk assessment

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<sup>15</sup> Ex Article 141.

<sup>16</sup> Burrows and Robison, "An Assessment of the Recast of Community Equality Laws" (2007) 13(2) ELJ 186 at 194/5.

<sup>17</sup> Article 15 of the Recast Directive. This Article is beyond the scope of this paper.

<sup>18</sup> 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).

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 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.<sup>19</sup> 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. The Court of Justice has made it clear that the pre-conditions to be satisfied before a woman can be put on health and safety leave must be strictly complied with in order to avoid the employee being subjected to less favourable treatment on grounds of her pregnancy. In *Pedersen & Others v Kvickly Skive & Others*<sup>20</sup> national law permitted the employer was entitled to send a pregnant employee home where the employer considered they could not provide work for her although the employee was deemed fit for work. The Court of Justice found that such practice was unlawful because the reason for the employer sending the employee home was based on the interest of the employer. The Court held that such a decision could not be taken without first examining the options as set out in the Directive.

The second part of the Directive contains one of the most significant features of the Pregnancy Directive being Article 10 which quite simply prohibits a dismissal of a pregnant woman during the period from the beginning of their pregnancy to the end of the maternity leave, save in exceptional circumstances not connected with their condition, which are permitted under national law or practice. If a pregnant worker is dismissed during that period, they must be provided with “duly substantiated” grounds in writing and Member States must provide a remedy for pregnant workers who are dismissed. Article 10 is particularly significant in that it has now been recognised by the Court in *Melgar*<sup>21</sup> that it is directly effective in the Courts of the Member States. The Court observed that whilst the Article does not require Member States to draw up a specific list of exceptional circumstances, it does not

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<sup>19</sup> Article 5(4) of the Pregnancy Directive.

<sup>20</sup> (C-66/96), [1998] E.C.R. I-7327.

<sup>21</sup> (C-438/99), [2001] E.C.R. I-6915

prevent them from providing for higher protection for pregnant workers by laying down specific grounds for when dismissals can take place.<sup>22</sup> Interestingly, many Member States take this approach and in fact the protection in some Member States is almost absolute.<sup>23</sup>

Articles 8, 9 and 11 of the Pregnancy Directive contain provisions safeguarding women's employment rights during pregnancy and childbirth and the period thereafter which are the core entitlements relating to maternity. Article 8 is the most substantive right being the right to maternity leave of at least 14 weeks during which time the Directive provides an adequate allowance shall be payable to the employee which will be at least what a person on statutory sick leave would receive under national rules.<sup>24</sup>

### *Amendments to Pregnancy Directive*

The proposed Pregnancy Directive<sup>25</sup> puts forward a number of potentially far reaching amendments to the Pregnancy Directive. The most noteworthy proposed provisions contained in the proposed Directive, following the amendments passed by the EU Parliament,<sup>26</sup> are the extension of maternity leave to a minimum period of 20 weeks, provision 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, that Article 10 of the Directive (which provides for an obligation on an employer to provide written grounds substantiating a reason for the dismissal of a pregnancy worker) be extended to the period from the beginning of pregnancy to at least six months following the end of the maternity leave and the payment two weeks' fully paid paternity leave be provided to fathers. It also provides for two weeks paternity leave. The right to request flexible working arrangements is also provided for women coming back from maternity leave such as by way of alteration to working patterns and hours. It is unsurprising with the breadth of these proposed amendments that they have faced opposition

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<sup>22</sup> (C-438/99) , [2001] E.C.R. I-6915 aft paragraph 37

<sup>23</sup> Network of Legal Experts, *Report on Pregnancy, Maternity, Parental and Paternity Rights*, (2007) at p. 7.

<sup>24</sup> Article 11.

<sup>25</sup> COM (2008) 637 final. For a detailed examination of the proposed Directive see L. Waddington, 'Future prospects for EU Equality law: lessons to be learnt from the proposed Equal Treatment Directive' [2011] 36(2) European Law Review 163.

<sup>26</sup> European Parliament legislative resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvement in the safety and health and work of pregnant workers and workers who have recently given birth and or are breastfeeding P7\_TA(2010)0373.

from member states and it appears that the proposed Directive has effectively been stymied since June 2011. The position of the Council is awaited.

