

European Gender Equality Law Review



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*The Place of Gender Equality in European
Equality Law*
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European Gender Equality Law Review

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EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

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Introduction

Thinking the Unthinkable?

*Christopher McCrudden**

The European Court of Justice decided the first *Defrenne* case in May 1971. The fortieth anniversary of the decision is a suitable time for reflection and celebration on the considerable progress in reducing gender discrimination that has been achieved since then, and the place of that litigation in stimulating that change. Perhaps the greatest legacy of the *Defrenne* litigation was how it demonstrated the importance of thinking the unthinkable. Who would have predicted, in the early 1970s that European law would be at the forefront of women's equality, or even a significant player? Forty years on, I'd suggest that it is still as important to think the unthinkable. Here are nine 'unthinkable' thoughts to begin with, in no particular order of importance; readers may well have different or additional issues. To keep it as simple and uncluttered as possible, I am presenting it as a 'think piece', unburdened with citations and authorities.

First, *is the individual litigation model of enforcement still useful?* An easy one to begin with, I'd suggest, since the answer must be both 'yes' and 'no'. 'Yes', if the purpose of gender equality law is to redress individual grievances; 'no', if the purpose is to achieve widespread and fundamental structural change. The point of raising this issue is to question, however, whether the adoption in the equality directives of individual remedies as the *primary* method of legal enforcement has been shown to be the correct strategy. The answer to this more focused question must be 'no', and this seems generally accepted among experts. So far, however, this marked consensus has not led to any significant shift in the regulatory approach the Union continues to adopt in producing new directives. Surely we should be thinking harder about how to create a European political consensus on what further methods of legal enforcement Member States should establish.

Second, *should we continue to focus on employment as the key site for creating change?* Readers may find this to be a puzzling question. Surely, you might think, gender equality law is now much more expansive, reaching beyond employment. Whilst this is true, it seems clear to me that the primary focus, even in those Member States that extend their prohibition of gender discrimination into other areas of social life, remains *in practice* the area of employment. If that is the case, and I think it is, then the way we think of gender equality law is likely to be significantly affected by seeing it primarily through the employment lens. Perhaps in particular, the basic legal concepts we use, such as 'discrimination', may have to be rethought. The more we move away from the dominant employment-related focus, the more our existing legal concepts may also have to be supplemented with additional legal concepts. Would developing a legal concept of 'care' be useful, for example?

Third, *are equality bodies effective?* The major study that the Commission initiated into the operation of the equality bodies did not specifically address the question of whether these bodies were actually instrumental in bringing about necessary societal change. Part of the problem in making this assessment is the difficulty of pinning down precisely what the function of these bodies is. If their function is one of strategic law

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enforcement, and I believe that this should be their primary function, then there is sufficient scattered evidence from several Member States to lead us to question whether equality bodies are up to that task. I am not arguing that such bodies cannot be effective in engaging in strategic law enforcement (the example of Northern Ireland shows that they can); rather, I am arguing that there is sufficient evidence that these bodies do not do so consistently. Surely we should be thinking about how a clearer set of requirements should be placed on Member States regarding what equality bodies should do, and how they should do it.

Fourth, *is the Commission doing enough to secure compliance by Member States?* The answer to this question depends on what you mean by ‘compliance’. The Commission appears to see its ‘compliance’ role primarily as ensuring that legal provisions are adopted in all Member States that accurately transpose the equality Directives. And this is, of course, a vital role. But we might question whether the Commission is sufficiently ensuring compliance beyond simply ensuring accurate transposition. Whether due to lack of resources, lack of evidence, or a finely tuned sense of what is politically feasible, infringement proceedings seem to concentrate on formal compliance rather than substantive compliance, and seldom seem to demonstrate a strategy for using litigation to push the interpretation of the Directives in a more progressive direction. Fortunately, the Commission values the independent role of the Network, one of the functions of which is to challenge the Commission on just this issue.

Fifth, *is gender equality best furthered by viewing it as part of European Union human rights law?* The answer might appear to be obvious to you: of course it’s better to see gender equality as a human right. I think it *probably* is, but it does have certain implications that should give us some pause. A fundamental rights approach is much more likely to lead to a view that equality law should be interpreted from the perspective of grand principles, such as ‘human dignity’, and this inevitably increases judicial discretion, which may or may not be good for women. To the extent that equality law has redistributive implications, this is more likely to be accepted, I’d suggest, if viewed from a social law perspective than from a human rights law perspective. And viewing equality law from the human rights perspective emphasizes balancing between equality and other rights, such as privacy, freedom of expression, and freedom of assembly, which may become significant limitations on equality.

Sixth, *has ‘mainstreaming’ failed as a policy?* ‘Mainstreaming’ always seemed to me to be an important initiative. The fear used to be expressed that it would prove to be problematic because it would lead to the collapse of initiatives targeted specifically at women, such as Women’s Ministries, because if all public bodies had responsibility to mainstream equality, then this might lead to none having specific responsibility. That fear does not appear to have materialized generally, although it may perhaps in limited cases; it would be hard to argue that ‘mainstreaming’ has actively harmed women’s equality. Instead, the problem appears to be that ‘mainstreaming’ isn’t really doing much at all. In several Member States, ‘mainstreaming’ has been noticeable ineffective in challenging recent budgetary cuts, which have impacted so significantly on women. If my intuition is correct, then we need to think more systematically about how to make it more effective in the future. Surely now is the time to examine how successful regulation in other areas might teach us how to make ‘mainstreaming’ more effective in the future.

Seventh, *is gender equality law paternalistic?* The appropriation of gender equality law to challenge practices of some religious women is a relatively new development in several Member States. Is this development to be encouraged, or discouraged? To the

extent that these women are forced into semi-slavery, then it is clear that the use of equality law to prevent this is entirely appropriate; indeed, the problem is that there is too little enforcement. However, when arguments are made that religious women who embrace certain practices, such as wearing the veil, are not capable of acting autonomously and should be made to stop, whatever their own preferences, that seems pretty crude paternalism, and there is a danger that gender equality law will be misused to serve as a key strategic instrument to attack multi-culturalism.

Eighth, *are the judicial systems of the 'new' Member States up to the task of interpreting and enforcing gender equality law?* It is sometimes regarded as in bad taste to distinguish between the 'new' Member States and the 'old', i.e. between those that joined before 2000 and those that joined after. There is some evidence, however, that the judicial systems in the 'new' Member States, with their state-socialist past, are having considerable difficulties in adjusting to their new role, partly because the interpretative openness of EU gender equality law sits uneasily with the more rule-based interpretation they employed previously. If this is the case, and I am not qualified to judge, then it opens up the question of whether accession negotiations in future should consider not only the transposition of the formal *acquis*, but also the fitness for purpose of the existing institutions charged with implementing that *acquis*.

Ninth, *should public policy primarily concern itself with the position of 'women-in-general' or 'women-with-particular characteristics'?* Although the pattern is not clearly established across the whole of the EU, there is significant evidence, for example, that it is increasingly the case that addressing 'women's' equality may be too broad a target for EU activity, and that the greatest need is to be found in the group of 'women-with-children'. That is where the problem of equal pay, for example, is the greatest. It is with regard to this group that there is the greatest evidence of employment practices such as unfair dismissal. That is where the need to balance work and home hits hardest. That is the area where women have most trouble in securing employment that best uses their talents once the children have flown the nest. Up to the point of pregnancy, in many Member States, women have secured significant equality, and if they choose not to have children, then most will continue to be treated equally. Is it now time for the Union to accept explicitly the significant progress that women without children have made, and concentrate more on those with children? So, too, a similar argument may be made that greater differentiation between different groups of women should be made, with policy more consistently concentrating on the worst off women, such as those with low incomes, those with low standards of education, and ethnic minority women.

The aim of this brief introduction is not to set out a comprehensive agenda for change; nor is it intended to be needlessly controversial just for the sake of it, although I realize that even raising some of these issues will offend some. But just as we go to a dentist to check our teeth regularly, and to a mechanic to check our cars, we also need (at least occasionally) to check whether our operating assumptions regarding gender equality law and policy are fit for purpose, and if they are not then we should not be afraid to consider changing them. There should be no sacred cows in gender equality law. We would be failing those who struggled in the past to think the unthinkable if we decided not to do so now because it is difficult or politically controversial.

The Place of Gender Equality in European Equality Law

Hélène Masse-Dessen *

Introduction

Much has been said and written to emphasize the crucial place of gender equality in European Union law and, consequently, the key role of European Union law in advancing equality in the Member States from a historical, sociological, political and legal perspective. The last of these aspects will form the focus of this short article, which does not aspire to present radical new ideas or produce a compendium on this already almost exhaustively debated matter.

However, no matter how mainstream this issue is, there is still room for questioning the specific features of this field of Union law, while not questioning its importance.

There is an increasingly strong tendency to reduce gender equality to nothing more than non-discrimination, and to deal with it solely in this light. However, eliminating inequalities is a much further-reaching objective and involves more than simply tackling discrimination. There is a proactive and transversal side to gender equality and reducing it to nothing more than discrimination is to cut it off from its roots, from its objective, and to ignore its true nature. The fact is that this combination of two approaches – non-discrimination and proactive equality – is a specific feature of gender equality law.

However, although it has pioneered equality law in Europe, gender equality is showing signs of being diluted into general law on non-discrimination. The institutions responsible for its promotion are being grouped together in larger bodies with a range of responsibilities. Some publications no longer distinguish between equality and non-discrimination, and the specific features of the gender issue seem to be fading away. Is this something to be welcomed? Will gender equality lose its way or gain in effectiveness? Is it under threat?

Gender equality under ordinary non-discrimination legislation

1 – Clearly, no practitioner will claim that there is no such thing as ordinary non-discrimination legislation and that the legal means that can be invoked to combat it are fundamentally different depending on the field concerned.

On the contrary, the debate, both about the concepts themselves and about the techniques, in particular as regards the key issue of proof, is fuelled by experience in each of these fields. International instruments have been late in addressing certain fields in which discrimination is common practice today and some fields have been tackled more successfully than others in domestic legal cultures.

In France, for instance, proceedings have long been brought for racial and trade union discrimination, undoubtedly because of the activities of the organizations concerned, which are more proactive than others in taking such action. Furthermore, the development of gender equality has, in turn, influenced progress in other fields of inequality. The rules of evidence and compensation applied in the case law of the European Court of Justice in Luxembourg have been extended to other areas of

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discrimination without great difficulty. It has been possible to apply the concepts of direct and indirect discrimination¹ to other areas.

Each of these cases fuels another. And it is undoubtedly in dealing with the question of gender that these concepts have now become most refined.

2 – The debate on similarities and overlaps has largely been conducted by the bodies responsible for promoting equality. This has been discussed in great depth in a publication by K. Nousiainen² and no purpose is therefore served by returning to this aspect here. The sole point to be raised is the need for such organizations not to lose sight of the distinction between these fields.

3 – But there is one particular implication for gender equality:

This singular feature is self evident and needs no introduction, since it is glaringly obvious from the outset that women are neither a minority nor a group, that everyone is defined by their gender and that this is true in all civilizations. But the consequences of belonging to one gender or another differ. And it is not a question of compensating for a disability, but of ensuring equality, and this is the crux of the issue raised.

This is not the same as saying that the question of gender is not posed in terms of non-discrimination, but that it is not posed in those terms alone; it is also posed in specific terms.

That having been said, what is the situation in Europe?

The origin of and changes in gender equality law in Europe

As everyone knows, the principle of equal pay enshrined in Article 119 of the Treaty of Rome³ is the only social provision contained in this Treaty. Or, to be more precise, it is the only provision for social posterity, since its initial objective was to prevent anti-competitive practices linked to salary disparities. Originally, therefore, this principle was not adopted as a way of guaranteeing a civil liberty, a social value or the morality of the Community, but as an instrument for free competition.

It is, however, on the basis of this text and the law deriving therefrom that a specific body of evolving and diverse law was built up and gained impetus, supported by institutional practices and driven by social organizations willing to take a proactive lead. Organizations were set up for its study and promotion. This was the case with the network of legal experts in the field of gender equality, whose know-how and expertise it is hoped will remain useful and productive.

But it is particularly important to note at the outset that the body of law thereby developed predated the other bodies of rules on non-discrimination and equality in Europe – leaving aside the question of nationality within the context of freedom of movement. These other bodies of law are founded solely on the Treaty of Amsterdam, which introduced Article 13 EC. These sources therefore developed in parallel, often

¹ With regard to the definitions, see below and in particular the European Network of Legal Experts in the Field of Gender Equality, S. Prechal & C. Mc Crudden *The concepts of equality and non-discrimination, a practical approach*, November 2009, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, available on <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 19 April 2011.

² K. Nousiainen 'Unification (or not) of equality bodies and legislation', *European Gender Equality Law Review* no. 2/2008 pp. 24-33, available on <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 19 April 2011.

³ Which became Article 141 EC, and later Article 157 of the Treaty on the Functioning of the European Union (TFEU).

containing similar but not identical rules. Hence, equality law in Europe took its inspiration from gender equality law.

This remark is by no means insignificant.

The fact is that this dynamic is exactly the opposite of that of international law, which, in contrast, only developed specific instruments for gender equality at a later stage and to some extent as an afterthought.

Consequently, gender equality law in Europe had its own dynamic, which was particularly effective.

Not having derived from the traditional concept of non-discrimination, but evolving directly with the aim of ensuring equality, it was free to develop without restricting itself to seeking formal equality but by also seeking out ways and means of achieving genuine equality. It was more a question of conferring the same rights and of punishment by way of repression, looking at the criteria of gender from an abstract viewpoint but allowing for differences between the sexes to ensure genuine equality.

The European concept of gender equality became more proactive and specific, breaking away from the formal concept of non-discrimination alone.

It was not long, therefore, before it was pointed out that ‘the Community (...) is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe (...) The economic aim pursued is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.’⁴

Gender equality transformed itself from a measure intended to combat competitive imbalances into a fundamental right, a right not only to non-discrimination but also to equality.

It is a right which is, in itself, required not only serve to defend citizens but to feed public policy across all fields.

But this development was even more significant. The promotion of gender equality has become one of the key tasks of the Community with the entry into force of the Treaty of Amsterdam in 1999 (Article 2 EC). Under the provisions of Article 3(2) of the EC Treaty, ‘the Community shall aim to eliminate inequalities, and to promote equality, between men and women’ in all the activities referred to in Article 3 EC. This obligation to incorporate the gender aspect means that the Community and the Member States must proactively take due account of the gender equality objective when drawing up and implementing their legislative, regulatory and administrative provisions, and in their policies and activities.

This is not the place to reopen the debate on the binding effect of the Charter of Fundamental Rights and its place in the sources of equality law.⁵ It is sufficient to reiterate that the importance of equality law is enshrined in the Charter of Fundamental Rights, which states, in Article 21: ‘1. Any discrimination based on any ground such as

⁴ Case C-149/77 *Defrenne v Sabena* [1978] ECR I-1365 [26], [27], Case C-50/96 *Schröder* [2000] ECR I-774, C-270-271/97 *Sievers* [2000] ECR I- 929, regarding the interpretation of Article 119 of the Treaty of Rome.

⁵ See, on this question, the seminal article by S. Koukoulis Spiliotopoulos ‘La garantie constitutionnelle des droits fondamentaux dans l’UE et leur avenir, exemples et interrogations par rapport à la Charte’, *Annuaire international des Droits de l’Homme* n° 2 (2007) pp. 181-226, on which this article draws heavily. We express our gratitude to Sophia Spiliotopoulos.

See also S. Koukoulis-Spiliotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the acquis in gender equality’, *European Gender Equality Law Review* no. 1/2008 pp. 15-25, and E. Ellis ‘The Impact of the Lisbon Treaty on Gender Equality’, *European Gender Equality Law Review* no. 1/ 2010 pp. 7-13.

sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.⁶

But another specific and different provision on gender equality, drawing on the Union's body of law, is added to this general provision which is worded as follows: 'Equality between men and women must be ensured in all areas, including employment, work and pay.'

The Charter therefore makes a distinction between condemning the discrimination referred to in Article 21, which includes discrimination between the sexes, and the equality relating solely to that between men and women which is referred to in Article 23.

Gender equality is therefore enshrined not just as a form of discrimination that is prohibited but also as a principle of equality guaranteed at the highest level.

Finally, it should be remembered, as S. Prechal and S. Burri⁷ write, that 'gender equality is included in the common values on which the Union is founded (Article 2 TEU)', that 'the promotion of equality between women and men is also listed among the tasks of the Union (Article 3(3), TEU)', and that there is an 'obligation to eliminate inequalities and to promote equality between men and women in all the Union's activities (Article 8, TFEU). Here, the Lisbon Treaty clearly reiterates the obligation of gender mainstreaming for both the Union and the Member States'.

The twofold aspect of gender equality law in Europe Equality and non-discrimination

Again, this is not the place to re-work the definition of the concepts in this matter. For an in-depth study of this issue, it is best to refer to the exhaustive study undertaken by S. Prechal and C. McCrudden.⁸

But some clarification is required here.

Firstly, as in the other fields of discrimination, Union law provides instruments for combating direct discrimination (taking gender into account 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'⁹), or indirect discrimination ('where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary').¹⁰

On the other hand, however, there is a proactive aspect to promoting equality in all areas and throughout the Union territory.

⁶ See in particular, in the articles cited, the question of the scope of the Charter's commentary.

⁷ European Network of Legal Experts in the Field of Gender Equality, S. Prechal & S. Burri 'EU gender equality law', September 2008, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, available on ec.europa.eu/social/BlobServlet?docId=1771&langId=en.

⁸ European Network of Legal Experts in the Field of Gender Equality, S. Prechal & C. McCrudden *The concepts of equality and non-discrimination, a practical approach*, November 2009, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, available on <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 19 April 2011.

⁹ Article 2(1)(a) of Directive 2006/54, 'Recast'.

¹⁰ Article 2(1)(b) of Directive 2006/54, 'Recast'.

From a strictly legal viewpoint, a twofold approach has been seen in certain Member States.

Firstly, they have identified, developed and eliminated statutory provisions whose nature is clearly discriminatory.¹¹ This initiative was in fact advantageous to men in some cases, but must be pursued indefatigably, as shown by domestic case law and the case law of the Court of Justice.

Pursuing this still further, the statutory instruments offered by Union law and the case law of the Court have made it possible to tackle not only certain legislation but also direct and indirect discriminatory practices.

This exercise has led to a search for the causes of situations of inequality, rather than for conspicuous cases.

It is in this context that the concept of indirect discrimination, as defined above, has been pursued. Interest has ceased to focus solely on situations which could be directly identified as being linked to gender and has turned to the identification and combat of measures which are undoubtedly prejudicial to women. The concept of indirect discrimination, which has sometimes been a problem issue, has made it possible to give a concrete purpose to the search for equality. Numerous examples could be cited, including the extremely common problem of equal pay arising from job classifications, with jobs typically held by women not receiving salaries equivalent to those typically held by men.¹²

It is also against this background that the concept of positive action has been defined as follows: 'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life'.¹³ In no way, therefore, is positive action an exception to the principle of non-discrimination but on the contrary is a measure for promoting equality.

These concepts, which derive from 'recasts' of past directives, were then also included in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

But the other aspect resides in the fact that the promotion of equality presupposes an analysis of women's true position, hence the emphasis that has been placed on a proactive concept of equality. To promote equality and determine whether it is being implemented effectively, the social reality of each of the sexes must be taken into account. Attention must therefore be paid to maternity protection, also perceived as a question of equality. This means not only promoting maternity leave, but also assessing the consequences of such leave or its impact on women's professional careers. Attention must also be focused on social protection schemes, and the ways in which the entitlements they introduce can be acquired, and on pensions, while seeking to ensure genuine equality, taking account of the differences in the positions that existed in the

¹¹ See S. Burri 'Un regard critique sur l'approche du genre en droit du travail communautaire' in: *Genre et Droit Social, Actes du Séminaire International de Droit Comparé Presses Universitaires de Bordeaux 2007* p. 50; H. Masse-Dessen 'La question du genre en droit social français', in the same publication, pp. 65-82.

¹² European Network of Legal Experts in the Field of Gender Equality, P. Foubert, S. Burri & A. Numhauser-Henning *The Gender Pay Gap in Europe from a Legal Perspective*, October 2010, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, available on <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 19 April 2011.

¹³ Article 3 of Directive 2006/54.

past and the roles given to men and women. With regard to access to goods and services, there is a need for emphasis to be placed on equality. Sexual harassment also falls within the scope of equality.

It might also be necessary to take a look at the rules of family law, and the regulations regarding names and marriage, which lie at the heart of certain inequalities. But clearly, the limits on Community competence in these areas and the difficulties this can entail must be borne in mind.

Finally, the now crucial issue of reconciliation of professional and family life may be raised in the context of implementing equality. Hence, increasing the status of domestic work and of time spent bringing up children or taking care of the elderly or dependents, tasks which are still essentially assigned to women, are relevant factors to be taken into consideration in establishing gender equality. This plainly illustrates the need to analyse the very roots of inequality.

This non-exhaustive checklist shows the crosscutting nature of gender equality.

The extension of the scope of gender equality law is therefore rooted in analysis of the very causes of inequalities in this field

This inequality, as we know full well, is far from being simply biological. It is based on history, social organization, customs and traditions, as well as ideologies that still vary across Europe.

The whole population is affected, directly or indirectly and to varying extents: men and women, the young and the old, and throughout their lives.

This is not the case for all other fields of discrimination, but only a few (race, disability), while some may be temporary (age, health).

Gender equality law has absolutely nothing to do with the protection of minorities; women account for half or more of the human race. Nor do they constitute a uniform group.

Women are also affected by all other forms of discrimination. They are the first to suffer multiple discrimination, i.e. discriminatory action based on two or more discrimination criteria.¹⁴ This obvious fact cannot be ignored by the statutory instruments designed to combat discrimination and they must therefore be adapted to reflect this. This is yet another reason for taking into account the singular features of women's position.

But all this is self-evident. However, the evidence points to a key conclusion. The promotion of gender equality cannot be achieved by a policy which does not encompass all social, economic, employment and family policies, together with civil liberties. It cannot restrict itself to general measures to combat discrimination.

This is reflected in the *acquis* of the European Union a body of law which is being transposed, at varying paces, in each of the Member States, depending, quite rightly, on their respective history and traditions.

¹⁴ European Network of Legal Experts in the Field of Gender Equality, S. Burri & D. Schiek 'Multiple Discrimination in EU Law', July 2009, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, available on <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 19 April 2011.

Conclusion: current need for gender equality law to take on specific features

The gender equality acquis has fuelled anti-discrimination law in other areas. These two types of law still need to continue to go hand in hand in this area, notably to tackle multiple discrimination.

The various fields of equality complement and support each other. It is not surprising to note that where it is a question of debating the justification of differences, there is a need for care in identifying whether the justification itself does not result in direct or indirect discrimination in another field.

One of the strengths of Union law is that it does not reduce gender equality to non-discrimination or solely treats it as such. Eliminating inequalities is a further-reaching objective and consists of more than simply tackling discrimination.

Approaching gender equality solely from the point of view of non-discrimination would be tantamount to ignoring this achievement. The treaties enshrine and guarantee gender equality as a fundamental value, a crosscutting objective of the EU and a fundamental right, in addition to non-discrimination.

By the same token, the Charter does not restrict itself to guaranteeing a right to non-discrimination (Article 21), but also guarantees gender equality as a fundamental right in all areas, enshrining this in a specific article (Article 23).

Hence to ignore the singular features and avoid making it a specific field of action and study would be to ignore the very principles thus enshrined and the progress they have set in motion and continue to drive. Preserving its autonomy is necessary for its own generative capacity and for progress to be achieved not only in gender equality, but also in equality and non-discrimination in general.

The Equality Act 2010

Catherine Barnard*

1. Introduction

The Equality Act (EqA) 2010, which completed its passage through the UK Parliament in the dying hours of the Labour Government, is a remarkable instrument. It confines to history over a hundred separate pieces of equality legislation and replaces them with one substantial Act of Parliament, which applies to England, Scotland and Wales. It comprises 218 sections and 28 Schedules covering discrimination not only in employment but also in respect of services, transport, and education. Already a number of secondary measures have been adopted to accompany the legislation, especially in the field of disability.

The Equality Act was the culmination of an extraordinarily ambitious project. It was not merely a codification and harmonisation exercise, bringing the different strands under one roof and applying (where possible) a single set of principles. This in itself would have been challenging enough. But it was also a transformative exercise, pushing at the frontiers as to what conduct was considered discriminatory. Navigating this measure through the legislative process took courage and persistence on the part of the Minister and her team. They were faced with brickbats on the one hand from a hostile Tory press who saw the new legislation as adding to the burdens on business,¹ and on the other from those who wished it could have gone much further. But the Act has probably provided Great Britain with one of the most sophisticated pieces of anti-discrimination legislation in Europe and for this reason it certainly repays further study.² The aim of this article is to highlight some of the most significant changes made by the legislation.

2. Prohibited conduct

The Act identifies nine protected characteristics³ – age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race (with a power for the Government to extend this to caste); religion or belief; sex; and sexual orientation – and prohibits five types of conduct across those characteristics: direct discrimination, indirect discrimination, harassment, victimisation and instruction to discriminate.

In respect of direct discrimination, the statute has changed the familiar language: Section 13(1) now provides that ‘A person (A) discriminates against another (B) if, *because of a protected characteristic*, A treats B less favourably than A treats or would treat others.’ According to the Explanatory Memorandum (EM), the change in wording

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¹ See e.g. A. Brummer, ‘Ten REAL ways to help business’, *Daily Mail*, 8 March 2011 ‘1. Abolish the Equality Act. This Act (...) was the last mad, unaffordable piece of legislation from former Equalities Minister Harriet Harman’.

² It is not possible to do justice to a statute of this complexity in the space allotted here. Those who would like to know more are referred to Bob Hepple’s excellent book *Equality: The New Legal Framework*, Hart Publishing 2011, the helpful Explanatory Memorandum (EM) accompanying the statute which is considerably more user friendly than the, at times difficult, language of the statute, and the Codes of Practice published by the EHRC (<http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>, accessed 27 May 2011).

³ Section 4 EqA 2010. Further detail is provided in Sections 5-12.

from ‘on the grounds of’ to ‘because of’ does not alter ‘the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act’. Yet, the EM also says that the phrase ‘because of’ is ‘broad enough’ to catch association discrimination (i.e. less favourable treatment because of the victim’s association with someone who has that characteristic (extending the ruling in *Coleman*⁴ to all strands)), and perception discrimination (where the victim is treated less favourably because she is wrongly thought to have that characteristic e.g. the victim is discriminated against because she is thought to be a lesbian even though she is not⁵). And in specifying in the EM that Section 13 covers associative and perception discrimination, the Government identifies why there might be a difference with the previous law.

Section 13(1) makes clear that a comparator (actual or hypothetical) is still needed in direct discrimination cases, despite calls for the comparator requirement to be dropped to make it easier to bring claims. By contrast, in the case of the victimisation, an area where identifying a comparator had been particularly vexed in the past, a comparator is no longer necessary. It is sufficient merely that detriment be shown: Section 27(1) provides that ‘A person (A) victimises another person (B) if A subjects B to a detriment because — (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.’

While a comparator is generally needed for direct discrimination cases, there are two situations where this is not the case: racial segregation is per se directly discriminatory,⁶ as is pregnancy and maternity discrimination.⁷ Section 17 adds the innovative provision that treating a woman less favourably because she is breast-feeding a baby who is under six months old is also unlawful.

Where a comparator is required, there must be no material differences between the circumstances relating to each case.⁸ The Act also makes clear that an employer can be held liable for discrimination even where he shares those characteristics himself (so an employer who is Muslim can be liable for discrimination on the grounds of religion where he refuses to employ a suitably qualified Muslim for the job.)⁹

Potentially, one of the most radical provisions found in the Act concerns multiple or ‘combined’ discrimination. The *Final Report of the Equalities Review*¹⁰ recognised that some of the worst discrimination and disadvantage was suffered by people falling into more than one disadvantaged group. The issue had arisen in *Bahl v Law Society*,¹¹ where Ms Bahl alleged that she was discriminated against on the basis of being a *Pakistani woman*. Both these strands were relevant; considering each strand in isolation would not have reflected the reality of what she suffered. So, in a single strand claim she would have had to compare herself with a black *man* for a sex discrimination case and a *white* woman in a race case. But, critics would argue that a black man or a white woman might not have been treated in this way. A multiple discrimination claim was therefore necessary to catch the subtlety of the situation, thus enabling Ms Bahl to compare herself with a white man.

⁴ Case C-303/06 [2008] ECR I-5603.

⁵ Perception discrimination also applies to transsexuals whom, prior to *Coleman*, the Government intended to exclude from perceived discrimination fearing it would cover transvestites.

⁶ Section 13(5) EqA.

⁷ Section 18 EqA.

⁸ Section 23 EqA.

⁹ Section 24 EqA.

¹⁰ <http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html>, accessed 4 May 2011.

¹¹ [2004] IRLR 799.

Section 14(1) of the Equality Act sought to address this problem. It provides: ‘A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.’ There are, however, limits to this innovative provision. First, it applies only to claims of direct discrimination, not indirect discrimination, and second, in order to avoid overcomplexity, it covers two protected characteristics only. This does present problems. What of the situation of young, Afro-Caribbean males, one of the most disadvantaged groups in British society? How would these three characteristics be dealt with: on a strand-by-strand basis (in which case why the need for Section 14?), on a 2+1 basis (in which case which two characteristics are selected for the multiple discrimination claim?), or a combination of the above (so much for simplicity)? This example offers succour to the critics of Section 14 who said it was unnecessary and confusing. Certainly, in *DeBique*¹² the Tribunal was able to find that the situation of a single-parent soldier from the Caribbean who had been dismissed for not turning up on army parade because of childcare problems, could be dealt with perfectly well under the existing rules on indirect discrimination on a strand-by-strand basis (i.e. sex and race).¹³ And this is the approach which will have to apply for now because in the 2011 Budget, *The Plan for Growth*, the Chancellor announced that the Coalition Government would ‘not bring forward Equality Act dual discrimination rules that would have cost business £3 million per year’.¹⁴

In respect of indirect discrimination, the Act has now harmonised the *O’Flynn* ‘particular disadvantage’¹⁵ test across all strands, including disability. Previously, a special regime had applied to those with a disability: they were not protected from indirect discrimination but from ‘disability related discrimination’ (DRD). DRD was considered to provide more effective protection to people with disability. Under the DRD, a person discriminated against a disabled person if ‘for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply’, and he could not show that the treatment in question was justified. The problem with the DRD test was that the comparator was counter-intuitive, as the following example shows. An employer has a policy to dismiss all employees (whether disabled or not) who take six months sick leave. Joe, a disabled man, takes six months’ sick leave which was disability-related and was dismissed in accordance with the employer’s policy. He claims DRD. The correct comparator is a person to whom that reason does not apply – that is, someone who has not taken six months’ sick leave. By definition, that person would not have been dismissed with the result that the employer must justify dismissing Joe.

¹² [2010] IRLR 471.

¹³ The ET found that two provisions, criteria or practices were applied to her by the MOD, namely that she be a soldier available for deployment on a 24/7 basis; and also that she could not have a member of her extended family (a half-sister) to stay with her in the Service Families Accommodation because she was a foreign national only entitled to stay in the UK for a short period. The ET found that these PCPs had not been shown to be a proportionate means of achieving a legitimate aim and upheld the claims. The EAT rejected the MOD’s appeal.

¹⁴ http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf, p. 53, accessed 4 May 2011. Section 216 of the Act gives power to the Minister to bring the provisions of the Act into force on the dates he or she chooses. It is on this basis that the Government has decided not to bring the multiple discrimination provision into force.

¹⁵ Case C-237/94 [1994] ECR I-2617.

The House of Lords in *Malcolm v Lewisham*¹⁶ struggled with the choice of comparator in DRD claims. Controversially, it took the comparator appropriate for a *direct* discrimination case (i.e., in the above example, a non-disabled person who has taken six months sick leave). And in reaching this conclusion, the House of Lords effectively neutered DRD. The Equality Act essentially reinstates the pre-*Malcolm* position with the introduction of a renamed provision, discrimination arising from disability.¹⁷

Those with disabilities (but not other protected characteristics) have been further assisted by another innovation, considered by the disability lobby to be more significant than the other provisions mentioned so far, a general prohibition on pre-screening questionnaires. Section 60(1) provides that ‘A person (A) to whom an application for work is made must not ask about the health of the applicant (B) — (a) before offering work to B, or (b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.’ However, there is a sting in the tail: Section 60(6) does allow questions for the purpose of, for example, establishing whether B will be able to carry out a function that is intrinsic to the work concerned. The result is that Section 60(6) may merely shift the line of questioning from ‘Have you ever had...?’ to ‘Have you got...?’.

3. Defences and justifications

3.1. Occupational requirements

Both direct and indirect discrimination can be saved by non-exhaustive ‘Occupational requirements’ (ORs). Buried in Schedule 9, Paragraph 1 provides that a person (A) does not contravene the Act ‘if A shows that, having regard to the nature or context of the work — (a) it is an occupational requirement, (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)’. This replaces the exhaustive list of Genuine Occupational Qualifications (GOQs) found in the original Sex Discrimination Act 1975 and Race Relations Act 1976 which covered matters such as models, toilet attendants, hospital and prison staff and personal welfare counsellors. These GOQs have, however, inspired the examples given in the Explanatory Memorandum of what sort of conduct might be permitted as an OR.

The general OR found in Paragraph 1 is supplemented by two specific ORs for religion. The first, in Paragraph 3, allows employers with a religious ethos to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos, being of that religion or belief is a requirement for the work and applying the requirement is proportionate means to achieve a legitimate aim. Therefore it is lawful for a religious organisation to restrict applicants for the post of head of its organisation to candidates that adhere to that faith.

Paragraph 3 essentially concerns religion on religion/non-religion discrimination. More controversial is the second religious OR concerning ‘organised religion’ found in Paragraph 2 which allows religion to trump the interests of other strands as well, namely sex, marriage/civil partnership, sexual orientation. This is a legacy from the earlier legislation and had already been subject to criticism from the European

¹⁶ [2008] UKHL 43.

¹⁷ Section 15 EqA 2010.

Commission. Where employment is for the purposes of an organised religion (ministers of religion and a small number of lay posts, including those that exist to promote and represent religion), employers can apply a requirement to be of a particular sex, or not to be a transsexual person, or to make a requirement related to the employee's marriage or civil partnership status or sexual orientation, but only if appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or, because of the nature or context of the employment, employing a person who meets the requirement is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.

When this provision in its original incarnation in the Sexual Orientation Regulations, was challenged in the British courts¹⁸ Richards J upheld the legality of the rule. He emphasised the narrowness of the provision and strictness of the conditions applied. He also recognised the wisdom of the balancing act between the interests of the church and those of gays being carried out by the legislature and not the courts, noting 'It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field. As a matter of principle, that was a course properly open to the legislature (...)'.

3.2. *Objective justification*

The basic structure of anti-discrimination legislation has traditionally been that direct discrimination can be saved by an exhaustive list of derogations while indirect discrimination can be saved not only by the derogations but also, more importantly, by objective justifications. These objective justifications are open-ended and widely thought to be more generous to the defendant employer than GOQs/ORs. The Equality Act, largely following the European Directives, has eroded that general distinction. As we have seen, direct discrimination can be saved by (now non-exhaustive) ORs which are a proportionate means of achieving a legitimate aim. Indirect discrimination can be justified, provided the measure constitutes a proportionate means of achieving a legitimate aim.

The erosion of the distinction between direct and indirect discrimination is particularly problematic in respect of age discrimination. Section 13(1) of the Equality Act 2010 prohibits direct discrimination on the grounds of age while Section 19 prohibits indirect discrimination on the grounds of age unless it can be objectively justified. Uniquely among the strands, Section 13(2) adds that 'If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.' In other words, Section 13(2) allows employers to objectively justify *direct* discrimination. But what is the legal basis for this in the Directive? The language used in Section 13(2) suggests that the UK is relying on the test for objective justification found in Article 2(2)(b) of Directive 2000/78 on *indirect* discrimination. Yet, in *Age Concern*¹⁹ the Court said that 'For differences in treatment constituting direct discrimination, Article 2(1) of the directive does not provide for any derogation'. Therefore, the UK may have to fall back on Article 6(1) of Directive 2000/78 to allow for direct age discrimination to be justified. However, the criteria laid down in Article 6(1) are strict. It provides that (i) *Member States may provide* that differences of treatment on grounds of age shall not constitute discrimination, if, (ii) *within the context of national law*, (iii) they are objectively and

¹⁸ *R (Amicus – MSF Section) v. Secretary of State for trade and Industry* [2004] IRLR 430.

¹⁹ Case C-388/07 [2009] ECR I-1569.

reasonably justified by a legitimate aim, including *legitimate employment policy, labour market and vocational training objectives*, and (iv) if the measures are proportionate. Since Article 6(1) is an ‘exception to the principle prohibiting discrimination, [it] is however strictly limited by the conditions laid down in Article 6(1) itself’, as the Court said in *Age Concern*.²⁰ When the UK had legislation identifying 65 as a default retirement age (DRA), the Court of Justice ruled in *Age Concern* that UK legislation was in principle compatible with Article 6(1). However, the UK has repealed the default retirement age from April 2011 (albeit with transitional measures). Can employers rely on Section 13(2) to maintain a retirement age for their own business (known as an employer justified retirement age (EJDRA)), given that the detailed criteria of Article 6(1) no longer appear to be fulfilled?

4. Positive action

The UK has traditionally taken a formal equality view of equal treatment and so has set its face against much positive action, let alone positive discrimination. The early sex and race discrimination legislation did provide for special encouragement and training for under-represented groups who, because of previous discrimination and disadvantage, had not been able to realise their potential or did not have the requisite qualifications or experience, but the legislation certainly did not allow protected characteristics to be taken into account at decision stage. The new positive action provisions found in the Equality Act 2010 represent a significant change of approach.

Section 158 provides that the Act does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, to reduce their under-representation in relation to particular activities, and to meet their particular needs. It therefore allows measures to be targeted at particular groups, including training to enable them to gain employment, or health services to address their needs.²¹ Any such measures must be a proportionate way of achieving the relevant aim. The breadth of this provision is striking – by allowing employers to take proportionate measures to overcome a perceived disadvantage or to meet specific needs based on a protected characteristic the provision comes close to legitimising reasonable adjustments outside the disability sphere. This might cover providing prayer facilities at work or English language lessons for staff who do not have English as a mother tongue or flexible working hours or childcare facilities.

Section 159 goes further still. It allows employers, in a tie-break situation and subject to the limits laid down by EU law, to take a protected characteristic into consideration when deciding whom to recruit or promote, where those having the protected characteristic are at a disadvantage or are under-represented. This provision was met with hysteria in certain quarters (‘White men face jobs ban as new law favours ethnic minorities and women’²²). The truth is less dramatic: it applies only where two individuals are equally qualified. Some fear that the criteria for determining equal qualification are so contested and the risk of being sued by unsuccessful candidates so great that the provision might be little used in practice. In a brave attempt to encourage use of Section 159 the Government Equalities Office has produced a ‘quick start guide’ for using positive action.²³

²⁰ Paragraph 62.

²¹ Explanatory Memorandum, Paragraph 511.

²² *Daily Express*, 26 June 2008.

²³ <http://www.equalities.gov.uk/pdf/Positive%20Action%20in%20Recruitment%20and%20Promotion%20Guide.pdf>, accessed 4 May 2011.

5. Scope, liability and enforcement

The personal scope of the legislation is broad, covering not only employees but also those who work under a contract to provide personal services which will include certain types of the self-employed. In addition, the Act applies to a number of professions who might not fall within this definition including police officers, those working for the Crown and barristers. The material scope of the legislation is also wide, covering job applicants, current employees and ex-employees. The territorial scope of the legislation is more perplexing. While the previous legislation provided that it was unlawful for an employer to discriminate ‘in relation to employment by him at an establishment in Great Britain’, Section 39 of the EqA 2010 is silent on territorial matters. In the EM, the Government explains: ‘the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain’.²⁴

Employers are vicariously liable for the acts of their employees in the course of employment but with a defence for the employer that he took all reasonable steps to prevent the employee from doing the act.²⁵ The Act also makes clear that employees, too, can be held liable for their own discrimination.²⁶ In addition, the Act provides that employers can be liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control. Liability in relation to third-party harassment will, however, only arise when harassment has occurred on at least two previous occasions, the employer is aware that it has taken place, and has not taken reasonable steps to prevent it happening again.²⁷ However, in the budget of March 2011 the Government announced that it would consult on removing what it describes as this ‘unworkable requirement’.

The approach to combating discrimination outlined so far, based on individual action by private litigants against individual employers, is reminiscent of the first generation anti-discrimination law. Yes, it offers an avenue of redress for the offended party but does little by way of more structural change. One change to the remedies provisions introduced by the Equality Act does make a small step towards mandating structural change: tribunals can now make a recommendation to benefit the wider workforce. However, arguments in favour of introducing more radical change, including some type of provision for representative actions (under which bodies such as trade unions and the Equality and Human Rights Commission (EHRC) can bring claims in their own name on behalf of groups of individuals),²⁸ fell on deaf ears, although the EHRC can give financial support to individual cases and intervene in other cases as an *amicus curiae*. However, the role of the EHRC is now also being reviewed because the new Government thinks that it has ‘struggled to deliver value for money and has deviated from its core priorities’.²⁹

More substantive structural change was meant to be delivered by public sector equality duties, now applied across all strands and not just to gender, race and disability as was the case before the Equality Act 2010. Section 149 requires the public bodies

²⁴ The courts may well have to consider developing rules equivalent to those in *Lawson v Serco* [2006] UKHL 3.

²⁵ Section 110 EqA.

²⁶ Section 110 EqA.

²⁷ Section 40 EqA.

²⁸ EM, Paragraphs 479 and 482.

²⁹ <http://www.equalities.gov.uk/pdf/EHRC%20Reform%20Condoc%20Accessible.pdf>, accessed 4 May 2011.

listed in Schedule 19 to have due regard to three specified matters when exercising their functions:

- eliminating conduct that is prohibited by the Act, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules which are read, respectively into a person's terms of work and into occupational pension schemes;
- advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and
- fostering good relations between people who share a protected characteristic and people who do not share it.

Subsection (6) makes clear that complying with the duty might mean treating some people more favourably than others, where doing so is allowed by the Act. This includes treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions.³⁰ However, a failure in respect of a performance of a public sector equality duty does not confer a cause of action at private law.³¹ As Fredman notes, experience with the public sector equality duty in respect of race has not been overwhelmingly positive. More often than not 'The duty has frequently become an exercise in procedure and paperwork, rather than in institutional change'.³² The Coalition Government views these provisions with suspicion, as illustrated by the title to its recent consultation paper, *Equality Act 2010: the public sector equality duty: reducing bureaucracy* which has delayed the implementation of the specific duties under Section 153.

The Coalition's suspicion of the administrative burdens imposed by the Act is extended to the most radical provision, the socio-economic duty in Section 1 which it has always declared that it will not bring into force. Section 1 provides:

'(1) An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.'

As the Explanatory Memorandum points out, such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socio-economic disadvantage. It is for public bodies subject to the duty to determine which socio-economic inequalities they are in a position to influence. It gives the example of the Department of Health (DoH) deciding to improve the provision of primary care services. The DoH finds evidence that people suffering socio-economic disadvantage are less likely to access such services during working hours, due to their conditions of employment. The Department therefore advises that such services should be available at other times of the day.

³⁰ EM, Paragraphs 479 and 482.

³¹ Section 156 EqA.

³² S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* Oxford, OUP 2008, p. 194.

6. Equal pay

The area where the Equality Act has effected the least change is equal pay. Yes, there have been some tweaks to iron out some wrinkles with respect to EU law – for example, the statute now makes clear that applicants can use their predecessor as a comparator³³ but the comparator still needs to be actual, not hypothetical.³⁴ There is, however, one small exception to the UK's position on hypothetical comparators. In a situation where there is no comparator doing equal work but the employer says to a female employee 'I would pay you more if you were a man', the sex equality clause of the equal pay provisions would not apply but the woman can bring a sex discrimination claim.³⁵ In this way, the Equality Act brings UK law more closely into line with Directive 2006/54. Other, more minor, changes include a name change of the defence to an equal pay claim from genuine material factor (GMF) to material factor (e.g. experience, red-circling, market forces), and a tidying up of the language of justification (now the factor such as experience must be 'a proportionate means of achieving a legitimate aim' to justify paying the man more than the woman).

More radical are provisions intended to address the gender pay gap. Section 77 makes a 'pay secrecy clause' in a contract unenforceable to the extent that it prevents employees from making 'relevant pay disclosures', and makes it unlawful to victimise an employee for making or seeking a relevant pay disclosure. Section 78 contains a power for the Government to require large employers (250 plus) to publish information about their gender pay gap. The Coalition Government has not yet decided whether it will use this power; the Conservatives were publicly against it before the May 2010 general election. Even Labour said it would not bring them into effect until after 2013 if sufficient progress on (voluntary) reporting had not been made.

However, none of these changes deal with the elephant in the equal pay room: the huge volume of equal pay cases currently blocking up the tribunal system. A large number of these cases relate to equal pay claims brought by women doing typically female jobs (e.g. school dinner assistants) against local authorities and the health service using men doing traditionally male jobs (e.g. rubbish collection) as a comparator. In 2007-2008 the number of equal pay claims exceeded those of working time and unfair dismissal. Yet, the Government has done next to nothing about this. In particular, it has not facilitated any collectively agreed solutions to the cases, possibly because its hands are tied by the EU law requirement of an effective remedy for each individual affected: a collectively agreed solution might not deliver this because any deal is likely to limit the period of back pay from the six years permitted by statute to, say, only two. The only small concession the Act has made to providing a solution to these cases is in respect of pay protection provisions (where jobs typically done by men are paid more and the employers slowly reduce those differences to bring the men's pay into line with that of the women). Section 69(3) says *the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim*. This largely confirms the recent case law.³⁶

³³ Section 64(2) EqA.

³⁴ Section 79 EqA.

³⁵ Section 71 EqA.

³⁶ See e.g. *Audit Commission v Haq* UKEAT/0123/10.

7. Conclusions

The Equality Act had laudable ambitions. As Bob Hepple notes:

- It is comprehensive, adopting a unitary or integrated perspective on equality enforced by a single EHRC;
- it harmonises, clarifies and extends the concepts of discrimination, harassment, and victimisation and applies them across nine protected characteristics;
- it contains measures described as transformative equality, extending the public sector equality duties, and broadens the scope for positive action, as well as introducing greater protection for those with disabilities.

