

THE NEW PARENTAL LEAVE DIRECTIVE AND THE CASE OF THE KINGDOM OF SPAIN

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I. PRELIMINARY REMARKS

On 18 March 2010, the Official Journal of the European Union published 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. With over a decade between them, the arrival of a directive that delves substantively deeper into the objectives of its predecessor offers an excellent opportunity to revisit how the domestic legal order in each of our countries needs to change, firstly in order to comply with the minimum requirements of the new Directive, but secondly, and more importantly, to bring the law of each Member State into line with the legislative standards of our European systems and consolidate our policies in this field.

In this paper, I shall avoid commenting on matters of legislative technique and will focus on a substantive analysis of the revised Framework Agreement, which, let me say from the outset, constitutes an indisputable advance compared with the last one, even though there are plenty of reasons for saying that the wording is lukewarm and that this is a lowest common denominator that is tremendously lax. It is not for nothing that the very high level of discretion given to Member States by the Agreement of 14 December 1995 was said to undermine the efficacy of the Directive in serious ways¹. In practice, it also generated an excessive variety of models in both the quantitative and qualitative sense. There is a striking contrast, for example, between maternity leave, where the countries of the European Union have drawn considerably closer together, and parental leave, where the legal diversity is so much greater². It remains to be seen whether the revised Agreement will result in greater homogeneity, although perhaps we are witnessing more similarities between systems not so much because of directives, but more as a consequence of the exchange of best practice, management by objectives and an evaluation of outcomes.

Any analysis of parental leave must inevitably make reference to the care services that are available for dependent relatives, and in particular childcare. The preamble to the Framework Agreement of 2009 does this too, of course, when it alludes to the Barcelona targets. The availability of childcare is the most obvious aspect. The option of working while the child is small depends on the availability of places, but also on pre-school facilities and the compulsory school age. This goes quite a long way in accounting for different female employment rates between one European country and another: the public childcare network varies considerably from one to the next, especially for children under three³. Consequently, the increase in mothers entering the

¹ CARACCILO DI TORELLA, E., *New Labour, New dads – The impact of family friendly legislation on fathers*, Industrial Law Journal, vol. 36, 2007, p. 325, on the minimalist implementation undertaken by the United Kingdom.

² PRONZATO, Ch.D., *Return to work after childbirth: does parental leave matter in Europe?*, Review of Economic Household, no. 7, 2009, p. 343.

³ *Ibid.*, pp. 344-5. For greater detail on this question, CABEZA PEREIRO, J., *Conciliación de vida privada y laboral*, TL, no. 103, 2010, pp. 57 ff.

labour market is very much influenced by the existence of adequate resources⁴. It is no surprise that the European Employment Strategy always links care services to the issue of women's employment⁵, as one of the instruments serving the aim of drawing more people into the labour market.

However, quite apart from parental leave, public services and the organisation of working hours, the trickiest challenge lies doubtless in achieving a society which values the assumption of family responsibilities, where employers and workers accept these responsibilities as a prime social necessity, in an environment where the most prestigious organisations stand out for the political priority they attach to promoting a shared responsibility for reconciling employment and private life⁶.

II. SOME THOUGHTS ON THE PREAMBLE TO THE AGREEMENT

The Preamble is remarkably thorough, by contrast to its far skimpier forerunner of December 1995. Fortunately, the 2009 version highlights more clearly how parental leave is part and parcel, along with other policies, of reconciling professional, private and family life. It refers to numerous documents, links and programmes in the European Union, and above all to a series of strategic objectives.

First, it recalls the European strategy for growth and jobs, notably the 2010 target of achieving an employment rate of 60% for women and 50% for older workers. This is an important reference, bearing in mind that in recent years the reconciliation issue has been literally co-opted by employment policy, becoming chiefly a tool in the service of the latter.

Second, the Preamble recognises that “*a balanced, integrated and coherent policy mix must be put in place, comprising of leave arrangements, working arrangements and care infrastructures*”. This highlights the specific influence and impact of the three most strategically relevant factors in enhancing the compatibility of working and family life for people in employment: 1) the ordered, coherent and effective regulation of parental leave, with corresponding social security benefits, 2) industrial rules or provisions to ensure sufficient flexibility in working arrangements in response to the family or personal situations which arise – basically, flexible working hours and leave on grounds of force majeure, and 3) enough quality public services to ensure that the care needs of family dependents can be sufficiently met, in particular childcare facilities.

The Preamble goes on to recall that measures to enhance reconciliation are part of a broader policy agenda to address the needs of employers and workers and improve adaptability and employability as part of a flexicurity approach. True enough, flexible working hours to serve this aim of reconciliation have been practically the only aspect of the term “flexibility” that works in the interests of labour as one of the parties to the employment contract. It is fitting, therefore, that there is a reference to it in the secondary EU legislation on parental leave.

