

European Gender Equality Law Review



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Sandra Fredman
*Making Equality Effective:
Proactive Measures and Substantive Equality
for Men and Women in the EU*
Berta Valdés de la Vega
*Gender Equality in Private Enterprises
in Spain: The New Equality Plans*

European Gender Equality Law Review

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Introduction

Susanne Burri*

EU gender equality law is a very dynamic field of law. In 2010, two new directives have been adopted, repealing older directives. A proposal aimed at improving the pregnancy and maternity directive (92/85/EEC) is pending. In addition, the European Commission has published a new work programme on gender equality: the *Strategy for equality between women and men for 2010–2015*, which is a follow-up to the *Roadmap for equality between women and men 2006–2010* and the *European Pact for Gender Equality*. The Court of Justice of the European Union has issued several judgments, notably on the right to parental leave for parents of twins and supplementary pay allowances in relation to absences due to pregnancy and maternity leave (see the Court of Justice of the EU case law update in this issue). In this introduction, we pay attention to the most relevant legislative developments at EU level and some issues which are further addressed in this issue 2010-2 of the *European Gender Equality Law Review* (EGELR).

The first new directive adopted in 2010 (Directive 2010/18/EU) is putting into effect the framework agreement on parental leave that the European social partners reached in June 2009, which is annexed to the directive.¹ This directive repeals Directive 96/34/EC and has to be transposed into national law by 8 March 2012. The main improvement of the framework agreement and ensuing directive is that the individual right to parental leave must be granted for a period of at least four months, thus one month more than according to Directive 96/34/EC, and this right should, in principle, be provided on a non-transferable basis. The non-transferability is emphasised in the sense that at least one of the four months has to be provided on a non-transferable basis (Clause 2). This provision is meant to encourage a more equal take-up of leave by both parents. In many countries parental leave is non-transferable and in some countries it is (partially) paid leave.² At EU level however, there is still no obligation to provide (partially) paid parental leave and the new directive does not change this. Therefore the existing pattern of mostly women taking up parental leave is unfortunately unlikely to change in the near future. A novelty in the framework agreement is that parents returning from parental leave may request changes to their working hours and/or working patterns for a set period of time and the employer has to consider and respond to such requests. A similar right already exists in the UK.

The second new directive adopted in 2010 (Directive 2010/41/EU) concerns the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, which repeals Directive 86/613/EEC.³ This directive applies to

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¹ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by *BUSINESSEUROPE*, *UEAPME*, *CEEP* and *ETUC* and repealing Directive 96/34/EC, OJ L 68 of 18 March 2010, p. 13.

² See for an overview: European Network of Legal Experts in the field of Gender Equality, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, European Commission, August 2008, available at: <http://ec.europa.eu/social/keyDocuments.jsp?type=3&policyArea=418&subCategory=641&country=0&year=0&advSearchKey=noerep&mode=advancedSubmit&langId=en>, accessed on 11 November 2010.

³ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a

self-employed workers, meaning all persons pursuing a gainful activity on their own account, and to the spouses of self-employed workers. It also applies to the life partners of self-employed workers, when and in so far as recognised by national law. The conditions are that spouses or life partners are not employees or business partners, that they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks. Conditions laid down in national law might apply (Article 2). The directive introduces in this field the definitions of direct and indirect discrimination, harassment and sexual harassment that are similar to the definitions in the non-discrimination directives adopted since 2000 (Article 3). An instruction to discriminate is also explicitly prohibited (Article 4(3)). Positive action is allowed (Article 5). The principle of equal treatment on the grounds of sex applies both to the public and private sectors (Article 4(1)). The directive does not extend the rights to social protection for the self-employed. However it stipulates that where a system for social protection for self-employed workers exists in a Member State, that Member State has to take the necessary measures to ensure that spouses and life partners can benefit from social protection in accordance with national law (Article 7(1)). This is a rather weak provision. In addition, the Member States can decide whether this social protection is on a mandatory or voluntary basis (Article 7(2)). The provision on maternity benefits (Article 8) stipulates that the Member States have to take the necessary measures to ensure that female self-employed workers and female spouses and life partners may, in accordance with national law, be granted a sufficient maternity allowance to enable interruptions in their occupational activity, owing to pregnancy or motherhood, for at least 14 weeks. This allowance may be granted on a mandatory or voluntary basis. The allowance is sufficient if it guarantees an income equivalent to an allowance in the case of a break in activities for reasons of health. In addition, Member States must take measures to ensure access to temporary replacement measures or existing national social services. Such services may provide an alternative to the maternity allowance. Worth mentioning are some so-called horizontal provisions, for example the requirement that equality bodies should provide, among other things, independent assistance to victims of discrimination, independent surveys etc. (Article 11). Compared to the rights self-employed persons had under Directive 86/613/EEC, this directive is an improvement, even if the provision on social protection remains rather weak.

A still pending proposal is aimed at amending Directive 92/85/EEC 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.⁴ The European Parliament has proposed 81 amendments to the Commission proposal.⁵ The most important amendment aims at an extension of maternity leave from 14 weeks now to at least 20 compulsory weeks (18 weeks in the Commission's proposal) allocated before and/or after confinement (with a minimum of six weeks after confinement). The last four weeks of maternity leave could be family-related leave (paid at 75 % of the last monthly salary). If such family-related leave is taken instead of the four last weeks of maternity leave, the total period of leave granted should exceed the period of parental leave granted in Directive 2010/18/EU. The EP has further taken the position that workers on maternity leave should be paid their full

self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180 of 15 July 2010, p. 1.

⁴ COM (2008) 637.

⁵ This second report has been prepared by Edite Estrela for the European Parliament: A7-0032/2010 and the EP has adopted a position in first reading: T7-0373/2010.

salary and the allowance should be 100 % of the last monthly salary or the average monthly salary. The proposal of the Commission merely encourages Member States to pay the full salary, but stipulates that workers on maternity leave should be entitled to an adequate allowance, which guarantees an income equivalent to the last monthly salary or an average monthly salary subject to any ceiling laid down under national legislation. Such a ceiling may not be lower than the allowance received by workers in the event of a break in activity on grounds connected with the worker's state of health. In addition, the EP's proposed amendments also provide for a non-transferable paid paternity leave of at least two weeks to workers whose life partners have recently given birth. The Council has to reach a political decision on these proposals and will discuss the Commission's proposal and the amendments of the EP during its meeting on 6 December 2010. To be continued...

With its *Strategy for equality between women and men for 2010–2015*, the European Commission has identified the following issues that require specific attention in future policies of the European Union in the field of gender equality.⁶ In the first place, the importance of equal economic independence of women and men is stressed and paid work is seen as the main way to reach this. The labour market participation of women and men in the EU on average should reach 75 % according to the objective set in *Europe 2020* (it is now 62.5 %).⁷ Key actions involve, for example, the promotion of female entrepreneurship and the assessment of gaps in family-related leave such as paternity and care leave and the consultation of social partners on further measures. Further objectives mentioned in this *Strategy for equality between women and men for 2010–2015* are a reduction of the gender pay gap, an enhanced representation of women in decision-making, measures to combat gender-based violence and to further gender equality in external actions.

The European Network of Legal Experts in the field of Gender Equality has produced a report on proactive measures, which is published electronically on the website of the European Commission.⁸ The author of this report, Sandra Fredman, has written an article for this issue of this review in which she highlights the main conclusions of her report. Berta Valdés de la Vega, the expert for Spain of the Network, provides in her article an interesting overview of the Spanish law on gender equality, which illustrates how proactive measures can play a role at national level.

The European Network of Legal Experts in the field of Gender Equality has recently also published a report on the gender pay gap: *The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports)*.⁹ The aim of this report is twofold: the provision of better data on the national policies, initiatives and legal instruments aimed at tackling the gender pay gap in practice, and an exploration of the potential links between equal pay and other national labour law provisions. The report provides information at national level on the 27 Member States, three EEA countries (Iceland, Liechtenstein and Norway) and three candidate countries (Croatia, FYR of Macedonia and Turkey). The report is available electronically. In addition, the

⁶ See <http://ec.europa.eu/social/BlobServlet?docId=5770&langId=en>, accessed on 11 November 2010.

⁷ COM(2010) 2020.

⁸ See <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, last accessed on 11 November 2010.

⁹ European Network of Legal Experts in the field of Gender Equality, Petra Foubert, Susanne Burri and Ann Numhauser-Henning, *The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports)*, European Commission, October 2010, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed on 11 November 2010.

first part of this report, which provides an overview of the main findings, has been published electronically and in print in English, French and German.¹⁰

Issue 2010-1 of the *European Gender Equality Law Review* is now available on the website of the European Commission in English, French and German.¹¹ The English version of this review is also available in print. If you would like to receive a printed copy of the *European Gender Equality Law Review* in English free of charge, you can contact EU-network.law@uu.nl.

On 9 November 2010, a legal seminar on *Making Equality Rights Work in Practice* took place in Brussels. This seminar was attended by academics, lawyers, representatives of Member States, NGOs, etc. and was organised jointly by the European Commission, the European Network of Legal Experts in the Non-Discrimination Field and the European Network of Legal Experts in the field of Gender Equality. The specific themes discussed during workshops were: access to justice/enforcement, including costs and legal aid; the gender pay gap; positive obligations; equality bodies; EU disability non-discrimination law in practice; and the prohibition of indirect discrimination under EU law.¹²

As usual, this issue of the *European Gender Equality Law Review* offers not only an overview of recent developments in EU policy, legislation and case law, but also on developments in the field of gender equality at national level. The members of the editorial board of the EGELR hope that you will enjoy reading this issue. We would welcome any reactions, comments and suggestions and proposals for future articles.

¹⁰ Petra Foubert, *The Gender Pay Gap in Europe from a Legal Perspective*, European Commission, October 2010, available at EU Bookshop, see http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KE3210353, last accessed on 11 November 2010.

¹¹ See <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed on 11 November 2010.

¹² See for more information <http://www.non-discrimination.net/en/seminar>, accessed on 11 November 2010.

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Making Equality Effective: Proactive Measures and Substantive Equality for Men and Women in the EU

Sandra Fredman^{*}

Introduction

Gender inequality across Europe persists despite a sophisticated framework of anti-discrimination laws. This suggests the need to re-examine the methods used to achieve real and substantive equality between men and women. The traditional approach has been to rely on an individual complaints model of adjudication. But a range of new approaches are emerging, which aim at institutional change through proactive measures to promote equality. A new report published by the European Network of Legal Experts in the field of Gender Equality¹ assesses these models in the light of current practice among the 27 EU Member States as well as Iceland, Liechtenstein and Norway. This article is based on the conclusions of that report.²

1. The pure complaints-led model

A pure complaints-led model requires an individual victim to bring a complaint to court to establish a breach of her right not to be discriminated against. When it functions well, this approach is an important avenue of redress for individuals. Unlike proactive measures, it clearly defines who has rights and remedies in cases of gender discrimination. Moreover, the complaints-led model does not require official consent or action for the individual to challenge discrimination affecting her. However, it is limited in at least three ways. Firstly, reliance on an individual complainant to bring an action in court puts excessive strain on the victim both in terms of resources and personal energy. Litigation is lengthy and costly. Secondly, victim-initiated litigation means that the courts' intervention is random and ad hoc. Many individuals, particularly non-unionised ones, are unable to pursue their claim. The result is that a large number of cases of discrimination go unremedied. Thirdly, it is necessary to identify a perpetrator and prove a breach of anti-discrimination law. Yet it is now recognised that much inequality is institutional and not the fault of any one person. This means that the impact of equality legislation is likely to be patchy: structural discrimination cannot be addressed if there is no identifiable perpetrator, and cases of unlawful discrimination go unremedied if no victim is willing and able to come forward.

Although all the Member States surveyed make it possible for victims of discrimination to invoke a judicial procedure, as required by EU law,³ it is difficult to gauge precisely whether the complaints-led model is sufficiently widely used to make a real impact on discrimination. This is because of the striking fact that very few

^{*} Professor of Law, Oxford University.

¹ Sandra Fredman, *Making Equality Effective: The role of proactive measures*, December 2009. The report is published electronically at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>

² The article does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities.

³ EP and Council Directive 2006/54, Article 17(1).

Member States compile statistics on the use of courts in discrimination cases. Nevertheless, in the few states in which such statistics were available, it was clear that only a handful of gender discrimination cases are litigated before courts each year. By 2008 in Slovakia, there had been no court decisions since the Anti-discrimination Act came into force in 2004. Under the previous jurisdiction, the anti-discrimination provision in the Labour Code, there were only three successful cases. In Bulgaria, two court decisions on gender discrimination were reported in 2006–7 of which only one was successful. In Cyprus, there were three gender discrimination cases before the Supreme Constitutional Court in 2002–3. The Industrial Tribunal Court, which has jurisdiction over employment discrimination and equal pay issues, dealt with only one case in 2005 and one more in 2008. Although this court has power to order the re-employment of the worker, there have been no cases on this issue thus far. A similar pattern is evident in other Member States. In France, although the *Cour de cassation* issued 111 decisions on discrimination in 2007 and 139 in 2006, very few were specifically concerned with sex discrimination, with the majority concerned with discrimination on grounds of trade union membership. Where statistics were not available, expert reporters had a strong impression that litigation in this area was rare.

Several reasons consistently emerge for the paucity of litigation through the pure complaints-led model. The first is that such procedures are slow and costly. For example, the most important problem identified in respect of the complaints-led model in the Czech Republic is the fact that the procedure often lasts for many years and is very expensive. This low level of trust in the judicial system is reflected too in Romania, where the general perception is that seeking justice is too expensive, time-consuming and complicated, particularly because of long delays. Long delays were also identified as problematic in Slovenia, while the Latvian report pointed to the anxiety induced by court procedures.

Problems of proof constitute a second disincentive. In addition, in 14 jurisdictions, it is necessary to identify a victim before a claim can be brought. As well as precluding the possibility of addressing structural discrimination, this leaves the initiative entirely in the hands of the individual complainant, a burden which is exacerbated by the absence of standing for trade unions, NGOs and other bodies to bring claims. The result is that even sophisticated legislation addressing gender discrimination can make little impact on patterns of discrimination. Generally good and updated legislation can be undermined by lack of enforcement.

Thirdly, victims may be discouraged by the low quality of court judgments. This may in turn be due to lack of familiarity among the legal profession itself, as in some Member State where the judiciary itself is not accustomed to gender discrimination disputes and lacks familiarity with the application of EU law. A fourth significant deterrent is the fear that attempted proceedings might make the victim feel exposed or stigmatise her as a nuisance. A further reason is the lack of visibility of discrimination cases even when they do reach the courts. This lack of public debate in the mass media and elsewhere means that even when cases are decided on an individual matter, they cannot contribute effectively to the changing of stereotypes and attitudes in general.

2. Modified complaints-led models

Many jurisdictions have introduced modifications to the pure complaints-led model. There are two main, complementary methods by which modifications can be introduced. The first involves lessening the burden on the individual by allowing

actions to be initiated by others. The second consists of the provision of alternative forms of adjudication which are cheaper and more accessible.

One way of lightening the burden on the individual is to allow class actions, whereby a group of victims can litigate the same claim together. About half the Member States (11) permit class actions. A different way of taking the burden off the individual litigant is to give standing to other bodies to pursue her case for her. EU law in fact requires that Member States should ensure that standing be accorded to relevant bodies to engage in any judicial procedure on behalf of or in support of the complainant, with his or her approval.⁴ In Italy, for example, Equality Advisers can bring a claim on the victim's behalf. This strengthens the victim's financial and psychological position and ensures the assistance of an expert both before and after the trial. In 12 Member States, equality bodies have the right to bring claims on behalf of individuals. Notably, this generally requires the consent of the victim.

A further step would be to permit an equality body to bring a case without an identified victim, engaging patterns or practices of discrimination on a more collective level. There are very few jurisdictions which give standing to an equality body to bring proceedings on their own account – only Austria, Hungary, Italy, Slovakia and the UK fall into this category. Also effective, in the employment context, is to permit trade unions to bring such claims. Trade unions can take claims on behalf of victims in 14 Member States. This is particularly useful in countries with high levels of trade union representation. Thus in Sweden, where the rate of affiliation is about 80 %, many victims of alleged discrimination have the advantage of being represented by their trade union, averting some of the costs and stress of litigation. French law takes this one step further and permits a trade union to act on behalf of an employee claiming to be the victim of discrimination, without having to have a mandate to do so. The only condition is that the employee must be given written notification of the action and must not have opposed the union action by the end of a 15-day period. The effectiveness of this approach has recently been demonstrated in the context of discrimination on grounds of trade union membership, where challenges against such discrimination in the enterprise have led to a number of cases in the *Cour de cassation*.

On the other hand, reliance on trade unions can have disadvantages. Trade unions may decide not to pursue actions, because they do not take the issue seriously or because they prefer a strategy of negotiations with employers rather than a campaign of litigation. Victims of discrimination may find themselves extremely isolated if their unions are reluctant to pick up individual cases or if they are not unionised in the first place. Notably, in Greece, trade unions seldom make use of their rights to bring claims. This suggests that the most effective approach might be to have a menu of alternative options for an individual complainant, including trade unions, NGOs, the equality body and others.

A different method of modifying the pure complaints-led model is to give, adjudicative functions to alternative bodies which are faster and cheaper than courts. There is a spectrum of possibilities. Closest to the pure judicial model is one which remains complaints-led, but reduces the costs, delay, technicality and complexity of judicial procedures by using tribunals dedicated to equality issues or to labour matters more generally. The strongest version of such an approach is a tribunal or board which has power to impose binding sanctions. The tribunal might have its own enforcement powers, as in the UK, or its orders might be enforced by the courts after

⁴ EP and Council Directive 2006/54, Article 17(2).

a specific period, as in the case of Equality Tribunals in Ireland. Such tribunals might have a tripartite structure, as in the UK, with an adjudicative panel which includes nominees of workers and employers as well as a legally qualified chair.

A similar adjudicative mechanism, which removes the cost and delay of full-blown court procedures, is the Danish Equality Complaints Board. This body is similar to a court in that it cannot act on its own initiative, either in respect of conducting independent surveys or to start a case. Moreover, the Board is composed of three judges who compose the presidency, and nine members who have a law degree. However, it departs from ordinary court procedures in that cases are decided on the basis of written complaints, and the procedure is cheap and speedy in comparison with court proceedings. It is tax-financed and there is no charge to the complainant. Other models move still further away from a pure complaints-led model by enabling the adjudicative body to initiate its own proceedings. Thus the Lithuanian Equal Opportunities Ombudsperson may initiate an investigation on the basis of media reports or verbal or anonymous complaints in addition to a complaint by an individual or legal entity.

A more radical departure from the complaints-led model would be one which emphasises conciliation. Several jurisdictions have attempted to establish specialist equality bodies which do not have the power to issue binding decisions, but instead function as a 'soft-law' alternative to the court, with the aim of mediating and conciliating between the parties. A particularly sophisticated version of this approach is the Austrian Equal Treatment Commission. Because the aim is conciliatory, the Commission differs in important respects from a court. Firstly, it is a tripartite body, consisting of four representatives each of management and labour, and three state representatives, one of whom holds the chair. Secondly, the aim is to help parties understand the opposite point of view and to mediate solutions which could not easily occur in adversarial court proceedings. Thirdly, the objective is to discover the truth, rather than leaving it to the parties to decide which facts are in dispute. This means that there is no cross-examination of parties. A similar body is the Dutch Equal Treatment Commission, which has the power to investigate and adjudicate complaints, and also to initiate an investigation if there is an indication that there is 'systemic discrimination'. No legal representation is required and the procedure is cost-free. On the other hand, its decisions and recommendations are not binding and it has no power to impose sanctions.

In France, at the end of 2004, a new institution was created: the High Authority against discrimination and for equality (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité* (HALDE)). The HALDE is an independent administrative body and it has already demonstrated its capacity to play a very active role in the fight against discrimination. The mandate of the HALDE covers all forms of direct and indirect discrimination prohibited by French legislation or in international agreements ratified by France. It plays an important role in supporting individual claims. It may, at its own initiative, investigate cases of discrimination brought to its knowledge without identifying a concrete victim. It assists any and all individuals who turn to it in identifying discriminatory practices and countering them. It holds investigative powers to enquire into cases. It may demand documents and proof which the victim was unable to obtain; ascertain facts on site; and take evidence from witnesses. It provides advice on legal options and helps establish proof of discrimination. It has the power to refer cases to the court system itself on any discriminatory practice brought to its knowledge.

Modified complaints-led models make an important contribution to addressing the limitations of a pure complaints-led approach. This is particularly true where collective complaints can be brought and where forward-looking remedies may be triggered by individual or group complaints. Nevertheless, although modified complaints-led models deal with a larger number of complaints than judicial procedures, available statistics show that they are still not widely used. This is true both for bodies which have binding adjudicative powers and those which do not. A salient exception to this trend is the UK, where the number of claims before employment tribunals is significantly higher than in the other countries surveyed.

It is very difficult to explain why modified systems are under-utilised. One possibility, identified in several Member States, is lack of widespread knowledge of these processes by the victims themselves and by union representatives, lawyers, judges and labour inspectors. Absence of meaningful sanctions is also referred to as a possible cause. It is therefore possible that such procedures might be better utilised if they were more widely known.

3. Proactive measures

More recently, attention has shifted to measures to promote or achieve equality between men and women. Rather than being initiated by individual victims against individual perpetrators, responsibility is placed on bodies, such as public authorities or employers, who are in a position to bring about change, whether or not they have actually caused the problem. Such models aim to remedy each of the deficiencies of the complaints-led model above. Firstly, instead of consisting in reactions to ad hoc claims, the initiative lies with policy makers and implementers, service providers, employers and trade unions. Secondly, change is systematic rather than random or ad hoc, ensuring that all those with a right to equality are covered. The structural causes of inequality can be diagnosed and addressed institutionally. Thirdly, there is no need to prove discrimination or find a named perpetrator. Instead, the duty to bring about change lies with those with the power and capacity to do so. Finally, proactive models broaden participation, both in norm setting and in norm enforcing. The citizen is not a passive recipient but an active participant.

These measures are known by many different names, including mainstreaming, proactive measures, positive action and others. The term ‘proactive measures’ is used here to signify the forward-looking nature of such measures, requiring bodies⁵ to take the initiative rather than merely responding to complaints. Most include an element of discretion, and while some impose legally binding duties, others are based on incentives, political accountability or goodwill.⁶

Proactive measures can operate in at least three different ways. The first is to provide more effective means of ensuring that existing anti-discrimination laws are fulfilled. Instead of responding only to individuals with the courage and resources to bring a complaint to a court or tribunal, the employer or public body should take the

⁵ The term ‘bodies’ is used here to include a wide variety of actors, including public authorities, Member States, civil servants and other Government officials, equality bodies, unions, employers and others who are in a position to bring about change.

⁶ This article does not cover procurement. See C. McCrudden *Buying Social Justice: Equality, Government Procurement, and Legal Change* Oxford and New York: Oxford University Press 2007; C. McCrudden ‘Advice to a Legislator on Problems Regarding the Enforcement of Anti-Discrimination Law and Strategies to Overcome Them’ in: T. Loenen and P.R. Rodrigues *Non-Discrimination Law: Comparative Perspectives* pp. 295-312 Kluwer Law International 1999.

initiative in seeking out instances of unlawful discrimination and rectify them. An example is that of equal pay, where an individual, complaints-led approach is particularly problematic. This is because pay structures are often opaque and apply collectively rather than individually and comparative value is difficult for an individual to establish. An individual litigant therefore faces often insuperable hurdles. Nevertheless, few Member States have established proactive measures in relation to pay. Among these, many halt at the collection of gender-disaggregated statistics. A few have established mechanisms to identify possible solutions. Possibly most important are those which concentrate on pay structures at enterprise or occupational level. In several Member States, employers are required to formulate periodic equality action plans, usually in cooperation with trade unions or other employee representatives. Others give collective bargaining a central role. One Member State has fixed targets for the elimination of the gender pay gap.

The second way in which proactive measures operate is to prevent inequality arising in the first place. A key means is to require decision makers to assess new measures to determine their impact on gender and to adjust them if necessary. There are several important features of impact assessment. One is to ensure that responsibility for impact assessment is properly allocated. Responsibility for impact assessment lies with the equality body in several Member States, whereas in a number of other Member States this responsibility lies with Government and the executive. In Belgium, the 'Gender Mainstreaming Act' of 12 January 2007 designed a complete system for *ex-ante* assessment of impact on gender. One civil servant is in charge within each Federal Ministry; there is an interdepartmental monitoring unit; and the Equality Institute provides training and expert assistance. In several Member States, however, only a limited commitment is made to impact assessment. It is also essential to ensure that further action is taken once a negative impact has been identified. Not all impact assessments make sure that this happens. Equally important is the need to review changes once instituted. For example, in Luxembourg, the latest '*Plan d'Action National d'égalité des femmes et des hommes*' (national action plan on equality for women and men), which covered the period from 2006–2008, has been assessed and the next plan will take the results into account in order to improve the impact of the National Plan. Impact assessment might, however, be significantly impeded by a shortage of resources. In Poland, equality bodies can only conduct impact assessment selectively due to a limited budget coupled with a large number of draft laws and existing legal instruments.

A third function of proactive measures is to look beyond existing anti-discrimination law and seek to promote equality between women and men regardless of whether there is evidence that a particular individual has been guilty of discrimination. Such an approach is capable of addressing structural discrimination where no specific individuals are responsible. Possibly the best known such mechanism is that of instituting quotas. Quotas are in one sense paradigmatic proactive measures. They apply in order to correct under-representation without the need to find an individual victim, or to prove breach of anti-discrimination legislation. On the other hand, policies which expressly prefer women are still seen in some Member States as a breach of the equality principle itself, rather than a means to promote equality. For example, in France, statutory provisions prescribing measures to improve women's representation on councils and boards were invalidated by the Constitutional Council, on the grounds that restrictive rules based on sex, such as quotas, were not allowed by the Constitution. The revised Constitution, adopted in July 2008, now states that 'Statutes shall promote equal access by women and men to

elective offices and posts as well as to professional and social positions'. Other Member States make express provision for affirmative action or quotas. Thus the 1998 amendment to the Federal Constitution in Austria states expressly that measures aimed at de facto equality between men and women are admissible. Sweden has a similar provision. Pursuant to such permissive provisions, several states have instituted quotas for women in legislatures, public employment or decision-making bodies. A sophisticated example is the Austrian Federal Equal Treatment Act,⁷ which requires public sector employers to make provision for preferential treatment in cases of recruitment and career advancement whenever women constitute fewer than 40 % of a particular pay grade or function. In such cases, as long as a woman is as well qualified as the best qualified male candidate, she must be hired or promoted until the 40 % target has been reached. Germany follows a similar template.

Family-friendly measures constitute a further proactive measure to promoting equality. One of the key causes of gender inequality is the fact that women remain primarily responsible for child-care and housework. To be effective, it is therefore essential to include proactive measures which both facilitate women's involvement in the paid workforce, and enhance men's ability to participate in child-care responsibilities. Almost all Member States include family-friendly measures. But the focus remains primarily with the mother. Provision of leave for fathers is considerably shorter than for mothers and is frequently unpaid. Even when leave or rights to reduced working time are optional and available to both mothers and fathers, the uptake by fathers remains low, a pattern which is consistent across the vast majority of Member States. This remains true too when the right to leave cannot be transferred from the father to the mother and is therefore lost if not taken. A primary reason is the fact that parental leave is unpaid, or attracts compensation at too low a level to create sufficient incentives for fathers. Added to this are cultural expectations, which militate against fathers staying at home to look after children. Experience from some Member States shows that fathers' uptake can be significantly improved by increasing the remuneration available to men. Moreover, changing the gender stereotypes as to the division of care responsibilities between men and women is seen as an important measure in achieving equal opportunities for men and women.

4. Ingredients of a proactive model

There are four central ingredients of a proactive approach: responsibility, participation, monitoring and enforcement.

4.1. Responsibility

Proactive measures entail a shift in responsibility away from the individual claimant to a body which is in a position to take action to eliminate unlawful discrimination, to assess new policies for their impact on gender equality and to promote structural equality. The question of who has such responsibility is therefore of central importance. Public bodies have responsibility for taking proactive measures in 13 Member States; and in a significant number of Member States, responsibility for proactive measures also falls on trade unions and public or private employers. Specific allocation of responsibility is more effective at delineating responsibility than general provisions, which run the risk that no specific person takes on the responsibility. The provision of a network of institutions, as well as channelling

⁷ OJ No. L 65/2004, Paragraphs 11–11d.

responsibility through collective bargaining procedures, tends to be the most effective at pinpointing responsibility. However, the risk remains that the apparatus of responsibility exists, but little action is taken in practice. Much depends on political commitment and goodwill.

4.2. Participation

Given the potential bureaucratic and ‘top-down’ nature of proactive measures, it is of central importance to involve stakeholders, potential victims, trade unions, service users, relevant NGOs, and others in the process. Consultation of some sort is found in the vast majority of Member States, but there is typically no systematic principle for selection of consultees, raising questions as to the representativeness of consultees, their expertise and their capacity to engage in the process. Several Member States have created a durable consultative framework, involving equality bodies, members of the Government, social partners and other interested parties, while others give this role primarily to the equality body. Collective bargaining or works council structures also constitute an important arena for consultation at the enterprise level. Not all consultative fora, however, have been functional or effective.

Also of importance is the function of consultation. Consultation is invariably aimed at giving and gaining information: no Member States reported consultation with binding effect on decision making. In some Member States, decision makers are simply required to consider the views of consultees; in others, rejection of such views must be accompanied by reasons. Several Member States delegate the drafting process itself to the consultees (usually the equality body). The weight given to opinions of consultees depends largely on the political culture, the goodwill of decision makers and the political or industrial strength and influence of consultees. An active and engaged civil society is therefore crucial to the success of participation mechanisms.

4.3. Monitoring

Unlike an individual complaints-led model, which is concerned with a self-contained incident, proactive measures are programmatic and ongoing. A process of monitoring and review is therefore essential to assess whether a proactive measure is effective, to review its progress, and to readjust it if necessary. As a first step, it is necessary to gauge the extent of the problem, usually through constructing a statistical picture. While a number of Member States still do not collect gender-disaggregated statistics at the national level, in other Member States there are now quite comprehensive duties to collect such statistics. Alternatively, monitoring may be conducted through requiring regular reports from the responsible body to be assessed by a monitoring body such as the equality body or worker representatives at enterprise level. However, it is not sufficient simply to collect data or reports. It is also important to make use of these instruments to assess and review the progress of proactive measures. Several Member States have instituted sophisticated structures for reviewing proactive measures in the light of the outcomes of monitoring, and taking of remedial steps.

One possible obstacle to monitoring might be that the collection of statistics might breach domestic confidentiality or data protection laws. In general, there are no such obstacles as long as individuals are not identified. However, a key source of difficulty arises in respect of equal pay, where in many Member States wages are regarded as confidential. This makes it close to impossible to identify and monitor gender wage gaps at the enterprise level. A handful of Member States have dealt with this difficulty by permitting workers to disclose their wages.

4.4. Enforcement

A key challenge is to devise appropriate means of enforcement. This has proved to be the most problematic aspect of proactive duties. Much depends on political goodwill and a sense of responsibility on the part of duty-bearers, and when these are lacking, there is no easy solution. This is particularly so where the main enforcement mechanism consists in reporting to Parliament, where effectiveness depends on the seriousness with which it is regarded by Parliament or the relevant Ministry.

The ideal model is a pyramid of enforcement. On this approach, the first response to non-compliance is to initiate a process of discussion and negotiation in the hope of achieving a co-operative solution. If this is not successful, the recalcitrant respondent could be subject to an order to comply issued by the equality body. Only if this further step fails do fines or other judicially enforced sanctions come into play.

The Swedish Discrimination Act 2008 follows a pattern of this sort. The Equality Ombud, which is responsible for supervising compliance with active measures under the Act, is required to try in the first instance to induce those to whom the Act applies to comply with it voluntarily. To this end, it has powers to require the provision of information and access to workplaces. Respondents can also be required to attend discussions with the Ombud.⁸ If voluntary compliance is not forthcoming, the Ombud may order the respondent to fulfil its duties, and this in turn is subject to a financial penalty issued by a special Board against Discrimination on application from the Equality Ombud. A slightly different permutation is found in the UK, where the aim is to induce initial compliance through the more general process of auditing public bodies. Inspectorates with responsibility for checking that public bodies generally comply with their responsibilities are also charged with ensuring that equality duties are observed. As a second stage, the Equality and Human Rights Commission can issue an enforcement notice in respect of failures by public bodies to comply with the specific duties set out in regulations. These can ultimately be backed up by judicial proceedings. A similar practice is seen in Hungary, in which the equality body – the ETA – can investigate compliance with an Equal Opportunity Plan, and apply sanctions in circumstances where it is of the view that the Equality Opportunity Plan has not been complied with. However, any power of enforcement held by the ETA is limited to situations in which there is an existing Equality Opportunity Plan.

A further possibility is to enforce legal obligations through collective bargaining structures. In France, the social partners have a duty to include measures promoting gender equality in their collective agreements. If proactive measures defined by a collective agreement are not respected by the employer, the employee and/or trade unions have a right to claim enforcement of these measures before a court.⁹ If the tribunal finds that the measures are mandatory, according to the collective agreement, it will order the employer to apply them and can also order some remedies. In countries without a well-developed collective bargaining structure, this means of enforcing proactive measures is conspicuously absent.

Finally, there may be a need to retain some initiative for individuals within a proactive model. Without reverting to an individual complaints-led model, proactive measures might nevertheless better serve the objective of achieving real and substantive equality if tools were granted to the victims themselves. Most Member States have no such possibility, although a handful of Member States do allow

⁸ Failures to comply with such orders are themselves subject to financial penalties.

⁹ An industrial tribunal if it is an individual claim, a civil tribunal if it is a trade union claim.

individuals to bring complaints where proactive measures have not been fulfilled. Judicial review is particularly rare

One of the particular difficulties is that proactive measures may themselves be ill-defined and therefore it is not easy to determine whether they have been breached. This can undermine the most sophisticated of enforcement mechanisms. In Sweden, for example, although the system of enforcement is carefully constructed, the rules on active measures in the 2008 Discrimination Act, although obligatory, are quite imprecise and sanctions are correspondingly inefficient. Similarly, in Romania, a strong commitment to ensure active and visible gender mainstreaming in all national policies and programmes, is accompanied by a duty to submit activity reports and analyses, including the ways in which budgetary and extra-budgetary allocated financial resources are utilised for implementing equal opportunities legislation. However, , statutory provision for proactive measures lacks clear strategic content and organised and concrete targets. Thus, the sophisticated enforcement powers operate in the absence of measurable objectives designed to assess the extent to which proactive measures have been implemented.