Unfortunately, such a radical agenda is being implemented in a hostile economic and political climate. There is a severe risk that much of its radicalism will be neutered by a Government with a determined deregulatory agenda. The British beacon may be reduced to more of a flicker.

Equal Pay for Men and Women in Europe Anno 2011

The Gender Pay Gap on the Retreat?

Petra Foubert*

Introduction

Equal pay for men and women for work of equal value has been a concern of the European Union (EU) from its very beginning. The principle was included in the original EEC Treaty, and is currently embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU).¹

Throughout the previous decades, the principle has been brought into practice by directives² and also the Court of Justice's case law has boosted its importance. In particular, the ECJ's findings in the 1970s that the Article is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations³ proved to be a powerful instrument for enforcing the principle in national courts, doubtless also with considerable preventive effects.

At the national level, the principle of equal pay is, in general, also fully reflected in the legislation of the 27 EU Member States and the 3 countries of the European Economic Area (EEA): Iceland, Liechtenstein and Norway. The three candidate countries of Croatia, the FYR of Macedonia and Turkey have also adapted their legislation to EU standards.

Notwithstanding all those efforts on the legal plane, Eurostat data show a persisting gender pay gap, reportedly of 17.6 % on average for the 27 EU Member States in 2007. Provisional figures for 2008 and 2009 show gender pay gaps of 17.5 % and 17.1 %

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¹ Article 157 TFEU (ex Article 141 TEC) states:

‘1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’

² These directives include Directive 75/117/EEC on the approximation of the laws of the Member States, relating to the application of the principle of equal pay for men and women, OJ L 45, of 19 February 1975, p. 19, recently replaced by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, of 26 July 2006, p. 23.

³ Case 43/75 *Defrenne II* [1976] ECR 455.

respectively.⁴ Progress in closing the gender pay gap appears to be very slow, and in a number of countries the gap is even widening once again.⁵ With regard to the fact that the European Union has been taking action in the field for more than 50 years, this is a disappointing result.

This article, which is based on a recent study of the gender pay gap in Europe,⁶ intends to highlight some of the characteristics of the gender pay gap, to indicate a number of explanations for its high levels and, finally, to point out a few traditional and less traditional ways to combat the gender pay gap.

1. A snapshot of the gender pay gap in Europe⁷

1.1. The bare figures

The EU (27) provisional value in 2009 being 17.1 %, the differences among the countries studied are large, varying from a reported gender pay gap of around 10 % in, e.g., Poland and Portugal, to a pay gap of around 26 % in, e.g., the Czech Republic.⁸ It is interesting to note here, however, that low national gender pay gap levels do not necessarily mirror a good position of women workers in the national labour market concerned. In Turkey, for example, the negative gender pay gap of – 2.2 % in 2006⁹ could be explained by the fact that female participation in the labour market is still extremely low in this country. Similar situations are reported in, e.g., the FYR of Macedonia, Malta and Poland. These countries tend to focus on policies to encourage women to enter the labour market, rather than on policies to address the gender pay gap.

A number of countries (including Cyprus, Romania and Spain) show a gradual downward trend in the gender pay gap over the last few years. In Cyprus and Romania, such a trend has allegedly been triggered by the introduction of national minimum wages or the increase of such minimum wages, which is said to be to the advantage of occupational categories in which women are overrepresented.

However, as already indicated above, in some countries the gender pay gap is again widening. This is the case in, e.g., Poland and Portugal. Part of the explanation could be found in the introduction by Eurostat of a uniform methodology to calculate the gender pay gap (see below). It could be interesting in this respect to look into the relationship between the economic crisis and the recent widening of the gap in a number of countries.

1.2. Putting the bare figures into perspective

It must be stressed that comparisons between countries need to be made with a great deal of caution. After all, it is not always entirely clear whether the data provided by the different countries have been collected and processed in a comparable way. Also, the time period covered by the data may differ among the countries and different pay

⁴ These figures do not yet include the values of all Member States.

⁵ See Eurostat table of the gender pay gap in unadjusted form, available on <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsiem040>, accessed 26 April 2011 (hereinafter ‘Eurostat table’).

⁶ P. Foubert *The gender pay gap in Europe from a legal perspective* Luxembourg, Publications Office of the European Union 2010, 39 pp., available online on <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=578&type=2&furtherPubs=no>, accessed 22 May 2011.

⁷ In this article ‘Europe’ refers to: the 27 EU Member States, the 3 countries of the European Economic Area (EEA): Iceland, Liechtenstein and Norway, and the 3 candidate countries of Croatia, the FYR of Macedonia and Turkey.

⁸ See Eurostat table.

⁹ See Eurostat table.

concepts are used in the discussion of the gender pay gap. For example, when the income per worked hour is measured, the gender pay gap is considerably lower than when the income per paid hour is used. The explanation for this difference is that women, more often than men, receive pay for more hours during which they do not perform work, e.g. due to illness, care functions, etc.

In 2007¹⁰ Eurostat improved the methodology used to calculate the gender pay gap in the EU. Instead of a mix of various national sources, it is now an EU harmonised source (called the 'Structure of Earnings Survey') which is used. Notwithstanding the fact that this is certainly a good development, account should be taken of 'transition problems'. In some countries, part of the increase/decrease in the gender pay gap since 2007 may not correspond to a real increase/decrease, but may merely be the result of the change in methodology.

Another element that should be highlighted is that, at the EU level, the 'gender pay gap' is defined as the relative difference in the average gross hourly earnings of women and men within the economy as a whole.¹¹ This indicator has been defined as 'unadjusted', as it has not been adjusted according to individual characteristics that may explain part of the earnings difference. Such individual characteristics relate, among other things, to traditions in the education and career choices of men and women; to a gender imbalance in the sharing of family responsibilities; to the fact that men and women still tend to work in different sectors; to part-time work, which is often highly feminised, etc. Very often these characteristics are seen as the result of the free choice of individuals.

The above implies that the 'unadjusted' gender pay gap – also referred to as the 'absolute' or 'raw' gender pay gap – comprises both potential pay discrimination and pay discrepancies based on factors that have nothing to do with discrimination as such, but which may at least explain part of the difference.

The 'corrected' or 'net' pay gap, by contrast, corresponds to the portion of the pay gap that cannot be explained, and that, for an important part, is assumingly caused by pay discrimination.

1.3. The main characteristics of the gender pay gap

In nearly all European countries the gender pay gap (whether high or low) features a number of recurrent characteristics.

1.3.1. Lower gender pay gap in the public sector

The gender pay gap is usually considerably lower in the public sector, as compared to the private sector. Iceland, Hungary and Sweden were the only countries to mention a gender pay gap that is higher in the public than in the private sector. In Hungary this phenomenon could allegedly be related to limited opportunities in the public sector to resort to non-reported labour and non-reported payments, the use of which is said to be widespread in the Hungarian private sector. Because of this habit, reported salaries in the private sector would be kept at a minimum – non-discriminatory – level (the 'supplement' being the 'real' pay, frequently a multiple of the formal, reported wage).

¹⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Tackling the pay gap between women and men', COM (2007) 424 final.

¹¹ See the website of the European Commission on <http://ec.europa.eu/social/main.jsp?catId=681&langId=en>, accessed 4 April 2011. Note that some researchers consider the comparison of a median of wages to be more appropriate. In probability theory and statistics, a median is described as the numeric value separating the higher half of a sample from the lower half.

As a consequence, the gender pay gap is not visible here. In the public sector, by contrast, the operation is more formalised (bank transfers, public visibility) and the gender pay gap is consequently more visible.

1.3.2. Impact of age

Generally speaking, the lowest levels of the gender pay gap are found in the 20-29 age group, at the beginning of both men's and women's professional careers. This is the time when both men and women tend to be professionally active (high employment rates for both men and women) and work full time.

The gender pay gap is usually highest in the 30-49 age bracket, when most women have children and tend to either leave their jobs, take time off in this respect (periods of leave and part-time work), or do not aspire to seek jobs with more responsibilities (and higher pay). Men of the same age continue their careers at the same pace as before and see their pay grow.

Quite surprisingly, Germany, Belgium and Greece reported the highest levels of the gender pay gap in the higher age brackets (55+ and 60+). Explanatory factors advanced include: low levels of female employment in this age bracket and lower levels of education and vocational training of those women who are professionally active.

1.3.3. Large differences between sectors

Gender pay gaps are very high in the well-paid sectors of finance and insurance, and also in sectors that tend to be highly feminised (like education and healthcare services), although in the latter sectors pay is reported to be low in general.

Quite the opposite happens in sectors like construction and building, and mining and quarrying. In these sectors the gender pay gap appears to be very low, for the obvious reason that these sectors employ very few women. Moreover, those women tend to fill clerical positions rather than physical jobs. That could explain why in some countries (e.g. Croatia, Hungary and Slovenia) women are earning even more than men in these sectors!

1.3.4. Impact of education and position

The largest gender pay gaps are for people with lower education on the one hand, and for those with postgraduate education on the other. The smallest differences are generally recorded for people with upper secondary education and for those with a technical education.

Also the position of the workers seems to play a role. The highest gender pay gap rates are observed among senior executive officers. These are typically positions with salaries that reflect the employee's 'negotiating capacities', capacities that are allegedly male rather than female.

1.4. Main explanations for the gender pay gap

Several studies have been conducted on the national level to try to find out the main reasons for the gender pay gap. Such explanations reduce the 'unadjusted' gender pay gap to the 'corrected' gender pay gap. What is left is allegedly partly due to discrimination.

Below is an overview of recurrent explanations for the gender pay gap.

1.4.1 Part-time work and temporary (fixed-term) work

Taking into account the gross salary per hour, a considerable pay gap can be observed between part-time and full-time employees. Such a pay gap, however, is not necessarily the result of directly discriminatory wages, but often a consequence of the fact that part-time jobs are more frequent in low-paid and highly feminised sectors, like e.g. the healthcare and cleaning sectors. Among part-time workers, the gender pay gap is reportedly smaller than when part-timers are compared to full-timers.

Part of the gender pay gap can also be explained by the use of fixed-term contracts (with low pay rates), which often seem to be entered into by (young) women.

1.4.2. Frequent career interruptions and a combination of a profession with family duties

Shorter periods of accumulated professional experience by women, caused by more frequent interruptions to their career paths due to family-related leave, also contribute to the gender pay gap. The number of children would clearly increase the gender pay gap in each sector, occupation and level. The financial disadvantage women suffer is double. First, during such interruption or leave a woman feels the direct impact as she receives no wages, a lower wage, or a (low) social security benefit during this period. Second, her choice may also produce an indirect consequence: she may be excluded from benefits related to employment, for instance, benefits related to the lack of absence despite justification, or be disadvantaged regarding entitlement to social security benefits.¹²

1.4.3. Horizontal/sectoral and vertical/occupational segregation of the labour market

On the one hand, women and men tend to predominate in different sectors (i.e. horizontal or sectoral segregation). Women often work in sectors where their work is valued lower and is consequently lower paid than those dominated by men. Recurrent examples are the healthcare, education and public administration sectors.

On the other hand, within the same sector or company, women predominate in lower valued and lower paid occupations (i.e. vertical or occupational segregation, to be connected with the ‘glass ceiling’). Women are frequently employed as administrative assistants, shop assistants or low-skilled or unskilled workers. Many women work in low-paying occupations, for example, cleaning and care work. Women are underrepresented in managerial and senior positions.

2. Tackling the gender pay gap

Many European countries have developed measures to fight the gender pay gap. For the time being, however, those ‘traditional’ measures do not seem to have substantially reduced the gender pay gap. Therefore, it is important to think outside the box and to try and find more ‘novel’ ways to combat the gender pay gap.

¹² See e.g. Case C-537/07 *Gómez Limón Sánchez Camacho* [2009] ECR I-6525.

2.1. The traditional way to combat the gender pay gap: equal pay legislation

2.1.1. Legislative provisions

Most European countries have adopted legislative provisions (in constitutions, acts of parliament, or other legislative instruments) aimed at tackling the gender pay gap, often because of the requirements of EU legislation in the field.

The social partners must comply with those legislative provisions. That is probably the reason why most collective agreements today do not contain provisions which are *directly* discriminatory. However, many collective labour agreements continue to contain provisions with an *indirect* discriminatory impact on female employees' pay. Such indirectly discriminatory provisions include job evaluation and pay systems that are neutral on their face value, but appear to structurally disadvantage female workers. Some countries (e.g. Austria, Malta and Portugal) have established a monitoring system, implying that collective labour agreements are scrutinised - systematically or on an *ad hoc* basis - to detect discriminatory provisions. Such examinations can be conducted by a governmental body, or by research institutions, e.g. universities.

Most countries do not have legal measures in place that induce or oblige the social partners to actively address the gender pay gap in collective agreements. In a very limited number of countries the social partners are encouraged by law to adopt measures to tackle (pay) discrimination, but such measures are found to be very general and vague (e.g. Romania). A notable exception is the French *Génisson* law of 9 May 2001, which has introduced an obligation for the social partners to negotiate on occupational gender equality.¹³

Like the social partners, employers are also obliged to comply with the legislative provisions aimed at tackling the gender pay gap. This obligation serves as an indirect way to realise equal pay for men and women in the workplace. After all, the threat of legal action by individuals and the prospect of significant periods of back pay in the event that they succeed may incite employers to scrutinise their pay policies on their own initiative.

Apart from this, many countries have also adopted legislative instruments that specifically oblige/encourage employers to address the issue of the gender pay gap in a more active way. Such instruments include the (compulsory) delivery of gender-specific pay statistics. In Denmark, for example, employers can obtain such gender-specific wage statistics free of charge (i.e. at the expense of the Ministry of Employment) if they choose to use the statistics produced by the Statistical Bureau. If, however, employers prefer to use a different statistical method, they will have to do so at their own expense.

Another example is the compulsory delivery by employers of an (anonymous) report showing salaries paid to both women and men, but often also enumerating other elements like the placement of women and men in different jobs, an analysis of the job classification system, and pay and pay differentials of women's and men's jobs. Such reports may be examined by a monitoring body, and must sometimes be published and/or delivered to workers' representatives as well. In, e.g., Austria, Finland, France, Italy, Norway and Sweden, such reporting systems have already been introduced.

Sometimes large employers¹⁴ are obliged by law to adopt policy instruments that define how gender equality, including pay equality, will be achieved in the company. Such instruments are known by different names like 'pay mapping' (Finland), 'equal

¹³ See S. Laulom 'Gender Pay Gap in France', *European Gender Equality Law Review* no. 1/2009 p. 8.

¹⁴ It depends on national legislation which employers are to be considered as a 'large employer'.

opportunity plans' (Hungary), 'gender equality programmes' (Iceland), 'equality plans' (Spain) or 'action plans' (Sweden).

2.1.2. Problems with the enforcement of legislative provisions

Notwithstanding the fact that numerous equal pay rules have been adopted, only very few (or even no) claims of gender pay discrimination seem to make their way up to the competent national (regular or administrative) courts. Multiple explanations for such a scarcity in national case law are reported.

Often the scope of comparison in pay discrimination claims (what is work of equal value?) is not laid down in statutory law and, therefore, is problematic. Most countries, for example, do not accept a hypothetical comparator and only allow comparisons within the same company.¹⁵ Finding a real-life comparator, as opposed to the mere hypothetical comparator, proves to be particularly difficult in highly segregated occupations, where fellow workers of the opposite sex are rare or even non-existent. In France, however, the *Cour de Cassation* stated in 2009 that the existence of discrimination does not necessarily imply a comparison with other workers,¹⁶ thus admitting a very broad scope of comparison, possibly also with a hypothetical comparator.

The costs of legal assistance and proceedings often have a deterrent effect, in particular given the often limited compensation that can be obtained. In some countries, pay discrimination claims can be brought on behalf of the employee by trade unions, ombudspersons, national equality bodies or other organisations (e.g. non-profit entities or NGOs). Costs are often borne by these organisations.

Sometimes claims can be brought on behalf of a group of victims. However, notwithstanding the importance of such class action suits, they are not yet available in all countries and sometimes national legal systems (e.g. Liechtenstein) provide that, in case of a class action, individuals can only be financially compensated when they each start separate and individual proceedings to this end.

Time limits (prescription periods) may also substantially reduce the number of claims that eventually reach the competent courts. Prescription periods are extremely diverse across Europe. In Latvia, for example, the general two-year time limit laid down in the Labour Code is not applicable to discrimination cases. As regards discrimination, applicants must bring a claim within three months from the violation of the principle of non-discrimination (equal pay) or from the moment the applicant learned or should have learned about such discrimination.¹⁷ It has been argued on many occasions that such a brief time limit does not correspond to the EU law principles of equality and effectiveness.

Finally, in some countries also the lack of trust in the judiciary could be indicated as one of the reasons why few gender pay discrimination cases reach the courts. Such lack of trust includes a suspicion of corruption within some courts, but also the belief that the courts simply do not have the capacity to effectively deal with complex cases like pay discrimination on the basis of sex.

Procedures before national equality bodies are in some countries a good alternative to bringing the case before the ordinary courts. Those procedures are generally free of

¹⁵ In doing so, the national courts follow the ECJ, which also tends to restrict comparisons to within the company, the idea being that only in that case can the differences in pay be attributed to one single source (i.e. the employing company). Cases C-320/00 *Lawrence* [2002] ECR I-7325 and C-256/01 *Allonby* [2004] ECR I-873.

¹⁶ *Cass. Soc.*, 10 November 2009, n° 07-42849.

¹⁷ Articles 34(1), 48(2), 60(3), 95(2) of the Labour Code (*Darba likums*).

charge and bringing the claim is usually straightforward and not formalistic. Sometimes the claim can even be brought on behalf of the employee, e.g. by the ombudsperson. Moreover, the national equality bodies have substantial know-how in discrimination matters, which makes them particularly well-equipped institutions to deal with cases of pay discrimination on the basis of sex. In Norway, for example, the procedure before the national equality body is allegedly so efficient that nearly no cases end up before the courts.

2.2. Innovative ways to combat the gender pay gap

As already mentioned above, combating the gender pay gap may require some thinking outside the box. In this respect it seems important to go beyond those provisions directly connected to equal pay for equal work for men and women, and also to investigate other parts of national (labour) law, so as to discover their possible influence on the gender pay gap.

2.2.1. Relationship between the gender pay gap and other parts of the law

In the first place, there is a link with legal rules on part-time work.

In many countries the equal treatment of part-time and full-time workers is guaranteed by law, which is in full accordance with the principle of non-discrimination between full-time and part-time employees as laid down in Directive 97/81/EC (part-time work).¹⁸ Quite contrary to this, there still exist legislative measures regarding part-time employees that influence the gender pay gap in an indirect way. In Belgium, for example, the courts' views have recently clashed with regard to the question whether the notice period and payment in lieu of notice upon the termination of a part-time employment contract should be calculated on the basis of the full-time or the part-time remuneration. Generally, the Belgian courts have refused to see the gender dimension of this issue and its obvious impact on the gender pay gap.

Secondly, legislation on overtime work also seems to have an impact on the gender pay gap.

In some countries, extra remuneration for overtime work in sectors with a high female presence is very low (e.g. Bulgaria) or even non-existent (e.g. Croatia). On the other hand, making overtime easier and cheaper for employers entails the risk of negatively impacting those workers - mostly women - for whom the performance of overtime work clashes with, e.g., family duties. Their pay will not be increased with overtime pay and, as a consequence, the gender pay gap will increase.

A similar negative impact on the gender pay gap can be expected when certain groups of women (e.g. pregnant women, women who are breastfeeding, women raising young children, etc.) are prohibited by law from working overtime without their consent, as is the case, for example, in Lithuania.

In the third place, there also seems to be a link between the gender pay gap and legal rules on the use of fixed-term contracts. Where Directive 1999/70/EC (fixed-term work) intended to eradicate abuse arising from the use of successive fixed-term employment contracts or relationships,¹⁹ we see that in some countries (e.g. Italy) a more flexible use of fixed-term contracts was allowed in order to improve female labour market participation. However, allegedly no positive effect from this on the gender pay gap could be recorded, as we are here talking about precarious and low-paid jobs. Also,

¹⁸ Clause 4 of Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC, OJ L 14, of 20 January 1998, p. 9.

¹⁹ Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, of 10 July 1999, p. 43.

fixed-term contract workers are often disadvantaged as to their pay: e.g., their seniority/length of service is not taken into account for the calculation of their pay, and they cannot work overtime. This is the case in Greece.

Also the legal possibility to contract-out work from the public to the private sector has been mentioned as an important downward driver of female pay. Private contractors undercut public sector rates either for all staff or for new recruits. Particularly for the United Kingdom, this has been mentioned as a problem. In the *Allonby* case²⁰ the Court of Justice could not provide a solution for this type of problem as the (male) employee and the (female) posted worker did not work for the same employer.

Finally, also the high level of protection of labour law with regard to female workers is said to have a negative impact on women's pay. In particular, lengthy family-related periods of leave given primarily or entirely to women – although to be welcomed at first sight – eventually work to the disadvantage of female employees and have a negative impact on the gender pay gap (see above).

2.2.2. Innovative ways to combat the gender pay gap: a few best practices

It is remarkable that some countries have started to discover that novel ways to combat the gender pay gap can be based on the idea that explanations for the - unadjusted - gender pay gap (see above) should be revisited in order to find out whether the legislation regarding these explanations still reflects discriminatory practices and ideas.

For example, since one of the explanations for the unadjusted pay gap is that it is caused by the low wages that are being paid in highly feminised branches of the public sector, the Finnish Government has taken the initiative to earmark an amount of money as an 'equality pot' and this has meant that municipal governments could fund pay rises in low-paid highly educated 'female' sectors; this seems to be a very good practice that could inspire other countries.

Also, given the fact that women tend to interrupt their careers frequently and often combine their profession with family duties, it has been suggested that policies to support continuity in women's employment could help to reduce the gender pay gap. In this respect, reference should be made to employment policies to reconcile family and working life, like the establishment of pre-school classes and childcare facilities at the workplace. It has also been argued that the extension of statutory maternity leave is not necessarily a good idea. It is said to reinforce traditional gender roles and to counteract continuity in women's employment.

Such opposition to the extension of statutory maternity leave is often combined with a call for measures that oblige men to be more actively involved in household and child-rearing tasks. This would be another way to fight the gender stereotype that involves the reconciliation of family and work life, and would eventually also have a positive impact on the gender pay gap.

3. Conclusion

From the above it has become clear that research with regard to the discovery of unexpected links between the gender pay gap and a wide variety of legal provisions should be encouraged. As direct instances of pay discrimination have become rather exceptional in many parts of Europe, the focus for legal action by both the EU and the Member States should be on the indirect instances of discrimination, including those that are unexpected and unattended.

²⁰ Case C-256/01 *Allonby* [2004] ECR I-873.

EU Policy and Legislative Process Update

October 2010 – May 2011

1. On 28 March 2011, EU Justice Commissioner Viviane Reding delivered a speech at the European Central Bank Diversity Forum on ‘the European Commission’s New Gender Equality Strategy: Towards Quotas for Women in the boardroom?’
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/219&format=PDF&aged=0&language=EN&guiLanguage=en>
2. In the ‘Report on Progress on Equality between Women and Men in 2010 – The gender balance in business leadership’ five significant areas are assessed from the perspective of gender equality: equal economic independence; equal pay for equal work and work of equal value; equality in decision-making; dignity, integrity and an end to gender-based violence; and gender equality outside the Union. The report points out that despite a general trend towards more equality in society and on the labour market, progress in eliminating gender inequalities remains slow. Meeting the employment targets in the Europe 2020 Strategy will be a challenge, and this report highlights the importance of gender equality for reaching those targets. The report was published in March 2011.
<http://ec.europa.eu/social/BlobServlet?docId=6562&langId=en>
3. On 7 March 2011 the Council adopted its conclusions on the European Pact for gender equality for the period 2011 – 2020. In its conclusions the Council reaffirms its commitment to fulfil EU ambitions on gender equality as mentioned in the Treaty and in particular: to close the gender gaps in employment and social policy, promote a better work-life balance and combat all forms of violence against women. In those areas the Council urges the Member States to take action, such as to strive for the elimination of gender stereotypes in education.
http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lssa/119628.pdf
4. On 5 March 2011 the first European Equal Pay Day was held, meant as a signal of commitment to ending discrimination against women at work.
http://ec.europa.eu/news/employment/110304_en.htm
5. On 1 March 2011 EU Justice Commissioner Viviane Reding met with European business leaders to push for more women in boardrooms. ‘I want to send a clear message to corporate Europe: women mean business,’ said Vice-President Reding, the EU’s Justice Commissioner. ‘We need to use all of our society’s talents to ensure that Europe’s economy takes off. This is why the dialogue between the Commission and the social partners is so important. I believe that self-regulation could make a difference if it is credible and effective across Europe. However, I will come back to the matter in a year. If self-regulation fails, I am prepared to take further action at EU level.’
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/242&format=HTML&aged=0&language=EN&guiLanguage=en>
6. On 16 February 2011 the Commission closed legal proceedings against Austria for failing to communicate national measures to implement EU rules against gender discrimination in employment (Directive 2006/54/EC). Also against Hungary legal

proceedings because of incorrect implementation of the Directive were closed. The cases were successfully concluded after Austria notified the Commission of its legislation and Hungary brought its national law into line with the Directive's requirements following the Commission's action.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/191&format=PDF&aged=1&language=EN&guiLanguage=en>

7. On 6 December 2010 the Council adopted its Council conclusions on strengthening the commitment and stepping up action to close the gender pay gap, and on the review of the implementation of the Beijing Platform for Action.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:345:0001:0010:EN:PDF>
8. On 24 November 2010 infringement actions were closed against Germany, Latvia, Lithuania and Slovenia regarding their lack of compliance with the obligation to implement EU rules prohibiting discrimination in employment and occupation on the grounds of Directive 2006/54/EC. Germany provided additional information to the Commission on the implementation of the Directive. Latvia and Lithuania both modified their laws according to the Directive and Slovenia explained to the Commission on the maternity leave in law and in practice.
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1554&format=PDF&aged=1&language=EN&guiLanguage=en>
9. On 24 November 2010 the Commission also closed legal proceedings against Italy and Greece for discriminatory pensionable ages. Italy had adopted a new law in 2010 to equalise the pensionable ages for women and men in public service. Greece provided evidence that a new law had been adopted that will equalise the pensionable ages in both the private and the public sector by 2013.
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1553&format=PDF&aged=1&language=EN&guiLanguage=en>

European Court of Justice Case Law Update

October 2010 – May 2011

Case C-326/09 of 17 March 2011¹

European Commission v Republic of Poland

Directive 2004/113

Facts

Poland did not timely inform the European Commission of the implementation of Directive 2004/113 in national law. The Commission therefore started legal action against Poland.

Judgment of the Court of Justice

Although the Polish Government argued that the Directive had been implemented in Polish national law, in its general legal context, no direct reference to Directive 2004/113 was made and no information was provided on the content of the implementing provisions. The Court of Justice ruled that Poland in the period from 21 December 2007 to February 2009 had failed to fulfil its obligations to implement Directive 2004/113.

Case C-147/08 of 10 May 2011

Jürgen Römer v Freie und Hansestadt Hamburg

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 157 TFEU

Facts

Mr Römer worked for the Freie und Hansestadt Hamburg, as an administrative employee. On 15 October 2001, the applicant in the main proceedings and his companion entered into a registered life partnership. Mr Römer informed his former employer of this by letter of 16 October 2001. By a subsequent letter, dated 28 November 2001, he requested that the amount of his supplementary retirement pension be recalculated on the basis of the more favourable deduction under tax category III/0. This request was refused, because only ‘married, not permanently separated’ pensioners and pensioners entitled to claim child benefit or an equivalent benefit were entitled to have their retirement pension calculated on the basis of that tax category. Römer claimed before the national court that the words ‘married pensioner not permanently separated’ contained in that provision must be interpreted as including pensioners who have entered into a registered life partnership. Mr Römer considered that his right to equal treatment with married, not permanently separated, pensioners resulted, in any event, from Directive 2000/78 (non-discrimination on the ground of sexual orientation). He also argued that, since that Directive had not been transposed into national law within the period prescribed in Article 18 thereof, i.e. by 2 December 2003 at the latest, it applied directly to the defendant in the main proceedings.

¹ Only available in French and Polish.

Judgment of the Court of Justice

1. Council Directive 2000/78/EC (...) is to be interpreted as meaning that supplementary retirement pensions such as those paid to former employees of the Freie und Hansestadt Hamburg and their survivors on the basis of the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg (*Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg*), as amended on 30 May 1995, which constitute pay within the meaning of Article 157 TFEU, do not fall outside the material scope of the Directive either on account of Article 3(3) thereof or on account of Recital 22 in the preamble thereto.
2. Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10(6) of that Law of the Land of Hamburg, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if
 - in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the Law on registered life partnerships (*Gesetz über die Eingetragene Lebenspartnerschaft*) of 16 February 2001, which is reserved to persons of the same gender, and;
 - there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as governed within the corresponding institutions, which are relevant to be taken into account for the purpose of and the conditions for the grant of the benefit in question.
3. Should Paragraph 10(6) of the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg, (...), constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.

Case C-516/09 of 10 March 2011

Tanja Borger v Tiroler Gebietskrankenkasse

Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community

Facts

Following the birth of her son on 7 January 2006, Ms Borger, an Austrian national living in Austria, took unpaid leave until 7 January 2008. With her employer's agreement, she subsequently extended her unpaid leave for a further six months up to 6 July 2008. In March 2007, Ms Borger moved with her son to Switzerland, where her husband had been working since 2006. The *Tiroler Gebietskrankenkasse* paid Ms

Borger childcare allowance for the period from 5 March 2006 to 28 February 2007, and a compensatory benefit for the period from 1 March 2007 to 6 January 2008. Ms Borger's application for childcare allowance and the maintenance of entitlement to social security for a further six months was, however, refused, because Ms Borger was not in a *de facto* employment relationship in Austria. Before the national court the question arose whether Ms Borger would fall under the scope of Regulation 1408/71, under the circumstances that she agreed a further six-month period of unpaid leave with her employer in order to draw childcare allowance or a corresponding compensatory benefit for the maximum statutory period, and then terminated the employment relationship.

Judgment of the Court of Justice

The status of an 'employed person', within the meaning of Article 1(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, must be attributed to a person in a situation such as that of the claimant in the main proceedings during the six-month period of extended unpaid leave following the birth of her child, on condition that, during that period, that person is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of that regulation. It is for the national court to determine whether that condition is satisfied in the dispute before it.

Case C-236/09 of 1 March 2011

Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres.

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 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.

Judgment of the Court of Justice

It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that Directive, the application of unisex rules on premiums and benefits. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 to that Directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit ‘exemptions’. Accordingly, Directive 2004/113 is based on the premise that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.

Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely. Under Article 5(2) of Directive 2004/113, any decision to make use of that option is to be reviewed five years after 21 December 2007, account being taken of a Commission report. However, given that Directive 2004/113 is silent as to the length of time during which those differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.

Therefore the Court of Justice rules that Article 5(2) of 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 is invalid with effect from 21 December 2012.

Case C-356/09 of 18 November 2010

Pensionsversicherungsanstalt v Dr. Christine Kleist

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. In the context of the national procedure the *Oberster Gerichtshof* referred two questions on Directive 76/207/EEC.

Judgment of the Court of Justice

The Court of Justice ruled that ‘In those circumstances, given that (i) the difference in treatment established by rules such as those at issue in the main proceedings is directly

on grounds of sex, whilst, (...), the situations of men and women are identical in the present instance, and (ii) Directive 76/207 contains no exception, applicable in the present case, to the principle of equal treatment, it must be concluded that that difference in treatment constitutes direct discrimination on grounds of sex.'

Article 3(1)(c) of Council Directive 76/207/EEC (...) must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute direct discrimination on the grounds of sex prohibited by that Directive.

Case C-232/09 of 11 November 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 the time 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?

Judgment of the Court of Justice

1. A member of a capital company's Board of Directors who provides services to that company and is an integral part of it must be regarded as having the status of worker for the purposes of Council Directive 92/85/EEC (...) if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the Board Member receives remuneration. It is for the national court to undertake the assessments of fact necessary to determine whether that is so in the case pending before it.
2. Article 10 of Directive 92/85 is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits a member of a capital company's Board of Directors to be removed from that post without restriction, where the person concerned is a 'pregnant worker' within the meaning of that Directive and the decision to remove her was taken essentially on account of her pregnancy. Even if the Board Member concerned is not a 'pregnant worker' within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a Board of Directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of

sex, contrary to Article 2(1) and (7) and Article 3(1)(c) of 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.

PENDING CASES BEFORE THE COURT OF JUSTICE

Case C-572/10: Reference for a preliminary ruling from the Tribunal Administratif de Saint-Denis de la Réunion (France) lodged on 8 December 2010
Clément Amedée v Garde des sceaux, Ministre de la justice et des libertés, Ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'État

Referred questions by the Tribunal Administratif de Saint-Denis de la Réunion

1. Can the scheme put in place by Article L. 12(b) of the French Civil and Military Retirement Pensions Code, as amended by Article 48 of the Law of 21 August 2003, and by Article R.13 of that Code, as amended by Article 6 of the Decree of 26 December 2003, be regarded as giving rise to indirect discrimination, within the meaning of Article 157 of the Treaty on the [Functioning of the] European Union, against the biological parents of children, given the proportion of men liable to fulfil the condition relating to a break in their career for a continuous period of at least two months, in particular by reason of the absence of a statutory framework allowing them to fulfil that condition by taking paid leave?
2. If the first question is answered in the affirmative, can the indirect discrimination thus established be justified by the terms of Article 6(3) of the Agreement annexed to Protocol No. 14 on Social Policy [annexed to the Treaty on European Union]?
3. If the second question is answered in the negative, do the provisions of Directive 79/7/EEC [1] preclude the maintenance in force of Articles L.12(b) and R.13 of the French Civil and Military Retirement Pensions Code?
4. If the first question is answered in the affirmative and the second and third questions are answered in the negative, must any challenge to those Articles be limited solely to the discrimination that they imply or does it relate to the impossibility for civil servants of both sexes to benefit from them?

EFTA Court Case Law Update

October 2010 – May 2011

Case E- 18/10, Action brought on 22 December 2010 by the EFTA Surveillance Authority against Norway

On 22 December 2010 an action against Norway was brought before the EFTA court for non-compliance with the judgment in case E-2/07. In this decision from 2007 the EFTA Court decided that Norway had failed to fulfil its obligations under Directive 86/378/EEC, since the Norwegian Public Service Pension Act discriminated against widowers in relation to survivor's pensions granted to persons whose spouse had joined the Public Service Pension Fund prior to 1 October 1976. Under those circumstances, the survivor's pension of a widower would be subject to curtailment where he had other sources of income, whereas a widow in the same circumstances receives her survivor's pension without curtailment.

Case E-18/10

http://www.eftacourt.int/images/uploads/18_10_Application_OJ_text.pdf

Case E-2/07

<http://www.eftacourt.int/images/uploads/E-2-07.pdf>

Case E-11/10, *EFTA Surveillance Authority v The Principality of Liechtenstein*

On 17 December 2010 the EFTA court decided in a case against Liechtenstein for non-compliance with Directive 2006/54/EC. The application was based on one plea in law, namely that by failing to adopt, or to notify ESA of, all the national measures necessary to fully implement the Directive, within the time limit prescribed, the Principality of Liechtenstein had failed to fulfil its obligations under Article 33 of the Directive, as incorporated into the EEA Agreement, and under Article 7 EEA. In its statement of defence, the Liechtenstein Government set out several reasons for the delay in implementation, noting that the decision to combine the implementation of Directives 2006/54/EC and 2004/113/EC had caused a longer delay than expected. The Government of Liechtenstein did not, however, dispute that not all necessary national implementation measures had been adopted within the time limit prescribed. However, the Government also argued that since Directive 2006/54/EC was a recast of several existing directives already implemented into Liechtenstein law, and entailed in substance only minor changes, neither the homogeneity within the EEA nor individuals' rights had been put at risk by the slightly delayed implementation.

The EFTA Court ruled that Liechtenstein failed to meet its obligations to implement Directive 2006/54 in time, since it is clear that Liechtenstein did not take the necessary measures to implement the Directive in time.

Judgment E-11/10

http://www.eftacourt.int/images/uploads/11_10_Judgment_EN.pdf

European Court of Human Rights Case Law Update

October 2010 – May 2011

Case of *Andrle v the Czech Republic* (Application no. 6268/08) of 17 February 2011

Facts

In this case, the Czech Republic's preferential treatment of women concerning their pension eligibility was subject of a complaint. In the Czech Republic women and men who care for children are eligible for an old-age pension at different ages. In this legislation, the pensionable age of women can be lowered according to the number of children raised, which did not apply to the pensionable age of men. Mr Andrle started a national case before national courts and the Constitutional Court claiming that this provision was discriminatory.

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property), Mr Andrle complained about the current pension scheme in the Czech Republic whereby women and men who care for children are eligible for an old-age pension at different ages. Notably, he complained that he had been denied a pension at an age at which a woman in his position would have been able to receive it.

Judgment of the Court

The Court considered that the lowering of the age at which women were eligible for a pension in the Czech Republic, adopted in 1964 under the Social Security Act, was rooted in specific historical circumstances and reflected the realities of the then socialist Czechoslovakia. That measure pursued a 'legitimate aim' as it was designed to compensate for the inequality and hardship generated by the expectations of women under the family model existing at the time (and which persists today): that of working on a full-time basis as well as taking care of the children and the household. Indeed, the amount of salaries and pensions awarded to women was also generally lower in comparison to men.

The perception of the roles of the sexes has since evolved and the Czech Government is progressively modifying its pension system to reflect social and demographic change. The very nature of that change is, however, gradual and the Government cannot be criticised for not having pushed for complete equalisation of the retirement age at a faster pace. Furthermore, the task of reform is demanding, especially given the different methods to choose from for equalisation and other demographic shifts, such as the ageing of the population and migration, which have to be taken into account. Moreover, the Court emphasised that the national authorities were the best placed to determine such a complex issue relating to economic and social policies, which depended on manifold domestic variables and direct knowledge of the society concerned.

Therefore, the Court found that the Czech Republic's approach concerning its pension scheme was reasonably and objectively justified and would continue to be so until such time as social and economic change in the country removed the need for special treatment of women.

Judgment

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ANDRLE&sessionid=71351962&skin=hudoc-en>

Press release:

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=88476&sessionId=71420353&skin=hudoc-pr-en&attachment=true>

Case of *Korosidou v Greece* (Application no. 9957/08) of 10 February 2011

Facts

The applicant, Sophia Korosidou, is a Greek national who was born in 1929 and lives in Thebes (Greece). Relying in particular on Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) and Article 1 of Protocol No. 1 (protection of property), she complained about a refusal to award her a survivor's pension as a widow on the ground that she had not been married to her deceased partner. Under Article 6 Paragraph 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), she complained that the proceedings she had brought for the payment of the survivor's pension had been excessively long and that she had had no remedy by which to have that complaint examined.

Judgment of the Court

- With regard to Article 6 of the Convention, the Court considers that in this case the duration of the proceedings was excessive and did not respond to the requirement of 'reasonable time'. Accordingly, there has been a violation of Article 6 Paragraph 1 because of the length of proceedings by the applicant before the administrative courts. The Court also found that there were no effective remedies open in the sense of Article 13 of the Convention.
- With regard to Article 14 and 8 of the Convention combined with Article 1 of the first Protocol, the Court assesses the margin of appreciation of the State to distinguish between married and unmarried couples. The Court concludes in the present case that there has been no violation of Article 14 of the Convention combined with Article 8 of the Convention and Article 1 of Protocol No. 1.
- The Court only takes compensation for moral damages as such into account and grants the applicant EUR 10 000.

Judgment (in French only):

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=KOROSIDOU%20%7C%209957/08&sessionId=71412734&skin=hudoc-en>

Press release:

<http://cmiskp.echr.coe.int/tkp197/portalthbkm.asp?sessionId=71420353&skin=hudoc-pr-en&action=request&poll=3#>

Case of *Sporer v Austria* (Application no. 35637/03) of 3 February 2011

Facts

Under Article 166 of the Austrian Civil Code the mother of a child born out of wedlock had sole custody. A transfer of custody was only to be ordered if the child's best

interests were at risk. In the present case, the applicant is the father of a son born out of wedlock, who after the factual divorce wanted to have custody. He contended that the relevant provisions of the Civil Code, i.e. Articles 166 and 176, were discriminatory and suggested that the appellate court request the Constitutional Court to rule on their constitutionality. Since the child had been born out of wedlock, his mother had sole custody of him and he, as the child's father, could only be awarded custody if the mother put the child's well-being at risk.

Judgment of the Court

The Court refers to the case of *Zaunegger*, in which it ruled that in view of the different life situations into which children whose parents are not married are born and in the absence of an agreement on joint custody, it was justified to attribute parental authority over the child initially to the mother, in order to ensure that right from the child's birth there was a person who would act for it in a legally binding way. Nevertheless, the automatic granting of sole custody to the mother would be a violation of Article 14 and 8 of the Convention. The Court concludes that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

Judgment

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sporer&sessionid=71416376&skin=hudoc-en>

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=88030&sessionId=71420353&skin=hudoc-pr-en&attachment=true>

Case of *Ternovszky v Hungary* (Application no. 67545/09) of 14 December 2011

Facts

The applicant is a Hungarian national who was born in 1979 and lives in Budapest. She was pregnant when she lodged her application with the Court. She intended to give birth at her home, rather than in a hospital or a birth home, but alleged that she had not been able to do so because health professionals were effectively dissuaded by law from assisting her as they risked being convicted. It appeared that at least one such prosecution had taken place in recent years. The applicant complained that the ambiguous legislation on home births dissuaded health professional from assisting her when giving birth at home, which amounted to a discriminatory interference with her right to respect for her private life. She relied on Article 8 read in conjunction with Article 14 of the Convention.

Judgment of the Court

- The Court only assesses the violation of Article 8 of the Convention. The Court notes that the applicant was not prevented as such from giving birth at home. However, the choice of giving birth in one's home would normally entail the involvement of health professionals, an assumption not disputed by the parties. For the Court, legislation which arguably dissuades such professionals who might otherwise be willing from providing the requisite assistance constitutes an interference with the exercise of the right to respect for private life by prospective mothers such as the applicant. The lack of legal certainty and the threat to health professionals has limited the choices of the applicant considering home delivery.

For the Court, this situation is incompatible with the notion of ‘foreseeability’ and hence with that of ‘lawfulness’. The Court concludes that there has been a violation of Article 8 of the Convention.

- Under Article 41 (just satisfaction) of the Convention, the Court held that Hungary was to pay the applicant EUR 1 250 in respect of costs and expenses.

Judgment:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ternovszky&sessionId=71416506&skin=hudoc-en>

Press release:

<http://cmiskp.echr.coe.int/tkp197/portalthbkm.asp?sessionId=71420353&skin=hudoc-pr-en&action=request&poll=3#>

Case of *P.V. v Spain* (Application no. 35159/09) of 30 November 2010

Facts

P.V. is a male-to-female transsexual. She had a son born before the transsexual operation. After the divorce from the mother of the child, also before the change of sex, custody was granted to the mother and both parents had parental authority. The mother of the child requested to have P.V. deprived of parental responsibility and to have the contact arrangements and any communication between the father and the child suspended, arguing that the father had shown a lack of interest in the child and adding that P.V. was undergoing hormone treatment with a view to gender reassignment and usually wore make-up and dressed like a woman. The national court did restrict contact, but did not suspend them. Relying on Article 8 (right to respect for private and family life) taken in conjunction with Article 14 (prohibition of discrimination), the applicant complained about the restrictions ordered by a judge on the arrangements for contact with her son, on the ground that her lack of emotional stability following her gender reassignment was liable to upset the child, who was six years old at the time.

Judgment of the Court

According to the Court the decisive ground for the restriction had been the risk of jeopardising the child’s psychological well-being and the development of his personality, rather than the emotional status of P.V. In addition, P.V.’s lack of emotional stability had been noted in a psychological expert report, which she had had the opportunity to challenge. The Court therefore considered that the restriction of the contact arrangements had not resulted from discrimination on the ground of the applicant’s transsexualism and concluded that there had been no violation of Article 8 taken in conjunction with Article 14.

Judgment (in French only)

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SPAIN%20%7C%2035159/09&sessionId=71418024&skin=hudoc-en>

Press release

<http://cmiskp.echr.coe.int/tkp197/portalthbkm.asp?sessionId=71420242&skin=hudoc-pr-en&action=request&poll=3#>

Case of *Losonci Rose and Rose v Switzerland* (Application no. 664/06) of 9 November 2011

Facts

The applicants are Laszlo Losonci Rose, a Hungarian national, and Iris Rose, his wife, who has joint Swiss and French nationality. The applicants, who were intending to get married, asked to keep their own surnames rather than choose a double-barrelled surname for one of them.

After their request and their subsequent appeal were rejected, the applicants decided that, in order to be able to marry, they would take the wife's surname as the 'family name' for the purposes of Swiss law. Their surnames were entered in the register of births, deaths and marriages as 'Rose' for the second applicant and 'Losonci Rose, né Losonci' for the first applicant, who requested after the marriage that the double-barrelled surname he had 'provisionally' chosen be replaced in the register by the single surname 'Losonci', as permitted under Hungarian law, without any change to his wife's surname. This request was refused.

They argued that this refusal constituted discrimination since the first applicant was been prevented from keeping his own surname after marriage, which he could have done had the applicants' sexes been reversed.

Judgment of the Court

- The Court concluded that the rules in force in Switzerland gave rise to discrimination between binational couples based on whether the man or the woman had Swiss nationality, and that there had therefore been a violation of Article 14 read in conjunction with Article 8.
- By way of just satisfaction, the Court held that Switzerland was to pay the applicants EUR 10 000 in respect of non-pecuniary damage and EUR 4 515 for costs and expenses.

Judgment (in French only)

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=876974&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Press release

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=6883&sessionId=71420242&skin=hudoc-pr-en&attachment=true>

Case of *Serife Yiğit v Turkey* (Application no. 3976/05) of 2 November 2010

Facts

The applicant, Yiğit, is a Turkish national who was married to Ö.K. in a religious ceremony (*imam nikahı*) in 1976. Ö.K. died on 10 September 2002. The youngest of their six children, Emine, was born in 1990. Yiğit requested the authorities to recognise her marriage with Ö.K. and to register Emine as his daughter. Furthermore she requested that the retirement pension and health-insurance benefits of Ö.K. to be transferred to her and her daughter. Since the marriage was not legally recognised, the benefits of the pension fund were only transferred to the daughter. The applicant relied on Article 8 of the Convention in order to argue that the refusal to recognise her marriage would constitute a violation of her right to family life.

