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Editorial

European Citizenship, Gender Equality and Fundamental Rights: Different Paths or Coming to a Crossroads?

*H. van Eijken, LL.M.**

In this issue of the European Gender Equality Law Review the question of the personal scope of protection in the gender equality Directives and issues of pregnancy as a ground of discrimination are both addressed. Specific attention is paid to two thematic reports of the European Commission's Network of Legal Experts in the Field of Gender Equality in these articles: a report on the personal scope of equality and a report on pregnancy discrimination. Authors who were responsible for the executive summaries of the respective reports wrote the two articles.¹

In the article by Nicola Countouris and Mark Freedland, the gap in protection regarding the personal scope of equality is discussed. They conclude that considering 'the whole picture of personal scope concepts and definitions in sex equality law ... there are still further unresolved complications'.² Hence, in the context of the specific gender equality Directives, both personal scope and therefore of the scope of protection, are issues which demand attention.

In the second article included in this Law Review, pregnancy as a ground of discrimination is discussed in depth. In this article Eugenia Caraccioli di Torella and Annick Masselot pay attention to pregnancy discrimination in the sphere of employment and beyond (for instance regarding the refusal to pregnant women of access to a flight usually after 28 weeks of pregnancy). Moreover, the authors highlight the need for a holistic approach towards pregnancy discrimination for effective reconciliation of work and family life.³

This Editorial places these issues in the broader context of two important developing aspects of EU law: the meaning of EU citizenship, and the role of the EU Charter of Fundamental Rights.

The year 2013 was designated the European Year of Citizens, 'to enhance awareness and knowledge of the rights and responsibilities attached to Union citizenship'.⁴ In this European Year of Citizens the European Commission published its EU Citizenship Report 2013, 'EU citizens: your rights, your future'.⁵ This builds upon the EU Citizenship Report published in 2010, in which the obstacles with which EU citizens are confronted were discussed in detail.⁶ According to the 2010 report, awareness of the specific legal rights of Union citizens is lacking. Of the 500 million European citizens only a small percentage seem to exercise their

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¹ E. Caraccioli di Torella and A. Masselot, 'Work and Family Life Balance in the EU law and policy 40 years on: still balancing, still struggling', p. 6 and N. Countouris and M. Freedland, 'Work', 'Self-employment', and other personal work relations. Who should be protected against sex discrimination in Europe?', p.15.

² See in this Gender Equality Law Review, p. 17.

³ Recognised in the Charter of Fundamental Rights in Article 33 (2).

⁴ Decision No 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013), OJ 23/11/2012, L 325/1.

⁵ EU Citizenship Report 2013 EU citizens: Your Rights, Your Future, COM(2013)0269 final.

⁶ EU Citizenship Report 2010, Dismantling the obstacles to EU citizens' rights, COM (2010)603.

rights as Union citizens and are acquainted with the rights attached to the status of European citizenship.⁷ The Eurobarometer Spring 2013 reveals that a majority of 53% Europeans feel that they do not know their rights as citizens of the European Union.⁸ The Commission has placed raising awareness of the legal consequences of Union citizenship and the removal of obstacles to exercise Union citizens' rights high on its agenda.⁹ In the 2013 report, 12 actions to improve the exercise of EU citizenship rights have been announced by the Commission. No specific gender related issues are included in the report, but increasing gender equality could improve the exercise of the rights attached to European citizenship, as will be discussed below.

The right to move, reside, and work in a Member State other than that of one's nationality may be one point of connection between EU citizenship and gender equality. In this sense, the pending case of *Saint Prix*¹⁰ may be mentioned. This case concerns two questions of the UK Supreme Court on Directive 2004/38/EC.¹¹ That Directive regulates the free movement of European citizens and their residency in Member States other than the Member State of their nationality, either in their capacity as workers or self-employed persons, or regarding non-economically active persons, and their family members. According to Article 7 (3) of the Directive, the right to residence in a host Member State should be granted to a Union citizen for a period of more than three months when he or she is a worker. This right to reside could continue in certain situations in which the person is still regarded a 'worker'. A Union citizen who is no longer a worker or self-employed person will retain the status of worker or self-employed person, when he/she is, *inter alia*, temporarily unable to work as the result of an illness or accident. Ms. Saint Prix is a French national, who has been residing and working in the UK since 2006 on the basis of Directive 2004/38. She became pregnant and her baby was born prematurely. As a consequence Ms. Saint Prix could not work for three months, which resulted in the loss of her status as a worker. The question referred by the Supreme Court is whether Article 7 (3) of the Directive also concerns 'a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)'?

This specific case reveals the gap in protection for mothers of an ill new-born baby. The British courts are not very tolerant about such protection and regard the pregnancy-gap as a deliberate choice of Member States.¹² The Secretary of State argued in *Saint Prix* that it would be up to the legislature to bridge the protection gap in, not for the Court of Justice of the European Union (CJEU). The Supreme Court, however, refers to the broad interpretation shown by the CJEU in EU citizenship case law and in the case law concerning workers,¹³ as well as the fact that equal treatment of women and men is one of the fundamental principles of Union law.¹⁴ Therefore the Supreme Court referred to the CJEU the question whether gender-related periods of unemployment should be protected under Article 7 of the Directive, giving the CJEU the opportunity to improve protection for women in these particular circumstances.

⁷ EU Citizenship Report 2010, Dismantling the obstacles to EU citizens' rights, COM (2010)603.

⁸ Standard Eurobarometer 79, European citizenship – Spring 2013, p. 35, available on http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_citizen_en.pdf, last accessed 5 December 2013.

⁹ EU Citizenship Report 2010, Dismantling the obstacles to EU citizens' rights, COM (2010)603 and Progress towards Effective EU Citizenship 2011-2013, COM(2013)270 final and EU Citizenship Report 2013 EU citizens: Your Rights, Your Future, COM(2013)0269 final.

¹⁰ Case C-507/12 *Saint Prix*, Reference for a preliminary ruling from the Supreme Court of the United Kingdom (United Kingdom) made on 8 November 2012 – *Jessy Saint Prix v Secretary of State for Work and Pensions*, OJ C 26, 26.1.2013, p. 32.

¹¹ Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30 April 2004, pp. 77-123.

¹² See on this issue also O'Brien, The CJEU's chance to stop punishing pregnancy – The St Prix case on DELI Blog: <http://delilawblog.wordpress.com/case-comment/>, last accessed 13 November 2013.

¹³ Referring to Case C-138/02 *Collins* [2004] ECR I-02703.

¹⁴ Supreme Court, *Jessy Saint Prix (Appellant) v Secretary of State for Work and Pensions (Respondent)* of 21 October 2012, [2012] UKSC 49.

The case of *Saint Prix* will be decided in the upcoming year and hopefully the gap in protection regarding pregnant workers in Directive 2004/38 will be closed by the CJEU. The case demonstrates the potential connection between free movement and gender related issues in terms of removing obstacles for the exercise of EU citizenship rights, and in doing so it highlights the need to place such an issue on the European agenda in the future. Moreover, the case shows where challenges lie ahead in terms of gender equality in the broader context of EU law. As the Commission stated in its most recent Strategy for Equality Between Women and Men¹⁵ with regard to gender mainstreaming, ‘the impact of EU legal measures, policies and spending programmes on both women and men needs to be taken into account in all areas’. Such an integral approach is certainly needed, including in areas outside the scope of the specific gender directives.¹⁶

Hence, pregnancy and the right to effective reconciliation of work and family life are also important issues for European citizens when they exercise their right to free movement (Article 21 TFEU). As the *Saint Prix* case reveals, pregnancy, and pregnancy related illness, may create obstacles not only to the exercise of the right to move and reside freely as a European citizen in another Member State, but perhaps also to the personal scope of protection. From that perspective, the need for a holistic approach to ensure gender equality is integrally implemented in all policy areas is telling. Such an approach is also necessary to both raise awareness of gender stereotypes, and to facilitate their abolition, as such stereotypes are still present in these situations.¹⁷ As argued by the applicant in *Saint Prix* before the Supreme Court: ‘Pregnancy is not just a lifestyle choice. (...) Excluding a woman who makes that choice from the right of residence which she would have retained had she not become pregnant is (...) direct discrimination on grounds of sex.’¹⁸ Removing obstacles for European citizens may include removing obstacles based on gender.

In the perspective field of gender equality, the scope of application of the Charter and the recent developments in that context are particularly noteworthy. Two points may be raised here. First, gender equality may be strengthened by the recognition of gender equality as a general principle of Union law. Second, the scope of application of the Charter is of importance for the application of the provisions on gender equality that are included in the Charter.

First, the Charter supports the recognition of certain equality principles as principles of Union law.¹⁹ Although a general principle of Union law prohibiting gender discrimination as such has not (yet) been recognised by the CJEU, there are certain links to be found in EU law that could support such a principle. Article 21 of the Charter clearly states that ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic

¹⁵ Mid-term review of the Strategy for Equality Between Women and Men (2010-2015), p. 13.

¹⁶ See also Article 8 TFEU which provides, ‘In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’.

¹⁷ L. Senden, ‘Gender-Related Assumptions or: How Old Habits Die Hard...’, in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 1/2012*, pp. 1-3, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-1_final_web_en.pdf, last accessed 9 December 2013.

¹⁸ Supreme Court, *Jessy Saint Prix (Appellant) v Secretary of State for Work and Pensions (Respondent)* of 21 October 2012, [2012] UKSC 49, para. 19. See the well-established case law of the CJEU establishing that discrimination on the ground of pregnancy constitutes direct discrimination, for instance in C-177/88 *Dekker* [1990] ECR I-03941 and C-506/06 *Mayr* [2008] ECR I-1017. See also the Recast Directive, (Art. 2(1)(a) and in Article 2 (2) (c), Article 10 of Directive 92/85.

¹⁹ See also S. Koukoulis-Spiliotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and developing the *acquis* in gender equality’ in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 1/2008*, pp. 15-24, European Commission 2008, available at http://ec.europa.eu/justice/gender-equality/files/egelr2008-1_en.pdf, last accessed 9 December 2013; see also Cases C-555/07 *Küçükdeveci* [2010] ECR I-00365 and C-144/04 *Mangold* [2005] ECR I-09981.

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.’ Moreover, Article 23 of the Charter recognises the right to gender equality in all areas, while Article 33 of the Charter codifies the right to reconciliation of family and working life and protection against dismissal for a reason connected with maternity. The Charter has entered into force and has been granted the same legal status as the Treaties (Article 6 (1) TEU). Article 19 TFEU grants the institutions the competence to act in order to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Even though this provision provides a competence for the Union to act, rather than a directly enforceable substantive equality right, it may, additionally, support the existence of a general principle of non-discrimination on the ground of sex. Although Article 51 of the Charter limits its application to the situation in which Member States are ‘implementing Union law’, the Charter could still support the existence of a general principle of Union law, which is applicable only within the scope of Union law.²⁰

Second, with regard to the scope of application of the Charter, the judgment in *Fransson*²¹ is of considerable importance. As previously mentioned, several provisions of the Charter protect and support gender equality. Nevertheless, the scope of application of the Charter is a much debated issue, since the Charter provisions only apply if a measure falls within that scope. In the recently decided case of *Fransson*, the CJEU adopted a broad interpretation of the scope of application of the Charter, interpreting the situation in which Member States ‘implement’ EU law. As noted above, according to Article 51 (1) Member States are only bound by the Charter when they are implementing Union law. The Explanations relating to the Charter of Fundamental Rights, however, allow for a much broader interpretation of the scope of application of the Charter, stating that, ‘As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.²² Acting within the scope of Union law seems to be much broader than implementing Union law.

