



Legal Seminar 26 November 2012
Equality Law for Everyone: Challenges Ahead

SUMMARY - WORKSHOP 2
Pregnancy and Maternity Discrimination

This document does not necessarily reflect the opinion or position of the European Commission, Directorate-General Justice.

Summary of the Draft Thematic Report of the European Network of Legal Experts in the Field of Gender Equality entitled "Fighting pregnancy and maternity-related discrimination: The application of EU and national law in practice in 33 European countries".¹ Written by Annick Masselot, Eugenia Caracciolo di Torella and Susanne Burri

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1 General trends

National statutory rights relating to the protection of pregnancy, maternity and parenthood across the EU Member States, the Candidate and Acceding Countries as well as Iceland, Liechtenstein and Norway are generally of a reasonable standard. The EU has successfully established a common ground and often domestic legal provisions go beyond the obligations set by the EU. Despite extensive legislation, pregnant women and new parents experience high levels of discrimination and difficulties, because there appears to be a large gap between the letter of the law and its practice. In other words, while the law exists and is comprehensive on paper, it is too often circumvented in practice and individuals do not always enforce their rights. In addition, it is clear that cultural stereotypes are still very much alive across Europe and women are still perceived as the main carers and therefore not primarily as workers with full employment rights.

Generally speaking, the level of protection granted to pregnancy, maternity and parenthood is more sophisticated for those working in the public sector than for workers in the private sector. As a result, the vast majority of women end up working in the public sector, which is then seen as responsible for managing pregnancy and child-care-related problems. In correlation, workers in the private sector are more likely to suffer from discrimination than those in the non-profit sector. Discrimination appears to be less common in large enterprises compared to small businesses. This

¹ This report currently only exists in draft form and is not (yet) publicly available.

is reinforced by national law which, at times, differs according to the size of the company.

Employers generally argue that more entitlement to pregnancy and maternity rights leads to more discrimination against women, while parents claim that more protections and more rights are required in order for them to be able to access and retain paid employment. It has been suggested that the extent of pregnancy and maternity rights is directly linked to lower employment rates among women. However, there is no clear evidence to suggest that discrimination against women is triggered by the *existence* of rights or that women are discriminated against because rights are too burdensome for employers.

2 Discrimination in access to employment – recruitment process and monitoring

Since the decision in Case C-177/88 *Dekker*, the Court of Justice has established two pivotal principles. First, as only women can become pregnant, the refusal to engage or the dismissal of a pregnant woman because of pregnancy or maternity amounts to direct discrimination, which means that, in principle, it cannot be justified in any way, in particular by economic considerations, except if explicit exemptions are mentioned in EU equality law. Secondly, in certain circumstances, such as pregnancy, a male comparator is not necessary. By now these principles appear to have been embedded in the relevant domestic legislation of all the Member States.

In the vast majority of Member States the law prohibiting discrimination regarding the recruitment of pregnant women and new mothers is sufficient and satisfactory. Nevertheless, unfavourable treatment against pregnant women and young mothers applying for jobs remains significant in practice. While discriminatory practices regarding the wording of job advertisements are relatively easy to monitor, it is much more difficult to monitor the substance of interviews conducted prior to hiring and to assess the real motivation behind the recruitment decisions of employers. Harmful gender stereotypes are also widespread and reinforce the practice of not appointing pregnant women or new mothers seeking employment. For instance, it is common for employers to assume that mothers of young children will not arrive punctually at work in the morning and therefore are not worth employing. Women who are not pregnant or mothers may nevertheless be perceived as potential mothers and be refused employment. One of the main difficulties in relation to recruitment procedure lies in the ability to produce sufficient evidence in order to prove discrimination. Job applicants also rarely seek legal remedy because of the fear of being labelled as 'troublesome' or victimised when they look for other employment.

One way around this difficulty could be to impose the systematic monitoring of recruitment processes. In **Spain**, an initiative was undertaken by the Labour and Social Security Inspectorate which was aimed at monitoring companies' compliance with their obligations to achieve effective equality between women and men in

access to employment and recruitment processes. The study uncovered breaches which were followed by penalties and involved a large number of workers.

Legal redress could also be made available so as to combine damages with an order for the employer to put an end to the discrimination as is the case in **Belgium**.

3 Dismissal /pressure to resign – the impact of the economic crisis

The introduction of pregnancy and maternity rights has led some to argue that these rights have created a barrier in women's employability. The recent economic crisis has further heightened the argument that women's legal protection with regard to pregnancy and maternity make them the first 'casualties' on the list of employees to be made redundant.