A second difficulty concerns the lack of proper funding to support compliance measures. For example, the Finnish expert notes that the downside of the Finnish tradition of proactive-oriented gender equality policies is that the resources allocated to such policies are scarce. The result is that the apparent development from formal to substantive equality, and from complaints-led models to proactive measures, may not truly reflect the real situation.

5. Conclusion

The introduction of proactive models into the arena of gender discrimination holds much promise, as well as many new challenges. The architecture of proactive measures is increasingly visible within Member States provisions for gender equality, and there is a continuing and dynamic process of development and appraisal. However, structures on their own are not sufficient to ensure that proactive measures are implemented and have an impact. The greatest challenge remains that of creating appropriate incentives, sanctions and mechanisms for accountability to ensure that elaborate structures do not simply conceal apathy or proceduralism. The study suggests that political commitment and goodwill, together with the active involvement of stakeholders, particularly trade unions and other representatives of those affected, are essential for success. The danger remains that the location of proactive measures on the borderline between law and politics makes it appear that fulfilment of such measures is discretionary or optional. The ultimate challenge is therefore to ensure that proactive measures are based on a recognition that equality is a fundamental right, not an optional policy.

Moreover, proactive measures and the complaints-led model should not be regarded as mutually exclusive. The complaints-led model, where successful, makes it possible to satisfy the specific needs of the individual claimant; whereas proactive measures are normally more sensitive to the general needs of the victims of the discrimination. Particularly interesting is the possibility of a creative synthesis between a judicial and a proactive model. This can be created by giving powers to judges or equality bodies to order collective and forward-looking solutions.

Gender Equality in Private Enterprises in Spain: the New Equality Plans

Berta Valdés de la Vega *

1. Introduction

The regulatory framework applied to gender equality in Spain has changed considerably with the introduction of Law 3/2007 on the effective equality between men and women (LOI in its Spanish acronym). The basis for this law is the insufficient scope of the previous framework based on formal equality, which failed to address issues such as wage discrimination, higher unemployment among women, few women holding decision-making jobs in the political, social, economic and cultural spheres, and the lack of joint responsibility for domestic duties. The LOI aimed to eliminate the social obstacles and stereotypes standing in the way of achieving real, effective equality between men and women.¹ To achieve these aims, the state lawmaker developed measures to prevent discriminatory behaviour and introduced active equality policies, all with a cross-sectional dimension. These rules are applied to a variety of fields (the media, private sector and public sector jobs, the armed forces and national security forces, access to goods and services, corporate social responsibility) and affect all public policies in Spain, including: education, artistic and intellectual creation, health, sport, rural development, urban policy, housing, development cooperation and government contracts. The principle of balanced presence or composition affects several institutions to varying extents, among them the General Council of the Judiciary and political parties, with regard to presenting candidates for election.²

The LOI is not the first law on equality between women and men passed in Spain: many autonomous communities have passed their own equality laws, at times preceding the LOI. Nevertheless, laws passed in autonomous communities cannot affect matters falling within the exclusive jurisdiction of the State, such as labour laws which are regulating private enterprises. Because of this, and because of the changes made to the protection model itself to combat gender-based discrimination, the LOI is particularly pertinent to the employment sphere. Equality laws from the autonomous communities cannot modify labour law, but the LOI did. Also the LOI introduce proactive measures related to private enterprises. For lawmakers, the responsibility of achieving effective equality in the private sector rests mainly on the responsible entity of the company in question. It is a duty for the enterprises, at the end of the day, to introduce measures to change the disadvantageous situation of women and prevent discriminatory behaviour in the workplace and it is a duty to do it through a negotiation process with the social partners.

In fact legislators target enterprises as being ultimately responsible for guaranteeing effective equality in the workplace and also encourage the involvement

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¹ The LOI also aims to incorporate into the Spanish system Directive 2002/73/CE, modifying Directive 76/207/CEE, Directive 2004/113/CE and Directive 89/552/CEE, on the coordination of certain provisions concerning television broadcasting activities.

² The principle of balanced composition means the presence of women and men in proportions of no more than 60 % and no less than 40 % for each sex.

of workers' representatives. Indeed, the role of social partners in achieving real equality in the workplace has increased considerably. To the general duty of negotiating in good faith is added the new obligation to engage in specific negotiations on equality and workplace harassment issues.

2. Equality legal framework applied to private companies before 2007 and the role of Collective Agreements

Before the LOI, gender equality laws mainly focussed on prohibiting discrimination against women in companies. This model revolved around abolishing discriminatory actions, providing compensation for victims and applying the corresponding penalties. However, this meant that the victim of the discrimination or, where appropriate, other authorised parties, had to take legal action and provide proof of the discriminatory activity. Moreover, when discrimination was manifested by omission – a failure to act – it was particularly difficult to combat violation of rights.

The legal framework was completed by the working conditions regulated in the Collective Agreements. In Spain Collective Agreements negotiated according to the provisions of the Workers' Statute (ET in its Spanish acronym) are especially relevant in labor relations because of their general personal effect. These agreements are to be applied to all workers and companies owners within its geographical, sectorial or corporate scope, irrespective of whether they have taken part in the negotiations and signed the agreement through their representatives. But before 2007 there was not a legal duty to negotiate equal measures or to introduce them in Collective Agreements. At the end, enterprises generally lacked an effective equality policy³ and insufficient measures were adopted in collective bargaining agreements in order to reach a real gender equality. Aware of this situation, the leading trade unions and companies associations with nationwide following decided to establish guidelines for collective bargaining. The option of organising collective bargaining on different levels – state, autonomous region, corporate, etc. – is regulated by Article 83 of the ET. This has enabled social partners to establish, since 1998, negotiation criteria on equality in each Interconfederal Agreement on Collective Bargaining (AINC in its Spanish acronym).⁴ These criteria have guided the content of collective bargaining, although adherence to them differs according to the level of negotiation. These agreements included proposals ranging from general clauses such as, for example, the prohibition of discrimination clauses, to more specific problems such as promoting equal rights for part-time workers or eliminating wage differences stemming from an incorrect application of the principle of equal pay for work of equal value. The possibility of negotiating positive actions to eliminate obstacles standing in the way of equal opportunities was also included.

However, up to December 2007, that is the period up to the introduction of the LOI, the balance of collective bargaining on equality was clearly deficient.⁵ Few

³ Except for those involved in the '*Optima*' programme started in 1995 and sponsored by the European Social Fund. One of the aims of this programme is to promote equal opportunities for men and women in companies, and one of the measures is to encourage companies to prepare positive action plans. The *Entidad Colaboradora en Igualdad de Oportunidades* (Equal Opportunity Partner) label was also created as part of the programme, and has so far been awarded to 45 companies.

⁴ The most important AINC's were those from 2003 to 2007.

⁵ JF. Lousada Arochena (editor) *El principio de Igualdad en la Negociación Colectiva (The Principle of Equality in Collective Bargaining)* Madrid, Ministry of Employment and Immigration, 2008, makes a detailed analysis of all State collective agreements, a large selection of collective

collective agreements identified recruitment, training and career progression as the breeding grounds of gender discrimination, and consequently effective instruments for eradicating these were not introduced. Most agreements lacked good guidelines on recruitment, leaving this to a large extent to the discretion of each company. Neither was action taken on career progression: the most popular criterion for this was length of service, which placed women at a disadvantage due to their relatively recent incorporation into the labour market.⁶

A careful analysis of wage structures included in collective agreements yielded also negative results. Many agreements included a literal transcription of the legal principle of 'equal pay for work of equal value', although regulations applied to professional hierarchy systems merely perpetuated wage discrimination. Performance was assessed on the basis of rewarding typically male qualities, such as undertaking arduous, toxic or dangerous work, particular dedication to the job or availability (precluding devotion to family responsibilities), or length of service. The particular characteristics of women's jobs with regard to, for example, type of contract – quick turnover and seasonal work, part-time work – were not included in the wage structure.⁷

Collective agreements included various references to the work schedule (working hours, holidays, overtime, etc.), although none were directly linked to objectives regarding the balance between the workers' personal, professional and family lives. Measures intended to facilitate joint responsibility for caring for the family were generally scarce, and were particularly absent from agreements in sectors where female workers did not abound, thus further perpetuating job segregation. Nevertheless, this situation varied with regard to rules applied to granting leave of absence, and collective agreements introduced improvements encouraging men to take joint responsibility by authorising leave only for caring for direct relatives, and not for members of the spouse's family. With the exception of these kinds of clauses, and others which brought in flexible measures allowing workers to adapt their working schedule to their personal requirements, the remaining clauses showed sexist tendencies by strengthening the woman's role in the family. Such was the case, for example, of rules applied to breastfeeding leave (reduction of working time in one hour per day⁸). This right was recognised to the mother or, if both parents worked, to one of them. Collective agreements could regulate the possibility of accumulating this daily reduction and increase the maternity leave in several weeks. But in many cases collective agreements did it only for the mother and this made difficult for the father the option of making use of this right.⁹

Something else should be added to this negative balance: the existence, in collective agreements, of clauses discriminating women directly or indirectly also

agreements signed by large companies and sectorial, regional and provincial collective agreements, all in force up to 31 December 2007.

⁶ F. Fernández Prol '*Igualdad por razón de sexo/género en el acceso al empleo en la formación y en la promoción profesional*' (*Equality based on sex/gender in access to jobs, training and career progression*).

⁷ F. Fernández Prol '*Igualdad por razón de sexo/género en la retribución y en los beneficios sociales*' (*Equality based on sex/gender in salary and fringe benefits*).

⁸ The breastfeeding leave was a right to leave the work during one hour per day -or two times a day, half an hour each- meanwhile the baby was under 9 months.

⁹ J. Cabeza Pereiro '*Los derechos de conciliación de la vida personal, familiar y laboral de las personas trabajadoras*' (*Workers' Rights to Balance Personal, Professional and Family Life*).

highlighted the ineffectiveness of the control included in Article 90.5 ET.¹⁰ This control is mandatory for all collective agreements negotiated according to the provisions of the Workers' Statute.¹¹ The labour authority should detect any illegality and in that case, start the proceedings at the social jurisdiction, but in reality the control function was not effective. Because of this, the LOI has strengthened supervisory mechanisms, commissioning the labour authority to be particularly vigilant with regard to sexual equality.

3. Equality at work in private companies: the new legal framework

In order to achieve effective equality in the workplace, an important change arrived in 2007 with the LOI. To this end lawmakers opted to target companies, imposing obligations but also establishing a series of instruments to foster equality and endeavour to avoid discrimination. Today's regulatory framework has expanded to include these other measures to encourage, and even reward, initiatives taken voluntarily by enterprises to make gender equality in the workplace more effective.

3.1. Fostering equality in the enterprise: current measures to achieve effective equality

The most important of these measures include providing technical assistance to implement voluntary Equality Plans in enterprises that are not legally bound to do so,¹² creating an equality label, corporate social responsibility actions on gender equality and steps to promote the inclusion of women on the boards of commercial companies.

Application for the equality label granted to companies (Article 50, LOI) is voluntary but has not been possible until April 2010, even though the LOI gave only a period of six months to regulate the label.¹³ In order to decide whether a company may obtain the equality label the following criteria will be taken into account: the equality measures or Equality Plans put in place as well as their results, the implementation and evaluation of positive actions to combat discrimination and the procedures and criteria of regular assessment or evaluation of such actions. For a company to be eligible for this label it must achieve a high level of real equality in items such as access to employment and conditions of work, organizational models that contribute to the elimination and prevention of discrimination situations and to corporate social responsibility.

¹⁰ T. Pérez del Río '*La función de los interlocutores sociales y de la negociación colectiva en la Ley Orgánica de Igualdad efectiva entre mujeres y hombres 3/2007. Los Planes de Igualdad en las empresas*' (*The Role of Social Partners and Collective Bargaining in the Law on the effective equality between men and women 3/2007. Equality Plans in firms*) Revista del Ministerio de Trabajo y Asuntos Sociales, n° extraordinario 2007, p. 267.

¹¹ The labour authority is in charge of the Register for Collective agreements and also of the control in terms of legality.

¹² To this end grants can be obtained by small and medium-sized enterprises from the General Secretariat for Equality Policies (Article 49, LOI). The latest grant programme (February 2010) was aimed at small and medium-sized companies and organisations of between 30 and 250 employees, on the condition that workers' representatives or the workers themselves take part in drawing up the Equality Plan.

¹³ The Royal Decree (*Real Decreto 1615/2009, de 26 de octubre, por el que se regula la concesión y utilización del distintivo «Igualdad en la Empresa»*) regulating the process was published in November 2009, and the first call to obtain the equality label was started on the 10th April 2010, so at the moment no companies have received it yet.

Regarding to corporate social responsibility (Articles 73 and 74, LOI) companies can take other kinds of action (economic, commercial, assistance, etc.) which must be aimed at promoting equality in society or within the company. At the moment no concrete examples exist yet of such actions. Such measures are voluntary but not unilateral and must be agreed with the social partners involved (consumer organisations, trade unions, equality organisations, etc.). One of the aims of companies implementing corporate social responsibility measures is naturally to use these actions for advertising purposes, although any claims made must be true. The use of misleading publicity on social accountability could give the *Instituto de la Mujer* grounds to take legal action against the company. In such a case the *Instituto de la Mujer* will proceed with a cease action and the judgement could sentence the company to cease with the misleading publicity

Finally, Article 75 LOI encourages large companies to gradually place women on their boards, until an even number of male and female members is achieved. These companies should, within eight years, gradually modify the composition of their boards until a proportion of between 40 % and 60 % is achieved. This is a recommendation and there is no sanction for failure to comply with obligations, but it will be taken into account to, for example, obtain the equality label, public subsidies or state administration contracts. At the moment (August 2010) companies within IBEX 35 (the Spanish stock market) have as a whole 54 women on their boards out of a total of 500 members which means a 10.8 %, far away from a balanced composition.¹⁴

3.2. Gender equality obligations and legal obligation to negotiate equality measures

Enterprises must adhere to rules of equal treatment and opportunities in the workplace, and to this end the LOI has made it compulsory to adopt equality measures and specific measures to prevent sexual or gender-based harassment in the workplace. Failure by an enterprise to comply with its obligations regarding equality can be considered a serious or very serious infringement. Comply with its gender equality obligations means that companies must achieve one goal: that the principle of equal treatment and opportunities for the people working in their organisation is respected within their productive organisation, avoiding any kind of discrimination. To achieve this they have to take whatever measures are required, be they specific or isolated, or measures included in their Equality Plan.¹⁵ It is compulsory for enterprises to draw up and apply an Equality Plan in certain circumstances established in Article 45 of the LOI. These circumstances are the following: if the company has more than 250 employees; if, even though the company does not have more than 250 employees, application of such a Plan is made compulsory by a collective agreement applicable to the company; when the labour authority decides to replace the accompanying sanctions (resulting from violations of the principle of equality) with the preparation of an Equality Plan.¹⁶ Enterprises that are not under the obligation to draw up an Equality Plan may nevertheless do so voluntary.

¹⁴ Informe Add Talenta 2010 'la paridad, cada vez más lejos', in <http://addtalentia.com>, accessed on 2 November 2010.

¹⁵ To comply with its gender equality obligations an enterprise can take positive action mainly through negotiations with workers' representatives. Even though the Constitutional Court had already ruled positive action to be constitutional, this is the first time that a state-wide law (Articles 11 and 43, LOI) expressly recognised this course of action, declaring it to be compatible with the principle of equality and the prohibition of constitutional discrimination.

¹⁶ Accompanying sanctions consist of the loss of grants and allowances derived from the application of job programmes.

The LOI (Articles 45-47) regulates the Equality Plans by establishing the concept of an Equality Plan, the proceedings of their implementation and a 'legal obligation to negotiate equality measures'. The Equality Plan will include specific goals to be achieved and a global strategy consisting of an organised set of measures and actions to be taken. But before drawing up an Equality Plan, the situation within the company must be analysed in order to identify existing problems.¹⁷ To do this, information should be gathered from several different areas (there is no legal limit to this), analysed and evaluated. Mechanisms for monitoring and supervising implementation of the plan should also be indicated.

The 'legal obligation to negotiate equality measures' means, at least, that enterprises must negotiate with workers' representatives when adopting equality measures or when drawing up Equality Plans, whenever these are compulsory.¹⁸ The implications of this obligation to negotiate have been widely discussed in legal circles, although the ultimate aim of the rule is to achieve an agreement when drawing up equality measures or Equality Plans. If disagreements arise during negotiations, social partners should, in order to comply with the concrete obligation, look for ways to solve the differences and reach an agreement. An option could be appeal to the *Instituto de la Mujer* or other institutions to settle the conflict out of court, in compliance with the obligation to negotiate.¹⁹ If no agreement has been reached after following this process, they do have the option of adopting unilateral equality measures or a unilateral Equality Plan. In any event, failure to comply with the obligation of implementing an Equality Plan would be considered a serious violation (Article 7.13 Real Decreto Legislativo 5/2000 on infringements and penalties against public order²⁰). When the Equality Plan is implemented voluntarily, the company is only obliged to engage in a process of consultation with workers' representatives.

4. Equality Plans in private enterprises

The LOI came into force in March 2007, however, no specific deadline for complying with the obligation of negotiating Equality Plans was established. This obligation was deferred to the time when each company or sector would have to negotiate the next collective agreement. Due to the adverse economic situation and the effect this had on social dialogue, more than 2 000 collective agreements have not been renegotiated following the date on which they expired two years ago. Plans have been implemented in those agreements that have been renewed, usually through the creation of Commissions for Equality. The result is that less than 5 % of the more than

¹⁷ This analysis may be carried out by the company itself, with or without the collaboration of the workers' representative, or outsourced, but the assessment of the gender situation in the enterprise and the strategy is to be negotiated with them according to R. Gallardo Moya 'Los nuevos Planes de Igualdad en la empresa: un análisis de las primeras experiencias' (*The New Equality Plans in the Firm: Analysis of the Initial Experiences*), *Revista de Derecho Social* n° 48, 2009, p. 90.

¹⁸ Legal action alleging violation of the right to non-discrimination can be taken if a company fails to comply with its obligation to negotiate equality measures. JF Lousada Arochena 'El marco normativo de la negociación colectiva de medidas de igualdad de mujeres y hombres' (*The Legal Framework for Equality Measures for Women and Men in Collective Bargaining*), *Revista de Derecho Social* n° 41, 2008, p. 39.

¹⁹ R. Gallardo Moya 'Los nuevos Planes de Igualdad en la empresa: un análisis de las primeras experiencias' (*The New Equality Plans in the Firm: Analysis of the Initial Experiences*), *Revista de Derecho Social* n° 48, 2009, p. 87.

²⁰ The fine for a serious violation could be between 626 and 6 250 euros.

4 500 companies for whom implementation of an Equality Plan is compulsory have complied with this obligation.²¹

4.1. The relevant equality measures in the Plans

Even though the number of Equality Plans already negotiated and signed is still low, the result of a preliminary evaluation is giving a quite interesting outcome. In fact, an analysis of the contents of a selection of these pioneering Equality Plans reveals two different models.²² One of the models followed is the ‘open and dynamic road map’, where objectives and measures are periodically reviewed by a specific body. Other plans are closed and include structured objectives and measures applied over the particular period – between 2 and 3 years – of the Plan.²³ The structure of the first type of model will probably entail more guarantees for effectiveness than the second type of model. To date, Equality Plans are the result of an agreement reached between the company and its social partners, in compliance with the legal obligation to negotiate equality measures, and have not therefore been implemented unilaterally by the company. Social partners have limited their analysis of equality almost exclusively to issues recommended in Article 46.2 LOI – job recruitment, job classification, promotion and training, wages, organisation of working hours and prevention of sexual and gender-based harassment.

The measure most widely applied with regard to job recruitment is the establishment of affirmative actions to be taken at the time of signing the contract, and usually comply with the provisions of Article 17.4 ET, which state that priority can only be given to members of the least represented sex if all candidates are equally suitable and qualified for the position. Many Equality Plans also stress the need to use non-sexist language in job offers, application forms and interviews, and to enable women to form part of selection committees.

With regard to professional promotion, they organise training programmes aimed at breaking through the ‘glass ceiling’ and enabling women to gain promotion to management positions within the company, and also establish affirmative actions. Criteria applied to promotion are also modified so that no direct or indirect mention is made of the effects of family duties (care of children or dependents). Actions programmed, such as training provided within working hours for a particular group of

²¹ In Spain, as of 30 April 2010, there are 2 516 enterprises with between 250 and 499 workers, 1 059 companies with between 500 and 999 workers, and 950 with more than 1000 workers, according to official Ministry of Employment statistics (<http://www.mtin.es/estadisticas/ANUARIO2009/EMP/index.htm>, accessed on 24 May 2010).

²² A total of 34 plans negotiated between 2007 and 2010 have been selected, including companies of different sizes and also groups of companies. The Equality Plans analysed came from: Rojegan (15/8/2007), Elcogas (July 2007), Santander (8/10/2007), Banesto (19/12/2007), BBVA (May 2010), Rural Servicios Informáticos (18/12/2007), Garrigues (julio de 2008), Gloria Gestión (7/3/2007), Mutuaia (8/3/2008), El Corte Inglés (11/4/2008), Plataforma Europa del Grupo Inditex (May 2008), ENDESA (26/6/2008), Cemex España S.A (17/9/2008), Equipos Nucleares (ENSA) (18/9/2008), Ernst & Young (23/2/ 2009), Empresa Municipal de Servicios de Medioambiente Urbano de Gijón (EMULSA) (2/3/2009), Grupo Inditex (3/3/2009), Pelayo (12/5/2009), Alcatel-Lucent España (17/7/2009), Asepeyo (27/1/2009), Caixa Penedès (2009), Danone (25/8/2009), Facility Services (1/1/2009), Grupo Ferroviario (22/6/2009), Flightcare (24/3/2010), Iberdrola (12/3/2009), Laboratorios Liconsa (2009), Grupo Repsol YPF (30/6/2009), Severiano Gestión (15/1/2009), Mercadona (17/12/2009), Cajacirculo (27/2/2010), Mutua Balear (1/4/2010), Bimbo (23/4/2010), Deutsche Bank (23/3/2010).

²³ R. Gallardo Moya ‘Los nuevos Planes de Igualdad en la empresa: un análisis de las primeras experiencias’ (*The New Equality Plans in the Firm: Analysis of the Initial Experiences*), Revista de Derecho Social nº 48, 2009, p. 94.

workers, take into consideration the reality of female workers in Spain, the group mainly engaged in caring for children and other family members. Continuing professional training is made compatible with family duties (for example, training provided within working hours for a particular group of workers).

Concerning wage conditions, their analyse, the assessment of the gender situation in this issue and the strategy designed are not always correctly carried out. When such plans are limited to a superficial analysis they usually show that no wage discrimination exists, without analysing the factors behind the wage gap. However, many companies identify these factors after discovering that on a whole, women's wages are lower than those of their male counterparts. Some examples of these factors of indirect discrimination can be highlighted here: the requirement to work 100 % of the full working hours in order to receive bonuses²⁴; length of service as a salary supplement which greatly affects wages or the existence of a greater proportion of women in lower category jobs as a result of tradition promotion policies based on greater experience and not on professional performance.²⁵ In these cases criteria applied to systems of job classification or wage structure are modified, with particular attention to pay supplements, where the greatest wage differences originate.²⁶ Some companies plan to establish additional increases for women as a proactive means of eliminating wage discrimination.²⁷ Other measures aimed to prevent that taking care of children and family members could affect wages. For example, in cases where working hours are reduced, taking the working day as 100 % for the purpose of calculating bonuses, or applying proportionality to performance bonuses for workers starting maternity or paternity leave.²⁸

Generally speaking, the issues most widely dealt with are measures aimed at balancing working, personal and family life.²⁹ The trend points to a slight improvement in statutory regulations, particularly in increased flexibility of working hours (starting and finishing times, increased or improved leave periods and leave of absence or reduced working hours, etc.). A positive trend has been the promotion of joint responsibility, with measures designed to raise the awareness of men and eliminate stereotypes. In addition, although less frequent, actions are taken to remedy the negative effect on women's professional career and wages with regard to maternity leave or balancing professional and personal life.

4.2. Effective system for monitoring and assessing the objectives of the Equality Plans

Almost all the Equality Plans create a specific organ (an 'Equality Agent' or similar) in charge of monitoring the implementation of the equality measures and detecting inequality situations or discriminations. When the Plans are drawn up including a periodical review of measures and objectives (following the model of a 'dynamic road map') the whole system is more efficient. In fact, effective systems for monitoring

²⁴ The performance bonus included in Mercadona's Equality Plan (17/12/2009).

²⁵ Equality Plan implemented by Bimbo (23/4/2010) Grupo Ferrovial (22/6/2009).

²⁶ There is not much difference in wages with regard to fixed pay elements – less than 5 % – while the difference between bonuses and supplements is over 20 %, according to the analysis included in R. Gallardo Moya 'Los nuevos Planes de Igualdad en la empresa: un análisis de las primeras experiencias' (*The New Equality Plans in the Firm: Analysis of the Initial Experiences*), Revista de Derecho Social nº 48, 2009, p. 99.

²⁷ Mutuaia Equality Plan, (8/3/2008).

²⁸ Iberdrola Equality Plan (12/3/ 2009) and Pelayo Equality Plan (12/5/2009)

²⁹ Measures for prevent sexual and gender-based harassment are also dealt with in nearly all Equality Plans as article 48 LOI makes this compulsory and provides detailed instructions.

and assessing the objectives of the equality plan must be put in place, together with transparency in the implementation of plans.³⁰ No specific verification procedure is established by law; this is established in the plan by social partners. Economic and human resources must be available, i.e. people in charge of monitoring and assessment, and also technical resources. In addition, an assessment procedure and indicators to evaluate achievement of targets must also be established.

From another point of view, monitoring is also connected with the role of Labour and Social Security Inspectorate (*ITSS*). This is quite important as it is largely responsible for ensuring that companies comply with the law. After approval of the *LOI*, the *ITSS* drew up a programme, valid until 2010, for supervising real corporate equality between women and men. For this purpose, the *ITSS* has itself drawn up equality guidelines for the Labour and Social Security Inspectorate to follow, the aim being to provide a methodology by which a complete external analysis can be made of issues affecting equal treatment of men and women in the company. The Inspectorate is empowered to automatically apply administrative penalties to companies engaging in discriminatory behaviour with regard to their staff. These administrative penalties are in practice applied by the inspectors, the workload is however very high. The Law of social order infringements and penalties classifies failure to comply with obligations regarding equality plans as a serious or very serious administrative offence.³¹

5. An overall assessment of the pioneering Equality Plans

The entry into force of this law on 24 March 2007 has been particularly important in guaranteeing the effectiveness of the principle of gender equality in private companies. Equality Plans seem to be an exceptional opportunity to overcome gender discrimination and lack of equal opportunities in the companies. But to be efficient it is absolutely necessary to make a correct assessment of the enterprise situation related to gender equality, to draw up the required actions so as to reach real objectives within a timeframe. This is not happening in many of the present Equality Plans and therefore an overall assessment of them cannot be positive, from this point of view. Even though all the new legal obligations and the different measures adopted by the public administration to foster equality in private enterprises is leading to change in the ‘company’s culture’ which probably will change the behaviour regarding gender equality in the private enterprises in the future.³²

³⁰ To this aim, it is required that individual workers or their representative have full access to all information relating to the plan and its application (Article 47 *LOI*).

³¹ Failure to comply with obligations stated in the law (*ET*) or in collective agreements regarding equality plans is a serious violation (the fine could be between 626 and 6.250 Euros) or, under certain conditions, very serious violation (the fine could be between 6.251 and 187.515 Euros)

³² R. Gallardo Moya ‘*Los nuevos Planes de Igualdad en la empresa: un análisis de las primeras experiencias*’ (*The New Equality Plans in the Firm: Analysis of the Initial Experiences*), *Revista de Derecho Social* n° 48, 2009, p. 99.

EU Policy and Legislative Process Update

May 2010 – October 2010

1. On 28 October the European Commission sent the Czech Republic a reasoned opinion regarding non-compliance of Czech legislation with Directive 2002/73/EC. The Czech Republic did transpose the Directive in 2009 with the Anti-Discrimination Act, but still fails, according to the Commission, to guarantee the right of a woman to return to the same or equivalent post after maternity leave.
<http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=920&furtherNews=yes>
2. On the same day, 28 October 2010, the Commission closed proceedings against the United Kingdom for non-transposition of EU rules prohibiting gender discrimination in access to and supply of goods and services with regard to Gibraltar. Since the ECJ confirmed that the UK failed to meet its obligations to transpose Directive 2004/113 (Case C-186/09), the UK has adopted legislation implementing the Directive in Gibraltar.
<http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=919&furtherNews=yes>
3. On 20 October 2010 a majority of MEPs voted in favour of extending the minimum maternity leave from 14 to 20 weeks, thus going beyond the European Commission's proposal to extend it to 18 weeks. However, Members adopted amendments adding that, when family-related leave is available at national level, the last 4 weeks of the 20 may be regarded as maternity leave and must be paid at least at 75 % of salary.
<http://www.europarl.europa.eu/en/pressroom/content/20101020IPR88388>
4. On 19 October 2010 the Commission published a Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union. According to the communication 'the development of individual policies concerning certain specific fundamental rights on the basis of the Treaties will continue, examples being protection of personal data, children's rights, gender equality, non-discrimination, intellectual property and freedom of movement'.
http://ec.europa.eu/justice/news/intro/doc/com_2010_573_4_en.pdf
5. On 11 October 2010 the report 'The Gender Pay Gap in Europe from a Legal Perspective' of the European Network of Legal Experts in the Field of Gender Equality was published. It analyses a wide variety of national policies, initiatives and legal instruments that aim to combat the gender pay gap and it uncovers a number of unexpected links between the gender pay gap and other parts of the law. The report is available in English, French and German.
http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KE3210353 (print).
<http://ec.europa.eu/social/BlobServlet?docId=6138&langId=en> (online).
6. On 30 September 2010 the European Commission closed legal proceedings against Malta for incorrectly implementing EU rules on parental leave. The Commission launched infringement proceedings against Malta in March 2007 for incorrect transposition of Directive 96/34/EC. The Directive implements a

framework agreement on parental leave concluded by the European trade union and employers' organisations UNICE, CEEP and ETUC. The case was concluded after Malta brought its national law into line with the Directive's requirements following the Commission's infringement action.

<http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=898&furtherNews=yes>

7. On the same day, 30 September 2010, the Commission closed legal proceedings against Italy for the incorrect implementation of EU rules on equal treatment between men and women in employment (Directive 2006/54/EC), especially the requirement for an independent national equality body. In June 2008 Italy adopted new legislation in order to comply with EU law.

<http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=899&furtherNews=yes>

8. On 21 September 2010 the European Commission published its 'Strategy for equality between women and men for 2010–2015'. The Strategy is a follow-up of the Roadmap 2006–2010 and 'represents the work programme of the European Commission on gender equality, aiming additionally to stimulate developments at national level and to provide the basis for cooperation with the other European institutions and with stakeholders'.

<http://ec.europa.eu/social/BlobServlet?docId=5770&langId=en>

9. On 7 July 2010 Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (repealing Council Directive 86/613/EEC) was adopted.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:180:0001:0006:EN:PDF>

10. In July 2010 the report 'Access to healthcare and long-term care: equal for women and men?' was published. The report describes the main differences in the health status of women and men in European countries and examines how healthcare and long-term care systems respond to gender specific needs in ensuring equal access. It is available in English.

<http://ec.europa.eu/social/BlobServlet?docId=5590&langId=en>

11. On 3 June 2010 the Commission sent a reasoned opinion to Slovakia, because Directive 2002/73/EC was implemented incorrectly. One of the problems is that Slovak national legislation does not guarantee the full set of rights, for women returning from maternity leave, under Article 2(7) of the Directive: the right to any improvement in working conditions to which the woman would have been entitled during her absence and the right to return on the same terms and conditions after maternity leave.

<http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=818&furtherNews=yes>

12. In May 2010 a study on non-legislative initiatives for companies to promote gender equality at the workplace was published. The survey, conducted on behalf of the Commission, focuses on initiatives such as prizes, awards, labels, charters, rankings etc., targeted at promoting gender equality in businesses and organisations.

<http://ec.europa.eu/social/BlobServlet?docId=5364&langId=en>

European Court of Justice Case Law Update

May 2010 – October 2010

Case C-104/09, 30 September 2010

Pedro Manuel Roca Álvarez v Sesa Start España ETT SA

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts

Pedro Manuel Roca Álvarez requested ‘breastfeeding’ leave, which was refused by his employer on the ground that the mother of Mr Roca Álvarez’s child was not employed but self-employed, and the mother’s employment was an essential condition of entitlement to that leave. After the refusal of the court of first instance, the High Court of Justice of Galicia referred to the Court of Justice a question on the compatibility with EU law of a national measure, which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child’s birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child’s mother is also an employed person.

Judgment of the Court of Justice

Article 2(1), (3) and (4) and Article 5 of Council Directive 76/207/EEC must be interpreted as precluding a national measure such as the one at issue in the main proceedings, which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child’s birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child’s mother is also an employed person.

Case C- 149/10, 16 September 2010

Zoi Chatzi v Ipourgos Ikononikon

Framework agreement on parental leave concluded on 14 December 1995, which is set out in the annexe to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC as amended by Council Directive 97/75/EC of 15 December 1997

Facts

Mrs Chatzi is a public servant at the State Tax Office and gave birth in May 2007 to twins. She was granted, at her request, nine months paid parental leave from 20 September 2007, but the State Tax Office refused a second period of nine months paid parental leave for the second child. The referring court observes that the Greek Council of State ruled in 2008 that the multiple pregnancy of a public servant does not give rise to a right to a number of periods of parental leave equal to the number of children born. The referring court has doubts, however, as to the interpretation to be given to Directive 96/34 in the light of the Charter of Fundamental Rights which

became legally binding upon the entry into force of the Treaty of Lisbon on 1 December 2009.

Judgment of the Court of Justice

1. Clause 2.1 of the framework agreement on parental leave cannot be interpreted as conferring an individual right to parental leave on the child.
2. Clause 2.1 of the framework agreement is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.

Case C-577/08, 29 July 2010

Rijksdienst voor Pensioenen v Elisabeth Brouwer

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Facts

Ms Brouwer, a Belgian national residing in Belgium, worked in the Netherlands as a frontier worker from 15 August 1960 to 31 December 1998. From 1 January 1999, she ceased working and received benefits as an early retiree in Belgium. Since 2004 Ms Brouwer received pension payments from the Rijksdienst calculated, according to the applicable Belgian legislation, on the basis of notional and/or flat-rate daily wages determined annually by Royal Decree on the basis of the average pay received by workers in Belgium during the previous year. In the period 1984 to 1994 the amount of pension payments was calculated in such a way that these payments were lower for female workers than for their male colleagues. According to the Belgium Government the pay to be taken into consideration for the calculation of average salaries was different, because during the relevant period there was a significant difference between the pay of male and female workers, employed in different sectors, and often a reduced working plan for women. As a result, the pay to be taken into consideration for the calculation of average salaries was different. During the hearing the Belgium Government acknowledged the unequal treatment and announced that a proposal for a Royal Decree was drawn up, which was intended to make the flat-rate daily wages for women equal to those for men. The Belgian Government maintained that Article 2 of that proposal provided that those who wished to benefit from that equalisation had to make an application in accordance with the general regulation on retirement and survivors' pensions for workers.