The Court of Justice held in *Fransson* that national law, which aimed to achieve the goals of a Directive, qualifies as implementing EU law. Such national measures therefore fall within the scope of Union law and the Charter is applicable to such national legislation. Remarkably, the CJEU explicitly refers in its judgment to the Explanations for the interpretation of its scope of application. The CJEU therefore seems to adhere to the broader explanation of the scope of the Charter, rather than the more limited interpretation of ‘implementation of Union law’ provided for in Article 51 (1) of the Charter. That interpretation is in line with Article 52 (7) of the Charter which stresses that the ‘explanations [are] drawn up as a way of providing guidance in the interpretation’ of the Charter.²³

Although the scope of application of the Charter will be a topic for debate in the future, the case of *Fransson* demonstrates the broad interpretation given by the CJEU in line with the Explanations to the Charter. This development is interesting not only in the broader context of EU law, but certainly also for gender equality.

²⁰ See in that respect also: K. Lenaerts and J.A. Gutiérrez-Fons ‘The Constitutional Allocation of Powers and General Principles of EU Law, CML Rev. (2010) pp. 1654-1655. See by analogy: Case C-149/10, *Chatzi*, [2010] ECR I-08489, para. 63 in which the Court found that Article 33 (2) of the Charter supported the existence and application of a principle of equal treatment with regard to parental leave. See also the more recent case of *Fransson* on the scope of the Charter.

²¹ Case C-617/10, *Fransson* [2013] ECR nyr.

²² Explanations relating to the Charter of Fundamental Rights, OJ, 14.12.2007, 2007/C 303/02.

²³ See also Case C-279/09 *DEB* [2010] ECR I-13849, para. 32.

As in previous editions, the European Gender Equality Law Review contains an overview of the relevant European case law in the field of gender equality, from both the CJEU and the European Court of Human Rights in the period between May and November 2013. Moreover, an overview of the European policy and legislative developments is included.

In addition, the national developments of the 33 countries involved with this Network (the EU Member States, the EEA countries (Liechtenstein, Norway and Iceland) the FYR of Macedonia and Turkey) are detailed.

The members of the editorial board hope that the content will be of interest to the reader. Reactions, comments, and suggestions regarding the review are, of course, very welcome.

The publications of the European Network of Legal Experts in the field of Gender Equality can be found at:

http://ec.europa.eu/justice/gender-equality/document/index_en.htm.

Work and Family Life Balance in EU Law and Policy

40 Years on: Still Balancing, Still Struggling

Eugenia Caracciolo di Torella and Annick Masselot*

1. Introduction

The following findings echo those of a recent report presented by the European Network of Legal Experts in the Field of Gender Equality to the European Commission, entitled ‘Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The application of EU and national law in practice in 33 European countries’. This unveiled evidence of the high level of discrimination and difficulties that parents, in particular mothers, continue to experience across Europe.¹ In this article, the two main authors of this report discuss some of the main findings. It seeks to shed some light on the reasons behind this widespread discrimination and argues that the cost of reproduction and care-giving across Europe today remains very high. It also suggests ways forward, based on a number of good practices.

It is 40 years since the 1974 Social Action Plan first placed the issue of reconciliation between work and family life (reconciliation) on the EU (then EEC) agenda.² This document acknowledged the need ‘to ensure that the family responsibilities of *all* concerned may be reconciled with their job aspiration’. Since then, slowly but steadily, it has been developed by a complex array of secondary legislation³ and soft law.⁴ These provisions have been further enhanced by the contribution of the Court of Justice of the European Union.⁵ In 2000, the

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¹ European Network of Legal Experts in the Field of Gender Equality, S. Burri, E. Caracciolo di Torella, and A. Masselot *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The application of EU and national law in practice in 33 European countries* (hereafter: the *Report on Pregnancy Discrimination*), European Commission 2012. The report is available in the EU Bookshop, and at: http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final.en.pdf, accessed 15 November 2013. It reports on the situation across the EU Member States, the

Candidate and Acceding Countries as well as Iceland, Liechtenstein and Norway with a view to highlighting the most important good practices. The executive summary has been translated into French and German.

² Social Action Programme 1974, EC Bull Supp. 2/74. See further E. Caracciolo di Torella, A. Masselot *Reconciling Work and Family Life in EU Law and Policy* London, Palgrave Macmillan 2010.

³ The Equal Treatment Directive 76/207/EEC as modified by Directive 2002/73/EC and repealed by the Recast Directive 2006/54; the Social Security Directive 79/7/EEC; the Equal Treatment in Social Security Directive 86/378/EEC as modified by Directive 96/97/EC and repealed by Directive 2006/54/EC; the Directive on the equality of independent workers 86/613/EEC now repealed by Directive 2010/41/EU; the Pregnant Workers Directive 92/85/EC; the Parental Leave Directive 96/34/EC, repealed by Directive 2010/18/EU; the Goods and Services Directive 2004/113/EC.

⁴ In particular, the Childcare Recommendation OJ L123, of 8 May 1992, p.16; see also the European Commission report, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM(2008) 638 and the comment by J. Plantenga, ‘Investing in Childcare. The Barcelona Childcare Targets and the European Social Model’, key note speech presented at the conference Childcare in a Changing World, 21-23 October 2004, Groningen.

⁵ From the early cases of C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941 and C-421/92 *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V.* [1994] ECR I-1657 where the Court held that discrimination on grounds of pregnancy is direct discrimination, to more recent cases where the Court was prepared to give pregnancy and maternity rights a fundamental rights perspective, *inter alia* Cases C-243/95 *Hill and Stapleton* [1998] ECR I-3739 and C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.

Charter of Fundamental Rights elevated the right to reconciliation between work and family to a fully-fledged fundamental human right.⁶ For this purpose, Article 33(2) states that:

‘to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.’⁷

Despite this comprehensive legal framework, there is overwhelming evidence that many parents continue to experience difficulties in reconciling work and family life. The vast majority of them are women who do not only face the immediate effect of discrimination on grounds of pregnancy and maternity, but also, later in life, struggle with the consequences of having taken time off work in order to care for a young family, such as a reduced or no pension.⁸ A recent study conducted by the European Women’s Lobby highlights that discrimination on grounds of pregnancy and maternity ‘is a relatively silent’ but nevertheless common phenomenon across the EU.⁹ In the UK alone, for example, recent research reported that up to 50,000 women who take maternity leave each year are unable to return to the jobs they left due to workplace discrimination.¹⁰ Changes might include fewer hours, changed job title, less chance of promotion, or outright dismissal, all of them contributing to a growing gendered wage gap in later life. These experiences are exacerbated by expensive and complex judicial procedures leaving many women de facto unable to seek compensation.

2. The findings of the Report on Pregnancy Discrimination

The Report on Pregnancy Discrimination starts on an encouraging note: the EU has been successful in introducing a comprehensive set of minimum standards and rights ensuring periods of leave, for both mothers and fathers, in connection with the birth (or the adoption) of a child.¹¹ The EU has also provided broad protections and benefits for parents within and outside the workplace. Such rights have in most cases triggered the implementation of even more generous rights in the Member States. However, the existence of these sophisticated legislative frameworks at EU and national levels might actually be largely ineffective as there is an extensive gap between the letter of the law and its practice. In other words, whilst on paper the law exists and is comprehensive; in practice it is too often circumvented. The following section provides an overview of some of the problems encountered in a number of specific areas.

⁶ See, *inter alia*, M. Barbera, ‘The Unsolved Conflict: Reshaping Family Work and Market Work in the EU Legal Order’ in: T. Hervey, J. Kenner (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights* pp. 139-160 Oxford, Hart Publishing 2003.

⁷ Article 33(2) OJ C 364 of 18 December 2000, p. 1. Since 2009 the Charter of Fundamental Right has had binding value.

⁸ G. Mayes, M. Thomson (eds.) *The Costs of Children* Edward Elgar 2012. See also F. Bettio, P. Tinios, G. Betti, *The Gender Gap in Pensions in the EU*, ENEGE 2013, see http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf and http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm.

⁹ <http://www.womenlobby.org/spip.php?article5379>, accessed 30 September 2013.

¹⁰ Slater & Gordon commission report on maternity issues in the workplace 2 July 2013: <http://www.slatergordon.co.uk/media-centre/press-releases/2013/07/slater-and-gordon-commission-report-on-maternity-issues-in-the-workplace/#ixzz2fALxBISf>, accessed 30 September 2013. See also the 2012 annual report of the French Protection of Rights Body, which states that, following the period of maternity or parental leave, the professional situation of women very often deteriorates, and sometimes leads to harassment or to dismissal. Rapport annuel 2011 du défenseur des droits, <http://www.defenseurdesdroits.fr/documentation>, accessed 30 September 2013.

¹¹ See also the position of surrogate mothers who might also be protected; see the recent opinion of Advocate-General Kokott in Case C-167/12 CD v ST, but see also Advocate-General Wahl in Case C-363/12 Z v A Government Department and the Board of Management of a Community School (both opinions issued 26 September 2013).

Access to employment

The Court of Justice in the early case of *Dekker*,¹² established the prohibition of discrimination on grounds of pregnancy and maternity in access to employment, where it introduced two leading principles. Firstly, as only women can become pregnant, the refusal to employ, or the dismissal of, a pregnant woman because of pregnancy or maternity amounts to direct sex discrimination prohibited under EU law. This is particularly important because, in principle, direct discrimination – as opposed to indirect discrimination¹³ which can be justified on objective grounds¹⁴ – can never be justified, in particular by economic considerations; the only exception being an explicit exemption referred to in EU equality law. Secondly, in case of pregnancy discrimination, a male comparator is not necessary.

All of the Member States have now clearly embedded these principles in their legislation; however, unfavourable treatment against pregnant women and mothers applying for jobs, in practice, remains a significant problem. Whilst it is relatively easy to monitor discriminatory practices concerning the wording of job advertisements,¹⁵ it is more complicated to monitor the substance of interviews conducted prior to hiring and to assess the real motivation behind the recruitment decisions of employers. Widespread gender stereotypes across the EU appear to underpin employers' decisions in many cases to refuse to appoint pregnant women, or new mothers, seeking employment. For instance, it is common for employers to assume that mothers of young children will not arrive punctually at work in the morning or are likely to take time off to look after sick children and are, therefore, not worth employing. Women in many countries do not apply for jobs knowing that in reality they have no chance of being employed while being pregnant. Discrimination is not only limited to pregnant women and women with caring responsibilities: some employers prefer to appoint male candidates as they consider young women as potential mothers, therefore not fully available for work.¹⁶ Legal redress is rarely sought by female candidates who either face lengthy and complex legal procedures or fear victimisation, especially but not exclusively in smaller countries, where they can easily be identified as 'difficult' persons. Evidence is hard to gather as few employers would state that refusal of employment is based on the pregnancy.

