ERA SEMINAR ON EU GENDER EQUALITY LAW

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INTRODUCTION

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

Response of member states
“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).
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
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
Pregnancy Directive:

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

- Extension of maternity leave
- Paid full salary during maternity leave
- Flexible arrangements
- Paternity leave
Chart 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”. 
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.
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.
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
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
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”
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.
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.
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.
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.
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.”
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.”
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??
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 Directive

- Work life balance
- Promote women’s participation in the workforce
- 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
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 (C-116/08) compensation part time worker due to parental leave not calculated on basis of lower salary.
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