

RECONCILING PRIVATE AND PROFESSIONAL LIFE

CONTENTS:- I. The scope of the Agreement. II. Parental leave and modalities of application. III. Employment – and social security – rights and combating discrimination. IV. Returning to work. V. Time off on grounds of force majeure. VI. Parents' rights and sex discrimination.

From 8 March 2012, Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC will cease to be effective. It will have been repealed by Article 4 of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE,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. That is the deadline for Member States to incorporate the new Directive into their domestic law, although if they encounter specific problems with this, they can take advantage of an additional year, as long as they notify the Commission accordingly before 8 March 2012.

While we are in transition between two Directives, it seems advisable to examine in detail the new features of the revised Agreement, signed in 2009, and also to analyse the case-law that has emerged from the Court of Justice of the European Union (CJEU). There have been some interesting judgments in recent years, some actually centring on the Framework Agreement of 1995, and others on the Equality Directive, both its original version (Directive 76/207/EEC and the recast version (Directive 2006/54/EC). Reference will be made to these during my comments on the new Agreement.

Although this paper is devoted strictly to comments on the Directive and case-law, it is important to add that, in practice, the European Union essentially seeks to influence the reconciliation of family and working life through other fields, in particular employment and public service policies. Its employment objectives, reflected in the strategy Europe 2020, highlight an inclusive labour market and the need to combat social exclusion. To both these ends, typical reconciliation policies, such as an expansion in childcare services and an improved organisation of working hours, are cited in Commission and Council documents¹.

¹ See, for example, Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States (OJ of 24 November 2010).

At the same time, given the wide diversity of existing models in the various Member States, it should be acknowledged that, to all practical intents, the Framework Agreement on Parental Leave, in both its initial and its revised form, is not very ambitious as a minimum common denominator. In fact, progress on these issues owes more to procedures of soft law, notably the exchange of good practice, than to the Agreement. This is even evident in the Preamble, which will be exempted here from lengthy comment.

I. THE SCOPE OF THE AGREEMENT

The first task is to define the purpose and scope of the Agreement. As it states in Clause 1.1, it is designed to facilitate the reconciliation of professional and parental responsibilities for working parents. It adds a qualifier here: "taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice". The latter reference is actually a call to each Member State to improve the standard of protection it provides for child-rearing situations. That is the only explanation for amending the wording of the 1995 Agreement. The other factor is more relevant: taking greater account of family structures. As we shall see, the Agreement of 18 June 2009 gives consideration to some of these structures. However, alongside those it explicitly mentions, the reference in Clause 1.1 is extremely important for the purpose of interpretation, as the CJEU anticipated when interpreting Clause 2.1 of the 1995 Agreement – which, with some alterations, echoes Clause 2.1 of the 2009 Agreement. Addressing the care of twins, the Court reasoned that this Clause "*obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs*"². If that applies to caring for two children born simultaneously, it also applies to taking into account the needs of other parents, in the light of the particular nature of their family unit. And all the more so now that the Agreement calls upon Member States to introduce measures that respond to these circumstances. In effect, the *Chatzi* judgment says that the parents of twins find themselves in a specific situation which is clearly different from that of parents whose children are a little apart in age.

² C-149/10, *Chatzi*, judgment of 16 September 2010

However, it must be stressed that it is the parents, not the children, who hold the entitlement. Parental leave is not granted to young children so that they can be properly cared for by their parents, but to the parents so that they can properly care for their children. This needs emphasising, because, regardless of how each Member State implements the Directive within its domestic law, it cannot be claimed that it confers an individual right to parental leave on the child, even in the case of multiple births, adoption or fostering³. Equally, it is important to recall the purpose of this leave, which is strictly dedicated to raising children and not to caring for other family members who might need the attention of their working relatives. This is a question which is also not covered in the revised Framework Agreement, despite all the criticisms that the original version attracted for leaving it out.