Dismissal /pressure to resign

According to Article 10 of Directive 92/85 it is prohibited to dismiss an employee on the basis of her pregnancy from the moment she is pregnant (or she is undertaking IVF treatment)¹⁷ until she returns from maternity leave.¹⁸

Despite the clear prohibition, many employees continue to be dismissed for reasons linked to their pregnancy and caring roles. Many employers, in particular in countries experiencing austerity measures, financial difficulties or even the pressure of globalisation,

¹² Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

¹³ According to Article 2(1)(b) of Directive 2006/54/EC indirect discrimination occurs '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'.

¹⁴ Case C-170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1989] ECR 1607.

¹⁵ However, in other cases, such as Bulgaria or Croatia, there is not enough monitoring of the situation. See G. Tisheva 'Bulgaria' and N. Bodioga-Vukobrat 'Croatia' in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination*, at pp. 52 and 57 respectively, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf accessed 20 November 2013.

¹⁶ See for example, the case of Romania, as described by R. Teșiu, 'Romania' in: European Network of Legal Experts in the Field of Gender Equality, S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination*, at p. 229, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 20 November 2013.

¹⁷ Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.

¹⁸ Over the years, the Court has further developed and expanded this principle. See for instance, Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECR I-4185.

consider women with caring responsibilities to be costly and not flexible enough. Various pressure tactics are, therefore, being used to ‘encourage’ or force pregnant employees and new mothers to resign.

Apart from plain bullying, the practice of ‘white or blank resignation’ has been identified in a number of Member States as a particularly serious example of breach of EU law.¹⁹ As a precondition to recruitment, women are asked to sign an undated resignation letter which can be used by the employer to make the worker resign when needed (for example, in the event of the worker becoming pregnant, although this is certainly not the only reason for using such ‘white resignations’). This practice has been tackled in Italy by means of a requirement for the resignation to be signed in front of an official of a public authority (such as the labour inspectorate). In addition, in Portugal workers have been given the right to reverse a signed resignation within a set period of time.²⁰

In a similar vein, in practice, health and safety requirements are often used as ways of excluding women from the workplace. Although EU law provides that health and safety provisions cannot be used to undermine gender equality provisions, which must be interpreted harmoniously,²¹ many workers are being over-protected and the requirement of equality is often (conveniently) forgotten.

A further way to dismiss a pregnant worker or worker with caring responsibilities is to not renew her fixed-term contract, a practice highlighted by the Cypriot Ombudsman, who condemned the institutionalised practice of not extending fixed-term contracts in the public service.²² Although the Court of Justice has held on several occasions that refusing to renew the fixed-term employment contract of a pregnant worker is direct sex discrimination,²³ in many countries this is still common practice.

Rights during maternity leave

EU legislation clearly states that maternity leave should have no negative effect on an employee’s job.²⁴ The Court has further confirmed that women on maternity leave retain their rights inter alia to annual holidays²⁵ or remuneration.²⁶ However, many problems persist. For

¹⁹ This is the case in Italy; see S. Renga ‘Italy’ in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination*, at p. 146, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 20 November 2013; and further C. Valentini, *O i Figli o il Lavoro* Milano, Feltrinelli 2012.

²⁰ See M. do Rosário Palma Ramalho ‘Portugal’ in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination*, at p. 218, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 20 November 2013.

²¹ Article 6 of Directive 92/85/EEC clearly establishes that employers are under an obligation to ensure the health and safety of pregnant workers and workers who have recently given birth or are breastfeeding and, at the same time, must respect the principle of sex equality and refrain from discriminating. In addition, in Cases C-66/96 *Høj Pedersen and others* [1998] ECR I-7327 and C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549, the Court of Justice stated clearly that obligations regarding health and safety cannot be taken into consideration in such a way as to be detrimental to pregnant workers.

²² Ombudsman (Cyprus Equality Authority) *Annual Report 2006* www.ombudsman.gov.cy (last accessed 30 September 2013).

²³ Cases C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*, acting on behalf of Marianne Brandt-Nielsen [2001] ECR I-2785 and C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-6915 in paragraph 47.

²⁴ See in particular Article 2(2) of Directive 2006/54/EC which clearly states that there should not be any discrimination on the grounds of pregnancy and maternity.

²⁵ Case C-342/01 *Gomez v Continental Industrias del Caucho SA*. [2004] ECR I-2605.

²⁶ Article 11 of Directive 92/85 states that: ‘... the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice’ and that allowance ‘shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation’. See for example Cases C-342/93 *Gillespie v Northern Health and Social Services Board* [1995] ECR I-4705; C-411/96 *Boyle* [1998] ECR I-6401; and C-147/02 *Alabaster v Woolwich plc and Secretary of State for Social Security* [2004] ECR I-3101.

example, the legal framework relating to the remuneration of workers on maternity leave is complex, involving, on the one hand, the articulation of the principle of equal pay under Article 157 TFEU and the Recast Directive and, on the other hand, the right to maintenance of payment and/or an adequate allowance under Article 11 of the Pregnant Workers Directive. The Court of Justice has reviewed this area in a number of cases but the law remains very complex and this may explain the confusion of many employers. The method for calculating the remuneration of a worker on pregnancy, maternity or paternity leave (and, when applicable, parental leave) differs from Member State to Member State. However, despite these differences, the relevant benefits under Article 11(3) of the Pregnant Workers Directive should be adequate and at least equal to the allowance provided in case of sick leave.

One of the contentious points with regard to the remuneration of workers on maternity leave relates to bonuses and whether these should be taken into consideration when calculating maternity pay. The Court of Justice has identified two types of bonuses: those which are aimed at all workers as an encouragement to work should be given to all workers regardless of whether they are pregnant or on maternity leave.²⁷ By contrast, those depending on the performance of the worker at work do not need to be paid to women on maternity leave or women who are pregnant and who cannot perform their duties due to health and safety reasons.²⁸ In many countries, this classification is not understood and it is common practice for employers not to pay specific bonuses (e.g. attendance bonuses, productivity bonuses or meal or transport bonuses)²⁹ that were attached to the salary when the worker was not on leave. It is also common for employers to refuse to pay the more general bonuses normally paid to all employees, on the basis that the company made profits or achieved good results in the past year (e.g. a Christmas bonus).³⁰ Furthermore, in the Netherlands, the main equality body, namely the Equal Treatment Commission (now the Netherlands Institute for Human Rights), decided that, contrary to earlier cases, a bonus does not constitute pay and therefore a claimant did not have a right to this bonus during her pregnancy/maternity leave.³¹

Some women also experience a subtle type of discrimination, based on their pregnancy or their caring role, which affects their promotion and career prospects. For example, in Germany the law allows employers to refuse to take into account periods of parental leave when awarding pay increases. Employers justify this form of discrimination on the grounds that parents who have taken parental leave have less work experience. In some countries, such as Romania, it is widespread and accepted practice not to consider pregnant women for promotion.

Return from maternity leave

Returning from maternity leave can be a challenging time and in order to make it as smooth as possible, Article 15 of the Recast Directive expressly provides that: ‘a woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during

²⁷ See Case C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR I-7243 in relation to a Christmas bonus.

²⁸ Case C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-6285; Case C-471/08 *Parviainen v Finnair Oyj* [2010] ECR I-6533.

²⁹ This is the case in Portugal and Ireland, see M. do Rosário Palma ‘Portugal’ and F. Meenan ‘Ireland’ in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination* at pp. 218 and 138 respectively, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 20 November 2013.

³⁰ This is the case in Germany, see U. Lembke ‘Germany’ in S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination* at p. 104, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 20 November 2013.

³¹ ETC 19 May 2011, Reference Number ETC 2011-79-80-81; see R. Holtmaat ‘Netherlands’ in S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination* p.193, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 20 November 2013.

her absence'. Unfortunately, the implementation of this provision varies amongst the Member States, especially when the leave in question covers a long period of time, which can be a combination of maternity, parental and child care leave. The French courts have made it an obligation for the employer to provide adequate training so that an employee who had been absent for over 11 years on various forms of care-related leave could be reinstated in the same job and at the same level.³² While some Member States have not implemented this provision at all,³³ where it has been transposed, its effectiveness remains difficult in practice because many employers and States consider that vocational training and retraining of women returning to the labour market after maternity leave is too expensive.³⁴

Discrimination beyond employment

To put it simply, discrimination in the workplace is a consequence and a reflection of discrimination in society at large. It is, therefore, not surprising that women experience unfavourable treatment on the grounds of their pregnancy not only in the workplace but also beyond it.

One of the most serious issues relates to the access of pregnant women and women who suffer from pregnancy-related or maternity-related illness to private health insurance and/or care insurance. This concerns especially self-employed women whose insurance companies sometimes require the expiry of a waiting period for the insurance to start covering the risks of loss of income related to pregnancy and maternity. The waiting periods can also apply in the context of social security benefits. However, under Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services and the recent Court of Justice ruling in *Test-Achats*,³⁵ sex can no longer be a criterion in the calculation of or access to insurance.

The most common pregnancy-related discrimination outside the workplace relates to airline practices which impose conditions on pregnant women. Generally, pregnant women can fly only if in possession of a medical certificate stating that they are 'fit to fly' after a certain period (usually about 28 weeks of pregnancy) and after a few more weeks there is a total ban. The number of 'qualifying' weeks varies, depending on the airline policy, and thus also varies considerably between states. The airline company often justified such practice on grounds of health and safety, but there appears to be no clear research backing these policies and it seems that airline companies are only trying to avoid the inconvenience of an accidental delivery whilst in the air. The legality of this practice is questionable under the Goods and Services Directive, although there has not yet been any legal challenge.

Other common forms of discrimination include parents being prohibited from entering shops with a pram for fear of shoplifting, or being denied access to restaurants/shops because of a lack of infrastructure. The Goods and Services Directive has so far generated little interest with regards to pregnancy, maternity and parental rights. However, the various issues highlighted above show that pregnant women and parents continue to be excluded from engaging fully in society. These problems might not be perceived as strictly legal, which might explain why there is very little case law available in this area.

³² Cass. Soc. 11 March 2009, no. 07-41821.

³³ For instance under Belgian law, an employee who is transferred to an inferior job during or after her leave cannot claim to be reinstated in her job. Similarly, in the Netherlands, there is no explicit legal right to return to the same or a comparable job.

³⁴ This was well documented in Lithuania by A. Atmanaviciene, *Moteru diskriminacija darbe Lietuvoje* (Discrimination of Women at Work in Lithuania) 2006, p. 8.

³⁵ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773, see further E. Caracciolo di Torella, 'No Sex Please: We're Insurers', *European Law Review* (2013) pp. 636-652.