Not until paragraph 8 of the General Considerations is it mentioned that family policy should contribute to achieving gender equality and sharing responsibilities between men and women. This reference does justice, firstly, to an orientation that

⁴ SPIESS, C.K. and WROHLICH, K., *The parental leave benefit reform in Germany: Costs and labour market outcomes of moving towards the Nordic model*, Population Research Policy Review, no. 27, 2008, p. 585.

⁵ CABEZA PEREIRO, J., *op. cit.*, pp. 60 ff.

⁶ SALLEE, M.W., *A feminist perspective on parental leave policies*, Innovative Higher Education, no. 32, 2008, p. 184, shows how the more prestigious educational bodies in the United States meet especially high standards of parental leave.

should be expected to play a certain role in rules on parental leave and, more generally, in all the institutional and judicial fabric related to reconciliation policy. Secondly, however, it is evident that it is in no way a priority in the construction of either. Rather, the objective of shared responsibility, or equal responsibility, is an ambition that has been clearly neglected in recent years, especially with the emergence of this newer theme, reconciling personal and working life, which has masked the more egalitarian objective of fairly distributing care tasks between men and women.

This same paragraph also refers to demographic change and the effects of an ageing population. Probably this serves a dual purpose: first, to show the importance of establishing some rules about raising and caring for children, consistent with an environment that will encourage the fertility and birth rates; second, to indicate, if tacitly, that there will be a similar need to recognise measures like those in the present Agreement with regard to caring for elderly relatives.

There is an equally interesting allusion in paragraph 11 to the growing diversity of the labour force and in society, including the broader spectrum of family structures. This emphasises that the rules on parental leave, at both European and domestic level, should be sufficiently adaptable to all eventualities in order to respond to extremely heterogeneous situations, whether in terms of the employment relationship or the family and personal scenarios that have to slot together with it. In fact, Clause 1 of the Agreement, in its first paragraph, stresses this growing diversity as a factor influencing the reconciliation of parental and vocational responsibilities for working parents.

The next preambular paragraph reflects upon one of the greatest inadequacies and failures of the Agreement of December 1995: encouraging men to assume an equal share of family responsibilities has not produced sufficient results. Consequently, more effective measures should be taken to promote a more equal distribution of family responsibilities between men and women. Put in such explicit terms, that failure justifies – as we shall see – the more forceful effort in the present Agreement, compared with the last, to make some of the parental leave non-transferable. Indeed, paragraph 16 emphasises this, while recognising that there will be a few exceptions.

In addition, however, this observation highlights a very interesting response by the social partners – and by the European Union itself, with the Agreement becoming a Directive – to a *status quo* that has been extremely dominant in recent years and that has reduced the reconciliation issue to helping individuals fit their working hours to duties outside the workplace. It should even be pointed out that the emergence of this attitude had quite a lot to do with obscuring the debate about responsibilities. If the European Union is taking on board criticism about the lack of equality, that raises hopes for greater political sensitivity towards involving men in parental leave. That would be good news, suggesting that the issue could take on a more sincere equality perspective.

Paragraph 13 reflects on the variety of policies and practices relating to leave, childcare facilities and flexible working arrangements that are already operating in Member States, recommending that these be taken into account when implementing the Agreement. This is inviting rules and in-house guidelines and any concrete initiatives that may be launched to consider the positive examples and good practice that already exist and all that has been built in the course of recent years.

Paragraph 15 is especially interesting in drawing a clear demarcation line between, on the one hand, parental leave, and on the other, time off from work on grounds of force majeure and maternity leave. Without it being absolutely clear where this idea is going, it does give the impression of leaving behind a certain confusion that has been created, deliberately or not, about maternity and reconciliation, a confusion

that has been significantly boosted by provisions in many Member States allowing mothers to transfer some of their maternity leave to the other parent.

The Preamble then goes on to address the special needs of parents who have children with disabilities or long term illness. This is, indeed, an eventuality that has gradually made its appearance in domestic legislation in the Kingdom of Spain through, for example, the option for people with young children to reduce their working day with a pro rata reduction in salary, or, indeed, the care leave granted to those who adopt or foster a child, echoing specific provisions also featured in maternity leave. It is worth wondering what other policies might be adapted to this end, such as the rules which allow the daily hour for breastfeeding, granted during the first months of an infant's life, to be taken all at once in the form of a block absence, or perhaps within the framework of a radical renewal of care leave to look after children or other family members.