According to Clause 1.2 – which echoes the wording of 1995 at this point – the Agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. This once again begs the question whether there should be a specific definition of what constitutes a worker, with a view to preventing unwarranted exclusions by Member States. Although this matter has not been subject to an explicit ruling by the Court, the answer is clearly yes. Indeed, the Court has indicated that maintaining rights acquired or in the process of being acquired by a worker until the end of parental leave constitutes “*a particularly important principle of Community social law which cannot therefore be interpreted restrictively*”⁴. This ruling, therefore, rules out interpretations that allow Member States to implement the Agreement in their domestic law in such a way as to exclude, among other groups, public servants.

In addition, the 2009 Agreement is more specific than the 1995 version on one point: that part-time workers, fixed-term contract workers and persons employed through a temporary agency shall not be excluded from the scope. This

³ *Ibid.*

⁴ C-116/08, *Meerts*, judgment of 22 October 2009. Moreover, the Court refers here to its own case-law (cf. C-307/05, *Del Cerro Alonso*, judgment of 13 September 2007) where this characteristic was used to include within the scope of the Directive persons linked to the public administration in their capacity as administrative staff or civil servants.

clause has clearly been influenced by the emergence of the principle of equal treatment enshrined in the three directives on atypical employment (1997/81/EC, 1999/70/EC and 2008/104/EC). Apart from this, the CJEU has already, *ex officio*, applied the Parental Leave Directive in its original version to part-time workers, even though the referring court had raised the matter⁵.

II. PARENTAL LEAVE AND MODALITIES OF APPLICATION

Clause 2 of the 2009 Agreement contains more substantive provisions on parental leave. The first part is very similar to the original text, marking it as an individual right of men and women workers to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age of up to eight years, to be defined by Member States and/or social partners. Nothing new so far: the Agreement still omits any reference in its provisions to caring for other family members who might require the attention of the workers entitled to parental leave, and it retains the age guideline of eight years.

The innovations come in the second part. The first is to extend the minimum duration of leave to four months, compared with three months in the original version of the Agreement. The second, far more significant, is to declare that a portion of the leave is non-transferable. In the 1995 version, Clause 2.2 simply reflected an opinion on the part of the signatories: *“consider that the right ... should, in principle, be granted on a non-transferable basis”*, with a view to promoting equal opportunities and equal treatment between men and women. Unlike that simple proclamation of attitude, Clause 2.2 of the 2009 Agreement makes the point that leave *“should, in principle, be provided on a non-transferable basis”*. Moreover, in order to encourage a more equal take-up by both parents, it adds that *“at least one of the four months shall be provided on a non-transferable basis”*. How the modalities for the application of this non-transferable basis are to be set down is left in the Agreement to the national authorities, who may opt for a statutory approach or a collective agreement.

Consequently, one of the four months of leave may not be transferred from one parent to the other. The clause is by no means clear, because it borrows the

⁵ C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, judgment of 22 April 2010

adverbial phrase “in principle” from the Agreement of 1995. Given the wording of the clause, this expression needs to be seen in the context of taking into account the diversity of family structures, which must be interpreted as meaning that there may be exceptions to this transferability rule, such as when the parents are divorced or separated, or when one of them is unable to work or deceased. Obviously, the efficacy of this measure will depend primarily on adequate incorporation into domestic law. If the duration of parental leave accorded to an individual is extremely protracted – e.g. three years, as in some systems – the fact of not being able to transfer one month to the other parent will not have much of a practical impact. If there is to be a change of behaviour in practice, it supposes that the male parent will really make use of the entitlement, at least the non-transferable part.

Clause 3, basically, begins with some rules that echo Clause 2.3 of the 1995 Agreement. There are some small, but nonetheless very interesting changes. It refers to the conditions of access and the rules for applying parental leave, which must be defined in national law in accordance with a number of options set out explicitly in this clause: on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system. The possibilities introduced in the statutes of different countries are varied. In 2009, Europe’s social partners added that consideration should be given to “*the needs of both employers and workers*”. While this addition is not unambiguous, it seems to be asking for rules that are sufficiently flexible and adaptable to respond to the needs of both parties to the employment contract. This reflects case-law from the CJEU, which has reasoned that “*it is also clear from paragraph 6 of the general considerations of the framework agreement that measures to reconcile work and family life should encourage the introduction in the Member States of new flexible ways of organising work and time which are better suited to the changing needs of society, taking the needs of both undertakings and workers into account*”⁶.