3. Why does discrimination still exist? Possible ways forward

The debate over the struggle for parenthood-related rights highlights the inherent tension between the demands of the market (production, i.e. the public sphere) and the needs of the family (reproduction, i.e. the domestic sphere).³⁶ There are two sides to this debate: on the one hand, employers generally argue that increasing entitlement to pregnancy and maternity rights are too burdensome and thus lead to more discrimination against women. On the other hand, employees claim that more protections and rights are required in order for them to be able to access and retain paid employment. The report has found no evidence to suggest that discrimination against women is triggered by the mere *existence* of rights. In other words, it is far from clear that fewer statutory rights would lead to less discrimination in this area. Based on the findings of the Report on Pregnancy Discrimination, complex reasons are more likely to account for discrimination against pregnant women and parents in general. Such reasons are particularly challenging as they are not strictly speaking ‘legal’ and therefore cannot be addressed exclusively with legal instruments: a more comprehensive approach is needed. It is, however, important to note that there are wide variations across European states. In the Scandinavian countries, for example, we note no significant gaps in this area, reflecting the long-standing nature of gender equality principles and the importance of exchanging good practices across these states; whilst in other states pregnancy/maternity and parental rights are subject to tensions with cultural traditions, (recent) state financial difficulties, structural and historical transitions from socialism to a market-based society as well as the pressure of globalised markets.

Although rights are in place, in practice they are not applied and/or are circumvented. Many of these practices are ‘invisible’, as exemplified by the so-called ‘white resignation’ in Italy (and other states).³⁷ This could be effectively addressed by better and systematic monitoring of employers’ decisions to employ, dismiss or promote employees returning from parental leave. Gathering and following trends and statistics in companies of who is recruited and dismissed and when, would also provide better exposure of the treatment of workers who are pregnant, on maternity leave or new parents. For some countries, such monitoring represents a technical difficulty, where there is no labour inspectorate (in the UK and Ireland for instance). National equality bodies also often lack adequate powers and/or funding to provide such monitoring. However, alternatives are available. For example, Norwegian company law requires companies to report on progress relating to gender equality at company level, in the same way as financial or environmental results are reported. In order to ensure adequate effectiveness, such monitoring should also be complemented with automatic and meaningful sanctions for breach of equality rights.

Discrimination also takes place because individuals are not, or are only partly, aware of their rights. Members of a minority who do not speak the language of the country where they live, for example, are at an obvious disadvantage. Those who are less traditionally involved in care-giving are also less likely to know about their rights: a survey on the take-up of the Parental Leave Directive provided evidence that few employees, in particular fathers, were aware and, therefore, taking advantage of their rights.³⁸ There are several ways to increase awareness and several actors can play a role: the state, the social partners but also private industries, commercial companies and professional associations have proved in some cases to be proactive in this field. Some professional bodies have been very active in campaigns for raising awareness.

³⁶ C. McGlynn ‘Reclaiming a Feminist Vision: the Reconciliation of Paid Work and Family Life in European Union Law and Policy’, *Columbia Journal of European Law* 7(2) (2001) pp. 241-272.

³⁷ See the discussion earlier in this article.

³⁸ Eurobarometer, ‘Europeans’ Attitudes to Parental Leave’, May 2004.

Even when individuals are aware of their rights and of the fact that these rights have been violated, discriminatory and unfair practices do not always come to light because there are instances where individuals choose not to enforce them. Only a small minority of individuals are prepared to pursue legal actions. Many fear negative consequences, namely to be seen as ‘troublesome’ or to be victimised when looking for further employment or they simply do not want to be exposed. This is particularly the case, but not exclusively, in small countries such as Liechtenstein³⁹ or Luxembourg.⁴⁰ It has also been suggested that many individuals do not pursue their rights because they are overwhelmed by the many competing demands of juggling work and family life.

Finally, discrimination on the grounds of pregnancy/maternity and parenthood has increased since the recent economic downturn and, in countries such as Greece and Portugal, women have been hit particularly hard by the consequences of the crisis.⁴¹ Mothers of young children, who have constraints due to care responsibilities, are often the first ‘casualties’ on the list of employees to be made redundant because they are not considered to be flexible enough⁴² and because they are expected to be less able to fulfil the anticipated increased workload following reorganisation. In this context, it is important to remember the importance of the contribution of the Court of Justice, which has always taken a strong stand against discriminatory practices on the grounds of pregnancy/maternity and parenthood especially when based on economic reasons.⁴³

4. Conclusions

Although the concept of reconciliation between work and family life has been on the domestic and EU agendas for several decades, the cost of reproduction and child rearing continues to be high, especially for women. Effective mainstreaming of pregnancy and parenting rights into society should be considered, at both the public level (statutory rights, society at large) and at the individual level (individuals and companies). For this strategy to be successful, however, it needs to be underpinned by a change of culture.

Although the male breadwinner model is increasingly being challenged and unravelled,⁴⁴ women are still perceived primarily as ‘carers’ rather than as ‘workers’ with full employment rights, regardless of the fact that a large percentage of them are actively engaged in employment. A lack of relevant services, such as preschool structures, does little to dissipate this perception.

³⁹ See N. Mathé ‘Liechtenstein’ in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination* at p.164, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf accessed 20 November 2013.

⁴⁰ See A. Raskin ‘Luxembourg’ in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination* at p.176, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf accessed 20 November 2013.

⁴¹ See the Expert Group on Gender and Employment, F. Bettio et al., *The impact of the economic crisis on the situation of women and men and on gender equality policies* European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/documents/130410_crisis_report_en.pdf accessed 20 November 2013; F. Bettio ‘Women, Men and the Financial Crisis. Seven Lessons from Europe’; H. Conley ‘Economic Crisis, Austerity and Gender Equality – The UK Case’; and M. Amparo Ballester-Pastor ‘Legal Effects of the Economic Crisis on Gender Equality in Spain: Effects on the Right to Reconciliate Work and Family after the 2012 Labour Law Reform’, all in European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* No. 2/2012 pp. 4-30, European Commission, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-2_web_final_en.pdf, accessed 15 November 2013.

⁴² European Women’s Lobby, *The Price of Austerity. The Impact on Women’s Rights and Gender Equality in Europe*, October 2012.

⁴³ In *Dekker* the Court unambiguously stated that financial reasons cannot be used to justify discrimination on grounds of pregnancy and maternity; in Case C-270/97 *Deutsche Post v Sievers & Schrage* [2000] ECR I-929, the Court of Justice held that the economic aims are only secondary to the social aims.

⁴⁴ R. Crompton, S. Lewis, C. Lyonette, *Women, Men, Work and Family* Palgrave 2007.

Needless to say, this affects domestic policies, legislative agendas and the application of the relevant rights on the ground by employers. Arguably, the involvement of fathers in the care of children represents an important element in the process of establishing equality when it comes to the reconciliation of work and family life and it also contributes to combating gender stereotypes in the employment market.⁴⁵ At present, however, pregnancy and parenting rights remain exceedingly minimal. There are two main measures which allow fathers to be involved in the care of their children: paternity leave which, to date, is not available in all the Member States⁴⁶ and parental leave. Fathers are increasingly using the right to feeding breaks, which is sometimes considered to be a form of parental leave.⁴⁷ In practice, it is very unusual for fathers to take parental leave because the leave is seldom remunerated and, men are still often the main breadwinner of the family (partly due to the gender pay gap). Consequently, it is more convenient for families to lose part of the woman's pay, especially where childcare is expensive. In addition, there still exist strong cultural perceptions/social stereotypes surrounding caring and the distribution of roles within the family and in some cases men have experienced the same forms of discrimination as women for using their right to parental leave.⁴⁸ Thus, reconciliation for both parents needs to be based on a strong legal framework supplemented by financial entitlements which make the take-up of care leave feasible for all parents regardless of their sex.

The EU has shown that it is serious about making sure that parents can combine work and family life. Effective reconciliation, however, requires that such rights be mainstreamed in legal provisions and policies. Such a holistic approach to gender equality has proved successful in Norway and other Scandinavian countries. However, such mainstreaming will remain largely an empty gesture if it is not underpinned by a change in attitudes: there is no point in granting rights to fathers if, in practice, they cannot (or do not) exercise them; nor in granting rights to mothers in the workplace if such rights have the effect of rendering them less competitive in the workforce. Any legislative initiative must work hand in hand with changes in social attitudes. The EU is in a position to provide the necessary leadership for shifting cultural and legal changes.

⁴⁵ This was recently acknowledged by the Court of Justice in Case C-104/09, *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I- 8661 where it held that 'the position of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child'. However, this has been somewhat watered down by the recent decision in Case C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, judgment of 23 September 2013. See further E. Caracciolo di Torella 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union', *European Law Journal* (forthcoming 2014, first published online: 15 April 2013 DOI: 10.1111/eulj.12033, <http://onlinelibrary.wiley.com/doi/10.1111/eulj.12033/full>, accessed 20 November 2013).

⁴⁶ At the time of writing paternity leave is not available in Liechtenstein, Slovakia, Croatia, Cyprus or Germany.

⁴⁷ This is the case in Spain; see B. Valdés de la Vega 'Spain' in: S. Burri, E. Caracciolo di Torella, and A. Masselot, *Report on Pregnancy Discrimination* at p.247, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf accessed 20 November 2013.

⁴⁸ See inter alia, H. Aune, 'Fedrekvoten, normer og stereotype kjønnsroller' in K. Ketscher et al. (eds.) *Festskrift til Asbjørn Kjønsstad* Velferd og Rettferd 2013.

‘Work’, ‘Self-Employment’, and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe

Nicola Countouris* and Mark Freedland**

1. Introduction

This article stems from, and partly reproduces and elaborates on, a research project carried out in 2012 under the auspices of the European Network of Legal Experts in the Field of Gender Equality, eventually leading to a comprehensive report on *The Personal Scope of the EU Sex Equality Law*¹ (hereinafter the *Report on Personal Scope*) which was published in 2013 and incorporated some 33 national reports outlining and clarifying how the personal scope provisions of the main EU sex equality instruments² had been implemented domestically in the EU Member States, and in Liechtenstein, Norway, Iceland, FYR of Macedonia, and Turkey. That particular project offered us a unique opportunity to inspect and analyse closely the different approaches adopted by the various national systems and to identify a number of gaps (if not also potential infringements of the letter and spirit of the EU directives in question) in the protective coverage *ratione personae* of EU sex equality law at a domestic level. In the present article we seek to offer a short overview of the protective lacunae identified in the *Report on Personal Scope* 2012 project, and also to suggest possible ways of redressing them, with the aim of giving a sufficiently broad coverage to EU equality law in general, and EU sex equality law in particular.

The article is thus divided into three main parts. The next section provides a summary review of the main framing concepts utilised by the various EU sex equality instruments to define their personal scope of application. Section 3 offers a series of snapshots of the main shortcomings identified by the *Report on Personal Scope* in a number of national implementation approaches. That section will reveal that, in a number of legal systems, the coverage of the bulk of EU sex equality law appears to be confined to a fairly narrow concept of subordinate ‘worker’, to the detriment of a large number of other labour market participants, and – no less problematically – to the exclusion of all those economic actors who establish, or seek to establish, a personal professional relationship with another party which, by virtue of that relationship, appears as their client or customer. Section 4 concludes by offering a number of normative perspectives as to why the personal scope of application of EU equality law, and sex equality law in particular, ought to be expanded beyond a narrow definition of dependent employment.