Judgment of the Court

- The Court considered that the difference in treatment between married and unmarried couples with regard to survivors' benefits was aimed at protecting the traditional family based on the bonds of marriage and was therefore legitimate and justified. There had accordingly been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.
- As to the applicant, she chose, together with her partner, to live in a religious marriage and found a family. She and Ö.K. were able to live peacefully as a family, free from any interference with their family life by the domestic authorities. Thus, the fact that they opted for the religious form of marriage and did not contract a civil marriage did not entail any penalties – either administrative or criminal – such as to prevent the applicant from leading an effective family life for the purposes of Article 8.

Judgment

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=876611&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Press release

<http://cmiskp.echr.coe.int/tkp197/portalthbkm.asp?sessionId=71420242&skin=hudoc-pr-en&action=request&poll=3#>

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

AUSTRIA – *Neda Bei*

Policy developments

The next regular federal elections being due in September 2013, the governmental cohabitation of Social Democrats (*SPÖ*) and the People's Party (*ÖVP*) can be considered as still stable. However, recent polls show an increasing disposition of the electorate in favour of the right-wing, xenophobic and explicitly anti-European populist Freedom Party (*FPÖ*).

The widely media-covered accident at the Japanese atomic power plant in Fukushima (11 March 2011) overshadowed Austrian politics for weeks. Among the gender-related topics still discussed was the controversial proposal the Minister of Justice had launched as an alternative to the current model of joint custody, so far without result. In March, the yearly official report on income statistics again indicated a considerable gender pay gap, the median women's income in the private sector amounting to 57 % of the median men's income in 2009. Legally binding women's quotas for boards of private companies had been discussed in February; on 15 March the council of ministers decided upon a self-binding measure when appointing members to boards of companies which were owned by the Federal State for 50 % or more. Gradual implementation will start with a target women's quota of 25 % for 2013 and aim at a representation of women by 35 % in 2018; progress will be monitored by annual reports.

Legislative developments

Although the equal treatment legislation for the private sector has been amended, the outcome was not as comprehensive as had been intended by the Ministry of Labour, which had proposed 'levelling up' the Equal Treatment Act to the level of the European Commission's proposed Directive of 2 July 2008 on implementing equal treatment in access to goods and services on other grounds than ethnic origin or sex/gender.¹ The Ministry's draft legislation which proposed this was not enacted. The amendment to the Equal Treatment Act as finally promulgated on 15 February 2011² focuses on measures aiming at transparency of wages within enterprises and provides for further adaptations of a more technical nature. So the minimum damage for harassment and sexual harassment was raised from EUR 720 to EUR 1 000; the existing prohibitions of discrimination including legislation applying to disabled persons were amended by provisions on discrimination by association, and an explicit provision was added about advertising housing facilities. Furthermore, the provisions on the Equal Treatment Ombud and the Equal Treatment Commission were amended. Inter alia, the strict confidentiality of the Commission's meetings was abolished to allow for the presence of persons escorting the complainant (friends, lawyers); although the meetings of the Commission are still not public, in future the complainant and the alleged perpetrator of a discrimination are to be present during proceedings (*'Parteienöffentlichkeit'*). Cases

¹ COM (2008) 426 final.

² OJ No. L 7/2011.

of sexual harassment are exempted from this new procedural regime, which will apply to complaints dating from 1 March 2011.

The main instrument introduced to achieve income transparency is the ‘income report’, which enterprises have to provide every two years; actually the ‘report’ is an aggregation of anonymous data, its content and structure being defined by legislation. In the first part of the report the enterprise has to indicate the number of women versus the number of men in the respective groups of the relevant pay scheme (collective agreement and/or a job classification system applied specifically at enterprise or plant level). The second part should indicate the number of women versus the number of men in those subgroups of the relevant systems that are typically defined in years. In the third part, the employer has to indicate the average *or* the median wages of respectively women and men in all of the groups mentioned. The reference period is the calendar year; wages of part-time employees are to be extrapolated to full-time employment per annum. The data must be anonymous and established in a way barring individual identification.

The primary addressee of the income report is the works council, which is entitled to pass information to the employees and to take legal action if the report is not established or duly handed over. If there is no works council in the enterprise, the employer has to make a copy of the report available to the employees concerned; so an individual employee may also take action before court if the report is not established or if information is not made available. With the exception of law enforcement and legal counsel, the Equal Treatment Act provides explicitly for confidentiality of the data aggregated within the meaning of the provisions of the Labour Constitution Act and the Penal Code protecting professional secrets of the enterprise and applying to works councils. If a breach of confidentiality occurs, as defined by the new legislation, for instance when informing the media on the report, the full weight of sanctions provided for by labour law (dismissal), civil law or even penal law might apply to an individual employee; should those provisions not be applicable, the employee could still be prosecuted by the administrative authority and ordered to pay a fine of up to EUR 360, according to a provision which was introduced by a controversial³ amendment of the Equal Treatment Act. The new provisions on the ‘income report’ will gradually enter into force depending on the size of enterprises; for those regularly employing more than 1,000 employees the entry into force was on 1 March 2011, the first report for 2010 being due at the latest on 31 July 2011. On 1 January 2014, the amendment to the Equal Treatment Act will have entered into force completely, applying to enterprises with less than 251 but more than 150 employees. Income reports for the public sector provided for in a comparable way entered into force without further ado on 1 March 2011.⁴

Additional provisions apply to the private sector. Employers and employment agencies have to indicate the legal minimum wage when advertising a job (entry into force: 1 March 2011); the job applicant or the Equal Treatment Ombud may request an administrative penalty of up to EUR 360 for non-compliance (entry into force: 1 January 2012). The Equal Treatment Ombud and the Equal Treatment Commission are entitled to receive information on income data from social security organisations (entry into force: 1 March 2011).

³ K. Firlei ‘Entgelttransparenz ultralight – der Einkommensbericht gem § 11a GIBG’, *DRdA No. 331* (to appear in June 2011) pp. 238–248.

⁴ OJ No. I 6/2011.

Case law of national courts

Supreme Court

When there are several applicants for a job in the public sector, individual assessment of each applicant is a mandatory part of an appropriate selection procedure, notwithstanding the principle of promotion of women required by the Federal Equal Treatment Act and an affirmative action plan providing for women's quota.⁵

When assessing the compensation for immaterial (psychic, dignitary) damage caused by extensive mobbing over a period of six months and resulting inter alia in post-traumatic stress disorder, a second instance labour court declared a legal remedy before the Supreme Court to be admissible because the latter had not ruled on that precise question yet; the first instance had awarded EUR 5 900 in damages.⁶ However, another second instance labour court prevented an appeal to the Supreme Court in a case of sexual harassment by intense verbal abuse repeated regularly over a period of more than five months which ended with the employee giving notice; the Court confirmed that an 'overall approach' to the case and a compensation for immaterial harm of EUR 2 000 were adequate.⁷

Constitutional Court

The Court rejected a complaint about the result of proceedings before the Equal Treatment Commission (private sector) as inadmissible; the non-binding proposals (opinions) of the Commission were not normative verdicts which ascertain or constitute rights implementing the principle of equal treatment and can be subject to a complaint before the Constitutional Court.⁸ In a second case concerning access to goods and services, the Court abolished provisions of a competent Federal Minister's administrative regulation regarding the general terms of transport by trams which provided for reductions for retirees, available for men when they turn 65 and for women when they turn 60; the Court considered the challenged provision as direct sex-based discrimination, linking the reduction directly to different ages independent of the fact whether a person has retired or not.⁹

Furthermore, the Court abolished two provisions relating to the reimbursement of benefits for parental leave, one dating back to the transition from the former type of benefits to the current type of transfer payments, the other concerning a legal provision which does not take into account the alimony a parent who is living separately is obliged to pay for other children.¹⁰

High Administrative Court

An employee of the municipality of Vienna was found guilty by a penal court of sexual duress, perpetrated while drunk, against two employees (waitresses) of a café run by his wife. In consequence, the public employer had launched disciplinary proceedings because his behaviour was deemed detrimental to the municipality's credit and he was eventually dismissed. The High Administrative Court confirmed the dismissal to be a correct and adequate disciplinary measure; the Court stated furthermore that findings of

⁵ Supreme Court 23 November 2010, 8 ObA 35/10w.

⁶ Upper Provincial Court Graz 6 October 2010, 7 Ra 53/10h = ARD 6119/3/2011 - § 1157, § 1325 ABGB.

⁷ Upper Provincial Court Linz 20 October 2010, 12 Ra 71/10p = ARD 6119/4/2011 - § 12 (11) GIBG.

⁸ Constitutional Court 29 November 2010, B 1952/08.

⁹ Constitutional Court 15 December 2010, V 39/10-13, V 40/10-13.

¹⁰ Constitutional Court 24 February 2011, V 76/10; 4.3.2010, G 184/10.

a penal court are binding on the administration as far as issues of responsibility and the specific form of guilt are concerned.¹¹

Case law of equality bodies (opinions)

After six years of employment, Mr. A. was given notice some time after he had taken leave to care for his sick wife who, as main caretaker and due to illness, was not able to care for their eight months old child; in this case, the employer's agreement is not required. Senate I of the Equal Treatment Commission (private sector) found that terminating his employment constituted indirect discrimination against him on grounds of sex/gender. The Commission referred to the wording of Directive 76/207/EEC – ‘no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status’ – and the equivalent wording of the Equal Treatment Act, as well as to the legislator's intention. On the basis of this, the Commission stated that being married or not, or the circumstance of having children, respectively, was not to induce discriminatory treatment; there had been a sufficiently close connection in time between taking leave and being given notice. Furthermore, the employer had not been able to establish the probability of other than discriminatory reasons for ending the employment.¹²

The Commission drew the same conclusions and referred to the same legal arguments in the case of Ms A, stressing additionally that a different treatment of employees solely because they have children, especially by disadvantaging them by reducing their ability to have flexible working time, constituted a discrimination on grounds of gender. Ms A was not aware, stressing additionally that discriminating against employees solely because they have children, especially by disadvantaging them by reducing their ability to have flexible working time. Ms A was not aware that prolonging her parental leave for six months after her child's second birthday meant losing protection against dismissal; she wanted to work 35 hours per week after returning from parental leave and was given notice. The employer said he was uncomfortable because she would have had to commute so often between her home and her place of work.¹³

Miscellaneous

In January 2011 the human rights situation in Austria was assessed by the UN Human Rights Council for the first time within the framework of the Universal Periodic Review (UPR) and 166 recommendations were made. Several member states of the Council (Honduras, UK, Canada, Uzbekistan, Israel and the Islamic Republic of Iran) referred to issues concerning non-discrimination and equal treatment legislation, recommending *inter alia* the harmonisation of existing legislation against all forms of discrimination. Norway urged Austria to implement the planned amendments to the Equal Treatment Act, and Honduras recommended that the financial resources and the personnel of the Equal Treatment Ombud should be upgraded. Austria will probably not accept the last mentioned recommendation. The first periodic review of Austria will be concluded in June 2011.

¹¹ High Administrative Court 27 January 2011, 2010/09/0146.

¹² Equal Treatment Commission (private sector) - Senate I 5 October 2011, GBK I/214/09, <http://www.frauen.bka.gv.at/DocView.axd?CobId=42118>, accessed 6 April 2011.

¹³ Equal Treatment Commission (private sector) - Senate I 23 November 2011, GBK I/220/09, <http://www.frauen.bka.gv.at/DocView.axd?CobId=42349>, accessed 6 April 2011.

Policy developments

Given the ongoing political crisis, which kept preventing the formation of a new federal government, the previous Cabinet remained in charge of current affairs, a notion which tends to broaden its scope but still precludes any daring initiatives. Meanwhile, the federal Parliament, which was elected in June 2010, exercised its right to pass legislation originating in proposals from its own members and based on *ad hoc* majorities which made the process rather hectic.

Legislative developments

Prohibition of burqa in public spaces

As reported previously,¹⁴ the proposal for a penal Act to prohibit the wearing of any attire in public spaces which prevents the identification of the wearer had been adopted on 29 April 2010 by the House of Representatives, but the Senate (Second House) had summoned the proposal for examination, and the dissolution of Parliament had then made it invalid. The same proposal¹⁵ was revived after the general election, and was adopted again by the House of Representatives on 31 March 2011; it is now for the Senate to decide whether or not it wishes to summon the proposal for examination.

Gender quotas in boards of directors

In the same way, a Commission of the House of Representatives achieved a compromise over five distinct proposals, and on 15 March 2011 adopted a text¹⁶ according to which at least one third of members must be of the other sex than the rest within the boards of directors of all companies which are quoted on the stock exchange as well as of the federal Economic Public Bodies (i.e. the post office, the telecom organization and the air traffic control organization; the same rule applied already to the three companies which form the railway group). Whether the same political majority will be found within the full House to adopt the text remains to be seen.

Collective agreements: improvement to breastfeeding breaks

When Belgium, very belatedly (in 1990), ratified the European Social Charter, no provisions were adopted to comply with Article 8(3), under which ‘sufficient time off’ should be made available for breastfeeding mothers. Under the relentless pressure exerted by the European Committee of Social Rights, this defect was finally remedied, in the private sector, by Collective Agreement n°80 of the National Labour Council of 27 November 2001.¹⁷ The latter instrument provides that a breastfeeding employee is entitled to two 30-minute breaks in a full working day. The breaks do not give the right to any remuneration, but to a social security benefit. The breaks may be used during a maximum of seven months following the child’s birth, or nine months under exceptional circumstances related to the child’s health condition.

¹⁴ See *European Gender Equality Review* no. 1/2010 p. 50 and no. 2/2010 p. 46.

¹⁵ *Parliamentary documents*, House of Representatives, no. 53/0219, available (in French and Dutch) on <http://www.lachambre.be> or <http://www.dekamer.be>, accessed 4 April 2011.

¹⁶ *Parliamentary documents*, House of Representatives, no. 53/0211, available (in French and Dutch) on <http://www.lachambre.be> or <http://www.dekamer.be>, accessed 4 April 2011.

¹⁷ C.A. no. 80 was made generally binding by the Royal Decree of 21 January 2002, available (in French and Dutch) on <http://www.juridat.be>, accessed 4 April 2011.

More recently the European Committee of Social Rights observed that all employees concerned should be entitled to breastfeeding breaks during the same period. Consequently, Collective Agreement n°80 *bis* of 13 October 2010¹⁸ amended C.A. n°80 so that the breaks are now available unconditionally for a maximum of nine months following the child's birth.

Given that collective agreements are not applicable in the public sector, the various authorities had inserted provisions equivalent to C.A. n°80 into their regulations. These will now have to be amended in conformity with C.A. n°80 *bis*.

Case law of national courts

Three decisions, related to the hijab/burqa issue, are worth mentioning.

Conseil d'État, judgment of 21 December 2010

When the local council of Charleroi adopted a regulation forbidding all school personnel to wear any 'explicit sign' of religious, political or philosophical adherence when performing their duties, a hijab-wearing teacher of mathematics applied to the *Conseil d'État* to have that regulation annulled; moreover, considering its immediate effects on her own position, she also requested that the implementation of the regulation be suspended before the *Conseil d'État* decided on the merits.

Although applications for a suspension are normally dealt with by a single judge, this one was referred to the General Meeting of the *Conseil d'État*, which meant that 24 judges, both French and Dutch speakers, took part in the decision. And although such proceedings only require a summary examination of the applicant's ground for annulment ('the ground seems, or does not seem, to be serious'), a 44-page judgment¹⁹ was deemed necessary to reject the application for suspension, so that the future decision on the merits is a foregone conclusion.

Essentially, the *Conseil d'État* subscribed to the thesis that given any public body's duty of philosophical neutrality, it is entitled to impose a prohibition on 'explicit signs of adherence' as far as its employees are concerned, even if this is at the expense of their individual freedom to express religious convictions.

Gender equality was not mentioned at any stage, except by the *Conseil d'État* in the usual lip-service mode. The applicant herself merely presented a ground of ethnic or religious discrimination which the *Conseil d'État* dismissed by stating that as neutrality is 'a philosophical concept' to which state schools must adhere, neutrality was a determining factor for access to teaching positions in such schools and thus entailed no discrimination under the relevant legislation (the anti-discrimination *décret* of the French-speaking Community, of 12 December 2008).

Constitutional Court judgment of 15 March 2011

As to the Flemish Community, a *decreet* of 14 July 1998 implemented the Constitutional provision (Article 24) on education, according to which the education system organized by each of the three Communities itself must be 'neutral'. However, the *decreet* delegated to an advisory body (the Community Education Council) the responsibility to make the notion of neutrality explicit. When the Council produced a decision prohibiting the wearing of any visible signs of religious or philosophical

¹⁸ C.A. no. 80 *bis* was made generally binding by the Royal Decree of 5 December 2010, available (in French and Dutch) on <http://www.juridat.be>, accessed 4 April 2011.

¹⁹ Judgment no. 210.000, unpublished, available (in French and Dutch) on <http://www.consetat-raadvst.be>, accessed 4 April 2011.

adherence within the Community schools, a hijab-wearing pupil applied to the *Raad van State/Conseil d'État* to have that decision annulled. The latter then found that it had to refer to the Constitutional Court for a preliminary ruling on the validity of the delegation to the Council.

The Constitutional Court observed that the *Raad van State's* reference did not concern the interpretation of the notion 'neutrality', and concluded²⁰ that the delegation given by the *decreet* to the Council was not incompatible with Article 24 of the Constitution.

Magistrates Court of Brussels, judgment of 26 January 2011

In the borough of Etterbeek (Brussels Capital Region), a by-law of the local council prohibits the wearing of any attire that prevents the identification of the wearer in public spaces, except at Carnival.

Proceedings were instituted against a niqab-wearing woman after she refused to pay two administrative fines that had been imposed upon her on the ground of the said by-law. On 26 January 2011, the Magistrates Court of Brussels delivered a surprising judgment²¹ after analyzing the case in the light of the European Convention of Human Rights. The Court found that while ordering a niqab to be removed could be justified under certain circumstances (e.g. security controls at airports), such a general prohibition as imposed by the by-law was an excessive encroachment upon the freedom of religion, guaranteed by Article 9 of the Convention. Consequently, the case was dismissed. The mayor of Etterbeek immediately declared that the local council would appeal against this judgment.

Equality body decisions/opinions

Follow-up of the ECJ's decision in case C-236/09 Test-Achats

Within the federal jurisdiction, the 'Gender Act' of 10 May 2007 is the instrument of transposition of the 'Goods and Services' Directive 2004/113/EC. While the original Article 10 of the Gender Act provided that the use of gender-segregated actuarial factors in private insurance was prohibited as from 21 December 2007, an Act of the same date amended Article 10 to make the use of those factors admissible again (although in life insurance only), availing itself of the possibility of an exception provided in Article 5(2) of the Directive. When a consumers' rights association, *Test-Achats/Test aankoop*, applied for annulment of the Act of 21 December 2007 to the Constitutional Court, the Court referred the validity of Article 5(2) to the ECJ for a preliminary ruling. On 1 March 2011, the ECJ delivered its decision in Case C-236/09 (2011, n.y.r.), which stated that Article 5(2) of the Directive was invalid as from 21 December 2012.

In its role of an advisory body to the federal government, the Equal Opportunities Council (EOC) produced its opinion n°131 of 31 March 2011.²² Considering that Article 5(2) of the Directive only offered the opportunity to make an exception, as opposed to requiring an exception to be made, the EOC advised that the Act of 21

²⁰ Judgment no. 40/2011, unpublished, available (in Dutch, French and German) on <http://www.constitutional-court.be>, accessed 4 April 2011.

²¹ *Tribunal de police* (Magistrates Court) of Brussels, judgment of 26 January 2011, *Journal des tribunaux*, 2011, p.146.

²² Available on <http://www.conseildelegalite.be> (in French) or www.raadvandegelijkekansen.be (in Dutch), accessed 4 April 2011.

December 2007 should be repealed immediately, without waiting for its annulment by the Constitutional Court (which appeared inevitable given the ECJ's decision).

The EOC also stressed that the same reasoning which guided the ECJ in Case C-236/09 surely also applied to Article 9(1)(h) of Recast Directive 2006/54/EC, which gives the Member States the opportunity to allow the use of gender-segregated actuarial factors in occupational social security schemes. Consequently, the EOC advised that Article 12(2) of the Gender Act, which is a copy of the provision mentioned above, should be repealed as well.

BULGARIA – *Genoveva Tisheva*

Introduction and policy developments

By the end of 2010 some positive trends in the legislation related to gender equality and its implementation can be identified. The positive developments are, nevertheless, fragmented and achieved under pressure, as a result of specific lawsuits or sporadic initiatives of the Government, rather than as a result of consistent policy on gender equality. This is an inevitable consequence of the ineffective work of the gender equality body in Bulgaria, located at the Ministry of Labour and Social Policy, combined with the poor legal practice of the Commission for Protection against Discrimination in this field. An additional important factor are the continuing effects of the economic crisis, not yet overcome in Bulgaria, with the resulting budget limitations and, at times, even severe restrictions. Therefore it is not surprising that, until the end of 2010, no concrete steps were undertaken in the direction of the adoption of specific gender equality legislation, together with a corresponding mechanism for ensuring implementation.

A more positive note is the adoption in December 2010 by the Council of Ministers of the National Plan on Gender Equality for 2011. There is a clear focus on ensuring gender equality in social security, in the field of defence and the armed forces. Further emphasis is put on the need to eliminate gender stereotyping and gender-based violence. For the first time in such a document better coherence between the National Plan on Gender Equality and other policy documents is sought, such as those on prevention and protection against trafficking, against domestic violence, some related to child protection and, more specifically, the protection of children against trafficking and sexual exploitation.

In this context, the non-governmental organizations and civil society, broadly speaking, were the driving force behind the changes and achievements in this period. Below are some examples of such action in the field of policy and implementation of the legislation related to gender equality.

In the field of protection against domestic violence, the women's NGOs united within the Alliance for Protection against domestic violence exerted serious pressure on the Government to implement its financial obligations under the Law on Protection against Domestic Violence. In fact, after initially cutting the funds available for protection against domestic violence for 2010, the Ministry of Justice subsequently launched (as a result of the pressure at national and international levels) a call for projects for NGOs dealing with domestic violence in early 2011 and promised to allocate EURO 250 000 for this purpose during the year. If actually implemented, such an allocation of funds from the regular state budget for specific NGO activities will be an unprecedented initiative.

In the field of human trafficking, the main achievement is, undoubtedly, the adoption by the National Anti-Trafficking Commission of the National Referral Mechanism for victims of trafficking. The mechanism is an initiative of a women's NGO and is focused on the protection of victims of trafficking and on the coordination between the interested organizations and institutions. The adoption of this mechanism by the Council of Ministers is expected in the near future and it will have impact on gender equality; according to information from the Ministry of Interior, by November 2010 of the 561 trafficking victims, 523 were women.

It is worth noting that as a result of the alternative reporting by NGOs, important issues of gender equality and women's rights were brought to the attention of the Human Rights Council and the UN treaty bodies. As a matter of fact, the issues of violence against women, trafficking, and the need for Bulgaria to pass specific gender equality legislation, were all raised in the Recommendations to the Bulgarian Government under the Universal Periodic Review (UPR) which took place before the Human Rights Council in November 2010. The importance of the issues was recently acknowledged by the Government itself.²³ Relevant questions on gender equality, including the need for a specific law regarding the use of sexist advertisements, were also raised in the list of issues to be taken up in connection with the consideration of the third periodic report of Bulgaria by the HRC under the ICCPR.²⁴ During the 102nd session of the HRC, the Bulgarian Government will be obliged to respond and address these issues.

Legislative developments

In the autumn of 2010, the Minister of Defence repealed Ordinance No. 12/2005,²⁵ issued according to Article 7 Paragraph 1 p. 2 of the Protection against Discrimination Act,²⁶ under which there was an exception providing that by reason of their nature or of the conditions in which they are performed, sex constituted an essential and decisive occupational requirement for certain activities of the armed forces.

The legislative change was made as a result of a case brought before the Supreme Administrative Court by two female university students who were refused admission to the exams for National Guard officers due to the fact that women could not occupy such positions. They claimed that this was direct discrimination against women and that the Ordinance should be repealed. Although the case is still pending for procedural reasons, the Minister of Defence took a decision in favour of the claim. Nevertheless, the claimants will insist that a referral be made to the Court of Justice of the European Union on the issue of whether EU law allows for such an exception.

The response of the media to this development was quite interesting, as well as the response of the public at large. Although overall positive coverage can be observed, there were several publications that regarded the reaction of the Minister as weakness, especially for a Minister of Defence. There were headlines, like 'Anyu [the Minister's

²³ <http://www.mfa.bg/bg/news/view/31009>; <http://www.mfa.bg/content/2011/3/17/recommendaton170311.pdf>, accessed 15 April 2011.

²⁴ CCPR/C/BGR/3 of 22 October 2010.

²⁵ S.G. 87/ 12 November 2010.

²⁶ Article 7(1) The following shall not constitute discrimination:

(...)

2. Different treatment of individuals on the grounds under Article 4(1) where, by reason of the nature of a particular occupation or activity, or of the conditions in which it is performed, such characteristic shall constitute an essential and decisive occupational requirement, the aim is legitimate and the requirement does not go beyond what is necessary for its achievement;

first name] could not resist the female push for service in the Army'. As Bulgaria is ranked as doing well regarding female participation in the armed forces, compared to other European countries (about 30%), this new step in the direction of abolishing all limitations is seen by some media as exaggerated. A prejudiced perception of the participation of women in activities of the defence is still present, despite the changes.

Legislative changes are expected also in a field quite different from the claims of women to be able to serve as National Guard officers: in the area of *in vitro* fertilization. The pressure for amendments again comes from a case which is still pending. The Administrative Court of Sofia held that it is age discrimination to deny a woman over 43 the right to access assisted reproduction. The existing regulation includes this age limit for eligibility for the procedure. The planned provisions will include: the possibility for *in vitro* fertilization for women until their menopause, which can vary with age; the eligibility for funds from the Assisted Reproduction Fund will have an age limitation, until the age of 43 for the woman; the assisted reproduction with a donor's ovum will only be paid until the age of 52.

The possibility that surrogate motherhood might be introduced did not have any further development. It will be interesting to follow the further debates and legislative developments.

Equality body decisions and legal practice

There is no substantial development in the practice of the Commission for Protection against Discrimination. The very few cases on gender equality examined by the Commission in 2010 did not bring anything new and did not contribute to legal practice. In most cases, the complaints were found inadmissible, not raising specific issues of gender discrimination or not falling within the competences of the Commission. Some more detailed decisions can, however, be identified. Previously, the Commission decided a case on sexist advertisement of an alcoholic beverage – a case described in *European Gender Equality Law Review* no. 2/2010 – in which the Commission found a lack of *prima facie* discrimination based on sex. In 2010, the Commission examined another complaint against a TV advertisement containing debasing comparisons concerning women. In this case, the Commission found the case was not within its competence and deferred it to the decision of the Council on Electronic Media. Nevertheless, the Commission noted, outside any kind of procedure, that the messages could be considered discriminatory for women and a range of arguments from the previous complaint against sexist advertisement were introduced by the Commission itself. This illustrates the inconsistent attitude of the CPAD towards gender stereotyping and gender discrimination in media and advertising. This fact is quite strange and unfortunate for Bulgarian women because the protection against discrimination in these areas is available in the Protection against Discrimination Act, and the Commission is expected to tackle these cases of unequal treatment as well.

It is also worth noting the practice of the courts in the field of sexual harassment, which only confirms the negative trends identified in the decisions of the equality body. In April 2010, the District Court in Sofia issued a decision against the victim of serious sexual harassment at the workplace. The victim was a teacher and was subjected for a long time to sexual harassment by the director of the school. As she refused to have sexual intercourse with him, she was fired. The act of dismissal was declared illegal by the court. The judge in the case did not find sufficient proof of *quid pro quo* sexual harassment, based on arguments that only fostered gender stereotyping, e.g. '(...) for a woman above 42 sexual hints can be regarded as a compliment (...)'. Despite this, the

judge ordered the respondent to restrain from further acts of sexual harassment in front of the claimant. The court decision was appealed and the upper court (the Sofia city court) again refused to recognize the fact of discrimination and sexual harassment. By sustaining the arguments of the first instance court, the appellate court added that it was not proven by the claimant *that the dismissal was due specifically to the fact of sexual harassment*. Again, the court demonstrated a lack of understanding of the substance and procedure required in discrimination cases, and therefore, of European gender equality law and principles. The case was referred to the Supreme Court of Cassation, although expectations for a different final decision are not high.

The practice of the courts and the jurisdiction of the equality body, although scarce and inconsistent in the field of gender equality, is very discouraging for women who would undertake legal steps to protect their rights in Bulgaria. It is also due to the insensitive attitude of these institutions themselves to the discrimination and harm suffered by women.

It has to be noted that, in contrast with the general anti-discrimination legislation, the Law on Protection against Domestic Violence is better implemented. In the District Court in Sofia alone, over 600 complaints for orders of protection were submitted in 2010, the great majority being made by women.

CROATIA – Goran Selanec

Policy developments

Several important policy developments have taken place recently. First, the Government has established a working group that has a mandate to draft a new National Policy for Promotion of Sex Equality for the period 2011-2016. The working group has met twice so far and it has scheduled to produce its first proposal by the summer.

The second development is a cause of great concern. The Government has recently started ‘floating’ the idea to abolish the Ombudspersons for sex equality and the Ombudsperson for people with disabilities as independent equality bodies and join their tasks and personnel with those of the Office of the General Ombudsperson.

There is hardly any doubt that the merger will diminish the existing level of sex equality protection in Croatia. Several reasons need to be pointed out here. First, the task of the Ombudsperson for Sex Equality is not limited to addressing individual discrimination complaints. She also monitors the implementation of CEDAW and monitors the work of sex equality officials within ministries and local governments. She also monitors the involvement of all competent institutions in cases of violence against women. In fact, the key reason why the Ombudsperson for Sex Equality was established in the first place in 2003 was the fact that no other government institution, including the General Ombudsperson, performed these tasks properly. Hence, it is highly doubtful that the General Ombudsperson, who has different priorities, will continue performing these tasks with the same commitment. Second, the General Ombudsperson hardly has any experience concerning the task of active promotion of equality. Accordingly, it is highly doubtful that the GO will be able to preserve the same level of protection offered by the Office of the Ombudsperson for Sex Equality, which is specialized exclusively in this task. Thirdly, the primary purpose of the General Ombudsperson is protection of the classic fundamental rights such as freedom of expression, protection against illegal intrusion of the police etc. In that sense, the notion of sex equality will have to

‘compete’ in terms of resources and political priority not only against other grounds of discrimination but also against other human rights.

Legislative developments

In response to the Commission’s objections, Croatia has amended the Act on Maternity and Parental Support. The key change concerns the right to maternity leave. According to the new Act, employed and self-employed pregnant women are entitled to 6 months of maternity leave. Maternity leave consists of a mandatory and an optional part. The mandatory maternity leave is 98 days: 28 days before the expected date of birth and 70 days after the birth. The length of the mandatory maternity leave and the ease with which Croatian law tends to disregard women’s individual autonomy indicates the influence of the gender-based notion that women carry primary responsibility for childcare in Croatia. After the mandatory leave, women can take an optional maternity leave. The optional part of maternity leave lasts until the child is six months old. The mother can transfer the optional part to the father, either partially or completely. In order for the transfer to be legally valid, the mother needs to give her written consent. After the expiration of the optional part of the maternity leave, both parents have an individual right to parental leave. In principle, the parental leave is 6 months. It can be used piecemeal or continually. However, it has to be used before the child turns eight.

Case law of the national courts

There have been no major developments in the case law of the Croatian courts. This does not necessarily mean that the Croatian courts did not decide any sex equality disputes in this period. It simply means that no cases have been publicly reported. As pointed out before, Croatian courts, in principle, still do not publish their decisions. Consequently, it continues to be extremely difficult to scrutinize the manner in which they enforce sex equality law.

At the same time, however, three high-profile sexual orientation cases have been initiated. All three of them are sponsored by very active *LGBT* NGOs. This merely emphasizes the fact that the extremely small number of sex equality disputes before Croatian courts is to some extent related to the fact that women’s NGOs in Croatia have not properly developed this type of legal support yet.

CYPRUS – Lia Efstratiou-Georgiades

Policy developments

Women’s positions

In March 2011 the President of the Republic of Cyprus, Mr. D. Christofias, appointed a new Ombudswoman, Mrs Eliza Savvidou, with the consent of Parliament.

Legislative developments

In March 2011 the Minister of Labour and Social Insurance proposed a Bill regarding maternity (the Protection of Maternity (Amendment) Law of 2011) in order to: a) harmonize Cypriot law with article 10 of Directive 92/85/EC and the decision of the ECJ on the 11th October 2007 in Case 460/06, *Nadine Paquay v Societe d’architects*

Hoet + Minne SPRL; and b) provide an extension to maternity leave in cases where the baby needs to stay in an incubator for additional days due to premature birth or any other health reasons. It is expected that this Bill will be passed into law at the last meeting of Parliament on 14 April 2011 (before the parliamentary elections on 22 May 2011).

Case law of national courts

Supreme Court of Cyprus, application No. 503/2009, dated 27 January 2011

The Applicant held a degree in ‘Science of Physical Education and Athletics’ from Athens University, Greece, which he obtained on 3 March 1992, with the mark ‘Very Good’. On 19 June 1992, he applied for registration on the list of candidate teachers of physical education. His application was accepted and he was included in the relevant list of August 1992.

The appointment of teachers in public secondary education is made on the basis of the order in which their name appears on the list of candidates, and in accordance with the Public Educational Service Law of 1969 (Law No. 10/1069) as amended by Laws Nos. 180/87 and 245/87. The order of priority is first determined by the year in which candidates obtained their first university degree. Among candidates who obtained their first university degree in the same year, the order of priority is determined on the basis of criteria which give candidates specific points (Article 28B(1)(2)(3)). Article 28(3) provides that those who serve in the National Guard (the Army) of the Republic obtain one point. Only male citizens have an obligation to serve in the Army and to carry out military service of 24 months’ duration, as provided in the National Guard Law No. 20/64, as amended.

In 2009, the Applicant was registered on the list of candidates for Teachers of Physical Education as No. 174. The Applicant complained to the Supreme Court that the provision of the Law as regards the method followed for the registration of candidates on the list is unconstitutional.

In his complaint, the Applicant alleged that the method followed for the determination of the order of candidates on the list contravened the principle of equality and non-discrimination on the ground of sex and is therefore unconstitutional. He alleged that male candidates, because of service in the National Guard, are subject to discrimination compared to female candidates, who do not serve in the National Guard. This situation contravenes: (a) the constitutional principle that prohibits discrimination between the two sexes (Article 28 of the Constitution), (b) the principle of the same or similar treatment of all citizens under the same or similar conditions (Article 38 of the Law on the General Principles of Administrative Law of 1999 (Law No. 158(I)/99)), (c) the principle against direct or indirect discrimination on the ground of sex as regards access to employment (Articles 2 and 8 of the Equal Treatment of Men and Women in Employment and Occupational Training Law No. 205(I)/2002 as amended) and (d) the relevant EU Directives (76/207/EC and 2006/54/EC) as interpreted in the case law of the ECJ.

The Court found that the granting to male candidates of one point for their service in the National Guard as compensation for the ensuing delay in obtaining their university degree and the resulting delay in applying for registration on the list of candidates causes inequality. Male candidates face a two-year delay in obtaining their first university degree because of the obligatory service in the National Guard and, as a consequence, again face a two-year delay in applying for registration on the list of candidates, whereas their female colleagues do not face such delays as they are not

obliged to serve in the National Guard. This obvious inequality unavoidably adversely affects not only the time that male candidates are appointed to the Public Educational Service but also all the benefits that teachers are entitled to during their career, such as promotion based on seniority, remuneration benefits related to longer service, etc.

The Court concluded that the provisions of Article 28B of Law No. 10/69 as amended create indirect discrimination against male candidates and violate the provisions of Article 28 of the Constitution as well as Article 38 of Law No. 158(I)/2002 and Articles 2 and 8 of Law No. 205(I)/2002 as amended. The Court declared the decision relating to the Applicant's registration on the list of candidate teachers as null and void by virtue of Article 14.4(a) of the Constitution.

Equality body decisions/opinions

File No. A.K.I. 25/2009 dated 29 October 2010

Mrs AP submitted a complaint on 7 May 2009 to the Equality Authority (the Office of the Ombudsman) against the Government Mental Health Services, relating to her work appraisal report for the year 2008.

Mrs AP worked as a Work therapist in the Mental Health Services under contract on a casual basis from 29 January 2001 until 2 April 2006 and was given the highest mark of 'very satisfactory' in the appraisal reports. From 3 April 2006 until 3 April 2008 she was given a permanent post on probation and again achieved the highest mark of 'very satisfactory'. In both cases the evaluation was on six criteria and the highest mark mentioned in the Regulations is 'very satisfactory'. On 3 April 2008 she acquired the status of a permanent officer. As a permanent officer she worked only for the two months in 2008 (November and December) because of serious pregnancy problems. The highest mark in the evaluation reports for permanent officers is 'excellent' and the mark that follows is 'very satisfactory'. In the appraisal report for 2008 she was given the mark 'very satisfactory' for three criteria (out of eight).

Mrs AP complained that the appraisal report relating to her performance, which had been prepared by the appropriate evaluation committee, referred to the entire year 2008, whereas in reality she had only worked for two months (November and December 2008) because she had had serious problems during her pregnancy. She considered this to be a reduced appraisal of her work performance, that this reduction was due to her long absence from work because of a problematic pregnancy and that consequently it constitutes discrimination on the ground of sex. She asserted that the evaluation committee wrongly reduced the marking on the criteria 'performance', 'work interest' and 'cooperation', from the level 'excellent' to the level 'very satisfactory' and failed to refer to her pregnancy problems that kept her away from work for 10 months in 2008, as they should do according to the Public Service (Appraisal of Officers) Regulations of 1990 to 2009. Article 6 of these Regulations provides that the annual appraisal reports of permanent public officers evaluate them on eight criteria, for the purpose of promoting the development, the rational functioning, and the proper management of the public service. These Regulations also provide that the officers who form the evaluation committees must try their best to carry out true evaluations, which reflect the real value of each officer. If any health problems have adversely affected the quality of the work or the effectiveness of the officer, this fact must be written in a separate note that must be attached to the report.

The Director of the Mental Health Services and the officers who formed the evaluation committee expressed the view that the appraisal of Mrs AP was objective and impartial and that it was the result of a comparison of her performance with the

performance of other officers who held the same post in the Mental Health Services. They also supported the view that for the year 2008 her appraisal was not reduced, but on the contrary had been upgraded on the other five criteria, as she was given the mark 'excellent'.

The Ombudsman, after investigating the facts of the case, reached the conclusion that the three-member evaluation committee had failed to take into consideration certain essential facts, namely that they had omitted to write in a separate note that Mrs AP was absent for many months in 2008 for health reasons connected with her pregnancy according to the Public Service (Appraisal of Officers) Regulations of 1990 to 2009.²⁷ Consequently, they could not use a common measure to compare her performance with that of other officers. The evaluation of her performance was not objective and impartial. The Ombudsman also rejected the allegation of the Mental Health Services that the appraisal of Mrs AP had not been reduced in 2008 because she was upgraded on some criteria.

The Ombudsman examined the complaint on the basis of the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002 to 2009²⁸ in combination with the provisions of the Protection of Maternity Laws of 1997 to 2008 and the Public Service (Appraisal of Officers) Regulations of 1990 to 2009. The Ombudsman reached the conclusion that the way the evaluation committee carried out the work appraisal of Mrs AP for the year 2008 contravened the above-mentioned Laws and led to unfavourable treatment and discrimination against her because of sex in the sense of the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002 to 2009. In addition, Article 7 of the Protection of Maternity Laws of 1997 to 2008²⁹ explicitly does not allow any adverse effect on seniority or the right to promotion of a female officer due to the reason that she was absent on maternity leave and, in combination with the absolute prohibition of discrimination because of pregnancy, the Ombudsman believed that Mrs AP's right to promotion must not be adversely affected.

Furthermore, the Ombudsman noted that the failure of the evaluation committee to write a separate note and attach it to the report, in which it should have been stated that Mrs AP's report referred only to the two months that she actually worked in 2008, rendered the evaluation defective.

The Ombudsman decided to make a recommendation after consultation with the Mental Health Services and Mrs AP. Also, as the Public Service Commission (PSC) is the appropriate body for promotions in the public service, the Ombudsman decided to send her decision to the PSC, which has the right to ignore appraisal reports that are defective.

CZECH REPUBLIC – *Kristina Koldinská*

Policy developments

Concluding observations of the CEDAW

At the end of October 2010, the UN Committee on the Elimination of Discrimination against Women (CEDAW) issued its observations with some recommendations for the

²⁷ The Public Service Law No. 1/1990 as amended by Law No. 137(I)/2009.

²⁸ The Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205(I)/2002 as amended by Law No. 39(I)/2009.

²⁹ The Protection of Maternity Laws of 1987 as amended by Law No. 8(I)/2008.

Czech Republic.³⁰ The CEDAW Committee welcomed the fact that the Antidiscrimination Act had finally been adopted and that the Labour Code had been amended accordingly. On the other hand, the Committee reiterated its criticisms regarding the involuntary sterilisation of Roma women. The Committee urged the Czech Republic ‘to adopt legislative changes clearly defining the requirements of free, prior and informed consent with regard to sterilizations, in accordance with relevant international standards’. The Czech Republic was also recommended to review the three-year time limit in the statute of limitations for bringing compensation claims in cases of coercive or non-consensual sterilizations in order to extend it and, as a minimum, to ensure that such time limits start from the time of discovery of the real significance and all consequences of the sterilization by the victim rather than the time of injury, and to investigate and punish illegal past practices of coercive or non-consensual sterilizations.

The Committee further stressed the topic of violence against women by urging the Czech Republic ‘to intensify its efforts by taking effective measures to prevent and prosecute acts of domestic and sexual violence and assist female victims of such violence, enhance victim assistance and protection by providing training for the police, judges, prosecutors, social workers and health personnel on standardized procedures in dealing with victims; collect sex-specific data on domestic and sexual violence, including on the number of women who die as a result of such violence; and provide information on the number of reported incidents, prosecutions, convictions, as well as on the sentences imposed on perpetrators and the compensation provided to victims in its next periodic report.’

The Committee further recommended that the Czech Republic provides free legal aid to women without sufficient means to pay for legal assistance in anti-discrimination proceedings, where the interests of justice so require.

Case law of national courts

Regional court’s decision on equal access to employment

A regional court issued a new decision³¹ after the Supreme Court had referred the case of Ms Čaušević back to the court.³² Ms Čaušević applied for the position of financial director of a large gas company and argued that she had not been appointed to the position because she was a woman. According to the Supreme Court, the employer had not satisfied the burden of proof that fell on him, because he did not adequately prove that he had not discriminated against the appellant on the ground of her sex. The Supreme Court reversed the previous decision of the appeal court, ruling that the reasoning of that court, which held that the appellant had not proved discrimination and thus had no claim, was incorrect.

The regional court issued a very long decision, where it analyzed in detail all the evidence that had been presented during the procedures. The court came to the conclusion that the claimant had not been discriminated against on the ground of sex, as the employer had proved that the conditions during the appointment procedure were sufficiently equal and transparent.

³⁰ Concluding observations of the Committee on the Elimination of Discrimination against Women CEDAW/C/CZE/CO/5, available on <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-CZE-CO-5.pdf>, accessed 4 April 2011.

³¹ Case No. 26 C 25/2006 – 372.

³² 21 Cdo 246/2008.

This case is already regarded as of historic importance. The case has also been discussed in the media, as it is one of the first cases where a woman applied for damages because she felt that she had been discriminated against. It is possible that this case will continue, as Ms Čaušević again has the right to appeal against the decision of the regional court.

Miscellaneous

New Government Human Rights Commissioner

In February 2011, the Czech Government unanimously agreed on appointing Mgr. Monika Šimůnková as its new human rights commissioner. The Commissioner, in cooperation with the Human Rights Department of the Office of the Government, carries out the activities required of the Government Commissioner for Human Rights, the chairman of the Council for Human Rights, and the first vice-chairman of the Inter-Ministerial Commission for Roma Community Affairs. In particular, the Commissioner is a governmental initiative and the coordinating body responsible for evaluations of the situation and standards regarding the protection of human rights in the Czech Republic. The Commissioner, in cooperation with the Human Rights Department of the Office of the Government, and in coordination with all the ministries and entities concerned, draws up national concepts of the long-term development of human rights protection for the Czech Government. The Commissioner is the Chairman of the Government Council for Human Rights. The Commissioner carries out this task in accordance with the regulations of the relevant international systems (the UN, the Council of Europe) and the European Union system, including coordination with international and multinational systems.

DENMARK – *Ruth Nielsen*

Legislative developments

Since 2002, by virtue of Directive 2002/73 (amending Directive 76/207/EEC, repealed since 15 August 2009), the Member States and the EEA countries have been 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 treatment between 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.

In Denmark until recently, there was no equality body with the full range of competences required in the gender equality directives. The European Commission commenced infringement proceedings against Denmark over the issue of independent bodies. On 20 November 2009, the Commission sent a reasoned opinion to Denmark. On 10 December 2009, the Danish Minister for Employment, who at that time was also the Minister for Gender Equality, was called to a meeting with a committee under the Danish Parliament to answer questions about what the Government will do in response to the Commission's criticism. The Minister answered that the Government planned to extend the competence of the Danish Institute of Human Rights so as to cover gender

equality. On 30 November 2010, the Minister for Employment put a proposal before Parliament to amend the Act on the Danish Institute of Human Rights so as to extend the Institute's competence to also cover gender equality.

On 1 March 2011, the proposal was adopted and on 15 March 2011 the Act entered into force, so that Denmark now – since 15 March 2011 – fulfils its obligation to designate an Equality Body in matters of gender equality.

ESTONIA – *Anneli Albi*

Policy developments

On the basis of the proportion of women in the Estonian Parliament and Government over time, politics could be regarded as being predominantly male-centred in Estonia. In the previous Law Review, an overview was given of a study on the situation of gender equality in Estonia in 2009.³³ In that study, in comparison with 2005, more men and women supported the suggestion that a greater number of women ought to participate in politics.

On 6 March 2011 the elections for the new *Riigikogu* (Parliament) were held. The results of the elections were declared on 24 March 2011. According to the results, 20 women were elected to Parliament, which in total consists of 101 members.³⁴ Parliament convened on 4 April 2011.