Moreover, like its predecessor, the 2009 Agreement – Clause 3.1 (b) – leaves it to domestic rules to decide whether the entitlement to parental leave should be subject to a period-of-work qualification and/or a length-of-service qualification which shall not exceed one year. The novelty here is that space is given to the

⁶ Judgment of 22 October 2009, *Meerts*, cit.

particular situation of people employed on fixed-term contracts, for whom – says the clause – Member States or social partners shall ensure “*that in case of successive fixed term contracts, as defined in Council Directive 1999/70/EC on fixed term work, with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period*”.

This reference picks up and assimilates case-law from the Court on repeated fixed-term contracts, which we do not have to reproduce here⁷. This does not at all mean that the reference is limited to fixed-term contracts and does not refer, for example, to part-time contracts, where calculation problems also arise⁸. Besides, especially given the high proportion of women among part-time workers, different ways of calculating based on a strict application of the equality principle often pose an insurmountable barrier to accessing parental leave. Given the combined effect of Directives 97/81/EC and 2006/54/EC, there is apparently no other solution than to recognise the right to parental leave of persons who have held their contract for a year, however many hours a day they work⁹.

Clause 3 (c) asks Member States, by means of a statute or a collective agreement, to define the circumstances in which an employer is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation. There are no substantial changes to the 1995 Agreement here, apart from deleting the explicit reference to examples of such reasons – namely, seasonal work, problems finding a replacement worker, a significant proportion of the workforce requesting leave at once, or functions of strategic importance. There is also nothing new about the call to authorise special arrangements to meet the operational and organisational requirements of small undertakings.

There is likewise considerable continuity in leaving it to each Member State – or its social partners – to set periods of notice that the worker must give the employer, indicating the beginning and end of the leave. The text added in 2009 is

⁷ Suffice to mention the most recent judgments, including C-378/07 to C-380/07, *Angelidaki*, of 23 April 2009, and C-109/09, *Deutsche Lufthansa AG*, of 10 March 2011

⁸ Some are dealt with in C-395/08 and C-396/08, *Bruno and Pettini*, judgment of 10 June 2010.

⁹ One case where the Court applies this logic is C-243/95, *Hill and Stapleton*, judgment of 17 June 1998.

quite interesting, because it requires account to be taken of the interests of both parties when specifying the length of these periods of notice. This will no doubt attract controversy and sooner or later result in case-law from the Court on notice periods which are disproportionately prejudicial to one or other of the parties because they are too short or too long.

Following this, Clause 3.3 and Clause 4 allude to two circumstances that must be taken into account when drawing up provisions on parental leave, and the first of them is new compared to the 1995 Agreement. In its current version, the Agreement urges Member States or the social partners 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. It similarly asks them to consider additional measures to address the specific needs of adoptive parents. Although, formally speaking, neither clause imposes an inescapable requirement to incorporate these circumstances into the domestic law of Member States, and only asks that the need be assessed, it should be recalled that the *Chatzi* ruling cited above does confirm – in relation to an Agreement that makes no express reference to the specific needs of any group of parents in terms of their children’s circumstances, except when they are adopted – that States must ensure that parents are given treatment that takes account of their particular needs. Of course, taking these into account does not necessarily mean extending parental leave, but only that it should be possible to adopt measures of different kinds.¹⁰

III. EMPLOYMENT – AND SOCIAL SECURITY – RIGHTS AND COMBATING DISCRIMINATION

Clause 5 of the new Agreement also displays continuity, here with regard to guaranteeing the worker who takes up parental leave the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship. This provision is unambiguous enough not to have provoked any major problems of application

¹⁰ Here we need look no further than point 73 of the judgment in the *Chatzi* case: “However, it is also possible to conceive of and adopt other measures that are appropriate for the purpose of meeting the particular needs of the parents of twins, such as material assistance, in the form, for example, of a right of access to childcare centres, or financial aid, in the form, inter alia, of specific benefits allowing the method of care to be freely chosen.”

before the CJEU. It merely enshrines the worker's right to reserve the same job, or at least a similar one.