Judgment of the Court of Justice

Article 4(1) of Council Directive 79/7/EEC precludes national legislation under which, for the years 1984 to 1994, the calculation of old-age and retirement pensions for female frontier workers, concerning equal work or work of equal value, was based on notional and/or flat-rate daily wages lower than those for male frontier workers.

Case C-194/08, 1 July 2010***Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung***

Directive 92/85/EEC 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

Facts

Susanne Gassmayr is a junior doctor and worked at the anaesthesia clinic of the University of Graz. In the working conditions an on-call duty allowance is paid when employees have to be on duty outside the normal working hours. Gassmayr stopped working for reasons related to her pregnancy. In Austria pregnant workers can take leave if they have a medical statement declaring that their or the child's health requires such leave. The University refused to pay her allowances for average on-call duties for the period that she did not work. Since she had not performed such duties, she was not entitled to such allowance according to the Federal Minister for Education, Science and Culture. Gassmayr challenged the Minister's decision before the *Verwaltungsgerichtshof*, which referred the case to the Court of Justice.

Judgment of the Court of Justice

1. Article 11(1) of Council Directive 92/85/EEC has direct effect and gives rise, for the benefit of individuals, to rights which they can rely on against a Member State which has failed to implement that directive in national law or has implemented it incorrectly, and which the national courts are required to protect.
2. Article 11(1) of Directive 92/85 must be interpreted as not precluding national legislation which provides that a pregnant worker temporarily granted leave from work on account of her pregnancy is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her pregnancy with the exception of the on-call duty allowance.
3. Article 11(2) and (3) of Directive 92/85 must be interpreted as not precluding national legislation which provides that a worker on maternity leave is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her maternity leave with the exception of the on-call duty allowance.

Case C-471/08, 1 July 2010***Sanna Maria Parviainen v Finnair Oyj***

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

Facts

Sanne Parviainen was temporarily transferred to lower-paid work because of her pregnancy, whereas she used to work as head of a cabin crew at Finnair and worked for a certain period as part of a ground crew. The question was whether she had to be paid the average salary she received before the transfer based on the Protection of Pregnant Workers Directive.

Judgment of the Court of Justice

Article 11(1) of Council Directive 92/85/EEC must be interpreted as meaning that a pregnant worker who, in accordance with Article 5(2) thereof, has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to that transfer, is not entitled to the pay she received on average prior to that transfer. In addition to the maintenance of her basic salary, however, such a worker is entitled, pursuant to Article 11(1), to pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications. Although Article 11(1) of Directive 92/85 does not preclude the use of a method of calculating remuneration to be paid to such a worker based on the average amount of the allowances linked to working conditions of all the air crew in the same pay grade during a given reference period, the failure to take account of those pay components or supplementary allowances must be regarded as contrary to that Article.

Joined Cases C-395/08 and 396/08, 10 June 2010

Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno Massimo Pettini and Istituto nazionale della previdenza sociale (INPS) v Daniela Lotti and Clara Matteucci,

Framework Agreement annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

Facts

Ms Tiziana Bruno, Mr Massimo Pettini, Ms Daniela Lotti and Ms Clara Matteucci, employees of Alitalia SpA, had applied for and obtained (in respect of the periods specified) conversion of their contracts of employment from full-time to vertical-cyclical part-time work. Thus, they worked in some months of the year, but not in others. The INPS only treated the periods worked, excluding the periods not worked, as contributory periods for pension purposes.

The *Corte d'Appello di Roma* referred three questions to the Court of Justice on the compatibility of this measure (also provided for by Italian legislation) with Directive 97/81/EC (and especially the Framework Agreement).

Judgment of the Court of Justice

1. With regard to retirement pensions, Clause 4 of the Framework Agreement on part-time work annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, must be interpreted as precluding national legislation which, for vertical-cyclical part-time workers, disregards periods not worked in calculating the period of service required to qualify for such a pension, unless such a difference in treatment is justified on objective grounds.
2. If the referring court reached the conclusion that the national legislation at issue in the main proceedings is incompatible with Clause 4 of the Framework Agreement, Clauses 1 and 5(1) of the Agreement would have to be interpreted as also precluding such legislation.

OPINIONS OF ADVOCATES-GENERAL

Case C-236/09, Opinion of Advocate-General Kokott of 30 September 2010

Association Belge des Consommateurs Test-Achats ASBL and Others

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

Facts

In June 2008 an action for annulment was brought before the Belgian constitutional court by a non-profit-making consumer organisation and two private individuals with regard to the Law of December 2007 that transposed Directive 2004/113. The Belgian constitutional court found that the alleged provisions of the Law of December 2007 were adopted under the exemption provided for by Article 5(2) of Directive 2004/113 and that the applicants' complaints therefore also applied to that provision of the directive. Article 5(2) of Directive 2004/113 allows Member States to permit proportionate sex-specific differences in insurance premiums and benefits, where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data. The provision thus permits differences in insurance contracts, which are directly linked to the sex of the insured person. Before the Court of Justice the question was asked whether this exemption to gender equality is in accordance with the principle of equality and non-discrimination.

The Advocate-General is of the opinion that:

1. Article 5(2) of Directive 2004/113/EC is invalid, due to infringement of the prohibition of discrimination on grounds of sex, which is enshrined as a fundamental right.
2. The effects of the provision which has been declared invalid will be maintained until the expiry of a period of three years following the delivery of the judgment of the Court in the present case. That does not apply to persons who, prior to the date of delivery of the judgment of the Court in the present case, have initiated legal proceedings or raised an equivalent claim under the applicable national law.

Case C-356/09 Opinion of Advocate-General Kokott of 16 September 2010

Pensionsversicherungsanstalt v Dr. Christine Kleist (not available in English)

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts

Christine Kleist, born on 11 February 1948, had been employed by the Pensionsversicherungsanstalt, an Austrian social security institution. The Pensionsversicherungsanstalt decided, in 2005, to dismiss all staff members who met the requirements for retirement under the applicable collective agreement. Kleist refused to retire at the age of 60 and informed the company that she wanted to

continue working until the age of 65. If Kleist retired at the age of 65, the age set for male workers, her pension rights would increase by approximately EUR 800 a month.

The Advocate-General is of the opinion that:

Article 3, paragraph 1(c), of Directive 76/207/EEC, as amended by Directive 2002/73/EC, precludes the compulsory retirement of female employees when they reach retirement age, when their normal retirement age is five years lower than the current retirement age for male employees.

Case C-232/09, Opinion of Advocate-General Y. Bot of 2 September 2010

Dita Danosa v LKB Līzings SIA

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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)

Facts

Dita Danosa was appointed as head of the management board of LKB Līzings SIA in January 2007. In July of that year, the meeting of shareholders decided to dismiss Danosa from her post. Danosa argued that the underlying reason for this decision was the fact that she was 11 weeks pregnant at that moment and that her dismissal was therefore in violation of EU law. The referring court asked whether members of the managerial body of a capital company were to be regarded as being covered by the concept of worker laid down in Community law. Furthermore, the Latvian court asked the ECJ whether Article 10 of Directive 92/85/EEC and the case law precluded a national provision which provides that the members of the board of directors of a capital company may be removed without any restrictions, in particular in the case of a woman, irrespective of the fact that she is pregnant?

The Advocate-General is of the opinion that:

1. A woman who is a member of the management of a capital company can be regarded as a worker within the meaning of Directive 92/85/EEC. She is therefore entitled, according to Article 10 of Directive 92/85/EEC, to protection against dismissal.
2. Article 10 of Directive 92/85/EEC precludes a national provision which allows dismissal of members of the board of a limited liability company, provided that this provision allows dismissal for a reason related to pregnancy.

PENDING CASES BEFORE THE COURT OF JUSTICE

Case C-415/10 Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 20 August 2010

Galina Meister v Speech Design Carrier Systems GmbH

Referred questions by the Bundesarbeitsgericht

1. Are Article 19(1) of 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), and Article 8(1) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, to be interpreted as meaning that, where a worker shows that he meets the requirements for a post advertised by an employer, he has a right vis-à-vis that employer, if he does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?

2. If the answer to the first question is affirmative: Where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?

Decisions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW)

May 2010 – October 2010

CEDAW/C/46/D/18/2008, *Karen Tayag Vertido v The Philippines*, 16 July 2010

The decision concerns a claim by a Filipino woman of a violation of Article 1 of the Convention in relation to general recommendation No. 19 and also of Article 2(c) (legal protection); 2(d) (discrimination by public authorities); 2(f) (discriminatory customs and practices); and Article 5(a) (elimination of prejudices). The question on the admissibility of the communication is left out of this summary.

The complainant was raped by her employer in 1996 and filed a complaint with the police. After a trial that lasted from 1997 to 2005, the Regional Court of Davao City acquitted the accused on the basis of three principles: (1) that it is easy to accuse someone of rape, but harder to prove and even harder to disprove; (2) with the crime of rape, the testimony of the complainant must be scrutinised with extreme caution; and (3) the evidence for the prosecution must be strong and not only rely on the weakness of the evidence for the defence. The Court found that the complainant was unable to prove rape because she couldn't clarify why she hadn't escaped: the man was already in his sixties and she allegedly had had several opportunities to escape.

The complainant argued that she was a victim of gender-based myths and misconceptions by the Court, which resulted in the acquittal of the accused. The myths and stereotypes *in casu* were the contentions that:

1. a rape victim must try to escape on every opportunity;
2. only timid persons can be raped by intimidation;
3. to conclude that the rape was executed by threat, there must be evidence of a direct threat;
4. the fact that the victim and accused were 'more than nodding acquaintances' makes the sex consensual;
5. because the victim did not act like a 'normal' rape victim, rape could not be proved;
6. if the accused could proceed to ejaculation, it indicated that the victim did not resist;
7. a man in his sixties could not be capable of rape; and
8. the three 'rape principles' of the Court made for an unfair balance of proof.

The complainant argued that a court that decides a case based on gender myths and misconceptions cannot be seen as a competent tribunal for the purposes of Article 2(c) of the Convention. She claimed furthermore that other Filipino judicial decisions on rape are consistently in violation of the Convention.

On the accusation of gender-based myths and misconceptions by the Court, the Committee found that the Court was indeed influenced by a number of stereotypes. It should not have assumed that a woman would have to show physical resistance before the lack of consent could be proved. Different people react differently under emotional stress. The Committee also found evidence of gender-based myths and misconceptions in the fact that the Court relied on the notion that a man in his sixties could not proceed to ejaculation while a woman resisted and that the fact that the

victim and accused knew each other made sex consensual. The Committee therefore found that the state had failed to fulfil its obligations and recommended *inter alia* that the state remove ‘any requirement in the legislation that sexual assault be committed by force or violence’.

http://www2.ohchr.org/english/law/docs/CEDAW.C.46.D18.2008_en.doc

European Court of Human Rights Case Law Update

May 2010- October 2010

The Cases of *Fawsie v Greece* (Application no. 40080/07) and *Saidoun v Greece* (Application no. 40083/07), 28 October 2010

Facts

The first applicant, Hamo Fawsie, who was born in 1954, is a Syrian national. The second applicant, Mona Saidoun, who was born in 1965, is a Lebanese national. They have both been officially recognised as political refugees, together with their children, since 1998 and 1995, and are legal residents in Athens.

On 24 January 2005 the family allowance branch of a farmers' social security organisation rejected the applicants' requests for the allowance paid to mothers of large families. The rejection decision explained that the applicants did not have the status of 'mother of a large family' within the meaning of the legislation, as neither they nor their children had Greek nationality nor the nationality of one of the Member States of the European Union nor were refugees of Greek origin.

Judgment of the Court

While the Court did not call into question the desire of the Greek legislature, in awarding the family allowance to people who were unlikely to leave the country, to address the country's demographic problem that seemed to be worsening, it did not agree with the criterion chosen, being based mainly on Greek nationality or origin, especially as it was not uniformly applied at the relevant time. The Court held unanimously that there had been a violation of Articles 8 and 14 of the Convention taken together.

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?sessionId=61298956&skin=hudoc-en&action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=86093>

Judgments (in French):

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=876438&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=876436&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Case of *Özpınar v Turkey* (Application no. 20999/04), 19 October 2010

Facts

The applicant, Arzu Özpınar, has been a judge since 1997. In 2002 a disciplinary investigation was started against the applicant based on anonymous complaints. She was reproached, in particular for her close relationship with a lawyer whose clients had allegedly benefited from favourable decisions on her part, her repeated lateness for work and her unsuitable clothing and make-up. Testimony was taken from about 40 witnesses, who gave contradictory statements, and the cases that the applicant had dealt with as a judge were examined. The National Legal Service Council decided to

remove her from her office as a judge based on the investigation file. No information from the investigation was disclosed to Ms Özpınar.

The applicant relied on Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy), alleging that her dismissal by the National Legal Service Council had been based on aspects of her private life and that no effective remedy had been available to her. She also relied on Article 6 (right to a fair hearing) and complained of sex discrimination under Article 14 (prohibition of discrimination).

Judgment of the Court

The Court found that there had been a violation of Article 8, as the interference with the applicant's private life had not been proportionate to the legitimate aim pursued. Since the applicant had not had access to a remedy meeting the minimum requirements of Article 13 for the purposes of her Article 8 complaint, the Court found that there had been a violation of Article 13 in conjunction with Article 8. Finally, the Court rejected the applicant's complaint under Article 14 as out of time.

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=85790&sessionId=61662998&skin=hudoc-pr-en&attachment=true>

Judgment (In French)

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=875797&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Case of *A v Croatia* (Application no. 55164/08), 14 October 2010

Facts

The applicant had been married to B. Her ex-husband subjected her to repeated violent behaviour. The violence was both verbal, including serious death threats, and physical, including hitting and kicking the applicant in the head, face and body, causing injuries. B often abused the applicant in front of their daughter and, on several occasions, turned violent towards her too.

The applicant complained about the authorities' failure to adequately protect her against domestic violence. She relied on Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private and family life) and 13 (right to an effective remedy). She also alleged that the relevant laws in Croatia regarding domestic violence were discriminatory, in breach of Article 14 (prohibition of discrimination).

Judgment of the Court

The authorities' failure to implement measures ordered by the national courts, aimed on the one hand at addressing B's psychiatric condition, apparently at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence, had left her for a prolonged period in a position in which her right to respect for her private life had been breached, in violation of Article 8. In view of that finding, the Court considered that no separate issue arose under Articles 2, 3 and 13.

With regard to the applicant's claim that Article 14 had been violated, according to the Court she had not given sufficient evidence that the measures or practices

adopted in Croatia against domestic violence, or the effects of such measures or practices, were discriminatory.

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=85645&sessionId=61661657&skin=hudoc-pr-en&attachment=true>

Case of *Konstantin Markin v Russia* (Application no. 30078/06), 7 October 2010

Facts

Konstantin Markin is a Russian military serviceman, who has three children and has been divorced. After the divorce the three children lived with Mr. Markin. He subsequently asked the head of his military unit for three years' parental leave. The request was rejected because parental leave of this duration could only be granted to female military personnel.

Judgment of the Court

The Court was not convinced by the Russian Constitutional Court's argument that the different treatment of male and female military personnel concerning parental leave was justified by the special social role of mothers in the upbringing of children. In contrast to maternity leave, primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed if she so wished, parental leave related to the subsequent period and was intended to enable the parent to look after the infant at home. As regards this role, both parents were in a similar position. Furthermore, the Court was not convinced by the argument of the Russian Constitutional Court that military service required uninterrupted performance of duties and that therefore the taking of parental leave by servicemen on a large scale would have a negative effect on the operational effectiveness of the armed forces.

For these reasons, the Court considered that not entitling servicemen to parental leave, while servicewomen were entitled to such leave, was not reasonably justified. It therefore concluded, by six votes to one, that there had been a violation of Article 14 in conjunction with Article 8.

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=85407&sessionId=61661573&skin=hudoc-pr-en&attachment=true>

Judgment

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=875216&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Case of *JM v United Kingdom* (Application no. 37060/06), 28 September 2010

Facts

The applicant, JM, a British national, is the mother of two children, born in 1991 and 1993. She and her husband subsequently divorced and the applicant left the family home. For the purposes of the UK's child support legislation, her former husband became the parent with care of the children and the applicant, as the non-resident parent, was required to contribute financially to the cost of their upbringing. Since

1998 the applicant has been living with another woman in same sex relationship. Her child maintenance obligation was assessed in September 2001 in accordance with the regulations that applied at that time. These provided for a reduced amount where the absent parent had entered into a new relationship, married or unmarried, but took no account of same-sex relationships. The applicant complained that the difference was appreciable – she was required to pay approximately GBP 47 (EUR 54) per week, whereas if she had formed a new relationship with a man the amount due would be around GBP 14 (EUR 16).

Judgment of the Court

The Court considered that JM could compare her situation to that of an absent parent who had formed a new relationship with a person of the opposite sex. The only point of difference between her and such persons was her sexual orientation. Therefore, her maintenance obligation towards her children had been assessed differently on account of the nature of her new relationship. Yet, bearing in mind the purpose of the domestic regulations, which was to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court could see no reason for such difference in treatment.

The Court therefore held that there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=85117&sessionId=61660675&skin=hudoc-pr-en&attachment=true>

Judgment

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=37060/06&sessionId=61660593&skin=hudoc-en>

Case of *PB and JS v Austria* (Application no. 18984/02), 22 July 2010

Facts

The applicants are PB, a Hungarian national, and JS, an Austrian national. They were born in 1963 and 1959 respectively and live in Vienna in a homosexual relationship. The case concerns their inability under Austrian law to have one partner's sickness and accident insurance extended to the other partner.

JS is a civil servant while PB is not gainfully employed and runs the couple's household. In July 1997, PB asked the authority in charge of insurance for civil servants to recognise him as a dependant to whom JS's sickness and accident insurance cover could be extended. The authority eventually dismissed the request in January 1998, referring to the relevant section of the Civil Servants Sickness and Accidents Insurance Act ('the Insurance Act'), which provided that only a close relative or a cohabitee of the opposite sex qualified as a dependant. The administrative court dismissed PB's complaint against the decision in October 2001, holding that only where a man and a woman lived together in a household run by one of them while not being gainfully employed could it be concluded that they were cohabiting in a partnership. This was not the case if two people of the same sex lived together in a household.

In August 2006 an amendment to the Insurance Act entered into force, which introduced the possibility for a same-sex partner to qualify as a dependant if he or she

was raising children or doing nursing work in the household. This condition was not necessary for a partner of the opposite sex to qualify as a dependant. Another amendment to the Act entered into force in July 2007, after which opposite-sex partners were no longer entitled to qualify as a dependant without raising children or doing nursing work in the household. The amended Act included a transitory provision for people previously entitled to benefits.

Judgement of the Court

As regards the period before August 2006, the Court observed that the Austrian Government had not given any justification for the difference in the treatment of PB and JS, on the one hand and cohabitants of the opposite sex on the other. The Court underlined that states had only a narrow margin of appreciation as regards different treatment based on sex or sexual orientation and that they were required to demonstrate that such a difference in treatment was necessary in order to realise a legitimate aim. In the absence of any justification, the Court concluded, by five votes to two, that there had been a breach of Article 14 in conjunction with Article 8 in respect of the period in question.

The Court unanimously concluded that there had been no violation of Article 14 in conjunction with Article 8 since July 2007.

Press release

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=18984/02&sessionId=61661657&skin=hudoc-pr-en>

Judgment

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=57465983&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=84054&highlight>

Case of *Schalk and Kopf v Austria* (Application no. 30141/04), 24 June 2010

Facts

The applicants, Horst Michael Schalk and Johann Franz Kopf, are Austrian nationals who live in Vienna. They are a same-sex couple. In September 2002 the applicants asked the competent authorities to allow them to contract a marriage. Their request was refused by the Vienna Municipal Office on the grounds that marriage could only be contracted between two persons of opposite sex. The applicants lodged an appeal with the Vienna Regional Governor, who confirmed the Municipal Office's view in April 2003.

In a subsequent constitutional complaint, the applicants alleged in particular that the legal impossibility for them to get married constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. The Constitutional Court dismissed their complaint in December 2003, holding in particular that neither the Austrian Constitution nor the European Convention on Human Rights required that the concept of marriage, as being geared to the possibility of parenthood, should be extended to relationships of a different kind and that the protection of same-sex relationships under the Convention did not give rise to an obligation to change the law of marriage.

On 1 January 2010, the Registered Partnership Act entered into force in Austria, aiming to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. While the Act provides for many of the same

rights and obligations for registered partners as for spouses, some differences remain, in particular registered partners are not allowed to adopt a child, nor are step-child adoption or artificial insemination allowed.

Judgment of the Court

1. In conclusion, the Court found that Article 12 did not impose an obligation on the Austrian Government to grant a same-sex couple like the applicants access to marriage. It therefore unanimously held that there had been no violation of that Article.
2. The Court was not convinced by the argument that if a state chose to provide same-sex couples with an alternative means of recognition, it was obliged to confer a status on them which corresponded to marriage in every respect. The fact that the Registered Partnership Act retained some substantial differences, compared to marriage, in respect of parental rights corresponded largely to the trend in other Member States. Moreover, in the present case the Court did not have to examine every one of these differences in detail. As the applicants did not claim that they were directly affected by the remaining restrictions concerning parental rights, it would have gone beyond the scope of the case to establish whether these differences were justified.

In the light of these findings, the Court concluded, by four votes to three, that there had been no violation of Article 14 in conjunction with Article 8.

Press release:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Schalk%20%7C%20Kopf&sessionId=61649224&skin=hudoc-pr-en>

News from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – *Anna Sporrer*

Policy developments

At the end of June 2010, the Minister for Women's Affairs presented a National Action Plan on the Equality of Women in professional life, which has been agreed upon by the social partners from both sides of industry. This action plan has been developed with the participation of academia, research institutions, non-governmental organisations and other relevant stakeholders of the civil society. This National Action Plan is composed of 55 measures aimed at improving the situation of women in education, professional training and access to and promotion within jobs, and at enhancing the representation of women in senior positions as well as the better balancing of work and family life.¹

By the end of 2010, the Minister for Women's Affairs is going to launch a campaign for lobbying for paternity leave. This campaign will be composed of seminars for employers, chiefs of staff, enterprises as well as works councils, aimed at an improved way of organising paternity leave. It will be accompanied by a media campaign including advertisements in the press and on TV.

Legislative developments

Legislation

The Council of Ministers has passed an amendment to the Equal Treatment Act applicable to the private sector, which is aimed at combating the gender pay gap. Beginning in 2011, employers will have to deliver an anonymous biannual report to the enterprise's works council on the average salary of all employees, sorted by gender, wage groups and functions. This system will be implemented gradually:

- in 2011 this obligation will be in force for all enterprises with more than 1 000 employees, and at this first step 15 % of the Austrian workforce will be included;
- in 2012 this obligation will be in force for all enterprises with more than 500 employees, and then 24 % of the Austrian workforce will be included;
- in 2013 this obligation will be in force for all enterprises with more than 250 employees, then 34 % of the Austrian workforce will be included; and
- in 2014 this obligation will be in force for all enterprises with more than 150 employees and therefore finally 41 % of the Austrian workforce will be included.

These reports will also be used as evidence before the labour court in equal pay cases. Furthermore, job advertisements will have to include information on the wages in the applicable collective agreement as well as an indication as to whether overtime pay will be possible under the individual labour contract. The amendment of the Equal Treatment Act contains further improvements by raising the minimum compensation in cases of sexual harassment from EUR 750 to EUR 1 000, as well as by prohibiting discrimination by association. Moreover, discrimination on grounds of religion and belief, age and sexual orientation will be forbidden in the field of access to goods and services.

¹ <http://www.frauen.bka.gv.at/> accessed on 6 October 2010.

The Austrian Parliament passed an amendment to the Act on the Austrian Broadcasting Foundation by which new provisions on obligatory affirmative action in favour of women will be introduced, which is designed on the model of the federal public service. In the case of equal qualifications, women are to be preferred until a quota of 45 % of women is reached, and women also have to be promoted by vocational training and other measures. Furthermore, the in-house Equal Treatment Commission as well as Equal Treatment Ombudspersons, which until now have been established on the basis of a collective agreement at individual site levels, have been given an improved legal basis. All this can be regarded as a major step in equality policy as the Austrian Broadcasting Foundation will be the first employer, apart from the public service, which will be legally bound to obligatory preferential treatment of women in the enterprise.²

Administrative law

The Federal Government delivered its 8th biennial report to Parliament under the Federal Equal Treatment Act on the implementation of gender equality within the federal public service. For the first time this report contains a comprehensive cross-gender comparison of wages which shows that despite the fact that salaries within the public service are regulated by legislation, the average incomes of men are higher than those of women, which is due to the principle of seniority, the over-representation of men in higher and top positions, as well as the unequal distribution of overtime working hours. On the other hand, the report also provides evidence that the obligatory quota system in favour of women is effective, as the representation of women in total, as well as in higher positions, is constantly increasing.³

Under the Federal Equal Treatment Act, all federal Ministries have to issue affirmative action plans for women, which have to be revised every other year and which have to formulate concrete aims and goals for the advancement of women in all fields and at all levels. These action plans have the legal status of a legally binding regulation and are to be regarded as a means of enforcement of the Federal Equal Treatment Act, which provides for legally binding provisions on the promotion of women, including the quota of 45 % for the representation of women at all levels and income classes. Thus, all action plans reaffirm de facto equality between women and men as a major goal and all Ministries commit themselves to proactive policies towards this aim. The action plans contain provisions on hiring and career advancement, job advertisements, protection against harassment, promotion of women in vocational training, career planning, adequate representation of women in commissions and other advisory and deciding bodies, as well as measures for a better balance between work and family life for women and men. Furthermore, most of the action plans provide binding goals for the percentage of women in areas where women are still under-represented, which have to be reached within the following two years. Recently the action plan for the Ministry of Defence and Sports has been amended.⁴

Case law of national courts

Supreme Court

The Supreme Court confirmed the judgments of lower labour courts by which the expiry of a terminated employment contract, which was intended to be changed into an

² OJ I 50/2010.

³ <http://www.frauen.bka.gv.at/> accessed on 6 October 2010.

⁴ OJ II 304/2010.

ongoing contract, will be suspended by notification by the employee of her pregnancy. The Supreme Court confirmed the intention of the Maternity Protection Act to protect pregnant women from unjustified termination of their employment contracts and ascertained that – in order to prevent employers from intentional evasions of the law – the termination of employment contracts always has to be reasoned and justified.⁵

On the other hand, the Supreme Court confirmed the dismissal of a pregnant employee as admissible where the employee, being a foreigner, had never had permission to work in Austria, and therefore the employment contract was invalid. Invalid employment contracts are not covered by the Maternity Protection Act.⁶

High Administrative Court

The High Administrative Court confirmed that the fact that the Austrian education system is not gender segregated, does not constitute any justification for a father not sending his daughter to a state school. Therefore the administrative fine imposed on the father was in conformity with the law.⁷

BELGIUM – *Jean Jacqmain*

Policy developments

After the premature resignation of the federal Government, the general election of June 2010 resulted in a renewed deepening of the political crisis. Indeed, three months later the country was still waiting for the creation of a coalition Government, and the previous Cabinet remained in charge of current affairs (including the European presidency) with extremely limited powers.

Legislative developments

Protective legislation repealed

Articles 115 to 117 inclusive, of the Various Provisions Act of 28 April 2010 repealed belatedly the provisions of the Working Conditions Act of 16 March 1971 which excluded women from certain tasks, as well as the provisions of the ancillary Royal Decree of 24 December 1968 on Women's Work.

The repealed provisions were leftovers from a distant past. Article 8 of the Working Conditions Act forbade the employment of women underground in mines, except as mining engineers. Article 10 empowered the sovereign to exclude women from certain tasks for health and safety reasons; after successive amendments, the ancillary Royal Decree of 24 December 1968 still forbade women from working as manual workers in excavations and from working in high-pressure caissons.

Article 8 lost any justification when Belgium withdrew from Convention No. 45 of the ILO as from 30 May 2009 (in any event, the last mine in the country had been closed down in 1992). The other protective measures for women in general (as opposed to measures aimed at protecting pregnant employees) had been allowed by the first two versions of the gender equality legislation (4 August 1978 and 7 May 1999). However, the Gender Act of 10 May 2007, aimed at implementing Directive 76/207/EEC as

⁵ Supreme Court 28.7.2010, 9ObA 89/09t.

⁶ Supreme Court 22.4.2010, 8 ObA 58/9a.

⁷ High Administrative Court 12.8.2010, 2008/100304.

amended by Directive 2002/73/EC, permitted no such exceptions to the rule of equal treatment.⁸

Prohibition of burka in public spaces not yet in force

On 29 April 2010, the House of Representatives (the first House of the federal Parliament) adopted the proposal for a penal Act to prohibit the wearing of any attire in public spaces which prevents the identification of the wearer.⁹ However, the Senate (the second House) immediately made use of its power to summon the proposal for examination. This examination became impossible due to the dissolution of Parliament; consequently, the Act has not yet been promulgated.

After the summer recess, Parliament can hardly resume its activities in the absence of a coalition majority, and the fate of the proposal remains uncertain.

Case law of national courts

Labour Court of Appeal in Brussels, judgments of 12 May 2010 and 21 April 2010

Reimbursement, by statutory healthcare insurance, of the costs of medication for the treatment of osteoporosis remains a bitterly disputed issue.

As far as the medication Actonel is concerned, the ancillary regulations to the Healthcare and Sickness Insurance Act (consolidated) of 14 July 1994 only provide reimbursement when the patient is a post-menopausal woman. A 64-year-old man suffering from osteoporosis, who had been prescribed Actonel, challenged the sickness fund's negative decision on reimbursement before the Brussels Labour Court. On 11 April 2008, the Labour Court found that the exclusion of men from reimbursement was incompatible with Article 4(1) of Directive 79/7/EEC. The disputed regulation was thus illegal and had to be set aside under Article 159 of the Constitution and the claimant was entitled to reimbursement. The Healthcare and Sickness Insurance Office's appeal against this judgment was rejected on 12 May 2010¹⁰ by the Labour Court of Appeal in Brussels, which upheld the Labour Court's reasoning, based on European gender law.

As far as the medication Fosamax is concerned, as from 2002 reimbursement was provided for men as well, but only when the medication is administered daily, while a weekly administration is reimbursable in the case of a woman. This difference in treatment was challenged as gender discrimination under Directive 79/7/EEC and on 5 August 2008 the Nivelles Labour Court found along the same lines as the Brussels Labour Court. However, when the Healthcare and Sickness Insurance Office appealed, the Labour Court of Appeal in Brussels (under another chairperson) felt obligated to follow the Court of Cassation's judgment of 14 June 2004,¹¹ according to which the criterion upon which the difference of treatment is grounded is not gender, but the menopause; consequently, there was no gender discrimination and on 21 April 2010¹² the Labour Court of Appeal quashed the Nivelles Labour Court's decision.

Such a blatant contradiction in the case law of the Labour Court of Appeal in Brussels can only be resolved by the Court of Cassation. The Health and Sickness

⁸ All legal instruments quoted in this contribution are available on <http://www.juridat.be> in French and Dutch, accessed on 2 October 2010.

⁹ See *European Gender Equality Law Review*, no. 1/2010, p. 50.

¹⁰ Rôle général No. 2008/AB/50985, unreported.

¹¹ *Chroniques de droit social*, 2004, pp. 5-8 with J. Jacqmain's case note.

¹² Rôle général No. 2008/AB/51336, unreported.

Insurance Office is certain to appeal against the 'Actonel' judgment of 12 May 2010, and the 'Fosamax' claimant may decide not to accept the judgment of 21 April 2010.

However, it is to be feared that the Court of Cassation will stick to its somewhat surprising analysis according to which the menopause is not connected to gender. One can only hope that one of the litigating parties will force that Court to refer to the ECJ for a preliminary ruling on the intention of Directive 79/7/EEC.

BULGARIA – *Genoveva Tisheva*

Introduction and policy developments

The second and third quarters of 2010 were characterised by the effects of the economic and financial crisis in Bulgaria. The forecast that it would affect the legislation and policy on gender equality was confirmed. In fact, in the middle of the year the state budget underwent a process of 'actualization', which cut subsidies to the Ministries, including the Ministry of Labour and Social Policy and the Ministry of Justice, where very modest state funds related to gender equality were provided. The cuts affected other state bodies as well, like the National Anti-Trafficking Commission, which impacted negatively on the timing of the adoption of the National Referral Mechanism for trafficked persons.

In the meantime, the negative trends and inequalities exacerbated by the crisis were not tackled by the Government with targeted policies. According to national statistics, the level of economic activity of men in the second quarter of 2010 was 58 %, while for women it was 47 %. By the end of 2009, women continued to predominate in long-term unemployment. Despite deteriorating working conditions and the increased liberalisation and flexibility of the labour market, due to the constraints of the labour market, women in Bulgaria did not complain of discriminatory practices.

The year of crisis coincided with the European Year against Poverty and Social Exclusion. All the activities related to this event were monopolised by the state and civil society was involved only in the dissemination events. As a result, among others, no specific action was taken for mainstreaming gender equality in the proposed activities for the year.

The marginalisation of gender equality was also expressed in the lack of understanding and of interest in the issue shown by the representatives of Ministries in relation to the work of the Advisory Council on Gender Equality within the Council of Ministers. This is due to the continuing reluctance of the Government to adopt special gender equality legislation and mechanisms needed for conducting everyday policy in the field.

Legislative developments

No substantial legislative developments have been observed in the last few months since the previous reporting period.

Better protection of women can be expected through a new provision of the Law on Weapons adopted in late summer and promulgated in State Gazette No. 73/2010. The perpetrators of domestic violence will not be able to obtain permission to keep weapons, if a restraining order has been issued against them within the last three years. Unfortunately, the amendments of the Law on the state budget in State Gazette No. 56/2010 do not help in this direction. The budget allocation provided for 2010

according to the Law on Protection against Domestic Violence was cut from the budget of the Ministry of Justice. It is certain that this cut will not bring better protection to the victims of violence.

Two pending legislative initiatives related to gender equality and women's rights can be mentioned as well. The first is the Draft Electoral Code where gender-specific amendments can be introduced under pressure brought to bear by non-governmental organisations. Women's NGOs would like to introduce provisions about affirmative action for bringing more women in politics but they have not been consulted so far. The second is the initiative to recognize surrogate motherhood which will be considered soon by the National Assembly. Surrogate motherhood is banned under current legislation. Developments in these two areas, although not explicitly focused on gender equality, will be monitored in the months to come.