On 5 April 2011 the Government was nominated. The same parties which constituted the previous Government – *Reformierakond* and *Isamaa ja Res Publica Liit* – also formed the new Government. Only one woman was nominated as a member of the Government: she holds the position of Minister of the Environment.

Miscellaneous

The new Government has promised to pay 'parental pensions'

According to the coalition programme, 'parental pensions' will be established as of 1 January 2013. This means that when a child is born after 1 January 2013 the State will contribute 4 % of the national average wage taxable by social tax to the second pension pillar of the parent who is making use of childcare leave, until the child reaches 3 years of age; contributions are not made for the period during which the parent is working. For a parent of children born between 1 January 1991 and 31 December 2012, the State will pay a pension supplement amounting to two annual grades (*aastahinne*); this will be increased to three annual grades as of 1 January 2015. This supplement is paid to only one parent and the parents have to agree themselves who will receive the pension supplement.³⁵

³³ Available online on the website of the Ministry of Social Affairs (in Estonian): http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised_20101.pdf, accessed 25 May 2011.

³⁴ The results of the elections are available (in Estonian) on: http://rk2011.vvk.ee/mandate_distribution.html, accessed 25 March 2011.

³⁵ The coalition programme is available (in Estonian) on: <http://www.reform.ee/UserFiles/Valitsusliit-1.pdf>, accessed 11 April 2011.

A study on the gender pay gap in Estonia

In January 2011, the results of a study on the gender pay gap in Estonia were presented. The study was carried out in 2010 by Praxis, the political research centre, under the auspices of the Ministry of Social Affairs. The purpose of the study was to analyse empirical data and to make policy recommendations.

According to statistics, the gender pay gap has increased in Estonia during recent years: in 2000 on average men earned 24 % more than women, while in 2008 the gender pay gap stood at approximately 31 %.³⁶

The study revealed that the gender pay gap is lower among the following groups:

- women who have higher education (29 % among women with higher education, 36 % among women who have a basic or lower education);
- among single women in comparison with married women (19 % and 31 % respectively);
- among women who do not have children (the gender pay gap is 34 % for parents and 24 % for employees do not have children; the gap stands at 38 % if children are younger than 7 years);
- women working in the public sector (23 % in the public sector, 31 % in the private sector).

The gender pay gap is highest (more than 30 %) in the age group 25-45, which is the general age for starting a family or having a higher share of family-related duties. The gender pay gap is highest in the finance sector and lowest in public administration. The difference between the wages of male and female managers is high (19 or 29 % depending on the database), and it is higher in larger organisations (up to 40 % if the number of subordinates is higher than 50).³⁷

The authors of the study emphasised that although the part of the gender pay gap that remained unexplained was high (85 %), it cannot be concluded that this amounts to discriminatory behaviour on the part of employers (whether in legal or broader economic terms), as several other factors can influence the existence of a gender pay gap. If horizontal and vertical gender segregation is taken into account, the unexplained gender pay gap decreases. Further, on average the gender pay gap is lower in larger organisations and in public sector companies. The gender pay gap among managers corresponded to the average gender pay gap regardless of the employment sector.³⁸

The authors concluded that gender segregation in the Estonian labour market has increased in the last five years. It is higher among younger people, as well as among employees who do not have a higher education.³⁹

Another objective of the study was to make policy recommendations in order to reduce the gender pay gap.⁴⁰ The authors of the study made the following recommendations:

³⁶ S. Anspal, L. Kraut, T. Rõõm. *Sooline palgalõhe Eestis. Empiiriline analüüs* (Gender pay gap in Estonia. Empirical analysis) Tallinn, 2010, p 7. Available (in Estonian) on: http://www.sm.ee/fileadmin/meedia/Dokumendid/Sotsiaalvaldkond/kogumik/2_raport.pdf, accessed 25 May 2011.

³⁷ S. Anspal, L. Kraut, T. Rõõm. *Sooline palgalõhe Eestis. Empiiriline analüüs* (Gender pay gap in Estonia. Empirical analysis) Tallinn, 2010, pp. 7-9, 41-43, 54.

³⁸ S. Anspal, L. Kraut, T. Rõõm. *Sooline palgalõhe Eestis. Empiiriline analüüs* (Gender pay gap in Estonia. Empirical analysis) Tallinn, 2010, pp. 62-72.

³⁹ S. Anspal, L. Kraut, T. Rõõm. *Sooline palgalõhe Eestis. Empiiriline analüüs* (Gender pay gap in Estonia. Empirical analysis) Tallinn, 2010.

⁴⁰ M. Karu et al., *Sooline palgalõhe Eestis. Poliitikameetmete analüüs* (Gender pay gap in Estonia. An analysis of policy measures) Tallinn, 2010. Available (in Estonian) on: http://www.sm.ee/fileadmin/meedia/Dokumendid/Sotsiaalvaldkond/kogumik/4_raport.pdf, accessed 25 May 2011.

- Increase public awareness on gender equality issues.
- Implement more actively the principles of gender mainstreaming, especially by using the potential of non-governmental organisations and the public sector in their roles as both policy-makers and employers.
- Introduce incentives that would allow a more equal distribution of family duties to balance work and private life. For example, increasing the proportion of men taking childcare leave, introducing a period of childcare leave that would be reserved for men, and restoring paid leave for fathers, etc. Additionally, childcare leave ought to be made more flexible by enabling it to be combined with work (e.g. by enabling a partial payment of the parental benefit during a longer period of time, enabling both the mother and the father to use the childcare leave at the same time, and facilitating part-time work). Further, career breaks for mothers could be shortened by facilitating part-time work for mothers and fathers, by analysing the obstacles to part-time work, and by providing more flexible childcare facilities.
- Analyse the situation regarding gender segregation in employment and occupations where gender segregation contributes to the existence of the gender pay gap. The awareness of teachers at all levels of the educational system ought to be enhanced in relation to gender equality, and young people ought to be offered professional advice.
- Reduce horizontal gender segregation, by enabling training and requalification to encourage access to non-typical occupations, by training career consultants and personnel workers, and by carrying out media campaigns.
- Reduce vertical gender segregation by means of the following measures: increase the proportion of women in managerial positions; support women who are starting as entrepreneurs by mentoring and coaching programmes; analyse specific problems that women may have concerning financing at the start of a business and introduce special financing programmes.
- Apply measures targeted at organisations to reduce discrimination based on gender. This could be achieved by analysing which measures would motivate employers to collect and analyse gender-based data within the organisation (e.g. the gender-based auditing of wages and analytical grading of positions). Annuling confidentiality clauses restricting the disclosure of wages could also be considered.⁴¹

FINLAND – Kevät Nousiainen

Policy developments

Government reports regarding gender equality

In 2010, two reports that would certainly have an impact on gender equality legislation in Finland were presented to the Finnish Parliament. The first of these reports was a follow-up on the amendments made to the Act on Equality between Women and Men in 2005. These amendments introduced a positive duty for employers to organise more extensive equality planning. At the time of the amendment, Parliament required that the impact of the amendment be reported by the Government, and this report was produced in 2010. Furthermore, the government report to Parliament on gender equality policies during the last ten years - an extensive report on gender equality policies - was

⁴¹ M. Karu et al., *Sooline palgalõhe Eestis. Poliitikameetmete analüüs* (Gender pay gap in Estonia. An analysis of policy measures) Tallinn, 2010, pp. 76-80.

published in October 2010⁴² and presented to Parliament. These two reports and the Parliament's reaction giving relatively clear guidelines for future amendments are described below.

In the Report on Gender Equality, the Government outlines future gender equality policy in Finland until the year 2020. The Report contains a number of policy recommendations, which should have an impact on policies formulated for and after the parliamentary elections in April 2011. The aim is to reinforce the long-term and systematic promotion of gender equality. The report also evaluates the objectives, measures and effectiveness of the policy that has been pursued as well as the developments in gender equality over the past ten years, covering the gender equality policy of not only the present Government but also of the previous governments from the end of the 1990s. The Report was prepared by the Ministry of Social Welfare and Health, but it covers issues administered by other branches of the administration as well. The Government Report on Gender Equality is the first of its kind in Finland.

The thematic areas chosen for reporting are derived from the gender equality objectives of the government programmes and government action plans on gender equality adopted at the end of the 1990s and during this century. The thematic issues include decision-making, education and research, working life, reconciliation of work and family life, men and gender equality, violence against women, interpersonal violence and human trafficking, and the status of gender equality and gender mainstreaming. The Report also addresses developments in gender equality legislation and Finland's activities in EU gender equality policy, including various arenas of international gender equality policy. Gender equality issues are also dealt with in an intersectional manner, including immigrant and minority groups. Earlier, in 2010, Parliament received a follow-up report on the amendment of the Act on Equality between Women and Men, which it required from the Government in 2005 when the latest amendment of the Act on Equality was adopted. The follow-up report concentrated on the equality planning obligations.

The Report on Gender Equality was prepared by public authorities and political decision-makers, and by gender equality experts. The preparation of the Report on Gender Equality was undertaken by an expert group led by Professor Helena Ranta, and a set of studies on central issues were done to support the work. Even the Report's publication is divided into two parts. The Report approved by the Government includes an evaluation of gender equality policy and policy objectives for the future. The background documents, which consist of the work done by the expert group, deals in more detail with the gender equality objectives and measures of the governments as well as reviewing changes in gender equality over the past ten years.

Parliament's reply to the Government Report on Gender Equality

The Government Report on Gender Equality was presented to Parliament in October 2010.⁴³

Parliament briefly discussed the Report in November; the issues mentioned by many parliamentary groups included the need to develop the parental leave system by increasing the role played by fathers; and, on the other hand, to enhance the position of fathers as custodians upon separation and divorce; violence against women, especially

⁴² *Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta. Sisältää tausta-aineiston. Sosiaali- ja terveysministeriön julkaisuja 2010:8*, Helsinki 2010, available on http://www.stm.fi/julkaisut/nayta/_julkaisu/1538250, accessed 25 May 2011.

⁴³ Government Report on Gender Equality to Parliament, Government Report to Parliament 7/2010 (*Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta*, VNS 7/2010 vp).

the failure to fund victim services; and the marginalisation of men. The Report was sent to one of the Parliamentary standing committees, the Employment and Equality Committee, for its opinion. The Committee heard a large number of experts before formulating its opinion.

The Parliamentary Committee commended the Report on Gender Equality in its opinion in February 2011⁴⁴ and generally agreed with its main conclusions. The Committee noted, however, that the next Government should define what it means by gender equality, and regretted that the Report on Gender Equality had been given to Parliament so late that the present Parliament had had no real opportunity to discuss it, as Parliament was dissolved in March prior to the elections in April. All Parliamentary Committees should, according to the Parliamentary Employment and Equality Committee, supervise whether the gender equality goals set have been met, but now the Employment and Equality Committee was the only standing committee to be heard before Parliament replied to the Government. The Committee further stated that it was important that the UN CEDAW Convention be duly noted, and that public authorities recognise the obligations under the Convention.

The Committee approved the Government's guidelines for the next decade where these required that the resources and administrative structures for implementing equality should be strengthened, and that certain officials should be nominated as responsible for gender mainstreaming in each Ministry, as well as in regional and municipal administration. The Committee emphasised that the Government Equality Unit should be given a higher position in the administrative hierarchy, and that the Equality Ombudsman should be given the resources and means to enable effective supervision of the duty to promote gender equality, to which public authorities, educational institutions and employers are obliged to conform. The Act on Equality between Women and Men is to be amended by inserting more specific provisions on equality planning, especially concerning equal pay, and to require even educational institutions for basic education to be obliged to engage in equality planning. Now, other educational institutions, but not schools that provide basic education, are obliged to engage in equality planning.

The position of gender studies at the universities should be strengthened. Men should be considered in gender equality policies by developing gender-sensitive services, but equality discourse should proceed on the basis of research information, and without setting men and women against each other.

Parental leave is to be developed in a manner that would lead to a more balanced spread of leave between parents, and the position of entrepreneurs will be considered in developing the family-based leave systems. The Committee further required that gender equality policy should consider economic policies and poverty more than previously, and that tax laws should be developed in a gender-sensitive manner. When necessity consumption is taxed more heavily, and income from employment is taxed more leniently than before, the reform is preferential for men and detrimental for women.

As for the prevention of violence against women, the Committee required firmer policies including criminal-law measures to be introduced, and more resources to be provided for victim services. The Committee also pointed out that immigrant women in Finland are often vulnerable and should be taken into account in formulating policies. The Committee had already presented a Report on Human Trafficking, and noted that actions to improve policies were also needed in that area.

⁴⁴ Report of the Parliamentary Employment and Equality Committee 18, 2010 vp. dated 25 February 2011.

Gender equality in working life has not proceeded, the Committee noted, and it also remarked that it is important to ensure that the proportion of women in decision-making bodies of private companies should be higher. If necessary, stricter guidelines should be adopted to improve the situation.

The Committee also paid attention to multiple discrimination and all dimensions of human life, such as age, ethnic origin, sexuality and the economic situation. The participation of minority women should be promoted, and women as well as men should be heard in matters concerning minorities. Further, the Committee considered international cooperation, environmental issues and climate change from a gender perspective.

The concrete proposals adopted by the Parliamentary Employment and Equality Committee were that Parliament should approve the government guidelines on gender equality policies for the next decade, and require that an amendment of the Act on Equality between Women and Men be prepared, so that equality planning duties concerning pay are specified, that personnel are given better access to participate in equality planning, that equality planning is extended to basic education, that provisions protecting transsexual people are added to the Act, and that the conciliation of discrimination cases be adopted. The Action Plan against violence against women is to be given appropriate resources, the number of shelters and the provision of services is to be brought up to the level required by the recommendations of the Council of Europe, and the resources of the Equality Ombudsman are to be increased so as to allow the supervision of the positive action duties under the Act on Equality. The next Government Report on Gender Equality is to be provided by the end of 2021.

Parliament's reply to the Government⁴⁵ repeated the main points made by the Employment and Equality Committee, requiring that the next Government prepares an amendment of the Act on Equality, provides the Action Plan against violence against women with appropriate funding, increases the number of shelters for victims of violence, and provides funds for the supervision of the positive duties placed on authorities, educational institutions and employers, and presents the next report by the end of 2021. An interim report on the measures carried out is to be presented by the end of 2016.

The guidelines adopted by Parliament for the policies to be adopted under the next Government are important, as they represent a political consensus on the most important issues and policies to be implemented during the next decade. Although it is up to the next Government to decide on what type of gender equality policies it will implement, there is a tradition of coalition governments and comprehensive consensus politics in Finland, and therefore the guidelines presented by the present Government and approved by the present Parliament do carry a certain weight.

Case law of national courts

Pay based on collective agreements during maternity leave

Under Finnish law, pay during maternity leave is not mandatory, but under many collective agreements employees are entitled to paid maternity leave. In these cases, the employer is entitled to receive the maternity benefit that the employee is entitled to during that period, and thus the overall costs to the employer remain reasonable. As the right to pay exceeds what is mandatory, employers tend to interpret the collective

⁴⁵ Parliament's Reply to the Government Report on Gender Equality (*Eduskunnan vastaus Valtioneuvoston naisten ja miesten tasa-arvoa koskevaan selontekoon*), Parliament Brief 51, 2010 vp.

agreement conditions narrowly. In two recent cases, the Equality Board (the body that, together with the Equality Ombud, monitors the Act on Equality between Women and Men) and the Labour Court (which has the responsibility to decide cases concerning collective agreements) have interpreted collective agreement conditions on pay paid to women on maternity leave somewhat differently, especially as to who is a proper comparator. Both the Equality Board and the Labour Court have members that represent the social partners.

The District Court of Helsinki asked the opinion of the *Equality Board* in a matter concerning compensation for gender discrimination in a case concerning a condition in a collective agreement under which an employee was entitled to pay during family-related leave where s/he had worked for a minimum of six months between two family-related periods of leave. An employee who did not fulfil this requirement claimed that the condition was discriminatory, because it put her at a disadvantage on the grounds of her pregnancy. The defendant claimed that because the condition exceeded the mandatory legislation (concerning the right to maternity benefit) it could not be discriminatory. Similar conditions are common in the labour market, and employers would not agree to exceed the mandatory legislation if it were considered illegal to limit these extra bonuses by conditions. The claimant compared her position to that of a woman who had spaced giving birth differently, and referred to the *Gillespie* case, C-342/93, claiming that she would have been entitled to pay while on maternity leave, had she not become pregnant, and referred to Case C-116/06, *Kiiski*, which describes pregnancy as an unpredictable event which cannot reduce the rights connected to maternity leave. The defendant held that the comparator should be someone who is not pregnant.

The Equality Board referred in its opinion⁴⁶ to the preparatory work of the Act on Equality,⁴⁷ which considered it natural in pregnancy-related discrimination to compare how the person in question would have been treated had she not become pregnant. However, other comparators have also been used in Finnish case law, a position which also finds support in ECJ jurisprudence in Case C-342/93 *Gillespie*, at Paragraph 17, and Case C-411/96, *Boyle*, at Paragraph 40. The Equality Board noted that these cases differed from the one under scrutiny. The claimant's situation was comparable at least to that of an employee who had managed to work six months between periods of maternity leave, even where the comparator had been on sickness leave due to a pregnancy-related sickness during those months. Whether the employee fulfils this condition often depends on unpredictable reasons. The Board therefore held that the condition of working for a minimum of six months between two family-related periods of leave was directly discriminatory. The Board also said that *Kiiski* implies that a collective agreement condition cannot prevent an employee from using her right to maternity leave. The Board also remarked that justifications may only be provided in a case of indirect discrimination. The unclear formulation of Section 8(2) of the Act on Equality seems to allow the justification of any type of discrimination, while the definition of discrimination under Section 7 clearly allows a justification only in the context of indirect discrimination. The Board stressed that although pay during family-related leave is not an obligation on the part of the employer, if such pay is agreed upon in a collective agreement, the conditions must not violate the prohibition of discrimination under Sections 7 and 8 of the Act on Equality. The member who represented the employers' organisation disagreed with the majority, referring both to

⁴⁶ Equality Board (*Tasa-arvolautakunta*), Opinion No. L 1/2010, 21 October 2010.

⁴⁷ Government Bill 195/2004, p. 39.

Boyle and *Gillespie*, and to Advocate General Kokott's opinion in *Kiiski*, at Paragraph 69. The dissenting member warned that the majority interpretation endangered the willingness of employers to agree to collective agreement conditions that exceeded the legal minimum.

The *Labour Court* followed a different path in a case⁴⁸ concerning an employee's right to compensation paid for a midweek public holiday (such as New Year's Day and Good Friday) during maternity leave. The issue was whether a woman on maternity leave was entitled to such compensation. Under the collective agreement, an employee was entitled to midweek holiday compensation provided s/he had worked for three months before the day in question, and was due to work on such a public holiday. The collective agreement specified that an employee on sickness leave or absent due to the sickness of a child was entitled to such compensation. The collective agreement entitled employees to receive pay during maternity leave. The labour union claimed that the maternity leave pay was what would have been paid in regular work during the leave. Had the employee not been on maternity leave, she would have received midweek holiday compensation. The employer responded that the collective agreement list of cases in which pay was paid for midweek public holidays was exhaustive, and the list did not include maternity leave.

The Labour Court held that there were good grounds for the claim that if compensation for midweek public holidays during maternity leave had been agreed upon, it would have been specified in the collective agreement. The condition on pay during maternity leave mentioned 'pay for regular working hours', which the Court held to refer to working days only. As the labour union had not taken the matter up in the negotiations leading to the agreement, the condition was to be read literally. First, after discussing the collective agreement in terms of the collective agreement tradition, the Court discussed the alleged discrimination. The Court dismissed the allegation by choosing not to compare the woman on maternity leave to anyone at work, and referred to *Gillespie*, at Paragraph 17 and *Boyle*, at Paragraph 40, as well as a Finnish case where the Labour Court had argued in a similar fashion.⁴⁹ Where a collective agreement entitled an employee to pay during maternity leave, the pay does not have to correspond to what an employee at work is paid. The Court decided that the employee on maternity leave was not entitled to midweek public holiday compensation, although she was entitled to pay under the collective agreement.

Supreme Court decision on the right to non-discrimination v. the freedom of religion

The Act on Equality between Women and Men makes an exception to the material scope of the Act in matters that involve the religious practice of religious communities. Although the biggest religious community in Finland, the Lutheran Church, decided soon after the Act on Equality came into force in 1987 that women were entitled to hold religious office and to perform religious rites, the Church tried to avoid open conflicts with dissenters who refused to cooperate with female colleagues. This avoidance of conflict came to an end when a male candidate for the position of a vicar in the Finnish Lutheran Church, who made clear in advance that he would refuse to cooperate with women in the performance of religious rites, was considered unsuitable by the See for appointment to a Church office. The Supreme Administrative Court upheld the decision of the See in its decision.⁵⁰ The Supreme Court⁵¹ has gone even further by holding that

⁴⁸ Labour Court Decision TT:2010-139, 1 December 2010, available on <http://www.finlex.fi/fi/oikeus/tt/2010/20100139>, accessed 25 May 2011.

⁴⁹ TT 2003/86.

⁵⁰ Supreme Administrative Court decision KHO 2008:8.

a refusal to cooperate was punishable under the Penal Code as discrimination. The case concerned a criminal-law discrimination charge against a male vicar who refused to cooperate with a woman in performing the religious rites of the Lutheran Church. The Supreme Court explained that while the material scope of the Act on Equality makes an exception for the religious practice of religious communities, there is no similar limitation as to the crime of discrimination under the Finnish Penal Code, Section 11:9. The Court further explained that the freedom of religion and conscience, under Section 11 of the Finnish Constitution, is not an absolute right, which would give anyone a right to violate human dignity or other fundamental rights, such as the right to non-discrimination. The prevention of discrimination is an acceptable ground to limit the powers of religious communities and to regulate the form of religious practices. Freedom of religion and conscience do not protect all activities based on a person's religion or belief.

FRANCE – *Sylvaine Laulom*

Policy developments

Proposals of the Halde

For international women's day, the Halde has published 26 proposals addressed to the Government to improve gender equality.⁵² Regarding the gender pay gap, the Halde proposes to improve the content of the report on the comparative situation between men and women that the employer has to present each year to workers' representatives, in enterprises employing more than fifty workers. The Halde also asks the Government to quickly adopt the decree defining some financial sanctions for enterprises that do not comply with their obligation to negotiate on gender equality and that have not concluded or adopted any plan for equality. The Halde also proposes the adoption of sanctions for public employers which do not comply with their obligations regarding gender equality. The Halde asks social partners to develop the training of the management of trade unions in gender issues. Finally, the Halde asks social partners when they are negotiating on gender equality to evaluate employment properly and to reevaluate job classifications. Regarding women's careers, the Halde asks the Government to adopt a communication campaign to fight discrimination linked to pregnancy and maternity. The Halde also asks enterprises in the private sector to establish procedures of human resources management to neutralise criteria which could lead to discrimination in recruitment or careers. Finally, the Halde recommends improving women's careers through adopting positive action measures. Social partners should negotiate agreements to guarantee that maternity and parental leave does not have any adverse consequences on women's careers.

⁵¹ Supreme Court decision KKO 2010:74, 22 October 2010, available on <http://www.fnlex.fi/fi/oikeus/kko/kko/2010/20100074>, accessed 25 May 2011.

⁵² Halde, Deliberation n° 2011-66, 7 March 2011, http://www.halde.fr/spip.php?page=article&id_article=14409, accessed 6 April 2011.

Legislative developments

Quota for women on company boards

The period since the previous EGELR has been marked by one significant legislative development. A Bill introducing quotas for women on company boards was adopted on 27 January 2011.⁵³ The Bill intends to improve the representation of women on company boards and imposes a quota for women. Firms will have to ensure that women have at least 20 % of boardroom places within 3 years and 40 % in 6 years. So far, only seven companies on the CAC 40 index (the benchmark French stock market index) meet that criterion, according to a parliamentary report. However, the Bill is a watered-down version of an earlier proposal which would have required full gender equality on company boards within six years. The Bill will only apply to large companies employing at least 500 workers and with revenues of over EUR 50 million. Non-complying companies would see their board elections nullified, but not the decisions adopted by the board. New elections must then be held in order to fulfil the obligation of gender representation. Even before the adoption of the Bill, French companies had begun to recruit women for their boards in the 2010 proxy season, with a 50 % increase in female directors of France's largest companies in the CAC 40, according to Proxinvest (www.proxinvest.fr). Leading the pack are Axa, BNP-Paribas, Bouygues, Michelin, PPR, and Vivendi, whose boards now contain more than 25 % of female directors.

Following the adoption of this Bill, which also applies to state-owned companies, a report of an MP, Françoise Guégot, published in March 2011, recommended the definition of numerical targets to favour the development of sex equality in public services. The objective of 40 % of women's participation in top management in the public services is proposed.⁵⁴

The end for the Halde

On 15 March 2011, Parliament adopted a law that creates the Defender of Rights, a new institution provided for by the Constitution, following its revision in 2008.⁵⁵ The Defender of Rights incorporates a number of independent authorities dealing with fundamental rights, such as the Defender of the Child, the Ombudsman, the National Commission for Ethics and Security (CNDS) and also the High Authority Against Discrimination and For Equality (*Halde*). The Defender of Rights will have legal personality and will be appointed by the President of the Republic. The absorption of the Halde into this new institution has been justified by the objective of efficiency and it has been presented as an improvement in the protection of rights and freedoms. The missions and competences of the Halde are transferred to the Defender of Rights. The Defender of Rights will be assisted by a deputy and a consultative commission for each of his activities. Therefore a deputy and a consultative commission will specifically deal with issues of discrimination. The Defender of Rights will overall be endowed with the same authority as the Halde. One of the main differences is that the commission's review of complaints will only have consultative value and can be overturned by the Defender. Moreover, contrary to the existing position of the Halde, the Defender can

⁵³ *Loi n°2011-103 du 27 janvier 2011, JO n°23 du 28 janvier 2011, loi relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle.*

⁵⁴ http://www.francoiseguegot.fr/sessions/data/fic/liens/version_finale_rapport_08_03_2011-2011-03-08-15-40.pdf, accessed 6 April 2011.

⁵⁵ *L. org. n° 2011-333, 29 mars 2011, JO, 30 mars 2011.*

choose the claims he decides to investigate and regarding which he wishes to intervene. Given the scope of his competence, this may create opportunities for the Defender to intervene in the commission's work, which could hinder the effective independence and value of the decisions adopted and could also alter the scope of subject matters and discrimination grounds effectively addressed by the institution. Thus many commentators have expressed their concern regarding the real independence of the new French equality body. Many commentators also fear that there is a risk of dilution of expertise and competence and that the Halde will lose out in terms of visibility and reputation.

Case law of national courts

Constitutional Court (Decision n° 2010-618 DC, 9 December 2010)

Different kinds of quotas have been created in France for different kinds of elections, with financial sanctions against parties which do not comply with their obligations. Laws of 2000 and 2007 require that the parties present 50 % of candidates from each sex in elections to the National Assembly. In legislative elections, which are conducted according to a two-round majoritarian system, the new law required political parties to present an equal number of female and male candidates. The single-ballot system where each list must be composed alternately of candidates of each sex tends to allow a better representation of women. Thus, at the level of the Regions, the regional councillors were elected on a proportional representation and with the law on equality, 47.5 % of the councillors are now women. At the lower level of the Departments, there is a uninominal system on a majority basis and only 12 % of the representatives at that level are women. For the MPs, where the system is the same, the representation of women in the National Assembly is still weak (currently only 18.5 % of MPs are women) and sometimes political parties have preferred to simply pay the financial penalty.

An important reform of the governance of the Regions was adopted in December 2010⁵⁶ and the election of representatives of the regional communities has also been modified. The new representatives of regional communities will replace both regional and department councillors and they will be elected by a two-round uninominal system on a majority basis. Even if the system of sanctions has been improved (the financial penalty for non-compliance will be higher), one of the consequences of the new system is that the representation of women assuming the functions of representatives of territorial communities will be lower than it is now. The new two-round uninominal system on a majority basis instead of a proportional representation disfavors women's representation, as political parties prefer to present men rather than women. On the contrary, with a single and proportional ballot system, political parties present lists of candidates composed alternately of candidates of each sex. Some opponents to the reform argue that as a result the law was unconstitutional as it disfavors women's representation. It is thus contrary to Article 1 of the Constitution, according to which 'statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions'. Unfortunately in a disappointing decision, the Constitutional Council considers that Article 1 does not limit the legislative competences and without any justification it simply states that the new Bill is not contrary to Article 1 of the Constitution.⁵⁷ The Constitutional Council considers that Article 1 defines an objective which does not limit the legislative competences and that

⁵⁶ Loi n° 2010-1563 du 16 décembre 2010.

⁵⁷ Decision, n° 2010-618 DC, 9 December 2010, Loi de réforme des collectivités territoriales.

the law was not contrary to Article 1. Article 1 simply allows the adoption of positive action reforms which otherwise would be considered as contrary to the constitutional principle of equality. The fact that the new Law will have negative consequences on the representation of women is not taken into consideration by the Council.

Cour de cassation (Cass. Soc. 23 March 2011, n° 09-42666)

For the second time, the *Cour de Cassation* considered that the existence of discrimination does not necessarily imply a comparison with other workers.⁵⁸ In this case, the discrimination between a woman and other workers was created by a provision of a collective agreement regarding the calculation of the seniority of the worker. The *Cour de Cassation* held that the provision of the collective agreement was discriminatory as such, and thus that a comparison with other workers was not necessary in order to be able to apply the principle of equal pay for equal work.

GERMANY – Beate Rudolf

Policy developments

The best way to increase the number of women on company boards continues to be debated, and this caused a division in the Federal Government in the early spring. The Minister for Labour and Social Affairs declared to be in favour of binding quotas, whereas the Minister for Family, Senior Citizens, Women and Youth, who technically is the competent Minister in this matter, announced that she considered a voluntary commitment by companies to be preferable. In her view, this should be accompanied by a binding obligation if the number of women on company and management boards has not tripled by 2013. The Chancellor declared to be in favour of the latter proposal. Under this proposal,⁵⁹ which has not been laid down in legislation so far, enterprises will be legally obliged to set themselves a target quota and to publish it, if the aim of tripling the number of women on management and supervisory boards has not been attained in Germany by 2013. This ‘flexiquota’ serves to take into account that, in the view of the Minister, there may not be a sufficient number of qualified women in all areas of economic activities. At a later date, not yet fixed, companies will suffer from sanctions under company law if they have not met their own target. If, however, they have reached a 30 % representation of women on their boards, the obligation for a voluntary commitment ceases to apply. Critics consider this approach too soft, stating that it postpones the solution of the problem.

Case law of national courts

Federal Constitutional Court (Bundesverfassungsgericht), Decision 1 BvR 1409/10 of 28 April 2011⁶⁰

The Federal Constitutional Court had to decide on a provision concerning a supplementary pension scheme for the public service, the *Versorgungsanstalt des*

⁵⁸ *Cass. Soc.* 10 November 2009, n° 07-42849.

⁵⁹ For a schematic description see: <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung4/Pdf-Anlagen/Stufenplan-Schema,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, accessed 20 May 2011.

⁶⁰ http://www.bundesverfassungsgericht.de/entscheidungen/rk20110428_1bvr140910.html, accessed 29 May 2011.

Bundes und der Länder (VBL), a legal person under public law. According to the by-laws of that institution, in force until the end of 2001, a pension claim for old age, invalidity or as a surviving spouse or child, depended on the insured person's having been insured for at least 60 months. Periods of maternity leave did not count towards these 60 months. The Court considered this rule to be incompatible with the constitutional prohibition of sex-based discrimination (Article 3(3) of the Basic Law). As the rule was inseparably connected to the female sex, only compelling grounds could justify the different treatment in question ('*zwingende Gründe*'). The Court rightly could not detect any such grounds, and held that the technical reasons presented by the *VBL* did not justify introducing discrimination 'through the backdoor.'

Federal Labour Court, judgment 6 AZR 526/09 of 27 January 2011

The judgment⁶¹ concerned alleged gender-based discrimination in the calculation of pay under the Collective Agreement for the Public Service, General Part (*Tarifvertrag des öffentlichen Dienstes – Allgemeiner Teil, TVöD-AT*). The Collective Agreement provides that a salary is determined first according to the pay group (*Entgeltgruppe*) and second, within that pay group, by the 'step' (*Stufe*) to which an employee belongs. The pay group is determined by general factors describing the type of work and the relevant requirements (skills, diploma). The 'step' reflects the employee's experience in the work in question. This is determined by an employee's uninterrupted period of work (sick leave, holidays and mandatory maternity leave do not count). Pursuant to Section 17(3)(2) *TVöD-AT*, voluntary parental leave constitutes an interruption of work and thus excludes the parental leave period from counting towards reaching the next 'step'. In the case before it, the Federal Labour Court had to determine whether that rule was compatible with the prohibition of gender-based discrimination under the General Equal Treatment Act or other higher-ranking law.

The Federal Labour Court concluded that the impugned provision did not amount to discrimination against women. It held that the provision was gender neutral on face value and hence could, if at all, only constitute indirect discrimination against women. Specifically, the reference to parental leave did not constitute discrimination based on pregnancy or maternity in the sense of the case law of the ECJ because parental leave is not inseparably connected with being a woman.

The Court considered that the provision did not indirectly discriminate against women, since the applicant could not show that women were disproportionately hit by the impugned provision. In particular, the Court referred to the ECJ and held that the comparison must be made with all other groups of employees who fall under the provision, i.e. who have interrupted their paid work for other reasons (such as long-term sickness or other private reasons).

In an *obiter dictum*, the Court found that, even if one had to look only at the group of employees taking parental leave, and even supposing that a disproportionately larger number of women than men take parental leave, the different treatment would be justified. It argued that there were objective reasons for the different treatment (not to count the time of parental leave towards reaching the next 'step'), namely that the interruption prevented the employee from gaining additional experience, which is honoured through the higher payment at the next 'step'.

The judgment strongly hinges on the lack of available data and thus illustrates the difficulty in proving indirect gender-based discrimination. It is problematic in that it

⁶¹ <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2011-1&nr=15056&pos=1&anz=30>, accessed 29 May 2011.

accepts the justification presented by the social partners without closer investigation of its proportionality. The criterion of uninterrupted work is one that is highly suspicious as women have a disproportionately higher percentage of interrupted work biographies for family reasons. In such a situation, arguably, the Court should verify whether the competences gained through family work are such as would be required in the job in question, too. In the case before it, the Court perfunctorily noted that the social partners had only wanted to take into account experience gained on the job. However, the case before it concerned a tailor at a town theatre, who might have gained additional experience in sewing, mending, and ironing during her parental leave. In this light, the social partners' general intention may well have been irrelevant in the case at hand.

Federal Labour Court (Bundesarbeitsgericht), judgment 8 AZR 483/09 of 27 January 2011

The decision⁶² concerned a claim for compensation for gender-based discrimination in promotion. The pregnant claimant had applied for a promotion. When informing her that a male colleague had been chosen for the position, her supervisor mentioned that she should be looking forward to having her baby. The Appellate Labour Court (of Berlin/Brandenburg) held that this fact was not sufficient to constitute an indication that the applicant had been discriminated against. Instead, it considered that the supervisor had merely intended to console the applicant. Consequently, the Court rejected her claim for compensation pursuant to Section 611a of the Federal Civil Code (*Bürgerliches Gesetzbuch, BGB*).⁶³

The Federal Labour Court quashed the judgment and remanded it. It held that the supervisor's words, even if uttered as a consolation, could be an indication of gender-based stereotypes prevalent in the company. For this reason, they could be an indication of conduct that is regularly applied vis-à-vis members of one sex. As the Federal Labour Court, in an earlier referral to it in the same case,⁶⁴ had already concluded that the Appellate Court should have taken this fact into consideration when weighing the evidence, the lower Court was precluded from denying the supervisor's words any indicative value.

The case is important because it prevents courts from interpreting certain conduct or statements in only one particular way while disregarding the potentially discriminatory content. If certain conduct or statements have, on face value, a discriminatory connotation, this is sufficient indication that discrimination was part of the reasons for job-related conduct, such as rejecting the application for promotion.

Miscellaneous

The Federal Government has submitted its reports on gender equality in the public sector (*Bundesgleichstellungsbericht*)⁶⁵ and on women's representation in panels,

⁶² <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2011-1&nr=15109&pos=5&anz=30>, accessed 29 May 2011.

⁶³ The norm was replaced in 2006 by the General Act on Equal Treatment, implementing the European Anti-Discrimination Directives (*Allgemeines Gleichbehandlungsgesetz, AGG*), but continues to cover cases the facts of which took place before the entry into force of the *AGG*. Section 611 *BGB* served to implement the Sex Equality Directive (76/206/EWG, as amended by Directive 2002/73/EC).

⁶⁴ Federal Labour Court, judgment of 24 April 2008, 8 AZR 257/07, reprinted in *Entscheidungs-sammlung zum Arbeitsrecht (EzA) BGB 2002 § 611a Br. 6*.

⁶⁵ *Zweiter Erfahrungsbericht der Bundesregierung zum Bundesgleichstellungsgesetz*, Documents of the Federal Parliament (*Bundestagsdrucksache*) 17/4307, <http://dipbt.bundestag.de/dip21/btd/17/043/1704307.pdf>, accessed 29 May 2011.

committees and boards of institutions and legal persons within the sphere of influence of the Federation (*Bundesgremienbericht*).⁶⁶

GREECE – *Sophia Koukoulis-Spiliotopoulos*

Policy developments

In 2008, the Council of State (Supreme Administrative Court, CS) ruled that a public official is not entitled to more than one period of parental leave for multiple births. In the *Chatzi* case,⁶⁷ which raised the same legal issue, the Thessaloniki Administrative Court of Appeal (ACA) made a preliminary reference to the Court regarding the meaning of Clause 2.1 of the Framework Agreement (F.A.) on parental leave annexed to Directive 96/34.⁶⁸ The ACA responded to the Court's judgment with judgment 1842/2010.

The facts of the Chatzi case

The claimant in the main proceedings, a civil servant, gave birth to twins. She took the nine months' paid parental leave provided by Article 53(2) of the Civil Servants' Code (CSC).⁶⁹ Her application for a second period of the leave for the second twin was rejected. She challenged the rejection before the ACA.

Preliminary questions – application of the accelerated procedure by the Court

The ACA asked in essence whether Clause 2.1. of the F.A. means that:

- 1) it confers an individual right to parental leave on the child and, therefore, the refusal of a second period of parental leave in the case of the birth of twins infringes upon the rights which twins derive from the EU legal order;
- 2) a multiple birth provides an entitlement to a number of periods of parental leave equal to the number of children born or to a single period of parental leave.

By Order of 12 May 2010, the Court agreed to apply the accelerated procedure,⁷⁰ as any delay would deprive the relevant EU provisions of their useful effect (the claimant could only take the leave until the child reached the age of four years, i.e. until 21 May 2011).

The Court's answers to the preliminary questions

1. The answer to the first question

In light of the wording of Clause 2.1, the scope of the F.A. and the purpose of parental leave, the Court held that Clause 2.1 'cannot be interpreted as conferring an individual right to parental leave on the child'. It noted that this was also the sense of Article 33(2)

⁶⁶ *Fünfter Gremienbericht der Bundesregierung zum Bundesgremienbesetzungsgesetz*, Documents of the Federal Parliament (*Bundestagsdrucksache*) 17/4308 (neu), <http://dipbt.bundestag.de/dip21/btd/17/043/1704308.pdf>, accessed 29 May 2011.

⁶⁷ Case C-149/10 *Zoe Chatzi v Ipourgios Ikononikon* [Minister of Finance] 6 September 2010, nyr.

⁶⁸ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC, OJ L145 19/06/1996 p. 4. Clause 2.1: 'This agreement grants (...) men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour'.

⁶⁹ Act 3528/2007, OJ A 26/9.2.2007.

⁷⁰ Article 104b of the Court's Rules of Procedure.

of the Charter, which proclaims parental leave as a fundamental social right, while under Article 24(1) of the Charter, which grants children the right to such protection and care as is necessary for their well-being, ‘it is sufficient that this right be granted to parents’.

2. *The answer to the second question*

2.1. The answer to the second question was that ‘Clause 2.1 of the [F.A.] does not require the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, 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 parents of twins receive treatment that takes due account of their *particular needs*. It is up to *national courts* to determine whether national rules meet that requirement and, if necessary, to interpret those rules, insofar as possible, in conformity with [EU] law’.⁷¹

2.2. The Court’s reasoning which led to this answer provided guidance to the national legislature and the ACA, so as to enable them to take into account the needs – indeed the fundamental rights – of the parents of twins. The Court deemed the ‘constraints’ of parents of twins ‘quantitative’, but since twins, in principle, go through the same stages of development at the same time, ‘doubling the duration of parental leave does not necessarily constitute the only appropriate measure’ for alleviating their burdens.

2.3. As to the ‘general principle of equal treatment’, ‘whose fundamental nature is affirmed in Article 20 of the Charter’, the Court recalled that it ‘requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified’. Its observance is ‘all the more important’ concerning the right to parental leave – a fundamental social right.

2.4. ‘Parents of twins are in a special situation, which must be taken into account in the first instance by the national legislature when it adopts measures transposing Directive 96/34’. Examples of appropriate measures include: a parental leave ‘appreciably longer’ than the *minimum* ‘and a certain degree of flexibility’ to take it according to the child’s age; ‘flexible ways of organising work’; ‘material assistance’, e.g. ‘a right of access to childcare centres or financial aid’, or ‘specific benefits allowing the method of care to be freely chosen’. ‘It is for the national court to determine whether the body of national rules offers sufficient possibilities to meet in a specific case’ the needs of these parents.

2.5. The Court did not mention the needs of the twins. However, as it recalled, EC measures must be interpreted ‘in conformity with primary law as a whole’. The Charter forms part of primary EU law by virtue of Article 6(1) TEU. Thus, Article 24(1) of the Charter, which requires that ‘in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration’ is binding on all national authorities. This consideration underpins the ACA final judgment.

⁷¹ Emphasis added.

The implementation of the Court's judgment by the referring court (ACA)

1. The main parts of ACA judgment 1842/2010⁷²

1.1. The ACA recalled that the Lisbon Treaty granted to the Charter legal force equal to that of the Treaties (Article 6(1) TEU), while Titles III (Equality) and IV (Solidarity) of the Charter deal with the principle of equal treatment of men and women. It quoted Articles 20, 21, 23 and 33 of the Charter, several recitals of the Preamble to and clauses 1, 2 and 4 of the F.A. It then recalled that the CS, referring to the Court's case law, relied on 'the principle of harmonisation of professional and family life as a natural corollary of the principle of equal treatment of men and women and a means for its substantive implementation'.⁷³ 'The interpretation of Clause 2.1 of the F.A. in light of this principle acquired greater importance, as Articles 23 and 33(2) of the Charter recognise the fundamental nature of the social right to parental leave. This principle is enshrined in Directive 2002/73, transposed by Act 3488/2006'.

1.2. Article 3 Act 3488/2006 copies the definitions of 'direct' and 'indirect' discrimination from Directive 2002/73, while Articles 4 and 5 prohibit 'any form of direct or indirect discrimination, in relation, in particular, to family status'. Under Article 5, the right of mothers 'upon expiry of maternity leave, to return to the same or an equivalent post, on the same terms and conditions, and to benefit from any improvement in working conditions which they would be entitled to during their absence' 'also applies to parents who take parental leave'; moreover, 'any less favourable treatment of a woman on grounds of pregnancy or maternity (...) or of parents on grounds of parental leave constitutes discrimination in the sense of this Act'. Article 53 of the CSC transposed Directive 96/34 by granting to parents a transferable right to a reduced working day or, alternatively, to nine months paid parental leave, until the child becomes four years old.

1.3. When the CS's judgment,⁷⁴ which denied a public official, mother of twins, a second period of parental leave, were given, 'the Charter was not yet legally binding'. Moreover, the CS did not examine the issue in light of the equality principle enshrined in Article 4 of the Constitution,⁷⁵ nor in light of Directive 2002/73, transposed by Act 3488/2006. Thus, 'there was no question for the CS to apply the interpretation adopted by the Court'.

1.4. The ACA noted that 'the implementation of the equal treatment principle, regarding the social right to parental leave, is derived from Article 5 Act 3488/2006, which prohibits any direct or indirect discrimination on grounds of family status. More specifically, Paragraph 3(d) of this Article provides that less favourable treatment of parents on grounds of parental leave or leave for child care constitutes discrimination in the sense of this Act. Thus, the equal treatment principle is breached when certain parents are treated less favourably than other parents regarding the conditions for granting parental leave'.

1.5. The ACA recalled that Directive 96/34 sets a *minimum* of three months' parental leave for each parent. The nine-month total (transferable) parental leave granted by Article 53 CSC amounts to four and a half months for each parent, unless the

⁷² Website of the ACA: <http://www.defeteio-the.gr/thes/news.jsp?new=31>, accessed 14 February 2011.

⁷³ The ACA gave as examples CS judgments 899/2010 and 2112/2009.

⁷⁴ CS 2637-2638/2008.

⁷⁵ The first Paragraph of Article 4 requires equality before the law, while the second paragraph provides that 'Greek men and women have equal rights and obligations'. All Greek courts review the conformity of statutes with the Constitution, EU law and ratified international treaties and set aside those that conflict therewith'.

parents decide otherwise. If one parent is employed in the private sector and the other is a civil servant, the former is entitled to three and a half months unpaid leave (Article 5 Act 1483/1984) and the latter to five and a half months (nine months minus three and a half months) paid leave; these periods are not much longer than the Directive's *minimum*. If both parents work in the private sector, Article 5 Act 1483/1984 entitles each parent to unpaid, non-transferable parental leave of three and a half months, i.e. seven months in total for both. 'Anyway, the system of transferable parental leave does not favour the Directive's purpose of encouraging men to assume an equal part of family responsibilities'.

1.6. Moreover, the CSC grants the leave until the child is four years old, while the Directive's *minimum* is eight years. Thus, the flexibility of the leave is diminished. The CSC provides no other measure for parents of twins to cope with their limitations and special needs. This is 'less favourable treatment, in breach of the equal treatment principle, which requires that different situations not be treated in the same way, in view also of the lack of objective justification of their treatment'.

1.7. Public childcare centres are supervised by local authorities. In order to have access thereto, the child must be domiciled in the area of the specific local authority; children of working parents and children of low-income families have priority, preference being given to children who need care on various social grounds (orphans, children of single or handicapped parents, or from large families etc.). A child may attend a childcare centre of a neighbouring local authority, provided that there is a vacancy or a particularly acute social need of the parents. The parents pay monthly fees whose amount depends on their financial situation; they may be exempted therefrom or pay a lower fee.