Women, and particularly pregnant workers and mothers, have been found to be disproportionately affected by recent legislative measures in some Member States which aimed at increasing labour market flexibility. These measures sometimes enable employers to unilaterally change the terms and conditions of employment contracts and are in practice disproportionately imposed on women with children. Pregnant women and women with young children are more often selected for dismissal during workforce reduction because they are expected to be less able to fulfil the anticipated increased workload following the reorganisation.

In addition, various pressure tactics, referred to as 'mobbing' practices,² are being used by employers to encourage or force pregnant employees or new mothers to resign. Moreover, the practice of 'white resignation' has been identified in a number of Member States. As a precondition for recruitment, women are asked to sign an undated resignation letter which can be used by the employer to make the worker resign when needed (for example, in the event of the worker becoming pregnant, although this is certainly not the only reason for using such 'white resignations').

This practice can be eradicated by means of a requirement for the resignation to be signed in front of a public authority and the right to reverse a signed resignation within a set period of time (e.g. **Portugal**). In a similar vein, the dismissal of pregnant and new mothers could be submitted to an ex-ante authorisation by the labour inspectorate.

4 Fixed-term employment or precarious forms of employment

In Cases C-109/00 *Tele Danmark* and C-438/99 *Melgar*, the Court of Justice held that refusing to renew the fixed-term employment contract of a pregnant worker is direct sex discrimination. However, in many countries this is still common practice.

² Although the experts refer to "mobbing" practices, the term should be understood as bullying practices.

People employed under a fixed-term contract or in other kinds of temporary positions do not tend to enforce their pregnancy and maternity rights, because they fear that their contract might not be renewed. This is especially true for young people, who are also potential parents. The economic crisis has further reinforced fear of victimisation and reluctance to enforce such individual rights.

Some national courts have been proactive with regard to this problem. In **Belgium**, for example, failure to renew a fixed-term contract following maternity leave is now classed as direct discrimination by the courts. The power to monitor the refusal to renew the fixed-term contracts of pregnant women or women on maternity leave could be given to a national equality body, as is the case in **Portugal**. Finally, a fixed-term contract could be made to be automatically prolonged by law if the worker becomes pregnant until the beginning of the period of maternity protection (e.g. **Austria**).

5 Return from maternity leave

Article 15 of the Recast Directive 2006/54/EC³ provides that, “A woman on maternity leave shall be entitled, after the end of her period of maternity leave, 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”. However, this obligation appears not always to be clearly implemented by the Member States, especially when the maternity leave in question covers a long period of time. While some Member States have not implemented this provision at all, where it has been transposed, its effectiveness remains doubtful in practice.⁴

Requiring employers to provide adequate training so that the employee can return to the same job or a job at the same level appears to be a good practice in **France**.

6 The right not to be discriminated against during pregnancy and maternity leave

Under Article 2(2) of the Recast Directive there should not be any discrimination on the grounds of pregnancy and maternity and the Court of Justice has confirmed in various cases that women on maternity leave retain their employment rights. However, some problems persist.

³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

⁴ This happens in most of the Member States despite Recital 25 of the Recast Directive which clearly states that express and specific provision should be adopted in national legislations in order to protect these complementary rights to maternity leave and to the prohibition of dismissal during maternity leave.

6.1 Holiday and maternity leave

In Case C-342/01 *Gomez* the Court of Justice held that a worker must be able to take her annual leave during a period that does not overlap with her maternity leave. However, many school teachers continue to face difficulties when maternity leave overlaps with school holidays (especially the school summer holiday).

6.2 Promotions

Some women experience a subtle type of discrimination, based on their pregnancy or their caring role, which affects their promotion and career prospects. In some instances, the law allows employers to refuse to take into account periods of parental leave when awarding pay increases. This indirect sex discrimination is justified by employers on the grounds that parents who have taken parental leave have less work experience. In some countries it is common practice not to consider pregnant women for promotion. Again, in this case it is very difficult for workers to prove discrimination.

7 Adjustment of working conditions/leave for reasons connected to health and safety

The Pregnant Workers Directive 92/85/EEC⁵ creates two types of obligations for employers, who must, on the one hand, ensure the health and safety of pregnant workers and workers who have recently given birth or are breastfeeding and, on the other hand, must respect the principle of sexual equality and refrain from discriminating against this category of workers. The two obligations should work in harmony. Although in Cases C-66/96 *Høj Pedersen* and C-207/98 *Mahlburg*, the Court of Justice clearly stated that obligations regarding health and safety cannot be taken into consideration in such a way as to be detrimental to pregnant workers, it remains the fact that, in practice, health and safety requirements are often used as way of excluding women from the workplace. Women are then over-protected and the requirement of equality is (conveniently) forgotten.