What was far more controversial was the former Clause 2.6, which, while unchanged, is now Clause 5.2. Given the problems it created, it is worth reproducing the wording: *"Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply."* Firstly, let us recall that in the *Meerts* judgment this provision on maintaining rights acquired or in the process of being acquired was held up as a particularly important principle of Community social law. Secondly, we should add that the CJEU has acknowledged this principle on a number of occasions. And it has stated, among other things, that it should be interpreted to mean that the principle 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.¹¹ More generally, however, the Court has declared that the concept of "rights acquired or in the process of being acquired" *"covers all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts"*¹². These include all rights relating to patterns of employment and, in the case in point, the right of a full-time worker currently on part-time parental leave to a period of notice if his or her contract is to be terminated. And, of course, the right to severance pay, following any dismissal during part-time parental leave, that is calculated on the basis of the salary received while working full-time prior to the parental leave¹³. After all, any other solution might dissuade the worker from taking up this leave and encourage the employer to single out people on part-time parental leave for dismissal.

There has been no case, in relation to the Parental Leave Directive, about the specific rule that, when parental leave ends, any changes arising from national law,

¹¹ C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, cit.

¹² C-116/08, *Meerts*, cit.

¹³ *"That body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the basis of the salary relating to his employment contract."*

collective agreements or national practice shall apply. However, the doctrine set out on maternity leave in the *Alabaster*¹⁴ case can be applied almost one-to-one. The Court affirmed the right of a worker receiving maternity benefit calculated, at least partly, on the basis of the pay she had been receiving previously to have the sum recalculated following a pay rise that took place during her maternity leave. In these matters, the Parental Leave Directive will clearly be reinforced in most instances – as in the *Alabaster* case – by Equality Directive 2006/54/EC.

Just as pivotal – and likewise unchanged – is Clause 5.3, according to which “Member States and/or social partners shall define the status of the employment contract or employment relationship for the period of parental leave”. Despite deferring here completely, the Court has had to mediate on the matter several times. As this is the clause that governs the definition of the status of the employment contract¹⁵, this is also the clause which must serve to answer any questions that arise, for example, about the status of a person on part-time parental leave: the CJEU has confirmed that, although such a person is not working the same amount of hours as a full-time worker, that does not mean he or she has a different status with regard to the employment contract with the employer. As a result, this worker continues acquiring seniority at the same rate. And sight should not be lost of the fact that the period of part-time parental leave is limited¹⁶. This means, even if the Court has not stated so plainly, that in this situation the worker is still treated like a full-timer, at least for the purposes of the compensation for dismissal referred to here.

A delicate issue that frequently arises is the relationship between parental leave to care for a young baby and a further pregnancy on the part of the worker who is taking it. The Court has also had occasion to address this, in the case of a worker who wanted to return to work earlier, once she became aware of her condition, probably in order to secure her entitlement to maternity benefit. In this regard, and from the perspective of parental leave, a question was raised as to whether pregnancy was a circumstance sufficiently extraordinary or unforeseeable to warrant a change in the terms – in this case temporary – of the parental leave. In this context, the Court holds that it is legitimate to establish strict requirements for altering the length of leave, given that it has an impact on the organisation of the

¹⁴ C-147/02, judgment of 30 March 2004

¹⁵ C-537/07, *Gómez-Limón*, judgment of 16 July 2009

¹⁶ C-116/08, *Meerts*, cit.