Equality body decisions and legal practice

The Commission for Protection against Discrimination in its current composition is at the end of, and even beyond the mandate provided by law. The instability of this body's future affects its work and the Commission is not so active as it was in identifying discriminatory acts, attitudes and stereotypes. This is especially so in the identification of gender discrimination. In September 2010, the Commission reached a decision on the case of sexist advertisements of the alcohol company 'Peshtera', after two years of lengthy proceedings. The Commission found no discrimination in this case of overtly discriminatory advertisements. It recognised the fact that the area of advertisements is covered by the protection against discrimination, including discrimination based on sex, in Bulgaria. Despite that, the Commission showed a lack of understanding of discrimination based on gender stereotyping. Without undertaking any concrete analysis, the Commission denied the existence of discrimination and at the end of the decision it even referred the claimants to other, self-regulatory bodies. The decision is currently on appeal before the Supreme Administrative Court.

It is worth noting that, in contrast with the opinion of the state equality body, the National Council of Self-regulation, which is a non-governmental body established by the producers of advertisements, found a violation of its own ethical code by a similar sexist advertisement disseminated by the same alcohol company. Among the arguments of the Council's decision issued in August 2010, is the argument concerning the violation of the principle of equality of women and men.

Among the decisions of the courts, it is worth mentioning a decision of the administrative court of Sofia on age discrimination in a case of an *in vitro* procedure. The court found discriminatory the applied age criteria for eligibility for assisted reproduction. The case was filed by a woman who was not allowed to enter a procedure of assisted reproduction because she was more than 43 years old. The order, issued by the Assisted Reproduction Fund, was repealed by the administrative court. An expert opinion was presented in the case, which identified that the state of the woman's health established a high probability of success for the *in vitro* procedure. The decision is not final yet.

The general assessment that women in Bulgaria still do not complain enough about gender discrimination is still valid. The economic crisis which affected Bulgaria during the last year and the increased unemployment, as well as the absence of special mechanisms to facilitate the access to justice for women victims are still obstacles for severe discrimination cases trying to reach the Commission for Protection against Discrimination and the court.

Policy developments

There were no noteworthy policy developments in the area of equality of women and men in the Republic of Croatia since the last report. Croatia is still in a deep economic recession. Moreover, since then the economic crisis has spilled over even more into the political arena, which has had significant negative implications for policy initiatives in general.

What is particularly troubling is that it seems that the grim economic situation has not merely affected the economic wellbeing of women in Croatia. It is alarming that violence against women has sharply increased during the economic recession. For example, as a result of family violence 21 women were murdered in 2009, which is almost a 100 % increase from 2008 (11 women murdered in family violence).¹³ It is striking that the overall number of murder victims in 2009 was 49, which was 18 victims fewer than in 2008. In other words, while the overall number of murders in Croatia decreased, the number of women who were murdered in family violence almost doubled in 2009. Unfortunately, the trend of violence against women seems to have continued in 2010. Based on the data collected from various media outlets, 12 women have been murdered in family violence up to September 2010. Unfortunately, the Government has not been particularly responsive to this problem. As a reaction to several brutal family violence murders of women that occurred during a rather short period in August and September, the Government did hold an urgent meeting at the beginning of October. However, apart from its commitment to more effective enforcement of the existing legal framework regulating the issue of violence against women, the Government has not proposed any new policy initiatives.

One important policy development is the beginning of the drafting of the national policy for the promotion of sex equality for the period 2011-2015. So far, the Government has established a working group and we are waiting for the first drafts of the document that will be submitted for public discussion.¹⁴

Legislative developments

The period since the last report has been marked by one significant legislative development. Reacting to the unfavourable public reception of its decision to propose to Parliament a gradual leveling of the retirement age for men and women by 2020, the Government has decided to change its position. It recently submitted to Parliament a legislative proposal according to which the retirement age for men and women would be gradually equalised during the next 20 years (i.e., by 2030). The proposed legislation is rather puzzling since it does not comply with the decision of the Croatian Constitutional Court (CCC). As reported on previous occasions, the CCC found that a different retirement age for men and women violates the Constitutional Equal Treatment Clause and asked Parliament to equalise the retirement age by 2018.

¹³ The Report of the work of the Office of the Ombudsperson for Sex Equality in 2009 submitted to the Croatian Parliament. Available at <http://www.prs.hr/content/category/11/64/45/>. AM asks: date of last accessing this website?

¹⁴ See the website of the Government's Office for Sex Equality at <http://www.ured-ravnopravnost.hr/page.php?id=648>. AM asks: date of last accessing this website?

Equality body decisions/opinions

The Office of the Ombudsperson for Sex Equality did not report any significant developments in the relevant period.

Case law of national courts

There have been no major developments in the case law of the Croatian courts in the last six months. This does not necessarily mean that the Croatian courts did not decide any sex equality disputes in that period. It simply means that no cases have been publicly reported. As pointed out on several previous occasions, the Croatian courts, in principle, do not publish their decisions. Consequently, it is extremely difficult to scrutinise the manner in which they enforce the law.

However, with the support of the Croatian Ombudsperson for Sex Equality, I have managed to acquire a significant number (around 15) of discrimination decisions of the Zagreb Municipality Civil Court (first instance court) and the Zagreb County Court (an appeal court). The decisions cover the period since 2005. It should also be noted here that these two courts are the largest Croatian courts. Interestingly, none of the acquired decisions is directly concerned with sex discrimination. This confirms the overall bleak situation regarding the judicial enforcement of sex discrimination guarantees in Croatia. However, the decisions do contain certain interesting and rather telling features that are worthy of our attention. Above all, they show that the Croatian courts tend to favour a rather narrow approach to discrimination disputes. They tended to overstress the relevance of (what I would call) the formalistic features of a factual situation before them. This allowed them to avoid a more substantive scrutiny of key questions. To demonstrate this claim, I have chosen to report two equal pay decisions. Both of them indicate the problems that Croatian courts are likely to face in both sex equality and equal pay cases.

The first example is the decision *Gžr-1003/07* of the Zagreb County Court.¹⁵ The court was presented with a discrimination claim that seems to be rather typical of Croatian discrimination litigation. A female claimant based her discrimination claim on the fact that she was asked to perform work which was not part of her employment contract but was not paid in accordance with the corresponding higher rate of pay. In a manner that makes this case typical, the claimant did not identify any particular ground of discrimination. She merely relied on the labour law provision prohibiting discrimination on a significant number of grounds. One of those grounds was sex. Croatian procedural law allows such general claims. Consequently, courts need to determine whether a particular disputed practice constitutes discrimination on *any* of the listed grounds.¹⁶ Briefly, both the Zagreb County Court and the Municipality Court found that the disputed practice did not constitute discrimination since it was not related to any of the listed grounds. However, the manner in which the courts reached the conclusion is striking. The courts found that the disputed practice was not related to any of the related grounds because of the clear evidence that the claimant was regularly paid for her work in accordance with the level of salary prescribed by her employment contract. The courts did not find it particularly relevant that the claimant often performed work that corresponded to a higher level of salary. Accordingly, they did not

¹⁵ Decision of the Zagreb County Court *Gžr-1003/07* dated 4 December 2007.

¹⁶ It should be noted here that the Croatian Supreme Court recently started limiting this practice. See, for example, the decisions of the Croatian Supreme Court *Revr 787/07-2* dated 23 January 2008 or *Revr 650/08-2* dated 18 February 2009.

engage in any comparison of her position with the position of another employee (of the opposite sex) performing comparable work. In this way they waived the opportunity to engage in more substantive antidiscrimination scrutiny of the disputed practice. The mere fact that the employer formally complied with the contract provisions was considered sufficient proof that the claimant was not discriminated against.

A similar approach can be found in another, more recent, decision of the Zagreb County Court. In the case *Gžr-3135/09* the County Court dealt with a similar equal pay dispute.¹⁷ The claimant argued that he was discriminated against since he was frequently asked to perform tasks that were not part of his position – a TV show editor. On the contrary, the disputed tasks were part of the job description of a better paid position – a TV show editor/journalist. Yet, he was paid the salary that was fixed for the position of a show editor. Both the Municipality Court and the County Court did not dispute that the claimant often performed some tasks that belonged to the job description of the editor/journalist position. However, they found that this fact did not place him in a comparable situation to the workers performing the work of the editor/journalist position since he performed only some of their tasks from time to time. The problem is that neither court identified any comparability criteria that could have allowed them to determine precisely how similar or different these situations were. The courts simply argued that the claimant was not in a comparable situation to other editor/journalist employees since they did not perform identical tasks. Moreover, the County Court stressed that the claimant's employment contract contained a clause according to which the claimant was required to perform tasks belonging to the job description of a show editor as well as other tasks given to him by the employer. It seems that this formality was sufficient proof for the court to conclude that the employer did not engage in discrimination.

The approach described above to equal pay claims favoured by the Croatian courts is a far cry from the equal pay approach favoured by the European Court of Justice in cases such as *Brunnhöfer*.

CYPRUS – Lia Efstratiou-Georgiades

Policy developments

Subsidy of women's organisations and trade unions

To help women's organisations and trade unions carry out their action plans on the basis of the National Action Plan for Gender Equality 2007-2013, the National Machinery of Women's Rights subsidised them in 2010 by up to EUR17 086 each.

Women's positions

In June 2010 six District judges were appointed, of whom five were women. Today there is a total of 104 judges serving at all courts (Supreme, District, Criminal and Civil), of whom 44 are women. Of these one is a Supreme Court judge and five are Presidents of District Courts.

Furthermore, out of three judges serving at the Industrial Disputes Tribunal two are women (one president), at Family Courts, out of 13 judges five are women (one president) and at Rent Control Courts all three serving judges are women. Moreover, the Chief Registrar of the Supreme Court is a woman.

¹⁷ Decision of the Zagreb County Court *Gžr-3135/09* dated 19 January 2010.

Equality Authority-Commissioner for Administration (Ombudsman's) Office Report 2009

The Equality Authority-Commissioner for Administration (Ombudsman's) Office will soon publish its Annual Report 2009. For the sixth consecutive year, the Equality Authority has been 'present' in the area of employment and professional training. It has been pursuing equal terms and equal treatment in relation to gender which, apart from the area of employment, also includes access to and supply of goods and services.

The Equality Authority has a wide range of activities in the private as well as the public sector, which also includes legislative proposals (laws, regulations, schemes) where these contain practices or criteria which prohibit discrimination, and even extends to the content of employment contracts or collective agreements.

An interesting detail concerning the grounds of the complaints is that the majority (57 %) of gender-related claims involved discrimination on the grounds of maternity and pregnancy, i.e., the biological particularity of women.

In 2009, 103 complaints of illegal discrimination were submitted to the Equality Authority. A further 58 complaints, which had been submitted in previous years and whose examination had not been completed, were also transferred for investigation.

During 2009 75 % of complaints were submitted by Greek Cypriots, 15 % by European citizens and only 5 % by migrants from third countries.

As for the types of complaints made in 2009, the highest number of complaints of discrimination were made on the grounds of gender (50 %), the second on the grounds of disability (17 %) and the third on the grounds of ethnic origin (16 %).

With specific reference to discrimination on the grounds of gender, 82 % of these involved discrimination against women and 18 % involved discrimination against men.

The Annual Report 2009 states that the Equality Authority's practical implementation of Cypriot legislation in the fight against discrimination has revealed some weaknesses and gaps in the laws which had not been anticipated by the legislator.

The first weakness found concerns the Equal Treatment of Men and Women in Employment and Vocational Training Law. This Law gives the alleged victims of discrimination on the ground of gender the right to go to the Industrial Disputes Tribunal, but it also gives them the possibility, on the one hand, of submitting the complaint to the inspectors in the Ministry of Labour and Social Insurance, who will conduct a court style investigation and, on the other hand, of submitting the complaint to the Ombudsman (Equality Authority) who acts as an independent body. As the law now stands, a worker can apply to both institutions, which will carry out simultaneous investigations on the same issue, with the possible result being two contradictory decisions.

A second issue is whether the regulations in force ensure effective access to court proceedings to victims of discrimination. According to Article 10A of the Annual Holidays with Pay Law 1967 to 2005,¹⁸ an application to the Industrial Disputes Tribunal should be submitted within twelve months from the date when the claim was raised. According to Article 27(2) of the Equal Treatment of Men and Women in Employment and Vocational Training Law, those who refer complaints of discrimination to the inspectors do not lose this twelve-month deadline for claiming compensation from the Tribunal. However, those who submit complaints to the Equality Authority face the risk of losing the right to apply to the Industrial Disputes Tribunal for compensation if there is a delay by the Equality Authority. This may amount to a breach of Article 17 of Directive 2006/54/EC.

¹⁸ No. 8/67 as amended, last amendment Law No. 18(I)/2005.

Furthermore, the Ombudsman pointed out the ineffective protection from dismissal for pregnant women working in the private sector. In the majority of cases, the complainants were dismissed before they could present to their employer their certificate from a registered doctor confirming the pregnancy, resulting in their dismissal not being seen as illegal according to the Protection of Maternity Law 1997-2008 (Article 4). This, therefore, reveals that the dismissal of a pregnant woman is illegal, not from the start of her pregnancy, but only from the moment that she makes her pregnancy known to her employer, and on the condition that this information is supported by the relevant doctor's certificate. This legislation invalidates the complete protection from dismissal which Directive 92/85/EEC gives to pregnant women.

The Ombudsman forwarded a request to the Ministry of Labour and Social Insurance to promote the amendment procedure of Article 4 of the Protection of Maternity Law, in order to secure protection from dismissal for pregnant women from the beginning of their pregnancy. The whole issue is pending in view of consultations with social partners.

Legislative developments

No legislation was adopted in the field of the promotion of gender equality in the second half of 2010.

Equality body decisions/opinions

File No. AKI 42/2008 dated 29 April 2010

On 28 May 2008, Mrs AP submitted to the Ombudsman a complaint against her employer (a Bank) relating to her lack of promotion for several years, which she considered was due to the fact that she had, in the past, accused the Assistant General Manager of the Bank, Mr XX, before the Board of Directors and the Trade Union of Bank Employees (ETYK), of sexual harassment.

The claimant was hired by the Bank in June 1999 as a branch manager. In 2000 she was upgraded to the post of sub-director of a department and in 2003 she was appointed to the post of Head of Banking Works for the Nicosia Area. Mrs AP stated that from the beginning of 2005 she noticed changes in the behaviour of Mr XX towards her, which caused her great stress and she submitted a complaint against him for sexual harassment before the Management of the Bank and the Trade Union ETYK. The Management of the Bank examined the complaint and found it justified. Because of the status of Mr XX in the Bank and his family situation, and after the Bank had assured her that proper action would be taken, Mrs AP withdrew her complaint upon request from the Bank. Mr XX was prematurely retired from the Bank in July 2005. The reasons for his decision to retire were not revealed.

After the claimant's complaint against Mr XX and in order to avoid any co-operation with him, the Management of the Bank moved her to the Internal Audit Department. At the same time the Management, as well as the Trade Union ETYK, assured her that this move would not affect her future advancement and would not last more than six months.

Despite these assurances, Mrs AP has remained at the same position in the Bank, without promotion, up to the presentation of the complaint. Her duties in this position are inferior to those of her previous position. In 2005 she was recommended for promotion, but not actually promoted. In 2006 she protested to the Bank Management

and to the Trade Union about her non-promotion and was orally told that she would be at the top of the list of candidates for future promotions.

The Trade Union forwarded her protest to the Ministry of Labour and Social Insurance as the appropriate body for solving labour disputes, but the case was withdrawn after the Bank's General Manager gave an assurance that Mrs AP would be promoted in the next round of promotions. Nevertheless, Mrs AP was not among the employees who were promoted in the following years and has still not been promoted, although she had very good appraisal reports.

After examining the case, the Ombudsman reached the conclusion that the reason for the professional stagnation of Mrs AP was the complaint she had made for sexual harassment at the workplace, and that Article 17 of the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002 to 2009 was infringed. Article 17 provides, *inter alia*, that the dismissal of a worker or any other harmful change to the conditions of employment by an employer as a reaction to a complaint, including a complaint for sexual harassment, shall be null and void, unless the employer proves that the dismissal or harmful change was due to a reason irrelevant to the complaint. The Ombudsman concluded that discrimination on the ground of gender, contrary to these Laws, may have taken place.

The Ombudsman made a recommendation to the Bank that, at future promotions, the complainant should be promoted if she satisfied all requirements.

CZECH REPUBLIC – *Kristina Koldinská*

Policy developments

The Czech Republic has a new right-wing Government. All the members of the Government are men; there are no female members.

The Government promised voters that it would tackle the economic problems of the country, principally through the reduction of mandatory expenditure. Social security is one of the areas targeted.

In September 2010 the Government approved a proposal to reduce some welfare benefits or to tighten the legislative conditions for claiming them. The main changes are envisaged in the area of family benefits and sickness benefits.

If the Parliament approves the proposed changes, the birth allowance will be changed from a universal benefit (today CZK13 000 (about EUR 500)) to a means-tested benefit, available only to poorer families. The benefit will be provided for just one child (regardless of how many children are born during one delivery), whereas until now the benefit has been provided for each child who is born.

The parental allowance would also be reduced, as would child allowance. The so-called social supplement, which used to be a means-tested family benefit to support the poorest families with children, will be abolished. Support to the poorest families will be provided through the system of aid in material need (Act No. 111/2006 Coll.).

Case law of national courts

Supreme Court decision on discrimination

In its decision No. 21 Cdo 1743/2009, the Czech Supreme Court ruled on a case in which an employee of Czech Airlines sued her employer because she believed she had been discriminated against, as she has been treated less favourably than her colleagues.

She worked as a stewardess, and then became responsible for the cabin crew. She also had other functions, where further reimbursements were envisaged. At a certain moment she was accused of not paying attention to her duties as the head of the cabin crew. This was not proved, but for several months she was not allowed to work in all of her previous capacities. As a consequence, she was paid less.

The lower courts accepted that there had been discriminatory behaviour on the part of her employer compared with the treatment meted out to other employees of the same employer. The Supreme Court had to decide whether or not in such a case of discrimination it was possible to calculate the material damage. The Supreme Court stated that it was possible and that this damage should be calculated according to the general responsibility rules for calculating material damage caused by employees of the employer. It was the first time that the Supreme Court had so ruled in such a case.

http://www.nsoud.cz/JudikaturaNS_new/judikatura_prevedena2.nsf/WebSearch/90EA1CE2D6E45913C1257760002190FE?openDocument

Miscellaneous

New Czech Ombudsman sworn in

The newly elected Czech Ombudsman Pavel Varvarovsky, a former judge of the Constitutional Court, took his oath in the Chamber of Deputies, the lower House of Parliament, and assumed office in September 2010.

He was proposed by the Senate and supported by the Civic Democratic Party (ODS), TOP 09 and Public Affairs (VV), members of the centre-right coalition Government.

Varvarovsky is the second Ombudsman in Czech history, taking office after his famous and very greatly respected predecessor, Otakar Motejl, died in May 2010.

Projects in support of gender equality

There are currently some important projects being run by several NGOs to support awareness raising on gender equality.

One such international project is called EQ-TRAIN, which involves NGOs from Austria, the Czech Republic, Italy, Slovakia and Spain, focusing especially on awareness raising in the area of equal pay and equality in the labour market. Within the project, national reports on the gender pay gap were compared.¹⁹

An information campaign, publicised on public transport, has been launched in order to support the harmonising of private and working life.²⁰

DENMARK – Ruth Nielsen

Legislative developments

Since 2002, by virtue of Directive 2002/73, the Member States and EEA countries are obliged to designate Equality Bodies. Similar provisions are found in the Recast Directive (2006/54) and the Supply of Goods and Services Directive (2004/113/EC). The tasks of these bodies are the promotion, analysis, monitoring and support of equal

¹⁹ More information available on <http://www.frauenberatung.eu/eq-train/en/default.asp>, accessed on 29 September 2010.

²⁰ More information available on <http://www.feminismus.cz/fulltext.shtml?x=2257257>, accessed on 29 September 2010).

treatment for women and men. They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights. These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations.

As reported earlier, in Denmark there is no equality body with the full range of competences required in the gender equality directives. Denmark has an Equality Complaints Board which is empowered to deal with complaints about discrimination on grounds of, for example, sex, ethnic origin, religion, age, disability and sexual orientation from victims of discrimination. This body has no competence to conduct independent surveys concerning discrimination, to publish independent reports or to make recommendations on any issue relating to such discrimination and it is not able to start cases on its own initiative. It is therefore not a monitoring body in the sense required by the above provisions. In matters of ethnic equality, the parallel requirement in Article 13 of Directive 2000/43/EC is correctly implemented in Denmark. In addition to the Complaints Board which is also competent in cases of ethnic discrimination, there is a provision in Section 10 of the Ethnic Equality Act which empowers the Danish Institute of Human Rights to promote ethnic equality.

The European Commission has commenced infringement proceedings against Denmark over the issue of independent bodies. On 20 November 2009, the Commission sent a reasoned opinion to Denmark. In response to that, Denmark has promised to comply with the Directive.

The Danish Parliament (Folketing) opened on 5 October 2010 for the session 2010-11 and the legislative programme for 2010-11 was published. In that programme the Government announces that, in the first half of November 2010, it will present a bill that amends the Act on the Danish Institute of Human Rights so as to extend the competence of the Danish Institute of Human Rights to cover gender equality as well.

Equality body decisions/opinions

The Equality Complaints Board published its annual report for 2009 on 25 August 2010. In this report there is a brief mention of all cases decided by the Board in 2009. The report also contains articles about the board's working style as well as articles on key issues within the various areas of discrimination.

ESTONIA – *Anneli Albi*

Policy developments

Reductions in state budget

As pointed out in earlier law reviews, during previous years the state budget has seen considerable reductions. This has posed challenges, for example to the funding of the activities of the Gender Equality Commissioner, as well as having had a broader impact on different aspects of state responsibilities. The process of preparing the draft of the state budget for 2011 is ongoing. Furthermore, in March 2011 the elections for the new Parliament will take place, although the parties have not made their programmes public as yet.

Gender Equality and Equal Treatment Commissioner

The term of office of the first Gender Equality and Equal Treatment Commissioner, Margit Sarv, has come to an end and she did not reapply for the position. In an interview she has noted that the three most important results of her time as Commissioner are the establishment of the office of the Commissioner, good co-operation with local government and participation in the process of amending the Gender Equality Act and adopting the Equal Treatment Act. She pointed out that, during her term of office, she was unable to carry out any in-depth studies on the impact of the legislative framework on the situation of gender equality and equal treatment. She identified the following issues as particular areas of concern: the gender pay gap, men's health (by way of background, men in Estonia have notably short life expectancy which may be related to the gender imbalances in the society) and domestic violence.²¹

Mari-Liis Sepper was nominated as the new Commissioner and she started in this position on 4 October 2010. She has identified the following priorities:

1. to raise awareness amongst the general public and legal professionals about gender equality and equal treatment;
2. to give an opinion about the existence of discrimination to the victim within a simple and available procedure as set out in the law;
3. to participate in creating an effective legal framework, in particular to provide effective remedies for victims; and
4. to make contact with the people who have a duty to promote equality, including state and local government officials.²²

One of the key challenges for the effectiveness of the work of the Commissioner is likely to be the very limited budget.

In view of the upcoming elections, the new Commissioner has noted that several parties have shown a willingness to apply a gender-balanced approach, at least among the first ten candidates in the electoral list. She has also called for a broader discussion on introducing quotas.²³

Legislative developments

The Statute of the Gender Equality and Equal Treatment Commissioner adopted

On 10 June 2010 the Government adopted the Statute of the Gender Equality and Equal Treatment Commissioner.²⁴ The Statute took effect on 21 June 2010.

According to Article 15(6) of the Equal Treatment Act, the Government of the Republic has to adopt the Statute of the Commissioner, i.e., to establish the organisation of the activities of the Commissioner and his or her Office.

²¹ K. Leppik, *Võrdõiguslikkuse volinik: palju jäi tegemata* (The Equality Commissioner: a lot remained undone), Postimees, 14.08.2010. Available on <http://www.postimees.ee/?id=299797>, accessed on 11 November 2010.

²² R. Sulbi, *Sepper: kandideerisin volinikuks selge visiooniga* (Sepper: I ran for the office with a clear vision). – Postimees, 28.09.2010. Available on <http://www.postimees.ee/?id=319212>, accessed on 11 November 2010.

²³ *Sepper: Eesti erakonnad on valmis kvoote rakendama* (Sepper: Estonian parties are ready to use quotas) – Postimees. Available on <http://www.postimees.ee/?id=321594>, accessed on 11 November 2010; R. Sulbi, *Sepper: kandideerisin volinikuks selge visiooniga* (Sepper: I ran for the office with a clear vision). – Postimees, 28.09.2010. Available on <http://www.postimees.ee/?id=319212>, accessed on 11 November 2010.

²⁴ The regulation of the Government of the Republic of 10 June 2010, No. 71 'The Statute of the Gender Equality and Equal Treatment Commissioner and the Chancellery', RT I 18.06.2010, 33, 170.

The Statute regulates the issues concerning the organisation of the work of the Commissioner and specifies the tasks to be carried out by the Commissioner when supervising the fulfilment of the requirements of the Gender Equality Act and the Equal Treatment Act.

Article 4(1) of the Statute stipulates that the activities of the Commissioner and his or her Office are financed by the state budget and these expenses are provided for in the budget of the Ministry of Social Affairs as a separate item.

Article 7 of the Statute specifies the duties of the Commissioner when implementing the requirements of the Gender Equality Act and the Equal Treatment Act. According to Article 7, the Commissioner has to collect and analyse data from state and local government institutions, educational and scientific institutions, training establishments and employers as to how they have implemented the Act; collect and analyse data regarding violations of the principle of gender equality and discrimination on other grounds as set out in the Equal Treatment Act and how such cases have been resolved; collect and analyse data from employers about promoting the principle of equal treatment; collect other information of a legal and social nature which relates to the implementation of the equal treatment principle; and to monitor how the principle of equal treatment of men and women is being followed in the media, particularly regarding employment and training advertisements.

Article 8 of the Statute regulates the procedure of issuing an opinion as to whether the principle of equal treatment has been followed; Article 9 deals with the method of analysing the effect of legislative Acts; and Article 10 concerns the promotion of gender equality and the principle of equal treatment.

Miscellaneous

Gender equality in Estonia in 2009

The Ministry of Social Affairs has published a study regarding the gender equality situation in Estonia in 2009.²⁵ In the course of preparing the study, 1 517 persons between the ages of 15 and 74 were questioned. The study revealed the following results.

Almost half of the population considers that men have a better position in society. The highest percentage of respondents who thought this was among women aged between 30 and 39 (this group also had the highest gender pay gap and experienced the highest burden of domestic responsibilities and limitations arising from raising children).

The majority of respondents thought that gender equality was also useful for men. More than half of the respondents thought that men have better opportunities in their working life. At the same time, women view the chances for women in working life as lower than those of men. Discrimination in working life appears more often in relation to pay and pay rises. In comparison with the results of the study carried out in 2005, several changes have taken place. The opinion that men prioritise their careers more often than women is no longer so prevalent among both men and women; the proportion of men who think that the work of women is less valuable has decreased. Women experience difficulties with regard to reconciling work and family life more often than men. Interest in part-time work is high among women (43 % of women, both working and not working), but in reality part-time work is not common, not only

²⁵ Available online (in Estonian): http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised_20101.pdf, accessed on 11 November 2010.

because of the traditions of work arrangements but also because of the low level of salaries. It appears that employees perceive that employers are very resistant to the concept of working part-time. Women considered more often than men that it is difficult to work or study outside regular working hours, or participate in employment trips or training lasting longer than one day because of family commitments.

Half of the respondents agreed that it would be useful for companies if more women were involved in management positions. At the same time, 43 % of the respondents said that men are better leaders than women. A greater proportion of women than men have confidence in the ability of women to work as a leader.

The study revealed that gender based division of work still exists in families, and women do the majority of domestic household work. More women than men consider that they have to do too much of the domestic work – almost every second woman states that she has often or sometimes too heavy a burden of domestic work, whereas only every seventh man considered the same about himself. The results revealed that non-Estonians shared the more traditional viewpoints about domestic division of work. These results correspond to the results of the 2005 study.

More men than women agreed with the opinion that men are the main breadwinners and women should be responsible for domestic work. More women than men were of the view that economic independence is as important for women as for men, and women are able to fulfil positions that require technical knowledge as successfully as men. However, the majority of men and women agreed with the opinion that men should be more involved in taking care of and raising children. The study revealed the main reason of tension within families is the division of resources, time and domestic work.

Taking into account the amount of women in Parliament and Government, politics tends to be men-centred. However, in comparison with the 2005 study, more men and women support the view that more women should participate in politics.

FINLAND – Kevät Nousiainen

Policy developments

Action plan to reduce violence against women

Violence against women has been much in focus in Finland during this year. The prevalence of violence in general, and of gendered violence, is recognised as a problem. An action plan to reduce violence against women was recently drafted²⁶ in cooperation with several Ministries (the Ministry of the Interior, the Ministry of Justice, the Ministry of Social Affairs and Health, and the Ministry for Foreign Affairs). The work was coordinated by the National Institute for Health and Welfare, which has been nominated as the responsible national body on the issue. The present Government decided to introduce such an action plan as a part of its gender equality programme for 2008-2011, but drafting of the plan took two years, and the action plan was first accepted by the Ministries involved only in June 2010. In practice, implementation of the plan will be postponed until after the Parliamentary election in 2011.

Many experts consider violence against women to be the most severe gender equality problem in Finland. International human rights bodies have also paid attention

²⁶ Naisiin kohdistuvan väkivallan vähentämisen ohjelma. Sosiaali- ja terveysministeriö, Julkaisuja 2010:5, Helsinki 2010.

to the problem. The United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), in its concluding observations concerning Finland's fifth and sixth periodic reports in 2008, requested Finland to provide information on how the recommendations concerning violence against women had been implemented, and to put in place a comprehensive action plan to prevent such violence.²⁷ In August 2010, Finland provided the requested information,²⁸ listing measures undertaken by the Finnish Government. The Government referred to a number of Government programmes that have addressed the issue since 2003, but noted that the level of violence has not been reduced. Victimisation surveys show no significant changes in the extent to which women face violence. The CEDAW Committee noted that conciliation in cases of crimes of violence may lead to revictimisation of women. Also, the Committee noted that the number of shelters for victims of violence, their geographical distribution and resource allocation were insufficient, and services for victims of violence were scarce.²⁹

The CEDAW Committee's observations reflect the fact that, although a number of previous national action plans and campaigns have paid some attention to the issue of violence against women, they have not focused on the problem on a broad basis. Various studies show that violence against women has not been reduced. On the contrary, sexual violence and violence by ex-partners seems to have increased³⁰ under the various programmes aimed at the reduction of such violence. Previous programmes were also evaluated in a study undertaken as part of the preparation of the Government report to Parliament on the impact of gender equality policies of the last ten years, which is to be presented to Parliament this autumn. The study showed that an increase in services for victims of violence, a priority in several of the programmes, has not taken place. The quantity and quality of services offered by authorities and non-governmental organisations varies, and immigrants and other minorities are not provided with services.³¹ The present Government's Internal Security Programme for 2008-2011, for example, proposes the reinforcement of victim support services such as shelters and victim helplines, but the impact has been very limited. The recently launched action programme aims at a more coordinated policy, and directs responsibility for measures to various branches of the administration.

Services for the victim, preventive measures and similar policies are certainly important in addressing violence against women. However, criminal law measures, while the method of last resort, are also a necessary means of combating violence. Criminal law response to the problem of violence has not been a priority in Finland. The 2009 European Parliament resolution on the elimination of violence against women urged Member States to ensure that sexual violence and rape result in automatic

²⁷ Examination of the fifth and sixth periodic reports of Finland, 9 July 2008.

²⁸ Information provided in the follow-up to the concluding observations of the Committee on the Elimination of Discrimination against Women, Finland, CEDAW/C/FIN/CO/6/Add.1, 10 August 2010.

²⁹ Committee on the Elimination of Discrimination against Women, follow-up/41/FIN/46, 25 August 2010.

³⁰ Piispa, M. 'Parisuhdeväkivalta' in: M. Piispa, M. Heiskanen, J. Kääriäinen and R. Sirén (eds.) *Naisiin kohdistunut väkivalta 2005* Helsinki, HEUNI Publication Series No. 51, 2006. Sirén, R. 'Parisuhteen ulkopuolinen väkivalta', in Piispa, Heiskanen, Kääriäinen and Sirén (eds.) *op. cit.* Sirén, R. and Kääriäinen, J. *Suomalaisten kokema väkivalta 1980-2009*. Kansallisen uhritutkimuksen tuloksia. Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 219, Helsinki 2010.

³¹ Riski, T. *Naisiin kohdistuva väkivalta ja tasa-arvopolitiikka*. Sosiaali- ja terveysministeriön selvityksiä 2009: 50, Helsinki 2009.

prosecution under the criminal law.³² In Finland, at present, the public prosecutor may not bring charges for petty assault, unless the injured party reports the offence. Certain sex crimes, such as rape committed under mitigating circumstances, will not be prosecuted unless the victim starts prosecution proceedings, or a very important public interest requires that charges are brought. The action plan to reduce violence against women requires that several criminal law provisions, including those on prosecution, should be reassessed. The emphasis of the policies to reduce violence against women so far has been largely on 'softer' measures, most often supervised by the Ministry of Social Affairs and Health. The present action plan lists a number of criminal law measures to be carried out by the Ministry of Justice. Violence against women is, according to the recent Special Eurobarometer 344 on violence against women, more common in Finland than in most Member States, but punishing the perpetrators or stricter legislation in general are not seen as appropriate measures against it.³³ Pressure from human rights bodies and EU comparisons seem to have an effect on policy consideration.

Report on impact of gender equality policies

The Government report to Parliament on the impact of gender equality policies during the last ten years is to be finalised in October, and should be presented to Parliament soon after. The report contains a number of policy recommendations, which should have an impact on policies formulated for and after the Parliamentary election in April 2011.

FRANCE – Sylvaine Laulom

Policy developments

The general reform of pensions, aiming to lower the financial burden of pensions, has finally been adopted.³⁴ The main provision of the reform is the extension of the statutory age for entitlement to an old age pension from 60 to 62, a stage that will be reached gradually. The legal age is when one is able to claim pension, whether all the contributions have been met or not and it is a legal right. The minimum years of contribution which give the right to a full pension are also increased from 40.5 years to 41 in 2012 and to 42 thereafter. The age of entitlement to a full pension (that is, a pension without deductions) will also be progressively raised to 67 from 65.

It is obvious that the law will have negative consequences for women. As women are usually working and contributing less than men because of part-time work and because of interruptions to their careers, the increase of the minimum years of contribution will automatically affect women more than men. However, there are only three measures in the law taking into account the specific situation of women and they are not sufficient to improve the pensions situation of women, while the reform could threaten their already inadequate pension rights.