After this, the Agreement dwells on various aspects of social security: firstly, health benefits (the maintenance of entitlements to benefits in kind under sickness insurance during the minimum period of parental leave), which do not present any apparent problems in the Spanish legal system; and secondly, while taking into account the budgetary situation in Member States, the desirability of considering "*the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave as well as the role of income among other factors in the take-up of parental leave*". The wording is kept deliberately ambiguous so as to leave room for the many different systems of social protection encountered within the European Union, but it gives rise to recommendations of profound significance. The first is that social security schemes, be they public or occupational, should maintain entitlements. From a minimalist perspective, this could be taken to mean upholding the entitlement to receive future benefits by means of care credits, or counting the period as a period of regular contributions. However, it makes more sense to interpret the Preamble here as suggesting the recognition of social security benefits linked to parental leave. This triggers fierce debate in the field of domestic law, as the government has displayed great resistance on more than one occasion – for obvious budgetary reasons – to establishing social security payments for looking after children of the kind seen in some other European countries, especially (but not only) measures similar to those adopted in Nordic countries.

The appeal to give consideration to income also has some major repercussions. The aim is not – and I do not think it would be advisable – to pay benefits that would ensure a minimum income threshold during parental leave. This would be doing very poor service to the cause of shared responsibility and would act as a major disincentive to middle-income earners taking up these entitlements. I think it more likely that the Agreement is trying to draw attention to the idea that benefits should be wage substitutes, covering a greater or lesser proportion of the wage, but nevertheless ultimately substitutes. If that were not so, the partner with the larger income – statistically speaking the man – would never be willing to take leave because he would be heavily penalised in financial terms. There is a similar reference in paragraph 20, which talks about level of income being one factor that influences the take-up by parents, especially fathers.

There are further interesting themes in the Preamble, relating to flexible working arrangements. Evidently this is the other major pillar, in the framework of industrial relations, of policies for reconciling personal and professional life. There is some interesting input in paragraph 21, linking this to the period immediately after the return to work, a particularly sensitive moment when it may be all the more crucial to have

access to contracts permitting part-time work, flexible working hours, a reduction in the working day, or absence of leave due to unforeseen circumstances.

The Preamble goes on to raise another undoubtedly relevant question, which is the relationship between the company and its workers while they are on parental leave. Keeping in touch, to use a British expression⁷, also implies – as paragraph 22 points out – taking steps to prepare for the worker’s return. There is no doubt that Spanish legislation does make some reference to this, urging, for example, the right of workers on leave to care for children or other family members to be invited to training courses offered by the company “*especially on the occasion of their reintegration*”, or to have care periods recognised when calculating length of service. We should likewise mention the entitlement to work part-time – that is, to benefit from a statutory reduction in the working day when looking after children – as an arrangement that helps to maintain the employment relationship while taking time off to look after children. And more recently there has been an option to exercise the voluntary care leave described in Section 46(3) of the Statute of Workers’ Rights in a piecemeal fashion. For all this, it has to be said in this context that there is room for additional measures to be introduced.

III. THE MALE TAKE-UP OF PARENTAL LEAVE

All international, European and domestic rules on parental leave have their roots in a priority objective, which is that being a good father should not prove incompatible with being a good worker at the same time. This objective does not essentially challenge social rules that attribute a greater share of caring for the family to women. It is only once we factor in a desire for male parents to become a little more involved in these tasks that the need arises to improve the role fathers play in the various arrangements associated with reconciling private and working life. Generally speaking, legislation in most European Union countries has sought, particularly in the decade now ending, to come up with formats facilitating their active, responsible involvement⁸. It is also true, however, that the same laws have simultaneously introduced other provisions reinforcing the role of the mother – or women in general – as primarily responsible for the family, consequently emphasising their dual role as workers and mothers.

Social reality, therefore, can be very contradictory about recognising the caring role of fathers. Frequently, and sometimes with express intent, provisions about care arrangements ascribe them a secondary role in support of the prime agent of domestic labour, the woman. This does not only apply to the provisions allowing maternity leave to be transferred to fathers, but also more broadly to other rules suggesting that the man takes a back-seat role, as an aide for the working mother. In the case of Spain, one obvious example would be the rules – both statutory and collective – on time off for breastfeeding, an institution now entirely devoid of its original purpose that has simply become an arrangement for looking after young babies.

Indeed, company rules are extremely hostile to the hypothesis that fathers should interrupt their employment to look after their children or other family members. There is, of course, a deep-seated belief in the corporate world that rights and duties of this kind are exclusively a female affair, and should never be expected of male workers, who are then not permitted to take parental leave⁹. It is easy to see, not only that the employment rate for workers with children is higher than for workers without children,

⁷ On this aspect, JAMES, G., *Enjoy your leave but “keep in touch”*: *Help to maintain parent/workplace relationships*, *Industrial Law Journal*, vol. 36, no. 3, 2007, pp. 315 ff.

⁸ On UK legislation (the *Work and Families Act* of 2006), see CARACCIOLLO DI TORELLA, E., *op. cit.*, pp. 319 ff.