1.8. There is thus no priority for twins to access public childcare centres. Moreover, as the claimant submitted, in the area of the local authority where she is domiciled, only 30-40 % of applications from low-income parents can be satisfied, while in the areas of neighbouring local authorities there is no possibility to apply the legal criteria, access to childcare centres being determined by lot. No allowance or other material assistance to cover the cost of a private childcare centre or a baby sitter is provided for civil servants parents of twins. Due to the absence of any provision that would help them in coping with their limitations and specific needs, 'the less favourable treatment of these parents, in the framework of the parental leave system becomes even more unfavourable'. Thus, 'the national legislature has in no way taken into account the special situation of parents of twins, as it should have done, in the first instance, when transposing Directive 96/34'.

1.9. The ACA recalled the Member States' obligation to implement Directives, under Article 249(3) TEC (now 288(3) TFEU), as interpreted by the Court (Cases C-212/2004 *Adeneler*, C-6/90 & C-48/93 *Francovich*, C-453/00 *Kühne & Heitz*, and C-497-403/01 *Pfeiffer*). It also recalled the duty of national courts to interpret national law in light of the wording and purpose of the Directive and to avoid interpreting it in a way that would put in serious danger the achievement of the result pursued by the Directive. 'The principle of consistent interpretation demands that national courts do whatever is within their competence, in view of the whole national law and, by applying methods of interpretation recognised by this law, ensure the full effectiveness of the Directive and reach a solution which conforms to the objective of the Directive (*Pfeiffer* and C-106/89 *Marleasing*)'.

1.10. The ACA further recalled the purposes of Directive 96/34: to allow parents to devote themselves fully to the child and combine professional and family life, to promote gender equality and encourage men to assume an equal part of family

responsibilities, and to promote women's participation in active life. It referred to CS judgments⁷⁶ and to the ECJ case law invoked by these judgments (Cases C-342/2001 *Gomez*, C-243/95 *Hill*, C-1/95 *Gerster*). The Directive also aims to deal with 'demographic changes, population ageing and generations' rapprochement'. 'These purposes coincide with the purposes of Article 21(1) and (5) of the Constitution'⁷⁷ (CS (Plen.) 3216/2003, 1/2006)'. Therefore, 'the complete absence from the general system of parental leave of special measures in favour of civil servant parents of twins, which entails the above discrimination against them and leads to a violation of the equal treatment principle, breaches the obligation to ensure the full effectiveness of the provisions of Directive 96/34, which derives from Article 249(3) TEC (now 288(3) TFEU)' and 'makes very difficult in practice the implementation of the purposes of the Directive regarding an important category of workers with special needs, such as the parents of twins, as compared with other parents, something which is also particularly important in respect of the acute demographic problem'.

1.11. The ACA concluded: 'The downgrading of the effectiveness of Directive 96/34 and the breach of the equal treatment principle, due to non-compliance of the legislature with the obligation imposed by EC law to grant equal opportunities for combining family and professional life to an important category of workers, who suffer, due to their special needs, additional limitations in comparison with other working parents, can be restored by granting an autonomous parental leave to each parent of twins, so that the principle of proportionality is also respected'. It thus upheld the claimant's petition for the annulment of the administrative decision rejecting her application for a second parental leave. This means that her employer (a tax authority) must grant her a second parental leave.

1.12. Thus, the ACA applied scrupulously, in a detailed and well-reasoned manner, the Court's preliminary judgment, taking into account all the criteria laid down by it.

2. The dissenting opinion

One of the three ACA judges considered that the above solution would result in unequal treatment of the parents of children born following a single birth, as compared to parents of twins, triplets etc. She did not doubt that – as the Court also acknowledged – the parents of twins are in a 'special situation' and that, therefore, the legislature must provide for additional measures in their favour, such as the possibility to make use of a flexible working time, access to childcare centres etc. However, the matter whether such measures do or do not exist does not concern the present case, whose object is the duration of the parental leave, regarding which the Court held that 'F.A. clause 2.1 cannot be interpreted as requiring the birth of twins to confer a number of periods of parental leave equal to the number of children born'. This matter will eventually arise in a subsequent case, following an eventual refusal to grant such arrangements to the claimant; it is in such case that the Court will have to determine whether the unlawfulness has occurred and give 'an interpretation which conforms to EU law'. Therefore, the instant application should be dismissed.

This opinion is based on a misunderstanding of the response of the Court and of the purpose of preliminary proceedings. The purpose of the Court's preliminary judgment was to enable the referring court to solve the dispute before it in a way that conforms to

⁷⁶ CS 899/2010, 2112/2009, 2118/2009, 13/2008.

⁷⁷ Constitution, Article 21: '1. The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State'. '5. Planning and implementing a demographic policy, as well as taking all necessary measures, is an obligation of the State'.

EU law and, in particular, to ensure the *effet utile* of the EU rule(s) involved. By dismissing the application, the referring court would disregard its obligations under EU law and would deny justice. Thus, a case which was very urgent and was dealt as such by the Court (see above) would be referred to the Greek calends.

HUNGARY – Csilla Kollonay Lehoczky

Policy developments

In the second half of 2010 and the beginning of 2011, the policy of the Government (the conservative middle-right *FIDESZ*-Hungarian Civic Union in alliance with the small Christian-Democratic Party) was characterised by its efforts to overcome the country's economic difficulties, to increase employment, and to rectify the mistakes of the previous Government. The legislative activity was strongly determined by its comfortable two-third majority. Thus, almost no voice was given to the opposition parties and, similarly, almost no consultation took place with the representatives of the interested representative organizations of employers and employees. Two related problems – the increasing tension between the Roma and Hungarian population in the most impoverished areas and the growing influence of extreme right groups – influenced the first year of the Government. A further major concern of the Government has been the decrease of the population under ten million, and thus its policy has also been determined by a focus on family policy, whose ideal model is – even if never overtly expressed – a Christian middle-class family with adequate family roles.

Legislative developments

New Constitution ('Basic Law')

The most significant development has been the adoption of a new Constitution, now called 'Basic Law' ('Hungary', and no longer 'Hungarian Republic'). This law was adopted in a fast procedure (less than two months), accompanied by criticism due to the forced speed and the unilateral determination of the disputable contents (input of political opposition, constitutional law professionals and civil society was missing from the content). The law was adopted on 25 April, and will be in force from 1 January 2012.

The Basic Law (Article XV) declares the equality before the law of everyone and guarantees fundamental rights for everyone without distinction on the basis of race, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or other status. It is added that Hungary supports the realization of equal opportunities by special measures.

The family (family with children) is apparently one of the focal values and institutions of the Basic Law and, together with women, enjoys conservative-style protection. In addition to the general equality rules, the law declares that women and men are 'of equal rights'.⁷⁸ It furthermore declares that Hungary protects children, women, the elderly and the disabled by special measures – considering women as a weaker, vulnerable group.

The Basic Law defines marriage as a voluntary life partnership of a man and a woman (thereby excluding same-sex marriages). It declares the protection of marriage

⁷⁸ The translation cannot reflect the use of the word, rather used in the early ages of emancipation.

and the family ‘as the basis of the continued existence of the nation’. It declares that Hungary supports having children and that the protection of the family shall be regulated in a ‘fundamental law’ (i.e. in a law that requires a two-third majority to be adopted or amended.) The content of such a law is not known yet.

The Basic Law declares the obligation of the parents to take care of their children (including school/education) and that adult children are obliged to take care of their parents in need. (The latter raised concerns that the State wants to shift part of old-age security and thereby create an incentive to have multiple children.) The provision on old-age care refers to the maintenance of the public pension system and to voluntary social organizations as the two sources. The law may take into consideration the ‘need for increased protection of women’ regarding their eligibility for a public pension. (As is already the case, see below on pensions).

Among the provisions on labour employment, the Basic Law also declares that Hungary guarantees, by special measures, the protection of young people and of parents at the workplace.

Amendment of the Act on Social Pensions – Pension benefits for women

The amendment (in force from 1 January 2011) of Act LXXXII of 1997 on social security pensions entitles women to obtaining an old-age pension, regardless of their age, if they have attained forty years of service (employment or any other wage-earning relationship for which contributions were paid). This right is purely dependent on sex, regardless of family status or the number of children. Periods spent on any form of maternity or parental leave would be taken into consideration up to a maximum of eight years, in the case of five or more children this may be increased to 15 years (i.e. a minimum of 25 years of wage-earning activity might provide entitlement to this pension). Periods of vocational training or university studies are excluded. Contributions to the pension fund by insured persons were increased from 9.5 to 10 % with reference to the costs incurred by this law.

The declared goal of the Act is ‘to acknowledge the family and workplace role undertaken by women, achieving long-term employment parallel with fulfilling their commitments to the family’ and ‘to facilitate their ongoing family role, thereby improving labour market opportunities for younger mothers’. However, the entitlement is based solely on the sex of the person, whereas family status or having children does not play a role. While it directly discriminates men, by its indirect and long-term effect it can also perpetuate the subordination of women by reinforcing traditional family roles and encouraging women to opt for a career that results in a low income and consequent economic dependence.

Amendment of the Act on Private Pensions – abolishment of the former second tier (or pillar) of the public pension system

Act no. C of 2010 on the ‘Freedom to choose pension fund’ has abolished the mandatory private pension scheme, the former second tier of the mandatory pension insurance system. (See the Old-Age Pension Report, Section A.4.) Technically, this was done by ‘fostering’ the return to the public fund for everyone and, of course, transferring the savings accumulated in the private funds during the last twelve years to the public funds (in practice, the state budget). The return was set in motion automatically, immediately upon the adoption of the Act in November 2010. It included the option to remain at the private pension fund, if the insured declared so in writing, visiting the relevant office in person to do so, with a very short deadline. In addition, an open sanction for remaining at the private pension fund is that while the 10 %

contribution deducted from salaries will later be transferred to the private pension account of the insured (for one year it is transferred to the public budget), the 24 % contribution paid by the employer on behalf of the employee will be transferred to the public fund and the individual who refuses to return to the public system will lose his/her pension rights based on that amount. In order to avoid possible constitutional challenges for the violation of property rights, the 24 % contribution paid by the employer has been re-named as ‘pension tax’.

Amendment of the law on family benefits (parental leave)

The amendment of the law on family benefits has increased the period of entitlement to parental leave for which uniform social assistance is paid, from the child’s age of two to the age of three. At the same time, the former right to work full time while drawing childcare allowance was withdrawn and has been restricted to 30 hours per week if performed outside the home. This latter change has brought to an end to a controversial legal situation, and at the same time it has to be acknowledged that the allowance (slightly more than EUR 100) is by far inadequate to substitute a salary, prompting mothers to look for supplementary income.

Support of part-time employment – ‘job sharing’

Employers who hire employees returning from maternity or parental leave for half-time work (20 hours per week) and for the other half (20 hours per week) either hire the former substitute for the absent worker or another person on a part-time basis, only have to pay 20 % instead of 27 % of the workers’ salary as the total social security contribution. The upper limit of the benefit is double the amount of the minimal wage. If salaries exceed this amount, the general 27 % contribution has to be paid.⁷⁹

On the one hand, the legislator’s intention rightly is to support the reconciliation of parental and workplace duties and to increase the (currently low) use which is made of part-time employment. On the other hand, restricting the benefit to the employment of those returning from maternity or parental leave (which is taken by mothers in 98-99 % of the cases) practically restricts this opportunity to women. (Also, the accompanying propaganda only mentioned women as the potential beneficiaries, almost excluding the possibility for men to work part time.) The limitation of the benefit to double the minimum wage also confirms that the target group is female and, at the same time, it provides an incentive to employers to keep the salaries of these people at a low level (generally below average, considering that in Hungary the minimum wage is below 50 % of the average wage). Thus, in spite of the benevolent intention the measure, by its very structure and design, is a further retrograde step regarding gender equality in labour market opportunities.

Amendment of the Law on the Protection of the Child – facilitated adoption in order to avoid abortions

In line with the strong emphasis on family policy and improvement of the reproduction rate, Hungary has changed the Law on the Protection of the Child. A new title and several new provisions have been introduced on providing assistance to pregnant women in difficult circumstances to prevent them from turning to abortion and, if the parent nevertheless decides not to keep the child the ‘open adoption’ process might be facilitated by non-profit organizations. In such a process, the natural mother and the

⁷⁹ Act no. CXXIII of 2010, in force from 1 January 2011.

adoptive parent know each other, and they might already have contact during the pregnancy with the consent and assistance of the non-profit organization,

Case law of national courts

The scarcity of sex-discrimination cases reaching the national courts continues. No sex-based discrimination cases were published in the reviewed period. Two equal-pay decisions – even if the ground of discrimination was not sex – deserve attention.

Comparators for the examination of equal pay

The Supreme Court in a decision ‘of principal force’ (special decisions with a guiding power) decided that the principle of equal pay for equal work necessarily requires the determination of comparators who are equally situated. In this respect, it is decisive if the employer has a large number of establishments throughout the country, employing numerous employees in the same scope of activity, who fall under the same internal regulation with respect to both the conditions of work and the classification into wage categories.⁸⁰ Furthermore, the Supreme Court rejected, as a mistaken interpretation, the lower court’s assessment that an equal pay claim can only be grounded on Article 8 of the Equal Treatment Act (enumerating the grounds of prohibited discrimination).

In the case at hand, the claimant complained about having a lower salary than another (female) colleague doing the same job, even having lower qualifications. The procedure proved that the claimant’s salary was within the category determined for his job, and, examining the total staff nationwide in the same job, no one received a salary that belonged to a higher category, except the comparator referred to by the claimant. Actually, the claimant received the sixth highest salary within the wage category. The comparator with the significantly higher salary in the same establishment and in the same position received a salary exceeding the top of the wage bracket as a result of the individual decision of a higher executive of the employer, who had the power to raise wages beyond the wage category. Thus, as the Court established, the claimant’s right to equal pay was not violated, but the salary of the employee exceeding the top of the category rather was a violation of equal treatment (of all employees in the same wage bracket). However, this did not give the claimant any standing in the court procedure.

Supplement for health risk

The claimant worked as an assistant nurse in a children’s hospital, the duties were in part connected to caring children with cancer and leukaemia. The employer rejected her claim for supplementary pay with regard to the health risk to which she was exposed. The reason of rejection was twofold: the exposure to cytostatics and other chemicals was not present in the job for more than 50 per cent of the working time, and the wage supplement was only prescribed for skilled nurses and not for assistant nurses. The Supreme Court established that the health risk might not be connected to the hierarchy of the job category, and furthermore that not all risks can be regulated by law and that only individual medical assessment might be decisive. It was established by independent medical opinions that the employee was exposed to a psychological risk that was not less than that for skilled workers and for those working longer hours with that child-patient group, and therefore she was entitled to the supplement.⁸¹

⁸⁰ Legf. Bir. Mfv. II. 10.832/2008, BH – Court Decision no. 2155 of 2010.

⁸¹ Legf. Bir. Mfv. II. 10.689/2009, BH – Court Decisions no. 48 of 2011.

Decisions of the Equal Treatment Authority (ETA)

*Dismissal for caring for a sick child found unlawful*⁸²

The employment of the claimant was terminated during the probationary period because she was on sick leave with a two-year-old sick child. The reason was clear in the procedure, although the employer defended himself that he was not obliged to give the reason of the termination during probation. The ETA, with reference to the *Coleman* case,⁸³ established that in this case the reason was the health condition of the child that had ‘transpired’ to the employer. Thus, the dismissal was unlawful on the basis of the prohibition to discriminate on the ground of health condition. The fact that the employer terminated the employment with retrospective effect in order to avoid paying sick pay to the employee for the period of absence aggravated the fine imposed.

Dismissal of government servant without justification

Under a law adopted by the new Government, public servants working at governmental offices (‘government servants’) could be dismissed without stating reasons. (Since the adoption, the law has been abolished by the Constitutional Court.) The complainant, a woman with two children, was dismissed and was told that one out of two secretaries had to be dismissed, and her dismissal appeared more reasonable with regard to her absences and other impacts of the two children on her work. The complainant turned to the ETA claiming discrimination. The employer’s defence was based on the lack of duty to justify the termination and also the economic reasonability of dismissing the younger complainant than the other, older secretary whose severance pay would be higher. The ETA established that even if a termination need not be justified, if there is verified suspicion that someone is dismissed on discriminatory grounds, the burden of proof shifts to the employer due to the existing reasons of termination. Thus, the ETA found that the employer had violated equal treatment regulations and imposed a fine on the employer.

Sexual orientation

The complainant was harassed due to a supposed homosexual relationship with his colleague. Both of them were exposed to comments, later verbal attacks, and to an overall hostile, humiliating and intimidating environment, at the office, at public meetings, in the cafeteria and – since the employer was a small local TV station – the complainant was banned from appearing on TV. due to the employer’s alleged concern about the prestige of the company. The ETA proceeded along a long, extended evidence procedure, through careful assessment and investigation of contradicting evidence and decided that there had been harassment on the ground of sex, It prohibited such conduct for the future and imposed a fine of about EUR 3 500 (HUF one million).

⁸² EBH 23/2011.

⁸³ Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

Policy developments

The budgetary cuts in the last two years, since the financial collapse of the Icelandic banking system, have hit women worse than men.⁸⁴ The majority of jobs in the public service that have been cut were occupied by women (470 of 540). This was confirmed by the Minister of Finance on 14 March.⁸⁵

A new report on *Women in Recession*, produced for the steering group for welfare surveillance⁸⁶ has just been released. The aim of the report is to analyze the current situation of women and scrutinize how the financial recession may be hitting women harder than men despite the fact that the Icelandic State is legally obliged to establish and maintain equal status and equal opportunities for women and men in all spheres of society.⁸⁷ The report focuses on four of these spheres: (1) home and family, (2) the labour market and unemployment, (3) gender violence, (4) health. The report reveals that having children has a negative impact on the situation of women on the labour market while strengthening the position of men. After the financial crash in 2008 the payments to parents according to the Act on Maternity/Paternity Leave and Parental Leave No. 95/2000 have been reduced. The maximum payment is now approximately EUR 1 875 (ISK 300 000) and the result is that 45.7 % of men receive the maximum payment as opposed to only 19 % of women. This gender-based reduction in payments has led to a decrease in men taking advantage of the right to paternity leave.

The gender-based pay gap has not grown during the recession as is the case usually. The explanation is that pay, in particular of men, has been decreasing after the boom.⁸⁸

Case law of national courts

The Reykjavik District Court on 14 February⁸⁹ acquitted a company from a financial claim by a former employee who held that she had been unlawfully dismissed during her pregnancy leave in breach of Article 30 of the Act on Maternity/Paternity and Parental Leave No. 95/2000 and requested a payment for a three-month period of notice of dismissal. The Court found that the claimant could not prove that she had been hired on a permanent basis, to refute the objection of the defendant that the claimant had not been hired permanently and had not been working for the company in question in the weeks/months prior to taking the leave.

⁸⁴ www.velferdarraduneyti.is/media/ritogskyrslur2011/Konur_i_kreppu_22032011.pdf, accessed 11 April 2011.

⁸⁵ <http://eyjan.is/2011/03/15/slaandi-kynjamunur-faekkad-um-470-konur-hja-rikinu-en-70-karla/>, accessed 11 April 2011.

⁸⁶ http://www.velferdarraduneyti.is/media/ritogskyrslur2011/Konur_i_kreppu_22032011.pdf, accessed 11 April 2011.

⁸⁷ Act on Equal Status and Equal Rights of Women and Men No. 10/2008, Article 1.

⁸⁸ www.velferdarraduneyti.is/media/ritogskyrslur2011/Konur_i_kreppu_22032011.pdf, accessed 25 May 2011.

⁸⁹ E-1882/2010. *Sigríður Björk Ævarsdóttir gegn Fjölsmiðjunni*.

Equality body decisions/opinions and miscellaneous

The Gender Equality Complaints Committee ruled on 22 March 2011⁹⁰ that the Prime Minister had violated the Gender Equality Act No. 10/2008 when a man was hired as head of division in the Prime Minister's Office and not a woman. The Complaints Committee stated that there had been no evidence that the man promoted was more qualified. The ruling came as a shock for the Prime Minister, who is the first woman to hold that position and was furthermore the Minister of Social Affairs when the present Gender Equality Act was adopted in 2008. The State Attorney has requested that the legal implications of the ruling concerning this appointment will be postponed for 30 days, which means that during that period the woman who complained cannot initiate legal proceedings before a court of law. The Prime Minister, Ms Johanna Sigurðardóttir, issued a statement in the wake of the ruling saying that the Ministry had based its decision on the assessment of the firm that was responsible for the recruitment process and held that the woman ranked fifth in terms of qualifications while the man hired was the most qualified.⁹¹

IRELAND – Frances Meenan

Policy developments

On 9 March 2011, the new *Fine Gael* - Labour Coalition Government - took office. Functions in relation to equality have now moved back to the Department of Justice which has been renamed as the Department of Justice and Equality, effective from 2 April 2011.⁹² The Programme for Government states that all state boards (i.e. public sector boards) should have at least 40 % of each gender.⁹³

In terms of political representation there was a 13 % female representation in the outgoing 30th *Dáil* (lower house). Female representation in the 31st *Dáil* has increased to 15 % after the election.

There is a recent report from the *Oireachtas*,⁹⁴ which focuses on the experiences of European national parliaments in implementing special measures, especially gender quotas, which aim to improve the gender composition of those legislatures. It considers that quota systems can improve the gender balance amongst candidates, but if they are to succeed in getting more women elected, quotas need to be applied in a way that attends to the intricacies of the electoral system. Political parties also play a key role in balancing gender representation in parliaments since they nominate candidates for elections.

⁹⁰ Decision No. 3/2010, <http://www.rettarheimild.is/Felagsmala/KaerunefndJafnrettismala/nr/3724>, accessed 12 April 2011.

⁹¹ <http://www.forsaetisraduneyti.is/frettir/nr/6708>, accessed 11 April 2011.

⁹² SI No. 138 of 2011 and SI No. 139 of 2011, <http://www.justice.ie/>, accessed 8 April 2011.

⁹³ http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf, accessed 8 April 2011.

⁹⁴ http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/GenderBalanceInEUParliamentsSpotlight_181110.pdf, accessed 8 April 2011.

Legislative developments

Given the economic difficulties in Ireland, the main legislative developments have been in the area of emergency fiscal legislation, more particularly, reducing public sector pensions.⁹⁵ In addition, there was a General Election at the end of February 2011. The Government published its first programme of legislation on 5 April 2011, listing 105 Bills in various stages of preparation. About twenty Bills (i.e. draft legislation) are due to their urgency to be published by the end of the summer session on 21 July 2011. The main areas where the Bills will be focussing are more particularly in relation to reform in the public service and the legal profession. As a matter of urgency there is to be a Whistleblowers' Bill as well as an amendment to the Freedom of Information legislation.⁹⁶

The Programme for Government also provides that transgender people will have legal recognition and extend the protections of the equality legislation to them. All public bodies will have to take due note of equality and human rights in the carrying out of their function. Furthermore, there is to be reform of the current law on employees' rights to engage in collective bargaining so as to ensure compliance by the State with judgments of the European Court of Human Rights.

In the last edition of the *European Gender Equality Law Review*,⁹⁷ there was reference to the Civil Law (Miscellaneous Provisions) Bill 2010. As this Bill was not passed before the dissolution of *Dáil Éireann* (Parliament), the Bill falls and will have to be reintroduced.

Case law of national courts

HSE v Buckley

In the recent Labour Court Determination in *HSE v Buckley*,⁹⁸ (on appeal) the Labour Court determined that the complainant, an Assistant Director of Nursing (General) was not entitled to equal pay with her named male comparators, both Assistant Directors of Nursing (Mental Health) who are on a higher salary scale. The differences in rates of pay arose from a collective agreement and from the fact that historically the Assistant Directors of Nursing (General) were female and Assistant Directors of Nursing (Mental Health) were male. The parties agreed it was not direct discrimination; the complainant considered it to be a case of indirect discrimination. Therefore, the complainant had to show 'at the relevant time' an apparently neutral provision, criterion or practice that put the complainant at a particular disadvantage compared with the comparators unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The issue before the Court was preliminary in nature and relates to the relevant time period in respect of which the Court should be taking all factors into account. Section 19(1) and (2) of the Employment Equality Act 1998 (as amended) provide that it should be a term of the contract under which an employee is employed that they shall at any time be entitled to

⁹⁵ E.g. Financial Emergency Measures in the Public Interest Act 2010, Social Welfare and Pensions Act 2010, Credit Institutions (Stabilisation) Act 2010 and Social Welfare Act 2010; <http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=87&m=a>, accessed 8 April 2011.

⁹⁶ *The Irish Times*, 6 April 2011; <http://www.irishtimes.com/newspaper/ireland/2011/0406/1224294012276.html>, accessed 8 April 2011.

⁹⁷ *European Gender Equality Law Review* no. 2/2010 p. 74.

⁹⁸ Determination Number EDA 113 (on appeal); <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations>, accessed 11 April 2011.

the same rate of remuneration for the work for which they are employed to do as their comparator who, ‘at that or any other relevant time’ is employed to do like work by the employer. This means that the period regarding which the comparison takes place is the three years prior to the date of claim and the three years which follow the date of claim. The Labour Court considered the statistical data over the three-year period prior to the date of claim. Showing that the comparator grade was at one stage in history gender biased does not meet the criteria required by Directive 2006/54/EC and the Employment Equality Acts 1998 – 2008. The bias or the impugned provision, criterion or practice must be discernable, either directly or indirectly at the time that the complaint is first made to the relevant tribunal or court. The Court in considering the figures could not find any basis to show that the grade was predominantly male. The Court was of the view that whilst it is clear that the gender composition of the respective grades, at that time, was predominantly male and female respectively, this situation had changed over the intervening years and was not the case at the time the complainant commenced her claim under the Act or in the three years prior to that time. The Court considered that any historic discrimination which may have existed has long since disappeared and it is for individuals as individuals to decide to enter psychiatric nursing or general nursing. The complainant failed to establish that any discrimination existed at the time the complaint was made.

Definition of ‘employee’

In two recent cases the definition of ‘employee’ was considered for the purposes of the Employment Equality Acts 1998–2008 where the definition of ‘employee’ was confirmed⁹⁹ to cover persons working under both a contract of service and a contract for services (independent contractors/self employed). The definition of ‘employee’ includes a person who works under a contract of employment and agrees personally to execute the work or service concerned. In another case a discrimination claim was considered to survive following the death of the complainant.¹⁰⁰ The complainant died some time after commencing proceedings for discriminatory treatment on the family status and race grounds. The Equality Tribunal relied on Section 7 of the Civil Liability Act 1961 which provides (subject to certain exceptions) that on the death of a person, all causes of action vested in him shall survive for the benefit of his estate. Section 7(2) of the Civil Liability Act 1961, however, provides that there shall be certain exclusions in relation to the survival of actions to include damages for pain and suffering or personal injury. The latter issue was avoided in this case, but the issue is problematic as compensation may be awarded for distress, i.e. stress/ psychiatric injury. In this writer’s opinion, the definition of employee should be amended in both the Irish legislation and also in Directive 2006/54/EC.

⁹⁹ *Moher v The Department of Enterprise, Trade and Innovation (formerly the Department of Enterprise, Trade and Employment)* DEC- E2010 – 259; <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-259-Full-Case-Report.html>, accessed 8 April 2011.

¹⁰⁰ *Ibidunni (deceased) (represented by his Widow Joan Lally) v Boston Scientific (Ireland) Ltd.* DEC- E2010-230; <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-230-Full-Case-Report.html>, accessed 8 April 2011.

Policy developments

Agreement for Sustaining Reconciliation Policies: facade measure or step forward on the road to reconciliation?

On 7 March 2011, the Minister of Labour, Maurizio Sacconi, together with all social parties, signed an Agreement for Sustaining Reconciliation Policies,¹⁰¹ following the Mid-Term Programme for increasing women's participation on the Labour Market, issued by the same Minister, together with the Minister for Equal Opportunities, Mara Carfagna, in December 2009.¹⁰² The Agreement refers to all measures already provided by Article 9 of Act no. 53/2000 to improve reconciliation, such as flexible working hours, part-time work, tele-working, the promotion of female employment through apprenticeship contracts or of *reinserimento* (an atypical job aimed at helping some 'weak' categories to re-enter the labour market) and long-term part-time work. The subscribers to the Agreement declared that they value family-friendly flexibility, to be mainly ensured by collective agreements at the workplace, and they committed themselves to improving all existing good practices. With this aim, they established a Technical Board, which is charged with verifying the possibility of putting into effect the good practices highlighted by the Observatory of the National Equality Adviser. The impact of the Agreement will be monitored in one year's time.

Although the agreement is not completely clear as regards both its stages of implementation and the actual relevance of the list of reconciliation measures provided, it could actually spur all the social parties to improve this kind of voluntary intervention. Moreover, the preamble to the agreement also refers to a possible cut in taxation and contributions to be enforced by agreements on productivity at the level of undertaking themselves, which is an interesting instrument, although it has to be clarified by subsequent administrative acts. The agreement also suggests paying attention to evaluation criteria for productivity, which should be decided so as to also take into account the increasing productivity of workers who benefit from reconciliation measures. This is obviously a central, but often unacknowledged, point in order to avoid a gender pay gap.

Legislative developments

Labour law: a multitask reform and its impact on gender equality

Act No. 183 of 4 November 2010 has now been enacted, which has great social impact on workers' rights. The Bill, presented by the Government, was re-approved by Parliament, after it was rejected by the President of the Republic, who sent it back to Parliament for further examination of the text so as to achieve a reasonable reform within a framework of clear guarantees and a better balance between legislation, collective agreements and individual contracts.¹⁰³

¹⁰¹ Agreement of 7 March 2011 between the Minister of Labour and Social Parties for Sustaining Reconciliation Policies, <http://www.lavoro.gov.it/NR/rdonlyres/2748948A-8B47-49BC-83C7-70B51AFB441A/0/20110308TESTOCONCILIAZIONEFIRMATO.pdf>, accessed 4 April 2011. See also: <http://www.italiannetwork.it/news.aspx?ln=it&id=25683>, accessed 4 April 2011.

¹⁰² Mid-Term Programme for increasing women's participation on the Labour Market, December 2009, http://www.lavoro.gov.it/Lavoro/PrimoPiano/20091201_Piano_Azione_Italia2020.htm, accessed 4 April 2011.

¹⁰³ Message of the President of the Republic to Parliament, published on <http://www.senato.it/service/PDF/PDFServer?tipo=BGT&id=472803>, accessed 4 April 2011. See also <http://www.ilsole24ore.org/>

In the first place, the Act provides for arbitration as a private and alternative form of justice, which may be accepted by the worker at the beginning of the working relationship. This provision has been strongly criticized by one of the major trade unions (*CGIL*) as at the moment of recruitment, when free will cannot yet be said to apply, the worker cannot give up the fundamental right of access to justice provided by Article 24 of the Constitution. This type of promotion of private justice would represent a dangerous attempt affecting all other workers' rights. This could especially affect women, who would probably suffer from the reform both as particularly weak contracting parties (considering that their unemployment percentage is particularly high) and as subjects with a higher risk of suffering unfair treatment, as they show to be very reluctant to bring discrimination cases to court through the regular free instruments of public justice. The enforcement of this rule has been excluded for disputes on unfair dismissals; nevertheless, the trade unions' criticism is applicable as regards all other disputes about working conditions.

Among other things, the Act includes a limit to the awarding of damages in cases of nullity of a fixed-term contract: this is a large and remarkable change which can have a certain impact on female employees as a high percentage of them are employed in precarious jobs. It has to be recalled here that Article 18 of Directive 2006/54 states that compensation or reparation may not be restricted by the fixing of a prior upper limit: in relation to discrimination cases, Italian legislation, therefore, fails to fulfil this rule of the directive. In particular, claims on unfair dismissal, including discriminatory dismissal, change of workplace, an illegal term of contract and several other types of claims, are submitted to a short period of limitation, which could serve as a deterrent from judicial action for workers with precarious positions hoping to be hired again. Moreover, a maximum amount of damages has been fixed for the infringement of the legislative provisions on fixed-term contracts and on autonomous collaboration (so-called project contracts).

Article 16 of the Act provides that the Public Administration can review the change from full-time to part-time work, which was allowed until 25 June 2008. The new Act repealed the right of the public employee to obtain part-time work and provided that the Public Administration can reject the request for part-time work if the new schedule hampers the organization's operations. So the revocation of part-time work is a concrete risk for many workers who comprise about 5 % of public employees, following the annual statistics of the State Accounting Department, and the large majority of these are women. Unions have criticized this provision as it tends to restrict this form of contract, while in their opinion flexibility in working hours should be increased, obviously also taking into account the organizational needs of the Public Administration. This provision, in any case, fails to appreciate the issue of reconciliation.

The Public Administration also dealt with some minor changes and they directly concern the issue of equal opportunities (Article 21 of the Act). Article 1 of Decree no. 165/2001 has been slightly strengthened where it says that the rules of public employment are aimed at the realization of equal opportunities between male and female workers and also at ensuring the absence of all discrimination and forms of physical and moral violence. The obligation, ex Article 7 of the same Decree, of the Public Administration to counteract gender discrimination was extended to discrimination, direct and indirect, based on all factors other than gender and in all phases and aspects of the working relationship. Article 57 on Equal Opportunities has

art/norme-e-tributi/2010-10-10/stretta-permessi-part-time-193900.shtml?uuid=AYz9kkYC, accessed 4 April 2011.

also been modified as to provide the reorganisation of different committees ruled by the collective agreements in the public sector to establish one single Committee of Guarantee of Equal Opportunities and wellbeing of workers and against discrimination. The Committee shall deal with equal opportunities and mobbing issues in collaboration with the National Equality Adviser. As regards its effectiveness it shall be noted that public managers are also negatively evaluated in case the Committee is not established, but no further funds have been allocated for its functioning. The choice to establish Committees on Equal Opportunities and Mobbing provided by collective agreements into a single body ruled by law is a move toward a combined approach to equal treatment and health and safety issues. This choice, on the one hand, can be considered as a useful simplification and an opportunity to join hands to ensure workers' wellbeing; on the other hand, it risks obliterating the specificity of gender issues.

The Decree aims at further and greater flexibility on the labour market and at restriction of the field of action of the judiciary, together with such a strong role for arbitration that it raises doubts about the constitutional inconsistency.

As regards general labour law, the intervention of the centre-right Government seems to be more and more inspired by the logic of 'exchanging' the increase of the percentage of employment for a 'loss' of workers' protection. These changes mainly affect the weaker part of the labour market, including women. In particular, the reduction of the average level of workers' protection, together with the serious economic crisis in Europe and the consequent further increase of unemployment, tend to marginalize all issues regarding people's fundamental rights to the advantage of the main issue of finding a job, whatever it is. So equal opportunities also run the risk of being perceived as luxury policies by the workers themselves.

No gender mainstreaming seems to have influenced the text.

Quotas: women's representation on Company Boards of Directors and Boards of Auditors

On 15 March the *Senato* (one of the two Chambers of Parliament) approved the Bill on the introduction of a quota system for the appointment of managing directors of listed companies presented by Lella Golfo (who is a centre-right Member of Parliament) together with Alessia Mosca (who is a centre-left Member of Parliament), as modified according to the amendments presented by the Government after strong opposition by the employers' association and bank associations.¹⁰⁴

The Bill, based on an Article of the Code of Merchant Banking, is aimed at ensuring a balance in gender representation on the Company Boards by providing that the statute of companies and state subsidiary companies shall stipulate that directors and auditors of one sex cannot be elected in a proportion which is higher than one third compared with the directors and auditors of the opposite sex. This rule shall be enforced for three mandates, but at first the percentage will be 20 % and it will come into force only at the first change of board after one year since the approval of the Law. In case of

¹⁰⁴ Bill N. S2482 approved by *Senato* on 15 March 2011, published on <http://www.ilsole24ore.com/art/notizie/2011-03-15/quote-rosa-aula-senato-174042.shtml?uuid=Aa5YolGD>, accessed 4 April 2011. Dossier of the Bill passed to the *Camera* for final approval, published on http://nuovo.camera.it/view/doc_viewer_full?url=http%3A//nuovo.camera.it/701%3Fleg%3D16%26file%3DFI0466_0&back_to=http%3A//nuovo.camera.it/126%3FPDL%3D2426-B%26leg%3D16%26tab%3D6%26stralcio%3D%26navette%3D, accessed 4 April 2011; http://www.adnkronos.com/IGN/Lavoro/Politiche/Aidda-stupore-su-richiesta-modifica-legge-quote-rosa-nei-Cda_311690597105.html, accessed 4 April 2011; http://nuovo.camera.it/view/doc_viewer_full?url=http%3A//nuovo.camera.it/701%3Fleg%3D16%26file%3DFI0466_0&back_to=http%3A//nuovo.camera.it/126%3FPDL%3D2426-B%26leg%3D16%26tab%3D6%26stralcio%3D%26navette%3D, accessed 4 April 2011.

infringement, the *Consob* (the National Commission for Listed Companies, which is an independent administrative authority that controls the trading market) is due to issue a warning to apply the quota system within four months and with a pecuniary sanction in case of non-compliance; if necessary, a second warning is issued that this should be accomplished within three months on penalty of the dissolution of the Company Board. The Statute can also substitute members of a Company Board so as to ensure the balanced participation of the two sexes as provided by law. Some complexities arise from the absence of a similar provision for the Board of Auditors. Moreover, for the latter the pecuniary sanctions in the case of infringements to the quota system are also lower than those provided for Boards of Directors.

This provision involves a remarkable change to our system, where women are scarcely represented in Company Boards of directors and auditors. Actually its implementation is largely assigned to the *Consob* (or to an analogous authority for state-owned companies), which will play a crucial role in the effectiveness of the quota system by the issue of regulations. Although the text is very ‘soft’ in that it provides for gradual implementation and is merely a temporary measure, it has been strongly criticized by some politicians from the centre-right parties and has met with some opposition from the business sector. The success of the joint effort by the two promoters of the Bill, which was approved with a very large majority (203 for, 14 against with 33 abstentions), also risks being defeated by the current crisis facing the Government as it still has to be approved by the other Chamber of Parliament.

Case law of national courts

The right to maternity leave for self-employed fathers examined by the Constitutional Court.

The Constitutional Court’s ruling no. 285 of 28 July 2010 found Article 70 of Decree no. 151/2001 on the Protection of Motherhood and Fatherhood to be consistent with the constitutional principles on equality and on the protection of maternity, although this provision does not include the right of the self-employed father to a maternity allowance for two months before the birth and three months after it, alternative to the mother.

The case was submitted to the Constitutional Court by the Court of Appeal of Florence, which had to render an opinion on the claim presented by the National Insurance Body of Lawyers against the judgment of the Tribunal of Florence of 29 May 2008 that had recognized this right. The judge of the second degree asked the Court whether the lack of an express extension of the right as provided by Article 70 is consistent with the principles expressed by the Constitutional Court itself in judgment no. 385/2005. In that case, the Constitutional Court extended the right to the allowance of Article 70 to the self-employed father charged with the official custody of the child, on the ground of a ‘modern’ view of the rules of Decree no. 151/2001, which is no longer exclusively aimed at the protection of working mothers but also at the protection of the physical and emotional interest of the child.

The Court ruled this lack of equalization to be fully consistent with constitutional principles, as the two situations are completely different, although they share the same aim of protection of the child. In particular, according to the constitutional judge, the analysis of Decree No. 151/2001, as interpreted by the Constitutional Court in the past, shows that equality between the two parents is limited to those rights for which the interest of the child has a prominent value, so that the position of the mother and that of the father are perfectly interchangeable and justify the enforcement of the same rule. On

the contrary, as regards the provisions that also aim to protect the mother's health, the two situations cannot be equalized. The rules of compulsory maternity leave clarify this issue. The father can benefit from the compulsory maternity leave only when the mother is dead or seriously ill, i.e. only if the protection of the mother is no longer required and the only interest to be protected is the child's.¹⁰⁵

Actually, the recent judgment of the Constitutional Court does not represent a step back; on the contrary, it has to be appreciated as finally clarifying the *ratio* of the rules regarding the protection of motherhood and fatherhood. In fact, although the broad interpretation of the Tribunal of Florence could positively be valued as an expression of the new awareness of the necessity of the participation of both parents in taking care of the child, it also gave rise to some complexities for the reference to the compulsory maternity leave as a free choice of one of the parents in a hypothetical employment relationship.

In fact, employed parents cannot choose who will benefit from the compulsory maternity leave. It is a mother's right, which can be claimed by the father in the listed cases only. Moreover, the comparison was not appropriate, as in Italy the rules on maternity leave are different for self-employed persons and for employees. The self-employed are entitled to the allowance even if they do not stop working; employed mothers are obliged to stop working and can benefit from the compulsory maternity leave together with the maternity allowance. That is why in the case at hand the judge of Florence could 'forget', in the first degree, that the compulsory maternity leave is also linked to the biological needs of both mother and child.

LATVIA – Kristīne Dupate

Legislative developments

Legislative developments on account of economic crisis affecting gender equality

There have been no legislative developments directly related to the implementation of EU gender equality law. However, there have been legislative developments on account of the economic crisis that also affect gender equality. On 16 June 2009 the Latvian Parliament (Saeima) adopted a 'crisis law' – the Law on the Payment of State Allowances during the Years 2009-2012.¹⁰⁶ It envisages a temporary decrease in the amount of social insurance allowances, inter alia maternity, paternity and childcare allowances. Normally, maternity and paternity allowances constitute more than the normal salary: 100 % of the social insurance contribution's salary without deduction of taxes or the gross salary. And childcare allowance is 70 % of the social insurance contribution's salary which corresponds to the nett salary.¹⁰⁷ The Law on the Payment of State Allowances during the years 2009-2012 envisages cuts in the amounts of maternity and paternity allowances in two ways, but in childcare allowance in one way. The said law provides for temporary cuts in the amount of maternity and paternity from 100 % of the social insurance contributions salary to 80 %. The childcare allowance remains the same: 70 % of the social insurance contribution's salary. However, there

¹⁰⁵ Constitutional Court of 28 July 2010, published on <http://www.giurcost.org/decisioni/index.html>, accessed 9 November 2010; Tribunal of Firenze of 29 May 2008, published in *Rivista Italiana di Diritto del lavoro* 2009, II, 363; Constitutional Court 14/10/2005 no. 385, published on <http://www.giurcost.org/decisioni/index.html>, accessed 4 April 2011.

¹⁰⁶ OG No. 100, 30 June 2009.

¹⁰⁷ The Law on Maternity and Sickness Insurance, OG No. 182, 23 November 1995.

are second ‘ceilings’ on the amount of the said allowances. Persons on maternity, paternity and childcare leave are entitled to a daily allowance in the amount of 100 % (from 80 % (maternity and paternity allowances) or 70 % (childcare allowance) of the social insurance contribution’s salary) to a maximum daily income of EUR 16 (LVL 11.51), and all income exceeding this sum entitles to 50 % of the normally awarded allowance only. Currently the news is such that the Government has adopted a decision on the extension of ‘crisis provisions’ until the end of 2014.¹⁰⁸ Although the temporary decrease in the amounts of social insurance allowances concerns all types (except old-age pensions), the cut in allowances concerning childbirth and childcare predominantly affects women, thus exposing them to the risk of poverty and negatively affecting the birth rate. In addition, politicians have never assessed such decisions from the perspective of gender equality.

Case law of national courts

In May 2009 the Supreme Court of Latvia referred to the ECJ for preliminary ruling case C-232/09 *Danosa v. LKB Līzings SIA*. In this case the ECJ had to rule on the following questions: (1) whether a member of the Board of Directors of a capital company must be regarded as a worker within the meaning of Directive 92/85 and (2) whether Article 10 of Directive 92/85 and the case law of the Court of Justice preclude Article 224(4) of the *Komerclikums* (the Commercial Law), which provides that the members of the Board of Directors of a capital company may be dismissed without any restrictions, in particular, in the case of a woman, irrespective of the fact that she is pregnant. The ECJ answered to the effect that: (1) a member of a capital company’s Board of Directors who carries out activities which are integral to a company under the direction or supervision of another body of a company and receives remuneration for that purpose is to be considered as having the status of a worker under Directive 92/85, and (2) Directive 92/85 precludes such a national provision (Article 224(4) of the Commercial Law) which allows the unrestricted dismissal of a ‘pregnant worker’ on account of her pregnancy, while Directives 76/207 and 2002/73 preclude the said national provision even if a worker does not enjoy the status of a ‘pregnant worker’ under Directive 92/85, because it does not restrict the dismissal of a pregnant worker on account of pregnancy and thus offers no protection against direct discrimination.¹⁰⁹

The Grand Chamber of the Supreme Court of Latvia delivered its final decision on 19 January 2011.¹¹⁰ It rejected *Danosa*’s claim in its entirety on the following grounds. Firstly, although according to the factual circumstances of the case the claimant had to be regarded as a worker, she did not have the status of a ‘pregnant worker’, because she had not informed her employer of her pregnancy in accordance with national law (Article 37(7) of the Labour Law). Consequently, protection under Directive 92/85 was not applicable to the present case. Secondly, the claimant never claimed sex discrimination, namely that she was removed from the post of Director of LKB Līzings on account of her pregnancy, thus the protection provided under Directives 76/207 and 2002/73 was not applicable to the present case.

It is true that the claimant had not informed her employer about her pregnancy and she had never claimed that she had been dismissed on the grounds of her pregnancy,

¹⁰⁸ Decision of 29 March 2011 of the Cabinet of Ministers, available in Latvian on <http://www.mk.gov.lv/lv/mk/tap/?pid=40211248&mode=mk&date=2011-03-29>, accessed 30 March 2011.

¹⁰⁹ Decision of the Court of Justice in case C-232/09 *Danosa v LKB Līzings SIA*.

¹¹⁰ Decision of the Supreme Court in case No. SKC-1/2011, 19 January 2011, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2011/1-11.pdf>, accessed 22 March 2011.

consequently the decision of the Grand Chamber of the Supreme Court has correctly applied EU law and the interpretation provided by the ECJ in this particular case. However, the fact generally remains that Article 224(4) of the Commercial Law runs contrary not only to the gender equality directives but also to the non-discrimination directives, because it does not require giving written notice of dismissal with the grounds stated to a pregnant worker and does not offer protection against discriminatory dismissal.

Discrimination by recruitment agency

On 3 October 2010 the Regional Court of Riga (a court of appeal) delivered a decision in a case on discrimination on the grounds of sex with regard to access to employment. The claimant was a customer of a private employment company offering recruitment services. She participated in the application procedure for the recruitment of a sales manager. After the first round in the procedure for the selection of candidates she received an e-mail stating that she was excluded from the second round in the selection procedure because ‘for the second round the employer has selected only male candidates because the employer considers a male candidate to be more appropriate for the post in question’.