company or service. Indeed, a replacement may even have to be taken under contract. By the same token, it is equally legitimate for the worker to be in a position to alter the duration of the entitlement due to events that occurred after the leave was requested or granted, if these uncontestably prevent the worker from caring for a child in the conditions for which the parental leave was granted. Within this dialectic, as with a serious illness or other events resulting in the loss or significant reduction of the real abilities of the parent concerned to look after a child, so too with pregnancy, at least in the final stages, as the *“care which has to be given to the first child in accordance with the objective of the parental leave ... constitutes for the mother a multiple burden of a comparable kind and degree”* to such circumstances. Therefore, *“the period of at least 14 weeks preceding and after childbirth must be regarded as a situation which restricts the achievement of the purpose of the parental leave provided for under the framework agreement and therefore as a justified ground for authorising an alteration of the period of that leave”*¹⁷.

Apart from the particular factual effect described above, this interpretation is important to the extent that it attributes a touch of the exceptional to conditions which might justify a subsequent alteration to the duration of parental leave, or to the terms under which it is exercised.

In a clause on social security cover, which upholds the original approach apart from some changes to the language, the substantive rules are left to national law, collective agreements and existing practice. The Agreement does insist on the importance of the continuity of entitlements, in particular health care. As we might expect, in this particular field the facts on the ground are very varied. And the Court has clearly said that this is a social security issue, which is a task for the Member States.

In this respect, the 2009 Agreement retains its purely admonitory character. Clause 5.5, with a few syntactical adjustments, specifically repeats Clause 2.8 of the 1995 Agreement. Social security matters related to parental leave are for determination by Member States and/or social partners according to national law and/or collective agreements and practice. Of course they are, bearing in mind the

¹⁷ C-116/06, *Kiiski*, judgment of 20 September 2007. The Court adds that any other rule would *“constitute direct discrimination on grounds of sex prohibited by Article 2 of Directive 76/207...”*

importance of continuity of entitlements to social security cover under the different schemes, in particular health care. This passage in the Agreement was put to interpretation during the *Gómez-Limón* case, as we have seen, and the Court pointed out that *“the acquisition of entitlements to future social security benefits by the employee during that period is not mentioned in the framework agreement”*. It follows that the Agreement does not preclude the taking into account, in the calculation of an employee’s pension – in this case, for permanent invalidity – of the fact that he has taken a period of part-time parental leave during which he made contributions and acquired pension entitlements in proportion to the salary received.

The case-law in this respect seems to reflect the letter of the Agreement, but it is striking that little more than three months later, in the *Meerts* case, the opposite was established in relation to salaries. That is simply a consequence of the Directive having no say in matters of social security. As the Court argued in the *Gómez-Limón* case, the Agreement is merely a recommendation, and that cannot be otherwise, bearing in mind that *“it could not impose obligations on the national social security organisations, which were not party to that agreement”*.

Actually, two things need to be said about that. The first is that, in many cases, reference can be made to Directive 79/7/EEC. In other words, if there has been direct or indirect sex discrimination in the statutory social security scheme, this may influence the Court’s view when it interprets the Framework Agreement on parental leave. The second and more important thing to note is that the social partners have taken a timid step forward on this issue by including a second paragraph in Clause 5.5, which reads: *“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.”*. Clearly, this reference may influence future case-law from the Court. It can no longer be argued that the Agreement does not include provisions on this matter, even if it only defers to national legislation. And it can be reasoned, paraphrasing the *Chatzi* judgment, that the Agreement requires consideration to be given and rules to be drawn up in the domestic context in relation to income during parental leave – although, of course, the practical implications of this consequence are going to be fairly limited, for obvious reasons.