⁹ SALLEE, M.W., *op. cit.*, p. 183.

but that the former are more willing to work longer hours and overtime than the latter. There is a very noticeable fear among parents that their careers could be halted or seriously damaged by fully or partially interrupting their employment in order to perform their family duties¹⁰. It has to be acknowledged that, generally speaking, such fears are greater among fathers.

In this context, pretty much shared in the working world of European countries, parental leave looks like a suitable tool for changing social habits. However, for that to happen it needs to be structured appropriately. This structure, the literature tells us¹¹, needs to display three essential characteristics. The first is that the leave should be relatively short, quite unlike the three long years granted in Spanish legislation. The second is that, for the full duration, beneficiaries should receive sufficient income, concomitant with what they would be earning at this stage in their career. And the third is that there should be no option for fathers to transfer their share of the leave to mothers. Leaving aside the first two for the time being, the third characteristic is at the heart of one of the biggest changes in the 2009 Agreement compared with its predecessor of 1995.

Clause 2 of the current Agreement sets out that parental leave “*should, in principle, be provided on a non-transferable basis*”, adding that “*to encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis*”. It finishes by stipulating that “*the modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States*”. A hasty reading of the first quote, and in particular the sight of the adverbial phrase “*in principle*”, might lead one to conclude that the Directive wishes to add a note of flexibility to the imperative requirement for non-transferability. History might encourage that conclusion, because in 1995 the reservations lodged by some Member States resulted in a simple recommendation¹². If, on the other hand, we read the whole clause carefully, we will arrive at a different conclusion, especially as it stipulates unconditionally that at least one month of the four must be non-transferable. In the light of this, the words “*in principle*” appear rather to reflect a need to take into account different family constellations, where there may not be two parents. Some countries actually have a long tradition of taking into account the particular circumstances of one-parent families, for whom transferring the leave is irrelevant and where the only parent does, indeed, benefit from the entire period.

Finally, Clause 2 refers to national legislation and collective agreements on the modalities for applying the non-transferable period, adding that “*existing leave arrangements in the Member States*” shall be taken into account. Clearly, this allusion to existing arrangements is intended as an encouragement to apply a benchmarking strategy and identify the best examples among the body of laws and practice in each Member State.

These ideas give cause to reflect on the changes that should be made to Spanish laws and regulations to adapt them to the new Framework Agreement on parental leave. If we focus merely on the employment world governed by the Statute of Workers’ Rights, then certainly the key institutions of relevance – leave of absence to care for children and family dependents, and also the reduction in the working day that is also

¹⁰ See this idea in HAN, W., RUHM, Ch. and WALDFOGEL, J., *Parental leave policies and parents’ employment and leave-taking*, Journal of Policy Analysis and Management, vol. 28, no. 1, 2009, p. 31.

¹¹ PRONZATO, Ch.D., *op. cit.*, p. 344.

¹² Indeed, there are some Member States like Denmark, which withdrew a previous reservation in favour of fathers in 2002.

conceded for this purpose – lack any form of earmarking for the other parent. In fact, these arrangements did not even follow the recommendation in Clause 2(2) of the 1995 Agreement. What has changed is that, when the Gender Equality Act (Ley Orgánica 3/2007 of 22 March 2007) was adopted by parliament, provision was made for a 13-day period of parental leave on full benefit, which has now been extended to four weeks with two extra days if there is a multiple birth, and this will take effect from 1 January 2011, as provided in the Act of 6 October 2009 (Ley 9/2009). We should also not forget the leave for adoption or fostering, which also contains no provision on reserving time for the other parent.

So the only institution which comes anywhere near to complying with Clause 2(2) of the 2009 Agreement is paternity leave. The leave granted to parents adopting or fostering does not respect the requirement to reserve a month for the other parent, as one of them only needs to take one day of absence from work in order for the other to take the parental leave in full. In the case of biological maternity, the other parent does, in fact, enjoy the full benefit of paternity leave on a *take it or leave it* basis. In other words, he alone can exercise this leave on the grounds of paternity, and if he does not make full use of it, the unused time will lapse.

It does not matter that this paternity leave – which, in the language of the Statute on Workers' Rights, is a suspension of contract – does not last four months. It is not an entitlement reserved for the parent who takes least leave, but one which in essence compensates in terms of sharing family responsibility. It could, therefore, be argued that in a way it deputises for the non-transferable part of leave described in Clause 2(2) of the Agreement. It certainly could be recast along with another of the existing entitlements in order to create the kind of parental leave described in the Directive – without forgetting the minor, yet relevant, difference between the four weeks laid down in the Spanish law and the month stipulated in the Community Agreement.

