

Reconciliation of Private and Professional Responsibilities: Recent Legislative and Case Law Developments

**Joanne Conaghan, Professor of Law and
Head of Kent Law School,
ERA Seminar: *EU Law on Equality
between Men and Women in Practice* 25-26
October 2010**

The Policy Importance of Reconciliation

Communication from the European Commission, *A Better Work/Life Balance: Stronger Support for Reconciling Professional, Private and Family Life* COM (2008) 635

- Lisbon Strategy (labour activation policies)
- Gender Equality
- ‘Demographic renewal’ (aging population and low fertility rates)
- Combating poverty and social exclusion
- Emergence of a ‘care deficit’ (shrinking welfare state + rising aging population)

- 'It can therefore be concluded that, while the need for reconciliation policies is now uncontested at European level, the inadequacies of such policies coupled with the gender gap in take up means that reconciliation measures cannot yet make an optimum contribution to achieving the EU's major policy objectives. Enhancing the work/life balance also constitutes a real opportunity to reconcile the objectives of security and flexibility for employers and employees, although these principles are often presented as opposed' (COM (2008) 635)
- Reconciliation as one of 6 key priorities in *Roadmap for Equality between Women and Men* (2006-2010)

Reconciliation as a human right or fundamental principle

Included in

- EC Social Charter 1989
- EU Charter of Fundamental Rights 2000
- Draft CE and now *Charter of Fundamental Rights of the EU* Art 33 (2) '
 - To reconcile family and professional life everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.'
- ECJ recognition of reconciliation as a 'fundamental principle' in
 - Case C-1/95 *Gerster* (1997)
 - Case C-243 /95 *Hill & Stapleton* (1998)
 Reconciliation '...a natural corollary to gender equality and a condition for its substantive achievement'

Legal Framework

- **Equality/anti-discrimination law**, Art 141 EC
 - Equal Treatment Directive 76/207/EEC
 - Equal Treatment Directive 2006/54/EC (Recast Directive)
- **Health and safety/working environment**, Art 137 EC
 - Pregnant Workers Directive 92/85/EEC
 - Working Time Directive 93/104/EEC
- **Framework Agreements (Social Partners)** (Art 138EC)
 - Parental Leave Directive 96/34/EC
 - Part time Workers Directive 97/81/EC
 - Fixed-Term Workers Directive 99/70/EC

New Legislative Developments

- European Commission, First-Stage Consultation of European Social Partners on Reconciliation of Professional, Private and Family Life (SEC (2006) 1245)
- European Commission, Second-Stage Consultation of European Social Partners on Reconciliation of Professional, Private and Family Life (2007)
- Commitment to strengthening legislative support for reconciliation measures particularly in relation to various types of leave provision

New Directive and Framework Agreement on Parental Leave (Council Directive 2010/18/EU)

- Extension of parental leave to all employees on all types of contract
- Parental leave applies on birth or adoption of a child up to at least 4 months to be taken before child is 8
- In principle not transferable between parents
- Conditions and adaptability of leave to be defined by national laws or collective agreements (including special arrangements for small undertakings)
- Length of service qualification cannot exceed one year
- Member states/social partners shall assess the need for additional measures to address the specific needs of adoptive parents (clause 4) and parents of children with a disability or long-term illness (2.3)
- Right to return to work in same job or if not possible, equivalent or similar job
- Protection against less favourable treatment or dismissal
- Right to request change in hours or working partners after return from parental leave (6.1)

- Right to request leave on grounds of *force majeure* for family reasons (emergency 'making the immediate presence of the family member indispensable' (7.1)

- Concluded 18/6/09; entry into force 7/4/10; transposition deadline 8/3/12
- OJ L 68 of 18/3/2010

Proposed Amendments to Pregnant Workers Directive

- Proposal for a Directive amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM (2008) 637)
- Currently before European Parliament (October 2010)
- Proposed extension of minimum leave period from 14 to 20 weeks
- On full pay (recommended but not mandatory for 12 of 18 weeks)
- More flexibility to women about when to take leave before and after birth (with 6 weeks compulsory element after birth)
- May include a right to 2 weeks paid paternity leave
- Extended right to written statement of reasons for dismissal beyond maternity leave period for 6 months
- Right to request flexible working for women returning from maternity leave with obligation on Employers to consider taking business needs into account
- move beyond Health & Safety approach to pregnant workers (art 137) to include equal treatment (Art 141)

Recent ECJ Case Law on Reconciliation Issues

- Case C-303/06 *Coleman* 17 July 2008 (UK) (ETD 200/78)
- Case C-506/06 *Sabine Mayr* 26 Feb 2008 (Austria) (Pregnant Workers' Directive/Equal Treatment Directive)
- Case C-149/10 *Chatzi* 16 Sept 2010 (Greece) (Parental Leave Directive)
- Case C-1-4/09 *Roca Alvarez* 30 Sept 2010 (Spain) (Equal Treatment)

1 Can claimants rely on measures other than specifically concerned with reconciliation, effectively to extend reconciliation rights?

- *Coleman* Case C-303/06 (Grand Chamber)
- Applicant argued her dismissal unlawful discrimination under Directive 2000/78: treated less favourably because she was the primary carer of a disabled child
- (Constructive) dismissal stemmed from Er refusal to accommodate her requests for flexibility around her caring duties
- Domestic law governing disability discrimination only protected disabled people, therefore prima facie did not extend to Mrs Coleman

Preliminary Ruling

- 'In the context of the prohibition of discrimination on grounds of disability, does [Directive 2000/78] only protect from discrimination and harassment persons who are themselves disabled?
- If not, does [Directive 2000/78] protect employees who, though they are not themselves disabled. Are treated less favourably or harassed on the ground of their association with a person who is disabled?