In the context of acquiring future social security entitlements, a number of questions arise about the accumulation of qualifying periods, i.e. how periods of child-rearing count towards future benefits, such as a retirement pension. A number of social security systems and occupational schemes do this, and there has been occasion to refer the matter to the CJEU¹⁸ in relation to Article 119 – or Article 141 – of the EC Treaty, now Article 157 of the Treaty on the Functioning of the European Union. The reference for a preliminary ruling concerned a French rule granting a one-year service credit to female civil servants who had cared for a legitimate child, a legally recognised natural child, or an adopted child for a period of at least nine months. It did not, however, do the same for male civil servants, even if they could prove that they had devoted time to bringing up their children. The Court concluded that the rule was not designed to offset the disadvantages to which the careers of female civil servants were exposed, but to grant them a service credit at the date of their retirement, without providing a remedy for the problems which they may encounter prior to this. Consequently, given that an occupational social security scheme was at issue, the Court ruled that the principle of equal pay for men and women had been infringed.

Finally, Clause 5.4 of the 2009 Agreement contains a highly significant innovation. The original version – Clause 2.4 of the 1995 Agreement – sought to ensure that workers could exercise their right to parental leave by including a demand that Member States take the necessary measures to protect workers against dismissal on the grounds that they had applied for or taken up that right. This protection from dismissal, unlike Directive 92/85/EEC, has not so far led to much case-law from the CJEU. Now, however, realism has evidently prompted an extension of this protection beyond outright dismissal to include less favourable treatment on the grounds of such circumstances. This new element should be highlighted, because it has arisen in an area where, in most instances, the employer's response has probably not been dismissal, but has derived, rather, from the idea that a person may be less committed to or less involved in the corporate mission and more focussed on family responsibilities. This may translate into career stagnation and, quite probably, indirect wage discrimination, very plausibly in a kind of detrimental treatment that has a lot to do with stereotypes. In this sense, Clause 5.4 reinforces Article 14 of Directive 2006/54/EC of 5 July, although

¹⁸ C-366/99, *Griesmar*, judgment of 29 November 2001

it will not always be obvious that the less favourable treatment derived from parental leave has connotations of sex discrimination, direct or indirect.

IV. RETURNING TO WORK

As we have already seen, Clause 5 of the Agreement enshrines the right to return to the same job or, if that is not possible, a similar job when the parental leave comes to an end. While this is extremely important, it may not be enough, as it is very likely that workers, who have taken this leave, especially if it was lengthy, will find it difficult to return to the same pattern of work as they experienced previously, given the problems they encounter reconciling their family needs with their occupational needs. From another perspective, depending on the duration of the leave, it may result in an evident loss of occupational skills, which will need updating on return to work. Aware of these difficulties, the 2009 Agreement introduces a Clause 6, with two provisions primarily intended to prevent voluntary resignations under these circumstances.

The first requires Member States or the social partners to take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and or patterns for a set period of time. These measures should be such that employers consider and respond to such requests, taking into account both employers' and workers' needs. Of course, when transposing this demand into domestic law, it does not mean that the changes requested must on all accounts be granted, only that they be considered. But this does mean establishing appropriate channels to enable those requests to be made and to make employers consider them in good faith and in the light of all the circumstances. This suggests that the European social partners have given thought to a particular model – perhaps the British one – where specific procedures are set in motion with the aim of permitting these adjustments, procedures that can be used in other situations too, not just parental leave.

The second point is not a demand, but a recommendation. Likewise with a view to facilitating return after parental leave, the two parties to the employment contract are urged to keep in touch during the parental leave and to decide together on any appropriate reintegration measures. Again, those measures would be *“taking into account national law, collective agreements and/or practice”*. Of course,

the appeal is not only addressed to employers and workers, but also to domestic legislators and the social partners in each Member State. The clause is necessarily couched in ambiguous terms, but it offers some orientation. This “keeping in touch”, that has already been tried in some domestic systems, can translate into different kinds of response: for example, maintaining very limited, even negligible, working hours, so that the parent works a few hours a week or a few days in the year. Contacts can also be maintained by recognising the worker’s right to take part in training activities, as the law of some Member States actually provides. There are other measures, too, that prevent an absolute detachment from setting in during the period of parental leave between the two parties to the employment relationship.