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¹ European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Personal Scope of the EU Sex Equality Directives*, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

² Directive 2006/54/EC, OJ L 204/23, of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Directive 2004/113/EC, OJ L 373/37, 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 2010/41/EU, OJ L 180/1, of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. For reasons of convenience, in the remainder of this document, these instruments will be occasionally referred to as ‘the Recast Directive’, ‘the Goods and Services Directive’, and ‘the Self-employed Directive’.

2. The personal scope of application of the EU sex equality directives – an outline

It is useful briefly to recapitulate the definitions of the work relations which are included in the personal scope of the Directives in question, with a view to establishing whether and to what extent EU law requires that protections against sex discrimination are applied beyond the narrow confines of subordinate work. In this respect, the three principal and most recent sex equality directives, namely Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EU, present us with quite a complex patchwork.

The Recast Directive 2006/54/EC is expressed to have the purpose of 'ensuring the implementation of the principle of equal opportunities and equal treatment of men and women in matters of *employment and occupation*' (Article 1); and its Chapter 3 on equal treatment as regards access to employment, vocational training and promotion and working conditions, makes use of what has become in effect the standard formula for making fully inclusive provision in directives for non-discriminatory access to labour market opportunities, namely that:

'There shall be no direct or indirect discrimination on the ground of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for *access to employment, to self-employment or to occupation*, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion' (Article 14(1) (emphasis supplied by authors)).

However, Chapter 2 on equal treatment in occupational social security schemes is differently and somewhat more narrowly cast. Article 6 on personal scope extends its provisions to 'members of the working population, including self-employed persons ... in accordance with national law and/or practice'; but the 'material scope' of the Chapter is expressed to permit the exclusion of 'individual contracts for self-employed persons' (Article 8(1)(a)). Moreover, Chapter 1 on equal pay should probably be regarded as inherently limited, in its personal scope, to the 'workers' to whom Article 157 TFEU and the definition first outlined in the *Allonby* judgment apply,³ a definition that excludes the self-employed.

Hence there was perceived to be a need for a distinct EU instrument 'on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity' in the form of the new Self-employed Directive 2010/41/EU (replacing Directive 86/613/EEC) and there continues in our view to be that need. The instrument covers '(a) self-employed workers, namely all persons pursuing a gainful activity for their own account', but also specifies that this is '*under the conditions laid down by national law*' (Article 2) (emphasis supplied by authors).

The third of the sex equality directives covered in the *Report on Personal Scope* is Directive 2004/113/EC concerning the access to and supply of goods and services, is expressed not to apply to 'matters of employment and occupation' or to 'matters of self-employment, insofar as these matters are covered by other Community legislative acts' (Article 3(4)). But despite those rather intricate exclusions, we will note in the following section that this instrument has some implications for certain relations within the labour market.

³ Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-00873 paragraphs 66-72; see also the explicit references in paragraph 70 of *Allonby* to 'the context of free movement of workers', (Case C-344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 01621, para 16) and Case C-357/89 *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, para 10. This 'worker' definition is broad – and covers atypical workers as long as their activity is subordinate and is not purely marginal or ancillary, see to that effect Case C-53/81, *Levin v Staatssecretaris van Justitie* [1982] ECR 01035 at paragraph 12 – but does not include the self-employed.

If one considers the whole picture of personal scope concepts and definitions in EU sex equality law, it becomes apparent that there are still further unresolved complications. There appears, for example, to be a slight asymmetry between personal scope concepts that the CJEU has claimed to amount to 'EU definitions' ('worker' in the equal pay context, and 'pregnant worker' in the context of EU rules on pregnancy⁴ and, to a lesser extent, parental leave⁵) and other framing concepts such as the one of 'self-employed', where the lack of an explicit EU-level definition serves only to reinforce the lack of clarity of the concept at national level. The only input from the CJEU in respect of these unanswered questions comes in the form of rather high-sounding, but not sufficiently prescriptive, exhortations developed in the dicta of judgments such as *Runevič-Vardyn* suggesting that 'the scope of that directive cannot be defined restrictively'.⁶ So Member States, outside the fairly strict, but also limited, precincts dictated by judgments such as *Allonby* in the area of equal pay, and *Kiiski* or *Danosa*⁷ in the area of pregnancy protection, are left with little judicial guidance in respect of the vexed question of whether and to what extent self-employed workers should also be covered by EU sex equality law.

3. Implementing EU sex equality directives – national approaches and common shortcomings

Unsurprisingly, given the provisional conclusions reached in Section 2, implementing Member States take different approaches when it comes to granting sex equality rights to workers employed in work relations that go beyond the 'standard contract of employment' model. The main findings of the *Report on Personal Scope* in respect of, for instance, Article 14 of the Recast Directive, were illustrative of the heterogeneity of the various national implementation approaches in attributing the Directive's protections to, for example, self-employed workers, or volunteers. In this respect, our findings suggested the existence of at least three different models, or degrees, of implementation of this particular provision.

Firstly, according to the reports received, the majority of the states covered by the survey (with the possible exceptions of Estonia, Lithuania, Slovakia and Turkey, which do not seem to engage with the protection of self-employed workers) prohibit discrimination against the self-employed in the sense of protecting persons seeking access to a regulated liberal profession or trade (see in this respect the German report). Several countries in this first group appear to have implemented this provision of the Recast Directive verbatim, and we note that the Italian expert has expressed some concerns in this respect. Secondly, a relevant number of legal systems (Cyprus, France, Greece, Norway, Portugal, Italy and possibly Latvia) also understand this prohibition to extend to the conclusion of contracts for personal professional services between the self-employed and a professional user or client. A third group, which however only includes a minority of legal systems (Cyprus, Hungary, Portugal and possibly Belgium, France, Greece, the Netherlands and the Czech Republic), extends the protection of Article 14 to the termination of self-employment contracts. The fact that this third group only includes a handful of systems, should be seen as rather problematic, at least to the extent that the lack of protection from discriminatory contractual terminations arguably frustrates the primary duty not to discriminate against a self-employed person when concluding a contract for services, since such a contract, once concluded, could be rescinded on discriminatory grounds.

⁴ Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643 at paragraphs 24-25.

⁵ Case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

⁶ Case C-391/09 *Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECR I-03787. In this case the provision concerned was Article 3 of Directive 2000/43, which is essentially identical, as far as its personal scope is concerned, to Article 14 of the Recast Directive.

⁷ Cases C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643 and C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405.

As for the question of who ought to be seen as the duty holder vis-à-vis self-employed professionals in respect of the various distinct 'equality duties', national approaches appear to vary considerably and are often characterised by a high degree of uncertainty. Some states (e.g. Belgium, Italy, Portugal) adopt an approach whereby 'the duty holders may be ... public authorities (for professions or trades the access to which is regulated by statutes), professional councils (for professions such as physicians or barristers which respective statutes organised as self-regulating bodies), all partners of an association of professionals', as reported by the Belgian expert.⁸ One would assume that the Greek approach where '[a]n employer/client (individual or legal person) may also be a "duty holder" under the above provisions of the Act regarding discriminatory termination of a self-employment contract/relationship' would prevail in all systems where the equivalent provision is understood as applying both to the formation and to the termination of contracts between self-employed persons and professional users or clients.⁹ The Italian expert also noted that, in the absence of specific case law on this particular issue, the question of who is a duty holder is a particularly difficult one to address.¹⁰ The Maltese expert pointed out that an EU-level clarification in respect of the 'duty holder' question may be necessary.¹¹

In the *Report on Personal Scope* we also sought to explore the extent to which these gaps in protection resulting from the implementation of the Recast Directive were rectified by the implementation of Directives 2004/113/EC, the Goods and Services Directive, and 2010/41/EU, the Self-employed Directive. Far from receiving any reassurances, this further enquiry reinforced our perception that EU equality law, at least as implemented domestically, has a general tendency to exclude a considerable number of labour market participants who do not fit the subordinate worker profile. Both these Directives appear to be implemented in a sort of 'definitional vacuum' deriving from the concomitant consideration that neither the CJEU, nor any national legal system, aspire to provide a sufficiently robust set of definitions for key concepts such as 'goods and services provider' or 'self-employed'. Considering that these two instruments seek to minimise their protective overlaps with the areas of protection already covered by the Recast Directive (see in particular Article 3(4) and Paragraph 15 of the Preamble of the Goods and Services Directive), and that the concept of 'self-employed worker' enshrined in Article 2(1)(a) of the Self-employed Workers Directive is dependent on the definitions and 'conditions laid down by national law', one would have hoped, if not expected, that these concepts would have been sufficiently clear and robust.

In the absence of any such clear definitions we run two sets of risks, both of which have been lamented by various national experts participating in the *Report on Personal Scope*. Firstly, we run the – well documented – risk that some economically dependent (though perhaps nominally self-employed) workers can be 'chipped out' of the EU 'worker' definition, perhaps by being classified domestically as 'self-employed'. But equally problematically we run the no less insidious risk of seeing even some 'genuine' self-employed persons (to whom some protections offered by the three instruments above ought to apply) being stripped of

⁸ J. Jacqmain 'Belgium' in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, p. 28, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

⁹ S. Koukoulis-Spiliotopoulos 'Greece' in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, p. 95, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

¹⁰ S. Renga 'Italy' in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, at p. 118, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

¹¹ P. G. Xuereb 'Malta' in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, p.152, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

their EU sex equality rights by being categorised domestically as 'small entrepreneurs' or 'business persons'. As noted by the Italian expert, the notions of 'autonomous work and entrepreneurship do not fully correspond'.¹² Small entrepreneurs and business persons may thus be seen as operating outside the realm of employment, self-employment and occupation (i.e. escaping the protection of the Recast Directive) and may not be seen as self-employed persons covered by Directive 2010/41/EU either. If they are seen as operating exclusively in the realm of civil or commercial law, their best chance of being protected against discrimination on grounds of sex vis-à-vis another competitor would rest on a broad application of the Goods and Services Directive, but some national experts have clearly indicated the existence of persistent gaps in protection. The German report, for instance, indicates that 'due to the lack of a "duty holder" on the one hand and the restriction of the protection under civil law to so-called mass contracts on the other, discrimination in access to self-employed activities and promotion cannot be effectively prevented'.¹³ Similar concerns are echoed by the Italian and UK reports.¹⁴ This can be contrasted with the Finnish, French, Greek, Polish and Slovak reports, which have explicitly suggested that entrepreneurs acting and performing their activities under civil-law arrangements would be covered by the equal treatment and equality provisions and norms of their respective legal systems.¹⁵

So our investigation has revealed that, while the traditional binary divide between 'employment' and 'self-employment' continues to be a source of concern in the understanding of the coverage of EU equality law instruments, we also ought to be preoccupied with the hazy distinction between concepts such as 'self-employed' and 'small entrepreneur' or 'business person', since these further distinctions also engender the risk of exclusion for workers who offer personal services through economic relations established with other parties who, by virtue of the arrangement in place, appear to be their client or customers.