First, the daily maternity allowance received by women when they are on maternity leave will be taken into account when calculating their pension rights. Second, the age of entitlement to a full pension will stay at 65 for the parents, born between 1 July 1951

³² The European Parliament Resolution of 26 November 2009 on the elimination of violence against women.

³³ Domestic Violence against Women. Special Eurobarometer 344, September 2010.

³⁴ Loi No. 2010-1330 du 9 November 2010 portant réforme des retraites.

and 31 December 1955, of three children. This specific right will be granted to the parent who has interrupted or reduced her/his career to raise their children. A similar rule will apply to the parents of a disabled child. The third provision regards the gender pay gap. The idea is that a stricter policy on the gender pay gap will contribute to the reduction of wage differences and thus will have positive consequences on the level of women's pensions. The labour code already provides an obligation to negotiate on sex equality and equal pay at enterprise level. Thus every year, at company level, the employer has a duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to attain these objectives. If an agreement is reached, the obligation to negotiate will only apply every three years. The employer must also give information to workers' representatives on equality. Employers in enterprises with at least 50 employees must present to the works council, each year, a written report on the comparative situation of men and women in the enterprise. The report must contain a comparative analysis between men and women in terms of recruitment, training, qualification, pay, working conditions and balance between professional and private life. The new law on pensions provides that the report must now contain an 'action plan' to insure occupational equality between women and men. This plan must be based on clear, precise and operational criteria and must define the objectives for the year to come and the necessary actions to reach these objectives. The most important measure of the pension law is that sanctions are now prescribed for when enterprises employing at least 50 employees have not concluded any agreement on sex equality or have not produced an 'action plan'. The sanction provided by the law is a fine of a maximum of 1 % of the wages due to the workers during the period when an agreement should have applied. A decree must now be adopted to determine more precisely the sanction that will take into account the efforts made by the enterprise to reach equality objectives and the reasons why no agreement or action plan have been concluded. Enterprises now have until 1 January 2012 to comply with these new obligations. A decree must also be adopted to define the content of the action plan.

The pension reforms have met with strong opposition from all trade unions, with strikes and massive street protests. If, at the beginning of the debate, the gender consequences of the reform were highlighted by only a few commentators, this issue has become the one central argument of the numerous opponents of the reform. In a recent deliberation,³⁵ the Haute Autorité de Lutte contre les Discriminations et pour l'Égalité (HALDE) held that the reform will have much greater negative consequences on women than on men and asks for positive actions to improve the situation of women in the labour market, particularly concerning the gender pay gap. The HALDE also held that better account should be taken of the situation of women in the pensions system in order to improve their pension rights. The members of the Observatory of parity between women and men (Observatoire de la parité entre les femmes et les hommes) also want Parliament to pay attention to the possible indirect discrimination that can be found in the reform and they fear that the sanctions provided are not precise enough. However, the Constitutional Court has approved the law and found that the equality principle was respected as the law specifies the same rules for women and for men³⁶. The Constitutional Court adopted, in its decision, a very formal interpretation of the principle of equality between women and men and it did not take into account the fact that the law will have more negative effects on women than on men.

³⁵ Délibération No. 2010-202, 13 September 2010.

³⁶ Décision No. 2010-617 DC du 9 November 2010.

Legislative developments

The law prohibiting women from wearing the niqab or the burka in public places has been adopted. The Act prohibits the wearing of clothes that hide the face in public places. The Act provides for a fine and/or a citizenship course. The Act also provides that anyone convicted of forcing someone else to hide her/his face because of her/his sex risks one year in jail and a EUR 15 000 fine. The presidents of the National Assembly and of the Senate have referred the Act to the Constitutional Council which now has to decide if the law is constitutional. Indeed it is possible to argue that the general prohibition could be contrary to the individual freedom of every woman. In any case the law will be very difficult to implement.

The law on domestic violence against women was adopted in July.³⁷ The law establishes some new measures of protection and prevention. One of the most innovative parts of the law regards the ban on psychological violence in couples. The law applies to married and cohabiting couples and to both men and women. The law is expected to cover every kind of insult. The French Prime Minister, Francois Fillon, who announced the law, said: 'The creation of this offence will allow us to deal with the most insidious situations - situations that leave no visible scars, but which leave victims torn up inside.' However, this offence will be very difficult to prove and this provision will be difficult to implement.

Case law of national courts

In 2008, the Cour de cassation seemed to adopt a restrictive approach to the application of the principle of equal pay for equal work.³⁸ In this case, the Cour de cassation appeared to refuse to compare women's work with men's work when their jobs were not the same. In a decision of July 2010,³⁹ the Cour de cassation clarified its position. The Cour de cassation held that if the jobs of the workers are different, it is necessary to consider if the jobs are similar (in terms of responsibilities, work, etc.). If they are, then workers of both genders should be paid the same. This decision has been interpreted as reinforcing women's rights and could lead to better control of the gender pay gap.

Another recent decision of the Cour de cassation shows the influence of European legislation (here Directive 92/85) on the interpretation of French rules. The case concerned the dismissal of a woman just after the end of her maternity leave pregnancy leave (two days after) and the name of her successor had already appeared in the organisation chart of the company. For the Cour de cassation, a dismissal during maternity leave is forbidden and an act preparatory to dismissal is also prohibited during maternity leave, and it is necessary to check if the hiring of a worker during this period was aimed at replacing the pregnant woman.

Miscellaneous

The annual report on collective bargaining in France was published in June and it gives the general figures on collective agreements concluded in the previous year.⁴⁰ There is, in France, an obligation to negotiate on the gender pay gap, and the 2006 Act specifies that the gap must disappear before 31 December 2010. The annual report gives some

³⁷ Loi No. 2010-769 of 9 July 2010.

³⁸ Cass. Soc. 26 June 2008, No. 06-46204.

³⁹ Cass. Soc. 6 July 2010, No. 09-40.021.

⁴⁰ Ministère du travail, *La négociation collective en 2009, Bilan et Rapport*, 2010.

indication of the consequences of the law. Like the previous ones, this report indicates that the 2006 Act has brought an increase in the number of collective agreements concluded on equality. However, there are still few agreements concluded on this issue and, according to the report, the objectives defined in the 2006 Act have not been reached. The content of the agreements also varies and many of them just vaguely refer to equality between men and women in the context of a general agreement on wages. Thus from 68 agreements dealing with wages, 50 just refer in passing to the legal principle of equal pay, 10 refer to collective agreements at works level to resolve the gender pay gap, and only 10 undertake an investigation of the situation and set out some concrete measures. However, there is a small increase in good practices in the collective agreements concluded.

GERMANY – Beate Rudolf

Policy developments

The Minister for Families, Senior Citizens, Women and Young People announced that she would develop the ‘classical’ politics of gender equality into politics of equal chances that take into account the needs of both sexes. For this reason, and in light of boys’ markedly lower rate of success in education, she set up a unit for men’s and boys’ equality (*Gleichstellungspolitik für Jungen und Männer*) and an advisory council on boys’ politics (*Jungenpolitik*). Women’s organisations criticised this development because it is not accompanied by noticeable activities to combat women’s persistent inequality.

The Ministry also introduced a programme to support women’s re-entry into the labour market after family-related withdrawal from employment. The programme comprises, amongst other things, information centres, financed through the European Social Fund, information provided through a website and information days, and is accompanied by empirical research.⁴¹

Legislative developments

The Federal Parliament adopted an amendment to the law on statutory health care systems according to which the contribution deducted from an employee’s salary rises to 15.5 % (as compared to 14.9 % currently).⁴² In addition, the contribution is no longer borne equally by the employer and employee; instead, the employer’s share is fixed at 7.3 % and employees have to pay 8.2 %. Future increases of the expenses of health care systems will be borne solely by the employees through the payment of an additional contribution (*Zusatzbeitrag*). If that contribution exceeds 2 % of an employee’s income, he/she can get a reduction of the general (income-related) contribution. The German Women Lawyers’ Association criticised this solution as indirectly discriminating against women:⁴³ because of the persistent large gender pay gap, disproportionately more women than men will be affected by the additional contribution.

⁴¹ Links to all elements available at <http://bmfsfj.de/BMFSFJ/gleichstellung.did=108550.html>, accessed on 14 November 2010.

⁴² Documents of the Federal Parliament (*Bundestags-Drucksache*) No. 17/3040 of 28 September 2010, <http://dip21.bundestag.de/dip21/btd/17/030/1703040.pdf>, accessed 14 November 2010.

⁴³ Press release of 22 September 2010, http://www.djb.de/Kom/K4/PM10-26_GKV, accessed on 14 November 2010.

The Government introduced a draft law that would make forced marriage a criminal offence on its own.⁴⁴ So far, forcing another person into marriage is punishable as coercion (*Nötigung*). The purpose of making forced marriage a separate criminal offence is to clearly mark its punishable character. This legislative proposal came in the wake of a heated public debate on integration of migrants, which, amongst other things, focused on migrants refusing to integrate (*Integrationsverweigerer*). Thus, the timing of the law (whose enactment had been requested by women's organisations for quite some time) is questionable, as it may primarily reinforce anti-migrant stereotypes.

Case law of national courts

Federal Labour Court (Bundesarbeitsgericht), decision 7 ABR 103/08 of 23 June 2010

The decision concerned the question of whether an employer is obliged to pay for child care for a member of the workers' council (*Betriebsrat*) when that member participates in meetings of the workers' council. The Federal Labour Court held that these expenses were costs that a member of the workers' council was allowed to deem necessary for the fulfilment of his/her duties, if they were incurred for times outside the ordinary working hours of that employee. Pursuant to Section 40(1) of the Law on Workers Councils (*Betriebsverfassungsgesetz*), the employer has to bear such necessary costs. The Court considered that the employer had to reimburse expenses that became necessary because the workers' council meeting required its members to be away from their families for several days. Under these circumstances, the employee's duty to care for his/her children under Article 6(2) of the Basic Law (the German Constitution, *Grundgesetz*), which is concomitant with parents' right to care for their children, clashed with his/her duties as a member of the workers' council. In this situation, the member of the workers' council must not suffer a financial loss if he/she fulfils his/her duties under (collective) labour law.

The case is important from a gender equality perspective although it does not refer to the principle of gender equality. Since women constitute the vast majority of single parents, not reimbursing them in a situation as described would in fact disadvantage them as members of workers' councils. The judgment protects them against indirect discrimination.

Miscellaneous

Study on women in decision-making positions

The Institute for Labour Market and Occupation Research (*Institut für Arbeitsmarkt- und Berufsforschung*, IAB) of the Federal Agency of Employment (*Bundesagentur für Arbeit*) published a study on women in decision-making positions in the private sector.⁴⁵ According to its findings, the percentage has remained stable at about 25 %. Women business leaders can mainly be found in small enterprises and in sectors where women constitute a large percentage of the employees, with the exception of the financial sector and insurance companies. The study concludes that in the future the effectiveness of the Government's plan to increase the number of women in decision-making positions must be shown by introducing reporting obligations and by improving

⁴⁴ Documents of the Federal Council (*Bundesrats-Drucksache*) No. 704/10 of 5 November 2010, available at www.bundesrat.de, accessed on 14 November 2010.

⁴⁵ IAB-Kurzbericht 6/2010, <http://www.iab.de/194/section.aspx/Publikation/k100412a01>, accessed on 14 November 2010.

the transparency of voluntary commitments. However, there is reason for scepticism given the lack of effectiveness of the political agreement for the promotion of gender equality in the private sector entered into by the Federal Government and the principal associations of German industry (*Spitzenverbände der deutschen Wirtschaft*) in 2001 (see *European Gender Equality Law Review* No. 1/2010).⁴⁶

Quota for Women within the Christian Social Party (CSU)

The Christian Social Union (*Christlich Soziale Union, CSU*) decided to introduce a quota of 40 % for women in its local bodies (*Bezirksvorstände*) and its executive committee (*Parteivorstand*). The CSU is the conservative party in Bavaria and the sister party of the Christian Democratic Union (*Christlich Demokratische Union, CDU*), with which it forms a single faction within the Federal Parliament (*Bundestag*). The decision was taken by the party convention on a proposal by the party leadership. The step was strongly contested among the party members. Younger party members, in particular women, were against a quota. Proponents pointed to the fact that, in past elections, the party had lost disproportionately highly among the female electorate. After this decision, the Liberal Party (*Freie Demokratische Partei, FDP*) is the only party among the big political parties not to have introduced a quota for women.

GREECE – Sophia Koukoulis-Spiliotopoulos

Policy developments

Currently, the imminent local government elections, in conjunction with recent local government reform, are important subjects of political, social and legal debate in Greece.

In Greece, there are two levels of local government. The first level consists of municipalities and the second of regions. Until this year, there were 1 035 municipalities and 52 regions. By virtue of Act 3852/2010 ‘new architecture of local government and decentralised government – Kallikrates programme’, an important local government reform was introduced. The municipalities were merged and reduced to 325 and the regions to 13, while the competences of both municipal and regional authorities were widened. Act 3852/2010 also contains provisions regarding local government elections, including provisions on gender quotas. It is on the basis of this Act that the local government elections will take place on 7 November 2010.

Legislative developments

The constitutional framework: positive measures are a ‘must’

In Greece, positive measures are not merely allowed; they are *required* by the Constitution, in particular in favour of women, in all fields. The Constitution has always contained a general provision requiring equality for all Greeks before the law (Article 4(1)), which, however, proved insufficient to eradicate gender discrimination and ensure equal rights for men and women. In 1975, on the occasion of a constitutional revision, a specific gender equality provision was introduced into the Constitution, as a result of a big campaign by women’s NGOs. The provision states that: ‘Greek men and

⁴⁶ The European Gender Equality Law Review (EGELR) is available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 15.11.2010.

women have equal rights and obligations' (Article 4(2)). This provision was, however, combined with another one, which allowed derogations 'for sufficiently justified reasons, in cases specifically provided for by statute' (Article 116(2)).

In a landmark judgment, the Council of State (the Supreme Administrative Court),⁴⁷ also invoking Directive 76/207⁴⁸ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), held that Article 4(2) guarantees not only formal, but also substantive gender equality, and that positive measures in favour of women are necessary in order to remedy their inferior position in society. Following that judgment and a new campaign by women's NGOs, the original provision of Article 116(2) was replaced in 2001 by a provision whose wording was proposed by the Greek League for Women's Rights and was supported by many women's NGOs.⁴⁹ This provision reads: 'Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities which exist in practice, in particular those detrimental to women.'

Gender quotas in local government elections

The first positive measure in the field of politics was a gender quota requirement regarding local government elections. Article 75 of Act 2910/2001 required that: 'The number of candidate members of local government councils of each sex shall correspond to at least one-third of the total number of candidates appearing on each ballot.' This meant that, at least one-third of the candidates appearing on each ballot should belong to one sex.⁵⁰

It should be noted that the candidates in local government elections (as also in parliamentary elections) appear on a ballot paper on which the voter chooses his/her preferred candidate by placing a cross beside that candidate's name. Thus, the number of women elected depends finally on the voters' choice and the support of the party. The first positive measure was applied in two local government elections (in 2002 and 2006) with the result that female members of local government councils increased.

Articles 18(3) and 120(3) of Act 3852/2010 contain a modified version of the gender quota. Instead of corresponding to the number of *candidates* on each ballot, the one-third quota must now correspond to the number of *members* of the municipal or regional authorities to be elected.

NGOs complain about regression

The Greek League for Women's Rights, considering that the new quota provisions constituted regression in comparison with the previous provisions, took the initiative to complain to the competent Minister, i.e. the Minister of the Interior, Decentralisation and Electronic Governance. The complaint,⁵¹ which was also sent to other competent

⁴⁷ Council of State judgment No. 1933/1998 (Full Court).

⁴⁸ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39 of 14 February 1976, p. 40.

⁴⁹ On the contribution of women's NGOs to constitutional developments, see S. Koukoulis-Spiliotopoulos, 'Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships', *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008 pp. 74-82.

⁵⁰ This is the interpretation given to this provision by the Council of State. See e.g. Council of State judgment No. 1667/2009.

⁵¹ See the text of the complaint on the website of the Greek League for Women's Rights: www.leaguewomenrights.gr, accessed on 12 October 2010.

authorities and all political parties, was supported by twenty-one leading women's and mixed NGOs. The main points of the complaint are as follows:

It is recalled that Article 116(2) of the Constitution requires that the legislator and all other state organs take positive measures, including positive quotas in favour of women regarding access to elected posts, with the aim of promoting real gender equality. This is acknowledged by well-established case law of the Council of State (Supreme Administrative Court). The Council of State also acknowledged that it is the quotas which correspond to the number of candidates that serve the constitutional aim of the quotas, namely, substantive gender equality. Quotas which correspond to the number of members of municipal and regional authorities lead to a reduction of the proportion of women members of these authorities. This is because, according to the law, each ballot may contain a number of candidates which is up to 50 % higher than the number of persons to be elected. Thus, instead of advancing gender equality in practice, as required by the Constitution, the new gender quota provisions lead to its shrinking. Consequently, Articles 18(3) and 120(3) of Act 3852/2010 run counter to the letter and the aim of Article 116(2) of the Constitution.

The complaint also recalls that positive measures are required by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which has been ratified by Greece. The CEDAW, as any other ratified international convention, prevails, according to the Constitution (Article 28(2)), over any conflicting provision of domestic legislation. As a result of their unconstitutionality and their conflict with the CEDAW, the above provisions of Act 3852/2010 are invalid and any administrative act based on them will be subject to annulment. It is also recalled that, as Greece has ratified the Optional Protocol to the CEDAW, victims of breaches of this Convention can have recourse to the CEDAW Committee.

Case law of national courts

The Council of State, interpreting Article 116(2) of the Constitution in the light of the CEDAW and the Covenant on Civil and Political Rights, held that this provision requires the legislature and all other state authorities to take those positive measures in favour of women that are necessary for and pertinent to achieving real gender equality in all cases where women are in an inferior position. It thus confirmed the constitutionality of the positive measure regarding local government elections, and held that it was necessary, in view of the under-representation of women in this field, that measures appropriate for achieving the constitutional goal of substantive gender equality, and proportionate to this goal, be taken. These judgments concern the first and second local elections held after the relevant positive measure was introduced.⁵²

It results from this case law that it is not sufficient for positive measures to be taken in areas where women are in an inferior position. In order to be in conformity with the constitutional requirement, these measures must also be appropriate to bring about the desired result, i.e. a significant improvement of the position of women in the particular area.

Whenever it found that a ballot used in local government elections did not contain the required gender quota, the Council of State annulled the act proclaiming the results of the elections in the particular municipality or region. This means that the elections had to be repeated, with lawful ballots being used.

⁵² Council of State judgment Nos. 2831, 2832, 2833/2003, 192/2004, 2388/2004 (for the first elections); 1667/2009.

Policy developments

After the expected extensive victory of the conservative middle-right FIDESZ-Hungarian Civic Union, in alliance with the small Christian Democratic Party, at the national Parliamentary elections in April 2010, they can govern the country relying on a comfortable two-thirds majority in Parliament. The spring Parliamentary elections were followed by local elections on 3 October 2010 bringing again a sweeping victory of FIDESZ candidates in the local and county governments. Between the two elections, the Government was engaged in making an inventory of and reacting to inherited problems and preparing for the local elections. Besides a few symbolic radical legislative steps, the real direction of the Government will be seen only after the local elections. It is already apparent that opposition parties in Parliament will not have much say in the upcoming legislation and similarly the industrial representative organisations (trade unions, employers' associations) should not expect any significant role regarding future Government measures.

One thing seems clear: the new Government is committed to family-friendly policies in order to reverse the dramatic demographic trends which have brought the Hungarian population to below ten million. Whether this will be carried out only by financial means (tax deduction for child raising, extra financial support) or also by labour market means to promote equal opportunities for workers with family obligations, has yet to be seen. Regarding the equality of women and men, there have been mixed signals from the Government so far. The imbalance in equality issues seems to continue: gender equality is not treated as a problem in comparison with the dramatic inequality of the Roma population and the situation of the disabled

Legislative developments

No significant legislation or administrative regulation has been adopted in the last half year regarding gender equality. The legislative acts cutting childcare leave radically and increasing pre-conditions for entitlement⁵³ that entered into force from 1 May 2010 have not yet been abolished in spite of the heavy criticism and promises made by the current governing party.

An amendment to the Equality Act⁵⁴ converts into an obligation the existing possibility of local governments adopting a local equality programme. In the future, successful application for budgetary and European financial resources will be dependent on the existence of a local equality programme complying with the requirements of the Equality Act. Although women are mentioned as a group whose equal opportunity has to be improved, the emphasis is on the Roma who live in severe poverty in many regions. The constitution and supervision of such a programme has to be undertaken with the participation of a registered 'equality expert', whose status and registration receives detailed and complex regulation in this amendment. Their training has just started; the outcome and result of such a legislative change has yet to be seen.

The amendment of the Act on the Support of Families has been passed and the former uniform family allowance is now divided into two different kinds of benefits, without any difference in their amount. The allowance paid with regard to pre-school

⁵³ *European Gender Equality Law Review*, no. 2/2009.

⁵⁴ Act CIX of 2009, inserting a new Section 63/A.

age children is called ‘nursing allowance’, and that with regard to school-age children is called ‘schooling allowance’. The difference in the name is to indicate that the latter implies the duty of the parent to ensure regular school attendance by the child. Payment of the allowance is suspended if the child misses more than fifty teaching hours from school without justification. In such a case a temporary custodian is designated for the child and for the neediest children the allowance is provided in kind.

Case law of national courts

Reconciliation of private and workplace life

The Supreme Court found unlawful the summary dismissal of an employee for refusing an assignment from her employer. The employee, who was ordered to work 200 days abroad, suffered from some health problems (not affecting working capacity), and in addition she had to take care of her elderly mother. The employee refused to accept the terms of the assignment and the employer reacted with a summary dismissal for serious misconduct. In the view of the Supreme Court, the action of the employer, by not taking into consideration the personal circumstances of the employee and sending her abroad for more than six months, was an obvious violation of the obligation to act and cooperate with one another in compliance with the principle of good faith and fairness. The Supreme Court invalidated the summary dismissal and awarded full back pay for the litigation period, and other due payments, including damages.⁵⁵

Equal Treatment Authority

Dismissal of pregnant woman during probationary period

A woman, employed as a shop assistant, realised she was pregnant immediately after entering employment for a probationary period. She had not reported this to the employer but one day the superior asked her whether she was, indeed, pregnant. The employer dismissed her a few weeks later, still during the probationary period when no reasons for the dismissal had to be given. The employee lost employment and thereby lost entitlements to certain benefits. The employee turned to the ETA and claimed that the reason of the termination was her pregnancy. The employer asserted that the reason was not the pregnancy but inappropriate work performance. Since the employer could not present convincing evidence of the unsuitable work of the employee, the ETA found discrimination based on the facts that the employer had asked a prohibited question and had then dismissed the woman after she admitted to her pregnancy. The Authority imposed a fine of about EUR 2 000 and declared illegal such conduct in the future.⁵⁶ (Reinstatement and compensation was not awarded, in the absence of such power of the ETA.)

In another case, when the pregnant woman was dismissed during a probationary period immediately after announcing her pregnancy upon return from sick leave, the Authority accepted the defence of the employer that the intention to terminate the employment had arisen during the employee’s sick leave, prior to her announcement of

⁵⁵ Supreme Court Mfv. I. 10.431/2008. Published: BH 2010/195 (a compendium of selected court decisions).

⁵⁶ EBH 122/2010.

the pregnancy. This was evidenced by internal e-mail correspondence. The Authority thus rejected the claim and found the dismissal lawful.⁵⁷

Hiring practices

There were several cases when there was a manifestly discriminatory intent on the side of the employer; however, apologies and promises seemed sufficient to justify closing the case with or without an agreement by the parties. A slight concern arises regarding the future of the complainant or the future conduct of the employer.

A job advertisement offered a job in a pizzeria-bar for ‘young’ ‘girls’, ‘ladies’ as servers. When the ETA – on a claim from an NGO – initiated a procedure against the employer, the employer defended itself by claiming a lack of discriminatory intention evidenced by the fact that it had a mix of employees of different ages. The employer promised increased attention in the future to avoid such incidents and the case was closed with an agreement.⁵⁸

A woman applying for an advertised cashier’s position at a chain of department stores was rejected at the time of the first interview when she declared that she was raising two children. The local manager handed back the application and refused to forward it to the company management. Upon her complaint the employer defended itself by claiming that 40 % of its employees were raising children; thus it could not be accused of discriminating against child-raising mothers. Then the employer offered a meeting to the complainant and promised to hire her in the future. Based on this information and promise, the ETA terminated the procedure.⁵⁹

Benefits during maternity leave

An employee was deprived, during maternity leave and childcare leave, of different fringe benefits (such as Christmas bonus, contribution paid to the voluntary pension fund and her meal vouchers were not granted for the period of the annual leave⁶⁰) that were paid to other workers. The employer defended itself with reference to the long (more than 30 days) absence of the employee; claiming that the withdrawal of the benefits was justified because they were granted with regard to work performance and the absent employee had not been working. In the procedure before the Authority, it was revealed that the same benefits were provided to employees who spent long periods on sick leave during a year. The Authority accepted the employer’s defence only in respect of the voluntary pension fund contribution, in respect of the other benefits it found that the disadvantage to the woman occurred due to her maternity, thus it was unlawful discrimination. The decision reflects the uncertainty about the assessment of the spreading habit of employers of conditioning a growing proportion of payments and benefits on the effective presence at the workplace having a discriminatory effect on those who use their statutory rights to be off for family reason.

⁵⁷ EBH 163/2010. In this case some questions remained, even if the reliability of the evidence is not questioned: if the absence of the employee prompted the employer to dismiss the employee, and the sick leave was caused nonetheless by the pregnancy.

⁵⁸ EBH 561/2010.

⁵⁹ EBH 871/2010.

⁶⁰ It is a frequent complaint by women returning from child care leave that when – before resuming work they take the accumulated annual leave, meal vouchers are not provided for that period, while in other cases workers receive the vouchers also for the period of the leave.

Policy developments

The financial budget of 2010 was presented to the National Parliament (*Althingi*) on 1 October 2010. The principal objective, according to the fiscal plan, is for the National Treasury to be able to withstand shocks resulting from the economic collapse so as to maintain necessary social and welfare services. There will, however, be cuts in the Maternity/Paternity Leave Fund which will spend ISK 1 billion (EUR 6.4 million) less in 2011.⁶¹ The execution of this plan will probably be in the form of special restraint measures involving curtailing the leave period, reducing maximum payments or lowering the calculated proportion of grants. Which of these measures will be taken will be decided during the parliamentary session in the coming weeks. There are, however, also plans to increase payments to parents on the very lowest wages and especially to the unemployed (an increase of ISK 75 000 000 (EUR 480 000)).⁶²

According to a recent news broadcast, fewer men are taking advantage of their right to three months paid paternity leave since the financial collapse in the autumn of 2008.⁶³ According to the law on Maternity/Paternity Leave and Parental Leave,⁶⁴ parents each have an independent right to maternity/paternity leave of up to three months due to a birth, primary adoption or permanent foster care of a child. This right is not assignable, i.e. it cannot be transferred from one parent to the other. The main reason for the decreasing interest of men in this respect is the ceiling on maximum payments. Since the end of 2008 the maximum payments from the Maternity/Paternity Leave Fund have been cut three times. The maximum payment from the Fund by the end of 2008 was ISK 536 000 (EUR 3 442) and is now ISK 300 000 (EUR 1 927). In the year 2008, around 10 400 men exercised their right to use paternity leave, while the forecast now is that around 9 800 men will be taking the leave. This year the expectation is that around 19 400 women will be taking maternity leave.

The Ministry of Social Security has introduced recommendations to improve the registration of incidents of domestic violence, to increase the understanding of professionals dealing with domestic violence and to come up with remedies. These are the results of two research projects undertaken for the Ministry of Social Sciences by the Research Institute in Child and Family Protection at the University of Iceland.⁶⁵ The research is part of the Government's initiative to prevent domestic and sexual violence. The main findings are that registrations in the health care system do not provide sufficient evidence on the frequency of domestic violence nor whether the incidents of such violence are growing or decreasing. It is pointed out that there are no standard operating procedures on how to handle a situation where a woman reports that she has suffered domestic violence. The question was also raised as to whether it should become standard procedure to ask a pregnant woman whether she has suffered domestic violence.

Case law of national courts

No recent case law to report on gender equality.

⁶¹ <http://www.althingi.is/alttext/139/s/pdf/0001.pdf>, accessed on 23 October 2010.

⁶² <http://www.althingi.is/alttext/139/s/pdf/0001.pdf>, accessed on 23 October 2010.

⁶³ RUV, The State Broadcasting Company, on 23 August 2010. <http://www.ruv.is/frett/faerri-karlar-i-faedingarorlof>, accessed 12 November 2010.

⁶⁴ Article 8, Law No. 95/2000.

⁶⁵ <http://www.felagsmalaraduneyti.is/frettir/frettatilkynningar/nr/5196>, accessed on 24 October 2010.

Equality body decisions/opinions

The Gender Equality Complaints Committee delivered a ruling on 18 May 2010 concerning a complaint from a woman who was not hired as the supervisor at a swimming pool centre in a small town on the south coast of Iceland.⁶⁶ The woman held that the local authorities had violated the Gender Equality Act No. 10/2008, firstly by the wording of the advertisement for the job in question and secondly as she was more qualified than the man who was hired, regarding both schooling and experience, as well as corresponding better with the description of the required skills in the advertisement. The original advertisement had declared in its title that a man was wanted for the job. Such advertising is strictly prohibited by Article 26, paragraph 3 of the Gender Equality Act. The local authorities said that advertising for a man had been an error which had been corrected as soon as it was discovered. All applications had subsequently been handled without discrimination. Apart from the woman applicant three men applied for the job. The man who was hired was, according to the local authorities, the most qualified applicant for the job of pool supervisor as he had professional skills as a mechanic and plumber which would come in handy for the job in question.

The Gender Equality Complaints Committee held that it was not unreasonable of the local authorities to move away from the skills in the advertisement which, among others, included courses in first aid. The Gender Equality Complaints Committee furthermore did not contest the assessment of the local authorities that the man hired was more qualified than the woman applicant, with regard to both schooling and experience and ruled that there had been no violation of the Gender Equality Act.

The rulings of the Gender Equality Complaints Committee are binding for the parties to each case. The rulings may not be referred to a higher authority. The woman applicant would hence have to initiate legal proceedings if she wanted to take her case before a court of law.

IRELAND – *Frances Meenan*

Policy developments

The functions vested in the Minister for Justice, Equality and Law Reform in relation to:

- the Gender Equality Division which supports and co-ordinates ongoing policy development in relation to the achievement of de facto gender equality in Ireland and co-ordinates and contributes to policy review and policy development on gender equality issues and gender related matters at international level;
- the development and implementation of policies to combat discrimination and to promote a more inclusive society;
- the promotion of equal opportunities, fundamental rights and greater availability of family-friendly workplace practices;

were transferred to the Minister for Community, Rural and Gaeltacht (Irish-speaking region) Affairs with effect from 1 June 2010.⁶⁷

⁶⁶ Gender Equality Complaints Committee case No. 11/2010. Ruling delivered on 18 May 2010.

⁶⁷ [S.I. No. 217 of 2010 - Equality, Integration, Disability and Human Rights \(Transfer of Departmental Administration and Ministerial Functions\) Order 2010 \(PDF - 106KB\)](#), accessed on 18 October 2010. (Note: all references to the Irish language have been deleted in this Report.)

Legislative developments

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010⁶⁸ amended the Employment Equality Acts 1998–2008, the Equal Status Acts 2000–2008 and the Pensions Acts 1990–2008, deleting the ‘marital status’ ground and now including ‘civil status’ as one of the grounds of discrimination. The ‘civil status’ ground means single, married, separated, divorced, widowed, in a civil partnership that has ended by death or dissolution. This will effectively be an extension of the provisions of the legislation and of the sexual orientation ground of discrimination.

Civil Law (Miscellaneous Provisions) Bill 2010

The Civil Law (Miscellaneous Provisions) Bill 2010 was published on 30 August 2010⁶⁹ and inter alia provides for certain user-friendly and cost-saving procedures in relation to procedures before the Equality Tribunal, for example whereby the Equality Tribunal may make a case stated to the High Court, thus avoiding the apparently increasing number of applications for judicial review to the High Court. In addition, in cases where a claimant has been discriminated against and the claimant is or was in low-paid employment, he or she may be awarded EUR 40 000 where that sum is in excess of 104 weeks’ remuneration.

Case law of national courts

Equal pay

Remuneration on grounds other than gender was considered in *25 Named Employees v Irish Aviation Authority*,⁷⁰ where 25 female claimants claimed that they had been discriminated against on grounds of gender. The claimants were employed as aviation officers (grades I, II and III) and alleged that they performed like work with 11 named male comparators, who were employed as radio officers grade III, technical officers grade II and air traffic control officers grade III. The claimants’ jobs were wholly clerical or administrative in nature and they were not required to have any technical skills/knowledge to perform their roles. The comparators occasionally performed the functions of the claimants; however, the comparators also performed a wide range of tasks of a technical nature which the claimants at no stage performed, the comparators had to possess specific technical qualifications and skills/ knowledge coupled with the relevant third level qualifications (for two of the comparator groups), and also had to undergo continuous training specific to the posts. The requirements were premised on European and international standards; failure to comply with these standards could result in the respondent’s licence to provide air navigation services being revoked. The claimants considered that they were entitled to the same rate of remuneration and that the comparator carried out the functions of the claimants on occasion.

The respondent relied on the ECJ judgment in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse*⁷¹ where the ECJ held, notwithstanding that the complainant and comparators groups (psychologists and medical doctors employed as psychotherapists) performed similar tasks, members of the

⁶⁸ This Act is not yet available on line due to translation reasons.

⁶⁹ <http://www.oireachtas.ie/viewdoc.asp?DocID=16011&&CatID=59>, accessed on 18 October 2010.

⁷⁰ [2010] ELR 211, DEC-E2009-085. <http://www.equalitytribunal.ie/index.asp?locID=164&docID=2149>, accessed on 18 October 2010.

⁷¹ [1999] IRLR 804.

comparator group were qualified to perform other tasks, on the basis of their specific qualifications and they could not be regarded as being in a comparable situation and the phrase ‘same work’ was not applicable. The respondent also referred to the ECJ judgment in *Handels -og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*⁷² and submitted that the ECJ held that a difference in remuneration might be justified by reference to the training requirements necessary to perform the tasks associated with a post. The respondent added that the ECJ adopted the same view in the *Royal Copenhagen*⁷³ case, holding that training requirements constituted a factor which could be taken into account when deciding whether a difference in remuneration was based on grounds other than gender. Finally, the respondent referred to the determination of the Labour Court in *Department of Justice Equality and Law Reform v CPSU*⁷⁴ and submitted that the Labour Court accepted that the practice of deploying Gardaí (police officers) in clerical posts (which ultimately resulted in a pay differential) corresponded to a real operational need of the force and requiring those posts to be filled by serving police officers who had specialist training and/or knowledge was justified. The respondent added that such a requirement existed in the case of the aviation industry comparators and therefore any differential in remuneration was lawful in terms of the Acts.