V. TIME OFF ON GROUNDS OF FORCE MAJEURE

The second basic right in the Agreement – if we assume parental leave is the first – concerns very short absences from work on grounds of force majeure. There is nothing new about this in the revised Agreement, apart from some minor syntactical changes. Nor has the Court so far been called upon to address the former Clause 3, now number 7, which justifies maintaining the right unaltered, although it is fairly resistant to rigorous formulation.

The wording grants time off from work on the grounds of force majeure for urgent family reasons in cases of sickness or accident “*making the immediate presence of the worker indispensable*”. The time off is governed by two factors: first of all, there must be an illness or accident in the family that lends itself to definition as force majeure. It follows that the Agreement is ignoring other compelling circumstances unrelated to sickness or accident. Of course, the worker’s presence may be required both to attend personally to the family member suffering the sickness or accident, or in the event that the latter dies, or perhaps to deal with urgent matters associated with such a development, although not actually to care for the patient or victim or deal with the chores arising from their death. It may, for example, be a matter of looking after the dependents of the family member on leave, or replacing this person at an event requiring his or her presence, or some similar necessity. The second factor relates to the urgency, the need for immediate presence. In other words, this is not about medium-term and long-term arrangements around

someone in need of care, but about facilitating the inescapable and immediate presence of a worker in unexpected or unavoidable family circumstances.

To protect the company, given the changes that this may incur in productive operations, the second part of this clause adds that, when incorporating time off work on grounds of force majeure into domestic legislation, Member States and/or social partners may specify the conditions of access and detailed rules for applying Clause 3.1 and limit this entitlement to a certain amount of time per year and/or per case. This paragraph of Clause 7 is excessively vague, because in practice it would allow, for example, periods of seniority to be required before the right can be exercised. However, it is clear that groups of atypical workers – including temporary and part-time workers, as potentially more likely to be affected – must not be excluded, directly or indirectly. It does seem more reasonable to place a time limit on the absence, under conditions to be determined by each Member State.

Moreover, Clause 7 does not set out any demands relating to income or the maintenance of social security rights acquired or in the process of being acquired. The only thing that seems clear, given the terms of the right, is that the worker must be able to return to the same job and work patterns upon return.

VI. PARENTS' RIGHTS AND SEX DISCRIMINATION

This paper has referred several times already to the close relationship between Directive 2010/18/EU and sex discrimination, which gives rise in turn to intricate links between the latter and the Maternity and Equality Directives. Social conditions have traditionally imposed an unequal distribution of responsibilities, whereby those associated with caring for the family have fallen disproportionately to women. This has been reflected in a disproportionate take-up by women of the rights associated with family care. In this respect, women have been victims of family discrimination, which has become a subset of sex discrimination. It should, nevertheless, be recognised that men exercising responsibilities of care can also be victims of such discrimination, although social stereotypes obviously affect the genders differently, in a mosaic of family and professional relationships where men and women alike can experience detrimental treatment for reasons that are qualitatively different.

However, apart from this discrimination mosaic, the Court has been fairly assiduous in considering the problem of certain rights granted to female workers from which male workers are excluded. When these rights have been questioned, principally from the perspective of the men who have been excluded, two fundamental lines of argument can be discerned when national provisions are measured against Article 157 TFEU or Directive 2006/54/EC (or their earlier versions). One has focussed on women's particular biological condition and the need to preserve the special relationship between mother and child during the period just after birth, factors that demand recognition of certain rights denied to men. The other addresses the greater difficulties that women confront in their professional careers, demanding or inviting the application of measures to restore the balance, aimed solely at women workers. This second argument, of course, sometimes implies the added problem that such measures may consolidate and reinforce the same social rules that generate the unequal treatment. The *Griesmar* case cited above provides a very clear example of the tensions that can be created.