4. Conclusions – equality for some or equality for all

We noted in the second and third section of this short paper that the combination of a very fragmented set of EU primary instruments on sex discrimination, of multiple personal scope-framing concepts, and the limited guidance offered so far by the ECJ/CJEU on the scope of application *ratione personae* of the various provisions contained in this body of law, has resulted in numerous and different national answers to the question 'who should be protected against sex discrimination in Europe?'. In this concluding section we venture to develop a series of arguments suggesting that the answer to this question ought to be one that embraces a wide definition and broad range of work relations, and we advance a number of possible justifications for that view.

¹² S. Renga 'Italy' in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, p. 120, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

¹³ U. Lembke 'Germany' in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, p. 87, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

¹⁴ S. Renga 'Italy' at pp. 117-118; and A. McColgan 'United Kingdom' at pp. 225-226, in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

¹⁵ K. Nousiainen 'Finland' at pp. 71-78; S. Laulom 'France' at pp. 78-81; S. K. Spiliotopoulos 'Greece' at pp. 90-98; E. Zielińska 'Poland' at pp. 175-184; and Z. Magurová 'Slovakia' at pp. 194-201, in European Network of Legal Experts in the field of Gender Equality, N. Countouris and M. Freedland, *The Report on Personal Scope*, European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, last accessed 21 October 2013.

Firstly, we feel it is important to address the received wisdom that there is such a thing as a unitary body of 'EU equality law', or even just of 'EU sex equality law'. It is obvious to us that the various EU law instruments seeking to combat discrimination deal with a variety of different issues, ranging from equal pay to access to goods and services, which demand an abandonment of any unitary conception of this body of law. This is, we suggest, reflected in the various scope-defining concepts analysed in the *Report on Personal Scope* and briefly outlined above. Accordingly, any attempt to confine the guarantees offered by this fragmented body of law to the EU concept of 'worker', on the basis that the ECJ judgment in *Allonby* indicated that EU equal pay law applies only to the 'worker' as thus defined, is at best a non-sequitur, at worst gravely misconceived. In this respect, we cannot help mentioning our disagreement with the approach taken by the UK Supreme Court in the case of *Jivraj v Hashwani*, effectively confining the reach of Directive 2000/78 to the 'EU worker' notion, allegedly on the basis that the framing notions for equal pay instruments, on the one hand, and for equal treatment instruments, on the other, are 'near identical'.¹⁶ In EU law, as our research has suggested, they are distinct and different, and a number of national legal systems contemplate, in their implementing instruments, these distinctions.

Secondly, we feel that it is entirely appropriate that the various strands of EU equality law that are not concerned with 'equal pay law', ought to apply to labour market participants at large, even if they do not fall under the definition of 'EU worker'. There is both a very strong textual argument to advance this suggestion, based on the recurrent explicit reference to 'self-employment and occupation' across the various equality instruments, and an equally strong normative one. The latter is obviously linked to the 'fundamental rights' aspirations of EU equality provisions (especially since the introduction of what was formerly Article 13 of the Amsterdam Treaty), but also to the traditionally broader protective regulatory ambitions of employment discrimination law that, as best exemplified by the personal scope of application of ILO Convention C-111 (expressly cited by Recital 4 of the Preamble of the Framework Directive), have traditionally sought to prohibit unequal treatment even beyond the narrow confines of subordinated employment.¹⁷ We hope that the analyses of EU law and its national implementations upon which we have commented in this article will be regarded as having lent some substance to the normative conclusions which we have put forward.

¹⁶ *Jivraj v Hashwani*, [2011] UKSC 40 at Paragraph 27.

¹⁷ See M. Freedland and N. Kountouris, 'Employment Equality and Personal Work Relations - A Critique of *Jivraj v Hashwani*' *Industrial Law Journal* 41 No. 1 (2012) 56-66; and N. Countouris, 'Remoulding the Scope of Application of Anti-discrimination Law' *Cambridge Law Journal* 71 No. 1 (2012), 47-49. For a full and carefully argued presentation of the contrary view, see C. McCrudden, 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*', *Industrial Law Journal* 41 No. 1 (2012) pp. 30-55.

EU Policy and Legislative Process Update

May 2013 – November 2013

1. On 25 October 2013 the European Parliament held a plenary sitting (first reading) on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM(2012)0614 – C7-0382/2012 – 2012/0299(COD)). The European Parliament, having regard to the opinions of various Committees and the report of the Committee on Legal Affairs and the Committee on Women's Rights and Gender Equality:

‘1. Adopts its position at first reading hereinafter set out;
2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
3. Instructs its President to forward its position to the Council, the Commission and the national Parliaments.’

The purpose of the proposal is to substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40 % presence of the under-represented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the under-represented sex among the non-executive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective.

The report of the plenary sitting can be found on:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0340+0+DOC+PDF+V0//EN>, accessed 5 December 2013.

2. On 14 October 2013 the report on women and men in leadership positions was published on the website of the Commission. The report looks at the current situation and recent progress for gender balance across a range of decision-making positions in the public and private sectors, including business, financial institutions, politics, civil service and the judiciary.

The report of the Commission can be found on:

http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/131011_women_men_leadership_en.pdf, accessed 5 December 2013.

The press release can be found on:

[http://europa.eu/rapid/press-release MEMO-13-882_en.htm](http://europa.eu/rapid/press-release_MEMO-13-882_en.htm), accessed 5 December 2013.

3. On 14 October 2013 the gender equality strategy mid-term review was published on the website of the Commission. The European Commission's strategy for equality between Women and Men (2010-2015) was adopted in 2010.⁸⁹ It sets out 24 key actions under five headings: equal economic independence for women and men; equal pay for work of equal value; equality in decision-making; dignity, integrity and ending gender violence; and promoting gender equality beyond the EU.

This mid-term review finds that, half-way through the strategy's five-year time scale, the Commission is delivering on its commitments. It has taken action in the majority of areas covered, in particular in improving the gender balance in economic decision-making, tackling female genital mutilation, promoting equal pay and promoting equality within the EU's

⁸⁹ Press release available at: http://europa.eu/rapid/press-release_IP-10-1149_en.htm, accessed 5 December 2013.

overall economic strategy. In addition to the legislative proposal for women on boards (see above), the Commission has, for example:

- Proposed two pieces of legislation, which are now EU law, to improve rights and protection for women who are victims of violence;
- Run a campaign to raise awareness of female genital mutilation;
- Promoted women's employment and access to childcare through the Europe 2020 strategy
- Instituted an annual European Equal Pay Day to raise awareness of the gender pay gap and how to tackle it; and
- Supported equal pay initiatives in the workplace.

The gender equality strategy mid-term review can be found on:

http://ec.europa.eu/justice/gender-equality/files/strategy_women_men/131011_mid_term_review_en.pdf, accessed 5 December 2013.

The press release can be found on:

http://europa.eu/rapid/press-release_MEMO-13-882_en.htm, accessed 5 December 2013.

4. On 2 September 2013 the report of the European Network of Experts on Gender Equality (ENEGE) entitled *Starting fragile: gender differences in the youth labour market* was published on the website of the Commission. According to the report, early career patterns show that women more often fall into unsuccessful paths (inactivity, part-time work, temporary contracts) than men. It also stresses the need for greater attention to be paid to gender differences in youth policies.

The report can be found on:

http://ec.europa.eu/justice/gender-equality/files/documents/130902_starting_fragile_report_2013_en.pdf, accessed 5 December 2013.

5. On 3 June 2013 the report of the European Network of Experts on Gender Equality (ENEGE) entitled *The Gender Gap in Pensions in the EU* was published on the website of the Commission. The study sheds new light on the phenomenon of the 'gender pension gap'. It proposes a methodology to measure the gap and estimate gender differences in pensions for all EU Member States. It is the first such study of its kind.

The report can be found on:

http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf, accessed 5 December 2013.

The press release can be found on:

http://europa.eu/rapid/press-release_MEMO-13-490_en.htm, accessed 5 December 2013.

6. In 2013 the European Commission published the report *Study on the Role of Men in Gender Equality – European strategies and insights*. The report is intended to provide a better knowledge of the role and positioning of men in gender equality issues. During recent years a special focus on men has emerged at the European level and the amount of research as well as specific strategies have increased. The report offers international insights allowing for comparisons and it refers to the costs of traditional gender roles as well as to the benefits of gender equality, especially focussing on the role of men and on innovative practices. The main results serve as a source for recommendations developed in order to improve the role of men in gender equality across Europe. The recommendations are intended to lead to changes on the structural level, to the development of political measures and their institutionalisation as well as to practical initiatives.

The report can be found on:

<http://bookshop.europa.eu/en/the-role-of-men-in-gender-equality-pbDS3113881/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L>, accessed 5 December 2013.

7. In November 2013 the European Women's Lobby published the report *Women's Watch 2012-2013*, an overview of women's rights and gender equality in 30 European countries. The report is a feminist appraisal of the situation on the ground in 30 European countries with regard to women's rights and gender equality, judged by the yardstick of the European Women's Lobby's ideals. The *Women's Watch* report is a snapshot of the situation during a two-year period (2012-2013) and looks both at legislation and statistical data with 30 very short pages, one for each country.

The *Women's Watch 2012-2013* can be found on:

<http://womenlobby.org/Publications/Reports/?lang=en>, accessed 5 December 2013.

Court of Justice of the European Union Case Law Update

May 2013 – November 2013

▪ **Joined Cases C-216/12 and C-217/12 of 19 September 2013**

Reference for a preliminary ruling (Luxembourg)

Caisse nationale des prestations familiales (CNFP) v Fjola Hliddal (C-216/12) and Pierre-Louis Bornand (C-217/12)

Regulation (EEC) No. 1408/71 of the Council 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

Ms Hliddal and Mr Bornand, both Swiss nationals, reside in Switzerland with their respective families and work as airline captains for an airline in Luxembourg.

The Governing Board of the CNPF (National Family Benefits Fund) refuses to grant either of them a parental leave allowance on the ground that they do not satisfy the conditions laid down in Article L. 234-43 of the Code du Travail, pursuant to which a person claiming parental leave must have an official address and reside continuously in Luxembourg or be covered by the Community regulations.

The Cour de Cassation (Court of Cassation) decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling. In the Cour de Cassation's view it is uncertain as to whether a benefit such as the parental leave allowance provided for under the Luxembourg legislation can be classified as a 'family benefit' within the meaning of Articles 1(u)(i) and 4(1)(h) of Regulation No. 1408/71.

Judgment of the CJEU

Articles 1(u)(i) and 4(1)(h) of Regulation (EEC) No 1408/71 must be interpreted as meaning that a parental leave allowance, such as the allowance provided for under Luxembourg legislation, constitutes a 'family benefit' within the meaning of that regulation.

