



# Balancing work and family life - 40 years on: where are we now ?

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# Why do we need reconciliation policies?

- \* **Employment rates (age 15-64)**

72.8% men

59.1 % women

- \* **Part time employment**

7.9 % men

31.1 % women

- \* **Employment rates (age 29-49)**

- \* **with children under 12**

91.6 % men

67.1 % women

- \* **without children under 12**

84.8 % men

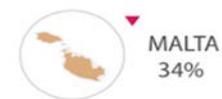
78.5 % women

(source: Equality between Men and Women 2010, COM (2009) 694 final)

## EMPLOYMENT

TOTAL EMPLOYMENT, EU-27, in January 2013

**45%** of all employed persons were **women** and 55% men.



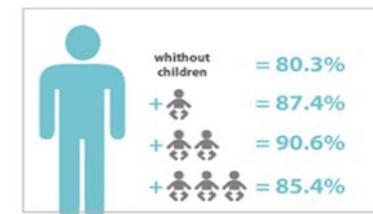
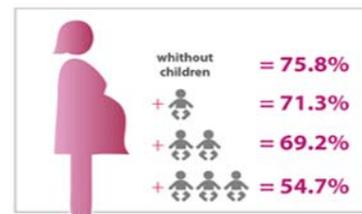
PERSONS EMPLOYED PART-TIME, EU-27, 2011

**32.1%** of **women** were employed part-time, compared to 9% of men.



## EMPLOYMENT RATE & CHILDREN

The more children, the lower the employment rate for women in the EU-27 in 2009



# The human right argument

- \* Article 8 ECHR

- \* Art 33 Charter of Fundamental Rights, (OJ [2000] C364/1)

(1) The family shall enjoy legal, economic and social protection; (2) : “To reconcile family and professional life, everyone shall have the right to protection from dismissals for a reason connected with maternity and a right to paid maternity leave and to parental leave following the birth or adoption of a child”

demographic  
issues

gender  
equality

economic  
concerns

genuine  
choice for  
individuals

fight against  
poverty



“It is a bore. I would like us not to have to talk about it, but we do have to talk about it because the present situation is terrible” (Baroness Hale of Richmond, 2013)

**URGENT**

# The legislative framework

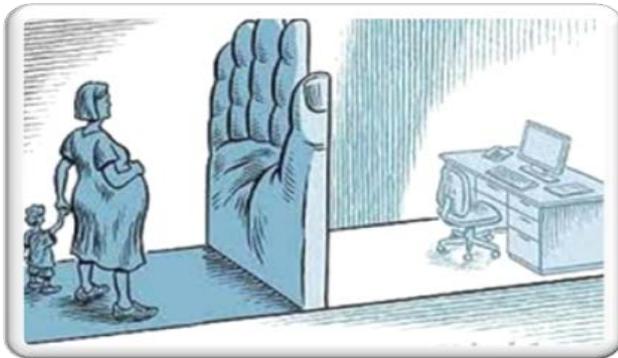
- \* The Primary Legislation (from Rome to Lisbon and the Charter)
- \* Equal Treatment Directive 76/207 EEC
  - \* Dekker
  - \* Hertz
- \* Pregnant Workers Directive 92/85
- \* Parental Leave Directives 96/34 and 2010/18
- \* Equal Treatment Directive 2002/207 EEC
- \* Recast Directive 2006/54 (repeals Directives 75/2002/73; 86/378 & 96/97 & 97/80)
- \* Part-Time Workers Directive 97/81
- \* Fixed-Term Work Directive 99/70



# PWD: access to employment

Case C-177/88 *Dekker* [1990] ECR I-3941

Discrimination on ground of pregnancy is *direct* discrimination



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

# PWD: dismissal

Case C-21 *Hertz v Aldi* [1990]  
ECR I-3979

The Court established that the protection from dismissal on grounds of pregnancy and/or pregnancy related issues is extended (limited?) to the period of statutory maternity leave.



# PWD: Right to Remuneration and Entitlement to Bonuses

Women on maternity leave can only rely on the minimum guaranteed allowance set in Article 11(2)(b) of Directive 92/85/EC, and which cannot be less than the sick leave pay.

See Case C-432/93 *Gillespie v Northern Health and Social Services Board* [1995] ECR I-4705 and Case C-411/96 *Boyle* [1998] ECR I-6401

C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-6285; C-471/08 *Parviainen v Finnair Oyj* [2010] ECR I-6533

## The right to return to work

## Non-renewal of the fixed-term contract of employment

Art. 7 Equal Treatment Directive

Art. 15 Recast Directive



- \* In Case C-438/99, *Melgar*, The ECJ has held that “where non-renewal of a fixed term contract is motivated by the workers’ state of pregnancy, it constitutes direct discrimination on the grounds of sex”



# The Work Life Balance Package

Pregnant Workers  
Directive

Self- Employed Directive

Barcelona targets for  
childcare

2008 Work-Life Balance Packet (EU Commission, COM(2008) 635, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/603&format=HTML&aged=0&language=EN&guiLanguage=en> )  
BUT:

the Work-Life Balance Package as “one of the main initiatives” of the EU Commission in this area but the “unequal share of domestic and family responsibilities” remains (see Commission’s Report on Equality between Women and Men – 2009 COM (2009) 77 final)

# The proposed amendments to the PWD

- \* goes beyond health and safety and includes equal treatment
- \* longer period of paid maternity leave (from 14 to 20 weeks)
- \* fully paid leave (recommended)
- \* 2 weeks paternity leave
- \* right to request flexible working arrangements



However, due to ‘the broad diversity of maternity protection and social security amongst the Member States (...) [and] the financial implications, especially during the crisis’, the Presidency of the European Council has not yet adopted its first reading position.

