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## Recent CJEU case law on equality M/F

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### outline

- Access to employment
- Pregnancy (dismissal, leave & promotion, burden of proof health risks)
- Right to parental leave
- Calculation of benefits (maternity leave, unemployment, occupational pension)
- Different retirement ages m/f (dismissal, entitlement to benefit)
- Miscellaneous: abuse of rights

## Access to work



- **Kalliri** (Greece), C-409/16, 18.10.2017
  - Dir. 76/207, rather than 2006/54 (*ratione temporis*)
  - Required height: 1.70:
    - Indirect discrimination of women
    - Justified?
      - Operational capacity is legitimate aim
      - Suitable? not for some police functions (e.g. traffic control)
      - Less disadvantageous tests possible (e.g. preselection by testing physical ability)
    - Conclusion: law does not appear appropriate or necessary to achieve its aim

## Pregnancy 1: dismissal



- **Porras Guisado (Spain)**, 22.02.2018 (C-103/16, 2018) - collective redundancy
- 2 issues:
  - a) protection as of when? (art. 2(a)): admissibility
  - b) prohibition of dismissal also in case of collective redundancy? (art. 10)

"We've decided to give you half maternity leave...you leave but you don't come back."

## ***Porras Guisado* continued**

a) protection as of when?

■ art. 2(a) dir. 92/85:

*“pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and / or national practice”*

■ Court: PG had not yet informed employer, but had told colleagues & superiors: not a hypothetical issue (admissible)

## ***Porras Guisado* continued**

b) collective dismissal?

■ art. 10(1): *“...prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave [...], save in exceptional cases not connected with their condition [...]*”

■ Court:

- prevent harmful effects on health pregnant worker - incl. that women ‘may be prompted to terminate the pregnancy’ (para 46), save in exceptional cases
- Collective redundancy is ‘exceptional case’, and thus allowed, provided that employer substantiates dismissal (art. 10(2))

## Pregnancy 2: promotion

**HB v Eur. Cie**, T-706/16 P  
Tribunal, 26.10.2017



- Annual promotion round officials Commission
- HB absent most of 2013, due to pregnancy & pregnancy-related illness.
- Not promoted: sex discrimination?
- Revolves around: burden of proof
  - Applicant must establish presumption of discrimination
    - Pregnancy as such is not enough

## Pregnancy 3: health risks

dir. 92/85 & 2006/54



- **Otero Ramos**, 19.10.2017 (C-531/15, 2017)
  - Nurse informs employer she is breastfeeding
  - Employer tells her 'the work does not pose risks'
  - Court:
    - risk assessment includes specific assessment of individual situation (art. 4(1) dir. 92/85)
    - Failure to assess the risk, amounts to direct sex discrimination (art. 2(2)(c) dir. 2006/54: burden of proof)

## Pregnancy 3: health risks continued

### ■ **González Castro** (Spain) (C-4/17, 19.09.2018)

- art. 7, 92/85: ' ... ensure that workers .... are not obliged to perform night work during their pregnancy
- does working in shifts which is sometimes at night constitute nightwork? (def. in dir 2003/88)
  - Court: yes, another interpretation would deprive provision of *effet utile*: worker would risk exposure to health or safety risks
- burden of proof:
  - request for certificate re existence of risk denied; no individual risk assessment
  - Court: lack of specific analysis of risks must be regarded as less beneficial treatment on basis of pregnancy, maternity or breastfeeding = direct discrimination (ref to *Otero Ramos*, 2017)



## Parental leave 1 (dir. 2010/18)

### ■ **Vadillo Gonzalez** (Spain) (C-252/17, 21 March 2018)

- VG asks for 1 hour leave per day
- Denied because wife lost job and is at home
- Spanish court wants to know:
  - Is a national law that denies parental leave to an employee because partner (regardless of sex) is unemployed, in conformity with EU-law?
  - is denial of such parental leave to a male employee not contrary to art. 3, 2006/54 (positive action)?
- Court: inadmissible: not enough information provided



## Parental leave 2

**Dicu** (Romania), C-12/17, 04.10.2018

- Are employees entitled to days off for the time spent on parental leave? (Dir. 2010/18 + 2003/88)
- Court:
  - Right to paid annual leave is fundamental right (art. 31 Charter)
  - Protects health and safety
  - Previous case law: re absence because of illness or maternity leave
  - But: fundamental difference between sick leave / maternity leave and parental leave:
    - not unforeseen (comp. to sick leave)
    - not involuntary (comp. to sick leave)
    - not meant to protect specific conditions (health mother, bond child mother) (comp. maternity leave)
    - during parental leave employee status continued, but reciprocal obligations employer / employee suspended
  - Conclusion: no, because - different from sick leave and maternity leave - parental leave cannot be equated to period of work

## Calculation of benefits 1



- **DW** (Latvia), C-651/16, 07.03.2018
  - Maternity benefit
  - Worked 11 of 12 months of reference period for an EU-institution.
  - Calculated as if unemployed (although contributions not required)
- Court:
  - obstacle to freedom of movement
  - Argument govt that unlikely to dissuade because only temporary impediment irrelevant: barriers not assessed in terms of durability
  - Justification?
    - Stability of social security system is legitimate aim, but: authorities must show in each individual case that measure is appropriate to achieve aim. Ic: analysis is lacking.