The Equality Tribunal, in dismissing the equal pay claim, considered that the comparators required the technical/professional skills and knowledge whilst the claimants did not require such skills and knowledge. Professional training is one of the criteria for determining whether or not the same work is being performed, and it may be an objective justification for giving different pay for doing the same work. Further, there was no requirement that the claimants’ roles be filled with the comparators’ special training. Finally, there were genuine reasons unconnected with the gender of the parties involved which explained the differences in the remuneration.

Equal treatment

In *Murphy v Iarnrod Eireann*⁷⁵ the claimant was awarded not only the maximum⁷⁶ two years’ remuneration but also the equivalent of one year’s salary for distress caused by victimisation, totalling EUR 186 000 which was not to be subject to income tax as per Section 192A of the Taxes Consolidation Act 1997 as amended by Section 7 of the Finance Act 2004. The background to this case was that the claimant was offered an exit package in the context of her access to promotion having been obstructed and instead being appointed to a ‘dummy’ position. The claimant was told that this position was promotion, yet she did not have a job title and she received neither an increase in remuneration nor any of the promised performance bonuses. There was considerable evidence as to how badly the claimant was treated and also evidence as to how a male colleague was given meaningful work and promotion. The Equality Tribunal considered that the claimant had been discriminated against and that a man with similar qualifications and experience and employed by the respondent would not have been

⁷² [1989] IRLR 532.

⁷³ *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere* [1996] ICR 51.

⁷⁴ [2008] ELR 140.

⁷⁵ [2010] ELR 143 *sub nom Ms Z v A Transport Company*. <http://www.equalitytribunal.ie/index.asp?locID=164&docID=2181>, accessed on 18 October 2010.

⁷⁶ If a claim, however, is initiated in the Circuit Court, there is no upper threshold. This case was initiated and heard before the Equality Tribunal where the maximum award is two years’ remuneration as compensation and, as in this case, there may be a further award in respect of victimisation.

treated in the same manner. The claimant had established a prima facie claim of discrimination regarding her terms of employment and in respect of promotion and that the respondent had failed to rebut the inference of discrimination. The respondent accessed the claimant's email constituted intimidation and to be privy to her complaint of gender discrimination and bullying and therefore constituted victimisation. Furthermore the respondent was very aggressive with the claimant, she had been excluded from some social events, and annual leave and expenses had not been sanctioned since the issue of gender discrimination had been raised. In addition to compensation, the respondent was ordered to provide the claimant with meaningful work consistent with her skills and experience with immediate effect and to provide for mediation involving the claimant and certain named employees.

Application was subsequently made by the respondent to the High Court for a judicial review⁷⁷ of this decision, essentially on the grounds that certain documentation had not been made available to the equality officer. The respondent challenged that aspect of the decision which stated that there had been discrimination in relation to the claimant's terms and conditions of employment. It was arising from the failure to provide the documentation that the equality officer made certain inferences. The respondent considered that the inferences made formed the basis of that part of the decision and that, where documents are not produced, she cannot make inferences but instead must invoke her statutory powers. An equality officer has considerable powers of inspection and entry into an employer's premises. Mr Justice Hedigan considered that inferences are a legitimate part of any decision-making process, but that there are limits. However, to show on judicial review that inferences made were a violation of a party's right to a fair procedure, it would be necessary for the party so alleging to show that those inferences were not properly made. The inference made would have to be clearly wrong and be an essential part of the decision made. In this case the first inference was that the documentation did not support the claimant's case. Indeed the documentation was never produced and therefore the court considered that the inference was correct. Furthermore the court considered that on reading the decision the inference was a small part of the reasoning behind the decision that the claimant had been discriminated against in relation to her conditions of employment. It was noted also that there was no reference at the High Court hearing as to the contents of the documents and that this silence was impossible to justify. If the documentation existed but it was unfavourable to the respondent, then the respondent was concealing evidence from both the equality officer and the High Court. If the respondent, having agreed to produce the documentation, considered that it would be too much trouble to produce the documentation, then it was a manifest disrespect to the equality officer who was carrying out functions for which she was charged by Parliament, and it was also disrespectful to the High Court. The application for judicial review by the respondent was considered to be devoid of merit.

⁷⁷ *Iarnród Éireann v Orlaith Mannion in her capacity as an equality officer and Murphy (notice party)*. Judgment of Mr Justice Hedigan delivered 27 July 2010. <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/5f91df4d09234675802577ae004a9e7b?OpenDocument>, accessed on 18 October 2010.

Policy developments

On 30 July 2010 the Minister of Labour issued a three-year plan to support full-time employment.⁷⁸ Leaving aside any consideration of the general intervention mentioned by the plan, we note that gender mainstreaming, provided by Article 1 of the Code for Equal Opportunities,⁷⁹ has not been enforced yet.

On the one hand, all the gender-neutral measures of the three-year plan do not take into consideration their possible impact on women and, on the other hand, measures addressed to women are separately dealt with by reference to the middle term programme for the expansion of women's participation in the labour market,⁸⁰ which was issued by the Minister of Labour, Maurizio Sacconi and the Minister for Equal Opportunities, Mara Carfagna, in December 2009. This programme is only concerned with measures aimed at sustaining services for the family and promoting the reconciliation of private life and work. The three-year plan expressly provides that 'the core of actions for the promotion of female employment are the policies of reconciliation to be enforced by an arrangement of working time and the promotion of childcare services, in particular family crèches'.

Although the support of services for care of the family (children and the elderly), which still mainly falls on women, is undoubtedly essential to increase women's participation in the labour market, the matching of these policies of supporting care services with the promotion of female employment shows a dated attitude to these issues and risks impoverishing the achievement of equal opportunities. This opinion is not shared by the current National Equality Adviser, who judged the three-year plan as a whole very positively and strongly defended it from the criticism of the opposition.⁸¹

Legislative developments

Equalisation of pensionable age of men and women in public employment

Act No. 122 of 30 July 2010,⁸² greatly modifies the terms of enforcement provided by Act No. 102 of 3 August 2009,⁸³ for equalising the pensionable age of men and women in the civil service sector. The rule should have been fully operative only in 2018, after gradual changes every two years. The recent amendment, however, provides only two steps: the first, an increase of one year already in force, and the second, an increase of four years from 1 January 2012. To put it differently, women's pensionable age will be fixed at 61 years until 31 December 2011, and the pensionable age of both men and women will be 65 years from 1 January 2012.

⁷⁸ http://www.lavoro.gov.it/Lavoro/PrimoPiano/Piano_triennale_lavoro.htm, accessed on 11 November 2010.

⁷⁹ Decree No. 198/2006 Code of Equal Opportunities, in <http://www.normattiva.it/dispatcher>, accessed on 4 October 2010.

⁸⁰ http://www.lavoro.gov.it/Lavoro/PrimoPiano/20091201_Piano_Azione_Italia2020.htm, accessed on 11 November 2010.

⁸¹ <http://job24.ilsole24ore.com/news/Articoli/2010/08/servidori-2608-2010.php?uuid=a53ab476-b04a-11df-995e-bb97119462ca&DocRulesView=Libero>, accessed on 11 November 2010.

⁸² Published in OJ No. 176 of 30 July 2010, ordinary supplement No. 174, <http://www.normattiva.it/dispatcher>, accessed on 1 October 2010.

⁸³ Published in OJ No. 179 of 04/08/2009, ordinary supplement No. 140, <http://www.normattiva.it/dispatcher>, accessed on 1 October 2010.

The financial saving – coming from the equalisation issued to comply with the judgment in Case C-46/07 of the European Court of Justice which ruled Italian legislation inconsistent with Article 141 of the Treaty – will be allocated to the Cabinet Office fund to sustain the real economy and will finance intervention regarding social and family policies. Moreover, from 1 January 2015 onwards, every three years (not five as previously provided by Act No. 102/2009) the pensionable age will be increased for all, men and women, proportionate to the increase of life expectancy as registered by the National Statistics Institute and validated by Eurostat. The mechanisms of this adjustment are not clear, as they are due to be enacted through a regulation of both the Ministry of Labour and the Ministry of Economy and Finance; Article 22 only provides a ceiling to the 2015 pensionable age increase of three months.

It must be emphasised that the equalisation has taken place by way of increasing the pensionable age of women up to the limit provided for men, rather than the opposite. Thus the equalisation has a negative effect, as could have been predicted given the budget constraints and the progressive increase of life expectancy in Europe. The shorter term in which equalisation is to be achieved, as provided by the amendments mentioned above, is probably going to highlight this effect.

Another minor change regarding female employment is provided by Act No. 122/2010 which postpones once again (to 31 December 2010) the term for the enforcement of Articles 17 and 28 of the new Code for Health and Safety at Work on the evaluation of risks.⁸⁴ The Code extended the evaluation of risks to factors which can affect specific groups of workers, such as risks arising from work-related stress (following the European Framework Agreement signed on 8 October 2004) and from gender, age and race differences. The difficulty, which we underlined in the biannual review I/2009, of giving a concrete application with specific criteria to very general concepts, such as work-related stress, is probably one of the reasons for the delay in the implementation of these Articles.

Case law of national courts

State Council judgment on the removal of National Equality Adviser

The State Council judgment No. 5031 of 29 July 2010 confirmed the Administrative Tribunal decision of 19 July 2009, which stated that the National Equality Adviser can be removed, if she or he is not ‘tuned in’ to the Government’s policies, under the ‘spoil-system’ provided by Article 6 of Act No. 145/2002,⁸⁵ as the office is not an independent body, despite her or his wide autonomy in matters of organisation.

The judgment ruled on the claim presented by the National Equality Adviser appointed by the previous Government, who was removed from office by a decree of the Labour Minister of 30 October 2008, in agreement with the Minister for Equal Opportunities, as she had expressed her radical disagreement, also giving voice to the opinion of the Network of Equality Advisers, with a series of legislative initiatives of the Government (on tax reduction for overtime, awarding of individual incentive remuneration at the enterprise level, overtime work, repeal of the provision on the written form of a worker’s resignation), which she deemed to involve further risks of discrimination against women.

⁸⁴ Decree No. 81/2008, published in OJ No. 101 of 30/04/2008, ordinary supplement No. 108, <http://www.normattiva.it/dispatcher>, accessed on 1 October 2010.

⁸⁵ Act 15.07.2002 No. 145 on the reorganization of public management and the promotion of the exchange of experiences between the public and the private sector, published in OJ No. 172 of 24/07/2002, <http://www.normattiva.it/dispatcher>, accessed on 1 October 2010.

The judgment of the State Council based the legitimacy of the removal precisely on the reference to the discretionary power of the Government to confirm the appointment, as laid down by Article 6 of Act No. 145/2002 ‘spoil system procedure’, which provides that the appointment of the top management of both the public administration and of state-controlled institutions which took place in the six months preceding the end of the legislature, can be confirmed, annulled, modified or renewed within six months from the vote of confidence in the Government.

So, according to the administrative judge, the Decree did not even need to justify the removal. Although the judge avoided directly facing up to the embarrassing problem of the grounds of the Decree, it was made clear that in any case the office of National Equality Adviser does not enjoy total independence from the Government, as it is not an Independent Regulatory Body (such as, for instance, the Ombudsman or the authority for the protection of personal data, both of which have autonomous organisational, financial and accounting powers and are not subject to the Government as regards appointment procedures). The National Equality Adviser, therefore, cannot diverge from the Directives of the Minister.

The claimant also proposed to raise a point of constitutional inconsistency, as well as a point of non-conformity with EU law, on the ‘independence’ of the National Equality Adviser. The State Council did not support these claims as, in its opinion: (1) the ‘spoil system’ had been declared invalid by the Constitutional Court only for acts that applied it as an automatic procedure, which was not the case here; (2) the independence and autonomy of the National Equality Adviser granted by EU law is not jeopardised by Article 6 of Act No. 145/2002, which takes into account the Government’s prerogative in the appointments procedure and its discretionary choices.

This decision must be regarded as a significant step back in the route towards gender equality and the first comments and analyses on it by both labour law and administrative law scholars were very critical. Among other things, they underlined some weak points of the reasoning which are in contrast with principles of administrative law, considering the independent nature of the Equality Body, who is appointed by the Minister of Labour after consultation with the Minister for Equal Opportunities, from candidates who have many years’ certified experience and competence in gender equality law and the labour market. This nature of the Equality Body should exclude the enforcement of the ‘spoil system’ and render unlawful, as an unjustified political decision of the Government, the removal of the National Equality Adviser..

It can also be argued that the judgment shows a certain insensitivity on the part of the State Council to recent developments arising from EU legislation. Indeed, Decree No. 5/2010,⁸⁶ which finally implemented Directive 54/2006/EC, has not been taken into consideration at all. It stipulates that the National Equality Adviser shall conduct independent surveys, publish independent reports and make recommendations on the implementation of gender equality. These amendments, aimed at improving the efficacy of the Equality Body’s action, could have presented a chance to stress the necessary autonomy of this Body and to overrule the narrow judgment of the Administrative Tribunal. But, on the contrary, the State Council upheld it and the grounds of the decision are very succinct, and deal quickly with the complex points of constitutional consistency and with EU law, both of which were advanced by the claimant. These

⁸⁶ Decree No. 5 of 25 January 2010, implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 54/2006/EC recast), OJ C 29, of 5 February 2010, <http://www.normattiva.it/dispatcher>, accessed on 1 October 2010.

points surely deserved more attention, as the functions of Equality Bodies are to counteract discrimination and to promote equal opportunities for male and female workers as a fundamental right recognised both at national and at EU level.

It is worth being reminded that, in order to fulfil their assignments, the Equality Bodies need to be free from political constraints and their status has to be that of a technical body with guaranteed functions. Until the Decree of 30 October 2008, the Ministry of Labour in its notes⁸⁷ had always recognised the autonomy and functional independence of the National Equality Adviser and these Ministerial notes were confirmed by a consultative opinion of the *Corte di Cassazione*.

If that is the case, then the 'last' hope is that the European Commission will use the infringement procedure against the Italian legislation as it has been interpreted by the Administrative Tribunal and confirmed by the State Council.

Equality body decisions/opinions

Promotion of substantive equality between male and female workers

An Agreement was signed on 30 June 2010 by the Minister of Labour, the National Board of Labour Consultants and the National Association of Labour Consultants, with the assistance of the National Equality Adviser, for the promotion of substantive equality between male and female workers in the labour market, taking into account the national and European legislative framework.⁸⁸

The Agreement provides for a number of initiatives such as: the promotion of conferences on non-typical jobs and the relevant social security measures, with special attention to justified absences from work; the realisation of specific research on measures to cut the cost of labour so as to enable employers and employees to exploit all available resources (i.e., different job contracts, professional training, tax and social contribution breaks, positive action); the endorsement of 'ethical work' through widespread information on non-typical jobs and 'continuous and coordinated collaborations' or 'on-the-job projects', and the use of 'job vouchers' for marginal activities; the promotion of professional training to help women re-entering the employment market after long periods of maternity leave; collaboration in drafting the rules for co-financed projects on professional training addressed to care services; experimenting with the provision of crèches at places of self-employment; and the creation of a 'women's space' in the media to deal with the main items of interest such as child care services and the balance between private and working life.

Although this last part of the Agreement shows the difficulty of overcoming the attitude of mind that dealing with matters of care is exclusively a woman's problem, and some other measures (e.g., the intention of promoting non-typical jobs) seem even risky as they may increase women's participation in low paid jobs, the decision to involve employment consultants in the promotion of equal opportunities goes in the direction suggested by the Charter for Equal Opportunities and Equality at Work⁸⁹ which was launched in Italy in 2009 following similar successful initiatives promoted in France and Germany, that is, a task force on equal opportunities where trade unions, the Network of Equality Advisers, employers' associations, secular and religious

⁸⁷ Notes of the legislative office of the Labour Ministry of 13 October 2004 and of 8 June 2005; Note of the General Secretary of the Labour Ministry of 24 January 2008.

⁸⁸ Published on <http://www.lavoro.gov.it/NR/rdonlyres/259D5C42-9E7C-4CE1-B45B-19288AAD4EDC/0/PROTOCOLLOCONSULENTILAVORODEFINITIVO16062010.pdf>

⁸⁹ <http://www.cartapariopportunita.it/Date>, accessed on 11 November 2010.

associations and the relevant Minister and local authorities can join forces and make the most of their combined talents.

LATVIA – Kristīne Dupate

Legislative developments

On 11 March 2010 Parliament (*Saeima*) adopted amendments to the Law on Support of Unemployed Persons and Jobseekers.⁹⁰ The amendments introduce the principle of non-discrimination on the grounds of gender, race and ethnic origin with regard to measures for the prevention of unemployment. Article 2¹ of the Law provides for all non-discrimination concepts, including definitions of discrimination, reversed burden of proof and prohibition of victimisation.

The amendments to the Law on Support of Unemployed Persons and Jobseekers led to the explicit prohibition of discrimination in all measures to promote employment and prevent unemployment, carried out by the state and in particular by the State Employment Agency. The Law was amended to include non-discrimination provisions for the purpose of implementing the requirements of Directives 76/207, 2002/73, 2006/54 and 2000/43, in particular provisions requiring equal treatment with regard to access to vocational training.

Because the Law on Support of Unemployed Persons and Jobseekers concerns only the narrow field of vocational training, and retraining provided by the State Employment Agency and intended primarily for unemployed people and jobseekers, on 4 March 2010 Parliament also adopted amendments on the prohibition of discrimination to the Law on Education.⁹¹ The amendments extend the concept of non-discrimination previously provided by including definitions of discrimination, reversed burden of proof, prohibition of discrimination and the right to claim before the court compensation for discrimination.

The Law on Education covers all kinds of education, including professional education. Article 3¹ prohibits discrimination on various grounds. It now also provides for the prohibition of victimisation and for the right to claim, before the court, the fact of discrimination and compensation. Interestingly, with regard to the applicable definitions of discrimination (like direct and indirect discrimination) the Law on Education refers to those definitions provided by the Law on the Protection of Consumer Rights. The non-discrimination provisions of the Law on the Protection of Consumer Rights were intended to implement Directive 2004/113 which does not cover education. At the same time such reference is logical since education, including professional education and training, in Latvia is more frequently provided within the framework of educational services than employment relationships.

Case law of national courts

There are currently several important cases pending before the national courts.

⁹⁰ Amendments to the Law on Support of Unemployed Persons and Jobseekers (*Grozījumi Bezdarbnieku un darba meklētāju atbalsta likumā*), Official Gazette No. 51, 31 March 2010.

⁹¹ Amendments to the Law on Education (*Grozījumi Izglītības likumā*), Official Gazette No. 47, 24 March 2010.

Discrimination by recruitment agency

On 20 May 2010, Riga city Zemgales district court (a first instance court) made a decision in a case on discrimination on the grounds of gender concerning access to employment. The claimant was the client of a private employment company offering recruitment services. She participated in the competition for recruitment for a particular vacancy. After the first round of the selection procedure for candidates, she received an e-mail stating that she was excluded from the second round of the selection procedure because 'the employer has selected only male candidates for the second round, because the employer considers male candidates to be more appropriate for the post in question'. The applicant claimed discrimination on the grounds of gender regarding access to employment, specifying harassment and claiming compensation for moral damage.

The court dismissed the claim on the grounds that the private employment company had never been the employer of the claimant and consequently the parties were not subject to the provisions of the Labour Law.

The court in this case had overlooked the provisions of the Regulations of the Cabinet of Ministers No. 458, 'The procedure on licensing and supervision of merchants – providers of recruitment services', which explicitly prohibits the application of discriminatory criteria in the selection procedure of candidates. Currently, the claimant waits for the decision of a court of appeal after a court hearing on 27 September 2010.

Unequal pay on account of child-care leave

On 3 June 2009 the Supreme Court issued a decision in a case concerning unlawful dismissal after child-care leave and the right to compensation for work stoppage.⁹² This judgment highlights the incomplete implementation of the equal pay principle in Latvian law. Compensation for work stoppage is to be calculated on the grounds of average pay. However, the Labour Law provides that, if a person has not received any salary during the previous 12 months, the average salary must be calculated not on the basis of the salary provided by an employment agreement but on the basis of the statutory minimum wage. The Supreme Court did not take into account the aspect of indirect discrimination against women in connection with child-care leave.

There has now been an interesting development in this case. The recurrent decision of the appeal court was contested again before the Supreme Court on the grounds that the court of appeal had incorrectly applied the EU gender equality law, in particular the principle of equal pay, although the court of appeals had ruled on the grounds of the ruling of the Supreme Court adopted on 3 June 2009. On 29 September 2010 the Supreme Court was faced with the claim asking it to overrule its previous decision in the same case. The Supreme Court took the decision to review this claim before the Grand Chamber of the Supreme Court.

⁹² Decision of the Supreme Court (3 July 2009) in case No.SCK-589/2009.

Legislative developments

Transposition of EC Directives 2004/113 and 2006/54

On 28 June 2010 the Government of Liechtenstein passed a report⁹³ concerning the transposition of EC Directives 2004/113 and 2006/54. The Government presented the necessary amendments to relevant national laws, e.g. the Gender Equality Act (GLG), for consultation until 27 August 2010. After a decision in Parliament, the newly amended law will hopefully soon enter into force.

Registered partnerships

On 13 April 2010 the Government of Liechtenstein passed a report concerning the law proposing the creation of registered partnerships² which would allow homosexual partners to register their partnership. The law proposal provides for equal rights for homosexual partnerships concerning succession law, social insurance law, immigration law, fiscal law and other areas of public law. The main difference from a marriage will be that the registered partners must have no children, either by adoption or by medically assisted procreation.

Sex crime legislation

On 20 April 2010 the Government of Liechtenstein passed a report⁹⁴ concerning a proposal for changes to the penal code with regard to sex crimes. The main aim is the better protection of victims, thus, the consent of the victim to a criminal prosecution will no longer be a precondition for crimes such as a dangerous threat to close relatives, stalking, rape within marriage or partnership, or assault to end a marriage. Instead, a criminal prosecution will start as of right and the victim will thus be released from pressure to give consent to prosecution. Moreover, provision is to be made for explicit criminal liability for female genital mutilation: consent to that kind of bodily injury will not be allowed anymore. In addition, emphasis is put on prevention measures, such as strict supervision of sex offenders.

Policy developments

*Commission for gender equality*⁹⁵

On 8 June 2010 the Government of Liechtenstein appointed the commission for gender equality for its new mandate for the years 2010 until 2014. The aim of the Government and also for the commission will be to reduce discrimination, to offer equal chances to both sexes and to empower people to live their lives freely and governed by self-determination. Furthermore, the commission will actively have to observe developments with regard to gender equality, with a special emphasis on bringing more women into decision-making positions.

⁹³ Consultation Report of the Government of 28 June 2010; http://www.llv.li/pdf-llv-rk_vernehmml_gleichstellungsgesetz.pdf, accessed on 5 September 2010.

⁹⁴ http://www.llv.li/pdf-llv-rk_vernehmml_abaenderung_straftgesetzbuches.pdf, Report of the Government of 20 April 2010, accessed 11 September 2010.

⁹⁵ Press release of the information office of Liechtenstein, dated 25 June 2010.

Miscellaneous

Manifest 2008—2010 Reconciling family and professional life⁹⁶

By 8 March 2015 conditions for balancing family and professional life will have changed radically in Liechtenstein. The Manifest was created on 8 March 2008 by 18 organisations dealing with gender equality and confirms that every effort must be made to change conditions in order to create a better balance between family and professional life.

Gender Health: Body Images⁹⁷

'Gender Health: Body Images' is a series of inter-regional events organised by the equality offices of Liechtenstein, Vorarlberg (Austria) and Appenzell Ausserrhoden and Graubünden (Switzerland) and which are being presented from 8 June until 10 November 2010. A perfect body is declared as the norm by the media. At the same time we receive the message that we can create a perfect body for ourselves by investing enough time and money. Despite this, the norms of the media seem to be unreachable, especially when we take into account that the photos of the supermodels are modified on the computer. Why is such a cult made around the body? What effect does the fixation on a perfect body image have on our society and our self-esteem, and on our satisfaction with ourselves? What price do girls and boys, women and men pay for the ambition to achieve the ideal body image? In this series of international events, the gender equality offices will analyse this complex phenomenon from the health, psychological and sociological points of view and will report on the gender-specific differences.

LITHUANIA – Tomas Davulis

Miscellaneous

The Gender Equality Institute in Vilnius starts its activities

On June 26 the Gender Equality Institute, which is based in Vilnius, started its activities with a high-level international conference devoted to the progress, challenges and good practices in ensuring equality between men and women. The Institute was established by Council Regulation (EC) No. 1922/06 and aims to support the EU institutions and the Member States in promoting equality between women and men and in combating sex discrimination. The Institute will gather, analyse and disseminate reliable and comparable research data and information needed by policy-makers. The Institute's budget for the period 2007-2013 is EUR 52.5 million. The Institute will employ approximately thirty staff during 2010 and envisages the engagement of seconded national experts to enhance its expertise in the field of gender equality. The management board of the institute consists of eighteen representatives of the EU Member States appointed by the Council and one member representing the European Commission. An Experts' Forum, an additional body of the institute, consists of twenty-seven delegates designated by the Member States, two delegates designated by the European Parliament and three delegates designated by the Commission, the last-

⁹⁶ http://www.llv.li/pdf-llv-scg-newsletter_04-2010.pdf, Newsletter of the Office for Equal Chances, April 2010, accessed 11 September 2010.

⁹⁷ Press release of the information office Liechtenstein, dated 21 May 2010.

mentioned including representatives from non-governmental, employers' and workers' organisations at EU level.

For more information please consult the webpage of the Institute at <http://www.eige.europa.eu/>

Massive transfer of female employees on maternity and parental leave to shelf company

The recent scandal in the 'Cili' chain of Lithuanian fast food restaurants⁹⁸ reveals one of several possible lacunas in the national framework prohibition of discrimination against women on maternity and parental leave. After granting maternity and parental leave to 98 female employees, the company transferred them to a shelf company as a result of a reorganisation. There is no information yet on whether any of the assets or property were transferred too, but the fact is that the former employer is running the restaurants and the places of work still exist. Today the new company with one male director and 98 female workers is going into liquidation and possibly bankruptcy, which would allow unconditional termination of the employment contracts, with severance payments of two weeks' average wages. The situation reveals uncertainty in the interpretation of some provisions of Articles 180, 138 and 131 of the Labour Code.⁹⁹ The spin-off (or split) is seen as a reorganisation in Lithuanian corporate law. The Lithuanian Labour Code mentions reorganisation as a situation which precludes termination of the contract of employment. In the current situation, the former employer, 'Cili' deviously used the principle of transfer of an employee in a case of reorganisation because of the lack of a ruling by the courts that the transfer of an employee must be based on the transfer of the place of work. In addition, there is no developed doctrine in Lithuania on the consent of employee to change his or her employer in the case of a transfer of business or of a reorganisation.

It is expected that the courts, if requested, may defend the right to retain a job during maternity leave or parental leave (Article 181 of the Labour Code) by giving a more detailed interpretation of Article 138 (transfer of place of work in case of reorganisation for the purpose of retention of job). The main problem here is the stance of the State Labour Inspectorate which has stated that there is no fraud and that administrative liability cannot be envisaged because of the limitation of actions (the action of the employer had been taken more than six months ago). A statement by the Equal Opportunities Ombudsperson is still awaited.

LUXEMBOURG – Anik Raskin

Policy developments

Parental leave

After having announced a possible reduction of the duration of parental leave from six to four months, the Government decided to produce a detailed analysis of the outcomes of the measure before any reform. The analysis is announced for 2012 which is the year when Directive 2010/18/EU implementing the revised Framework Agreement on parental leave has to be implemented by national law.

⁹⁸ <http://www.delfi.lt/news/economy/business/article.php?id=37641539>, accessed on 19 October 2010 (in Lithuanian).

⁹⁹ State Gazette, 2002, No. 64-269.

Awareness of equality issues among young people

The Ministry of Equal Opportunities launched a campaign which aims to increase awareness among young people from 12 to 20 years of age of the subject of equality between women and men. A specific Internet page (www.echsimega.lu) has been created.

In July 2010, the Minister of Equal Opportunities visited three schools in order to present the campaign.

The campaign is one of the measures included in the National Action Plan on Equality for women and men 2009–2014.

Legislative developments

Sexual and reproductive rights

In Luxembourg, abortion is legal during the first 12 weeks of pregnancy under the following circumstances:

- when the continuation of the pregnancy or the conditions of life that may result from the birth are likely to endanger the physical or mental health of the pregnant woman;
- when there is a serious risk that the child will be born with a serious disease, physical malformation or considerable mental defects;
- when the pregnancy can be considered as resulting from rape.

A doctor's certificate concerning the existence of the circumstances is required.

Beyond the 12-week period, abortion is permitted only if there is a very serious threat to the life or health of the pregnant woman or of the unborn child. The serious threat must be certified by two qualified doctors.

On 20 January 2010, the Minister in Charge of Justice introduced Bill No. 6103 by which the Government intends to extend the grounds for a legal abortion by adding 'social reasons'. It also proposes to introduce a second mandatory consultation before an abortion can be performed.

On 16 July 2010 the Council of State published its opinion on the Bill. It states that the future law should make it clear that it is the woman who is to make the decision about having an abortion or not. However, even if this is mentioned in the Bill's supporting documents, the Bill itself does not contain that proposal.

Divorce and pension rights

On 16 July 2010, the Council of State published a complementary opinion on Bill No. 5155 on the reform of divorce.

It is worth mentioning that the Council of State formally opposes the proposed method of taking into account the division of pension rights, as the proposal gives the task to judges which appears to the Council of State to be a way of creating uncertainty in the law. According to the bill in its present content, the civil judge would have to estimate the amount requested in order to operate the splitting. Instead, the Council of State proposes a mandatory division to be provided for by social security legislation.

So far as individual pension rights are concerned, the Council of State points out that a mandatory system can be introduced by law and that the only precondition to doing so is political will.

Domestic violence

On 27 August 2010, the Government introduced Bill No. 6181 which aims to amend the law of 8 September 2003 on domestic violence.

At present, the perpetrator can be evicted from the common home for a period of ten days. Bill No. 6181 proposes to increase the period from ten to fourteen days.

In 2009, on average, the police made 47.7 interventions a month and 25.2 evictions took place.

The main aims of this Bill are to improve the protection of victims and any children who are involved, by establishing a security perimeter. The Government also intends to make interviews with perpetrators mandatory.

FYR OF MACEDONIA – *Mirjana Najchevska*

Policy developments

In the second half of 2010, generally speaking, policy development in the Republic of Macedonia remains very controversial and contradictory.

On the one hand, there is still very evident formal acceptance of advanced policies, legal changes and projects which should have an impact on laws and on institutions. In the setting of the one-year programme for the promotion of gender-responsive budgeting as an instrument for the advancement of gender equality, the public debate on ‘Gender responsible budgeting in the Republic of Macedonia’ was launched in Parliament. On 12 October 2010, the Government adopted the ‘National strategy on the fight against poverty and social exclusion in the Republic of Macedonia 2010-2020’ where there is a specific part devoted to equality between women and men.¹⁰⁰ According to the information from the Government, a consultative meeting was conducted between representatives of the Ministry of Labour and Social Politics (responsible for the preparation of the fourth and fifth reports to CEDAW) and representatives from the civil society working in the field of gender equality.¹⁰¹ Also, the Minister for Labour and Social Policy again announced the possible changes to the Labour Law which will enable men to have two months parental leave as well as women.¹⁰²

On the other hand, however, most of the proclaimed changes and proposed activities just remain on paper¹⁰³ or are being repeated as announcements on the part of officials without any real change.¹⁰⁴ There are no visible changes that will indicate transformation of the general discriminatory position of women. Even the state official on gender equality at the Ministry of Labour and Social Politics announced that the implementation of the Law on equal opportunities between women and men did not result in an improvement in the situation of women nor in any reduction of discriminatory practices.¹⁰⁵

¹⁰⁰ <http://www.mtsp.gov.mk/?ItemID=0573674BA8785F469A592815F250A71A>, accessed on 11 November 2010.

¹⁰¹ <http://www.mtsp.gov.mk/?ItemID=4923B47369AFAE4D827B4319F315447F>, accessed on 11 November 2010.

¹⁰² <http://www.vesnik.mk/?ItemID=6F1AAC690566CD46B1E242E1A899AFE7>, accessed on 11 November 2010.

¹⁰³ Very similar conclusions in the analyses: <http://www.crpm.org.mk/Papers/Gender%20web%20verzii/Kon%20rodovo%20ednakva%20makedonija%20Makedonski.pdf>, accessed on 11 November 2010.

¹⁰⁴ The change to the Labour Law concerning paternal leave was announced several times during recent years.

¹⁰⁵ <http://www.makdenes.org/content/article/2169746.html>, accessed on 11 November 2010.

In the monitoring reports of the NGOs, the inconsistency in the creation and implementation of gender policies is highlighted. According to the NGOs, there are no clearly defined policies, clearly defined goals or roles for different actors.¹⁰⁶

The already established committees for equal opportunities at local level are not functioning, mainly because of the lack of a clear set of responsibilities and because of the ambiguous mandate of these bodies.¹⁰⁷

The most recent research concerning Roma women, namely, 'Even if I complain there will be no effect', makes it very clear that there are no visible results of the action plans that were developed during the previous period.¹⁰⁸

So far, there are no government reports on the implementation of the action plans and there are no documents on evaluation and self-evaluation on the questions connected with fulfilment of the activities scheduled in the action plans. There is not any information on the work of coordinators on gender equality appointed in fourteen ministries and nine governmental administrative bodies at the beginning of 2010.

Legislative developments

The legal changes are not following the proclaimed direction in fighting? gender-based discrimination and inequality.

After the adoption of the Law on equal opportunities for women and men in 2006, there have not been any activities directed toward implementation of the Law in practice and no positive (affirmative) measures have been promoted either in legislation or in practice.

In the recently changed laws (like the Law on state administration¹⁰⁹ and Law on public administration¹¹⁰) there are no articles which will promote gender equality in the process of employment or in career development. However, in both Laws, there are articles addressing ethnic discrimination and promoting affirmative measures to members of minority communities in employment procedures and career advancement.

Case law of national courts

There is no case law on any ground of discrimination.

Equality body decisions/opinions

The agent on equal opportunities has still not been appointed and up to now no initiative has been *brought to the attention of* the equality unit in the Ministry for Labour and Social Politics.

There have been no claims based on discrimination on the ground of sex during 2010 heard before the Office of the Ombudsperson.

There have been no reactions from either of these bodies related to gender issues during 2010.