The decision of the Regional Court of Riga overruled a previous decision of 28 April 2010 of the Riga city Zemgales District Court. On 28 April 2010 the Riga city Zemgales District Court decided that there was no direct discrimination against the claimant because she had never been in an employment relationship with the respondent. The decision of the Regional Court of Riga recognized that discrimination had occurred and awarded the claimant compensation for moral damage to the amount of EUR 426 (LVL 300).

The court of appeal upheld the interpretation of legal norms suggested by the claimant. Namely, that the principle of non-discrimination on the grounds of sex provided by the Labour Law is applicable to companies providing recruitment services as explicitly laid down by the Cabinet of Ministers’ Regulation No. 458.¹¹¹ The court of appeal also provided very good argumentation on factual circumstances demonstrating an attempt to apply a reversed burden of proof and even the principle of an objective investigation (as in an administrative process) by adding argumentation not provided by the claimant. The court in this decision stressed that the recruitment company had not submitted any evidence which would logically explain why in the final round only male candidates were included and why a male candidate would be more suitable for the post in question. The court also ruled on the amount of compensation for discrimination on the basis of criteria provided by the ECJ in the case of *Colson*. Namely, the decision on the amount of compensation was based on the considerations of just satisfaction and a deterrent effect. Overall, this decision demonstrates the progress of national courts in applying EU law in general and especially EU gender equality law. The respondent did not contest the decision and it has thus become effective.

¹¹¹ The Regulation of the Cabinet of Ministers No. 458 ‘The procedure on licensing and supervision of merchants – providers of recruitment services’ (*Ministru Kabineta 2007.gada 3.jūlija noteikumi Nr.458 ‘Komersantu – darbiekārtošanas pakalpojumu sniedzēju – licencēšanas un uzraudzības kārtība’*), OG No. 108, 6 July 2007.

Unequal pay on account of childcare leave

On 15 December 2010 the Grand Chamber of the Supreme Court¹¹² overruled its previous (incorrect) decision of 3 June 2009 in a case concerning unlawful dismissal after childcare leave and the right to compensation for work stoppage.¹¹³ The Grand Chamber held that the claimant was entitled to compensation for work stoppage calculated on the basis of her normal salary. The problem with the previous judgment lay in the fact that Article 75 of the Labour Law requires calculation of compensation of work stoppage on the basis of the statutory minimum wage, if a person has not received any salary during the previous 12 months. In practice, persons who qualify under this provision are those who were on long-term sick leave or childcare leave, as was true in the current case. The Grand Chamber took into account provisions of EU Law: Article 157 of the Treaty on the Functioning of the European Union (ex Article 141), Directive 75/117 and judgment of the CJ in case *Seymour-Smith* stating that the concept of pay within the meaning of equal pay comprises compensation for unfair dismissal,¹¹⁴ consequently compensation for work stoppage on account of unfair dismissal also constitutes pay within the meaning of the equal pay principle. Finally, the Supreme Court took into account the aspect of indirect discrimination against women in connection with childcare leave.

Amount of unemployment allowance after childcare leave

On 15 October 2010 the Supreme Court delivered a decision in a case on indirect discrimination with regard to the calculation of unemployment allowance after childcare leave.¹¹⁵

In Latvia, the right to statutory social insurance allowances and their amount depends on contributions made to the statutory social insurance budgets in the periods preceding the origination of the social risk (e.g. unemployment, sickness). During parental leave, the State insures the parent instead of himself/herself, but in a minimal amount, as if the parent earned a gross monthly salary of only EUR 70 (LVL 50). Consequently, if, for example, unemployment occurs in a particular period after this childcare leave, the person involved is entitled to an unemployment allowance in a minimal amount.

A particular claimant was fired two months after she returned to work after parental leave. Although her regular monthly earnings were EUR 1 422 (LVL 1 000) and normally her unemployment allowance should have been 50 % of her salary (EUR 711 or LVL 500), for the purposes of the calculation of unemployment allowance the six preceding months are taken into account and four months of those coincided with her parental leave, meaning that her unemployment allowance only amounted to EUR 512 (LVL 360).

The Supreme Court finally recognized indirect discrimination against women and thus overruled previous decisions of the lower courts. The Supreme Court found that Article 2¹ of the Law on Social Security¹¹⁶ prohibits indirect discrimination but the applicable norm is indirectly discriminatory. It decided to apply by analogy the system

¹¹² Decision of the Supreme Court (15 December 2010) in case No. SKC-694/2010, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2010/694-10.pdf>, accessed 1 April 2011.

¹¹³ Decision of the Supreme Court (3 July 2009) in case No. SCK-589/2009.

¹¹⁴ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1998] ECR I-05199.

¹¹⁵ OG No. 144, 21 September 1995.

¹¹⁶ Decision of the Supreme Court of Latvia in case No. SKA-480/2010, available in Latvia on http://www.tiesas.lv/files/AL/2010/10_2010/15_10_2010/AL_1510_AT_SKA-0480-2010.pdf, accessed 5 April 2011.

for the calculation of other types of allowances excluding indirect discrimination, or in other words requiring that the periods actually worked be taken into account for the purposes of the calculation of an allowance.

Comparable situations and ‘male’ and ‘female’ jobs

On 8 December 2010 the Supreme Court delivered a decision in a case on discrimination on the grounds of maternity.¹¹⁷ The claimant had been employed as a bookkeeper by ‘JD Mārketings’ Ltd. since 2 June 2003. From 2 March 2009 until 14 July 2009 she was on maternity leave. On 14 October 2009 ‘JD Mārketings’ Ltd. gave the claimant notice of dismissal as from 14 November 2009 on the ground that the undertaking was being reorganised and there would be a consequent decrease in employees. On 16 December 2009 ‘JD Mārketings’ Ltd. recognized that the notice of dismissal was void and it reinstated the claimant retroactively from 14 November 2009. Most probably the claimant was reinstated due to the fact that she had brought an action before the court on 13 November 2009 and due to the provision explicitly prohibiting the dismissal of an employee during the maternity period which lasts for at least one year after giving birth or for the whole period of breastfeeding. She claimed before the court that she had been discriminated against on the grounds of sex. This discrimination started on 10 August 2009 when the employer informed her that she would only be employed on a part-time basis ($\frac{1}{4}$ of the normal weekly working time or 10 hours a week) and that her salary would be reduced by 93 % (from EUR 939 (LVL 660) to EUR 64 (LVL 45)). However, in practice the workload remained the same. She claimed arrears of pay – the difference between the pay for the respective period – and compensation for moral damage on account of discrimination to the amount of EUR 7 114 (LVL 5 000).

Courts at all instances recognized the illegality of changing this employee’s employment conditions, including pay, and decided in favour of the claimant and ordered that her arrears in pay – the difference between EUR 939 and EUR 64 (LVL 660 and LVL 45) for the respective period – must be paid. The courts found that there had been no amendments to the employment agreement and thus the employment agreement had not been changed and the claimant was still entitled to a monthly salary of EUR 939 (LVL 660). However, all courts rejected the claim of discrimination.

The courts rejected the discrimination claim on the ground of the following argumentation. Firstly, it rejected the claim alleging a breach of the principle of non-discrimination on the grounds of sex based on the fact that only the claimant was subject to a pay cut of 93 % while the other workers were reduced by, on average, 13 %. The courts found that the claimant’s situation was incomparable with the other employees on account of the fact that other workers were employed in posts which corresponded more to males, in particular, the posts of loader, fitter, driver, storekeeper. The Supreme Court fully agreed with this finding of the lower courts!

Secondly, the claimant based the amount of compensation for moral damage on the fact that she had suffered from an almost total loss of the possibility to breastfeed her child. However, the courts found that she had not proven the causal link between the situation of discrimination after her return from maternity leave and the loss of the possibility to breastfeed.

Finally, the Supreme Court upheld the decisions of the lower court stating that there had been no breach of the principle of non-discrimination irrespective of the fact that

¹¹⁷ Decision of the Supreme Court of Latvia in case No. SKC-1336/2010, 8 December 2010, not published.

the employer, immediately after the maternity leave, had decreased the claimant's salary to a much greater extent than the salary of other employees and also irrespective of the fact that the employer had given her an illegal notice of dismissal during the maternity protection period.

This judgment demonstrates a lack of knowledge of gender equality law and, in particular, indicates the gender stereotype that judges have, resulting in their inability to identify discrimination. Such reasoning also runs contrary to the right to a fair trial. The Supreme Court is not well aware of the possibility to contest this decision on the basis of the state liability principle under EU law.

LIECHTENSTEIN – Nicole Mathé

Legislative developments

***Gender Equality Legislation*¹¹⁸**

In its session of 16 November 2010 the Government of Liechtenstein approved the report and the proposal for the amendment to the Gender Equality Act with regard to the implementation of Directives 2004/113/EC and 2006/54/EC into Liechtenstein's legislation. As it has not come into force yet, it cannot exactly be assessed to what extent these Directives have been correctly implemented into national law. The only thing that is clear at the moment is that the Government failed to transpose the above-mentioned Directives in time, meaning that the deadlines were exceeded in both cases. An important element in the future law concerns the equality of women and men outside the labour market: the Government will establish basic legislation for better integration of men and women in economic and social life.

Policy developments

***Family Council*¹¹⁹**

In its session of 25 January 2011 the Government of Liechtenstein decided to appoint a Family Council. It will consist of five experts from Liechtenstein, Switzerland, Austria and Germany.

The Family Council will meet at least twice a year and will provide advice to the Government's 'Family and Equal Opportunities' department concerning central questions relating to family politics. It will help to develop strategies in family politics. With the newly appointed Family Council, consisting of international experts, the Government wants to send out a clear signal to indicate their move towards modern and emancipated family politics.

***Father's Day 2012*¹²⁰**

To make men aware of their role as fathers, the idea of Father's Days has been promoted in Liechtenstein. They take place every two years, alternately in companies, kindergartens and schools. For one day, fathers can visit the 'workplace' of their child, and children can go to work with their father or another man who plays a large role in their life to gain insight into his professional world.

¹¹⁸ BuA No. 132/2010, <http://bua.gmg.biz/BuA/index.jsp>, accessed 11 March 2011.

¹¹⁹ Press release of the Information Office Liechtenstein, dated 26 January 2011.

¹²⁰ <http://www.mannsbilder.li/>, accessed 11 March 2011.

The care and education of children today is the task of both women and men. Men are very important for the development of children and young people as a role model and male figure of identification and to complete the female role. The Father's Day project will make men aware and support them in their role as fathers. Also, children will get to know their father in his professional role and be motivated to think about their own professional future.

From 2011 onwards the organisation will be moving towards an association to answer questions from men.

Training course in politics (Politiklehrgang) 2011¹²¹

On 25 February 2011, the eighth interregional training course in politics for women started and it will end on 19 November 2011 by awarding certificates. Registration was possible until 1 February 2011. The course will enable and encourage women to promote their ideas and potential in political committees and in public.

Miscellaneous

Equal Opportunities Prize¹²²

The Equal Opportunities Prize has been annually awarded by the Government for the last 10 years. The prize of EUR 14 500 (CHF 20 000) and the art object entitled 'Chancengleichheit' ('Equal opportunities') and two recognition prizes, each of EUR 3 500 (CHF 5000), honour and help to finance projects in the fields of gender equality, handicaps, migration and integration, social disadvantage, age and sexual orientation. Admitted candidates are enterprises, organisations, private initiatives or individuals. The winning project should soon be ready to start and should have a lasting effect.

The competition for the Equal Opportunities Prize 2011 was open until 14 February 2011. The prizes will be awarded on 14 March 2011 to the best projects to be supported.

Business Day for women 2011¹²³

The Business Day will take place for the fourth time in Vaduz on 17 May 2011 and will focus on the topic 'Courage – Success – Responsibility'. The Business Day brings together a large number of women occupying key positions. The economic forum analyses the specific needs of female managers and entrepreneurs and how they think and act. The Government of Liechtenstein is the supporting institution of this economic forum. It is meant for female managers, entrepreneurs and students, as well as for women and men from the world of economics. The Business Day offers the opportunity to network and the more people attend the more creative and innovative the exchange will be.

¹²¹ http://www.llv.li/pdf-llv-scrg-folder_politiklehrgang_2011_web-2.pdf, accessed 11 March 2011.

¹²² Press release of the Information Office Liechtenstein, dated 4 February 2011.

¹²³ Detailed information on the internet www.buinesstag.li, accessed 11 March 2011.

Legislative developments

Amendment of the Labour Code

On 12 April 2011 the Lithuanian Parliament adopted the amendment of Section 2(1) p. 4 of the Labour Code. The said Section establishes the general principle of non-discrimination, providing that the principle of equality of subjects irrespective of their gender, sexual orientation, race, national origin, language, origin, citizenship and social status, religion, *marital and family status*, age, opinions or views, political party or public organisation membership, and other factors unrelated to the employee's professional qualities shall be governing principles of labour law. The said amendment adds to this list another ground of prohibited discrimination – the intention to have a child (children). Apart from the possible problems of proper implementation the amendment is of a purely political and declaratory nature. First of all, the intention to have a child already falls under the concept of family and marital status – a ground which is already prohibited with respect to differentiation of employees. Secondly, Section 2(1) p. 4 of the Labour Code establishes the non-exhaustive list of prohibited grounds for discrimination and such ground would also be covered. Thirdly and lastly, there have been no evident discriminatory practices which would require this action by the legislator.

Legislative proposal to promote the policy of Equal Opportunities in the workplace

In early November 2010 a social democrat Member of Parliament, Ausrine Marija Pavilionienė, proposed the Law on the Implementation of the Policy of Equal Opportunities in the Workplace.¹²⁴ The Law aims to introduce a duty for an employer to issue a policy document in accordance with a sample form annexed to the Law where the declarations/duties/rules of behaviour for the employer will be described. The Law would address all grounds of discrimination under the existing Law on Equal Opportunities, including gender discrimination. The draft Law deserved a great deal of criticism as far as the systematic approach and the quality of the proposed text were concerned. The EU Law Department under the Ministry of Justice, together with the Parliament's Legal Department, rightly drew attention to the fact that the draft Law basically introduces only one novelty – the necessity for an employer to declare his/her anti-discrimination policy in writing and to make employees familiar with this document. The Member of Parliament rightly noticed the lack of knowledge and the lack of enforcement concerning equality policies at workplaces but the suggested instrument cannot be regarded as being sufficiently effective. Since Lithuanian equality legislation only mentions the main obligations of an employer and there is no established interpretation and practice, a detailed breakdown of the employer's duties and the employee's rights is essential. However, the present document merely reiterates the already existing interpretation and repeats existing rules using instructive language. It is doubtful that the very formal declaration of an employer's duties in the document issued by the employer himself could result in a significant change in practice.

¹²⁴ Draft Law on the Implementation of the Policy of Equal Opportunities in the Workplace no. XIP-2659. See http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=385916&p_query=&p_tr2=, accessed 8 February 2011.

Equality bodies decisions/opinions

Complaints Statistics at Equal Opportunities Ombudsman

The Office of the Equal Opportunities Ombudsman announced that in 2010 the majority of received complaints were related to discrimination based on sex. It investigated 158 cases in 2010 compared to 168 investigations in the year 2009. A large number of cases concerned discrimination in employment (55 cases out of 158). The gender-related cases were highly popular (40 complaints) but its number had slightly decreased (it was 44 a year before). The new ground of 'social status' is becoming more and more popular – 30 complaints were received in 2010. Discrimination based on age was alleged in 25 cases, discrimination against disabled persons in 22, and discrimination on the ground of national origin in 21 cases. Discrimination based on sexual orientation was examined three times, discrimination against ethnic group twice.

Miscellaneous

The impact of Danosa in Lithuania

On 11 November 2010 the European Court of Justice announced its judgment in the Latvian case C-232/09 *Dita Danosa*. The Court held that a member of a capital company's Board of Directors who provides services to that company and is an integral part of it must be regarded as having the status of worker under Council Directive 92/85/EEC. Consequently, Article 10 of Directive 92/85 precludes national legislation which permits a pregnant member of a capital company's Board of Directors to be dismissed from that post without restriction before the term of office expires. The case is of crucial importance for the situation in Lithuania, since the national courts consider the head of the company (as well as the members of the Board) as having a dual legal status even if a contract of employment has been concluded.¹²⁵ In all cases the competent body of the company can dismiss the head of the company and change the members of the Board without any restrictions – the absolute prohibition against dismissing pregnant women provided by Section 132(1) of the Labour Code¹²⁶ is not applicable to them.¹²⁷ The absolute power to dismiss the head of the company or members of the Board without reason, in the way it is perceived today by the courts, is not in conformity with Article 10 of the Directive. Secondly, national legislation refers to the medical certificate confirming the pregnancy as the only way to inform an employer of the pregnancy. The arguments of the ECJ (paragraphs 55-56 of the judgment) illustrate that the formal document will no longer be the sole method to prove the pregnancy and serve as a ground for application of statutory guarantees to pregnant women.

¹²⁵ See, in particular, the ruling of 20 November 2009 of the Lithuanian Supreme Court in case no. 3K-7-444.

¹²⁶ Article 132(1) of the Labour Code provides that an employment contract may not be terminated with a pregnant woman from the day on which her employer receives a medical certificate confirming pregnancy, and for another month after her maternity leave, except for the cases specified in Articles 136 (1) and (2) of this Code.

¹²⁷ See, in particular, the Decision of 8 February 2011 of Vilnius District Court (second instance) in case no. 2A-1260-520/2010.

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 perform a detailed analysis of the results of the measure before any reform. The analysis is announced for 2012, which is the year that Directive 2010/18/EU implementing the revised Framework Agreement on parental leave has to be implemented into national law. A reduction of the duration of parental leave by the implementing law could risk to result in a reduction of the protection afforded to workers in the field of parental leave.

The *Comité du Travail Féminin* (Women's Labour Committee) adopted an opinion on Directive 2010/18/EU in March 2011. This advisory body consists of representatives of the National Council of Women, employers' and workers' organisations and ministries. It is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. In its opinion, the Committee does not oppose the reduction of parental leave from six to four months, on the condition that the Government considers adapting the allowance for parental leave and introducing more flexibility into the procedures. Regarding the allowance, the Committee suggests making it a percentage of the salary, rather than the current fixed amount. It also suggests allowing workers to take parental leave by dividing the total duration into various shorter periods.

Gender quotas in the private sector

On 22 January 2011, the Minister of Equal Opportunities announced that she does not exclude legal quotas in the private sector. At first, she wants employers to put efforts into establishing gender-mixed teams until 2014.

Legislative developments

Goods and services

On 21 April 2010, the Government introduced Bill No. 6127, which aims to include the content of media and advertising as well as education within the scope of the law that implemented Directive 2004/113/EC.

The purpose of the Bill is to eliminate the current hierarchy of protection. Indeed, currently the protection against discrimination in the field of access to and the supply of goods and services does not include media, advertising and education regarding gender. However, protection against discrimination on the other five grounds does include these areas.

Equality body decisions/opinions

The *Centre pour l'Égalité de Traitement* or *CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET published its annual report covering the period from 1 November 2009 to 31 December 2010. During that period it registered 139 new claims. 18 claims introduced before were still pending. 90 out of 157 claims were filed by men. 13 claims were about gender discrimination.

Policy developments

The main policy developments related to gender equality are described in the documents of the Ministry of Labour and Social Politics (as the gender equality unit is part of this Ministry).

In recent months, several documents dealing with the issue of gender equality have been adopted:

1. In the Strategic plan of the Ministry of Labour and Social Politics (2011-2013)¹²⁸ the programme 'Equal possibilities' is designed to address discrimination on the ground of sex. This programme envisages changes in legislation (harmonisation with the EU equality directives), activities related to capacity building of the existing institutions (commissions on gender equality in the Ministries and at the local level) and activities directed toward practical changes in the field of employment.
2. In the Operational Plan for active programmes and measures for employment (2011)¹²⁹ several programmes are designed to address the unemployment of women (programme for self-employment, programme for long-term unemployed women, programme for employment of female victims of domestic violence).
3. In the National Strategy for the reduction of poverty and social exclusion (2010-2020) a specific area is defined under the title: Equal opportunities between men and women.¹³⁰

All these programmes are designed on the basis of the National Plan of action for gender equality (NAP) 2007-2012.¹³¹ A great concern is the fact that there is no information on implementation of the NAP, of the operational plans for implementation of the NAP for specific years, or of any other strategic documents or plans of action based on the NAP. There are no governmental reports on the implementation of the strategies and action plans and there are no documents on evaluation and self-evaluation of the results of the activities. The NGO *Akcija zdruzenska* has produced a comprehensive monitoring report of the policies on gender equality, emphasising several issues:¹³²

1. Lack of implementation of the NAP
2. Failure of the institutions and gender equality mechanisms¹³³
3. Absence of sexual orientation as ground for discrimination in legislation
4. Inefficient policies for employment of women
5. Insufficient incorporation of the gender perspective in strategic documents

¹²⁸ <http://www.mtsp.gov.mk/WBStorage/Files/strateski0.pdf>, accessed 4 July 2011.

¹²⁹ http://www.mtsp.gov.mk/WBStorage/Files/OP_2011_01_02_2011.pdf, accessed 4 July 2011.

¹³⁰ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 4 July 2011.

¹³¹ <http://www.mtsp.gov.mk/WBStorage/Files/NPARR-finalen%20dokument.pdf>, accessed 4 July 2011.

¹³² Report on monitoring of policies on gender equality in the Republic of Macedonia, *Akcija zdruzenska*, 2010; <http://www.zdruzenska.org.mk/documents/552/MONITORING%20final%20CIRa.pdf>, accessed 4 July 2011.

¹³³ There is lack of coordination between institutions at local and central level, lack of reports from the gender equality coordinators in the ministries, lack of gender-based analyses in various ministries and state institutions, insufficient capacities of different institutions responsible for gender issues. The gender equality mechanisms have not managed to encourage claims and court procedures because of discrimination.

6. Lack of gender perspective in education
7. Non-functional plan of action for Roma women¹³⁴
8. Problems in the functioning of the parliamentary Commission on Gender Equality.¹³⁵

There are no institutional policies on gender equality and there is a lack of knowledge on the role that different institutions should play in trying to achieve gender equality. The various institutions responsible for monitoring (inspectors, commissions and specialized bodies) are not specifically targeting women or discriminatory practices related to gender. These cases of discrimination are not recognized by institutions and victims of discrimination are usually left to fight discrimination by themselves. Proactive policy and positive action are almost absent from the work of state bodies.¹³⁶

In recent years, it has become a trend in Macedonia to prepare action plans for different issues. Probably the most covered field (because of the Decade for Roma People) is the discrimination of Roma people and specifically Roma women. There are many action plans developed by NGOs and there is a general plan of action for Roma women prepared by the Government. The basic problem with this plan (as well as with many others) is that an insufficient amount of money is awarded for the implementation of the plan and the stakeholders have a very vague responsibility. There are no reports on the effects of the planned activities or visible results that could be related to the planned actions.

Even more alarming is the situation that the same goals are envisaged again and again in different documents. For example, the activities related to employment plan to achieve a 38 % employment rate for women. This same aim is mentioned in all strategic documents¹³⁷ and plans of action since 2006. However, according to the official statistical data the employment rate for women is still very low (29 %) compared to the employment rate for men (47 %).¹³⁸ An additional curiosity is the fact that at the time that these strategies and plans started to be developed, the employment rate for women was higher (30 %).¹³⁹

At the same time, there are some strategic documents in which women would be expected to be mentioned (e.g. the national programme for development of social

¹³⁴ The same activities are re-planned without taking account of the previous periods. In the study entitled 'Even if I complain there is no effect' it is very clearly stated that there is no visible progress as a result of the planned activities (<http://www.mtsp.gov.mk/WBStorage/Files/DA%20SE%20ZALAM%20Makedonski.pdf>, accessed 4 July 2011).

¹³⁵ The Commission is not functioning at all. It met only twice in 2010 without any substantial debates or activities related to gender issues. None of the very important laws (e.g. the Labour law, Law on pension, educational laws) passed through this Commission in the process of the parliamentary discussions. Also, the issues of general importance (such as the absolute absence of female mayors in local self-government elections, or the anti-abortion campaign of the Government) did not provoke any interest or discussions in the Commission. The composition of the Commission is gender unbalanced (all members are women).

¹³⁶ Lack of coordination between institutions at local and central level, lack of reports from the gender equality coordinators in the ministries, lack of gender-based analyses in various ministries and state institutions, insufficient capacities of different institutions responsible for gender issues. The gender equality mechanisms have not managed to encourage claims and court procedures because of discrimination.

¹³⁷ NAP (2007-2012); Strategic plan 2011-2013, <http://www.mtsp.gov.mk/WBStorage/Files/strateski0.pdf>, accessed 4 July 2011.

¹³⁸ Women and Men in Macedonia, State Statistical office, 2010.

¹³⁹ <http://undp.gordsys.net/index.php/mk/knowledgebase?task=viewcategory&catid=33>, accessed 4 July 2011.

protection 2011-2021); however, women are not a specific target of any of the proposed activities.¹⁴⁰

The policies on affirmative action or positive measures directed toward achieving equality between women and men only exist in the Electoral Law. As a result, the only positive change could be seen in the number of female Members of Parliament, which sees constant progress and is now 39 (32.5 %).¹⁴¹ There have even been open statements against extending the possible use of affirmative action.

The Ministry of Labour and Social Politics, as part of the programme for the promotion of gender responsive budgeting as an instrument for the advancement of gender equality, continues with public debates. These debates have not yet produced any visible effect.¹⁴²

The priorities of the Government also include domestic violence and support for the victims of domestic violence.¹⁴³

Legislative developments

The main legal development is the adoption and entry into force of the Law on Prevention and Protection against Discrimination.

According to this Law, discrimination on the basis of gender is forbidden in all fields of public life; direct and indirect discrimination are forbidden as well as harassment (including sexual harassment). Affirmative measures are recognized as lawful until actual equality is achieved. Also, protective mechanisms are recognized for specific vulnerable groups, such as pregnant women and mothers, as well as positive measures aimed to achieve balance in the participation of women and men.¹⁴⁴

In the regulations of the Commission for Protection against Discrimination, gender balance is promoted as a criterion for the appointment of the members of the commission. However, the procedure and criteria of appointment have not managed to ensure the independence of the Commission, which was disputed from the very beginning.¹⁴⁵

Equality body decisions/opinions

The Agent on equal opportunities has been formally appointed; however, until now there have not been any initiatives brought before the equality unit in the Ministry of Labour and Social Politics.

No claims based on discrimination on the ground of sex were submitted to the Ombudsperson's office in 2010. Although the Ombudsperson covers activities related to the discrimination of women,¹⁴⁶ women and gender equality are not mentioned in

¹⁴⁰ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 4 July 2011.

¹⁴¹ Achieving gender equality in Macedonia, Centre for Research and Policy Making, 2009.

¹⁴² <http://www.mtsp.gov.mk/?ItemID=A7FB17D3CDEAF840AE7F52E5453C11B5>, 4 July 2011.

¹⁴³ The brochure on possibilities for economic strengthening of women - victims of domestic violence, UNDP, Skopje, 2010.

¹⁴⁴ It is not clear what kind of participation this law refers to. We can probably assume the broader meaning.

¹⁴⁵ http://daily.mk/cluster/0f9b5feed6ab9104f296f1c3daf4a475/kavga_vo_sobraniето_za_sostavot_na_komisijata_za_zashtita_od_diskriminacija, accessed 4 July 2011.

¹⁴⁶ Ombudsman, Work Programme 2010.

his/her annual report.¹⁴⁷ Moreover, women and gender equality are not mentioned in his/her Work Programme for 2011.¹⁴⁸

There were no reactions from either of these bodies related to gender issues in 2010.

The Commission for Protection against Discrimination was established at the beginning of 2011; however, it is still not working.

Miscellaneous

The main activities at the end of 2010 and first half of 2011 are marked by work on the capacity building of the commissions on gender equality at local level and initiatives in the fight against mobbing and domestic violence. There have been several trainings for the members of commissions and a number of capacity-building workshops.

Mobbing

Since 2007, mobbing has been identified as a widespread problem related to work, both in the public and the private sector. In most of the studies on the issue of mobbing, it was stressed that mobbing is much more linked to women than to men and much more to uneducated and younger than to educated and older women.

At the end of 2009, the Labour Law was changed and mobbing was introduced as a separate article. Mobbing is defined as specific psychological harassment in the workplace.¹⁴⁹ In recent months, trade unions have increased their activities in this area and have taken a proactive attitude in support of the victims of mobbing as well as in the preparation of easier complaints procedures.

All trade unions are involved in the development of support measures and the preparation to simplify the procedures for women to submit cases of mobbing to the courts. However, the media have given much information¹⁵⁰ on the cases submitted to court, but no information whatsoever on the progress in these cases or any court decisions (neither in the media nor on the official websites of the courts).

1. The Association of trade unions¹⁵¹ initiated the adoption of the special law on mobbing, established the anti-mobbing network, opened a support office for victims of mobbing, and promoted training on mobbing.
2. The Union of independent and autonomous trade unions of Macedonia¹⁵² opened an SOS telephone line for the reporting of cases of mobbing (in one year 780 cases were reported through this line), five support offices for victims of mobbing were opened in five towns in Macedonia, and several trainings were held.

Political participation of women

The main political development is connected with local self-government. However, the results are very modest and unsystematic. The last study of 17 political parties, done by

¹⁴⁷ http://www.ombudsman.mk/comp_includes/webdata/documents/Izvestaj%202010-MK.pdf, accessed 4 July 2011.

¹⁴⁸ http://www.ombudsman.mk/comp_includes/webdata/documents/Programa%20za%20rabota%202011-mk.pdf, accessed 4 July 2011.

¹⁴⁹ Article 9-a, Labour Law.

¹⁵⁰ <http://www.makdenes.org/content/article/1928553.html>; <http://www.vreme.com.mk/DesktopDefault.aspx?tabindex=11&tabid=1&EditionID=1886&ArticleID=128417>;; accessed 4 July 2011.

¹⁵¹ http://www.ssm.org.mk/index.php?option=com_content&view=article&id=614%3Aobuka-na-antimobing-sovetnici&catid=49%3Ahealth&Itemid=146&lang=mk, accessed 4 July 2011.

¹⁵² <http://unasmpp.weebly.com/1052108610731073108010851075mobbing.html>, accessed 4 July 2011.

the NGO *Antiko* and presented in February 2011,¹⁵³ claims that there have been no visible positive changes concerning the political engagement of women and, even worse, in some fields there has been stagnation and setback. Despite the fact that in 15 out of 17 political parties there are units on gender or women, none of these units receives any specific financial or other support.

National Council on Gender Equality

One of the largest networks, the ‘Association of women organisations’, was renamed at the beginning of 2011 as ‘National council on gender equality’.¹⁵⁴

MALTA – Peter G. Xuereb

Policy developments

The presence of women on company boards

While some debate proceeds over this issue, there has been no further reaction from the Government. The Government’s position remains that while employers are encouraged to ensure female participation in company boards, no positive measures are to be put in place as a matter of obligation.

Legislative developments

Proposal on gender identity

A Member of Parliament from the opposition party (Labour Party), the Hon. Evarist Bartolo, has presented a private member’s bill on Gender Identity.¹⁵⁵ The Bill, if it became law, would grant new rights to transgender persons. In doing so, it would address some of the difficulties faced by transgender persons in having their official documents altered. The Bill proposes the creation of a Transgender Persons Register to be held at the Public Registry Office. The Director of the Public Registry would also be required to maintain other registers and books, which, however, will be guarded by confidentiality rules. On submission of appropriate proof, the Director would be obliged to promptly alter the act of birth of the applicant to replace the old statement of gender with the new one and the old recorded name with the new name to be borne by the applicant. The entry in the register of acts of birth relative to the applicant would be marked with the word ‘Transgender’. It is provided in the Bill that as from the date of the entry, the applicant shall be considered for all legal purposes as belonging to the gender indicated in the register. Further, the entry in the register shall in no way affect the applicant’s rights and obligations arising out of parenthood or out of the relationship between the applicant and his or her parents, or the succession rights of the applicant. Provision is made for the issue of a new Identity Card. It is clear that the effect of this Bill, if passed, will be to provide a clear right to marry in accordance with the new declaration of gender. A public debate on the right to marry for transgender persons has emerged from time to time, as the various stages of the judicial proceedings in the case of Ms. Joanne Cassar have been reported in the press. This case is still proceeding and is commented upon below.

¹⁵³ ‘Gender analysis of political parties’ programmes’.

¹⁵⁴ <http://www.sozm.org.mk/index.php>, accessed 4 July 2011.

¹⁵⁵ See http://parlament.mt/motion11_198, accessed 7 April 2011. See also <http://www.maltagayrights.net/PressConfDec10>, accessed 8 April 2011, including links to press coverage.

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 initiate. The NCPE held its seventh annual conference at the end of March 2011, where it presented its seventh annual report: the NCPE Annual Report 2010. The Report has not yet been published on the NCPE's website, and it will be reviewed in the next edition of this Review. As is usual with these annual reports, the 2010 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, 2010). However, as has been the case in the report for the previous two years, a summary of some 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.¹⁵⁶

Case law of national courts

The Joanne Cassar case is ongoing. In 2007, a judge ruled that Joanne Cassar, who had had a sex change operation, was now entitled to marry a male partner. However, in 2008 the Director of the Public Registry appealed on public policy grounds, arguing that in Maltese civil law 'marriage' meant a union between a male and a female, and won. The case is now before the Constitutional Court. The case has been deferred until the end of May for judgment.¹⁵⁷

Miscellaneous

There have been top-level changes at the NCPE, which now has a new Commissioner and a new chief executive officer. At the seventh Annual Conference held at the end of March, the new CEO, Dr. Romina Bartolo, gave an extensive overview of the initiatives and measures carried out by the NCPE in 2010. Dr. Bartolo highlighted the implementation of a PROGRESS-funded project entitled *Strengthening Equality beyond Legislation*. She also highlighted another project, *ESF 3.47 – Unlocking the Female Potential*, a project intended to spur companies to upgrade their family-friendly measures in the interests of a better work-life balance for both male and female employees. In this connection also, nine organisations/entities were awarded the 'Equality Mark', which Dr. Bartolo said had become a coveted certification among employers who compete for qualified workers while respecting gender equality. This brings the number of organisations awarded the mark to date up to 17.¹⁵⁸

¹⁵⁶ The annual report for 2010 can be accessed on the NCPE website on www.equality.gov.mt, accessed 7 April 2011 (not yet available at the time of writing).

¹⁵⁷ See 'Joanne Cassar files submissions in sex change case', the Times of Malta, 15 February 2011, on <http://www.timesofmalta.com/articles/view/20110215/local/joanne-cassar-files-submissions-in-sex-change-case>, accessed 7 April 2011. See also 'Transsexual to resume fight for right to marry', in the Times of Malta, 11 January 2011, on <http://www.timesofmalta.com/articles/view/20110111/local/transsexual-to-resume-fight-for-right-to-marry>, accessed 8 April 2011.

¹⁵⁸ NCPE Press Release, <https://secure2.gov.mt/socialpolicy/download.aspx?id=1576> for further information, accessed 7 April 2011.

Political developments

Abolition of positive action policies

The Coalition Agreement that was concluded in 2010 between the two political parties participating in the new Dutch Government, i.e. the Liberals (*VVD*) and the Christian Democrats (*CDA*), explicitly provides that the Government will terminate all activities and programmes concerning positive action and diversity policies on the grounds of race/ethnicity and gender. Selection of personnel has to take place on the basis of the quality of the candidates.¹⁵⁹ This promise is also included in the so-called ‘*Gedoogakkoord*’ (the agreement to support the Government) which was concluded between the coalition partners, who have a minority in Parliament, and the Party for Freedom (*PVV*) of Mr Wilders.¹⁶⁰

Under equal treatment legislation, the exception that there is no discrimination if the unequal treatment is the result of positive action programmes only applies in the case of race/ethnicity, gender and disability. It is unclear whether the Government intends to amend this legislation and remove this exception, at least in the case of gender and race/ethnicity (the Coalition Agreement does not mention disability). It has become rather doubtful whether the wish, inter alia of the Equal Treatment Commission and many legal experts, to extend this exception to all other grounds, will be honoured by this Government. This change of policy will probably have the effect that in the filling of vacancies for public servants, policies explicitly inviting women and people from minorities to respond and giving them preference if they are underrepresented, provided that they are qualified for the job, will be abolished. In the private sector, such programmes and policies are scarce anyway.

The new Government is a minority government, and for its political survival depends on the Freedom Party (*PVV*). The leader of this party, Mr Wilders, has frequently stated that he is fiercely opposed to the application of Article 1 of the Dutch Constitution (the general equal treatment and non-discrimination clause) and that he is not in favour of the Equal Treatment Commission. Although the agreement between the coalition of *CDA/VVD* and the *PVV* does not mention this issue, it is to be expected that this Government will not be much in favour of any extension of the protection against discrimination on any ground.

Prohibition of face-covering veils and prohibition against wearing a headscarf in police and judiciary

In the same document, the new Government promises to propose a bill prohibiting face-covering veils and prohibiting wearing a headscarf in the police and the judiciary.

This promise is also included in the so-called ‘*Gedoogakkoord*’ (the agreement to support the Government) between the coalition partners and the Party for Freedom (*PVV*).¹⁶¹ Until now, no concrete proposals to this end have been submitted to

¹⁵⁹ The clause in the agreement is (in Dutch): ‘*Het kabinet beëindigt het diversiteits/voorkeursbeleid op basis van geslacht en etnische herkomst. Selectie moet plaatsvinden op basis van kwaliteit*’. See ‘*Regeerakkoord*’, p. 26, under the heading ‘*integratie*’ (integration). The text may be found on: <http://www.rijksoverheid.nl/regering/het-kabinet/regeerakkoord/immigratie>, accessed 18 October 2010.

¹⁶⁰ ‘*Gedoogakkoord*’, p. 9. Published on: <http://www.kabinetformatie2010.nl/dsc?c=getobject&s=obj&objectid=127492>, accessed 13 May 2011.

¹⁶¹ ‘*Gedoogakkoord*’, p. 9. Published on: <http://www.kabinetformatie2010.nl/dsc?c=getobject&s=obj&objectid=127492>, accessed 13 May 2011.

Parliament by the new Government. In fact, the police and the judiciary already have their own dress codes which prohibit explicit signs of any kind of ‘conviction’. It is difficult to see what a prohibition against wearing the Islamic headscarf would add to this. Earlier proposals by the *PVV* and the *VVD* to prohibit the burqa have raised a lot of discussion, but have not led to legislation.¹⁶² In 2008, it was announced by the Government that they wanted to prohibit face-covering materials in public transport and education.¹⁶³ The difference between earlier proposals and the announcement of the Government in the Coalition Agreement is that they now want a general prohibition of face-covering veils and that they explicitly mention the burqa as an example. Most probably, such a general prohibition would run against international non-discrimination standards and the freedom of religion.

Extension of paternal leave for fathers of newborn babies

In the Netherlands, fathers of newborn babies have the legal right to stay at home for two days after the birth. Employers have to pay their full salary for those two days. In some collective agreements this right is extended by a couple of days. On average, fathers have a right to take three days of paid ‘paternal leave’. In 2007, Members of Parliament from the Green Left Party (*GroenLinks*) initiated a Bill in which they proposed to extend this leave to two weeks of paid leave for all ‘partners’ of the mother (including married, registered or lesbian partners).¹⁶⁴ The leave would have to be taken within the first four weeks after the baby arrives home from the hospital or birth centre. Employers were supposed to pay for this parental leave. After extensive discussions in Parliament¹⁶⁵ and after strong opposition from the (then) Minister of Social Affairs, the Bill was rejected in February 2010, mainly because this extension was considered to be too costly at a time of economic crisis.¹⁶⁶ On 25 February 2011, the Green Left Party again published a proposal for paid paternal leave for ‘fathers’ of newborn babies (‘fathers’ here including married, registered or lesbian partners).¹⁶⁷ The new proposal suggested only one week of paid leave. As regards payment, it is proposed to give fathers a right to a social security benefit (of 100 % of their salary for this week) which will be paid from unemployment benefits funds. The costs for the employers will decrease (they no longer have to pay for the average three days’ leave), and although the burden on the unemployment benefits fund will increase, only when these funds run out of resources, a slight increase in the premiums (0.009 %) would have to be paid (to be shared between employers and employees). The Explanatory Memorandum to the Bill mentions the amount of EUR 60 000 000 as a net annual increase in the costs of paternal leave. The new proposal offers less paid leave (only one week), but it is more likely that it will be accepted, since the costs for employers will not considerably increase.

¹⁶² See *Kamerstukken II* 2006-2007, 31 108, Nos 1-4 (proposal by Mr Wilders and Mr Fritsma, *PVV*); *Kamerstukken II* 2007-2008, 31 331, Nos 1-3 (proposal by Mr Kamp, *VVD*).

¹⁶³ *Kamerstukken II* 2007-2008, 31200, No. 4 (response of the Government)

¹⁶⁴ See *Kamerstukken II* 2006-2007, 31 071, Nos 1-3.

¹⁶⁵ See *Handelingen Tweede Kamer*, 24 June and 26 June 2008 (page TK 100-7133 and page TK 102-7314) and *Handelingen Tweede Kamer* 17 February 2010 (page TK 56-5088).

¹⁶⁶ See *Handelingen Tweede Kamer*, 18 February 2010, page TK 57-5239.

¹⁶⁷ The Bill was sent to the Council of State (*Raad van State*), which is a first stage of submitting a Bill to Parliament. The text of the new Bill is available on the website of the Green Left Party: <http://standpunten.groenlinks.nl/vaderschapverlof>, accessed 16 March 2011.

The proposal is in line with the wishes of the European Parliament, who voted on 20 October 2010 in favour of extending the paternal leave for fathers of newborn babies to two weeks of paid leave.¹⁶⁸

Case law of national courts / Equality body decisions/opinions

In the last months of 2010 and the first quarter of 2011, several interesting cases have been decided by the courts and the Equal Treatment Commission (ETC).¹⁶⁹ We here describe some of the most exceptional ones.

KLM stewardess dismissed because of close-cropped hair¹⁷⁰

The Cantonal Court of Haarlem decided that Dutch airline company KLM could lawfully dismiss a stewardess because she (inter alia) wore her hair in a very close-cropped style. Apart from this, the stewardess was also required to take off her abundant jewellery, to remove her ear piercing and to cover a tattoo on her hand. Over the past years the stewardess was asked several times to conform to the KLM dress code in all respects. She had not obeyed these rules just as many times.

The Court stated that an employer has the right to impose a uniform dress code, including requirements as regards the physical appearance of their personnel, provided that these requirements stay within a certain limit of what can reasonably and fairly be asked of employees. In that regard fundamental norms as regards individual personal freedoms must also be taken into account. In this case, there was no breach of any such norms, since the stewardess knew in advance that working for KLM would imply that she could not dress the way she liked. It is in the KLM's interest to employ personnel that make a reliable and solid impression on their customers. As for the hairstyle code, the stewardess complained that men working as KLM stewards could shave their heads, while she was not allowed to do so. In this regard, the Court stated that 'although the requirement to wear her hair longer than one centimetre may have consequences for her in her free time, for women to shave their heads is not generally accepted or usual enough in society not to see this hairstyle as extravagant.' In other words: since few women cut their hair this short, the practice may be seen as extravagant and therefore be prohibited by KLM. The case relates to many other court cases concerning dress codes which are imposed by employers and – when not observed by the employee – may lead to sanctions, or even to a dismissal. Often, this has something to do with religion (headscarves, crosses), but as can be seen from this case, such codes can also have consequences for people who are seen as 'different' from what is considered 'normal' in mainstream society. Although the 'unequal treatment argument' was presented by the stewardess, the Court did not really deal with that aspect and decided the case on other labour law provisions.

¹⁶⁸ See Press Release EP 20-10-2010, to be downloaded from <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/509>, accessed 16 March 2011.

¹⁶⁹ To be found on the website of the Equal Treatment Commission: <http://www.cgb.nl>, accessed 26 May 2011.

¹⁷⁰ *Kantongerecht Haarlem* 24-09-2010 (published on 28 October 2010); LJN BO2066; to be found on: <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=rnl&querypage=../zoeken/zoeken.asp&searchtype=ljn&ljn=BO2066>, accessed 12 November 2010.

***Men not allowed to wear shorts in tax office*¹⁷¹**

A male (civil servant) employee of a provincial Tax Office complained to the Equal Treatment Commission (ETC) that, contrary to his female colleagues, he was not allowed to wear knee-length trousers on warm days. He stated that this was direct discrimination on the ground of sex. His employer defended this policy by stating that employees need to be dressed in a 'presentable' way. Although the claimant does not have a position in which he is in contact with the general public, he could encounter 'third parties' in the staff restaurant during breaks. This organization has no official regulations to clarify exactly what kind of clothes may be worn at work. A female employee may be allowed to wear knee-length trousers, provided that the management feels she looks presentable.

The ETC considers that equal treatment legislation leaves a certain margin of appreciation to employers as to what is considered to be 'a presentable clothing style' in a certain organization. In this regard, an employer to a certain degree may take social conventions into account. The equal treatment norm does not necessarily mean that men and women always need to be able to wear the same clothing. However, the law does prohibit that the rules can be interpreted and applied differently for both sexes. The Equal Treatment Act has a closed system of justification grounds. It was decided by the ETC that none of the accepted grounds was applicable in this case. Therefore, it concluded that the management of the Tax Office had indeed discriminated on the ground of sex.

***University obliged to issue new diploma to transsexual person*¹⁷²**

A university student who obtained his Master's degree in political science, after having had a gender reassignment operation (female to male), requested a new diploma with his new male first name on it. The university refused to give him a new diploma, but instead issued a 'declaration of graduation' and a new list of his grades containing his new male first names. The applicant stated that this was not sufficient. The fact that there are female first names on his diploma creates confusion and a suspicion of fraud. As a consequence, he needs to explain time and again that he is a transsexual. This leads to a violation of his right to privacy and subsequently he also experiences a great deal of prejudice and discrimination. The university argued that, according to Dutch higher education laws, it was not allowed to award a second 'original' diploma and that it never, under no circumstances, violated those rules (even if a former student had lost the diploma in a fire, for example). The ETC first concluded that the policy of the university amounts to indirect sex discrimination because transsexual people are more often disadvantaged by this rule than others. Second, it found that the applicable legal norms did leave room for a less strict interpretation and left some discretionary power to the university to act otherwise. Therefore, strictly obeying these rules could not offer an objective justification for the refusal to issue a new diploma. Also, the goal of preventing diploma fraud, although legitimate in itself, could be attained with other less detrimental means. Therefore, the university had indirectly discriminated against the applicant. The ETC further recommended the Ministry of Education to change the rules in such a way that they expressly state that this type of case allows the issuing of a new diploma.