*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.<sup>27</sup>

Article 33 of the Charter places the protection of the family at its core and is as follows:

*“(1) The family shall enjoy legal, economic and social protection.*

*(2) To reconcile family and professional life, everyone shall have the right to protection from dismissals for a reason connected with maternity and a right to paid maternity leave and to parental leave following the birth or adoption of a child.”*

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.<sup>28</sup> Similarly the Charter was cited in

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<sup>27</sup> See Articles 51 and 52 of the Charter of Fundamental Rights of the European Union (2000/C 364/01). See also Koukoulis-Spiliotopoulos, ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’, [2008] 1 European Gender Equality Law Review 15 and Ellis, ‘The Impact of the Lisbon Treaty on Gender Equality’ [2010] 1 European Gender Equality Law Review 7.

<sup>28</sup> *Kucukdeveci v. Swedex GmbH* Case C-555/07, Judgment of 19 January 2010 not yet reported.

a recent case concerning a pregnant company director.<sup>29</sup> 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*”.<sup>30</sup> Therefore, the Charter may play some role in determining the rights of pregnant workers.<sup>31</sup>

*Definition of pregnant worker:*

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.*”<sup>32</sup> This has been refined somewhat by the CJEU in its recent judgment in *Danosa*<sup>33</sup> 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. *Danosa*<sup>34</sup> 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. 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

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<sup>29</sup> *Danosa* Case C-232/09 [2011] 2 CMLR 45.

<sup>30</sup> *Danosa* Case C-232/09 [2011] 2 CMLR 45.

<sup>31</sup> 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>

<sup>32</sup> Case C-116/06 *Kiiski* [2007] ECR I-7643.

<sup>33</sup> Case C-232/09 [2011] 2 CMLR 45.

<sup>34</sup> C-232/09 [2011] 2 CMLR 45. At paragraph 26.

company and if, in return for those activities, she received remuneration. 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.

There was 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<sup>35</sup>, which could have led to the Court of Justice expanding yet again the scope of employees covered by the law on pregnancy discrimination. However this case was settled in August 2012 prior to the Court of Justice ruling.<sup>36</sup>

### *Surrogacy and protection:*

There are two referrals pending before the Court of Justice as to whether a woman who has a baby through a surrogacy arrangement is protected by the Recast and Pregnancy Directives. The first referral is from the Employment Appeal Tribunal in the UK *CD v ST* (C-167/12), and the second is a referral from the Irish Equality Tribunal, *Z*, (C-363/12). Advocate General Opinions<sup>37</sup> have issued in both referrals but judgments from the Court of Justice are awaited. In the referral from the UK EAT AG Kokott noted that there are no uniform rules on the matter of surrogacy in the EU. The Advocate-General therefore considered that an intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave provided for under EU law after the birth of the child in any event where 3 conditions are satisfied:

- she takes the child into her care following birth (not necessarily breastfeeding),
- surrogacy is permitted in the Member State concerned, and
- its national requirements are satisfied.

By contrast, in the reference from the Irish Equality Tribunal according to Advocate General Wahl, Mrs. Z has not been discriminated on grounds of sex or disability. Her situation could however be compared to that of an adoptive mother, but, as the EU has not yet passed legislation harmonising the right to paid leave of absence for adoptive parents, national law

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<sup>35</sup> *Kulikaoskas v Macduff Shellfish Ltd* C-44/12

<sup>36</sup> See <http://www.equalityhumanrights.com/scotland/legal-news-in-scotland/articles/coleman-revisited/>

<sup>37</sup> AG Kokott delivered an Opinion in CD on 26 September 2013 and AG Wahl delivered an Opinion on Z on the same date.

may or may not foresee in this possibility. Where national law does know the possibility of paid adoption leave, the national court ought to assess whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement constitutes prohibited discrimination contrary to that national law.

These are conflicting Opinions and the judgment of the CJEU is therefore awaited with considerable interest.

## **CASE LAW PREGNANCY AND MATERNITY LEAVE**

*Pregnancy and less favourable treatment: Setting the scene:*

The landmark judgment of the Court of Justice in *Dekker* is the starting point of any consideration of reconciliation of family life and caring responsibilities case law. 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 this case the refusal to offer employment, was prohibited as a form of direct discrimination on grounds of sex.<sup>38</sup>

*that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex . A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy . Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave .*

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.<sup>39</sup> A later decision applied this reasoning to the duration of a woman's pregnancy.<sup>40</sup>

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<sup>38</sup> *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941

<sup>39</sup> *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941 at paragraph 12.

<sup>40</sup> *Mahlburg* C-207/98 [2000] IRLR 276 at paragraph 27.