CJEU case-law cannot be described as either linear or unambiguous, but there does appear to be a tendency to avoid reinforcing the social conventions outlined here. By way of example, on one occasion, which probably deserves to be criticised from the current perspective, the Court justified granting only women a period of rest on grounds of motherhood after statutory maternity leave had expired¹⁹. It is true, of course, that this problem does broadly relate back to the duration of statutory maternity leave as such, beyond the minimum period imposed by Directive 92/85/EEC, or ILO standards if States have ratified the relevant conventions.

On another occasions, the Court has justified granting women certain benefits not exclusively, but preferentially. The best-known case is probably *Lommers*²⁰, which concerns an internal rule in a public administration that only offered nursery places to the children of female staff, so that male staff could only access these services for their children in cases of emergency. When this was contested by a male employee in the light of the Gender Equality Directive, the

¹⁹ C-184/83, *Hofmann*, judgment of 12 July 1984

²⁰ C-476/99, judgment of 19 March 2002

Court recognised that the fact that both men and women are in employment means that when they have young children they are in comparable situations with regard to access to childcare. However, given that women were considerably under-represented in the department concerned and that a lack of nursery places might induce women to give up their jobs, the Court had to consider whether the measure at issue could be regarded as compensating them for the disadvantages they suffered and whether it was acceptable in terms of proportionality. The Court recognised that this measure benefiting women on the staff, while seeking to eliminate a real inequality, might in practice help to perpetuate a traditional division of roles between men and women. Indeed, the promotion of equality between the sexes “*can still be achieved if its scope is extended to include working fathers ...*” However, there was a need to take into account the limited number of places in the nursery, subsidised by the public administration, which had waiting lists. Besides, other places were accessible in the relevant services market. This was the context in which women were granted preference, although without completely excluding the men, who could apply in cases of emergency, and the Court felt that an absolute exclusion would exceed the admissible bounds of complying with the primary and secondary law of the European Union. However, given the way the measure had been designed, it was coherent in the concrete context of female under-representation which had to be corrected.

If the *Lommers* judgment adopts a strongly preventive approach to encouraging social stereotypes by means of rules theoretically designed to promote women, the most recent highlight to date has been the *Roca Álvarez*²¹ case, which, like *Lommers*, does not address the Parental Leave Directive, but the one on equality. In this judgment, the Court takes issue with a Spanish institution, the “*permiso de lactancia*”, or (nominally) time off for breastfeeding, which is an entitlement only held by women, although the father may take it if the mother is employed or a public servant. When the CJEU was asked for a preliminary ruling on a case where a father had been denied this leave because the mother was self-employed, it concluded that the national rules governing this arrangement infringed the Equality Directive. In reaching that conclusion, the Court begins by recalling that the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their

²¹ C-104/09, judgment of 30 September 2010

daily working time in order to look after their child. The “permiso de lactancia”, although originally designed to facilitate breastfeeding, has gradually been detached from this purpose. As it means that feeding the child can be carried out just as well by the father as by the mother, this time off is really accorded to workers in their capacity as parents of the child. It cannot therefore be regarded as ensuring the protection of the biological condition of the woman. But nor is it intended to compensate for the disadvantages suffered by women in their working careers. So to hold that only a mother whose status is that of an employed person is the holder of the right, whereas a father can only enjoy this right if the mother holds it and is employed, “*is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties*”. Indeed, the effect could be that a woman who is self-employed might have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child’s father being able to ease that burden. All of this leads the Court to rule that Spain’s breastfeeding arrangement is contrary to the law of the European Union.

Taking these judgments as a whole, we might conclude that the Court is not much inclined to approve differences in the treatment of men and women when it comes to rights relating to the care of children. By granting preference to women, and outside the strict maternity remit, it is seen as suspect, and only under exceptional circumstances can the maintenance of certain differences in treatment be allowed, within a framework where proportionality is subject to rigorous review. None of this, of course, should hinder the introduction in Directive 2010/18/EU of new measures to expand, albeit discreetly, child-rearing rights and an entitlement to time off on grounds of force majeure. However, the specific treatment of men and women in this field is geared more towards establishing mechanisms that will encourage men’s involvement in family care.

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