¹⁷¹ Opinion of the ETC of 5 October 2010, 2010-147.

¹⁷² Equal Treatment Commission, Opinion 2010-175, 30 November 2010.

***Refusal to hire pregnant woman and failure to apply a complaints procedure*¹⁷³**

A pregnant woman applied for a job through a recruitment agency and was denied the job because of her pregnancy, especially because she would have a right to pregnancy leave after six months of working for the organisation concerned. After having made a complaint about this, the woman had another experience where she did not get a job because of her pregnancy or future right to pregnancy leave. The Equal Treatment Commission (ETC) found that both instances were clear cases of discrimination on the ground of pregnancy, which, according to equal treatment legislation, must be equated with direct discrimination on the ground of sex. None of the possible legal grounds for justification were applicable in this case. The ETC very explicitly stated that a recruitment agency cannot use the excuse that organisations to whom the agency sends its personnel do not want to have pregnant women who, within a short period of time, will have the right to pregnancy leave. Commercial reasons and financial gain are not an excuse for discrimination on the ground of sex.

The second part of the Opinion concerns the fact that the recruitment agency did not deal with the pregnant woman's complaint in an appropriate way. The Commission stressed that any complaint about discrimination must be taken very seriously and dealt with in a procedurally proper and timely fashion. An employer who fails to do so does not sufficiently guarantee that the working environment and the working conditions are free from any kind of discrimination. Therefore, the agency also discriminated against the applicant by not dealing with her complaint in a proper way.

***A hijab constitutes a safety and hygienic risk*¹⁷⁴**

The complainant in this case was an Islamic woman who received a social benefit from her local government. The social assistance bureau asked a mediation agency to find a suitable job for this woman in the cleaning sector. On the ground of her religious belief, the woman wore a hijab. During work, she wore a shorter version, consisting of a long and wide headscarf that covered her hair, neck and shoulders and her back and chest. The mediation agency went with her to a prospective employer, who made it clear that this type of headscarf could not be worn at work because of rules concerning safety and hygiene that apply everywhere in the cleaning sector. These rules are ultimately based on the Working Conditions Act (*Arbeidsomstandighedenwet*), regulating health and safety issues at the national level. After having contacted various other employers in the same sector, after having suggested to the woman that she should wear her headscarf under a wide t-shirt, and after having tried to persuade her to work in another sector, the agency halted the mediation process.

The ETC first observed that the complainant had stated enough facts to presume that the mediation agency had made a direct distinction on the ground of religion because it was not the (neutral) safety and hygienic rules as such that provided the reason to stop mediating on her behalf, but the fact that she wore this particular long and wide headscarf on the ground of her religion. Next, the agency was given the opportunity to prove that the reason to stop mediating on this woman's behalf was not her religion, but that other reasons made them do so. The Commission then concluded that the mediation agency had done everything possible to mediate on the woman's behalf in finding a job. Everywhere safety and hygienic rules prevented the employers from offering her a job. This cannot be blamed on the mediation agency, which did not therefore make a direct distinction on the ground of religion but made this decision on

¹⁷³ Equal Treatment Commission, Opinion 2011-12, 25 January 2011.

¹⁷⁴ Equal Treatment Commission, Opinion 2011-19, 4 February 2011.

the basis of its experience in finding that the woman was ‘non-employable’. Therefore, the conclusion of the ETC was that the agency did not make an unlawful distinction (discrimination) on the ground of religion by terminating the mediation process.

This Opinion of the ETC is remarkable in a number of ways. First, the ETC did not consider the possibility that there may (also) be a case of direct or indirect discrimination on the ground of sex. In that way, the possible intersectionality between these two grounds remains invisible. Second, it is remarkable that the ETC first concludes that there is a *prima facie* case of direct discrimination on the ground of religion and then finds that – although health and safety is not included in the law as a possible justification ground for direct discrimination on the ground of religion – the fact that several potential employers refused the woman for that reason justifies the decision of the agency to no longer mediate on her behalf.

Unequal pay caused by using (inter alia) the market position as a standard¹⁷⁵

A female doctor, working as a social psychiatrist complained about unequal pay as compared to a male comparator (in Dutch ‘*maatman*’), who essentially had the same function and performed the same duties as she did in the same psychiatric institution. This male doctor had been employed by this institution 12 days before her, but from the very beginning (in 2003) had enjoyed a higher salary in a different (higher) functional pay scale. Also, in 2008, he had enjoyed a considerable increase in his salary, while she had already reached the top of her salary scale in that same year. After having established that the work that the two doctors did was comparable and/or of comparable value, the ETC investigated the pay criteria (or ‘*beloningsmaatstaven*’) used by the employer to justify the unequal pay. To begin with, the ETC stated clearly that according to the Dutch Equal Treatment Law it is up to the employer to prove that the pay criteria that are used are equal (‘*gelijkwaardig*’) and sound (‘*deugdelijk*’).

The employer stated that the higher salary of the male doctor was due to five different factors that are used in this institution to place someone in a certain function group and/or pay scale.

1. *The situation on the labour market*, where at the time of the appointment of the male doctor there was a scarcity of social psychiatrists. This argument was rejected by the ETC because the female doctor was appointed only 12 days after the male doctor and in her case this argument had not led to placing her in a higher pay scale than was usual for this particular function group. Therefore this pay criterion was not applied equally to both of them.
2. *Heavier functional tasks* to be performed by the male doctor. Although it was discussed at the time of the appointment that the male doctor might have to perform heavier tasks within his function as a social psychiatrist, it was established during the investigation by the ETC that he in fact had never performed those tasks, and was also never asked to perform them. Therefore, this criterion could not be called sound.
3. *Last-earned salary* of the male doctor. According to the ETC (also in earlier Opinions¹⁷⁶), this criterion may easily lead to a continuation of pay differences between men and women. When this earlier salary is not directly related to the value of the (new) function, this is not a sound criterion and must therefore be rejected. In the case at hand, the employer had not proven that the earlier salary of the male doctor indeed justified the pay difference.

¹⁷⁵ Equal Treatment Commission Opinion 2011-25, 21 February 2011.

¹⁷⁶ See e.g. ETC Opinion 2010-44, reported in Newsflash 2010 no. 2.

4. *Experience.* Relevant job experience may be used as a sound criterion that can justify unequal pay. However, in this case the (said) wider experience of the male doctor was used as an argument to place him in a (higher) pay scale/function group that was not usually applied to social psychiatrists working for this institution. This led to a structural difference in pay, which could never be ‘made up’ by the female doctor. The male doctor was in fact paid for a function group that has a higher value than is normal for his actual function. Therefore, this criterion was applied unjustly in this case.
5. *Better pay negotiations* of the male doctor in the application procedure. The employer stated that a better position in the pay negotiations could objectively justify better/higher pay. Here the ETC answered that this is not a relevant criterion, since capacities or capabilities to negotiate are not functional assets for the job at hand. Also, the employer cannot refer to the *lesser or worse position* of the female doctor to negotiate her pay, since such a criterion cannot be applied in an objective way and is therefore not a sound criterion. Putting someone in a particular (higher than usual) pay scale, as a result of (good or sharp) negotiations, results in a non-transparent pay system that runs the risk of being arbitrary). It is feasible that deeply-rooted prejudices about presumed differences between men and women play a role in such decisions. In addition, the ETC emphasised that the equal treatment legislation puts a duty on employers to pay an equal salary to men and women, and therefore it is not justified to leave it to individual women to negotiate more strongly to achieve equal pay.

The conclusion of the ETC was that the employer had breached the equal pay norm. These five different reasons for the unequal pay of the female doctor all sound very familiar to experts in this field. Most of these arguments have been previously subjected to investigation by the ETC. The one that has emerged least often (at least so openly¹⁷⁷) is the fifth, where the employer in fact blames the pay difference on the female doctor herself: she should have negotiated more strongly for a higher salary. It is a good thing that the ETC very extensively and sharply rejected this argument.

NORWAY – Helga Aune

Policy developments

The report on ‘Gender Equality for Equal Pay’

The Government presented its Report No. 6, ‘Gender Equality for Equal Pay,’ to Parliament on 26 November 2010.¹⁷⁸ Mr. Audun Lysbakken, a Minister at the Ministry of Children, Equality and Social Inclusion said at the press conference which announced the report that we know that equality between men and women in work and family life is decisive in order to decrease the pay gap. It is therefore necessary to amend the structures in society that work as hindrances against equal pay for men and women. The report addresses a variety of measures:

- More equal parenting: Parental leave is to be divided into three parts, one reserved for each of the parents and the last third may be divided as the parents wish.

¹⁷⁷ See also ETC Opinion 2008-23.

¹⁷⁸ <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/likestilling-for-likelonn.html?id=626450>, accessed 5 April 2011. <http://www.regjeringen.no/nb/dep/bld/dok/regpubl/stmeld/2010-2011/meld-st-6-20102011.html?id=625636>, accessed 5 April 2011.

- A variety of measures to ensure equal pay: Pay statistics from individual enterprises, more open information about the levels of pay at those enterprises. If there is a suspicion of pay discrimination, the employer will have an obligation to report on pay levels.
- Ensuring better gender balance in education and the choice of profession (work). Norway needs to break the gender-segregated education and employment market.
- An obligatory focus on involuntary part-time work.

The report sums up the Government's policy to ensure equal pay. The only aspect which is omitted is the collective negotiation system.

The Parliamentary Committee on Family and Culture presented its evaluation of Report No. 6 to Parliament on 5 April 2011.¹⁷⁹ The Government has received support for its strategies, see the bullet points above.

Legislative developments

The fathers' quota of the parental leave has been extended by two weeks so that the total fathers' quota of the leave constitutes 12 weeks starting with children born or adopted on 1 July 2011 and thereafter.¹⁸⁰ This leaves a difference of three weeks between the reserved time for men and women; women have a compulsory leave of three weeks before birth and six weeks after birth. In reality, women tend to take most of this leave, even though there is now a trend for more and more couples to share the leave.

Case law of national courts

As most gender equality cases are dealt with by the Norwegian Equality Tribunal, a selection of its cases is presented here:

The Gender Equality and Anti-Discrimination Tribunal

Two cases from the Tribunal will be commented upon.

Equal Pay, indirect discrimination

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.¹⁸¹ The pay difference was approximately EUR 3 125 annually (NOK 25 000). During the evaluation of whether or not the employees performed work of equal value, the Tribunal was split in 3-1, where the 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 requirements pertaining to formal education/competence, responsibility and aspects

¹⁷⁹ See the preliminary version Innst. 299 S (2010–2011) (*Midlertidig*): <http://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2010-2011/inns-201011-299/>, accessed 5 April 2011.

¹⁸⁰ <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/pm-1211.html?id=619700>, accessed 5 April 2011.

¹⁸¹ <http://www.diskrimineringsnemnda.no/wips/2094117726/module/articles/smId/307568273/smTemplate/Fullvisning/>, accessed 5 April 2011. Reference to the media debate: <http://www.ldo.no/no/Aktuelt/Nyheter/Arkiv/Nyheter-i-2010/Kronikk-om-likelonn/>, accessed 5 April 2011.

of leadership attached to the positions. The majority of the Tribunal stressed that the formal requirements for the SFO leader were higher than the other positions. All division leaders were placed at the same organizational level in the municipality. All positions involved 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 organizing 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 is to raise the value of typical female professions and in that respect the mere responsibility for other human beings should be evaluated on equal terms as work for material values.

The Tribunal found that the difference in pay was not openly based on sex, but on other conditions. The Tribunal stated, however, that even apparently gender-neutral norms for deciding the pay of individuals may indeed violate the prohibition of indirect discrimination as contained in the Gender Equality Act Section 3, third paragraph. 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 GEA Section 16. The Municipality argued that the male division leaders were more in demand in the employment market, thus explaining the higher pay, but was unable to provide evidence to support this argument. Therefore the Tribunal did not see any objective reasons for the pay difference and concluded that the Municipality was in breach of Article 3. The decision was not appealed before the courts.

This decision throws some light on the need for awareness concerning the structural challenges that 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 received a great deal of attention from the media and resulted in a series of articles in newspapers from independent lawyers and lawyers from Employers' Organizations; the latter arguing that the Tribunal had no understanding of the free negotiations among 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 organization for more than forty years and there was still a lack of knowledge about the full content of the equal pay rule.

Employment, the use of a 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.¹⁸² The Equality and Anti-discrimination Ombud brought the case before the Tribunal after the Ministry of Justice and Police had decided not to change the uniform regulation (the dress code) for the police force, following the Ministry's own evaluation of political as well as international obligations.

The Tribunal decided the case after an evaluation of the prohibition of religious discrimination 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 the

¹⁸² <http://www.diskrimineringsnemnda.no/wips/2094117726/module/articles/smId/1198094242/smTemplate/Fullvisning/>, accessed 5 April 2011.

Norwegian anti-discrimination legislation and concluded that the making of the police uniform dress code instruction is the subject of 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 the majority of those wearing a headscarf in Norway are women. Thus a ban prevents more women than men from applying to join the police 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 of 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 law and order. The conclusion was therefore that the ban on religious symbols in the police uniform regulation is 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 legality as well as the political foundations of the ban on wearing religious symbols in the police force. Secondly, the Tribunal's leader has publicly voiced her frustration that neither the Ministry of Justice nor the public agrees with the Tribunal's decision. The concern of the Tribunal's leader is respect for the Tribunal as such. This debate returns every now and then as the Ministries are not bound by the Tribunal's decisions and sometimes they simply ignore the Tribunal, which is something that has no further precedent in society.

The Gender Equality and Anti-Discrimination Ombud

One case from the Ombud can be commented upon.

Part-time work

The Gender Equality and Anti-Discrimination Ombud found in this case (Decision No. 08/1660) that no gender-based discrimination against part-time workers had occurred¹⁸³ when a significant number of part-time workers had been given a higher rate of short-time working periods (so-called 'rush-hour' working periods) than those awarded to full-time workers. (Part-time workers usually have workdays of the same length as full-time workers, but there also exist 'rush-hour shifts' where part-time workers are called in for short periods of three or four hours.) As the vast majority of part-time workers are women, the Norwegian Nursing Association claimed that the practice of employing rush-hour working periods constituted indirect discrimination against women. The Nursing Association pointed to the disadvantages that these short-time periods constitute for employees, as they have to come to the workplace and leave for home again more often than full-time employees. It also reduces the possibility for part-time workers to work overtime and thus to obtain a full-time position. The hospital claimed that there was no statistical difference between the sexes regarding the allocation of the rush-hour working periods, and that some employees preferred to work shorter shifts because of health or family reasons. The Ombudsman did not assess whether or not the practice constituted discrimination against part-time workers compared to full-time workers, as the Ombudsman found the practice to be gender-neutral: since there are mainly women working at the hospital in both part-time and full-time positions, the effects of the practice are not gender-specific.

¹⁸³ <http://www.ido.no/no/Klagesaker/Arkiv/2010/Sykehus-brot-ikke-likestillingsloven//>, accessed 5 April 2011.

The decision is a peculiar one on two counts. Firstly, the Ombud did not address the underlying problem of unwanted part-time work in the health sector, thereby causing many employees to be involuntary part-time workers. These employees will sign up for extra work if it is available. This practice of many part-time positions in hospitals (in the care sector) concerns the basic right to work and to secure an income on which to live. In the long term, part-time work affects pension levels when these part-time workers reach retirement age. The system of rush-hour shifts is, in my view, yet another way of making it more difficult to secure a decent income if a person is already an involuntary part-time worker.

Secondly, this decision by the Ombud seems to deviate from the previous practice where it was not necessarily a requirement to take a male person or group as a comparison, as long as the practice was gendered (as is the case with part-time work in Norway). Decisive weight has been put on the gender-based reality. With the Ombud's point of view in the present case, the reality is that in sectors where the majority of employees working full time are women and the part-time workers are women as well, it will never be possible to use the Gender Equality Act to determine gender discrimination. This is highly disturbing when the reality, as in this case, is based on a practice that is deeply rooted in, what I would call, structural discrimination in how the working time regime is constructed and in gender stereotypes firmly embedded in a gender-segregated employment market.

Thirdly, one may notice that the case is registered as having been decided by the Ombudsman in June 2010, whereas it was posted on the website of the Ombud as late as 20 October 2010. At the time of writing, the National Nursing Association has not yet decided what its next step will be: to appeal to the Tribunal or to bring the case before the courts.

The Ombud does not have the mandate to assess discrimination between part-time and full-time workers per se, as this is specifically outside her mandate and is regulated under the Working Environment Act, see WEA §13-1(3).

POLAND – Eleonora Zielińska

Policy developments

The period under report was characterised by several positive legislative amendments, each of a different nature, but all likely to improve the status and real situation of women in Poland. On the one hand, the Law on quotas for electoral lists creates opportunities for many women to enter the world of politics. On the other hand, the public debate accompanying the legislative process gives reason to believe that it is only the first step towards adopting a pro-active state policy with regard to gender equality. The adoption of the law implementing EU equality directives, including Service Directive 2004/113/EC and Recast Directive 2006/73/EC, has finally brought our law into relative line with EU law. An important regulation on childcare aimed at creating better opportunities for parents for the reconciliation of work and family life may be seen as an indication of a more comprehensive demographic policy. The criminalization of stalking, which followed the amendments to the law on counteracting family violence (reported in EGELR 2010-2), has accomplished the reform of this group of offences which are considered as violence against women. Although these legislative changes do not provide a guarantee for an effective fight against gender

discrimination, they create a more favourable legal environment for such efforts than before.

Legislative developments

Amendment to the electoral laws introducing quotas

On 5 January 2011 Parliament passed a law,¹⁸⁴ amending several electoral laws, providing that candidates of each sex should make up at least 35 % of all electoral lists (for elections to the European Parliament and the national Parliament, as well as to local authorities). The sanction for not complying with this requirement is a refusal to register the list. The participation of women in all public bodies, based on popular elections, is relatively low in Poland. In the *Sejm* (the lower chamber of Parliament) female representatives constitute 20 % and in the Senate (the upper chamber) only 8 %. Therefore the first Congress of Women (a women's social movement uniting women from different political orientations), held in 2009, decided to propose a draft law providing that women should make up at least 50 % of all electoral lists. This initiative was presented as a so-called citizens' (social) draft, which had to be signed by at least 100 000 adult citizens in order to be successfully submitted to Parliament, which took place in February 2010 with more than 150 000 signatures. After long debate the drafters abandoned the idea of introducing a zipper system (in positioning women and men on electoral lists).

The new law, although providing for lower quotas than was proposed in the draft, is regarded by many women's organisations as a revolutionary step towards a more gender-balanced representation in public bodies based on popular elections. It is also interpreted as the first clear sign of political will by representatives of the governing parties to promote gender equality.¹⁸⁵ In the final vote 241 representatives voted in favour of the law, 154 were against and 9 abstained.¹⁸⁶ One should not forget, however, that there is still much to be done in order to persuade the female electorate that women can represent their interests better than men, and hence a more balanced representation will eventually depend on actual results of the elections that will take place this autumn.

New law implementing several equality directives

On 3 December 2010 the Polish Parliament passed a Law implementing the five equality directives.¹⁸⁷ The law applies to all physical and legal persons, as well to other

¹⁸⁴ *Dziennik Ustaw* (Journal of Laws of the Polish Republic) 2011 No. 34, item 172.

¹⁸⁵ http://wyborcza.pl/1,76842,9049825,35_proc_Poczatek_rewolucji.html#ixzz1DgLuCpxQ, accessed 3 April 2011.

¹⁸⁶ <http://orka.sejm.gov.pl/proc6.nsf/ustawy/3377>, accessed 2 April 2011.

¹⁸⁷ The Law of 3 December 2010 was published in *Dziennik Ustaw* (Journal of Laws of the Polish Republic) 2010 No. 254, item 1700, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20102541700>, accessed 7 April 2011. It refers to the following Directives: Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 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, and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

organisational units having legal capacity. It does not apply to employees in matters regulated by the Labour Code's equal treatment provisions (Chapter IIa) providing for special regulations and measures against discrimination in access to work, professional training and wage discrimination on the ground of sex, age, disability, race, religion, nationality, political convictions, membership of a trade union, ethnic origin, belief, sexual orientation, employment for limited periods of time, full and part-time employment. The new law provides for a definition of direct and indirect discrimination, harassment, sexual harassment, unequal treatment and of the principle of equal treatment. The law applies to professional training, conditions of employment and the performance of work in other forms of activity, access to and the functioning of trade unions, organisations of employers and professional corporations, access to and conditions for the enjoyment of publicly available instruments of the labour market, the social security system, the system of health protection, education, and goods and services including housing and the provision of electricity. It provides for several exclusions originating from various equality directives; among other things, it does not apply to private and family life as well as activities connected with those spheres, to advertising or educational and health services as far as they concern unequal treatment on the ground of sex. The law entered into force on 1 January 2011.

It should be pointed out that most of the equality directives have already been implemented, but mostly in a less than satisfactory manner. The delay in the transposition of Directive 2004/113/EC led to a verdict by the Court of Justice.¹⁸⁸ Therefore the adoption of the law aimed at fulfilling the country's transpositional obligations has to be evaluated positively. However, the way this task has been achieved cannot be regarded as being completely satisfactory. The law refers to Directive 86/613/EEC, while Directive 2010/41/EU now repeals Directive 86/613/EEC, and some specific formulations of the law may give rise to difficulties in their application, while several legal solutions seem to be unsatisfactory. In some places, for example, contrary to previous drafts, the law has adopted the exact wording of the directives, which has resulted in providing for different degrees of protection, depending on the ground of discrimination. Such differentiation on the one hand remains along the lines of the EU directives, but it may be challenged with regard to the equality clause contained in the Polish Constitution. On the other hand, the regulation concerning compensation for discrimination may be seen as improper implementation of EU directives. In its judgment of 10 July 2008, no. C – 54/07¹⁸⁹ (which refers to the legality of the publication of employment advertisements, where race-discriminatory criteria are used) the Court of Justice of European Union noted that Article 15 of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that Directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.¹⁹⁰ The civil-law claim provided for in Article 13 of the law of 3 December 2010 has the character of a pecuniary claim, the application of which is only possible if a particular

¹⁸⁸ Judgment of the Court of Justice of the European Union *Commission v Poland* of 17 March 2011 (Case C-326/09) on the non-timely transposition of Directive 2004 /113 / EC.

¹⁸⁹ Judgment of the Court of Justice of European Union *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*. Reference for preliminary ruling <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0054:EN:NOT>, accessed 6 April 2011.

¹⁹⁰ See Paragraph 40, operative part 3 of the judgment in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*. Reference for preliminary ruling <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0054:EN:NOT>, accessed 6 April 2011.

person has actually suffered damage as a result of the discrimination. A preventive application of this measure (e.g. when no one has suffered any damage) in order to eliminate improper practices is not possible.

There are also serious doubts as to the rationality of transferring the competence of the equality body to two different units: the Civil Rights Defender and the Governmental Plenipotentiary of Equal Treatment. With regard to the Civil Rights Defender, it is worth mentioning that the above law failed to provide this body with any additional legal measures, which could help to enforce application of the equal treatment rule in horizontal relations. Most important of all, the Civil Rights Defender is not equipped with any measures of imperative character with regard to private entities. According to Article 11 of the law on the Civil Rights Defender, in the wording introduced by the 2010 law, in order to enforce the application of the equal treatment rule among private entities, the Defender may limit himself to instructing the applicant as to whatever action the person is entitled to take, or he may take up the case if, in his/her opinion, it is necessary in order to protect human rights and freedoms, e.g. enforcement of the equal treatment rule.

In the past practice of the Civil Rights Defender, the provision regarding this body's competences was interpreted restrictively, according to the principle of subsidiarity.¹⁹¹ In a commentary to the Civil Rights Defender Act the authors noted: 'it should (...) be kept in mind that it is not the role of the Civil Rights Defender to perform the duties of a counsel, i.e. to replace the citizens in taking advantage of their fundamental rights. Hence the possibilities introduced by Article 4 item 4 of the law should be used by the Defender on an exceptional basis (...) (...), especially in cases when a party's extraordinary incapability to claim her rights requires such conduct, when the necessity arises to find solutions to a legal question, raising doubts with regard to the protection of fundamental rights and freedoms, and finally when the case is of precedential character and its solution will have substantial significance for shaping the legal situation of other citizens'.¹⁹²

Given the generally large number of cases submitted to the Defender and the lack of additional funds for performance of the new task vested in him, it is hardly to be expected that such practice will change.

Nursery Bill

The law of 4 February 2011 on the care of children under 3 years of age¹⁹³ provides that such care may be organised by local authorities, organisations and private persons. The so-called Nursery Bill introduced new forms of care for children under three, including crèches, group babysitters, day clubs and legally employed nannies. It provides for organisational regulations for such establishments, requirements as to the qualifications of the personnel and rules on surveillance. According to the new law, nurseries will fall under the scrutiny of the Ministry of Labour and Social Policy, instead of the Ministry of Health, which results in more lenient requirements expected from service providers. The law also encourages employers to establish company nurseries in exchange for a

¹⁹¹ S. Trociuk, *Komentarz do art. 11 ustawy z dnia 15 lipca 1987r. o Rzeczniku Praw Obywatelskich* (Commentary to Article 11 of the Law of 15 July 1987 on Civil Rights Defender), Biuro RPO. Warszawa 2005 p. 76.

¹⁹² S. Trociuk, *Komentarz do art. 14 ustawy z dnia 15 lipca 1987r. o Rzeczniku Praw Obywatelskich* (Commentary to Article 14 of the Law of 15 July 1987 on Civil Rights Defender), Biuro RPO. Warszawa 2005 pp. 76-77.

¹⁹³ *Dziennik Ustaw* (Journal of Laws of the Polish Republic) 2011, No. 45, item 236, http://orka.sejm.gov.pl/proc6.nsf/ustawy/3377_u.htm, accessed 3 April 2011.

tax allowance and provides for the possibility to cover the social security for nannies by the State. The new law aims to encourage Polish women to have more children by creating more nursery places. The Government reacted to the fact that the birth rate in Poland has been declining dramatically, reaching 1.3 children per family in 2009, which places Poland in the last but one position among EU countries. An important reason for such decrease is considered to be the problem of reconciling work with family life, given the fact that there are not enough nurseries in Poland (in 2009 there were only 392 such institutions, providing care for 27 000 children, while there were over one million children under three in the country). It was so difficult to find a place for a child in a nursery that some women had to leave their jobs, or spend most of their salary on babysitters. It may be expected that the new law will facilitate and quicken the process of granting permits to open childcare institutions. The new system seems to be flexible and adjusted to the needs of the parents. The new regulations should help women to reconcile work with motherhood if they are properly implemented. The introduction of this law will be accompanied by a special governmental programme entitled 'Baby', which will support local authorities with funds of up to EUR 10 million (PLZ 40 million). However, the law has also been criticised for not guaranteeing proper standards of care.¹⁹⁴

Criminalisation of stalking

On 25 February 2011 the Polish Parliament passed a law amending the Penal Code of 1996 (PC)¹⁹⁵ thereby introducing stalking as a new type of offence. Pursuant to Article 190a Paragraph 1 PC, whoever persistently stalks another person or the person closest to him/her and thereby causes a fear of endangerment, justified by the circumstances, or significantly violates such person's privacy, shall be subject to a custodial sentence for up to 3 years. If the consequence of the act specified in Paragraph 1 is a suicide attempt by the affected person, the perpetrator shall be subject to a custodial sentence for a term of between 1 and 10 years (Article 190a Paragraph 3 PC). Prosecution shall be initiated upon the motion of the affected person (Article 190a Paragraph 4 PC).

Stalking is one of the frequent appearances of violence against women, because women are significantly overrepresented among its victims. The dimension of this phenomenon in Poland is difficult to estimate, since only the most dramatic cases, such as those resulting in murder or suicide, are revealed to the public. Nevertheless, the Victims Survey organized in 2006,¹⁹⁶ according to which about 12 % of the interviewed persons declared that at least once in their lives they had been a victim of stalking, shows that this phenomenon may be considered to be a social problem. Until the mentioned amendment, there was no legal basis for effectively prosecuting such behaviour. Therefore the introduction of a specific type of offence may contribute to the elimination of this social problem.

¹⁹⁴ <http://www.thenews.pl/national/?id=126116>, accessed 1 April 2011.

¹⁹⁵ *Dziennik Ustaw* (Journal of Laws of the Polish Republic) 2011, No. 72 item 381, http://orka.sejm.gov.pl/proc6.nsf/ustawy/3553_u.htm, accessed 4 April 2011.

¹⁹⁶ This concerns a study of a random group of 2000 persons by J. Skarżyńska-Sernaglia; '*Stalking w Polsce – występowanie i charakterystyka zjawiska*' (Stalking in Poland – dimensions and characteristics of the phenomenon). The results of this study were published on <http://psychologia.net.pl/artukul.php?level=415>, accessed 2 April 2011.

Case law of national courts

Constitutional Tribunal's decision on equal rights of women and men to social security benefits

In the full bench ruling of 15 July 2010, No. K 63/07,¹⁹⁷ the Constitutional Tribunal found that provisions introducing a lower retirement age for women (60, as opposed to 65 for men) constitutes a constitutionally admissible equalisation privilege for women, aimed at diminishing factual gender inequality. The Tribunal also noted that retirement constitutes a right, not an obligation of every insured person, hence women may choose to continue their professional activity after reaching the retirement age, thus increasing their future retirement benefits. The Tribunal also considered the fact that the actual amount of benefits is calculated according to a combined average life expectancy of women and men, which positively influences the amount of benefits for women. It should be noted that all but one female members of the Constitutional Tribunal submitted dissenting opinions to the above ruling. All three judges noted that the retirement age constitutes the major factor determining the actual amount of individual retirement benefits. According to their argumentation, the questioned provision may be seen as constitutional only if regarded separately from the structure of the entire social benefit system, resulting in generally lower retirement benefits for women. Also considering the common practice of employers exercising pressure on women by employees to force them to retire after turning 60, the judges found the provision to be discriminatory, at least from the moment that a woman decides to use it.

With regard to the above ruling, the Tribunal also decided to use its competence to address the legislator with a formal indication of legal matters requiring special attention. In its signalisation decision of 15 July 2010, no. S 2/10, the Tribunal indicated the usefulness of gradually levelling the retirement age for women and men. The Tribunal noted, that even though the differentiation of the retirement age is constitutional, it is not an optimal solution. In its opinion, it would be reasonable, also with regard to reforms taking place in other European countries, to take action aimed at extending the period of professional activity of all citizens, as well as raising the retirement age.

One male judge submitted his dissenting opinion to the above signalisation decision, noting that differentiation of the retirement age for women and men is part of the concept of the social benefit system, designed and implemented by the legislator and should thus be respected. In his opinion, the legislator's attention should rather be directed at the necessity to provide instruments offering legal protection to women who decide to continue their previous employment after reaching the retirement age.

Miscellaneous

New programmes aimed at improving the reconciliation of maternity with a scientific career

In 2011 the Foundation for Polish Science (a non-profit, non-governmental organization, with the mission to support science in Poland) started a new programme, partially financed from the EU Structural Funds.¹⁹⁸ The Parent-Bridge Programme provides special grants to women, with the objective to enable them to return to research work, after an interruption to raise a child not older than 4 (7 in the case of

¹⁹⁷ <http://www.trybunal.gov.pl/OTK/otk.htm>, accessed 7 April 2011.

¹⁹⁸ http://www.fnp.org.pl/programmes/overview_of_programmes/programmes_financed_from_the_european_funds, accessed 1 April 2011.

adoption). This opportunity is also open to men who have taken at least 6 months' leave to care for a child. Such requirement is not explicitly provided for women, which may be considered as sex discrimination.¹⁹⁹ The research projects may be carried out in a part-time system, which should help the parents to reconcile work with family life. The programme also supports pregnant women conducting research that might be hazardous to the unborn child, by providing them with funding to employ assistants who will continue the research project during their pregnancy. Within the framework of this programme there is an additional possibility for parents with a scientific degree to apply for research grants of up to EUR 35 000 (PLZ 140 000) yearly, as well as additional funds to employ a research team. The budget of the whole programme is EUR 1 million (PLZ 4 million).

Many women during pregnancy, as well as parents after their maternity and parental leave, do not continue their scientific career because of difficulties in reconciling work with family life. This leads to the situation where science is losing many talented researchers. Therefore the Programme, aiming to improve the situation in this respect, has to be appreciated. Nevertheless, the admissibility of differentiation in the participation requirements for women and men should be further analyzed.

PORTUGAL – Maria do Rosário Palma Ramalho

Policy developments

Government Resolution establishing the IVth National Plan for Gender Equality (2011-2013)

The Portuguese Government has approved the IVth National Plan for Gender Equality for the years 2011-2013, by Resolution of the Ministers' Council nº 5/2011, of 18 January 2011.

This Plan considers gender equality as a factor inducing competition, productivity and development in society, and develops this approach in three main guidelines:

- reinforcement of the mainstreaming principle in gender equality;
- combination of the mainstreaming approach with specific actions, including positive actions in favour of women, in areas where 'de facto' gender discrimination still exists; and
- introduction of the gender perspective in policies regarding other sources of discrimination, in order to tackle and fight multiple discrimination practices.

For an effective pursuit of these guidelines, the Plan defines several areas of intervention: Public Administration; business and work, including the dimension of reconciliation between professional and family life; education and training; health services; environment; investigation and science; sport and culture; media, advertising

¹⁹⁹ However, the issue is controversial since in practice almost all women use the 5 months of maternity leave (of which 4.5 months are mandatory) and many women use the opportunity of taking additional maternity leave or parental leave as well. Polish law also provides for paternity and parental leaves for fathers. It should be noted, however, that in 2010, as few as 6 000 out of 300 000 fathers of newborn children decided to use it. http://www.se.pl/wydarzenia/kraj/mezczyzni-nie-chca-na-tacierzynski_143654.html, accessed 4 May 2011. Such different treatment of women and men within the Bridge Programme therefore seems to be justified by the aim of this solution, being to motivate a larger number of fathers to take parental leave to care for their children. The principle of proportionality, however, requires further analysis as to how many fathers who conduct scientific research take parental leave.

and marketing; gender violence; social inclusion; sex orientation and gender assignment; young people; NGO's, and actions of international cooperation, mainly with Portuguese communities around the world.

Legislative developments

New legislation regarding equality in independent work

A new piece of legislation has been approved – Law No. 3/2011, of 15 February – that explicitly refers to transposing Directives 2000/43/EC, Directive 2000/78/EC and 2006/54/EC, with regard to non-discrimination in independent work and also the procedural rights of private or public organisations which represent discriminated persons (Article 1 of this Law).

This Act is applicable both in the private sector and in the public sector (Article 2 No. 1).

With regard to independent work, a broad concept of independent work is established, considering as such all professional activity that is not developed under a labour contract or an equivalent situation (Article 2 No. 2).

Non-discrimination in this area is directly related to equal opportunities, which must be granted in access to independent work, in professional training, and in the conditions under which the work is performed (Article 3 No. 1).

Any act that favours or harms these workers, performed by the beneficiary of the work and based on any discriminatory factor, is prohibited (Article 5 No. 1). Both direct and indirect discriminatory practices are prohibited (Article 5 Nos 1 and 2) and harassment practices, including sexual harassment (verbal or physical), are qualified as discrimination (Article Nos 5 and 6).

These principles are compatible with specific legal rules concerning aliens, and with the rules concerning the protection of pregnancy, maternity and paternity, adoption and other situations related to the reconciliation of professional and family life (Article 3 No. 4).

Some exceptions to the principle of equality in this area are also allowed, meaning that different treatment is not qualified as discrimination whenever it is based on a determinant, objectively justified and proportionally necessary, mainly in activities related to fashion or show-business ; whenever the advantageous position is the result of specific training in some area, and, with regard to age, when the different treatment is necessary and adequate to pursue public policies regarding employment, the labour market or professional training (Article 5 No. 4).

Finally, the law imposes remedies and sanctions in order to enforce the practical implementation of the rules in this area (Articles 6 No. 1, 7, 9 and 10).

With regard to the procedural rights of private or public organisations which represent discriminated persons, Article 8 of this Law establishes that organisations dedicated to the defence of discriminated persons and the promotion of rights and interests related to equality and non-discrimination can intervene in judicial procedures regarding these issues when representing individuals who have been discriminated against, provided this representation is expressly laid down in the by-laws of the organisations and the represented person gives her/his consent.

Unlike the previous rules mentioned, this rule applies not only to discrimination in the area of independent work, but also in the area of dependent work.

New legislation on gender reassignment and a change of name

New legislation has been approved concerning gender reassignment and changing the first name of the individual concerned - Law No. 7/2011, of 15 March. This legislation establishes the procedure for gender reassignment in the civil register services and accordingly amends the Civil Register Code, approved by Decree-Law No. 131/95, of 6 July 1995.

The procedure to change the name is an administrative procedure of confidential nature (Article 1 of this Act) and starts with a formal request by the person in question. This request must be supported by a report indicating a diagnosis of transgender pathology, made by a medical team specializing in sexology, from a public or private facility, and signed by at least a physician and a psychologist. (Article 3).

In this procedure, the person can change his/her first name but not the surname (Article 1 No.1). This change is then introduced in the official data of the person at the Civil Conservatory Services, but it will only be inserted into the data concerning relatives (husband/wife/children) upon a request by those relatives.

Source:

Official Journal (www.dre.pt), of 18 January 2011, 15 February 2011 and 15 March 2011.

ROMANIA – Roxana Tesiu

Legislative developments

New legislation on granting child-raising leave and a monthly indemnity

At the end of 2010 the Government approved Governmental Ordinance No. 111 governing new methods of granting child-raising leave and an indemnity with effect from 1 January 2011.²⁰⁰ Moreover, on 31 January 2011 the Methodological Norms issued for the application of the Governmental Ordinance on child-raising leave were also published.²⁰¹ The new provisions regarding the granting of child-raising leave and a monthly indemnity that are covered by the state budget only apply to children born on 1 January 2011 and thereafter. For children born before this date, the former provisions of Governmental Ordinance No. 148 of 2005 regarding support for the family in the view of raising children continue to be applicable.

The novelty of GO 111 are the *optional* measures which are available to parents for raising a child aged up to 2 years (or 3 years, for children with disabilities). Child-raising leave is a statutory leave. According to the provisions of Article 1(1) of the Methodological Norms, the persons entitled to benefit from child-raising leave are:

- Any of the natural parents of the child;
- The person who adopted the child, has been entrusted with the child in view of adoption, or with whom the child has been placed (also as a result of an emergency placement), with the exception of the maternal assistant, who can only benefit from such a right for his/her own child;
- The person named as the tutor of the child.

²⁰⁰ Governmental Ordinance No. 111 of 8 December 2010 on granting child-raising leave and a monthly allowance, published in the Official Gazette No. 830 of 10 December 2010.

²⁰¹ Governmental Decision No. 52 of 19 January 2011 on approving the Methodological norms on the application of Governmental Ordinance No. 111 of 2010, published in the Official Gazette No. 78 of 31 January 2011. From now on: *Methodological Norms*.

In case of the death of the parent who is eligible to benefit, according to the law, from the child-raising leave and the indemnity or from the incentive for an earlier return to work, the surviving parent has the right to benefit, upon request, from the rights of the deceased parent.

The rights provided in GO 111 are established by the law for the first 3 births or, as the case may be, for the first 3 circumstances assimilated with births.

In order to benefit from the rights regarding child raising the employee must cumulatively meet the following conditions:

- Be a Romanian or foreign citizen or possessing no citizenship;
- Be domiciled or have his/her residence in Romania, according to the legal provisions;
- Be living in Romania together with the child/children for who he/she requests the rights and also raise and care for the child/children; and
- Have received, for 12 months prior to the birth of the child, revenue from salaries, independent activities or agricultural activities, subject to income tax in accordance with Law no. 571 of 2003 regarding the Fiscal Code, as amended.

The parent employee shall choose between two optional measures for raising the child aged up to 2 years or 3 years (for children with disabilities). The first option allows the parent to choose to continue to receive child-raising leave until the date the child reaches the age of 1 year. Under this option, the parent is entitled to receive a monthly child-raising indemnity amounting to 75 % of the average net revenue obtained over the last 12 months, which may not be less than EUR 145 (RON 600), but not more than EUR 825 (RON 3 400). If the parent who has opted to remain on child-raising leave until the child reaches the age of 1 year returns to work before the child reaches the age of 1 year, a monthly incentive for an earlier return to work of EUR 120 (RON 500) is guaranteed. In such a case, the incentive is granted until the child reaches the age of 2 years. If, although the parent has initially opted for the 1-year child-raising leave, he/she does not return to work after 1 year, the parent is entitled to unpaid leave for the period between 1 year and 2 years.

The second option allows the parent to choose to apply for child-raising leave until the date when the child reaches the age of 2 years. The parent shall receive a monthly child-raising indemnity of 75 % of the average net revenues obtained over the last 12 months, which may not be less than EUR 145 (RON 600), but not more than approximately EUR 282 (RON 1 200). For this option no incentive for an earlier return to work is granted.

In the case of children with disabilities, the parent who meets the eligibility conditions prescribed by the law will benefit from the same child-raising leave-related rights as described above, but for a longer period of time, respectively until the date the child reaches the age of 3 years.

The calculation base for the child-raising indemnity

The value of the monthly revenue taken into account in view of the calculation base is the net amount thereof as determined after the relevant income taxes are deducted, in accordance with the applicable legal provisions.

In the case of parents obtaining revenues from salaries, the gross revenue is represented by the base salary, indemnities, bonuses, premiums and any other amounts or advantages of a salary nature or assimilated with salaries that are granted by the employer in accordance with the applicable law. Should the eligible person obtain taxable revenues from several sources simultaneously, all such monthly revenues

obtained by the person in question shall be taken into consideration in determining the amount of the child-raising indemnity. Should the eligible person obtain taxable revenues from several sources simultaneously, both in Romania and abroad,²⁰² only the revenues obtained in Romania shall be taken into consideration in order to determine the amount of the child-raising indemnity.

The contribution period

The 12 months of contribution necessary for being granted the child-raising indemnity can be integrally or partially formed by periods during which the respective employee has been/is in one of the situations expressly provided by the EO 111, such as:

- In receipt of unemployment benefit, according to the applicable law, or having contribution periods within the public pension system according to the special legislation regulating collective dismissals;
- Benefiting from medical leave and corresponding health insurance indemnities in accordance with the applicable legislation;
- Benefiting from medical leave and corresponding indemnities for the prevention of sickness and resuming the capacity to work, but solely concerning the situations resulting from accidents at work and professional sickness, in accordance with the applicable law;
- Benefiting from child-raising leave and the corresponding monthly indemnity;
- Benefiting from child-raising leave and the corresponding monthly indemnity for children with disabilities;
- Benefiting from unpaid leave for child raising.

In view of being granted a child-raising indemnity, in the case of persons who have carried out professional activities in countries that are members of the European Union or in other countries applying Regulation 883/2004 and Regulation 987/2009, the periods of activity carried out in such countries shall be cumulated for the purpose of determining the contribution period necessary for the calculation of the child-raising indemnity. In case of a premature birth of a child, the 12-month contribution period shall be reduced by the period between the date of the birth and the presumed date of the birth, as certified by a specialist physician .

If the employee opts for one of the alternatives provided by EO 111 with respect to the measures available for raising the child aged up to 2 years or, respectively, 3 years for children with disabilities, this must be expressed in writing and an application must be submitted to the employer. The option initially chosen by the respective employee cannot be changed during the period when the rights relating to child raising have been granted.

Unpaid leave

After the first 3 births or the first 3 circumstances assimilated with births the persons who fulfil the eligibility conditions provided for by GO 111 are entitled to unpaid leave for raising the child. The unpaid leave shall be granted, in one instalment, for a period of 4 months, to each of the natural parents of the child or to the persons indicated in

²⁰² Particularly in countries that are members of the European Union or in other countries that apply the provisions of EC Regulation No. 883/2004 of the European Parliament and the Council of 29 April 2004 regarding the coordination of the social security systems ('Regulation 883/2004') and of EC Regulation No. 987/2009 of the European Parliament and the Council of 16 September 2009 for the setting up of a procedure for the application of Regulation 883/2004 ('Regulation 987/2009').

article 1(1) of the Methodological norms, during the period until the child reaches the age of 2 years or 3 years (for children with disabilities).

If the eligible person has initially chosen the option allowing her/him to continue to receive child-raising leave until the date the child reaches the age of 1 year, but also remains in unpaid leave during the period when the child is between 1 and 2 years, the respective person is entitled to unpaid leave after his/her child reaches the age of 1 year. The application for such unpaid leave shall be submitted to and registered with the employer. The natural parents of the child cannot benefit simultaneously from this unpaid leave for raising a child.

The employer has an obligation to approve the child-raising leave and the unpaid leave. The period during which such leave shall be granted shall be mutually decided by both the employer and the respective employee.

Successive leave

If an employee who is benefiting from child-raising leave or the monthly incentive for an earlier return to work, during the period until the child reaches the age of 2 or 3 (for children with disabilities), gives birth to one or more children or a circumstance assimilated with birth occurs during this period, upon the termination of the child-raising leave for the previous child the respective employee shall opt, on the basis of a new application, for one of the two options available for the child-raising leave or for the monthly incentive for an earlier return to work for the new child, as the case may be.

Children with disabilities

After the employee's choice for the options available, the rights provided by the law in the case of persons having children with disabilities shall be granted to the respective employee from the date the certificate establishing the child's disability level is issued, if that application is submitted within 60 days of this issuing date.

The same procedure is applicable if the child or children (as a result of a multiple pregnancy) is/are diagnosed with disabilities after reaching the age of 1 or 2 years. If one of the children resulting from a multiple pregnancy is diagnosed with disabilities before reaching the age of 3 years, the child-raising leave and the corresponding indemnity for children with disabilities shall continue to be granted to the parent employee concerned.

Prohibition of dismissal

It is forbidden for an employer to dismiss its employees during the period when:

- The employee is on child-raising leave until the date the child reaches the age of 1 or 3 years (in the case of a child with disabilities);
- The employee is benefiting from the incentive for an earlier return to work.

This prohibition shall be extended, once only, with a period of up to 6 months after the employee's return to work in an active role.

The provisions regarding prohibited dismissals are not applicable to dismissals in the case of the judicial reorganization or bankruptcy of the employer, in accordance with the law.