The decision in *Dekker* was later extended to dismissals on grounds of pregnancy<sup>41</sup> and to discrimination against a pregnant employee in respect of the terms and conditions of her employment which were also classified as direct discrimination.<sup>42</sup> 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.<sup>43</sup> 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*,<sup>44</sup> 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*.<sup>45</sup> 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.<sup>46</sup>

*Protection from dismissal during pregnancy and maternity leave:*

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. The case of *Webb v. EMO (Air Cargo) Ltd*,<sup>47</sup> 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*

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<sup>41</sup> *Handels-og Kontorfunktionaerernes Forbund i Danmark (acting for Hoj Pederson) v. Foellesforeningen For Danmarks Brugsforeninger* Case C-66/96 [1999] IRLR 55.

<sup>42</sup> *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.

<sup>43</sup> *Mahlburg* C-207/98 [2000] IRLR 276 at paragraph 25.

<sup>44</sup> Case C-77/88 [1990] ECR I-3941. See also Bolger and Kimber, *Sex Discrimination Law* (Round Hall, 2000) at pp. 296-298, Ellis, ‘Discrimination on the Grounds of Pregnancy in EEC Law’ (1991) Public Law 159 and Shaw, ‘Pregnancy Discrimination in Sex Discrimination’ (1991) EL Review 313.

<sup>45</sup> Case C-179/88 [1990] ECR I-3979.

<sup>46</sup> See also *Brown* Case C-394/96 [1998] ECR I-4185.

<sup>47</sup> Case C-32/93[1994] IRLR 482.

*woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract”.*<sup>48</sup>

In the later decision *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.<sup>49</sup> 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.<sup>50</sup> 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. 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:

*“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”.*<sup>51</sup>

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).<sup>52</sup> Ms Melgar informed her employer that she was pregnant and despite this was informed by her

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<sup>48</sup> *Ibid* at paragraph 26.

<sup>49</sup> *Tele Danmark A/S v. Handels-og Kontorfunktionaerernes Forbund i Danmark (HK)* Case C-109/00 [2004] ICR 610

<sup>50</sup> Paragraph 33.

<sup>51</sup> Paragraph 31

<sup>52</sup> *Melgar v Ayuntamiento de Los Barrios* Case C-438/99 [2001] ECR I-6915 Paragraph 42.

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.<sup>53</sup>

*“where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex”*

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 pregnant workers by laying down specific grounds for when dismissals can take place.<sup>54</sup> Many Member States take this approach and in fact the protection in some Member States is almost absolute.<sup>55</sup>

The ability of an employer to terminate an employee following the end of maternity leave has been clarified by the Court of Justice. It held in *Paquay*<sup>56</sup> 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.

*No requirement for employee to inform employer of pregnancy:*

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<sup>53</sup> Paragraph 46.

<sup>54</sup> Paragraph 37.

<sup>55</sup> Network of Legal Experts, *Report on Pregnancy, Maternity, Parental and Paternity Rights*, (2007) at p. 7.

<sup>56</sup> Case C-460/06 [2008] ICR 420.

The decision of the Court of Justice in *Busch*<sup>57</sup> has been described as pushing “*the principle of non-discrimination to its outermost limits*”<sup>58</sup> and demonstrates how far the Court of Justice is prepared to go in terms of protecting pregnancy employees. Ms Busch commenced a period of parental leave after the birth of her first child of three years in duration. Shortly after commencing her parental leave, she became pregnant and a number of months later requested that her parental leave be terminated so that she could return 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. Probably more clearly the Court of Justice in *Danosa*<sup>59</sup> stated that even if the worker had not formally informed her employer of her pregnancy, if the employer

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<sup>57</sup> Case C-320/01 [2003] IRLR 625.

<sup>58</sup> Barnard, *EC Employment Law*, (3<sup>rd</sup> ed, OUP, 2006) at p. 450.

<sup>59</sup> Case C-232/09 [2011] 2 CMLR 45.

learnt of it, she would be protected by the provisions of the Pregnancy Directive. Therefore no formal notice or notification is required.

*Pregnancy and less favourable treatment: Recent case law:*

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*<sup>60</sup> 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.”<sup>61</sup>*

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<sup>60</sup> Case C-506/06 [2008] IRLR 387.

<sup>61</sup> Para 50

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 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 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.<sup>62</sup> 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-Comalux*,<sup>63</sup> 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

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<sup>62</sup> Article 18 of the Recast Directive.