Clearly, the suspension of contract for fathers was conceived as a counterweight to the suspension of contract for mothers, and in parallel to it, with the explicit aim of encouraging fathers to take their share of family responsibility. All in all, the way it has been designed, with extraordinary flexibility as to the timing, which is normally but not necessarily simultaneous with the suspension of contract for the mother, tends to create the impression that the father – or the other parent – is helping the mother rather than genuinely sharing responsibility, and this sharing would probably be more visible if the father did not take his leave at the same time as the mother.

On the other hand, comparison throws up examples of other legal systems – whatever the level of protection they offer – which treat paternity leave and parental leave as separate entitlements¹³. That does not mean that they necessarily should be distinguished, as the purpose of the first could obviously be assumed under the purpose of the second.

In spite of all this, it seems logical to suggest that the most reasonable way of integrating the new Agreement into Spanish law would be to amend the current arrangements for reducing the working day and granting voluntary leave to care for children – and, in the same way, voluntary leave to look after other family dependents. It should be recalled in this context that, when the transposition of Directive 96/34 was being considered in the form of the Act of 5 November 1999 (Ley 39/1999), these were the institutions identified as corresponding to parental leave, at least in the more immediate sense. In both of them, it would be necessary to introduce a non-transferable period of at least a month reserved for the other parent.

¹³ As in the United Kingdom. On this, see CARACCIOLLO DI TORELLA, E., *op. cit.*, p. 320.

IV. THE DURATION OF PARENTAL LEAVE

Here the new Agreement has taken a slightly expansionist step, increasing the minimum duration of parental leave from three to four months. In fact, this increase is somehow symmetrical to including the reserved month. It does, however, illustrate a certain inflationary trend in fixing an entitlement threshold for parental leave, obviously with quite different time horizons from what we have in Spanish legislation. One fact is worth noting: the four-month minimum in the 2009 Agreement is fairly close to the minimum provided for by federal law in the United States, specifically in the Family and Medical Leave Act of 1993, which is twelve weeks¹⁴.

We should recall the theory, which I mentioned earlier, that granting too much leave can undermine women's position in the labour market. It seriously compromises their employment and their occupational standing¹⁵. Evidently, a long period of leave acts as an incentive for the beneficiary to terminate employment.

The reforms undertaken in the Federal Republic of Germany in recent years are especially significant in this respect, like the thinking behind it. Reducing parental leave from three years to one increases the rate of return to work, thereby decreasing the numbers of people who give up their job. At the same time, it triggers a rise in fertility rates by substantially reducing the losses suffered by nuclear families, especially in the middle income bracket¹⁶.

The issue of how long parental leave should last has a great deal to do with the objectives it is designed to achieve. If the aim is to involve mothers more in the care and development of their children, the effect will doubtless be directly proportionate to its duration, and establishing a network of services will be a secondary objective. In this respect, it has been shown on various occasions that children's health is at stake here, as they have more health problems when they regularly attend crèche, especially during the first year of life. If it is mothers who are called to book for this, to the detriment of their professional skills, that is largely due to a traditional imposition of cultural and social stereotypes. There are economic factors as well, however, because usually they earn less income than their male partners, which in addition increases the utility value to the family of the work they do in the home.

Besides, there are other trends to consider as a function of additional variables. Women in nuclear families with particularly high income will on average take longer advantage of their leave. On the other hand, if they are highly skilled they will stay at home for a shorter period. All in all, from the angle of legislative policy, a certain consensus seems to be forming that the duration of parental leave tends not to be excessive¹⁷.

It is helpful in this debate to look at the example of countries with a longer history of arrangements of this kind. In this respect, we can hardly ignore the Nordic model which – while there are differences from one Scandinavian country to another – is based on a period of about a year, with some of that period reserved for fathers. The German reform in 2007 followed similar time parameters, granting 14 months' leave, no more than 12 of which can be taken by one parent. By instituting this reform, Germany was overcoming old patterns, rooted rather more in the male breadwinner model with women performing the care work¹⁸.

¹⁴ HAN, W., RUHM, Ch. and WALDFOGEL, *op. cit.*, p. 33.

¹⁵ *Ibid.*, p. 30.

¹⁶ This is demonstrated by SPIESS, C.K. and WROHLICH, K., *The parental leave benefit...*, *op. cit.*, p. 576.

¹⁷ PRONZATO, Ch.D., *op. cit.*, pp. 344 ff.

¹⁸ All this is summarised in SPIESS, C.K. and WROHLICH, K., *op. cit.*, pp. 577-578.

Against these trends, the Spanish system remains attached to the idea of very long leave, with all the problems this entails, especially for sustaining women's employment. In this respect, it does not seem at all plausible that the increase to a minimum of four months should be used as an excuse for further prolonging the entitlements associated with parental leave. Quite the reverse: once again this serves to illustrate the huge gap between the minimum in the secondary Community instrument and the minimum under Spanish legislation. From this point-of-view, although it would not be an easy reform to carry out, the Spanish system ought to reduce the duration of voluntary care leave and reduced working hours in favour of more proportionate arrangements that are more in line with other European models. Reducing these to a period of more or less one year would be the most advisable. Essentially, this would mean taking up the baton in the wave of reforms that begin in Germany in the second half of this decade.