▪ **Case C-5/12 of 19 September 2013 - Reference for a preliminary ruling (Spain)**

Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)

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

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

Facts

After the birth of his son in 2004, Mr Betriu Montull applied for the maternity benefit provided for in the General Law on social security. The INSS refused to grant Mr Betriu Montull maternity benefit, on the ground that the right to such leave is a right of mothers who are covered by a State social security scheme and that, in the case of biological parenthood, the father does not have his own autonomous, separate right to leave, independent of the mother's right, but only a right which necessarily derives from that of the mother. In the present case, since the mother was not covered by any State social security scheme, she herself did not have a primary right to maternity leave, meaning that Mr Betriu Montull could not enjoy leave or, therefore, the maternity benefit which goes with it. Mr Betriu Montull brought an action before the Juzgado de lo Social No 1 de Lleida (Social Court No 1), and argued that his right to equal treatment had been infringed in so far as, in the case of adoption

or fostering of minors younger than six years of age, national law provides that each parent has their own primary right to maternity leave. Thus, in the case of adoption, an employed father covered by a State social security scheme can take the whole of the maternity leave and receive the corresponding benefit, even where the mother is not an employee covered by a State social security scheme, whereas in the case of childbirth, the biological father in employment cannot take any leave where the mother is not covered by a State social security scheme.

Judgment of the CJEU

Directives 92/85/EEC and 76/207/EEC must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the compulsory leave of six weeks which the mother must take after childbirth except where her health would be at risk, whereas a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme.

▪ Case C-614/11 of 12 September 2013 - Reference for a preliminary ruling (Austria)

Niederösterreichische Landes-Landwirtschaftskammer (NÖ-LLWK) v Anneliese Kuso

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

Facts

Ms Kuso had been employed by the NÖ-LLWK since 1 March 1967 under a permanent contract. On 18 July 2008 Ms Kuso was informed that her application to continue working beyond retirement age had been rejected. Ms Kuso contested the lawfulness of the termination of her employment relationship before the national court.

The Austrian Supreme Court (*Oberster Gerichtshof*) points out that one of the provisions laid down in Ms Kuso's employment contract, is that the employment relationship is to come to an end on the last day of the year in which the employee reaches retirement age. However, that age varies according to whether the employee is a man (65 years) or a woman (60 years). Furthermore, the employment contract at issue was concluded before the Republic of Austria acceded to the European Union, but expired after that accession. In the light of the principles of legal certainty and the protection of legitimate expectations, and the importance accorded to the right to equal treatment as between men and women, the referring court is uncertain as to the temporal and material scope of Directive 76/207.

Judgment of the CJEU

Article 3 (1)(c) of Directive 76/207/EEC as amended by Directive 2002/73/EC must be interpreted as meaning that national legislation, consisting of a body of employment rules which form an integral part of an employment contract concluded before the Member State concerned acceded to the European Union and under which the employment relationship is to come to an end upon attainment of the fixed retirement age, which differs depending on whether the employee is a man or a woman, constitutes discrimination prohibited by that directive where the employee concerned reaches that age after the accession.

- **Case C-7/12 of 20 June 2013 - Reference for a preliminary ruling (Latvia)**
Nadežda Riežniece v Latvijas Republikas Zemkopības ministrija (Ministry of Agriculture), Lauku atbalsta dienests (Rural Support Service)
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 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC

Facts

Nadežda Riežniece was appointed to the post of principal adviser at the Lauku atbalsta dienests. Immediately after her parental leave the Lauku atbalsta dienests notified her that her employment was being terminated on the ground that the post which she occupied was being abolished due to national economic difficulties. Ms Riežniece was offered another post as a principal adviser at another department, which offer she accepted immediately. Within a few weeks she was notified that her new post was being abolished as well. Consequently, her employment as a public official was terminated.

Ms Riežniece brought an action before the national court and stated inter alia that, under European Union law, female workers taking parental leave have a right, at the end of that leave, to return to their post or an equivalent post. The Senate of the Supreme Court (*Augstākās tiesas Senāts*) decided to refer to the Court of Justice for a preliminary ruling.

Judgment of the CJEU

Directives 76/207/EEC and 96/34/EC must be interpreted as precluding:

- A situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must inter alia ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and
- A situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.

OPINIONS OF ADVOCATES-GENERAL

▪ Case C-167/12, Opinion of Advocate-General Kokott of 26 September 2013

C.D. v S.T. (Request for a preliminary ruling from Employment Tribunal Newcastle upon Tyne, United Kingdom)

Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Facts

In the Member States of the European Union national legislation on surrogacy varies greatly. In the United Kingdom surrogacy is permitted under certain conditions. However, there are no specific rules on maternity leave for intended mothers. The question is whether the intended mother can derive such a right from EU law, in particular Directive 92/85/EEC.

Conclusion

In a case such as that in the main proceedings, an intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave under Articles 2 and 8 of Directive 92/85/EEC after the birth of the child in any event where she takes the child into her care following birth. Surrogacy is permitted in the Member State concerned (United Kingdom) and its national requirements are satisfied, even where the intended mother does not breastfeed the child following birth. The leave must amount to at least two weeks and any other maternity leave taken by the surrogate mother must be deducted.

▪ Case C-363/12, Opinion of Advocate-General Wahl of 26 September 2013

Z v a Government Department and the Board of Management of a Community School (Request for a preliminary ruling from the Equality Tribunal, Ireland)

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Facts

In this case a woman who is unable to support a pregnancy had her genetic child through a surrogacy arrangement. In Ireland surrogacy arrangements are unregulated. As a matter of EU law the question is whether she is entitled to paid leave of absence from employment equivalent to maternity leave or adoption leave.

Conclusion

The Advocate-General advises the Court of Justice as follows:

- Directive 2006/54/EC does not apply in circumstances in which a woman whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave. Consideration of the questions raised has disclosed no factor capable of affecting the validity of Directive 2006/54.
- Directive 2000/78/EC does not apply in circumstances in which a woman who suffers from a condition that makes her unable to support a pregnancy and whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave.

COURT OF JUSTICE OF THE EUROPEAN FREE TRADE ASSOCIATION STATES (EFTA-COURT)

▪ **Case E-10/13 of 15 November 2013**

EFTA Surveillance Authority (ESA) v Iceland

Directive 2006/54/EC of the European Parliament and of the Council of 6 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation

Facts

The ESA brought an action before the Court for a declaration that, by failing within the time limit prescribed to adopt measures necessary to correctly implement into its national legislation Articles 2(1)(a)-(d) and 2(2)(a)-(b) of Directive 2006/54/EC, Iceland has failed to fulfil its obligations under the Directive.

Judgment of the EFTA-Court

It is undisputed that Iceland did not adopt measures necessary to implement correctly Articles 2(1)(a)-(d) and Articles (2(2)(a)-(b) of the Directive before the expiry of the time limit given (1 February 2009). It must therefore be held that Iceland has failed to fulfil its obligations under the Directive.

European Court of Human Rights Case Law Update

May 2013 – November 2013

▪ Case of Topčić-Rosenberg v. Croatia (Application no. 19391/11) of 14 November 2013

Facts

The applicant, Diana Topčić-Rosenberg, is a Croatian national who was born in 1962 and lives in Zagreb. The case concerned Ms Topčić-Rosenberg's right to paid maternity leave. While working as a self-employed businesswoman, she adopted a three-year-old child in October 2006. Shortly afterwards she applied to the Croatian Health Insurance Fund for paid maternity leave. However, her application was rejected, on the grounds that this was only available for biological mothers until the child's first birthday, and adoptive parents had to be treated equally with biological mothers. Ms Topčić-Rosenberg appealed the decision multiple times, arguing that it was incompatible with Croatian legislation and that she had been discriminated against. However, she was unsuccessful, and her final appeal was dismissed by the Croatian Constitutional Court in February 2011. Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life), Ms Topčić-Rosenberg complained that she had been discriminated against as an adoptive mother and a self-employed businesswoman.

The Court

1. Rejects, by four votes to three, the Government's request to strike the case out of the Court's list of cases;
2. Declares, by a majority, the complaint concerning the applicant's alleged discrimination in respect of maternity leave, under Article 14 of the Convention read in conjunction with Article 8 of the Convention, admissible;
3. Declares, unanimously, the remainder of the application inadmissible;
4. Holds, by four votes to three, that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 of the Convention;
5. Holds, by four votes to three,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

Judgment

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-128053>,
accessed 5 December 2013.

Press Release

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-4566439-5517355>,
accessed 5 December 2013.

▪ **Case of Söderman v Sweden (Application no. 5786/08) of 12 November 2013**

Facts

The applicant is a Swedish national who was born in 1987 and lives in Ludvika (Sweden). She complains that the Swedish legal system, which does not prohibit filming without someone's consent, had not provided her any protection against her stepfather's violation of her personal integrity under Article 8 of the Convention by attempting to secretly film her naked when she was 14 years old.

In its Chamber judgment of 21 June 2012, the Court held, by a majority, that there had been no violation of Article 8 (right to private life) of the Convention.

On 19 November 2012 the case was referred to the Grand Chamber at the applicant's request.

The Court

1. Holds, by sixteen votes to one, that there has been a violation of Article 8 of the Convention;
2. Holds, by sixteen votes to one,
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 29,700 (twenty-nine thousand seven hundred euros) under the head of costs and expenses, plus any tax that may be chargeable to the applicant in this respect;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

Judgment

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-128043>,
accessed 5 December 2013.

Press release

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-4558051-5505514>,
accessed 5 December 2013.

▪ **Case of De Ram v. France (Application no. 38275/10) of 27 August 2013**

Facts

The applicant, Luc De Ram, a Belgian national, is married to Jossia Berou (married name De Ram), a French national. They have two daughters, Aurore and Aëla, who were born on 1 January 1986 and 22 June 1989 respectively. When they were born, the girls were entered in the civil register under their father's surname. As permitted by law, their parents decided that, for everyday purposes, the girls should use the first applicant's surname followed by that of his wife (De Ram-Berou).

A Law of 4 March 2002 allowed parents to give their children the father's surname, the mother's surname or the surnames of both parents in whatever order they chose. The Law was scheduled to come into force on 1 January 2005. Transitional arrangements were laid down for children born before that date, allowing their parents to request that the second parent's surname be added after the first parent's, if the eldest child was under the age of thirteen on 1 September 2003.

On 15 June 2003 Mr De Ram filed a request on behalf of his two daughters to have their names changed, seeking to have them entered in the civil register under the surname De Ram-Berou. The Minister of Justice refused the request as lacking any legitimate interest.

The Court

The Court found in particular that the interference with Articles 8 and 14 was reasonable and justified by the need to ensure a gradual transition in the rules governing surnames and by the legitimate decision to take into consideration the principles of legal certainty with regard to entries in the civil register and the immutability of names.

The Court unanimously declares the application inadmissible.

Judgment

(in French) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126578>, accessed 5 December 2013.

Press release

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4500191-5427130>, accessed 5 December 2013.

▪ Case of İzci v Turkey (Application no. 42606/05) of 23 July 2013

Facts

The case concerned in particular a Turkish woman who complained that she had been seriously attacked by the police following her participation in a peaceful demonstration to celebrate Women's Day in Istanbul.