<sup>63</sup> Case C-63/08[2010] CMLR 2.

employee who had been dismissed, constituted less favourable treatment of a woman related to pregnancy especially where the Code did not comply with the principle of effective judicial protection of an individual's rights under Community law.

*Pregnancy/Maternity leave/Health and safety leave 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”.*<sup>64</sup>

In *McKenna v North Western Health Board*<sup>65</sup> 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*

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<sup>64</sup> Costello and Davies, ‘The Case Law of the Court of Justice in the Field of Sex Equality Since 2000’ [2006] 43 CMLR 1567 at 1603.

<sup>65</sup> Case C-191/03 [2004] ECR I-3101, [2005] IRLR 895.

*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.”*<sup>66</sup>

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.<sup>67</sup> 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 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.<sup>68</sup> 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.<sup>69</sup>

The reasoning of the Court in *McKenna* is squarely within the position taken in *Gillespie*<sup>70</sup> 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 *Høj Pederson*<sup>71</sup> 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*

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<sup>66</sup> Paragraph 58.

<sup>67</sup> The Advocate General took a different approach finding that as duration of sick pay entitlement was at issue, it was an equal treatment case.

<sup>68</sup> Paragraph 67.

<sup>69</sup> Paragraph 68.

<sup>70</sup> Case C-342/93[1996] IRLR 214.

<sup>71</sup> 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.

that pregnant related illness is special in nature and is different to other conditions. 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. A more progressive approach can be seen from the decision of the Court of Justice in *Alabaster v Woolwich plc*<sup>72</sup> where the Court held that a pay rise awarded during maternity leave must be included in the calculation of statutory maternity pay which was linked to her previous level of income during a period prior to the commencement of maternity leave. The Court was emphatic in holding that “*to deny such an increase to a woman on maternity leave would discriminate against her, since, had she not been pregnant, she would not have received the pay rise.*”

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 potentially difficult to make.

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*,<sup>73</sup> 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 and as a result lost supplemental allowances amounting to approximately 40% of her salary. 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.<sup>74</sup> In this regard reliance was placed on Article 11(4) of the Pregnancy Directive which provides that:

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<sup>72</sup> C-147/02, [2004] ECR I-3101.

<sup>73</sup> 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.

<sup>74</sup> At paragraph 61.

*“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.”*

However the Court did find that a pregnant worker 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 second case, *Gassmayr*,<sup>75</sup> 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.<sup>76</sup> 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

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<sup>75</sup> 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.

<sup>76</sup> This finding was anticipated by Ellis, *EU Anti Discrimination Law*, (OUP, 2005) at p. 246.

to its earlier decisions on payment during maternity leave including *Boyle*,<sup>77</sup> *Gillespie*<sup>78</sup> and *Alabaster*<sup>79</sup> 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.

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 position with entitlements to a bonus during maternity leave is less clear. In *Lewen v Lothar Denda*<sup>80</sup> the Court held that Article 157 (ex article 141-equal pay) precluded an employer from taking periods of maternity leave into account when granting a Christmas bonus so as to reduce the benefit pro rata by failing to take account of the work done in the year/time off for maternity leave.<sup>81</sup>

#### *Maternity leave:*

Maternity rights are almost invariably confined to women only in spite of the fact that only a small aspect of those rights could be for medical purpose i.e. the limited periods of leave which a woman is required to take either before or after her date of confinement. The Court of Justice in Mr Hoffman's case<sup>82</sup> recognised at an early stage in the development of maternity rights, that maternity leave fell within the scope of Article 2(3) of the then Equal Treatment Directive which leaves Member States with a discretion in relation to social

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<sup>77</sup> [1998] ECR I-6401

<sup>78</sup> Case C-342/93 [1996] IRLR 214

<sup>79</sup> Case C-147/02 [2004] ECR I-3101

<sup>80</sup> (C-333/97) [1999] E.C.R. I-7243.

<sup>81</sup> See Bruning and Plontenga, 'Parental Leave and Equal Opportunities' (1999) 9 J.E.S.P. 195. See also Kimber 'Equal treatment for employees on leave and bonus payments' [2005] 2(2) I.E.L.J. 53

<sup>82</sup> *Hoffman v Berner Ersatzkasse* (C184/83), [1984] E.C.R. 3047. See to similar effect the earlier decision of *Commission v. Italy* (C-163-83) [1983] E.C.R. 3273 where the CJEU found that an Italian law which gave a woman (but not her husband) the entitlement to the equivalent of maternity leave when they adopted a child under six to be justified by the "legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new born child in the family during the very delicate initial period."

measures to guarantee the protection of women in connection with pregnancy and maternity.<sup>83</sup> It is clear from the judgment of the Court of Justice in *Hoffman* that the relationship between mother and young children is deemed special and worthy of protection. The view of confining maternity leave to women continues to emanate from the Court of Justice which has held that maternity leave protection is necessary for two main reasons. Firstly, it aims at protecting the woman's biological condition immediately following the birth of her child, and secondly at protecting the special relationship between the mother and her newly born child.<sup>84</sup> Therefore maternity leave can be restricted to the mother and denied to a father without violating the principles of equal treatment lay down in the Directive.