A separate issue is the maximum age of children whose parents are able to make use of the arrangements for voluntary care leave and reduced working hours. There is a big difference here between care leave and reduced hours. In the latter case, the rules are very flexible: in general the dependent minor must be under eight years old, but in the public sector the age limit may be as high as twelve. In the former, by contrast, the three-year leave of absence is calculated from birth or, as appropriate, the court ruling or administrative decision that triggers adoption or fostering. Consequently, on the whole, this right will expire before the maximum age of eight. However, the 2009 Agreement reaffirms the rule set down in its predecessor of 1995, which says that the child may be “*up to eight years*”. Trends in different Member States can vary considerably on this point, but in the Nordic countries there is a definite tendency to bring forward the age when parents on leave must return to work to five years or even less¹⁹.

All in all, of course, the extent of recognition that there is for entitlements associated with parental leave is influenced not just by the social and economic pressures confronting working mothers, but also by other, no less significant factors. First and foremost, these include the network of public childcare services available to look after young children in an appropriate manner, the compulsory school age, school hours and out-of-school care. But the length of the working day and the organisation of working hours, as regulated in collective agreements, are also important. In reality, I hardly believe it would be practicable to alter the maximum age limits – especially for reduced working hours – for the simple reason that the employment terms and public services that define the contours for all these leave arrangements are thoroughly unsatisfactory, although perhaps a bit of pressure for improvement would help legislative changes to stimulate some changes in social behaviour.

Whatever the case, the duration of voluntary care leave is excessive, and the time limit for the reduced working day even more so.

V. RETURNING TO WORK AND KEEPING IN TOUCH

Clause 6 of the Agreement, entitled “Return to work”, is a complete novelty compared with the Agreement of 1995. It picks up concerns the social partners have about two fundamental points. One is reducing the risk that people who take parental leave might in the end give up their jobs by choosing not to come back. The other is ensuring that the company and the worker do not lose track of each other during the leave, with a view to containing any damage to professional skills.

¹⁹ Cf. data on this in CABEZA PEREIRO, J., *La conciliación de la vida familiar y laboral. Situación en Europa*, RDS, no. 31, 2005, p. 32.

These are, of course, both important concerns. One of them is, indeed, at the heart of controversy about the relationship between employment and parental leave. While it is generally recognised that leave is an efficient tool for maintaining employment, there has been enough evidence of the negative consequences on professional skills, and the longer the leave, the greater the impact. Even so, there is broad consensus across Europe that leave is an effective arrangement that helps women to sustain their formal links with the labour market, a view that is far less accepted in the North American literature²⁰. Indeed, leave creates a clear disconnect between being in a job and performing effective work: it is true that women in Europe may be in employment, but without offering their services for considerable periods of time.

The second of these concerns is about helping a person who will return to work afterwards by keeping links with the company going for the duration of the leave. This is, essentially, a fairly traditional theme in the legal provisions governing care leave. In the case of Spanish law, let us recall the right to be invited to training courses that is enshrined in Section 46(3) of the Statute of Workers' Rights. There is also a preference, to some extent also insinuated in the European Agreement of 1995, for workers' to take their parental leave on a part-time, annualised or even piecemeal basis.

There are, of course, arrangements in the Spanish system which reflect the concerns in Clause 6. But some thought should be given to new options that would add flexibility to the legal position of workers who opt, for example, to exercise voluntary care leave in order to look after children or other dependents. Basically, this means measures relating to working hours or other employment conditions. Clearly, collective bargaining offers plenty of possibilities to address this. In practice, however, much is to be said for statutory provisions that can stimulate changes in the arrangements adopted on return from care leave or after working a reduced day. This is not so much about the educational value of texts which repeat the potential options open to collective bargaining, as about introducing concrete rules to establish a more favourable legal status during these transitions. For example, it would mean admitting a subjective right to switch to part-time working under such circumstances, or introducing rules on flexible working hours that would move forward on Section 34(8) of the Statute of Workers' Rights by creating an authentic subjective right to adapt one's working hours, at least in situations like this²¹.

At this point we should stress one aspect of the provision in Section 46(3) of the Statute, introduced with the Act of 22 March 2007, which says that voluntary care leave may be taken piecemeal. This is an option which to date has hardly been taken up at all in collective bargaining. However, it has been reinforced by case-law allowing a person on leave to return to work prematurely, before completing the full statutory or requested period. Naturally, the possibilities raised by this modality will strengthen the worker's links with his or her company.

