



Motherhood versus parenthood in the case law of the CJEU

CURRENT REFLECTIONS ON EU GENDER
EQUALITY LAW

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Outline

1. The context: unequal division of work and care
2. EU policies and legislation and case law
 - Main instruments and case law
 - the Pregnancy Directive
 - direct sex discrimination
 - the Parental leave Directive
 - indirect sex discrimination
 - general principle of equal treatment
 - Protection in relation to pregnancy and maternity versus parenthood
 - Protection of women
 - Parental rights
 - Again protection of women
 - Rights in case of surrogacy
3. Concluding observations



Unequal division of work and care

- Employment rate: male 69.6%, female 58,5
- FTE: male 67.0%; female 49.8%
 - Share of part-time employment: male 9.4%; female 32.5%

Much higher average number of unpaid working hours of women than men



"What do you mean, you need to find a balance between work and family? We consider you part of our family."



Main EU instruments and case law

- Pregnancy Leave 92/85
- Parental Leave 2010/18 (repealed 96/34)
- Equal pay and treatment (Art. 157 TFEU; Recast 2006/54)
- EU Charter Art. 33(2)



Pregnancy Directive 92/85

- 14 weeks maternity leave
- Payment or adequate allowance
- Protection against dismissal from beginning pregnancy until end of maternity leave
- Applies also to fixed-term contracts: *Tele Danmark* (C-109/00)
- Proposal pending (COM 2008, 637)



Direct discrimination

- Direct discrimination is defined as: 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'
- Prohibition of less favourable treatment in relation to pregnancy and maternity (Art. 2(2)(c) Directive 2006/54)
- Case law: eg. *Dekker* (177/88), *Melgar* (C-438/99), *McKenna* (C-191/03), *Gassmayr* (C-194/08), *Parviainen* (C-471/08)



Parental Leave 2010/18

- Framework Agreement
- Applies also to part-time workers, fixed-term workers and temporary agency workers
- Individual right, 4 months, not paid
- In principle non transferable
- Case law: e.g. *Meerts* (C-116/08), *Gómez-Limón* (C-537/07)



Indirect discrimination

- Indirect discrimination is 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'
- Mobility: *Danfoss* (109/88)
- Comparability: *Österreichischer Gewerkschaftsbund* (C-220/02)



Principle of equal treatment in the Charter

- Value of parental leave as a social right
- CJEU in *Chatzi* C-149/10:

'observance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognised as fundamental by Article 33(2) of the Charter of Fundamental Rights' (cons. 63).



CJEU on protection of mothers vs rights of fathers

- Protection of motherhood after birth: *Hofmann* (184/83)
- Reconciliation and link with equality between men and women: *Hill* (C-243/95), *Gerster* (C-1/95)
- Own rights of fathers: *Roca Álvarez* (C-104/09)
- Only derived rights of fathers: *Betriu Montull* (C-5/12)



Surrogacy cases

- Rights of intended mothers in case of surrogacy, two diverging Views of AG's:
- *C.D.* (C-167/12) AG Kokott and
- *Z.* (C-363/12) AG Wahl



CJEU in surrogacy cases

- MS are not required to provide maternity leave to intended (commissioning) mothers, even if she does breastfeed the baby
- No direct or indirect sex discrimination. Comparable situation of commissioning father and commissioning mother



Concluding observations

- Step-by-step process
- Declining scale of rights
- No paid parental leave, would be a strong incentive for fathers. No social security benefits
- Potential role of the Charter
- No rights to flexible work arrangements or influence on working hours



Concluding observations (II)

- Protection of motherhood vs parenthood: divergences in case law
- Comparability issues
- Value of care and risks related to case are not (yet) addressed
- Case law of the CJEU: danger of reinforcing the traditional roles of men and women... but offers also challenging perspectives



Thank you for your attention!