8 Equal pay

The legal framework relating to the remuneration of workers on maternity leave is complex, involving, on the one hand, the articulation of the principle of equal pay under Article 157 TFEU and the Recast Directive and, on the other hand, the right to maintenance of payment and/or an adequate allowance under Article 11 of the Pregnant Workers Directive. The Court of Justice has reviewed this area in a number of cases but the law remains very complex and this may explain the confusion of many domestic legal systems. The method for calculating the remuneration of a

⁵ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ [1992] L348/1.

worker on pregnancy, maternity or paternity leave (and, when applicable, parental leave) differs from Member State to Member State. However, despite these differences, the relevant benefits, under Article 11(3) of the Pregnant Workers Directive must be adequate and at least equal to the allowance provided in case of sick leave.

One of the contentious points with regard to the remuneration of workers on maternity leave is the question of bonuses and whether these should be taken into consideration when calculating maternity pay. The Court of Justice has identified two types of bonuses. In Case C-333/97 *Lewen*, the Court held that bonuses which are aimed at all workers as an encouragement to work should be given to all workers regardless of whether they are pregnant or on maternity leave. However, bonuses that depend on the performance of the worker at work do not need to be paid to women on maternity leave or women who are pregnant and cannot perform their duties due to health and safety reasons. The Court confirmed this rule in two recent cases. In Case C-194/08 *Gassmayr* an Austrian doctor was refused the on-call duty allowances, which were additional to her basic pay, because she had to stop working for health and safety reasons. Case C-471/08 *Parviainen* involved the temporary transfer of an air hostess during her pregnancy to other duties and the loss of her right to a supplementary allowance intended to compensate for the specific disadvantages connected with the organisation of working time in the air transport sector.

In many countries, these cases are not understood and it is common practice for employers not to pay specific bonuses (e.g. attendance bonuses, productivity bonuses or meal or transport bonuses), which were attached to the salary when the worker was not on leave, as well as Christmas bonuses.

In **Poland**, workers on maternity leave are entitled to receive the so-called 13th salary, which may be considered to be a bonus, if they have worked for at least six months in one calendar year.

9 The role of fathers

Rights granted to fathers at both domestic and EU levels are exceedingly minimal. Yet the Court of Justice held in Case C-104/09, *Roca Álvarez* that it is becoming increasingly clear that “the position of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child”. The involvement of fathers represents an important element in the process of establishing equality when it comes to the reconciliation of work and family life and contributes to combating gender stereotypes in the employment market.

There are two main measures which allow fathers to be involved in the care of their child(ren): paternity leave and parental leave. In addition to this, fathers are increasingly using the right to feeding breaks, which is sometimes considered to be a form of parental leave (e.g. **Spain**).

9.1 Paternity leave

At EU level, paternity leave has recently been recognised in Article 16 of the Recast Directive. In the Member States paternity leave usually lasts between two (e.g. **the Netherlands**) and 14 days and is not always paid. Some Member States provide much longer entitlements (e.g. 18 working days in **Finland** and one month in **Lithuania**), while in a few Member States there are no statutory paternity rights.

The aim of paternity leave differs amongst Member States. In **Finland** it is mainly used by fathers to get to know the baby and help the mother rather than as a way for fathers to care for the child. In **Romania** the emphasis is more on the welfare of the child and is conditional on the father completing a course in infant care. In **Slovakia**, it is more linked to health and safety concerns: an employer is obliged to grant time off for the time necessary to transport the mother to a medical facility and back.

9.2 Parental leave

Parental leave is a longer period of leave made available to both parents. At EU level it is regulated by the Framework Agreement on Parental Leave Directive 2010/18/EU⁶ which has, in different ways, been adopted by almost all the countries under analysis. At one end of the spectrum, the Scandinavian countries have enacted a form of mild coercion (father's quota) in order to encourage fathers to take up the leave. At the other end of the spectrum (e.g. **Turkey**) parental leave is not provided and thus the national legislation is in breach of EU law.

