

RECONCILIATION OF WORK AND FAMILY LIFE

**ERA SEMINAR ON EU GENDER EQUALITY
LAW**

CLAIRE BRUTON BL

7 APRIL 2014

INTRODUCTION

Life cycle approach: provision of accessible child care facilities and care responsibilities

Response of member states

INTRODUCTION

- *"The way we live our lives has transformed dramatically in the last 30 years. New parents expect to share the upbringing of their children and both women and men want to work more flexibly and provide more support for older relatives. But life around us has not caught up and we are still living with the consequences of an unfinished social revolution. We are still faced with many workplaces, institutions and services designed for an age when women stayed at home. In other areas of modern life, inequalities underpins life and death issues."*
- Equal Opportunities' Commission, *Gender Agenda*, (2007).

LEGISLATION

Recast Gender Directive:

- ▶ Reshaping and codification of existing law
- ▶ Equal opportunities and equal treatment
- ▶ Discrimination: pregnancy and maternity leave: any less favourable treatment, s. 2(2)(c)
- ▶ Working conditions including pay

LEGISLATION

Pregnancy Directive

- Exclusion from Recast Directive
- Health and safety protection
- Less favourable treatment
- Article 10: dismissal

LEGISLATION

Pregnancy Directive

- Exclusion from Recast Directive
- Health and safety legal basis
- Health and safety protection

LEGISLATION

- Pregnancy Directive:
 - Leave periods: protective leave and maternity leave
 - Contractual rights maintained

LEGISLATION

- Proposed Amendments to Pregnancy Directive
 - Extension of maternity leave
 - Paid full salary during maternity leave
 - Flexible arrangements
 - Paternity leave

LEGISLATION

Charter of Fundamental Rights: Article 33

- *"(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."*

Definition of pregnant worker

- Danosa (c-232/09) : if employer learnt of pregnancy, then no requirement for notification
- *"for a certain period of time a person performs services for and under a direction of another person in relation for which he/she receives remuneration"*.

Pending judgment

- Is a woman who has given birth by way of a surrogacy arrangement protected by the Pregnancy Directive or the Recast Gender Directive
- Two referrals: *CD* (UK) and *Z* (Ireland)
- Two AG Opinions: differing approaches
- Judgment of CJEU awaited.

CASE LAW

- **Pregnancy and less favourable treatment**

Dekker (C-177/88)

only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct 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 .

CASE LAW

- **Pregnancy and less favourable treatment**
 - *Thibaut (C-136/95)*: terms and conditions of employment
 - *Hertz (C-179/88)*: limits to protected period: statutory maternity leave

CASE LAW

- Article 10: dismissals
 - Webb (C-32/93): presence of women in workplace not necessary if coincide with maternity leave
 - Tele Danmark (C-109/00) no distinction fixed term contracts

CASE LAW

- Article 10 (contd)
- Melgar (C-438/99)
- *"where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex"*

CASE LAW

- Article 10 (contd)

- Paquay (C-460/06)

Article 10 extends to decisions to dismiss and steps taken to prepare for the dismissal (such as searching for a replacement) made during these protected periods.

Requirement of informing employer

- Busch (C-320/01)

employer was not permitted to take pregnancy into account in deciding whether she could return to work early, as an employee is not obliged or required to inform her employer that she was pregnant.

Requirement of informing employer

- Danosa (C-232/09)

even if the worker had not formally informed her employer of her pregnancy, if the employer learnt of it, she would be protected by the provisions of the Pregnancy Directive.

CASE LAW

- **Recent case law pregnancy and less favourable treatment**
 - *Mayr (C-506/06) ivf. Extension of protection the dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on grounds of sex*

CASE LAW

- Pontin (C 63/08): effective remedies. Article 18 of Recast Directive.
- Non compliance with effective judicial protection.

CASE LAW

- **Pregnancy and less favourable treatment:
pay and sick leave:**
- Contrast with level of protection for pregnant employees in the workplace v outside workplace
- Use of comparator

CASE LAW

- **Pregnancy/Maternity leave**

- *McKenna (C-191/03) :*

"...so far as dismissals are concerned, the special nature of a pregnancy-related illness may only be accommodated by denying an employer the right to dismiss a female worker for that reason. By contrast, so far as pay is concerned, the full maintenance thereof is not the only way in which the special nature of a pregnancy related illness may be accommodated.

CASE LAW

- Alabaster C-147/02:

to deny such an increase (pay rise) to a woman on maternity leave would discriminate against her, since, had she not been pregnant, she would not have received the pay rise."

CASE LAW

- **Pregnancy/Maternity leave**
- Recent decisions: similar approach to McKenna: basic salary only not performance dependent pay
- *Parviainen (C-471/08) Gassmayr (C-194/08)*
- Case law differentiates between pregnant women absent from workplace and those in the workplace

CASE LAW

- Lewen (C333/97):

Christmas bonus, prohibition on taking periods of maternity leave into account to reduce benefit

CASE LAW

- **Maternity Leave**
- Hoffman (C-184/83) : special nature of relationship child and mother
- *Lomers* (C-476/99) less restrictive approach
- Alvarez (C-104/09) progressive??

CASE LAW

- *Montull C-5/12* return to older approach. Emphasis on women's biological condition and special relationship between woman-child
- Article 15 return to work

PATERNITY LEAVE

- Recast Directive no right to paternity leave
 - Soft law approach
 - Article 16

PARENTAL LEAVE

Parental Leave Directive

- Work life balance
- Promote women's participation in the work force
- Sharing of care responsibilities
- Special needs for children long term illness or children with disabilities

PARENTAL LEAVE DIRECTIVE

- Extension of period three months to four months
- Non transferability
- Flexible working arrangements

PARENTAL LEAVE

- Commission v Luxembourg (C-519/03): maternity leave and parental leave are different
- Chatzi (C-149/10) no individual right for parental leave for each child
- Meerts (C116/08) compensation part time worker due to parental leave not calculated on basis of lower salary.

PARENTAL LEAVE DIRECTIVE

- Kiiski (C-116/06) refusal to allow employee to change dates of parental leave to allow for paid maternity leave: direct discrimination
- Gomez-Limon (C-537/07) clause 2(6) directly effective: employment rights maintained.

RECENT CASE LAW

- Riezniece (C-7/12): parental leave and assessments for redundancy.
- C-512/11 und C-513/11: Provision of collective agreement and interaction of unpaid parental leave, interruption and maternity leave and effect on remuneration.
- *Lyreco v Rogiers* C-588/ 12 dismissal part time parental leave and protective award calculation.

CONCLUSIONS

- Strong level of protection pregnancy and maternity leave
- Increase in role of men but clear preference for women
- Balance of caring responsible between parents desirable
- Need for gender neutral approach