A slightly less restrictive approach was taken by the Court of Justice in *Lommers*<sup>85</sup> where it held that a Dutch policy offering subsidised childcare to female employees in order to address under-representation was lawful provided that the same facilities were offered to men taking care of children by themselves or in exceptional circumstances. In a similar approach in *Alvarez*<sup>86</sup> the Court of Justice struck down as discriminatory a Spanish law which granted time off work to breastfeeding mothers but also allowed the same time to be taken by non breastfeeding mothers in order to care for their children. The failure to allow the latter, i.e. non breastfeeding mother's time off, to be equally taken by the fathers of the children was found to constitute unlawful discrimination on grounds of gender. However the Court specifically upheld the arguments made by the Irish government that time off for breastfeeding mothers exclusively without granting it to non breastfeeding mothers, was entirely legitimate as it was to facilitate something that could only be done by women.

The approach towards fathers has suffered a set-back in the more recent judgment of the Court of Justice in *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*.<sup>87</sup> This case concerned whether a Spanish law requiring the mother to be an employee or covered by a State social security scheme in order for the father to be permitted to share her maternity leave was precluded by the Pregnancy Directive or Equal Treatment Directive. In

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<sup>83</sup> Now Article 28 of the Recast Gender Directive. Directive 2006/54/EC of the European Parliament and of the Council of 5 July on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>84</sup> *Mahlburg Lan Mecklenborg-Vorpommern* (C-207/98) [2000] E.C.R. I-549.

<sup>85</sup> C-476/99 [2002] E.C.R. I-2891.

<sup>86</sup> (C-104/09) [2010] E.C.R. I-08661.

<sup>87</sup> C-5/12.

focussing on the women's biological condition and special relationship between a woman-child, the Court of Justice held that such treatment was not prohibited by the Pregnancy Directive or Equal Treatment. Moreover, as regards the difference in treatment adoptive fathers and biological fathers in relation to maternity leave, the CJEU stated that at the time of the facts, there was no prohibition in the EC Treaty, in any European Union directive or in any other provision of European Union law of that discrimination. This emphasis that the primary right to paid maternity leave rests with the mother and the father as a matter of EU law has no independent right to such leave. This judgment does not prohibit the sharing of maternity leave but if the mother has no right to paid maternity leave as she is self-employed and is not covered by the state social security scheme, there is no leave for the father to share.

Finally, the Recast Directive recognises the need to protect a woman returning to work from maternity leave. Article 15 guarantees the right of a woman returning to work from maternity leave to return to her job or to "an equivalent post on terms and conditions which are no less favourable to her".

## **PATERNITY LEAVE**

The Recast Directive does not provide for paternity leave in European law but does recognise that if paternity leave is provided for in national law, then a person who has taken the leave must be permitted to return to work. There is no right to paternity leave as such in European law, in spite of soft law and policy aspirations towards a greater level of involvement for fathers in taking time off work to care for their children, as discussed above. Article 16 of the Recast Directive does require Member States who recognise such leave to take the necessary measures to protect against dismissal due to exercising such rights and to ensure they are entitled to return to work at the end of the leave. However this is expressed to be without prejudice to the right of Member States to recognise "distinct" rights to paternity adoptive. Whilst any recognition of paternity rights are to be welcomed, the limited manner in which Article 16 recognised them has been criticised as potentially perpetuating a distinction

between maternity leave and paternity leave to the detriment of gender neutral parental rights making their way into working life.<sup>88</sup>