ECJ decision

- Purpose of 2000/78 to protect from discrimination on grounds of disability; does not mean limited to protection of disabled people alone
- The fact that Directive 2000/78 includes provisions designed to accommodate specifically needs of disabled people does not lead to conclusion that principle of ET must be interpreted strictly as prohibiting only discrimination against disabled people
- Effectiveness of 2000/78 would be undermined if an Ee in claimant's situation could not rely on prohibition of direct discrimination in Art 2(2)
- Disability is the ground for less favourable treatment (discrimination) and harassment in the claimant's case and within scope of 2000/78

2 Do reconciliation measures protect women seeking to start a family?

- Sabine Mayr Case C-506/06 26 Feb 2008 (Grand Chamber)
- Ms Mayr dismissed by telephone while off sick during IVF; at time of dismissal ova fertilised but not yet transferred to womb
- Ms Mayr had sent letter on same day as dismissal informing Er of planned transfer of 3 days later
- Legal issue before national court – was she entitled to pregnancy dismissal protection?
 - Court of first instance held that pregnancy began at point of fertilisation
 - On appeal held to be on transfer of ova to woman's body
 - Further appellate court made a preliminary ruling:

- ***'Is a worker who undergoes in vitro fertilisation a 'pregnant worker' within the meaning of ART 2(a) of [Directive 92/85], if at the time at which she was given notice of dismissal, the woman's ova had already been fertilised ... but not yet implanted within her?'***
- ECJ concerns about legal certainty (ova can be stored outside womb for a long time) require interpretation that precludes protection before transfer to womb

- BUT...
- Applying principle of ET, precludes dismissal of a female worker in advanced stages of IVF (as in this case) where it is established that dismissal is essentially based on fact that she has undergone such treatment
- IVF affects only women; therefore dismissal on those grounds constitutes direct discrimination on grounds of sex

3 Do reconciliation measures vest any rights in children as opposed to parents?

- Case C-149/10 *Chatzi* 16 Sept 2010
- mother of twins sought successive periods of parental leave
- Preliminary ruling sought on application of Parental leave provisions as transposed into national legislation in Greece to birth of twins which allowed for 9 months paid parental leave.
- Sought a second period of 9 months in respect of 2nd twin
- ***'Can cl 2.1 [of Framework agreement] interpreted in conjunction with Art 24 of Charter of Fundamental Rights – relating to the rights of the child – and in light of the enhanced level of protection of those rights ... brought about by the Charter ... - be regarded as creating in parallel a right to parental leave for the child so that if twins have been born, the grant of one period of parental leave constitutes an infringement of Art 21 ... on the grounds of discrimination on the basis of birth and a restriction on the rights of twins not supported by the principle of proportionality?'***

EU Charter of Fundamental Rights

- Art 21(1) 'Any discrimination based on any ground such as ...birth... shall be prohibited
- Art 24 'The Rights of the Child'
 - 1. Children shall have the right to such protection and care as is necessary for their well-being...
 - 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be the primary consideration

- Court held wording and purpose of Framework agreement preclude an interpretation which vests right in child
- Right granted to 'men and women workers'
- Purpose of right is 'reconciliation' which court does not view as extending rights to child
- Court also considered whether Framework Agreement might be interpreted so that determining criterion triggering leave entitlement is the 'child' rather than the 'birth' (cl 2.1 'birth or adoption of a child')
- Acknowledging ambiguity of wording but taking purpose of Agreement into account, ECJ held successive periods of leave would not necessarily accommodate needs of parents with twins (same developmental stages); therefore Framework Agreement does not require entitlement to a number of periods of leave equal to number of children born
- However, taking account of principle of Equal treatment, ***'[cl2.1] obliges national legislatures to establish a parental leave regime ... which ensure that the parents of twins receive treatment that take due account of their particular needs. It is incumbent upon national courts to determine whether national rules meet that requirement...'***

4 Are reconciliation measures concerned with adjusting distribution of domestic responsibilities between men and women ?

- *Hofmann* (Case 184/83) [1984] Father's challenge to German (additional) maternity leave provision as sex discrimination under equal treatment directive rejected.
- ECJ upheld as 'a provision concerning the protection of women particularly with regards to pregnancy and maternity' (Art 2(3)) .
- ECJ commented that it was '**legitimate to protect the special relationship between a woman and her child**
- and
- '**The [ET] directive is not designed to settle questions concerning the organization of the family or to alter the division of responsibility between parents.**'

Roca Alvarez (Case C-104/09) (30 September 2010)

- Father sought access to statutory 'breastfeeding leave' (time off during work day or reduction of working day).
- Legislation introduced 1980 to address breastfeeding but extended by courts to include bottle-feeding and amended 2007 to allow fathers to take leave if mother also an 'employee'. Mr Roca Alvarez's wife was self-employed
- On a preliminary ruling, ECJ held the provision inconsistent with Art 2 of Directive 76/207 and could *not* be justified as a special measure pertaining to maternity
- 'the fact that the evolution of the national legislation and its interpretation by the courts has ... detached the granting of breastfeeding leave from the biological fact of breastfeeding precludes a finding that the measure ensures the protection of a woman's biological condition following pregnancy
- ECJ commented '**To hold as the Spanish Government submits that only a mother whose status is that of an employed person is the holder of the right... Whereas a father with the same status can only enjoy this right but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to women in relation to the exercise of parental duties**