Let us again recall the right of workers on care leave as defined by Section 46(3) of the Statute to attend training courses. There is a need, however, to recognise the vital importance of having a proper contract, similar to an employment contract, during this period of leave. This perhaps calls for greater flexibility in Section 37(5), which regulates the reduced working day in grounds of care. It is true that these have been supplanted since the Act of 22 March 2007, and that they now allow for very small reductions, enabling the beneficiary to adapt his or her working hours while taking a minimal cut in wages. However, looking at the Framework Agreement of 2009 and its

²⁰ On this whole question, see SPIESS, C.K. and WROHLICH, K., *op. cit.*, p. 579.

²¹ We are familiar with case-law from the Spanish Supreme Court unfavourable to recognising these subjective rights, e.g. the judgment of 18 June 2008, RJ 2008\4230.

Clause 6(2), it would be a good idea to enable beneficiaries to reduce their working day to less than half. The advantage of this would be to establish a parental leave arrangement that combines keeping the company and worker in touch with a situation which is *de facto* similar to leave. One might, for example, limit the reduction in the working day to about 85%, so that the person concerned only worked about 15% of his or her annual hours, which could furthermore be spread flexibly and possibly concentrated in certain periods of the year.

Along the same lines, the legislation should stipulate that, whatever upper limit is placed on the reduction, the worker should have flexibility about when to do the hours. This is partly in order to give statutory force to an aspect that the case-law has not yet recognised: that the entitlement in Section 37(5) incorporates a change of schedule. The proposal goes further than that, however, in allowing the reduction to be annualised, which means that the accounting periods can be larger than a day, particularly in settings where there are agreements offering employees a lot of flexibility over their hours. It would mean, for example, that a person choosing to reduce her or his working day by a third could concentrate that third on part of the year, or the month, or the week, stepping out of the confines of the daily limit, which exists *de facto*, but not *de iure*.

VI. FINANCIAL BENEFITS DURING PARENTAL LEAVE

This may well be the least satisfactory aspect of the Spanish system. The Agreement, even in its 2009 version, merely urges action. Clause 5, paragraph 5, is worded as follows: “*All matters regarding social security in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law and/or collective agreements, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care. All matters regarding income in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law, collective agreements and/or practice, taking into account the role of income – among other factors – in the take-up of parental leave.*”

Nevertheless, this appeal does invite reflection on public benefits associated with parental leave, even though we currently face an economic crisis and are hardly likely in the short term to witness the creation of a specific benefit to cover voluntary absence of leave to care for children (or other family dependents) or a reduction in the working day on grounds of care. Certainly, some notable progress has been made throughout the last decade when it comes to family benefits, mainly in conjunction with the Act of 10 December 2003 (Ley 52/2003), but also in the wake of subsequent legislation such as the Act of 15 November 2007 (Ley 35/2007) or the Act of 4 December 2007 (Ley 40/2007). It is true that the recent emergency legislation abolished the tax (or social security) break for the birth of a child and cut family benefits substantially²². It is also true that the Act of 22 March 2007 devoted greater attention to the technicalities of acquiring entitlements or care credits by amending Section 180 of the Social Security Act and Section 124 of the recast legislation. In this it was adopting the logic behind Article 7(1) of Directive 79/7/EEC of 19 December 1978: “*This Directive shall be without prejudice to the right of Member States to exclude from its scope: ... (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children*”.

²² See Sections 6 and 7 of Order in Council 8/2010 of 20 May on the adoption of extraordinary measures to reduce the public deficit (BOE of 24 May).

We cannot, of course, ignore the paternity benefit, paid out at 100% of the benefit base, which was created by the Act of 22 March 2007, with an extension in duration from 2011 provided in the Act of 6 October 2009, nor the rule relating to the benefit base for unemployment benefit (Section 211(5) of the Social Security Act) likewise introduced by the Act of 22 March 2007, which says that the benefit base of a person on a reduced working day to look after children must be increased to place it on a par with the benefit base this person would have had if he or she had continued working the same hours as before.