## Calculation of benefits 2



- **Kleinstauber** (Germany) C-354/16, 13.07.2018
  - Full-time & part-time employment periods recalculated into one uniform activity rate.
  - Clause 4 Framework Agreement + art. 4 dir. 2006/54: discrimination?
    - No statistical differences
    - Actual years of service = objective criterion
    - Calculation method suggested by Ms K may artificially increase and overestimate her activity
    - No discrimination

## Calculation of benefits 3



- **Espadas Recio** (Spain) C-98/15, 09.11.2017
  - Contributory unemployment benefit
    - But: contributions paid because of national law, therefore not part of 'employment conditions'
  - Vertical & horizontal part-time contracts
    - Days worked calculated, rather than hours worked
    - Contrary to dir. Art. 4(1) 79/7?
      - All vertical part-timers adversely affected
      - Majority of all part-timers (vertical and horizontal) are women: indirect discrimination
      - Justified? Govt: system based on contributions (proportionality)
      - Court: measure not appropriate to ensure correlation between contribution & benefit (for vertical part-timers)

## Calculation of benefits 4

requests for preliminary rulings:

- **Villar Laiz** (Spain), C-161/18, lodged 27.02.2018
  - re: calculation of retirement pensions; art. 4(1) of Dir 79/7 + Charter art. 21
- **Safeway Ltd** (UK), C-171/18, lodged 05.03.2018
  - re: retrospective reduction of value of accrued pension rights of men and women Art. 157 TFEU)

## Also lodged:

- **Minoo Schuch Ghannadan** (Austria), C-274/18, lodged 23.04.2018
  - should *pro rata temporis* principle (pt 2, cl. 4 Framework Agreement - Dir 97/81 on part-time work) be applied to the calculation of consecutive employment contracts if significantly more women than men work part-time?
  - should claimant substantiate claim of indirect discrimination by providing evidence (e.g. statistics) to not only prove over-representation of women among part-timers, but also that women are ('much more') significantly affected?

## From the past: different retirement ages m/f 1



- **Maturi et al. v Opera di Roma**, C-142/17 and C-143/17, 07.02.2018
  - Until 2010: female dancers retired at 47, male dancers at 52
  - 2010: uniform retirement age: 45
  - Transitional option [2 years]: could continue to work till original retirement age (renewable annually)
  - Court: distinction between payment of pension & (automatic) termination of contract
    - Ic: termination of contract (art. 14(1)(c) 2006/54: no direct or indirect discrimination
    - No apparent reasons for difference m/f
    - Wish to avoid exposing workers to sudden change, cannot justify direct discrimination

## From the past: different retirement ages m/f 2

- **MB**, C-451/16, 26.06.2018
  - Specific period between entry into force UK Gender Recognition Act (2004) and access to marriage same sex couples (2014)
  - MB did not change legal gender: did not want divorce for religious reasons
  - Therefore denied retirement at 60.
- Court:
  - marriage is only an issue for trans women; does not play a role re retirement age for cisgender women
  - case is not about marriage; only about benefits (79/7)
  - Concerns a limited number of individuals
  - Difficulty arises because of a derogation of the equal treatment principle; will disappear

## Or not a relic from the past??

- Action brought 15.03.2018  
***Eur. Cie v. Poland***, C-192/18
  - Poland introduced a distinction between retirement ages for male & female judges and prosecutors:  
failure to fulfil obligations under art. 157 TFEU and artt. 5(a) and 9(1)(f) Dir. 2006/54?
  - + grants the right to decide on extensions of service to Minister for Justice (art. 19(1) TEU and 47 Charter)

## To conclude

- ***Kratzer***, C-423/15, 28 July 2016  
(dirs. 2000/78 & 2006/54)
  - *Kratzer* applies for trainee position and writes that *'owing to the death of his father, he had dealt with a very large medical law file and, therefore, had extensive experience in that field'*.
  - When not invited: complains and asks compensation for age discrimination;
  - Complains also about sex discrimination because only women hired.

## Kratzer continued



### ■ Court:

- an application that aims at obtaining the formal status of an applicant rather than obtain an employment position falls outside directives
- Finding of an abusive practice requires:
  - Objective element: combination of objective circumstances shows that despite formal compliance, objective of directives was not achieved
  - Subjective requirement: objective factors must show that essential aim is to obtain an undue advantage
- For the national court to verify

Thank you  
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