¹⁰⁶ Periodical report on the monitoring of politics for gender equality, Akcija zdruzenska, <http://www.civicamobilitas.org.mk/attachments/article/23/Periodocen%20monitoring%20final.pdf>, accessed on 11 November 2010.

¹⁰⁷ <http://www.undp.org.mk/content/Publications/Capacity%20Assessment%20ENG%20final.pdf>, accessed on 11 November 2010.

¹⁰⁸ <http://www.mtsp.gov.mk/WBStorage/Files/DA%20SE%20ZALAM%20Makedonski.pdf>, accessed on 11 November 2010.

¹⁰⁹ Official Gazette 76/2010 (last revised text).

¹¹⁰ Official Gazette 52/2010.

Miscellaneous

During the past several months, there has been a visible reduction of the presence of NGOs working on gender issues on the public scene. There have been no announcements, discussions or reactions on issues linked to gender equality.

Furthermore, some of the web pages of the large NGOs working on gender equality have disappeared, or they are not updated for months (even the largest and oldest of them).¹¹¹ The same thing is happening with the web pages of the projects run from the Government.¹¹² Usually it is result of the lack of the activities or lack of financial support which will enable maintaining of the web-sites of these NGOs.

The new Law on associations of citizens and foundations¹¹³ could be perceived as very restrictive for any further support that women's organisations could receive from the Government.¹¹⁴

MALTA – Peter G. Xuereb

Policy developments

Extension of the period of statutory maternity leave

The debate about the Commission proposal for a Directive extending the period of maternity leave still goes on, with the employers' associations continuing to argue that the costs for industry would be unsustainable. Their approach appears to be to suggest that all the cost of funding the measures should be borne by the state. The policy position is still open to debate.

The presence of women on company boards

There has as yet been no official reaction to the proposals now being revived at European level for action to be considered regarding the lack of women on company boards.

Legislative developments

There are no significant legislative developments to report for the period.

Equality body decisions/opinions

National Commission for the Promotion of Equality

The relevant Maltese equality body, the National Commission for the Promotion of Equality (the 'NCPE') is not empowered to make decisions. However, it is empowered to investigate complaints, to mediate, and to support claimants in any Court or Tribunal proceedings which claimants may wish to take. The NCPE published its sixth annual report – NCPE Annual Report 2009. As is usual with these annual reports, the 2009

¹¹¹ <http://www.sozm.org.mk/>, http://www.esem.org.mk/Root/mak/default_mak.asp, <http://www.forumi.org.mk/fg/>, accessed on 11 November 2010.

¹¹² <http://rodovarnopravnost.gov.mk/>, accessed on 11 November 2010.

¹¹³ Official Gazette 52/2010.

¹¹⁴ The criteria that should be reached by an NGO to be recognised as an organisation of public interest and to be supported by the Government are unreachable for many grassroots NGOs for gender equality.

report provides, without supplying details, the number, range and breakdown under various headings, of complaints received in the particular year covered by the report (in this case, 2009). However, as was the case in the report of the previous year, a summary of some few selected complaints and the outcome of the investigation carried out in their regard is also given. The report also details the several projects undertaken by the NCPE, including research projects related to gender discrimination. Further information regarding these projects can be accessed on the NCPE website.¹¹⁵

Case law of national courts

Industrial Tribunal – sexual harassment

According to media reports¹¹⁶ appearing in August of this year, the Industrial Tribunal delivered what is only the second judgment on sexual harassment (case not officially reported). In this case, the Maltese Industrial Tribunal is reported to have awarded damages¹¹⁷ to the tune of EUR 2 000, on the grounds of sexual harassment, to a female employee who walked into a board meeting to find that no seat was free, only to be told by the chairman of the meeting that she could ‘sit between my legs’. The last successful case was back in August 2008.

Both the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta,¹¹⁸ Articles 28, 29, 30 and 32) and the Equality for Men and Women Act (Chapter 456 of the Laws of Malta, Articles 9 and 19) prohibit sexual harassment. The Tribunal is reported to have found in this case that the claimant had been humiliated, intimidated and offended in front of some 20 people. Indeed, according to the evidence as reported, the employee then needed psychiatric counselling. It emerged that the company’s sexual harassment policy document had only been circulated to management and not to all employees. The tribunal rejected the defence put forward by the employer to the effect that the words used may have been vulgar but were not sexual in content. It is reported as having ruled that, while the employee had failed to report the incident formally to the supervisor of the person who had uttered the remark, the company should have had the proper mechanisms in place for employees to feel ‘safe’ to report their managers for bad conduct. It ruled that the company had not taken the proper measures to protect its employees from victimisation, harassment and sexual harassment. It therefore awarded damages of EUR 2 000 against the company for sexual harassment at the workplace. The official reaction, both from the Minister concerned, as well as from the relevant equality body, the NCPE, was to pledge that an awareness campaign would be mounted to raise awareness among employers of their legal rights and obligations.

While it is noteworthy that a case has succeeded on these grounds, the question remains why there are so few cases coming before the Industrial Tribunal when it is known that sexual harassment is common in Maltese places of work. Furthermore, the

¹¹⁵ The annual report itself should be accessible shortly on the NCPE website at www.equality.gov.mt, accessed 1 October 2010.

¹¹⁶ <http://www.timesofmalta.com/articles/view/20100802/local/awarded-euro-2-000-in-first-case-of-verbal-sexual-abuse>; <http://www.timesofmalta.com/articles/view/20100806/local/verbal-sexual-harassment-perpetrator-deserved-stiffer-penalty-cristina>, accessed on 4 October 2010. See also <http://www.maltatoday.com.mt/news/national/local-sexual-harassment-case-reported-and-taken-seriously>, accessed on 4 October 2010.

¹¹⁷ In some media it was reported that a fine had been imposed. Others reported that damages had been awarded.

¹¹⁸ The laws of Malta can be accessed on <http://www.mjha.gov.mt/LOM.aspx?pageid=27&mode=chrono&p=15&lawid=8918>, accessed on 30 September 2010.

damages awarded are in general considered to be too low, one reason being the lack of clarity in Maltese law about the availability of moral damages. Once again, such a case highlights the need for revision of the law on moral damages to permit the award of substantial damages capable of real deterrence as well as providing fair compensation for moral suffering. A proposal for legislation amending the relevant civil law is currently in process of being presented to Parliament. This should make clear provision for the award of ‘non-material damages’ if passed.

Miscellaneous

The National Council of Women – resolutions and activities

The influential women’s NGO, the National Council of Women for Malta (NCW Malta),¹¹⁹ has renewed calls for the speedy adoption of legislation fully implementing Directive 2008/104/EC of 19 November 2008 on temporary agency work. The Directive must be transposed by 5 December 2011. NCW Malta has issued a similar call in relation to the recently adopted Directive 2010/41/EU¹²⁰ on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. It has also called on Government to take a stand on the participation of women on company boards.

Report on the Economic Impact of Parental Leave

A number of events have taken place to discuss the issue of the extension of parental leave and maternity leave, such as the event held by Fondazzjoni IDEAT, a think tank of the Labour Party, which was presented with a report drawn up by Professor Edward Scicluna MEP.¹²¹

THE NETHERLANDS – Rikki Holtmaat

Legislative and policy developments

In the past six months, hardly any new legislative and policy developments have taken place, since the Government fell in February and a new Government has still not been installed since the general elections in June.

One noteworthy point is that the interim Minister of Social Affairs has announced that he does not intend to lengthen the period of pregnancy leave from 16 weeks to 18 or 20 weeks. According to the Minister, such a measure is not necessary.¹²² The Dutch regulation (a minimum of 16 weeks of paid leave) appears to be sufficient. If the mother is still not fit to work, she has a right to paid sickness leave. Research, which the Minister presented to Parliament in July, shows that such extensions would cost an additional EUR 117 million and EUR 322 million respectively.¹²³ The Minister also

¹¹⁹ <http://www.ncwmalta.com/home?l=1>, accessed on 3 October 2010.

¹²⁰ Directive 2010/41/EU of 7 July 2010, OJ L 180/1.

¹²¹ E. Scicluna, ‘The Economic Impact of Parental Leave – An Evaluation of the Benefits and the Costs’, which can be downloaded from the NCW website at www.ncwmalta.com/home?l=1, accessed on 4 October 2010.

¹²² See <http://www.rijksoverheid.nl/onderwerpen/verlof-voor-ouders/documenten-en-publicaties/kamerstukken/2010/04/13/brief-van-minister-donner-over-update-onderhandelings-ontwerprichtlijn-zwangerschapsverlof.html>, accessed on 6 October 2010.

¹²³ See <http://www.rijksoverheid.nl/onderwerpen/verlof-voor-ouders/nieuws/2010/07/14/langer-zwangerschapsverlof-kost-meer-dan-het-oplevert.html>, accessed on 6 October 2010.

does not intend to propose the introduction of a period of two weeks paid leave for fathers directly after the birth of a child. Such a measure would cost EUR 235 million and cannot be afforded in this period of economic crisis, according to the Minister. The Dutch Government therefore does not support the amendment of the Pregnancy Leave Directive (92/85/EEG), as proposed by the Commission and supported in the European Parliament.

Equality body decisions

In the summer of 2010 one interesting case in the area of gender equality has been decided by the Equal Treatment Commission (ETC).¹²⁴

An organisation that owns several centres which provide daycare for young children asked the Equal Treatment Commission to give its opinion about the organisation's intention to adopt special policy rules for their male employees. These rules (included in a protocol for how to handle cases of suspected child abuse), provide that male employees are not allowed to be the sole staff member working with a group of children. There always needs to be another adult person present in the room. Only for very brief periods of time (e.g. when the co-worker visits the toilet) it is permissible for a male worker to be the only person working with a group of children. The reason given for this rule is that male workers in daycare centres are specifically vulnerable to being accused of sexual abuse of children. The organisation states that the rule is meant to protect the children and the workers as well as the organisation itself (which could suffer as a result of (false) accusations).

The ETC reviewed this proposed measure and concluded that it would constitute a case of direct discrimination on the ground of sex in the working conditions of male workers, and none of the possible legal justification grounds in the equal treatment legislation would be applicable.¹²⁵

According to the ETC, the organisation had not substantiated (with statistics) its contention that male workers are more vulnerable to being accused of child sex abuse than female workers. In fact, in the past, there were many cases of female workers being accused of such abuse. Male workers will consider this rule to be discriminatory against them and will not see it as a protective measure. The ETC does not mention this argument, but the rule is highly stereotyping and stigmatising for male teaching assistants who work with young children. In Dutch society, they already have to fight against a general image of being 'sissies', or (worse) perhaps leaning towards paedophilia. Therefore it is right for the ETC to strike down this (proposed) discriminatory rule. All measures aimed at protecting children against (sex) abuse should be equally applicable to male and female workers in this sector.

¹²⁴ To be found at the website of the Equal Treatment Commission: <http://www.cgb.nl>, accessed on 11 November 2010.

¹²⁵ See Oordeel 2010-112 of 20 July 2010: <http://www.cgb.nl/oordeel/2010-112>, accessed on 17 September 2010).

Policy developments

National Action Plan for Gender Equality

The Government announced in a press release on 28 September 2010 that it will present its National Action Plan for Gender Equality for the period 2011–2014, during the spring of 2011.¹²⁶ Some of the areas to be covered are: equal pay, the segregated employment market, gender stereotypical choices of education/professions, equality in parenthood, violence in close relations, gender stereotypes, women in leadership, democratic participation, women and health.

Parental leave – fathers' quota

The Norwegian Government announced in the state budget for 2011, that paternity leave is to be extended by two additional weeks.¹²⁷ Paternity leave is also called the fathers quota of the parental leave, and is reserved for fathers. This leave may not be transferred to the mothers and if the leave is not taken by the father, the leave is lost. The extension of the paternity leave will be done by one 'fresh' week being added to the leave, while one week of the existing parental leave is being transferred to the paternity leave. The change takes effect for children born after 1 July 2011. Paternity leave will, from the same date, last for 12 weeks. Another strengthening of paternity leave is that fathers earn the right to paternity leave also in cases where the mother is on disability pension. Until now the fathers right to leave has been conditional that the mother is employed. With effect from 1. July 2009 the father earns an individual right to paid paternity leave irrespective of the mothers status as an employee or not, see the National Insurance Scheme Act (Folketrygdloven) section 14-14. Parental leave covers the loss of income. In practice students and home-makers with no income will not receive paid parental leave, but will receive a onetime payment from the National Insurance Scheme.

The Government sees paternity leave as an important step in strengthening men's relationship with their own children. Paternity leave is also viewed as an important measure in strengthening gender equality in the employment market. The Equality Ombudsperson is very pleased with the extension of paternity leave and interprets this as a development in the direction of parental leave being divided into three parts: one-third reserved for each of the parents and one-third which the parents may divide as they find best.¹²⁸ In practice – apart for the father's quota, the parental leave is mostly carried out by the mothers. However, in legal rights, the fathers have now 12 weeks reserved leave, while mothers have 9 weeks reserved leave (three weeks before birth and six weeks after birth). This fact has triggered a debate especially from medical doctors who argue that mothers need the leave to nurse and to recover for at least 7-8 months.

¹²⁶ <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2010/ny-handlingsplan-for-likestilling-.html?id=615741>, accessed on 5 October 2010.

¹²⁷ <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/pm-1211.html?id=619700/>, accessed on 5 October 2010.

¹²⁸ <http://www.ldo.no/no/Aktuelt/Nyheter/Arkiv/Nyheter-i-2010/Forventer-oppfolging/>, accessed on 5 October 2010.

Unwanted part-time work

The Norwegian Government has announced in the state budget for 2011, that it will spend NOK 25 million (EUR 3 104 741) on various projects aimed at reducing 'unwanted' part-time work (i.e., where employees wish to work more).¹²⁹ This is a problem especially in the health sector. It is very positive to note that the issue of unwanted part-time work is being addressed. 43 % of all employed women in Norway work part-time.

Norway's 8th report to the CEDAW Committee

Norway delivered its 8th report to the CEDAW Committee on 21 September 2010.¹³⁰ Norway expects to have it evaluated by the Committee during 2011 or 2012. A lot of emphasis is put on the need to address gender stereotypes as revealed in the fields of both education and employment.

Legislative developments

There are no amendments to Acts to report.

Case law of national courts

There is one court case from the Municipal Court of Oslo regarding gender equality from the civil courts, but no cases from the Labour Court during the period May 2010 to September 2010. As very few discrimination cases exist at the Appeal Court and Supreme Court level, the judgments at Municipal Court level are noteworthy.

Municipal Court case (TOSLO-2010-7432)

Oslo Municipal Court delivered a judgment on 8 July 2010 in a case where a male applicant for the post of 'sorenskriver' (leading position as a judge for a court district) claimed to be the victim of gender discrimination.¹³¹ The male applicant had been ranked as number one by the Board of Employment. The Government chose a woman ranked as number three by the Board. Oslo Municipal Court found that the two applicants were approximately equally qualified and the choice of a woman for the position was a legal affirmative action according to the Gender Equality Act Section 3a.

Equality body decisions/opinions

Norwegian Equality Tribunal Decision No. 42/2009 – equal pay¹³²

The Norwegian Equality Tribunal's Decision No. 42/2009 of 27 May 2010 concerns a female leader of the 'After School Care Division' (*skolefritidsordning* (SFO)) who claimed to have been the victim of discrimination due to gender, as she received less pay than five other (male) division leaders in the municipality. The pay difference was approximately NOK 25 000 annually (EUR 3 125). During the evaluation of whether or not the employees performed work of equal value, the Tribunal was split 3:1, where the

¹²⁹ <http://www.regjeringen.no/nb/dep/ad/pressemeldinger/2010/25-millioner-til-ny-offensiv-mot-ufrivil.html?id=620266>, accessed on 5 October 2010.

¹³⁰ <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2010/norges-8-rapport-til-fns-kvinnediskrimin.html?id=614698>, accessed on 5 October 2010.

¹³¹ The judgment is available on the case database Lovdata.no. The case was not appealed.

¹³² <http://www.diskrimineringsnemnda.no/wips/2094117726/module/articles/smId/307568273/smTemplate/Fullvisning/>, accessed on 13 September 2010.

majority found that the work carried out was of equal value. The assessment was based on a broad evaluation of the positions as division leaders, looking at the requirements of formal education/competence, responsibility and aspects of leadership attached to the positions. The majority of the Tribunal stressed that the formal requirements for the SFO-leader were higher than for the other positions. All division leaders were placed at the same organizational level in the municipality. All positions concerned leadership, while the SFO-leader had the overarching responsibility for more than 100 children as well as leadership tasks for employees working in the SFO-unit. The other male leaders had leadership tasks varying from no responsibility for other employees to responsibility for other employees in combination with planning and organising physical/technical operations. The majority of the Tribunal underlined that one of the main purposes of the equal pay provision in the Gender Equality Act was to raise the value of typical female professions and in that respect the responsibility for other human beings should be evaluated on equal terms with work related to more technical/mechanical nature.

The Tribunal found that the difference in pay was not openly based on gender, but on other conditions. The Tribunal stated, however, that even apparently gender-neutral norms for deciding the pay of individuals could be violating the prohibition of indirect discrimination set out in the Gender Equality Act (GEA) Section 3(iii). The Tribunal stated that since the SFO-division leader was from a female-dominated group while the other leaders were from male-dominated groups, the pay difference did constitute a gender-based difference. The burden of proof shifted to the municipality, see the GEA Section 16. The municipality argued that the male groups of division leaders were more in demand in the employment market, thus the reason for the higher pay, but it was unable to provide evidence to support this argument. The Tribunal therefore did not see any objective reasons for the pay difference and concluded that the municipality was in breach of Section 3. The decision was not appealed before the court.

The decision throws light on the need for awareness of the structural challenges which the rule on equal pay faces in the world of negotiating various collective agreements where there is a legal requirement not to treat female- and male-dominated professions differently.

This case got a lot of attention from the media and resulted in a series of articles in newspapers from independent lawyers and from lawyers from employers' organizations; the latter arguing that the Tribunal had no understanding of the free negotiations of the social partners, while one of the previous deputy leaders of the Tribunal (now working as a lawyer) argued that the equal pay issue had been on the table of the organizations for more than forty years and there was still a lack of knowledge in them about the full content of the equal pay rule.¹³³

Norwegian Equality Tribunal Decision No. 08/2010 – headscarf in the police force

The Norwegian Equality Tribunal's Decision No. 08/2010 of 20 August 2010 concerns the heated debate on the right to wear religious symbols while working for the police.¹³⁴ The Equality and Anti-discrimination Ombudsperson brought the case for the Tribunal after the Ministry of Justice and Police had decided not to change the uniform regulation (dress code) for the police force, following the Ministry's own evaluation of political as well as international obligations.

¹³³ Reference to the media debate: <http://www.ldo.no/no/Aktuelt/Nyheter/Arkiv/Nyheter-i-2010/Kronikk-om-likelonn/>, accessed on 13 September 2010.

¹³⁴ <http://www.diskrimineringsnemnda.no/wips/2094117726/module/articles/smId/1198094242/smTemplate/Fullvisning/>, accessed on 13 September 2010.

The Tribunal decided the case after an evaluation of the prohibition of discrimination on the grounds of religion in the Anti-discrimination Act Section 4, as well as the prohibition of indirect discrimination in the Gender Equality Act Section 3. The Tribunal started by looking at the relationship between the European Convention on Human Rights and Norwegian anti-discrimination legislation and concluded that the making of the police uniform dress code instruction was a matter for national discretion. The next topic to be evaluated by the Tribunal was the fact that, even though the police uniform regulation is gender neutral, the ban on religious symbols in practice affects more women than men since a majority of those wearing a headscarf in Norway are women. Thus a ban prevents more women than men from applying to the force. The Tribunal agreed with the Ministry that the need to express neutrality and equality is an objective reason. Where the Tribunal and the Ministry disagreed was on the question whether or not such a ban is necessary.

The Tribunal did not find that the Ministry had sufficiently proved that the prohibition was necessary in order to maintain confidence in the neutrality of the police force or to maintain peace and order. The conclusion was therefore that the ban of religious symbols in the uniform regulation of the police was a violation of the Gender Equality Act Section 3 as well as the Anti-discrimination Act Section 4. The decision was unanimous.

This case triggered two debates. Firstly, there was a debate on the legal as well as the political basis of the ban on wearing religious symbols in the police force. Secondly, the Tribunal's leader has publicly stated her frustration that the Ministry of Justice will neither follow the Tribunal's decision nor bring it before the courts. The concern of the Tribunal's leader is respect for the Tribunal as such. This debate recurs every now and then as the Ministries are not bound by the Tribunal's decisions and sometimes simply ignore the Tribunal; an option which private persons or companies do not have.

POLAND – *Eleonora Zielińska*

Policy developments

The reported period was, on the one hand, characterised by several positive amendments of the regulation dealing with counteracting family violence, as well as by some legislative actions towards adopting a draft law implementing among others the Services Directive 2004/113/ EU (see below). On the other hand, public opinion was misled by controversial statements expressed by the Government's Plenipotentiary for Equal Treatment (Pełnomocnik Rządu d/s Równego Traktowania) as to the notion of gender equality and discrimination based on sexual orientation. In an interview she presented the opinion that, according to the EU directive, admissible exceptions from the principle of equal treatment cover the refusal of employment by a Roman Catholic school of a teacher on the ground of their homosexuality. In this interview she also publicly disclosed the sexual orientation of one of her critics. The Prime Minister criticised the minister for her remarks but refused to dismiss her in relation to these events, despite repeated demands by numerous women's, feminists' and anti-discrimination NGOs.

It is also worth mentioning other social events negatively influencing the atmosphere around the issue of gender equality. The last Presidential elections and the upcoming local elections again drew public attention to the problem of sexual harassment. The former President of Olsztyn, who lost his post because of alleged

sexual harassment and rape of his female staff, declared recently his intention to run again for this post during local elections, which will take place in November. The long lasting criminal procedure in his case (still pending) creates a situation where there are no legal obstacles to his participation in the elections.

A similar situation occurred in the case of the former deputy Prime Minister, Andrzej Lepper, where the court verdict finding him guilty of sexual corruption¹³⁵ is still not final because of his appeal, thus allowing him to run for President during the elections in June (though with little success). These examples of the length of criminal proceedings (lasting several years) in cases of sexual harassment, raise doubts as to the effectiveness of the response given by the justice system to such appearances of gender discrimination. They also create an impression of impunity, which may be one of the factors facilitating the spreading of the phenomenon of sexual harassment (recently, the press revealed facts about sexual harassment occurring in one of the border guard stations).

The uncertainty as to the monetary worth of old-age pensions which come from the open retirement fund (a private retirement fund, administrated by the Universal Retirement Society), deriving from its bad management, evoked public discussion about further reforms of the pension system. The gender issue in this affair is connected with the fact that, because of their earlier retirement age, the first victims of the failure of this system are women.

Legislative developments

Amendments to the regulations dealing with gender violence

Gender violence also restricts women's opportunities to enjoy their human rights in employment (not only when it manifests as sexual harassment but also in the case of family violence, which often is the factor which holds women back from undertaking employment), therefore the improvement of the law aimed at counteracting this type of violence is of great importance for eliminating gender discrimination. Since 1 August 2010 the new provisions of the 2005 Law on counteracting family violence¹³⁶ have been in force.

It should be stressed that the Law of 2005 on counteracting family violence was an important step in extending protection for victims of family violence and making its prevention more effective. However, from the beginning the Law was very deficient. Some of its shortcomings have now been successfully eliminated by amendments implemented in 2010. The amendments of 10 June 2010¹³⁷ (which also concern several other legal acts¹³⁸) provide, e.g.:

- stronger protection for the safety of victims of gender violence;
- for the explicit prohibition of beating children; and
- for the obligation to take a multi-agency approach to family violence.

¹³⁵ For receiving non-material profits while performing a public function (Corruption, Article 228 of Penal Code of 6 June 1997 (*Dziennik Ustaw Rzeczypospolitej Polskiej (Dz.U.)*) (Journal of Laws of Republic of Poland) cited as JoL 1997, No. 89, item 553 with amendments).

¹³⁶ The Law of 27 July 2005 (JoL 2005 No. 180 item 1493 with amendments), in force from 21 November 2005.

¹³⁷ JoL 2010 No. 125 item 842.

¹³⁸ In particular: Penal Code and Code of Criminal Procedure of 6 June 1997 (JoL 1997, No. 89, item 555 with amendments) and Family Code (Act of 25 February 1964 JoL 1964 No. 9, item 59 with amendments) and Code of Civil Procedure (Act of 17 November 1963, JoL 1964 No. 43 item 296).

In respect to the protection of victims, the Law of 10 June 2010 provides in particular for:

- an additional civil-law-based protection order;
- explicit powers for the police to arrest an aggressor immediately; and
- powers enabling the prosecutor to impose on the offender, after criminal proceedings have been initiated, the obligation to leave the accommodation shared with the victim, and also to prohibit contact with named people.

In addition, the law of 20 May 2010,¹³⁹ in force from 8 September 2010, introduced into the Penal Code the definition of trafficking in persons (slavery) and also modified the prohibitions on trafficking (new Article 189a of the Penal Code replaced the former Articles 253 and 204). The lack of a definition of trafficking and the former incoherence of the Penal Code's types of offences aimed at combating this phenomenon, constituted important obstacles to combating trafficking effectively. The amendments introduced by the Law of 20 May 2010, implementing Framework Decision 2002/629/JHA, thus have the potential to improve the situation in this respect.

Draft regulations

New time limits for enjoying paternity leave by adoptive father

According to the Labour Code, the right to two months paternity leave is given to every employed father, biological or adoptive, only if the child is not older than 12 months. The long adoptive procedure in Poland makes it impossible for many adoptive fathers to enjoy this right, because the court's decision on the adoption is usually made after the child's first birthday. The existing law takes this factor into consideration only with reference to the adoptive mother, who is entitled to maternity leave until the child turns seven and, in the case of some disabled children, up to the age of 10 (Article 183(1)(C)). The draft law, already accepted by the Council of Ministers, aims to eliminate this unjustifiable difference proposing to count the 12-month time limit, in the case of fathers, from the moment when the court's decision on adoption becomes final, but not later than the child's seventh year (and tenth year in the case of some disabled children).¹⁴⁰

Draft law implementing EU equality directives

The procedure of implementation of the Services Directive 2004/113/EC and of improving the implementation of other equality directives seems to be coming to an end. The new draft law implementing EU equal treatment directives was presented to Parliament on 17 September 2010¹⁴¹ and now, after the first reading, is currently under debate by the Parliamentary Committees of Social Policy and the Family, and of Human Rights. The development of the draft law took almost six years. The Commission has already initiated non-implementation proceedings against Poland, among others regarding Race and Services Directives. Several drafts, formerly presented over the six years by the Ministry of Labour and Social Policy, have been discussed many times. In the opinion of 36 NGOs active in the field of equality and

¹³⁹ JoL 2010 No. 98 item 626.

¹⁴⁰ http://www.podatki.biz/artykuly/16_11819.htm, accessed on 6 October 2010.

¹⁴¹ Sejm Print No. 3386 <http://orka.sejm.gov.pl/proc6.nsf/opisy/3386.htm>, accessed on 5 October 2010.

non-discrimination, the last draft law, prepared by the Plenipotentiary for Equal Treatment, is the worst of the lot¹⁴², since it:

- limits the catalogue of grounds on which discrimination is prohibited;
- contains deficiencies in the definitions of main concepts and notions;
- differentiates between different groups concerning the protection against discrimination (e.g., does not provide for protection from discrimination for access to museums or public offices for disabled persons); and
- confers powers of the equality body on the Human Rights Defender (Rzecznik Praw Obywatelskich), despite the contrary opinion in this respect, expressed by the actual post holder, who stressed that her Office deals mainly with cases of discrimination by the State (or its organs) towards citizens and is not competent to interfere when discrimination occurs in relations between private institutions or people (e.g., between entrepreneur and client).¹⁴³

Case law of national courts

Supreme Court decision in wage discrimination case

Of some importance for improving the protection of victims' rights during court procedures is the Supreme Court judgment of 8 June 2010 (I PK 27/10), concerning unjustified unequal treatment, with reference to wages, of two female nurses performing the same work. Without going into the details of this case, it can be reported that the court of first instance dismissed the case because the claimant did not indicate any specific grounds of discrimination. This verdict was overturned by the Appellate Court which decided that, as a question of fact, the difference in wages was not justified. The Supreme Court (acting as the court of cassation) accepted the decision of the Appellate Court and expressed the opinion that the claimant should not only be awarded compensation for the discrimination in wages which had already occurred (this had already been done by the appellate court) but that, in addition, the court of first instance, when deciding the case, should also specify for the future a non-discriminatory wage for the claimant and the court's decision in this respect should replace the invalid (by virtue of law) discriminatory content of the employment contract concluded between employee and employer.

Supreme Court decision in sexual harassment/mobbing case

The simplified summary of this case is as follows. A female employee was forced to work under the supervision of her former partner, despite her complaints that he humiliated her, persecuted her and violated her dignity in other ways, e.g., by sexual harassment. She claimed damages of PLN 10 000 for injury to health caused by mobbing. Instead of the requested amount of damages, the court of first instance awarded her punitive compensation for discrimination in employment, on the basis of the Labour Code provision dealing with the violation of the equal treatment principle, of PLN 1 126. Both parties submitted appeals. The claimant/employee's appeal was rejected because she failed to pay the Appellate Court's fees. The employer's appeal, however, was successful and the Appellate Court changed the verdict of the court of

¹⁴² Contents of this draft are only available from the Drafter, i.e. the Plenipotentiary. See: www.rownetraktowanie.gov.pl and <http://www.gover.pl/news/index/tag/EI%C5%BCbieta%20Radziszewska/guid/rzad-przyjal-projekt-ustawy-antydyskryminacyjnej>, both accessed on 8 October 2010.

¹⁴³ http://wiadomosci.gazeta.pl/Wiadomosci/1,80708,8077663,Ustawa_o_rownym_traktowaniu_Prof_Sroda_To_ogryzek_.html, Compare: www.pap.pl, both accessed on 5 October 2010.

first instance, rejecting the claimant's claim: this rejection became the ground for her annulment claim to the Supreme Court. In the judgment of 8 March 2010 (II PK 255/09), the Supreme Court rejected the argument of the Appellate Court, according to which the court of first instance was not entitled to award the claimant the special punitive compensation provided for in case of gender discrimination, since she had claimed compensation for injury relating to mobbing. After having noted that Polish law does not precisely draw the border line between harassment, as a manifestation of discrimination, and mobbing (each of which is regulated by different parts of the Labour Code), the Supreme Court decided that the court of first instance was not bound by the legal terms of the claim made by the claimant (even when represented by a lawyer) if its verdict was pronounced on the basis of the same facts.

A further conclusion, deriving from the referred judgment of the Supreme Court concerned the costs of the court procedure. The Supreme Court decided that the motion on release of court fees, put forward by the claimant during the procedure before the court of first instance, although irrelevant at this stage (since the procedure before the labour court of first instance is free of charge) remains valid in the appeals procedure (when the fees are provided by law). Therefore the appeal of the employee should not be rejected.. The Supreme Court accordingly repealed the verdict of the Appellate Court and sent the case back to the court of first instance for further consideration.

It is difficult to predict what the outcome of this consideration will be. However the referred case gives grounds for believing that in the opinion of some Polish labour courts, contrary to the intention of the legislator, the special punitive compensation deriving from the violation of the principle of equal treatment, is treated as a measure to be applied *instead of* damages rather than *in addition* to them.

PORTUGAL – Maria do Rosário Palma Ramalho

Legislative developments

New legislation concerning marriage between persons of the same sex (follow up)

Following several proposals, very detailed debates in various sectors and a pronouncement of the Constitutional Court on the issue, new legislation has been approved and has entered into force regarding marriage between persons of the same sex: Law No. 9/2010, of 31 May.¹⁴⁴

This legislation has changed the traditional notion of the contract of marriage, in order to permit the celebration of this contract not only between persons of the opposite sex but also between persons of the same sex.

Since the marriage contract and the duties and rights attached to it are ruled by the Civil Code (since 1966), the new legislation has changed the Code's rules regarding this issue. The changes introduced are as follows:

- the contract of marriage is now defined as 'the contract celebrated between two persons who aim to found a family in a lifelong union, under the terms of this Code' (Article 1577 of the Civil Code);
- all other references of the Civil Code regarding the marriage contract that mentioned the different sex of the partners, such as the expressions 'husband' and 'wife', have been eliminated from the Civil Code;

¹⁴⁴ This legislation can be traced in the Official Journal (www.dre.pt) from 31 May 2010.

- the traditional cause for annulment of the marriage contract, namely that the partners were of the same sex, has been banned;
- all rights and duties attached to a civil marriage contract that the Civil Code grants to married couples, have been extended to the marriage between persons of the same sex, with the exception of the right to adopt children as a couple (Article 1979). This right is still reserved for heterosexual marriage.

Government Resolution establishing the Second National Plan for the Integration of Immigrants

Portugal has a strong tradition in favouring a complete integration of immigrants in its society, and this has already been recognised by the United Nations which, in its 2009 Report for Human Development, considered Portugal the most developed country in the area of immigrants integration policies.

In this area, the Government has recently adopted the Second National Plan for the Integration of Immigrants (for the period 2010-2013). This Plan was approved by Resolution of the Council of Ministers No. 74/2010, from 17 September 2010.¹⁴⁵

This Resolution contemplates several actions and measures in the most sensitive areas of integration policies such as:

- actions to improve welcoming services for immigrants;
- measures for the promotion of employment and training of immigrants;
- the training of national teachers in a multicultural environment;
- the humanitarian support of extreme poverty amongst immigrants;
- actions to make it easier for immigrants to have access to national health services;
- actions in the area of housing for immigrants;
- support and development of the actions of the Agency for Equality and against Racial Discrimination (*Comissão para a Igualdade e contra a Discriminação Racial*);
- actions to promote the political integration of immigrants, as well as immigrants' right of association;
- specific protection of immigrants in old age;
- promotion of the relations between immigrants and their countries of origin;
- actions to promote cultural diversity;
- reinforcement of the actions against human trafficking; and
- reinforcement of the gender mainstreaming perspective in all actions regarding the welcoming and integration of immigrants.

ROMANIA – Roxana Tesiu

Legislative developments

Introduction

The year 2010 has been marked in Romania by a profound economic crisis that impacted, inter alia, on the equal opportunities agenda. This impact is reflected in a set of legislative changes adopted with the main purpose of seeking economic redress and budgetary equilibrium. Hence, the equal opportunities agenda has been affected by two distinct sets of legislative measures:

¹⁴⁵ This Resolution can be traced in the Official Journal, (www.dre.pt) from 17 September 2010.

- a legislative package oriented towards reorganising the main state agencies, including the National Agency on Equal Opportunities;
- a legislative package designed to reduce the burden of state-paid allowances in various areas, as well as the burden of social contributions, through the restructuring of the public pensions system and reductions in pensions.