# Parental Leave Directive (Council Directive 2010/18/EU)

- \* it is for all employees on all types of contracts;
- \* 4 unpaid months' leave which can be used until the child has reached the age of 8, although the precise age is to be determined by the Member States (Clause 2). At least one month shall be provided on a non-transferable basis;
- \* length of service qualification cannot exceed 1 year;
- \* protection from discrimination for workers on the grounds of applying for or taking the leave;
- \* at the end of the leave workers have 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 (Clause 5);
- \* the right to request changes to their working hours for a limited period; in considering such requests, employers must balance the needs of the workers and the company (Clause 6);
- \* the right to leave on grounds of *force majeure* for urgent family reasons (Clause 7);
- \* these rights are also granted in the case of adoption.

# Effective work life balance needs more than leave arrangements

## Provisions on Working arrangements



- \* Change the structure of the contract
- \* Part-time workers directive (97/81 EC)
- \* Fixed-term workers directive (99/70 EC)
  
- \* 1992: 14.2 % of the EU working population was working part-time
- \* 2002: 18.1% of the EU working population was working part-timer

# Working arrangements: do they work?

- \* focus on the market rather than on parents;
- \* parents have limited control over flexible working arrangements;
- \* right to ask but not to obtain;
- \* there is no right to resume full time work
- \* type of jobs normally connected with flexibility;
- \* gender consequences of flexibility
- \* “the most prevalent form of working time in the EU is full-time work, both amongst men and women” (see European Foundation for the Improvement of Living and Working Conditions, 2007).

**There is, so far, no express link between flexible working arrangements and parents**



In 2005, over 6 million women aged between 25-49 were forced out of paid work in order to meet their family responsibilities (Eurostat, 2006)

# A care strategy?



*"That's right. Employee benefits include childcare - free of charge."*

- \* provided for a dependent child, sick or disabled adult or elder;
- \* often Informal: arrangements taking place within private households (private sphere);
- \* excluded from regulation of (paid) work (public sphere)
- \* no or little market value;
- \* gender dimension;
- \* no coherent legislative framework: the Childcare Recommendation (1992) & The Barcelona objectives (2002).

# What about fathers?

## The Legislation:

### Paternity leave

- \* Recast Directive Article 16
- \* Member States: overall very minimalistic although slowly developing

### Parental leave

- \* Parental Leave Directive 2010/18
- \* Variable implementations
- \* NB: the leave is unpaid and often inflexible
- \* Who uses it?

## The Case Law:

- \* Case 184/83, Hofmann
- \* C-218/98, Abdoulaye
- \* C-104/09, Roca Álvarez
- \* C-5/12, Betriu Montull



"I'M JUST WORKING OUT THE BEST TIME TO TAKE PATERNITY LEAVE."

# ... filling the gaps: maternity by surrogacy agreement ...

- \* Case 167/12, *C.D. v S.T.* (lodged on 3 April 2012) &
- \* Case 363/12, *Z. v A Government Department and the Board of Management of a Community School* (lodged on 30 July 2012)
- \* the extension of Case C-506/06, *Mayr* ?



# and discrimination by association in the context of pregnancy

- \* Case C-44/12, *Andrius Kalikauskas v MacduffShellfish Limited, Duncan Watt* (lodged on 30 January 2012)
- \* Case C- 303/06, *Coleman* revisited?
- \* potential impact on the reconciliation discourse

# Where are we now?



- \* “The equal treatment directive is not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents” (Case 184/83 Hofmann [1984] ECR 3047)

- \* “the positions of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child” (Case C-104/09, *Roca Alvarez* [2010] ECR I-08661)



# Difficulties remain

## \* economic climate

- \* at times of economic crisis women will be the first bear the brunt of austerity measures; if women will find themselves unemployed, it will be easier to fall back into a traditional caring pattern;

## \* stereotypes: a more equitable division of roles?

- \* women spend on average 17.7 hours a week more than men on domestic and family chores and do 7.4 hours a week less paid work than men (European Commission Report on Equality between Men and Women 2009 and European Commission Employment in Europe 2010);

## \* a right for everybody?

- \* see Articles 33 and 24 Charter of Fundamental Right, Case C-1/95 *Gester*, C-243/95 *Hill and Stapleton* (Reconciliation ... “a natural corollary to gender equality and a condition for its substantive achievement”)
- \* but see Case C-149/10, *Chatzi*.

# Further reading

- \* G. James and N. Busby ed., *Families, Care-Giving and Paid Work*, (Cheltenham; Elgard, 2011)
- \* V.M. Moghadam, “Women, Gender, and Economic Crisis Revisited” (2011) *Perspectives on Global Development and Technology* 10
- \* E. Caracciolo di Torella, “Brave New Fathers for a Brave New World? Fathers as care givers in an evolving European Union” forthcoming 2013 *European Law Journal*



any  
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