



Balancing work and family life - recent decisions of the CJEU

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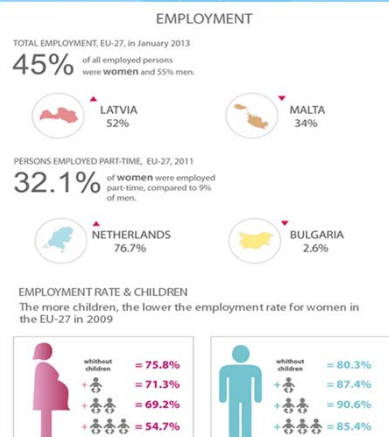


28-29 November 2013

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The background: 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)



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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”
- * Art 24 Charter Of Fundamental Rights: the rights of the child

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demographic
issues

gender
equality

economic
concerns

genuine
choice for
individuals

fight against
poverty



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“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

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The legislative framework

- * Equal Treatment Directive 76/207 EEC
- * 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 75/117; 76/207 & 2002/73; 86/378 & 96/97 & 97/80)
- * Part-Time Workers Directive 97/81
- * Fixed-Term Work Directive 99/70
- * 2008 Work-Life Balance Packet (EU Commission, COM(2008) 635)



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The case law: where it all started

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.”

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.

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Although a considerable amount of right/protection is in place, there are still gaps. Recent cases highlight problems in two particular areas:

- * the involvement of fathers
- * the regulation of maternity via artificial reproductive medicine, in particular surrogacy

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Why should the law include fathers?

- * **gender equality/employment strategy**
 - * supporting mothers who can then take a more substantial role in the employment market
 - * breaking down stereotypes
- * **children's rights/benefit**
- * **human rights**
 - * more fathers are willing to play a meaningful role
 - * right to *paid work* for women/right to *care* for men

Brave new 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



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



The role of fathers: 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)

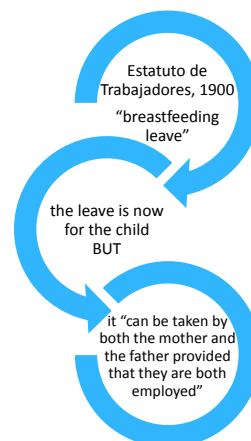
- * “the positions of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child” (Case C-104/09, Roca Alvarez [2010] ECR I-08661)



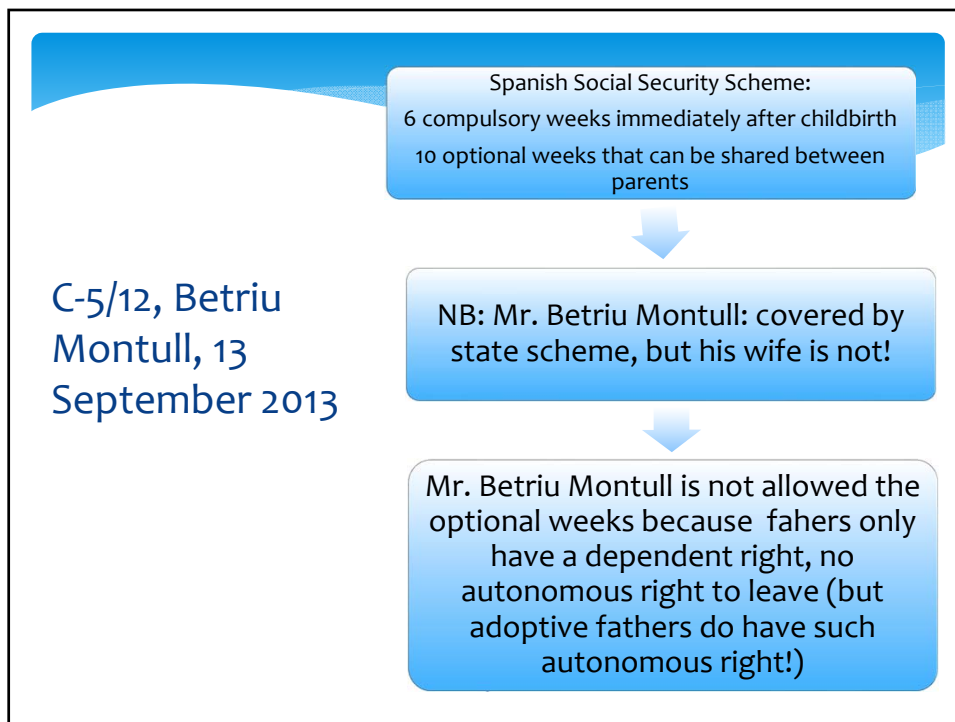
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Case C-104/09, Roca Alvarez [2010] ECR I- 08661

