Recent CJEU case law on equal treatment, parental leave and religious signs at work

Professor Sophie Robin-Olivier
La Sorbonne School of Law
University Paris 1 Panthéon-Sorbonne

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Structure of the presention

I- Gender and Religion

II- Differences justified by the « biological condition » of women

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I- Gender and religion

Joined Cases C-804/18 and C-341/19 *WABE* and *Müller Handels*

2 cases before German labour courts

Employers invoked the neutrality policy adopted by the company to justify the obligation imposed on employees to take off their headscarf

Still pending

Opinion of Advocate general Rantos delivered on 25 February 2021

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The *WABE* case

A charitable association

Running child day care centres, with more than 600 employees taking care of around 3 500 children

- Whilst IX was on parental leave, WABE adopted

'Instructions on observing the requirement of neutrality'

- Upon her return to work, IX was asked to remove her headscarf, which entirely covered her hair

She refused and was temporarily suspended

- She came back to work again wearing a headscarf, was given a warning and was asked to perform her work without a headscarf in the future

When she refused, she was once again sent home and temporarily suspended, and received a second warning

- WABE subsequently required a female employee to remove a cross that she wore around her neck

IX challenged WABE's decision to issue her with the warnings before the Arbeitsgericht Hamburg

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The *Müller Handels* case

MH Müller Handels runs a chain of drugstores in Germany

- MJ, who is of Muslim faith, is a sales assistant and cashier since 2002
- On her return from parental leave in 2014, she wore an Islamic headscarf
- Her employer's asked that she removed her headscarf at work, then ceased to employ her when she refused
- MJ subsequently carried on a different activity within the undertaking for which she did not have to remove her headscarf
- On June 2016, she was asked to remove her headscarf, and following her refusal, she was sent home, where she received the instruction to attend her workplace without any ***conspicuous, large-scale*** political, philosophical or religious signs
- Since July 2016, all Müller Handels stores have been subject to the rule that the wearing of conspicuous, large-scale political, philosophical or religious signs in the workplace is prohibited

MJ sought a declaration that the instruction was ineffective and requested that she be remunerated, relying on the freedom of religion protected by German constitutional law

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Objective of the preliminary ruling procedure

German courts are trying to obtain an evolution of the ECJ case law

C-157/15, *Achbita* and C-188/15, *Bougnaoui* (2017)

Moving away from a formal approach of proportionality

(neutrality can be imposed on workers who interact with customers)

A stricter control of the proportionality of infringements to the principles of non-discrimination on the grounds of religion

Firms would have to prove concrete consequences of the lack of neutrality on the economic situation of the company

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A stricter review of proportionality based on religious freedom?

- German courts refer to religious freedom (protected by the CFREU, Article 10) to require a stricter control of proportionality

Harm must be caused to the company by the wearing of a headscarf

Firms have the burden of proof

A solution more favourable to women concerned in the two cases

- AG Rantos suggests to leave review of restrictions to religious freedom to national law, and maintain the EU type test (2017) for discriminations on religion

In the *WABE* case, the employer's decision would pass muster, probably not in *Müller* (timing)

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What about prohibiting only « *conspicuous, large-scale* political, philosophical or religious signs »?

AG: this is less restrictive…

IX and the Greek & Swedish governments: employees of certain religions are particularly disadvantaged – Existence of differences between religions

⇒ Prohibiting only conspicuous, large-scale religious sign could targets mostly employees of some religions, which require signs that are more visible (in certain contexts)

⇒ Direct discrimination? Only muslims (muslim women) would be affected…

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Recognition of intersectional discrimination?

- Neither mentioned by German courts, nor by the Advocate general
- Could these cases be an opportunity for the ECJ to grant legal recognition to the concept and make it one of EU anti-discrimination law?
- Comp. Decision n° 2662/2015 (2018) of the UN Human Rights Committee on the Baby Loup case

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II-Differences justified by the « biological condition » of women

Drawing a line between different types of leaves?