## **PARENTAL LEAVE**

### *The Parental Leave Directive*

The Parental Leave Directive<sup>89</sup> was a framework agreement concluded by the three principle cross industry organisations providing for an entitlement to a period of unpaid parental leave to enable parents to take care of young children as well as limited urgent family leave (not limited to parent child relationships) known as force majeure leave. It is designed to support work life balance, promote women's participation in the labour force and the sharing of care responsibilities between men and women and to take account of the special needs of children with disabilities or long term illness. The Directive had a difficult history having been first proposed by the European Commission in 1983 but was blocked due to the then requirement for unanimity. The Directive that was eventually passed in 1996, with a period of 2 years for implementation, set out fairly minimum requirements. Whilst this did not particularly impact in many of the Member States as they already had parental leave provisions, it had a significant impact on Ireland in introducing parental leave for the first time. Although the Parental Leave Directive has been repealed as of 8 March 2012 and replaced by the 2010 Directive all references to the 1996 Directive shall now refer to the 2010 Directive.<sup>90</sup>

The purpose and scope of the new Directive is provided in clause 1.1. to “*facilitate the reconciliation of professional and parental responsibilities for working parents ... taking account of the increasing diversity of family structures while respecting national law, collective agreements and or practice*” which is clearly aimed at member states to improve their existing provisions pertaining to child-rearing situations. The right to parental leave is extended from 3 to 4 months for each child. The entitlement is given to both parents of a

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<sup>88</sup>A. Numhauser-Henning, “EU Sex Equality Law Post Amsterdam” in H. Meenan (ed), *Equality Law in an Enlarged European Union; Understanding the Article 13 Directive* (Cambridge: Cambridge University Press 2007) pp. 145-177 at p. 159.

<sup>89</sup> Council Directive on the Framework Agreement & Parental Leave concluded by UNICE, CEP and The ETUC (Directive 96/42/EC).

<sup>90</sup> Article 4 of Council Directive 2010/18 EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by Businesseurope, Ueapme, Ceep and Etuc and Repealing Directive 96/34/EC.

child or an adopted child up to a maximum age of 8 years. The Directive sets out the general principle that the leave is an individual right and should not be transferred from one parent to another and in order to encourage a more equal take up of leave by both parents, at least one of the months is non-transferrable. However by providing the non transferability of parental leave in principle, it is envisaged that member states may avail of exceptions for example where it is not possible such as where one of the parents is deceased or one of them is unable to work. The new Directive provides that there shall not be an upper limit on the compensation payable in the event of a breach of the principle of equal treatment.

Whilst the new Directive envisages a wide application of the right to parental leave to all employees including part time, fixed term and temporary agency employees (taking account of the increasing atypical nature of employment), it does maintain the possibility of a qualification period of a maximum of one year.

A significant new entitlement is that of employees returning from parental leave to have the right to ask for changes to their working hours and/or patterns for a specified period. Interestingly employees and employers are encouraged to maintain contact during parental leave and to arrange suitable reintegration measures on return to work. The Directive also provides for the right of an employee to return to the same job or if this is not possible to an equivalent position.

The new Directive does not make any significant changes to the entitlement to force majeure leave and continues to allow that to be granted by Member States on an unpaid basis.

*Case law:*

There has not been a great deal of judicial consideration of the Directive although recent cases have focussed on the rights of fathers. However the Court of Justice has provided some helpful clarification on the scope of the Directive. For example in *Commission v Luxembourg*<sup>91</sup> the Court held that the period of parental leave may not be reduced where it is interrupted by another period of leave such as maternity leave which has a different purpose from parental leave. The Court of Justice has made clear that parental leave and maternity leave are different: parental leave enables either parent to look after the child whereas

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<sup>91</sup> (C-519/03), [2005] E.C.R. I-03067.

maternity leave applies to mothers only after birth. A less helpful decision on the part of the Court of Justice arose in *Osterreichischer Gewerkschaftsbund*<sup>92</sup> where a distinction was drawn between an employee on parental leave and an employee on leave in order to perform national service. The Court found that the interest of the worker in the family in the case of parental leave were of a different nature to what the court referred to as the collective interest of the nation in relation to national service<sup>93</sup>. Therefore the situations were not comparable and the claim that a failure to take parental leave into account in calculating the period of service for the purpose of a termination package, did not constitute indirect discrimination of women. The decision has been criticised and it has been argued that the Court should have considered whether the failure to take the leave requirement itself into account worked to the disadvantage of women in which case what the Court should have considered was whether there was any objective justification for the practice.<sup>94</sup> The decision could also be criticised for failing to recognise the collective interests of the State in ensuring the care of children and family members rather than perceiving that as an individual right. A further failure to take a child centred approach to the scope of protection afforded by the Directive occurred in the Court's decision in *Chatzi v. Ypourgos Oikonomikon*<sup>95</sup> where the Court held that the Parental Leave Directive could not be interpreted as conferring an individual right to parental leave on the child nor did it confer entitlement to a number of periods of parental leave equal to the number of children born. The Court of Justice noted that parental leave is not provided to each child individually so that their parents can care for the child (as had been argued on behalf of the mother of twins who had claimed an entitlement to parental leave for each child) but rather for parents to properly care for their children. The Court's decision is relevant in confirming the overall legislative intention behind the Directive as parent rather than child focused.