the legislation used
Art. 2(3) Equal Treatment
76/207



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AG Wathelet

“By providing that the mother may, at the beginning of the maternity leave, elect, after the first 6 weeks, for the father to take a designated and continuous part of the subsequent 10-week period of leave, the Spanish legislature detached those 10 weeks of leave from the mother’s biological condition and, consequently, from the purpose of Article 2(3) of Directive 76/207.” (par. 71)

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The dictum of the Court

emphasis on
maternity leave
to protect:

- * women's biological condition
- * special relationship woman-child

"[...] Directive 92/85 does not preclude the mother of the child who has the status of an employed person from deciding that the child's father, who has the same status, will take all or part of the maternity leave in respect of the period after the period of compulsory leave."
(par. 58)

"[...] Article 2(3) of Directive 76/207 lays down that that directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity." (par. 61)

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... mind the gap: maternity by surrogacy agreement ...

- * what is surrogacy? surrogate/intended mother
- * Case 167/12, *C.D. v S.T.*
- * Case 363/12, *Z. v A Government Department and the Board of Management of a Community School*
- * the extension of Case C-506/06, *Mayr* ?



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C-167/12 (British case)

- Intended mothers requesting maternity leave (Dir. 92/85)
- CD had a baby using the sperm from her partner;
- CD began mothering the baby (including breastfeeding) within an hour from its birth;
- She was initially denied paid leave but the employer reconsidered the matter and allowed paid leave.

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the questions referred

- does a woman have the right to receive maternity leave where it is not she herself but a surrogate mother who has given birth to a child?
- Pregnant Workers Directive (92/85)
- Recast Equal Treatment Directive (2006/54)

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AG Kokott (C-167/12 26 September 2013)

- Dir. 92/85 protects breastfeeding and thr special relationship woman-child
- "Where a Member State recognises surrogacy and thus the functional sharing of the role of mother between two women, it must act accordingly and confer on the intended mother the relevant rights relating to maternity leave." (par. 63)
- an intended mother who has taken responsibility for a baby (via surrogacy agreement) has the right to receive maternity leave under the PWD whether or not she breastfeed the child. Such leave taken by the surrogate mother must be deducted from the intended mother's entitlement and vice-versa.

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C-363/12 (Irish case)

- Z suffers from a rare condition: has healthy ovaries but no uterus and thus unable to support a pregnancy
- Z had a child via surrogacy in California
- the child is the genetic child of the intended couple (in fact no mention of the Californian mother on the child's birth certificate)
- Z refused paid leave of absence and offered only unpaid leave

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the questions referred

- does Directive 2006/54 preclude as discriminatory on grounds of sex a refusal to grant paid leave of absence equivalent to maternity or adoption leave to another who has a child through surrogacy arrangements?
- does such a refusal constitute discrimination on grounds of disability under Directive 2000/7, given that the commissioning mother suffers from a condition which prevents her from giving birth?

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AG Wahl (C-363/12 26 September 2013)

- "Precisely because of the clearly enunciated objective of protecting the health and safety of workers in a vulnerable condition, I cannot read Directive 92/85 as protecting a right to paid leave of absence equivalent to maternity leave in the case of a mother who has had her genetic child through a surrogacy arrangement." (par. 48)
- recast Directive is not applicable either: differential treatment is not based on sex

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Difficulties remain

- * **is work/family life reconciliation 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”)
- * **consideration for children’s rights**
 - * need to detach pregnancy/ maternity leave (health and safety of the mother) from parental leave (interest of the child)
- * **stereotypes: a more equitable division of roles?**

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any
questions?
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