- ***Leaves considered necessary for the protection of women***

justified by pregnancy and maternity, which may be reserved for them

- ***Leaves aimed at care and education of children***

which both men and women can contribute to, and should have access to, in order to prevent the law from entrenching unequal participation of men and women in family life

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Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

Article 28

Relationship to Community and national provisions

1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.

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Legislative evolution - Impact on case law

- **Taking into account Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers**

- **Distinguishing from *Hofmann*, 184/83 (1984)**

A Member State may, after the statutory protective period has expired, grant to mothers a period of maternity leave which the State encourages them to take by the payment of an allowance

Directive 76/207 does not require Member States to allow such leave to be granted to fathers, even where the parents so decide

« It is apparent (…) that the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents » (§24)

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CJEU *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, C-463/19 (2020)

A national collective agreement reserves to female workers who bring up their children on their own, after the expiry of their statutory maternity leave, a right to leave

- Up to three-months' leave on half pay
- or to one and a half months' leave on full pay
- + unpaid leave of one year,

renewal for a period of one year being possible for this leave

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A method to assess the compatibility of the leave with EU Law provided by the CJEU (§ 62)

It is necessary to take into account:

- the conditions for entitlement to the leave
- its length and modalities of enjoyment
- and the legal protection attached to that period of leave

+ no formal approach should prevail

« the title of the chapter of the collective agreement within which the provision which provides for such additional leave falls is not a relevant factor »

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1- The conditions for granting the leave

They must be directly linked to the ***protection of the woman's biological and psychological condition*** and ***the special relationship between the woman and her child during the period following childbirth***

=> The leave must be granted to all women covered by the national legislation at issue, irrespective of their length of service and without the need for the employer's consent

The possibility of introducing a period of leave reserved for mothers after the expiry of the statutory maternity leave is subject to the condition that it is itself intended to protect women

⇒ the **mere fact that leave immediately follows the statutory maternity leave is not sufficient**

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2- Length and modalities of enjoyment

The duration of and the manner in which the supplementary maternity leave is exercised must be ***appropriate*** to ensure the protection that a maternity leave aims at, ***without exceeding the period which appears necessary for the protection***

In the case, the Court notes that the duration of the leave provided for in the collective agreement vary considerably, from one and a half months to up to two years and three months

« That period may thus be considerably greater than that of the statutory maternity leave of sixteen weeks, provided for in the Labour Code »

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3- Legal protection attached to the period of leave

Same protection as for maternity leave

in conformity with Directives 92/85 and 2006/54

⇒ ***protection against dismissal*** and the maintenance of a ***payment to and/or entitlement to an adequate allowance*** for the female workers, and the ***right to return to her job*** or to an equivalent post on terms and conditions which are no less favourable to her, and to ***benefit from any improvement in working conditions*** to which she would have been entitled during her absence

In the case, the Court notes that « where the leave is taken for one or two years, it is 'unpaid', which does not appear to ensure maintenance of pay and/or entitlement to an adequate allowance for the female worker, a condition required for maternity leave by Article 11(2) of Directive 92/85 »

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CJEU, *Caisse pour l'avenir des enfants*, C-129/20 (2021)

Interpretation of Directive 2010/18/EU – Revised Framework Agreement on parental leave

National legislation submits the grant of **parental leave** to 2 conditions

The worker must be lawfully employed in a workplace and affiliated in that regard to the social security scheme concerned

- without interruption for a period of at least 12 months immediately preceding the start of that parental leave

- at the time of the birth of the child (or children or of the reception of the child or children to be adopted)