The treatment of parental leave in calculating the value of a termination package also fell to be considered by the Court of Justice in the case of *Meerts v Proost NV*.<sup>96</sup> The employee in that case was working reduced hours in her full time job as she had taken parental leave when her employment was terminated without notice. The compensation to which she was entitled pursuant to national law was calculated on the basis of her part time salary rather than her full

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<sup>92</sup> (C-220/02), [2004] E.C.R. I-5907

<sup>93</sup> At paragraph 64

<sup>94</sup> C. Costello and G. Davies "The Case Law of the Court of Justice in the Field of Sex Equality Since 2000" (2006) 43 C.M.L.R. 1567 at p. 1608.

<sup>95</sup> (C-149/10), [2010] E.C.R. I- 08489

<sup>96</sup> (C 116/08), [2009] E.C.R. I-10093, [2009] All E.R. (D) 259.

time salary. The Court found that rights to which the employee had been entitled when she started her parental leave could not be lost or reduced at the end of the leave which the Court found included the right to notice.<sup>97</sup> Otherwise the Court pointed out that entitlement to rights and benefits would be compromised with the result that workers might be discouraged from taking their leave and employers might be encouraged to dismiss workers on parental leave rather than other workers which would run counter to the aim of the Framework Agreement. Thus the Directive required compensation of a worker on a part time parental leave could not be calculated on the basis of the reduced salary. In doing so, the Court of Justice was keen to emphasise that the maintenance of rights for parents until the end of parental leave constitutes “a particularly important principle of Community social law which cannot therefore be interpreted restrictively”.<sup>98</sup> The decision is welcome in recognising the important of protecting a worker on such leave and in so doing, in protecting the right to take parental leave without putting the employee’s other employment rights at risk. A similar approach can be seen in the Court’s decision in *Kiiski v Tempereen Kaupunki*<sup>99</sup> where the Court held that an employer's refusal to allow the employee to change the dates of her unpaid parental leave so as to enable her to take paid maternity leave constituted direct sex discrimination. The impugned national collective agreement in providing that a new pregnancy was not a good reason to change the dates of parental leave once agreed, was found by the Court to be contrary to both the Equal Treatment Directive and the Pregnant Workers Directive.

The importance of an employee’s terms and conditions being preserved during the leave was emphasised by the Court of Justice in *Gomez-Limon Sanchez-Camacho v Instituto Nacional de la Seguridad Social (INSS)*<sup>100</sup> where the Court held that clause 2(6) of the Directive which gives rise to the entitlement to maintain employment rights during parental leave, was sufficiently precise and unconditional to be directly enforceable by individuals against emanations of the State.

The significant limitation of the Directive is its failure to give rise to any entitlement to paid parental leave. Concern has been raised that this renders it more likely that the partner with the lower income (usually women) will take the unpaid leave thereby reinforcing the

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<sup>97</sup> Clause 5.2 of the new Parental Leave Directive provides that rights acquired by an employee as at the date of the parental leave are to be maintained until the end of the parental leave. This was also provided in clause 2.6 in the initial Parental Leave Directive.

<sup>98</sup> At paragraph 43.

<sup>99</sup> C-116/06 [2007] E.C.R. I-07643

<sup>100</sup> (C-537/07) [2009] E.C.R. I-06525.

stereotype of women as a primary carer in the family. The Directive has been criticised for failing to restructure gender relationships in spite of the father's right to share equally in the burden of family life.<sup>101</sup> In the EU, despite the availability of a right to parental leave, research suggests that fathers are not exercising this right for a number of reasons including lack of knowledge about rights, fears about the impact of taking leave on their career prospects and assumptions that women should be the primary carer and have primary role in parental responsibilities.<sup>102</sup>