Takeover of the National Agency on Equal Opportunities for Women and Men

Governmental Ordinance No. 68 of 30 June 2010¹⁴⁶ provides for the reorganisation of the Ministry of Labour, Family and Social Protection and of the institutions which it coordinates or which are under its control. The reorganisation aims to eliminate three state bodies through abolition and through the taking over of activities:

- the National Authority for Family Protection and Child Rights Protection;
- the National Agency on Equal Opportunities for Women and Men;
- the National Institute for Preventing and Combating Social Exclusion of Persons with Disabilities.

Furthermore, Governmental Decision No. 728 of 21 July 2010¹⁴⁷ provides in Annexe 1 for the disposition of the former National Agency on Equal Opportunities as a General Direction for Equal Opportunities between Women and Men within the Ministry of Labour, Family and Social Protection. Such a reorganisation of the activity of the Ministry of Labour represents a significant step back in recognising the importance of the equal opportunities agenda in Romania. Currently, it is not clear how the provisions of the 2002 Equal Opportunities Law are to be revised in the light of such reorganisation, nor the extent to which the attributions of the former Agency will be taken over by the new Direction.

According to the provisions of the 2002 Equal Opportunities Law,¹⁴⁸ the Agency was the national body on gender equality authorised to coordinate the application of the legislative framework on equal opportunities for women and men. Apart from the Agency, the National Council on Combating Discrimination is the body in charge of monitoring the overall national legal framework on anti-discrimination and monitoring the implementation of anti-discrimination policies in Romania.¹⁴⁹

Due to the reorganisation of the Ministry of Labour, Family and Social Protection through the taking over the activity of the former National Agency on Equal Opportunities and transforming it into a General Direction within the Ministry's structure, there has been a considerable impact on the recognition of and attention paid to equal opportunities matters. The republication of the 2002 Equal Opportunities Law is urgently required in order to seek clarity with regard to the extent to which the attributes, role and responsibilities of the former National Agency have been taken over by the Ministerial body.

¹⁴⁶ Governmental Ordinance No. 68 of 30 June 2010 on some reorganisation measures of the Ministry of Labour, Family and Social Protection, published in the Official Gazette No. 446 of 1 July 2010.

¹⁴⁷ Governmental Decision No. 728 of 21 July 2010 on modification and completion of the Governmental Ordinance No. 11 of 2009 on organising and functioning of the Ministry of Labour, Family and Social Protection, published in the Official Gazette No. 512 of 22 July 2010.

¹⁴⁸ Law No. 202 of 2002 on Equal Opportunities for Women and Men, republished in the Official Gazette No. 150 of 1 March 2007.

¹⁴⁹ Ordinance No. 137 of 31 August 2000 on prevention and sanctioning of all forms of discrimination, published in the Official Gazette No. 99 of 8 February 2007.

Reduction of parental leave allowances and elimination of allowances for family support

Based on the legal provisions of Article 12 of Law No. 118 of 2010,¹⁵⁰ the allowance for parental leave is to be reduced by 15 %. If, according to the basis of calculation, the final amount is lower than RON 600 (EUR 142), the allowance granted will be RON 600. Furthermore, Article 15(g) stipulates that Law No. 482 of 2006 on granting equipment for newborn babies is abrogated. Article 15(j) stipulates that the additional family support allowance granted for newborn babies, in the amount of RON 230 (EUR 54) is also abrogated.

SLOVAKIA – Zuzana Magurová

Policy developments

First woman Prime Minister in Slovakia's history

Following the June Parliamentary elections, the first woman Prime Minister in Slovakia's history was elected. Besides her, there is only one other woman in the government – the Minister of Justice. The decreasing trend in the representation of women in political positions continues and the number of women in Parliament dropped below 15 %, which is less than in the last Parliament.

Gender equality is missing from the policy statement of the new Government

In August the new Government adopted a policy statement from which gender equality was missing. Many human rights and feminist non-government organisations registered their disappointment that the policy statement of the Government ignored the topic of gender equality. They noted that the only sentence in the initial draft text on the application of the question of gender in the formulation and implementation of all policies, i.e., the active strategy for compensation for gender-based inequalities, had been replaced by a vague formulation on the elimination of gender discrimination. This approach is insufficient because it is limited to the elimination of discrimination that has already occurred. The Government policy statement only contains a few measures to support the family and the balancing of private and professional life. The willingness to deal with more serious problems, such as the gender pay gap, or the insufficient representation of women in political and decision-making positions, is missing. The chapter of Government policy statement devoted to human rights is extensive, but in case of specific measures it focuses on national and ethnic minorities only.

Slovak Government refused nomination of three judges for European Court of Justice

The new Slovak Government refused the nomination of three female ad hoc judges selected and submitted by the Judicial Council to represent Slovakia at the European Court of Justice. The Interior Minister, who was the Justice Minister from 2002–2006, claimed that the nominations were rejected because all three judges had pressed charges against the state alleging discrimination in connection with the amount of their salaries. The claims of judges stem from a Constitutional Court ruling on pay differences between judges of the Special Court and other judges who felt justified in claiming

¹⁵⁰ Law No. 118 of 2010 on some measures for seeking budgetary equilibrium, published in the Official Gazette No. 441 of 30 June 2010.

retroactive pay. The Interior Minister found such action to be not only unlawful, but also immoral. That is why he believed those judges were in no position to represent Slovakia.

Legislative developments

Extension of competences of the Deputy Prime Minister to gender equality

Upon the motion of a group of human rights non-government organisations, the new Government has adopted an amendment to the Competence Act.¹⁵¹ It included the general human rights agenda and the gender equality agenda in the name and scope of competences of the Deputy Prime Minister. The reason for the submitted initiative of the non-government organisations (NGOs) was the absence of a central public administration body which was fully responsible for issues of human rights. No organisational unit with cross-Ministerial and real competences in the area of gender equality existed at the level of Government.

The Government has also adopted another proposal of the NGOs and set up the Government Council on Human Rights, National Minorities and Gender Equality as its permanent advisory body. The Council will perform coordination, consultative or specialised tasks and its members will also be experts from NGOs and the academic community.

Equality body decisions/opinions

Report on the observance of human rights including the observance of the principle of equal treatment in the Slovak Republic for the year 2009

This annual report is currently available also in English on the Slovak National Centre for Human Rights website.¹⁵²

Slovak National Centre for Human Rights refused to represent Roma teacher before court because of certainty of losing case

The case of two Roma sisters – teachers with university education, who have been unable to find a job for four years – has been covered by the press since August of this year. Less-qualified applicants, often men, were appointed to jobs sought by these women, to whom schools can pay lower wages due to their lower qualifications and thus save resources from their budgets.

The Ministry of Education has commented on the case. In a letter addressed to a job applicant – one of the two Roma sisters – in August, a senior official admitted a mistake on the part of the school in the case where she had not been engaged as teacher. However, another senior official of the Ministry wrote in September, in his opinion addressed to the Slovak National Centre for Human Rights (the Centre), that he agreed with the procedure of the headmaster of the school and that the applicant had not got the qualifications required for the position in question. It was one of the reasons why the Centre had refused to help the applicant.

When one of the teachers had approached the Centre, the representative of its regional office tried to solve the problem by mediation, but without success. The Centre stated that unequal treatment may have occurred, but it might or might not be regarded

¹⁵¹ Act No. 575/2001 Coll. on the organisation of Government activities and on the organisation of central state administration (as amended).

¹⁵² Report on the Observance of Human Rights Including the Observance of The Principle of Equal Treatment in the Slovak Republic for the Year 2009, www.snslp.sk, accessed 4 October 2010.

as discrimination. The Antidiscrimination Act¹⁵³ talks about establishing a case of discrimination through the fulfilment of three conditions, all of which must exist: the grounds of discrimination; the area of discrimination; and the form of discrimination. The lawyers of the Centre are allegedly unable to specify the ground of discrimination and lack sufficient relevant evidence to prove the discrimination. On this basis, and taking into account the opinion of the Minister of Education, the Centre issued a statement that it would not represent the teacher before the courts, because it would be certain to lose.

The attitude of the Centre also results from its previous experience when it had represented a client who was unsuccessful in legal proceedings and for this reason had had to pay the high legal costs of the successful counterparty. Several experts have been drawing attention to the insufficient financial and personnel resources of the Centre for a long time. They see a potential solution in the increase of the number of experts in both gender equality and litigation, and in the creation of a special fund for financing selected disputes. In this way the number of law cases (especially successful ones) in the area of gender discrimination would also increase.

SLOVENIA – Tanja Koderman Sever

Policy developments

Campaign 50/50 run by Women's Lobby of Slovenia during local elections

Sustained efforts by women in civil society and in the majority of parliamentary parties led to the introduction of women quotas in local elections in 2005. In the 2006 local elections 21 % of the elected councillors were women due to 20 % women quotas and the rule that in the first half of the voting list both sexes must be represented for every three candidates. Quotas for mayoral elections have not been introduced and therefore only 3 % of female mayors were elected. Women again were underrepresented in local communities because the political elite organised elections in such a way that women did not have equal chances of being elected. The upcoming local elections in October 2010 present a new opportunity to eliminate this discrimination. In accordance with the transitional provisions of the Law on Local Elections 30 % women quotas will be introduced this year. However, even 30 % women quotas will not contribute to a greater representation of women in municipal councils without an equal distribution of candidates by gender on voting lists. Since the Law on Local Elections has not been changed and did not introduce the 'zipper rule', male and female candidates do not have equal opportunities to be elected. The 'zipper rule' means that male and female candidates are arranged on candidate lists in one-to-one relationship. To increase the share of women in municipal councils, the Women's Lobby of Slovenia started a project under the title Campaign 50/50, whose fundamental purpose is to create public pressure on the presenters of candidate lists who can, notwithstanding the electoral legislation, arrange female and male candidates on candidate lists alternately one after another and also place women in the first and second place more frequently. The project is supported by the Office for Equal Opportunities and will be primarily carried out in four major Slovenian cities during the election campaign. The project includes an open letter to the presenters of candidate lists, a round table conference in four major cities

¹⁵³ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, Amending and Supplementing Certain Acts (as amended).

and encouraging voters to give their votes to candidate lists which include gender equality issues in their programmes.

Activities of the Human Rights Ombudsman

Among activities of the Human Rights Ombudsman (*Zdenka Čebašek-Travnik*, hereinafter the Ombudsman) it is worth mentioning the participation in the meeting of the Parliamentary Commission for Petitions, Human Rights and Equal Opportunities in June 2010. Its members discussed the report on the work of the Advocate for the Principle of Equality for 2009 and the situation of its position. The Ombudsman stressed that the office of the Advocate was not independent and therefore it should be urgently reformed to make it so.

In addition the Ombudsman became aware of the protests of the civil society representatives about the appointment of only male members to the Council for Environmental Protection in July 2010. The Ombudsman pointed out that Slovenia is a member of intergovernmental and international organisations and is therefore obliged to comply with international standards, constitutional guarantees of gender equality and legal obligations to ensure women's participation in decision-making. Moreover, she called upon appointed Council members to take part in the implementation of the principle of equal treatment, and the National Assembly to respect the principle of gender equality when appointing members of public bodies.

In September 2010 the Ombudsman made a decision in a case of alleged discrimination in employment. A worker, who was citizen of Bosnia and Herzegovina and had a permanent residence in Slovenia, claimed that her employment contract would not be renewed due to her pregnancy. The reasoning of the employment agency, where the worker was employed, was the potential cost of sick leave due to the pregnancy. Because of the possible loss of work, the woman lodged a written complaint with the Ombudsman. Since the Ombudsman cannot intervene in cases where rights are violated by a private company, she assisted the complainant with advice about her rights, how she could file a complaint with the employer and with the labour inspectorate, and all other possible legal remedies available. Fortunately the case was resolved in favour of the female worker without the intervention of the competent authorities, on the basis of her discussion with the director. Her employment contract was renewed.

Governmental activities

The Ministry of Labour, Family and Social Affairs has issued a public tender, part of which relates to equal opportunities in the labour market. The tender is aimed at improving the employability and social inclusion of vulnerable groups, creating jobs for them and ensuring gender equality. In the public tender framework the Ministry will co-finance partnerships whose projects will expand existing practices or introduce new practices to reconcile work, family and private life, and will develop new approaches to ensure gender equality and reduce gender stereotypes, with an emphasis on the reduction of the segregation in the labour market. The total value of the project is EUR 8 million.

The Government appointed a new Advocate for the Principle of Equality (hereinafter the Advocate) in June 2010 for a period of five years. In accordance with the Act on the Implementation of the Principle of Equal Treatment, the Advocate works within the Office for Equal Opportunities and is responsible for hearing cases of alleged discrimination. The Advocate is Boštjan Vernik Šetinc, a lawyer with more than nine years experience in the field of human rights and equal treatment.

In June 2010 the Government appointed an inter-ministerial and inter-office coordination working group to prepare an analysis of the current institutional regulation for ensuring equality and protection against discrimination in Slovenia; to prepare an analysis of the obligations in relation to the legislation of the European Union and other international acts concerning equality and protection against discrimination; and to prepare a proposal of a new concept of institutional regulation, including policy-making, promotion of equality, monitoring the situation of social groups and providing legal assistance to victims of discrimination. One of the key tasks of the group is therefore to evaluate the effectiveness of the existing system of legal protection against discrimination (which includes both the institutional perspective and the assessment of the effectiveness of the particular legal remedies). Proposals may be submitted until the end of October 2010.

In July 2010 the Government adopted a decision amending the Decision on Nomination of the Members of the Governmental Council (hereinafter the Council) for the Implementation of the Principle of Equal Treatment. Two new members of the Council were nominated as a consequence of changes in personnel in the positions of Secretary General of the Government and the Advocate.

Another activity that needs to be mentioned is the discussion on the second Report on the Implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2008-2009 by the National Assembly Committee for Labour, Family, Social Affairs and the Disabled. The report was prepared by the Office for Equal Opportunities and presented by its Director. The report shows that gender mainstreaming is increasingly integrated into the work of Ministries and governmental offices. The members of the Committee drew attention in particular to the problem of unequal sharing of family work between men and women, and the persistence of stereotypical patterns in Slovene society which are changing too slowly, therefore resulting in slow progress in the area of gender equality. They pointed out that it would be necessary to devote more attention to research, analysis and awareness-raising campaigns aimed at eliminating gender stereotypes.

Legislative developments

There have been no legislative developments in the area of gender equality in the past five months.

Case law of national courts

It is rather unusual that Slovene citizens, who frequently litigate for various reasons, rarely decide to bring gender equality cases before the courts. That is why there has been no case law worth mentioning in the area of gender equality in the past five months.

Equality body decisions/opinions

Gender discrimination found in a case of sexual harassment

The Advocate for the Principle of Equality working within the Office for Equal Opportunities decided in a case of sexual harassment in a workplace. He found discrimination based on gender due to the sexual harassment.

Miscellaneous

International conference on equal opportunities for women and men in national legislation

The international conference on equal opportunities for women and men in national legislation was organised in Ljubljana in May 2010 by the Ministry of Foreign Affairs and the Norwegian Embassy in Slovenia. The goal of the conference was to contribute to the debate of the UN Human Rights Council in September 2010 in Geneva on new measures to promote equality between men and women in national law.

SPAIN – Berta Valdés

Policy developments

Abolition of the Ministry of Equality: a backward movement in equality policies in Spain

The President of the Spanish Government has reformed the state's general administration by reducing the number of Ministries. The Ministry of Equality has been abolished by means of Royal Decree 1313/2010, of 20 October. From now on, the Government's policies in three subjects (equality between women and men, the fight against all types of discrimination, and gender violence) will be drawn up by the Ministry of Health, Social Policy and Equality. The abolition of the Ministry of Equality will have serious negative effects because the subject of equality is now integrated within a wider Ministry and will depend on social policy. This will probably make it difficult to apply gender policy mainstreaming to all policy areas and to all Ministries.

It is argued that the abolition of the Ministry of Equality results from a budgetary cut motivated by the economic crisis, but in reality the cost of the Ministry of Equality was only 0.03 % of the general budgets of the state. Therefore what seems to be underlying this is a decision to push equality policies into the background in Spain. This probably means that the draft Law on Equal Treatment will experience many difficulties in becoming a Law without the existence of the Ministry of Equality.

Creation of the 'Rural and Urban Women's Network of Castilla-La Mancha'

The 'Rural and Urban Women's Network of Castilla-La Mancha' is an initiative formed from the set of equality policies of the regional Government. Its creation took place on 15 October, on the International Day of the Rural Woman. The purpose of this Network is to improve the quality of life of rural women and to promote their participation in all policy areas.

In Castilla-La Mancha there are more than 450,000 rural women and the creation of the Network tries to make visible and to recognise the work carried out by them. Another aim is to increase their participation in economic and social development, as a way of attaining equal opportunities between women and men.

Legislative developments

Organic Law 5/2010, of 22 June, modifying the Penal Code

Organic Law 5/2010 amends the Penal Code and an innovation is that there is now a specific regulation concerning labour harassment within the crimes of torture and acts

against moral integrity. ‘Labour harassment’ includes all kinds of harassment (‘mobbing’, harassment of women and sexual harassment) which take place within the framework of any labour or civil service activity, abusing the superior position in the relationship. It is not necessary that the repetition of the hostile or humiliating acts constitutes degrading treatment whenever they suppose serious a harassment against the victim.

For the first time, real estate harassment is regulated. This form of harassment, consisting of forcing the tenant or the owner to leave the house especially affects women. The sentence in both cases can be imprisonment of between six months and two years. The Law will come into effect six months from its publication on 23 June 2010.

Law 35/2010 on urgent measures for the reform of the employment market (Boletín Oficial del Estado (BOE) 18 September 2010)

The amendment of several labour laws by the Government after the breakdown of the Social Dialogue motivated the call, on 29 September 2010, for a general strike in Spain. The direction of the reform has been to grant more power to the employer in matters of dismissal and in the freedom to change working conditions unilaterally.

Nevertheless, Law 35/2010 has also introduced some changes related to the principle of equality and the prohibition of gender discrimination. The changes are not truly innovative as most of the provisions were already contained in previous regulations. The main rules of the Workers Statute (WS) regarding the prohibition of discrimination between women and men have been amended, and now include an express reference to the prohibition of both types of discrimination, i.e., ‘direct and indirect’ (Article 17 WS). The subjects modified are:

- the guarantee of the principle of equality in the access to employment (Article 16 WS);
- the bona fide application of the principle of equality in the definition of categories and professional groups (Article 22 WS);
- the criteria and systems to enforce the rights of promotion and professional training at work (Article 23 WS); and finally
- the criteria and systems of professional promotion in the company (Article 24 WS).

The reform states that the regulation of all these subjects carried out in collective agreements must have as an objective a guarantee of the absence of direct or indirect discrimination between women and men. Also, the reform supports the use of positive action measures directed at eliminating or compensating for situations of discrimination in the case of professional promotions in a company.

Law 35/2010 maintains and increases the measures directed towards increasing the employment of women. Under certain conditions, the enterprise quota to the Social Security authority is reduced in a higher quantity if the new employees are women.

Law 35/2010 also introduces a rule that affects the Inspection of Work and Social Security. The Inspection must include within its Integrated Plan of Action specific plans to fight wage discrimination between women and men.

Royal Decree 831/2010 developing the benefit of voluntary interruption of the pregnancy (BOE 26 June 2010)

Law 2/2010 on sexual and reproductive health and the voluntary interruption of pregnancy has been developed with this Royal Decree in an important aspect. The objective is to guarantee to all women the same access to abortion rights regardless of

the place where they live. If, exceptionally, the public health service could not provide the service, the woman will have the right to go to an authorised centre. The public health service must directly assume the cost of the service.

Miscellaneous

The inactivity of the Woman's Observatory

An example of the difficulty in the actual application of all the instruments to attain effective equality between women and men is the inactivity of the Women's Observatory, a consultative organ of the Internal Affairs Ministry. Its function is to analyse the employment situation of women in the security forces (Police, Civil Guard) and to identify discrimination situations. The Women's Observatory has held only two meetings since its creation and has been inactive since 2008, with no advances in the fight against discrimination.

SWEDEN – Ann Numhauser-Henning

Case law of national courts

There has been no significant case law concerning sex discrimination from the Swedish Labour Court in the last six months. However, a recent case from the Appeal Court in the ordinary court system deserves to be mentioned.

Alleged discrimination on the grounds of pregnancy-related physical problems

In the *European Gender Equality Law Review* No. 1/2010 I described four cases from the Stockholm District Court (judgments T 10670-07, 10671-07, 10702-07 and 15410-07 of 3 November 2009) concerning four pregnant women with pregnancy-related physical problems who were denied sickness benefits with reference to pregnancy being 'a natural state' and not an illness.¹⁵⁴ The Stockholm District Court found for the claimants. These cases were later appealed to the *Appeal Court Svea Hovrätt* which now has delivered its judgment.

Legal background and case history

According to the Swedish Public Insurance Act, *Lagen om allmän försäkring* (1962:381), there is a right to income-related sickness benefits for employed persons unable to work due to illness. The ability to work must be reduced by at least 25 %. Sickness benefits in cash are provided by a decision of the National Insurance Board (*Försäkringskassan*) in the first instance. Such a decision can be appealed against, at the County Court (*Länsrätten*), at the Administrative Appeal Court (*Kammarrätten*) and, eventually, at the Supreme Administrative Court (*Regeringsrätten*).

Four pregnant women were thus denied sickness benefits by *Försäkringskassan*, despite being prevented from working during parts of their pregnancy due to (mainly) pregnancy-related back problems. Ms A (a pre-school teacher) had, according to her doctor, a total loss of ability to work from week 33 of her pregnancy. *Försäkringskassan*'s medical expert regarded Ms A's problems as 'a natural' consequence of her pregnancy and *Försäkringskassan* denied her sickness benefits, arguing that 'a right to sickness benefits requires the pregnancy to deviate from what could be regarded as 'the normal process of pregnancy' in that there are complications amounting to 'illness'.

¹⁵⁴ *European Gender Equality Law Review*, no. 1/2010, pp. 132-133.

‘Illness’ was defined as ‘any abnormal physical or psychological condition not related to the normal process of life’. Only certain, quite specific, complications during pregnancy were regarded as ‘abnormal’ conditions amounting to illness. B, C and D were also denied sickness benefits by *Försäkringskassan* based on the same line of argument. All four women *received sickness benefits later* on appeal to the County Court.

Upon appeal by the Equality Ombudsman the Stockholm District Court the decision by *Försäkringskassan* was considered to amount to detrimental treatment despite the fact that it was changed later on by the County Court and thus never took legal effect. The County Court found the situation comparable with that of a (hypothetical) non-pregnant person with symptoms of the same kind and severity. Indemnification was set at approximately EUR 5 000 (SEK 50 000) each.

The judgment of the Appeal Court Svea Hovrätt

The Appeal Court also found direct discrimination on the grounds of sex.

The Appeal Court began by stating that the underlying cause of the symptoms amounting to an illness is of no relevance for the application of sickness-benefit insurance. The mere fact that *Försäkringskassan* took into account that, in these cases, the symptoms were pregnancy-related implied that it had applied a special and more severe reference norm than the one used for the relevant comparator – a ‘non-pregnant’ man. It is ‘obvious that the four women due to their pregnancies were treated worse than a man with similar symptoms’, said the Appeal Court and this amounts to a *prima facie case of direct discrimination*. *Försäkringskassan* has not been able to show that the denial of sickness benefits was not related to pregnancy, nor that a man with equivalent symptoms would also have been denied benefits.

Indemnification was, however, restricted to EUR 1 500 (SEK 15 000) each, taking into account that discrimination was ‘unintentional’ and that the consequences were limited (sickness benefits were, after all, approved).

Analysis

This decision may prove very important for pregnant women in Sweden in that pregnancy-related symptoms will qualify for sickness benefits to the same extent as other, non-pregnancy related symptoms. Until now, women had to use their limited days of parental leave benefits in this situation. It is also interesting that the decision by *Försäkringskassan* was considered to amount to detrimental treatment despite the fact that it was changed later on by the County Court and thus never took legal effect. It is still possible in this case to appeal to the Swedish Supreme Court (*Högsta Domstolen*).¹⁵⁵

¹⁵⁵ <http://www.do.se/sv/Press/Pressmeddelanden/Hovratten-slar-fast-Forsakringskassan-utsatte-gravida-for-konsdiskriminering/>, accessed on 1 October 2010.

Legislative developments

Insertion of positive discrimination into the constitution

The Turkish Parliament adopted a constitutional amendment package on 7 May 2010.¹⁵⁶ A referendum on a package of 26 constitutional amendments addressing a human rights agenda won approval by a wide margin with a vote of 57.9 % on a high turnout of 78 % on 12 September 2010, the anniversary of the 1980 military takeover. The main purpose of the package was to take steps towards ending military and judicial tutelage, a system in which generals and senior judges held power, toppling four Governments since 1960. The military and senior judiciary regard themselves as ‘guardians of the secular system’ and use secularism as a pretext to oust Governments they oppose and/or to expose the ‘truth’ about political parties.

The package allows civilian courts to try members of the armed forces who are accused of crimes including threats to national security, constitutional violations, organising armed groups and attempts to topple the government. The highly politicised and ideologised senior judiciary has been using self-created powers and has engaged in extraconstitutional efforts to interfere with the Government’s powers. Cronyism and nepotism have been prevalent among the senior judiciary. Changes were made in the structures of the constitutional court and the supreme council of judges and public prosecutors (HSYK) despite the desperate attempts by the defenders of the status quo, including penetrating objections from the Supreme Court of Appeals, because under the current system HSYK appoints the members of the Supreme Court of Appeals, who in turn appoint the members of HSYK.

Article 10 of the constitution on equality before the law has now an addendum that allows positive discrimination: ‘Precautions taken with this goal cannot be considered violations of the principle of equality.’ Article 10 now affirms that measures taken to achieve substantive equality are not to be deemed contradictory to the principle of equality, thus potentially providing for the greater use of temporary special measures.

Prime Ministerial circular

A recent Prime Ministerial circular¹⁵⁷ on enhancement of female employment and the provision of equality of opportunities, envisages gender equality mainstreaming. The circular starts by stating that the principles of the enhancement of female employment and the provision of equal wages are essential to strengthen women’s socio-economic status, to assure equality between women and men in society, and to achieve sustainable economic growth and social development. With this objective:

1. a Female Employment National Monitoring and Coordination Board (*Kadın İstihdamı Ulusal İzleme ve Koordinasyon Kurulu*) will be established to monitor, evaluate, and provide coordination and cooperation of all works undertaken by all stakeholders with the aim of diagnosing and eliminating current problems that hinder women’s employment;
2. in all Ministries, an assistant undersecretary is to be tasked to monitor implementation of all regulations on equality of opportunities as regards female employment in the public sphere. A unit in each Ministry is to be tasked with ‘Female–Male Equality of Opportunities’;

¹⁵⁶ Law No. 5982, Official Gazette 13.05.2010, No. 27580.

¹⁵⁷ *Başbakanlık Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması Genelgesi*, Official Gazette 25.05.2010, No. 27591.

3. in all types of auditing of public and private workplaces, the auditing report has also to include issues of compliance and non-compliance with gender equality rules inherent in Article 5 of the Labour Law;
4. a gender equality mainstreaming approach is to be prevalent in strategic plans, performance programmes and activity reports prepared by public bodies and institutions and local administrations. These publications must specify statistical data, academic works and appropriation of funds for these purposes;
5. public institutions, in the process of drafting laws must make an 'equality opportunities effect' evaluation that is to be submitted as an annexe to the draft law;
6. there must be no gender discrimination, rather compliance with equality of opportunities as regards job entry examinations, participation in in-service training, promotions and being tasked with high level administrative duties in the public sector;
7. 'equality of opportunities' is to be a topic in in-service training programmes of all public bodies and institutions;
8. Provincial Employment and Vocational Training Boards (*İl İstihdam ve Mesleki Eğitim Kurulları*) are to observe equality of opportunities in all their work and must have a representative from an NGO active in 'womens' issues to attend their meetings;
9. on the basis of provincial labour market analysis done by the Provincial Employment and Vocational Training Boards, weight must be put on in-service training directed to sectors prioritised for female employment. Reports on such activities and their results must be submitted to the National Monitoring and Coordination Board in January every year;
10. labour statistics must be compiled on the basis of gender. Also, as regards female homeworkers, research must be conducted and statistics are to be regularly and systematically compiled;
11. compliance with the legal rules on the obligation of establishing day nurseries in the public and private sector must be closely monitored and audited;
12. priority is to be given to projects aimed at promoting the re-entry into social life of: women who have been the victims of violence and who are staying at refuges; convicted women in penal institutions with at most a year to their release; and widowed or divorced women;
13. all non-formal training activities and vocational training programmes conducted by the Turkish Employment Office General Directorate, Public Training Centres and Society Centres must be planned in coordination with NGOs so as to include issues related to women's human rights, training and employment possibilities, and consultancy and guidance in the job-seeking process.

Controversy over headscarf issue

The ban on the use of headscarves has remained a serious problem in Turkey. The ban affects university students as well as those working in the public sector. Women with headscarves are not allowed to enter military facilities, including hospitals and recreational areas belonging to the Turkish military.

A headscarf ban denies some women access to higher education, but there are no statistics showing how many women have been denied their right to higher education because of the ban. The ban on headscarves in universities dates back to the 1980s, but was significantly tightened after 28 February 1997, when military generals ousted a Government they deemed to be too religious. There is no *law* banning headscarves in the universities but only a constitutional court decision, despite the fact that bans can

only be created by laws. The ruling AK Party (AKP) attempted to lift this court-imposed ban by Law No. 5735 amending the constitution,¹⁵⁸ but failed due to strong opposition from the main opposition party (CHP). CHP appealed to the constitutional court, which decided to nullify Law No. 5735 (5 June 2008). On 14 March 2008, a dissolution suit was initiated against AKP which received 47 % of the votes in the general election held in July 2007. The suit was on the basis of AKP being the centre of activities against secularism. The major accusation was that AKP opted for freedom of scarf-wearing in universities and that this revealed its ‘hidden intention’ of establishing a theocratic state. According to the indictment prepared by Abdurrahman Yalçinkaya, the chief prosecutor, and also according to Turkey’s senior judiciary, the headscarf is merely a political sign and cannot in any way be interpreted as a human right and be allowed in universities.

Following the approval of a constitutional reform package that brings affirmative action for women, a number of civil society organisations have called on the Government to end the ongoing headscarf ban, which is a type of discrimination against women.

Turkey became a signatory to CEDAW on 20 December 1985, and ratified the convention on 19 January 1986. CEDAW said, in its concluding observations of 30 July 2010,¹⁵⁹ that Turkey needs to address ‘discrimination in laws and the Constitution, violence against women, quotas for women in elections, female employment and education in mother tongues’. The Committee also invited Turkey to ‘consider developing and adopting comprehensive anti-discrimination legislation, including a clear definition of discrimination against women and a clear prohibition of multiple forms of discrimination against women in all areas of life’. As regards the headscarf ban, CEDAW requests Turkey ‘to undertake studies to evaluate the impact of the ban on wearing headscarves in the fields of education, employment, health and political and public life, and to include detailed information of the result of the study and of measures taken to eliminate any discriminatory consequences of the ban in its next periodic report’.

UNITED KINGDOM – *Aileen McColgan*

Legislative developments

The Equality Act: an introduction

The Equality Act 2010 was discussed in the last EGELR.¹⁶⁰ Many of the provisions of the Act came into force on 1 October 2010, though no firm date for implementation has been set for some of the more interesting amendments to existing law, including the amendments to the positive obligations on public authorities and the changes to positive action.

¹⁵⁸ Official Gazette, 23.2.2008.

¹⁵⁹ For concluding observations see: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-TUR-CO-6.pdf>, accessed on 1 October 2010. For the shadow report presented to CEDAW by 71 NGOs see http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CPRER_Turkey46.pdf, accessed on 1 October 2010.

¹⁶⁰ *European Gender Equality Law Review*, No. 1/2010, p. 135.

Case law of national courts

Timbrell v Secretary of State for Work and Pensions [2010] EWCA Civ 701, 22 June 2010

The Court of Appeal allowed an appeal against a finding that the Secretary of State had been entitled to refuse a state pension to the Claimant prior to her reaching the male state pensionable age of 65. The Claimant had been born a man and had undergone gender reassignment. In August 2002, at which time the UK made no provision for recognition of gender reassignment, she applied to receive her state pension, which she asked to be backdated to her sixtieth birthday. She was refused. Subsequently the Gender Recognition Act 2004 allowed for recognition of reassigned gender for all purposes with a gender recognition certificate, to which the Claimant did not become entitled as she did not wish to divorce her wife.

A lower court had ruled that the Claimant was not entitled to a state retirement pension before her sixty-fifth birthday because ‘she does not satisfy the criteria to be treated as a woman in all respects which (...) could entitle her to receive a Category A state pension [retirement pension] at the age of 60’ under Council Directive 79/7/EEC (on the progressive implementation of the principle of equal treatment for men and women in matters of social security). The Court of Appeal, however, ruled that the Claimant’s right to a state pension did not depend on whether she did, or would later, qualify for certification under the 2004 Act: the application in 2002 had to be judged on the law applicable at that time. Article 4(1) of Directive 79/7/EEC precluded a situation where there was no legislative or other legal means to give recognition to a person’s acquired gender, and the exceptions laid down in Article 7(1) did not apply because the issue in the case was not the fact that the UK legislation provided for different pensionable ages for men and women, but that the UK legislation did not deal with the situation where a person had acquired a different gender and wished to exercise legal rights according to that acquired gender. The decision of the ECJ in Case C-423/04 *Richards v Secretary of State for Work and Pensions* did not indicate what kind of national legislation should be in place or what sorts of conditions ought to be satisfied for the recognition of an acquired gender by means of gender reassignment, but did establish that a total lack of any kind of legislative or legal framework in UK law to enable acquired gender to be recognised so as to enable a person who had acquired a new gender to exercise the rights to obtain a retirement pension according to existing legislation, constituted discrimination within Article 4(1) of the Directive. Because the UK had failed to implement the Directive within the time permitted so far as it concerned acquired gender and rights to pensions, the Claimant was entitled to invoke its provisions and claim the right to a pension from the age of 60.

Miscellaneous

One of the most interesting legal challenges to have been issued in the field of gender equality in recent years is that of the Fawcett Society, a major women’s campaigning organisation, to the budget issued by the new coalition Government shortly after it came to power following the May 2010 general election. The Fawcett Society is arguing that the failure both to assess the impact of the proposed cuts in public expenditure on men and women respectively, and also to consider the justifiability of any disparate impact by sex, breached the positive obligations imposed on public authorities by the Sex Discrimination Act 1975, as amended by the Equality Act 2006. The evidence is clear

that women will bear the brunt of the proposed cuts in public expenditure but no impact assessment appears to have been carried out.

European Gender Equality Law Review



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