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Facts

- XI concluded a **fixed-term contract** with the Grand Duchy of Luxembourg for the provision of teaching services in post-primary education
- Following the expiry of that fixed-term employment contract, her affiliation to the social security bodies was terminated and she was registered by her partner under the co-insurance scheme
- **During her period of unemployment, she gave birth to twins**
- After having concluded **two other fixed-term contracts** with the Grand Duchy of Luxembourg, she obtained a contract of indefinite duration for the same work, but submitted an application to take parental leave
- Her application was rejected because she was not lawfully employed in a workplace and affiliated to the social security scheme concerned ***at the time of the birth of the child***

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The right to parental leave can depend on the parent being employed without interruption for a period of at least 12 months immediately preceding the start of that parental leave

- Solution deducted from wording of clause 3.1(b) of the revised Framework Agreement « the Member States may make the grant of parental leave subject to the condition of a prior period of work that may not exceed one year »
- Given the use of the words 'period of work' in the first part of that provision and the fact that that provision provides, in the second part, that the sum of successive fixed-term contracts with the same employer is to be taken into account for calculating that period, Member States may require that the period in question be continuous
- Since an application for parental leave seeks to secure, on the part of the applicant, a suspension of his or her employment relationship, the Member States may require that the prior period of work immediately precedes the start of the parental leave

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The right to parental leave cannot be subject to the condition that the parent is employed at the time of the birth of the child or children (or the reception of the child or children to be adopted)

Under clause 2.1 of the framework agreement, the right to parental leave is an individual right to which men or women workers are entitled on the grounds of the birth or adoption of a child ***to enable the parent to take care of that child until a given age to be defined by Member States*** but which may not, however, exceed eight years

The goal of the framework agreement is to facilitate the ***reconciliation of parental and professional responsibilities for working parents for all workers***, men and women, who have an employment contract

Reference to Articles 23 and 33 of the CFREU in the recital of the framework agreement indicates that it aims both to ***promote equality between men and women*** with regard to labour market opportunities and treatment at work and to ***enable working parents better to reconcile their professional, private and family life***. Those objectives are reiterated in clauses 1.1 and 2.2 of the revised Framework Agreement (§ 43)

The letter and objectives of the revised Framework Agreement preclude that a Member state requires that the parent is employed at the time of the birth of the child

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« The individual right of each working parent to parental leave on the grounds of the birth or adoption of a child is a particularly important EU social right which, moreover, is laid down in Article 33(2) of the Charter of Fundamental Rights »

« The individual right of each working parent to parental leave on the grounds of the birth or adoption of a child, enshrined in clause 2.1 of the revised Framework Agreement, must be interpreted as articulating a particularly important EU social right which, moreover, is laid down in Article 33(2) of the Charter of Fundamental Rights »

=> **that right cannot be interpreted restrictively**

(§ 44)

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Is this solution discriminating between parents who are unemployed and parents who are working at the time of the birth of their child?

Unemployed parents could make their own arrangements to take care of their child whereas working parents could not take care of their child at the time of birth without being granted parental leave (Caisse pour l'avenir des enfants)

CJEU

- such an argument does not take into consideration the fact that mothers are granted maternity leave at the time of the birth of their children
- the purpose of the grant of parental leave is not to enable a parent to take care of his or her child only at the time of the birth and shortly thereafter, but also at a later stage during childhood

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Conclusion

- Recent CJEU case law deals with ***factors leading to women leaving the workplace*** (Religious affiliation, maternity and child care)
- ***The CJEU (rather) progressive case law on leaves*** is paving the way for the implementation of Directive 2019/1158 on work life balance
- ***On religious signs***, the *Wabe* and *Müller Handels* cases give the Court an opportunity to add ***« intersectional discrimination »*** to the corpus of EU anti-discrimination law concepts
- In addition, the *Müller* case points at the consequences of ***a narrow definition of prohibited signs (conspicuous, large-scale).*** Would it facilitate identification of discriminations on religion?
- Lastly, a ***stricter control of proportionality (taking into account concrete economic impact on the firm of the employee wearing a headscarf)***, suggested by German courts, would limit exclusion of muslim women wearing a headscarf from the workplace

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