The social health insurance contributions for employees benefiting from the leave periods provided by GO 111 are paid from the state budget. The periods during which the employee benefits from the child-raising indemnity or from unpaid leave are deemed to be contribution periods in light of the health insurance system, the social

security system and the unemployment insurance system. The above-mentioned periods of leave also represent the respective employee's length of service.

SLOVAKIA – Zuzana Magurová

Policy developments

Statutes of the Council of the Government of the Slovak Republic for Human Rights, National Minorities and Gender Equality

The constituent meeting of the newly constituted Government Council for Human Rights, National Minorities and Gender Equality was held on 12 April 2011. The Council is a permanent professional, advisory, coordinating and consultative body of the Government in the area of the protection of fundamental human rights and freedoms, political and civil rights, rights of national minorities and ethnic groups, economic, social and cultural rights, rights for protection of the environment and cultural heritage, as well as in the area of children's rights and furthering of children's best interests and the enforcement of the principle of equal treatment and principle of equality, including gender equality.

On 2 March 2011 the Government approved the Statute of the Government Council for Human Rights, National Minorities and Gender Equality. Only six of the seven proposed specialized committees were finally approved. The Committee for Rights of Gays, Lesbians, Bisexual and Transgender Persons, whose functions should have been fulfilled by the Office of the Government, was excluded from the Statute at the request of *KDH* (Christian Democratic Movement).

The draft Statute of the new Government Council was the outcome of a process of several months and a repeated inter-ministerial comments procedure. This Council should help the Government to implement the principle of equal treatment and the principle of equality of all minorities in practical life. Although during the preparation of the Statute, the Committee for the LGBT minority was also among the permanent committees of the Council, the Government omitted this Committee from the Statute in the process of its approval, without consultation with representatives of this minority.

The six established specialized Committees of the Government Council will have the possibility to professionally deal with issues of gender equality, national minorities and ethnic groups, senior citizens, disabled persons, children and young people, research, education in the area of human rights and development education, and finally of prevention and elimination of fascism, xenophobia, anti-Semitism and other forms of intolerance in the near future. The list of these issues is nearly identical to the list of grounds for prohibition of discrimination, as enshrined in the Antidiscrimination Act. The chairman of the Committee for Equality is the Vice Prime Minister and Minister of Labour, Social Affairs and Family.

Appeal to the Vice Prime Minister for Human Rights

Civil society and the female and male experts in human rights issues welcomed the establishment of the Government Council and its six specialized committees, but also expressed their concerns and disapproval regarding the omission of the Committee for Rights of Gays, Lesbians, Bisexual and Transgender Persons from the Statute of the Government Council for Human Rights, National Minorities and Gender Equality. In their appeal addressed to the Vice Prime Minister for Human Rights they noted that this decision was a clear signal, not only to non-heterosexual persons, but also to Slovak

society as a whole and to the European Community, that the Government of the Slovak Republic did not regard LGBT persons worthy of any attention, interest or systematic approach to the solution of their problems. The repeated effort to make lesbian, gay, bisexual and transgender persons invisible places them in the position of second-class citizens – with the same obligations to the Slovak Republic, but not the same opportunities and rights. In his reaction to the appeal, the Vice Prime Minister declared his interest and the interest of his office to initiate and support the lay and professional discussion in this area, which he regarded as a natural and indomitable part of the human rights agenda. He stressed that prohibition of discrimination on the ground of sexual orientation was, among others, enshrined in Slovakian law in the Antidiscrimination Act and that this applied to the area of labour relations as well as to the area outside of the labour market. The Vice Prime Minister is aware that the ongoing public discussion on issues of persons with a different sexual orientation and their position in society was reduced to the subject of registered partnership. Therefore he welcomes and supports activities of non-governmental organizations to make the general public aware of sexual minorities issues in the form of a constructive presentation.

Conference ‘Women’s rights in the light of CEDAW’

In July 2008 Slovakia defended its government report before the UN Committee on the Elimination of Discrimination Against Women. Subsequently, the CEDAW Committee prepared its Final Findings, where the Government of Slovakia was invited to ensure the proper fulfilment of obligations resulting from CEDAW. The non-governmental organizations that had presented so-called ‘shadow reports’, decided to monitor the implementation of the Final Findings and to inform the public, the Government and the UN of the results. Thanks to the support of the Open Society Foundation they implemented a two-year monitoring programme, the result of which was a Monitoring Report on the implementation of the final findings of CEDAW in Slovakia that was presented to the conference in February. The female experts pointed out persistent and serious weaknesses in the area of human rights of women and expressed their concern about the continued discrimination against women and absence of systematic measures for its elimination.

According to the Monitoring Report, women in Slovakia were struggling with discrimination at all levels and in all areas. Every fifth woman is exposed to violence and does not receive sufficient help. The Health Ministry under *KDH*'s (Christian Democratic Movement). influence is doing everything it can to worsen the already limited access of women to abortion. A systematic solution to issues of sexual and reproductive health of women in Slovakia as well as the recognition of this agenda as a part of human rights are still lacking.

The existing legislation permits the dismissal of pregnant women in the trial period without indication of reason, wages of women are statistically one-quarter below the wages of men, the share of men using parental leave is only 0.5 %, women living in a relationship with a woman are not allowed to marry, women are exposed to a multiple risks of poverty. Another serious problem is forced sterilizations of Roma women that have not been effectively investigated yet and where the Government has not adopted any solutions in respect of this practice. Roma women face multiple discrimination in all areas of public and private life.

Legislative developments

Duration of maternity leave has been prolonged

From 1 January 2011, new wording in the Social Insurance Act that changes existing rules, especially in the pension and sickness scheme, entered into effect. The maternity benefit paid by the Social Insurance Company increased from 55 % to 60 % of the gross wage of the mother. At the same time, the period for receiving this benefit was extended from 28 weeks to 34 weeks, or 37 weeks in the case of single mother. To mothers who have given birth to two or more children at once (multiple births), the maternity benefit is paid during 43 weeks. The increase in and the extension of the period for receiving maternity benefit also applies to those mothers who started to receive this benefit before 1 January 2011 and will also receive it after this date. The Act also changed the length of maternity leave from 28 weeks to 34 weeks. A single mother is entitled to maternity leave of 37 weeks and a woman who has given birth to two or more children at once is entitled to maternity leave of 43 weeks. In connection with caring for a newborn baby, a man is also entitled to parental leave of the same duration with the same benefit if he cares for the newborn baby.

Public discussion on the Labour Code amendment

In November 2010 the Government approved a draft amendment to the Labour Code, which in January 2011 was submitted for review by the so-called tripartite social partners – a working group with representatives of employees (trade unions), employers and the Government.

The Ministry of Labour has received hundreds of comments on this draft amendment from members of the public as part of a review process that ended on 28 March 2011. The Ministry is now set to review the comments and eventually include some in the draft.

A total of 25 non-government organizations and nearly 650 male and female supporters have also submitted observations on the draft amendment relating to the conditions for the dismissal of pregnant women during the trial period and the need for its harmonization with EU legislation, as well as to the elimination of discriminatory rules on granting time off work to take one's spouse to a maternity clinic.

A particular form of discrimination, the elimination of which was requested by NGOs in their observation, is the dismissal of pregnant women during the trial period after employers have learnt of their pregnancy. This dismissal occurs in spite of the fact that since 2004 the Antidiscrimination Act has been in force in Slovakia and it prohibits, among other things, discrimination on the ground of pregnancy. Although the EU directives only permit the dismissal of pregnant women for well-founded reasons unrelated to pregnancy, due to the insufficient legislation in this area the practice in Slovakia is diametrically opposed. According to NGOs, the trial period must not serve as a tool for the discriminatory dismissal of female workers on the ground of their pregnancy – i.e. for a reason that has no relation to their ability or inability to carry out certain work, or to the quality of this work.

The Labour Code in force allows the employer to provide paid time off to the employee to drive his wife to the clinic and back in case of a birth. NGOs regard this provision as discriminatory because the law does not allow for such time off for a partner who is to give birth to a child and is not their wife. It is discrimination on the ground of family status because it places unmarried persons at a disadvantage compared to married persons, and discrimination on the ground of sexual orientation because non-heterosexual women are not allowed to marry.

Equality body decisions/opinions

The Slovak National Centre for Human Rights will submit the annual Report on the Observance of Human Rights including the Observance of the Principle of Equal Treatment by the end of April.

Miscellaneous

In 2009 and 2010, a common project of partner organizations from the Czech Republic, Poland, Ukraine, the Slovak Republic and Representation of the Heinrich Böll Foundation in Warsaw was carried out. Its aim was to examine gender implications of the financial and economic crisis from different perspectives and to apply the gender aspect in economics. The conclusions of the analyses are contained in two publications that are available in the Slovak language:

Gender implications of the crisis – Aspects of selected cases contains the following analyses:

- Jarmila Filadelfiová, ‘Gender dimensions of the crisis’: the situation in the labour market and the government’s anti-crisis measures, statistical data on changes in the labour market that occurred during the economic crisis, implications of the crisis that started in October 2008 for men and women, how their (un)employment was affected and how their social situation changed.
- Janka Debrecéniová, ‘State social benefits aimed at family support’: analysis of selected Acts adopted in the period of crisis. Like anti-crisis measures of the Government, these Acts were mostly perceived as gender neutral. This analysis stresses their gender implications, which also result from the fact that the care for family and children in Slovakia remains the domain of women. The absence of the gender aspect has caused the analysed Acts to be discriminatory against women, and in particular against groups of women who combine several discriminatory characteristics.
- Zuzana Maďarová, ‘The crisis in policy and mass media’: analysis of government and opposition debates on the crisis and content analysis of mass media in the period of crisis. Neither the Government nor the opposition looked at the causes and implications of the crisis from the gender perspective and nor did they include this perspective in ‘anti-crisis’ measures. Mass media at least mentioned gender inequalities in connection with the crisis, but they lacked a comprehensive gender-sensitive approach, too.

Gender perspective in economics – Aspects of power relations: This Collection of Documents contains contributions from the first seminar in Slovakia devoted to gender relations in economics that was co-organized by the Representation of the Friedrich Ebert Foundation in Bratislava and ASPEKT in cooperation with the Representation of the Heinrich Böll Foundation in Warsaw. It contains the following studies:

- Gabriele Michalitsch, ‘Market and Power’. The economic (re)production of gender inequalities creates an important definition of the perception of gender and gender relations. This study outlines possible ways to attain gender equality that are offered by the feminist economic policy within the framework of the existing system.
- Anna Zachorowska-Mazurkiewicz’s ‘Care and Economy’ draws attention to negligence of care and related work in the area of social sciences and political

- decision-making in the 20th century, but also to the shift that was achieved thanks to feminist-oriented female economists who regarded care as a fundamental subject.
- Daniel Gerbery's 'Childcare and Labour Market' deals with the search for links between existing forms of childcare and the allocation of tasks to men and women in different areas of productive activities, with emphasis on the labour market.
 - Jarmila Filadelfiová, 'Women and men at work and family'. Based on concrete data, this study describes the situation in the area of reproductive and productive work in Slovakia from the gender perspective.
 - Oľga Pietruchová – 'Gender experience with crisis - Particular cases from Central European countries'. This document studies specific data as well as the gender dimension of the crisis. The increasing public deficit will put pressure on savings, which will particularly affect women who, being exposed to a double load – at work and in the household - will hardly have the capacity and energy for both a career and engagement in public affairs.

SLOVENIA – Tanja Koderman Sever

Policy developments

Local elections 2010

The local elections in October 2010 proved once again that numerical quotas introduced with the Law on Local Elections in 2006 are not an appropriate measure to achieve a more balanced representation of women and men in political decision-making. Even 30 % women quotas, introduced with the 2010 local elections, did not contribute to a greater representation of women in municipal councils, because male and female candidates were not arranged on candidate lists in a one-to-one relationship (meaning: in alternating order) and therefore did not have equal opportunities to be elected. 21 % of female councillors and less than 5 % of female mayors elected, and nine municipalities without female councillors is not an election result that would speak in favour of a balanced representation of women and men in decision-making positions at the local level. Therefore, in terms of social justice there is serious doubt that such results will meet the needs of women, that women will be given the opportunity to show and prove their potential and that decisions about life in the local environment, which half of the population cannot sufficiently influence, will contribute to improving the situation of women.

Governmental activities

The Council for the Implementation of the Principle of Equal Treatment met for the fifth time in late October 2010. It discussed the Analysis of the Current Institutional Regulation for Ensuring Equality and Protection against Discrimination in Slovenia. It decided that the existing system of legal protection against discrimination is not effective and therefore a different organization of various institutions active in this field should be taken into consideration.

Activities of the Advocate for the Principle of Equality and Office for Equal Opportunities

The Advocate for the Principle of Equality Boštjan Vernik Šetinc (hereinafter the Advocate) expressed the same concern on 21 March, the International Day against Racial Discrimination. In his opinion, legal remedies mainly exist on paper and are not

effective, are not user-friendly and are dissuasive. Furthermore, assistance to victims of discrimination is not independent or effective, which shows the need to establish an independent specialized body for protection against discrimination. In addition, it is necessary to design and implement effective and coordinated policies to prevent and eliminate discrimination. In order to make the current system of legal protection more accessible, the Advocate opened a website 'www.zagovornik.net' presenting the basic information on discrimination, prevention of discrimination and his work.

The Act on Equal Opportunities for Women and Men obliges local communities to promote and establish equal opportunities and take into consideration the gender equality perspective with regard to the adoption of measures and activities needed for the establishment of equal opportunities within the framework of their competencies. Furthermore, it provides a legal basis to appoint coordinators for equal opportunities in local communities who propose measures and activities in the field of the establishment of equal opportunities and have a consultative role in the formulation of solutions in the field of gender equality. In accordance with this provision, the Office for Equal Opportunities called upon municipalities that have not yet appointed their coordinators for equal opportunities to start appointing them.

Case law of national courts

Although gender discrimination is not so rare in Slovene society, victims of discrimination rarely decide to bring gender equality cases before court. That is why there has been no case law worth mentioning in the area of gender equality in the past six months.

Equality body decisions/opinions

The Advocate published the Annual Report on his work for 2010. In 2010, he decided 7 gender discrimination cases. He found discrimination in:

- a case of alleged unequal treatment based on gender, regarding access to and supply of goods and services where a male claimant complained to have been discriminated against because the entrance fee to a club was charged only to men;
- two cases of public advertisements for certain jobs. The Advocate found such leaflets and advertisements for business secretaries being only described using feminine grammatical phrases, and advertisements for jobs like pilot, engineer, director, butcher, teacher and tourist guide being only described using masculine grammatical phrases to be gender discriminatory;
- a case of sexual harassment, where a man was touching a female co-worker and was sending her e-mails with inappropriate content;
- two cases of alleged discrimination based on parenthood and pregnancy at the workplace.

In addition, he discussed a potential equal pay case of a female worker. Unfortunately, he did not investigate any further and the outcome of the case is therefore not known.

This last case and all other cases in which he just gave oral advice to victims of discrimination, show that the system of the institute of the Advocate with his current duties, obligations and most of all competencies is not effective in preventing and eliminating discrimination and most of all in effectively assisting victims of discrimination. Therefore it should be reformed as soon as possible.

Miscellaneous

At the beginning of October 2010, the Office for Equal Opportunities together with the Centre for Judicial Training organized a workshop on anti-discrimination awareness raising for judges in the scope of the project 'Equal in Diversity'. The purpose of the workshop was to identify methods of discrimination and its elimination.

At the end of November 2010, the conference on 'Diversity between law and practice' was organized by the Office for Equal Opportunities, the Association Manager, Faculty of Social Sciences and Slovenian Association for Human Resource Management and Industrial Relations. The purpose of the conference was to present the results of a study on various forms of discrimination at the workplace, employers' legal obligations, the role of management, workers' rights regarding the protection against discrimination; and to inform participants about the case law of labour inspectorates, the Advocate and labour courts.

SPAIN – Berta Valdés

Policy developments

First Equality Plan for the State General Administration

There is a new Equality Plan for the General Administration, the first Equality Plan negotiated after Law 3/2007 for effective equality between women and men. The Plan was signed in January 2011 and will be valid for one year. The most outstanding objectives of the plan are to strengthen and develop equal treatment and opportunities between women and men; to guarantee real and effective equality; to attain a balanced composition in Public Administration and to promote women's access to management positions. The measures of central action are several, for example measures on access to public employment, equality in the development of occupational training, measures for the reconciliation of work, private and family life, and measures affecting sexual harassment and gender harassment protocols or the pay gap. A specific commission will control the degree to which the Plan is fulfilled and the main directorate of the Administration will compile an annual report on its implementation, which will be sent to the Cabinet of Ministers.

Strategic Plan for Equal Opportunities between Women and Men of

Castilla-La Mancha 2011-2016: implementing the law during an economic crisis

This Plan implements Article 12 of Law 12/2010 for equality between women and men in *Castilla-La Mancha*, but its effectiveness will depend on the economic resources and the economic situation is currently difficult. The Plan establishes eight main points as well as strategic targets and necessary measures for each of them. These are: implementing mainstreaming in all of the public administration (within the *Comunidad Autónoma*), conciliation and joint responsibility such as the main strategy for human sustainability, the eradication of gender violence, women's empowerment in public and private areas, the promotion of economic autonomy for women through high-quality employment, education in equality, health and the quality of life for women throughout their entire life cycle and specific measures for women living in rural areas. Framed within these point, 54 objectives have been developed through 302 measures designed to attain real equality between women and men in *Castilla-La Mancha*. The Plan also recognises the diversity of women's groups and situations of multiple discrimination

when women are in a position of special social vulnerability. For this reason, specific consideration is given to groups such as disabled women, the elderly, immigrants, single women with family responsibilities or victims of gender violence and of white slavery.

Legislative developments

Law of Asturias 2/2011 for equality between women and men and the eradication of gender violence (Boletín Oficial del Principado de Asturias, 18 March 2011)

Asturias is one of the *Comunidades Autonomas* that has needed a long time to regulate gender issues. As a novelty among other laws from different *Comunidades Autonomas*, that of Asturias combines, in a single normative body, equality between men and women and the eradication of gender violence. The Law has a total of 49 articles organised under five titles dealing with the following topics: public policies promoting equality between women and men, equal opportunities in access to employment, equality at work and, finally, in the last chapter, the guarantee of equal opportunities by means of applying public policies. The main objectives are related to these topics and there are some novelties such as the creation of the Women's Houses Network of Asturias by means of a framework agreement between the local Administrations. This law also regulates reports on the gender impact of laws, decrees and plans and creates Equality Units.

Law 12/2010, of 18 of November, Equality between Women and Men of Castilla-La Mancha (Diario Oficial of Castilla-La Mancha, 25 November 2010)

This law for Castilla-La Mancha improves on national Law 3/2007 for effective equality between women and men, by incorporating measures for certain groups of women. The law guarantees the rights of young women, women over 65, widows, disabled women, women living in rural, immigrants and prostitutes. The Law also regulates balanced composition, family and domestic joint responsibility, and proactive measures (such as positive action) in order to attain equality between men and women. These measures apply to various fields, emphasizing education, private and public employment, health, mass media and publicity. A set of preventive measures against gender discrimination (such as sexual and gender harassment, and the pay gap) are also regulated together with reparation and sanctions if discrimination has already taken place.

Law 1/2011 Evaluation of gender impact in Castilla y León (Boletín Oficial de Castilla y León, 11 March 2011)

The obligation to guarantee mainstreaming was recognized in Law 1/2003 on Equal Opportunities between Women and Men in *Castilla y León*, and also in the Statute of Autonomy of *Castilla y León*. Despite this, several years have passed before the evaluation report has been regulated. Probably the influence of the IVth Plan for Equal Opportunities (2007-2010) has determined the elaboration of this Law 1/2011, which regulates the evaluation of gender impact of legislation and of relevant economic and social plans. A report containing an evaluation of gender impact will be mandatory and will include an analysis and a description of the following aspects: an assessment of the initial situation of women and men within the specific scope of the act or plan, always including sex-segregated data; measures to neutralise any detected inequalities, in order to attain equality of opportunities; consequences of the implementation of the act or plan in relation to equal opportunities between women and men.

Law 39/2010 on the State General Budget for 2011 (Boletín Oficial del Estado, 23 December 2010)

Unfortunately, the Spanish legislator has traditionally used the State General Budget Law to regulate all kinds of issues, introducing amendments to a large variety of laws. In this case, two different regulations concerning gender equality have been introduced. The first one is the creation of an economic benefit for working parents taking care of minors affected by cancer or another serious disease. The benefit is for workers and public employees when both parents work and one of them must dedicate part or all of their working day to taking care of the minor that suffers a serious disease. The minor must be long-term hospitalised and in need of treatment that requires direct attention. The beneficiary of the benefit will have to reduce his/her working day to at least 50 % and the benefit will be proportional to the reduction of the working day. The social security contributions for the period of reduction of working hours will also be reduced. But this reduced contribution will be taken into account as if it was complete, i.e. increased to 100 % of the quantity that would have applied if there had not been any reduction in working hours. This new benefit will end at the time that direct, continuous and permanent care of the minor is no longer necessary or when the minor turns 18.

The second regulation deals with paternity leave. Law 9/2009 of 6 October on the duration of paternity leave has extended the duration of this leave to up to four weeks, both for workers and public employees. This law should have come into force on 1 January 2011 but Law 39/2010 on the State General Budget for 2011 has delayed its effects for one more year, and it will now only come into force on 1 January 2012.

Draft legislation

Integral Law for Equal Treatment and non Discrimination

The draft Integral Law for Equal Treatment and Non-Discrimination is an anti-discriminatory law with a double objective: to prevent and to eradicate any form of discrimination. The aim is to protect the victims, trying to combine the preventive approach with the repairing approach. It covers the six traditional grounds of discrimination (sex, racial or ethnic origin, disability, age, religion or belief and sexual orientation) and also incorporates three new grounds: disease, sexual identity and language. Some of the novelties are: the definition and regulation of multiple discrimination and positive actions for this specific type of discrimination; discrimination by association and error; the creation of the Authority for Equal Treatment and Non-Discrimination as an independent, single-person competence, based essentially on the *autoritas*²⁰³ of its holder. The Law is to be applied in all areas of life: political, economic, cultural and social. Finally, with this new Law the legislator aims to transpose Directives 2000/43 and 2000/78 in a more suitable way.

SWEDEN – Ann Numhauser-Henning

Case law of national courts

Relevant case law concerning sex discrimination in the last six months comes from the Swedish Labour Court. Two cases are presented here. Following the latter case – 2011 No. 2 – two parallel cases have been brought before the Labour Court. In Case 2011

²⁰³ Moral authority.

No. 22, the refusal to prolong a probationary employment of a pregnant employee amounted to a *prima facie* case of discrimination. The employer did, however, succeed in proving that adverse economic circumstances were the reason for termination. In Case 2011 No. 23 the non-employment of a pregnant jobseeker was deemed to amount to discrimination. The Swedish Labour Court is the ultimate instance in cases of work-related discrimination (among other labour-law issues).

Alleged multiple discrimination (age and gender) in relation to hiring

Labour Court Case 2010 No. 91 (judgment 2010-12-15)

Was a woman, 62 years of age, discriminated against on the grounds of sex and age when she was not among the applicants called for an interview and on the ground of age when she was also not employed as a job coach by the State Employment Agency?

The 62-year-old woman had applied for one of two positions as a job coach at the local State Employment Agency. She was not among the ten applicants (six women and four men) called upon for an interview, nor was she among the two eventually employed (two women, 27 and 36 years of age).

The Swedish Equality Ombudsman (DO) claimed discrimination on the grounds of sex *and* age to be at hand during the appointment process and on the ground of age as regards non-employment. (1) The claimant was better or equally qualified than most of the applicants who were called for an interview – among them two men with no higher education whatsoever and considerably shorter professional experience than the alleged victim. (2) She was also as equally qualified as one of the women finally appointed and better qualified than the other one. Among the ten applicants interviewed there were thus six women aged 27 to 43 and four men aged 23 to 60.

The Court found that the alleged victim was as equally situated as – or even better qualified than – all of the ten applicants who were called for an interview. She was clearly more qualified than two of the men interviewed and also one of the women later employed. The Court found that there was a *prima facie* case of discrimination on the grounds of sex and age with regard to the employment process and of age with regard to the final employment. The employer claimed that personal inability was the reason for not employing the claimant. According to the Court, however, in a case like this it was not enough for the employer to refer to the opinion of two employees concerning the complainant's personal abilities without further ado. There is a requirement for the employer in such cases to investigate such an objection in a structured and thorough way by also taking references. A mere claim that personal inability was the reason is not enough for the employer to prove that the decision did not in any way relate to the claimant's age and sex. The fact that the ten applicants interviewed represented both sexes and quite a wide range of ages was, having regard to the obviously better qualifications of the claimant concerning both education and professional experience in relation to at least two of the men interviewed, not enough to prove that sex discrimination was not at hand. The employer was therefore unable to satisfy the burden of proof. Indemnification was set at approximately EUR 7 500 (SEK 75 000), taking into consideration that it was a fixed-term appointment.

The case is interesting since it is one of the first examples of multiple discrimination. It is also interesting that the Labour Court found both age and sex discrimination to be at hand despite the 'mixed setting' of the case - the employment process involved both sexes and quite a wide range of ages. Moreover, the Court did not discuss the fact that there were not only persons of both sexes but also elderly men called to the interview. Did they tacitly distinguish a sub-group of *elderly women* when

stating that age and sex discrimination had been at hand in the interview situation? What is also interesting is the fact that double (no interview, no employment) and – at least partly - multiple (age and sex) discrimination were not considered a motive for increasing the indemnification, which was set at a normal level.

Source: Labour Court Case 2010 No. 91

Legislative provisions:

- *National law*: Chapter 2 Section 1 of the (2008:567) Discrimination Act
- *EU law*: Article 3.1 of the 2000/78/EC Equal Framework Directive and Article 14 of the 2006/54/EC Recast Directive.

Alleged discrimination on the ground of a miscarriage/expected pregnancy

Labour Court Case 2011 No. 2 (judgment 2011-01-19)

Did it amount to discrimination on the grounds of sex and/or unfavourable treatment on the grounds of parental leave to refuse employment to a woman after knowing that she had suffered a miscarriage? A woman (E.N.) worked as an apprentice on a Swedish farm in the spring of 2009. Having informed the employer that she had suffered a miscarriage in May 2009 she was denied further employment and the apprenticeship was ended without extension on the 15th of May 2009. The farmer later employed another woman.

According to the Court, it is clear that in May 2009 E.N. was an applicant for further employment at the farmer. The fact that the farmer had only just been informed about the miscarriage and that he – according to a recording of a conversation between himself and E.N. – had told E.N. that a future pregnancy would be very inconvenient for his business amounted to a *prima facie* case of discrimination/unfavourable treatment. Despite the fact that the Court was convinced that her failing abilities for the work in question was an important factor when denying E.N. further employment, an expected forthcoming pregnancy was also found to be a part of the decision not to employ her any further and this was enough to make it discriminatory. The farmer had thus not proved that his decision was not related to pregnancy and both discrimination on the ground of sex and unfavourable treatment on the ground of (expected) maternity leave were found to be at hand. However, the indemnification was set quite low, in this case approximately EUR 3 000 (SEK 30 000).

The judgment is of great interest for the careful treatment of the burden of proof on behalf of the employer once we have a *prima facie* case of discrimination and for the fact that discrimination was found to be at hand despite the fact that the claimant was not pregnant or entitled to maternity leave at the time of the refusal.

Source: Labour Court Case 2011 No. 2

Legislative provisions:

- *National law*: Chapter 2 Section 1 and Chapter 6 Section 3 of the (2008:567) Discrimination Act and Sections 16 and 24 of the (1995:584) Parental Leave Act.
- *EU law*: Article 14 of the 2006/54/EC Recast Directive.

Miscellaneous

The Swedish Equality Ombudsman dismissed by the Government

The introduction of the single non-discrimination act – the 2008:567 Discrimination Act – on 1 January 2009 also implied the start of the new ‘single’ Swedish Equality Ombudsman, replacing four former specialised ombudsmen against discrimination. Mrs Katri Linna – a former Ethnicity Ombudsman – was the head of the new authority from the start. Following months of harsh internal as well as public²⁰⁴ criticism of her leadership and the slow rate of dealing with complaints she was dismissed by 1 February 2011 with immediate effect from her tasks as Equality Ombudsman by the Government.

Internet source and additional information:

<http://www.regeringen.se/sb/d/14203/a/160188>, accessed 5 April 2011.

TURKEY – Nurhan Süral

Policy developments

Headscarf issue

A change was made to the guidebook for the Selection Examination for Academic Personnel and Graduate Studies (ALES) by the Student Selection and Placement Centre (ÖSYM) which lifted the requirement of taking the examination with the head being uncovered. On 19 January 2011, the Council of State, the high administrative court, ruled that this decision is invalid and cannot be enforced. The Court also claimed that the security of those taking examinations would be at risk as it would be difficult to ‘identify the sex of the candidates’ entering examination centres if they were wearing headscarves. Unfortunately, the Court once again took an ideology-based approach, not a rights-based approach. Its decision, which is devoid of any legal ground, is a confirmation of ideological secularism and judicial tutelage. The high judiciary views the headscarf as a symbol of resistance to secular modernity and refuses to treat it as an issue relating to human rights and equality.

The Constitutional reform package was adopted with a majority of 58 percent of the votes cast in the 12 September 2010 referendum where 77 percent of all eligible voters participated. The package, inter alia, strengthened the rule of law, restricted military jurisdiction and restructured the composition of the Constitutional Court and the Supreme Council of Judges and Public Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*, HSYK) to align them with their counterparts in the democratic world. With these initial steps the package intended to eliminate judicial tutelage. The high courts, which deem themselves to be the ‘ultimate guardians of secularism’, have always been involved in extraconstitutional attempts using ‘self-created powers.’ ‘Secularism’ and ‘Kemalism’ (following in the footsteps of Kemal Atatürk, the founder of the Turkish Republic) have been masks/justifications for a vicious circle of authoritarian military and/or judicial coups/interventions. The authoritarian political practice of secularism contributes to an undermining of the democratic process in Turkey.

²⁰⁴ Compare the articles in the Swedish daily newspapers *Dagens Nyheter* 6 September 2010 (*DO dröjer med beslut om heltäckande slöja*), 22 November 2010 (*Ny kritik mot DO för senfärdighet*), 9 December 2010 (*DO kritiseras av eget expertråd*) and *Svenska Dagbladet* 1 February 2011 (*Kritiken mot Linnas ledarstil på DO har varit hård*).

Right to an individual application to the Constitutional Court

A serious and chronic problem in Turkey is lengthy trial periods. The Court of Appeals has more than 1.5 million cases pending, making the wait for any new case to be heard around five years. The European Court of Human Rights (ECtHR) has frequently condemned Turkey for having lengthy detention and trial periods. A comprehensive reform of the system is underway. The Court of Appeals and the Council of State were especially against the idea of having more chambers. So far, it has been the Court of Appeals and the HSYK that have composed each other. The HSYK appoints $\frac{3}{4}$ th of the judges to the Council of State. New senior judges will now be appointed, this time by the democratically composed Supreme Council of High Judges and Public Prosecutors. With a new pluralist structure, the high judiciary is likely to become a guarantor of freedoms rather than a guardian of state ideology and a tool for opposition against democratically elected governments.

The Constitutional reform package introduced the right of an individual application to the Constitutional Court with regard to the fundamental rights and freedoms enshrined in the Constitution that fall within the scope of the European Convention on Human Rights. This new mechanism was devised within the scope of the opinions (CDL-AD(2004)024 & 034) issued by the Venice Commission at the Constitutional Court's request. The new Law on the Organization and Trial Procedures of the Constitutional Court with detailed provisions on the right of individual application has now been adopted.²⁰⁵ It will not be difficult to foresee that headscarf-wearing female students deprived of university education as well as headscarf-wearing women prohibited from entering the labour market, especially the public sector, and graduates of *imam hatip* (prayer and preachers') schools subjected to severe limitations when entering university education will be among the first ones to use this right. All these ideological prohibitions and limitations created/supported by the high judiciary are at stake. The Constitutional Court and the HSYK have been restructured and the Court of Appeals, together with the Council of State, fear that the Constitutional Court with its new structure may annul such ideological rulings. This is why the Court of Appeals and the Council of State and neo-nationalist circles, including the Judges and Prosecutors Association (YARSAV), resisted judicial reforms including this new authority to be conferred upon the Constitutional Court.

Legislative developments

Sack Law

The so-called 'Sack Law' (a law amending quite a number of laws is called a sack law) became effective on 25 February 2011.²⁰⁶ The Sack Law brought improvements in various areas, *inter alia*, working life, employment, social security and civil servants. New types of leave were introduced and substantial (generous) increases were made in the duration of the current forms of leave for civil servants and workers with a permanent employment contract in the public sector. The relevant provisions are analyzed below.

Effect of an early delivery on the length of maternity leave

In Turkey, there is a compulsory maternity leave of 16 weeks. The eight-week antenatal resting period may be reduced to three weeks at the request of the worker and the

²⁰⁵ Official Gazette 3 April 2011, no. 27894.

²⁰⁶ Official Gazette 25 February 2011, no. 27857 bis.

approval of a doctor, and the unused period is added to the eight-week post-natal rest period. If there is a multiple pregnancy, two more weeks are to be added to the ante-natal leave. These ante-natal and post-natal rest periods may be increased with a medical report on the basis of the worker's health and the nature of the work to be performed. The total period of maternity leave in Turkey is compulsory. If there is an early birth as a result of which part of the ante-natal leave is not used, this part would be lost and would not be added to the post-natal rest period. According to the Sack Law, where childbirth occurs before the due date, the unused prenatal portion of the leave is added to the post-natal portion of the leave. Short-term incapacity benefits are also to be paid for this portion added to the post-natal leave. Parallel amendments are made to the Civil Servants Law. Another amendment made in the Civil Servants Law concerns the death of a female civil servant during maternity leave. Where this occurs, the civil servant father, if he so requests, may use the leave granted to the mother.

Additional maternity leave

The worker, if she so requests, has to be granted unpaid leave of up to six months following the post-natal period. The two periods, compulsory and additional, run consecutively, to give an entitlement to 16 weeks (18 in the case of a multiple pregnancy) plus 6 months leave. There can be no gap between the two periods. Additional unpaid maternity leave upon request was one year for female civil servants. The Sack Law has extended this one-year period to two years.

Paternity leave

Paid or unpaid paternity leave for male workers is left to individual and collective labour agreements. A male civil servant was granted paid paternity leave of three days upon the birth of his child. The Sack Law extends this to ten days. Moreover, it introduces an unpaid paternity leave of 24 months for a male civil servant, upon request.

Parental leave

In the Labour Act and the Civil Servants Act, there is no leave under the title of 'Parental leave.' A worker may request leave for a valid reason and this may be a family-related reason. In the Civil Servants Act, there are forms of leave entitled 'excuse leave' and 'sickness and patient companionship leave' that may be used for family-related reasons. An 'excuse leave' is a ten-day paid leave to which a second ten-day paid leave may be added in a period of one year. A 'sickness and patient companionship leave' is 3 months' paid leave plus 3 months' paid leave plus 18 months' unpaid leave. An unpaid sabbatical leave of one year to be used altogether or in two parts is granted to civil servants who have completed five (previously ten) years of service. The sabbatical leave can only be taken once throughout the entire period of service. It cannot be used when the civil servant is serving in a region which is subject to martial law, a state of emergency or a disaster. Permanent workers employed in the public sector are entitled to an unpaid patient companionship leave of 6 months plus 6 months. Workers permanently employed in the public sector are also entitled to an unpaid sabbatical leave of 6 months upon the completion of ten years of employment. This sabbatical leave can only be taken once throughout the entire period of employment.

Adoption leave

Adoption leave has been introduced for the first time for civil servants by the Sack Law. If a child below three years of age is adopted, there will be, upon request, an unpaid adoption leave of up to 24 months. If both spouses are civil servants, then these periods can be taken consecutively.

Pregnancy, birth and night work

A pregnant worker cannot be obliged to perform night work during the period starting from the time that her pregnancy is specified in a medical certificate until delivery. Night work may be performed after maternity leave or by a nursing worker, after a six-month period following the delivery leave if she is fit to resume night work. If the worker presents a medical certificate stating that it is necessary for her safety or health that she does not perform night work, she cannot be compelled to do so for the period specified in the medical certificate. The six-month night work prohibition may be extended to one year upon a medical certificate. On the other hand, a female civil servant cannot perform night work starting from the 26th week of her pregnancy until one year after the delivery. According to the amendments made by the Sack Law to the Civil Servants Law, a female civil servant can perform night work until the 24th week of her pregnancy unless she presents a medical certificate stating otherwise. For the period between the 24th week of pregnancy and one year following the delivery there is an absolute prohibition of night work.

Nursing periods

The daily nursing period is 1½ hours during weekdays for women workers until the child is one-year old. This was also true for female civil servants, but now, with the Sack Law, it is 3 hours a day for a period of six months following the termination of maternity leave and 1½ hours a day for the second six-month period.

Those employed in domestic work and part-timers

Those employed in domestic work and part-timers are compulsorily insured for the periods of employment and are voluntarily insured during non-working periods in order to be entitled to a retirement pension. The Sack Law has reduced the required number of premium (contribution) paid days from 9 000 to 7 200.

Promotion of female and youth employment

The Sack Law extends incentives such as cancelled or lowered premiums for private sector employers to promote the employment of women and young people. These incentives, applicable until 31 December 2015, cover males aged between 18-29 and females above 18 without an upper age limit. The Government is to subsidize employers' social security premiums for newly hired women during up to five years. The Council of Ministers is authorized to extend the period by five more years after 31 December 2015.

Prime Ministerial circular on the deterrence of mobbing (psychological harassment) in workplaces

The Prime Minister issued a circular on the deterrence of mobbing in public bodies and institutions and private workplaces.²⁰⁷ The circular speaks of the potential negative impact of mobbing on working life and highlights the importance of occupational health

²⁰⁷ Official Gazette 19 March 2011, no. 27879.

and safety and labour harmony. Mobbing is defined as systematic negative social acts targeting an employee: Mobbing is deliberate and systematic behaviour during which an employee is humiliated, degraded, socially excluded, intimidated, has his or her personality and dignity violated and is subjected to (hostile) ill-treatment. The measures to be taken are:

1. Employers shall be under an obligation to provide for all dissuasive measures.
2. Employees shall refrain from acts and behaviour falling under the scope of mobbing.
3. Collective labour agreements laying down preventive measures to deter mobbing shall be promoted.
4. The Labour and Social Security Communication Center shall provide help and support through a psychological support hotline (*ALO 170*) in order to strengthen the fight against mobbing.
5. In the Ministry of Labour and Social Security, a Board to Combat Mobbing shall be established to follow, evaluate and create preventive policies with the participation of the State Personnel Directorate, NGOs, and relevant parties.
6. Auditing personnel shall investigate complaints with due care and must finalize them without undue delay.
7. The utmost care shall be taken for the protection of privacy in mobbing cases.
8. The Ministry of Labour and Social Security, the State Personnel Directorate and the social partners shall organize educational and informative meetings and seminars to create a different approach as far as mobbing is concerned.

UNITED KINGDOM – Aileen McColgan

Legislative developments

The Equality Act: an update

The Equality Act 2010 was discussed in the first EGELR of 2010 and is described in this EGELR issue by Catherine Barnard.²⁰⁸ Many of the provisions of the Act came into force on 1 October 2010, and most of the remaining provisions on 5 April 2011. These include the provisions permitting fairly broad positive action measures outside recruitment and promotion (Section 158), and positive action in relation to recruitment and promotion within narrower boundaries, but significantly in excess of that legally permitted prior to the Act's implementation (Section 159). The new public sector duties, which cover race, disability, religion and belief, age and sexual orientation as well as sex, gender reassignment and pregnancy, also came into force on 5 April 2011. Draft Regulations on specific duties designed to support the general duty was published on 17 March 2011 together with a policy review paper and the EHRC has published guidance on the new duties.²⁰⁹

The new Equality and Human Rights Commission (EHRC) codes of practice on employment and services came into force on 6 April 2011 and replace five existing codes issued by the predecessor bodies to the EHRC. They are designed to reflect the law subsequent to the implementation of the 2010 Act.²¹⁰

²⁰⁸ *European Gender Equality Law Review* no. 1/2010, p. 135.

²⁰⁹ See www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance, accessed 4 July 2011.

²¹⁰ See www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance, accessed 4 July 2011.

Case law of national courts

In *Ministry of Defence v Wallis* [2010] IRLR 1035 the Employment Appeal Tribunal considered the territorial application of the British sex discrimination legislation. The Sex Discrimination Act 1975 (subsequently replaced by the Equality Act 2010) applied only to those ‘ordinarily resident’ in Great Britain (Section 10). The Claimants were the wives of British service personnel who worked at NATO headquarters in Belgium and the Netherlands, and were themselves employed by the Ministry of Defence in pursuit of the latter’s policy of employing the spouses of military personnel posted abroad. They were dismissed when their husbands left the armed forces and brought employment proceedings against the Ministry of Defence, claiming sex discrimination as well as unfair dismissal. The employment judge ruled that, where an English court was considering directly effective rights derived from EU legislation, territorial limitations had to be set aside in order to ensure that directly effective rights could be enforced by the English courts. The Employment Appeal Tribunal upheld the employment tribunal’s findings, ruling that the Sex Discrimination Act implemented the UK’s obligations under EU sex discrimination legislation, rights which were directly effective, and that the tribunal was obliged to construe the Act to give effect to EU rights even in the face of inconsistent domestic law.

In *R (Fawcett Society) v Chancellor of Exchequer* [2010] EWHC 3522 the High Court considered an application for judicial review of the 2010 Budget, this on the basis that the Government had not paid ‘due regard’ to the elimination of sex discrimination and the promotion of gender equality, as it was required to do by the public sector equality duty imposed by the Sex Discrimination Act 1975 (now the Equality Act 2010). The claim arose as a result of calculations which showed that women would bear a significantly disproportionate burden of the public sector cuts as both employees and the majority consumers of public services, while changes to the tax system would favour far more men than women. The Court refused the application, ruling that the challengers had delayed unduly in bringing their claim. The challenge did, however, result in an investigation of the budget from a gender perspective issue by the Equality and Human Rights Commission and the Government conceded there should have been early assessments of the gender impact of the budget.

The cuts in public sector spending have resulted in a large number of equality-based challenges in which it is being argued that public authorities have failed to pay due regard to gender, race and/or disability equality in making decisions to cut funding. Most have yet to make their way through the courts, though in *Harjula v London Councils* [2011] EWHC 861 (Admin) the Court accepted that the Defendant had failed to pay due regard to considerations of gender, race and disability equality in planning cuts to the funding of voluntary sector organisations many of whose services were targeted at groups defined according to these characteristics.

On 6 April 2011 the Employment Appeal Tribunal decided, in *Eversheds Legal Services Ltd v De Belin* [2011] UKEAT 0352_10_0604, that an employment tribunal had been correct to decide that favouring a woman on maternity leave in a redundancy scoring was sex discrimination against a man in the selection pool. The EAT ruled that the obligation to protect employees who were pregnant or on maternity leave did not extend to favouring such employees beyond what was ‘reasonably necessary to compensate them for the disadvantages occasioned by their condition’ and that, where a maternity or pregnancy benefit is disproportionate, as here, a disadvantaged colleague was entitled to claim sex discrimination. This decision is likely to pose real difficulties for employers who are attempting to avoid discrimination in redundancy situations

against women who are disadvantaged by their absence from the workplace as a result of pregnancy/maternity, and for those women.

In *R (C) v Berkshire West Primary Care Trust & Anor* [2011] EWCA Civ 237 the Court of Appeal upheld the decision of the High Court that a Primary Care Trust had been entitled to refuse to treat post-operative male-to-female transgendered people as exceptions to its general rule that it would only fund breast augmentation surgery for women in exceptional circumstances. It was argued for C that the trust had discriminated against her, as a transgendered woman, by failing to treat her differently from natal women. The Court ruled that, in determining whether C was relevantly like or unlike other women, the question was whether the characteristic relied upon (here not having been born a woman) was relevant to the distinction being made by the decision maker. Here, while C thought that she was more needy than a natal woman with a similar problem, this was not conclusive and the Trust was entitled to apply the rule that they had to show exceptional circumstances to qualify for funding.

Miscellaneous

Parents are now entitled to share time off work during the first year of their child's life, if the child is due to be born, or is adopted, on or after 3 April 2011. While, from 3 April 2011, the mother will be able to transfer six of the twelve months' leave to which she is entitled to her spouse, civil partner or partner (and adoptive leave can be shared between the two parents), it is planned that leave will be open to full sharing in 2015. After the first six weeks of maternity leave, however, during which the mother is entitled to 90 % of her former salary, maternity/ paternity leave is paid at a flat rate (currently £128.73 per week, or 90 % of salary if that is less) for a further 33 weeks and is unpaid thereafter. Fathers are, in addition, entitled to two weeks' paternity leave.

On 7 March the Government's Equalities Office launched a consultation on governmental proposals to 'develop new methods of engaging with women, to ensure an effective dialogue about the key issues of concern to women of all ages and backgrounds in the UK today.' The consultation document points out that, while women now make up nearly half (46 %) of those in employment, and 'are increasingly represented in all areas of political and public life – as heads of companies, chairs of public bodies, as councillors, Members of Parliament (MPs) and as leaders and active volunteers in their local communities', '[t]he median gender pay gap for full-time men and women is 10.2 %, and the gap comparing all men and women is 19.8 %'; '[t]he low proportion of women holding directorships suggests British business is not using all the skills and talents of the workforce effectively' with women constituting 'just 12.5 % of directors on the Financial Times and the London Stock Exchange (FTSE) 100 boards' and that women account for only 20 % of MPs; that '[i]n 2009/10, women were the victim of 73 % of domestic violence incidents.' According to the consultation document:

'The Government is committed to breaking down these remaining barriers to gender equality. The barriers which women face are too often there because they are women, and government has a role to act as a catalyst and advocate for change, working to create equal opportunities which enable women to play a full part in society. However, in many cases these barriers are no longer direct discrimination, but arise out of a more complex combination of attitudes, behaviours, culture and expectations. To develop policies that challenge these barriers and that make a real

difference to women's lives it is essential that women's voices are brought into the heart of government.

This consultation seeks views on the Government's proposals to develop new methods of engaging with women, to ensure an effective dialogue about the key issues of concern to women of all ages and backgrounds in the UK today. The consultation also asks for your views on the challenges and priorities for women in the UK today.'

European Gender Equality Law Review



THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY