



This training session is commissioned under the European Union's Programme for Employment and Social Solidarity – PROGRESS (2007-2013).

RECONCILIATION OF WORK AND FAMILY LIFE

Protective measures for pregnant workers; Maternity leave; Parental leave

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GOOD WORKER versus GOOD CARER
for how long yet?

REMOVING OF GENDER BIAS FROM PARENTAL ROLES IS A PRECONDITION OF REMOVING GENDER BIAS FROM THE WORKPLACE



THE TWO MAIN INSTRUMENTS ON EQUAL TREATMENT AND EQUAL OPPORTUNITIES IN CASE OF PREGNANCY AND CHILDBIRTH

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 dir.)

- Recital 23
- Article 2(2)(c)

Negative character: prohibiting discrimination, not providing positive rights

Directive 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 on Health and Safety)

Grants positive, substantive rights, protection against discrimination provided by the Recast

THE PROHIBITION OF DISCRIMINATION ON THE GROUND OF PREGNANCY

Is discrimination on the ground of pregnancy – sex discrimination?

Not all women become pregnant – what about discrimination in favour of a non-pregnant woman against a pregnant woman?

First decided in C-177/88 - *Dekker v. VJV Centrum*:

YES – „pregnancy“ is a synonym for female sex

The Recast Directive (Dir. 2006/54/EC)

- Recital (23): It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.
- Article 2(2): For the purposes of this Directive, discrimination includes:.....
- (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

PROHIBITION OF DISCRIMINATION IN HIRING, TERMINATION OR RE-HIRING

- *Melgar (C-438/99)* – expiry of contract during pregnancy and non-rehiring
- *Busch (C-320/01)* – returning from parental leave – hiding advanced pregnancy
- *Mayr (C-506/06)* – termination at advanced stage of IVF procedure

PREGNANCY RELATED SICKNESS, NON-AVAILABILITY FOR WORK

- Must not be assimilated to sickness and apply the same rules and action
- **Webb** - C-32/93 hired to substitute an employee – soon becomes pregnant, and not anymore available for work
- **Rentokil** – C-394/96 absent longer than 26 weeks

Sick workers can be dismissed in such cases – workers with pregnancy related problems may not, it would be discrimination.

- **Herz** – C-109/88 – when the problem continues after the maternity leave – it is treated as sickness and not as pregnancy related condition

EXEPTION: IDENTICAL TREATMENT WITH SICK WORKERS IS PERMITTED IN CASE OF SALARY SUPPLEMENTS

- **McKenna** – C-191/03 – sick pay: full salary and then reduced to half
- **Gassmayr**, C-194/08
- **Ornano** – 335/15
- **Parviainen** – C-471/08 – flight attendant transferred to alternative duties loses salary supplement

Special protection granted with regard to maternity (Dir. 92/85/EEC, PWD)

- Obligations of the employers to protect pregnant workers from hazardous work:
 - risk-assessment,
 - change in working conditions,
 - transfer to other post,
 - exempting from work
- Paternalistic protection reflected by the wording.

Maternity leave – minimum 14 weeks, minimum sick pay

1. Non-discrimination: Periods of maternity leave must be considered when entitlement to benefits is calculated (*Lewen v. Denda*)

2. Equal treatment of equally able fathers to care for a couple of month old baby → Crucial for the main goals.

Controversial responses from the Court (*Hoffmann, Lommers, Alvarez, Betriu Montull*)

3. Surrogacy agreements (*CD: C-167/12, Z: C-268/12*)

Job security - during and after... THE PROHIBITION OF DISMISSAL Art. 10 of the PWD

- Prohibition – not absolute, „exceptional cases“ possible
- „written, duly substantiated grounds“ – very narrow
 - *Paquay* – time of the dismissal decision -
- Concept of pregnant worker:
 - Concept of „worker“ – EU concept – *Danosa*
 - Concept of „pregnant“ – flexible approach to „notification“
 - IVF procedure (*Mayr*)
- Remedy in case of unlawful dismissal – must be dissuasive for the employer and compensatory for the worker

PARENTAL LEAVE Council Directive 2010/18/EU

- Positive observations (final)
- Main goal: to “facilitate the reconciliation of professional and parental responsibilities for working parents”.
- “Soft law” → Member States, national social partners have broad discretion in setting norms – no entitlement to paid leave in the directive.
- When setting norms on the basis of the Directive
 - norms must observe equal treatment
 - rights shall be guaranteed as individual right for both parents
- no discrimination may be applied when taking such leave – with special regard to terms and conditions of employment (*Osterreichischer Gewerkschaftsbund* – highly controversial decision)
 - taking maternity leave and parental leave in combination must not impact on entitlements
 - shall not be upper limit on the compensation in case of a breach of the principle of equal treatment
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- **Conclusion:** Gender neutral parental roles are far from realized, stereotypes and bias still present in the rules and in Court decisions. Possible ways ahead.

- Thanks for your attention!
- and for your intention to promote the elimination of the gener-based distinction between „worker“ and „carer“