*Recent judgments:*

Recently the Court delivered its judgment in a referral from a Latvian Court in *Nadežda Riežniece v Zemkopības ministrija (Republic of Latvia), Lauku atbalsta dienests*<sup>103</sup> concerning whether the Parental Leave Directive must be interpreted as meaning that an employer is precluded from undertaking any action (in particular, the assessment of an employee while absent) which might result in a female employee on parental leave losing her post after returning to work. In this case the employee was assessed in the context of a redundancy process in her absence due to parental leave on the basis of her last annual performance appraisal pre her taking of maternity leave using new criteria whilst workers actually in the workplace were assessed on the basis of a performance appraisal from a more recent period. There were differences between the objectives of the two assessments (the 2006 assessment and the 2009 assessment). The Court determined that there was nothing unlawful about such assessments but that they must on the basis of identical criteria to that applied to employees in active service and could not involve the requirement for physical presence of an employee as parental leave means that employees are not able to meet this requirement. If the assessment placed employees on parental leave at a disadvantage then this could constitute indirect discrimination. Finally the Court of Justice found that the Parental Leave Directive prohibits a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not

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<sup>101</sup> J. Hunt and C. Wallace "Reconciliation between Working & Family Life in the EU-Reshaping Gendered Structures?" [2004] 26(3) Journal of Social Welfare and Family Law 325 at pp. 333-4

<sup>102</sup> European Opinion Research Group, *European Attitudes to Parental Leave*, (Brussels: European Opinion Research Group, 2004).

<sup>103</sup> (C-7/12), Judgment of the Court (Fourth Chamber) 20 June 2013.

equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.

In the joined Cases of C-512/11 und C-513/11, the Court held on 13 February 2014, that the parental leave directive must be interpreted as precluding a provision of national law, such as that provided for in the collective agreements at issue in the main proceedings, pursuant to which a pregnant worker who interrupts a period of unpaid parental leave within the meaning of that directive to take, with immediate effect, a maternity leave within the meaning of the Pregnancy Directive but does not benefit from the maintenance of the remuneration to which she would have been entitled had that period of maternity leave been preceded by a minimum period of resumption of work.

In *Lyreco v Rogiers*<sup>104</sup> a reference from Belgium, an employee with a full-time contract of indefinite duration took part-time parental leave. During that period, the employer terminated her employment contract without compelling or sufficient reason to do so. According to Belgian law, the latter is therefore required to pay the worker fixed-sum protective compensation equal to six months' salary. A question was lodged with the Court of Justice as to whether, in such a situation, the fixed-sum award must be determined on the basis of the reduced salary earned by the worker at the date of his dismissal due to part-time parental leave, or the full salary based on the employee's regular full-time contract.

The CJEU stated that where a worker is unlawfully dismissed during part-time parental leave, the fixed-sum protective award to which a full-time worker is entitled must be calculated on the basis of full-time salary. After all, a calculation based on part-time salary makes nugatory much of the protective system established by EU in the Parental Leave Directive and affects the rights acquired by the worker.

These cases establish the strong protections for employees under the parental leave in particular in the interaction between that Directive and the Pregnancy Directive which has a very practical application.

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<sup>104</sup> C-588/ 12

## **Conclusions:**

The case law demonstrates that there is a strong level of protection for women during pregnancy and maternity leave but not in relation to pay or economic rights during maternity leave. The rights of fathers and men in their caring responsibilities are slowly increasingly but with the clear preference for female participation. The balance between gender equality, parenting and family rights and responsibilities and a work/life balance for parents has been struck in a female specific manner. The managing of the balance of this relationship in favour of both parents is desirable and indeed this has been recognised by the Court of Justice in *Alvarez*<sup>105</sup> where it pointed out that limiting a right to time off to care for children “*perpetuates the traditional division of roles into the future*”. Parenting is and should be gender neutral and shared between mothers and fathers. Therefore the issues that arise in the workplace from the needs (both individual and societal) of parenting should also be gender neutral and insofar as there may ever be a disincentive for employers of parents, that should fall equally on mothers and fathers and should also be minimised and absorbed where possible by the State. The issue which will need to be determined is the extent of the period pre and post birth where women require protection, after which there is no reason why the child cannot equally be as well cared for by the father of the child.

**CLAIRE BRUTON BL  
THE DISTILLERY BUILDING  
145/151 CHURCH STREET  
DUBLIN 7  
IRELAND  
EMAIL: [clairebruton@gmail.com](mailto:clairebruton@gmail.com)  
17 MARCH 2014**

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<sup>105</sup> (C-104/09) [2010] I E.C.R.-08661. The Court also referred to having highlighted the same risk in its decision in *Lommers*[2002] ECR I-2891 at paragraph 32.