All of this has brought substantial improvements in social security benefits related to family care. Nevertheless, the original situation remains: the benefit system does not provide substantial cover for workers or public servants on voluntary care leave or a reduced working day for reasons of care. We even observe paradoxical situations which, ultimately, are pitfalls to working women, including the very obvious one which means that someone on a reduced working day for reasons of care will receive more benefit if unemployed than if working. In the present context, we are duty bound to challenge the impact this has in that it removes women workers from the labour market, firstly because they are the ones usually exercising these arrangements, given the wage gap between male and female workers. It is almost always the partner earning least income for the family unit who gives up his or her salary and career to take on the task of looking after the family. The second reason is that, given the lack of quality public services, women are trapped in a situation whereby working is very rarely worth the effort. The cost of access to the care facilities available in the regulated market, combined with other social and fiscal factors (including the social security system), makes staying outside the labour market an economically more efficient option for the family unit. That is why the reduced working day is such a popular option, but also – especially when it is not the first child – the voluntary care leave defined in Section 46(3) of the Statute of Workers' Rights. Ultimately, by seeking refuge in these arrangements, women workers are consolidating and perpetuating the male breadwinner model. Thirdly, the very duration of these arrangements – especially care leave – makes it particularly hard to return to work. That is why it would be a good idea, as I proposed before, to provide for a reduction in the working day of more than 50%, with the aim of sustaining the links, however residual, between the worker and her workplace. There are several reasons for that, one being to make it more likely that she will not, in the end, terminate her contract definitively.

Nevertheless, providing social security benefits in these situations is an essential step towards bringing us into line with our neighbours in the European Union. The challenge was just as difficult for other systems when they began moving in this direction, especially from 2000 onwards. The present economic situation is the only reason for not adopting such measures in the immediate future, but that is a financial justification, not a structural one. And it calls for us to start revisiting the efficiency of a model that, when all is said and done, results in a fictitious link between women and the formal employment market. It will, no doubt, prove an enormous challenge to introduce income benefits, but it is also an inevitable one.

VII. OTHER ASPECTS

There are doubtless other innovations in the Agreement that call for some reflection and that should be taken into account when transposing the new Directive in Spanish law. The first of these concerns Clause 1(3), which debar[s] excluding part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency from the scope and application of the

Agreement. This simply a logical corollary to Directives 1997/81/EC, 1999/70/EC and 2008/104/EC. In fact, no other solution can be derived, with regard to the directives already transposed, from the current wording of Sections 12 and 15 of the Statute. As for the Act of 1 June 1994 (Ley 14/1994), which still awaits the incorporation of that last directive, it is not possible to derive very definitive consequences beyond the need to interpret Community rules as favourably as possible in order to make the application of Community law effective.

This provision basically seems to banish any fickleness on the part of the courts in denying, for example, the right of a part-time worker to reduce her working hours. Moreover, all these entitlements should be extended to workers in atypical employment formats. It was not all that long ago, after all, that Spain's Constitutional Court had to engage in polemics on matters such as denying voluntary care leave to public servants on temporary contracts²³.

Another aspect associated with atypical employment is the recognition of a series of renewed fixed-term contracts when calculating the qualifying period for parental leave. In view of the fact that the Spanish rules do not require a full contribution record before applying to reduce working hours on grounds of care or to take paternity leave – except for obtaining the social security benefit – nor to exercise voluntary care leave, this part of the Agreement does not pose any problems as to inclusion in Spanish law.

A further point of interest is the appeal in Clause 3(3) for Member States to assess the need to adjust the conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness. This can be accommodated – with regard to maternity leave – in Section 48(4) of the Statute of Workers' Rights. Given the lengthy duration of the arrangements for a reduced working day or voluntary leave on the grounds of caring for children, there would not be much point to it in relation to employment relations. Where it does make sense, as the current rules demonstrate, is in social security provisions relating to benefit paid for a dependent minor, and, of course, in the developing legislation on dependent persons.

Finally, it is worth dwelling briefly on Clause 5(4) on protecting workers who apply for or exercise parental leave. In the Agreement annexed to Directive 96/34/EC, this protection only related to dismissal, but the current clause also refers to less favourable treatment. In fact, this new wording, although undoubtedly of interest, does not require any specific change in Spanish law, bearing in mind that Section 3 of the Act of 22 March 2007 (LO 3/2007) includes, within the principle of equal treatment for men and women, a prohibition of direct and indirect discrimination on the grounds – amongst other things – of an assumption of family duties. All the same, it would not be inappropriate to revise the Statute of Workers' Rights, probably in Section 17(1), to include an explicit prohibition of less favourable treatment on the grounds of seeking or exercising entitlements associated with parental leave.

There is little more to add, except that recently the Court of Justice of the European Union deliberated on the maintenance, during parental leave, of rights that the worker had acquired or was in the process of acquiring (now covered by Clause 5(2)). As we see from its judgment of 22 April 2010 – C-486/08, *Zentralbetriebsrat* – this precludes a national provision under which workers exercising their right to parental leave of two years lose, following that leave, their right to paid annual leave accumulated during the year preceding the birth of their child.

²³ Judgment STC 240/1999 of 20 December.

The Agreement of not 2009 was not particularly substantial, but it does present a useful opportunity to rethink some of our employment rules. Clearly, the Reconciliation Act of 5 November 1999 (Ley 39/1999) has become prematurely obsolete in a field where society is clearly moving faster than legislation – not only society, but also other systems applied by Spain's neighbours.

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