In practice, in almost all the countries it is very unusual for fathers to take parental leave. This is explained by the fact that the leave is often unpaid and, since men are still often the main breadwinner of the family (partly due to the gender pay gap), this means that it is more convenient for families to lose part of the woman's pay. In addition, there still exist strong cultural perceptions/social stereotypes around caring and the distribution of roles within the family.

In many countries initiatives have been adopted to encourage the take-up of paternity leave by fathers. In **Italy**, in order to reduce the negative effects of parental leave on the organisation or business, employers are entitled to employ a worker on a fixed-term contract, up to one month before the start of the parental leave, so that the worker taking leave can train his or her substitute and a reduction in employer contributions is available in relation to the worker's successor. In **Sweden**, a so-called 'Equality Bonus' was introduced to redress the inequalities inherent in the application of the parental benefits scheme. In **Lithuania**, parental leave until the child reaches the age of three is granted to the person who is actually looking after

⁶ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

the child, including grandparents or other relatives. Entitled employees may take it in turns.

In conclusion, fathers' rights are still very much developing and EU leadership in this area is needed in order to promote the development of such rights. A strong framework should be supplemented by financial entitlements which make its take-up feasible.

10 The Goods and Services Directive

The Directive on Goods and Services 2004/113/EC⁷ has had a relatively limited impact in the area of pregnancy and maternity. With few exceptions, the Goods and Services Directive has been implemented in the countries studied and, in some cases, states have gone beyond the requirements of the EU legislator by including the media and advertising⁸ (e.g. **Spain, Croatia**). Some national legislation does not make specific reference to pregnancy and maternity as a form of gender discrimination in this area, which makes discriminatory practices less visible and therefore more difficult to tackle.

Some of the most common issues in this area are highlighted below:

- In practice, in some Member States, pregnant women and women who suffer from pregnancy-related illness or maternity-related illness find it more difficult to access *private health insurance* or care insurance. Insurance companies sometimes require the expiry of a waiting period for the insurance to start covering the risks of loss of income related to pregnancy and maternity. The waiting periods can also apply in the context of social security benefits.
- A common complaint relates to *airline practices* which impose conditions on pregnant women. Generally, pregnant women can fly only if in possession of a medical certificate stating that they are 'fit to fly' after a certain period of about 28 weeks of pregnancy and after a few more weeks there is a total ban. The number of 'qualifying' weeks varies, depending on the airline policy, and thus also varies vastly between States. Such practice is often justified by the airline company on grounds of health and safety, but there appears to be no clear research backing these policies and it seems that airline companies are only trying to avoid the inconvenience of an accidental delivery while in the air. The practice is reported by all the experts and its legality is questionable under the Goods and Services Directive, although there has not been any legal challenge.
- The choice of delivery method and the right to *homebirth* represent an issue in a number of countries, where certain age groups of women may be excluded from

⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

⁸ It should be noted that the Directive on Goods and Services 2004/113/EC does not exclude the media and advertising sector from its scope. It only specifies that it does not apply to the "content" of media and advertising.

homebirth, choices being restricted on grounds of financial or safety regulations. In some countries, while in theory at least women are afforded a large degree of choice as regards home deliveries, in reality acute shortages of midwives mean that this choice is in fact not practical.

- Parents in some countries are prohibited from entering shops with a pram for fear of shoplifting or from access to restaurants/shops because of a lack of infrastructure. Perhaps because these problems are not perceived as strictly speaking legal, there is very little case law available in this area.

11 Is there space for self-regulation?

Private industries, commercial companies and professional associations have proven in some cases to be proactive in this field.

Some professional bodies have been very active in raising awareness campaigns. In **France** lawyers are self-employed, therefore the legal provision on pregnancy and maternity right does not apply to them. However, a report published by the legal profession in 2009 outlining discrimination faced by lawyers when they become pregnant or when they require some flexibility after they have had their child, has led to a reform in the legal profession. The new self-regulated regime of maternity leave for French lawyers is now similar to the legal regime of employees in the private and the public sectors.

Some commercial companies have also led the implementation of good practices in relation to pregnancy, maternity, paternity and parental rights, including flexible working arrangements. Arguably, companies gain much by retaining their staff and providing them with the tools to reconcile work with family life. In **Spain**, for instance, a number of private companies and industries have introduced measures to facilitate work-life balance beyond their legal obligations and in **Cyprus** the Cyprus Telecommunications Authority has adopted a range of family-friendly policies, such as flexible working patterns and time for personal activities.

Nevertheless, in times of economic crisis, these rights tend to be reduced and minimum standards set by EU law are seen as a strong stand against national legislative gaps and discriminatory practices.