Relying on Article 3 (prohibition of inhuman or degrading treatment/lack of effective investigation), Ms İzci claimed that she had been beaten up, sprayed with various gases, sworn at and insulted by the police officers. She also alleged that such attacks by police officers had been tolerated for many years and had gone unpunished in Turkey. She further complained in particular of a violation of Article 11 (freedom of assembly).

The Court

Unanimously:

1. Declares the application admissible;
2. Holds that there has been a violation of Article 3 of the Convention in its substantive and procedural aspects;
3. Holds that there has been a violation of Article 11 of the Convention;
4. Holds that there is no need to examine the complaint under Article 14 of the Convention;
5. Holds:
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points; and
6. Dismisses the remainder of the applicant's claim for just satisfaction.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122885>, accessed 5 December 2013.

Press release

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4443118-5346250>,
accessed 5 December 2013.

▪ **Case of Mudric v the Republic of Moldova (Application no. 74839/10) of 16 July 2013**

Facts

The applicant, Lidia Mudric, is a Moldovan national who was born in 1939 and lives in Lipcani (Republic of Moldova). Divorced from her husband for 22 years, Ms Mudric alleged that in February 2010 her ex-husband broke into her house, beat her up and, moving in permanently, abused her until January 2011 when the police removed him. She alleged that the authorities had tolerated the abuse to which she had been subjected in her home, relying on her ex-husband's mental illness as an excuse for not enforcing the various court protection orders against him. She also alleged that the authorities had failed to apply domestic legislation intended to protect her against domestic violence, as a result of preconceived ideas concerning the role of women in the family. She relied in particular on Articles 3 (prohibition of inhuman or degrading treatment) and 14 (prohibition of discrimination) of the Convention.

The Court

Unanimously:

1. Declares admissible the complaints under Articles 3 and 14 read in conjunction with Articles 3 and 8 of the Convention, and the remainder of the application inadmissible;
2. Holds that there has been a violation of Article 3 of the Convention;
3. Holds that there has been a violation of Article 14 read in conjunction with Article 3 of the Convention;
4. Holds that there is no need to examine separately the complaint under Article 14 read in conjunction with Article 8 of the Convention;
5. Holds:
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,150 (two thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points; and
6. Dismisses the remainder of the applicant's claim for just satisfaction.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122375>,
accessed 5 December 2013.

Press release

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4437362-5337121>,
accessed 5 December 2013.

▪ Case of Joanne Cassar v Malta (Application no. 36982/11) of 9 July 2013

Facts

The applicant was born in 1981 and was registered on her birth certificate as male. She always felt that she was in fact female and on 20 January 2005 she successfully underwent gender reassignment surgery. In 2006, the Civil Court ordered, upon request, that an annotation be made in the applicant's birth certificate whereby the applicant's details regarding gender be changed from male to female. Subsequently, the applicant and her boyfriend applied to the Director of Public Registry to issue the appropriate marriage banns. The Director refused their request. The First Hall of the Civil Court upheld the Director's decision to refuse to issue the marriage banns.

In 2008 the applicant instituted constitutional redress proceedings. She complained that the fact that Maltese law did not recognise transsexuals as persons of the acquired sex for all intents and purposes, including that of contracting marriage, breached her rights under Articles 8 and 12 of the Convention. On appeal the Constitutional Court confirmed the Civil Court's judgment (in the Civil Court's constitutional jurisdiction) in so far as it found a breach of Articles 8 and 12 of the Convention, however, on the basis of different reasoning to the Civil Court. It also overturned a part of the judgment and declared that the Director of Public Registry could not refuse to issue her marriage banns. It was, in the Constitutional Court's view, the lack of legislation providing for a registered life partnership for people in the applicant's position which breached the applicant's Article 8 rights, as the State had failed to fulfil its positive obligation. Such a registered life partnership, which could not be a marriage and which was to be regulated by the State, would suffice as a remedy. For the same reasons, namely only because of the lack of legal provision and therefore the opportunity for the applicant to enter into a registered life partnership, and not because of her inability to marry, there had also been a violation of Article 12.

The applicant complained before the European Court of Human Rights that she was not granted an effective remedy in respect of the breach of her rights and therefore that she was still a victim of a violation of Articles 8 and 12 of the Convention.

By a letter dated 12 April 2013 the Government informed the Court that an out-of-court settlement had been reached with the applicant on 10 April 2013 and that she wished to withdraw her application. The said settlement agreement, in so far as relevant, read as follows:

'(...) 5. The Government of Malta binds itself to present and pilot a Bill in Parliament with the purpose of making all necessary amendments in order to enable the applicant to marry a person of the sex opposite to that of the applicant's acquired sex in Malta, and commits itself to applying its best efforts to secure that the said amendments will be adopted and will come into force by the end of 2013.

6. The Government of Malta is also agreeing to pay the applicant the sum of ten thousand euros (EUR 10,000) by way of compensation which sum will be paid within forty (40) days from the date of this agreement. (...)

7. The applicant on the other hand obliges herself, and authorises the Government of Malta, to inform the Registrar of the European Court of Human Rights of this settlement agreement with a view to asking the Court to strike out the case from its list. The applicant however reserves the right, which the Government of Malta accepts, to ask for the case to be restored to the list in the event that the legislative amendments which the Government of Malta is undertaking to enact are not enacted or do not come into force by the end of 2013. (...).'

The Court

The Court unanimously decided to strike the application out of its list of cases.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-123392>,
accessed 5 December 2013.

▪ **Case of Stichting Mothers of Srebrenica and others v The Netherlands (Application no. 65542/12) of 11 June 2013**

Facts

The case concerned the complaint by relatives of victims of the 1995 Srebrenica massacre, and by an NGO representing victims' relatives, about the Netherlands courts' decision to declare their case against the United Nations (UN) inadmissible on the ground that the UN enjoyed immunity from national courts' jurisdiction. The applicants alleged in particular that their right to a fair trial under Article 6 of the Convention and their right to an effective remedy under Article 13 of the Convention had been violated by that decision.

The Court

The Court first pointed out that the foundation Stichting Mothers of Srebrenica, while having been set up for the purpose of promoting the interests of surviving relatives of victims of the Srebrenica massacre, had not itself been affected by the matters complained of under Articles 6 and 13. It could therefore not claim to be a 'victim' of a violation of those Articles for the purpose of Article 34 (individual applications) of the Convention. The application was therefore inadmissible in so far as the foundation was concerned.

As to the remaining applicants the Court found that the granting of immunity to the UN had served a legitimate purpose and was not disproportionate. Consequently that part of the application was manifestly ill-founded and had to be rejected as inadmissible. The Court unanimously declares the application inadmissible.

Judgment

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255#{\"itemid\":\[\"001-122255\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255#{\),
accessed 5 December 2013.

Press release

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\"itemid\":\[\"003-4416460-5307356\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\),
accessed 5 December 2013.

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

May 2013 – November 2013

AUSTRIA – Neda Bei

Policy developments

From March to May, elections were held in four of Austria's nine provinces (*Bundesländer*), resulting in political changes. While the conservative People's Party (*Österreichische Volkspartei – ÖVP*) kept the absolute majority in Lower Austria and a majority in the Tyrols, the Carinthian Freedom Party (*FPK*) lost their majority to the Social Democrats in a landslide. In Salzburg, by contrast, the Social Democrats (*Sozialdemokratische Partei Österreichs – SPÖ*), led by Governor (*Landeshauptfrau*) Ms Burgstaller, lost their majority in an early election. In all polls the new-founded party of the retired Austro-Canadian entrepreneur Frank Stronach obtained about 10 % of the votes. As a consequence, new forms of cohabitation governments have emerged. With Ms Burgstaller gone, the governors (*Landeshauptleute*) of the Austrian Provinces are back to being an all-male club. There are, however, five female vice-governors serving in the newly formed provincial governments. In the regular federal elections, scheduled for 29 September 2013, women's vote will be decisive, 3.3 million female registered voters outnumbering male voters by 300 000.¹ One gender-related topic of pre-electoral discussion has been the low women's representation in Parliament.² Another was introduced by the Vice-Chancellor (*ÖVP*) in July 2013. He challenged the Constitutional Act on Different Age Limits of Women and Men in Social Insurance, which provides for the gradual adaptation of women's regular retirement age to that of men by 2033, proposing an earlier adaptation by 2018 if not 2014.³ In her first reaction the Minister for Women's Affairs (*SPÖ*) rejected the idea, pointing out persisting disadvantages.

On 11 April 2013, Equal Pay Day was held.

Legislative developments

Amendments to the Child Care Allowance Act have made the choice between the various models provided for by legislation more flexible, particularly regarding the all-in or flat-rate model and the models providing for the allowance depending on income. Regarding the latter, the limits of the additional income allowed with respect to the allowance have been raised from EUR 6 100 to EUR 6 400 per year (entry into force: 1 January 2014), and only full calendar months of receiving the allowance will be taken into account for purposes of calculating the allowed additional income (retroactive entry into force: 1 January 2010). Particularly employed parents will benefit from this de-bureaucratisation.⁴

Amendments to the Equal Treatment Act (private sector) entered into force on 1 August 2013, focussing on the (belated) transposition of Directive 2010/41/EU. The new wording refers to 'establishment, equipment or extension (*Erweiterung*) an enterprise as well as taking up or widening (*Ausweitung*) any other form of self-employed activity'. Further amendments to the Equal Treatment Act clarified that not only the access to, but actually all forms of

¹ N. Horaczek *Wild umflirtet, heiß umschmeichelt* *FALTER* 36/13 pp. 10-12.

² A mere 29 % of the 183 members of Parliament (*Nationalrat*) are women; Austria Press Agency and <http://diestandard.at/1373513307400/Nationalrat-immer-noch-tief-maennlich>, accessed 22 July 2013.

³ Constitutional Act on Different Age Limits of Women and Men in Social Insurance, OJ No. 832/1992, expiring in 2033; Austrian Press Agency *Pensionen – Spindelegger hält weitere Reformen für nötig* APA0223 2013-07-09/12:23 9 July 2013.

⁴ Federal Act Amending the Child Care Allowance Act, OJ No. I 117/2013.

occupational training and counselling are protected for their full duration. Also, the notion of discrimination which applies to all areas of possible discrimination was amended, now referring not only to ‘marital or family status’, but to ‘family status’ or ‘the fact of having children’. Further amendments, which are technical in nature but important in practice, have extended the employer’s obligation to indicate the legal minimum wage when advertising jobs to cover the indication of the de facto minimum wage offered, if a legal minimum does not exist. Moreover, the time limit inter alia for actions in cases of sexual harassment was extended to three years. Amendments to the Equal Treatment Commission and Equal Treatment Ombud Act also provide, *inter alia*, for decreasing the size of the Equal Treatment Commission’s senates by reducing the members’ number. As a final point, the protection of disabled persons against discrimination was harmonised with the standards of the newly amended legislation.⁵

Administrative Law

The Federal Ministry for Agri- and Silviculture, Environment and Water Economy as well as the Federal Ministry for Education, Arts and Culture have issued Affirmative Action Plans in accordance with the Federal Equal Treatment Act, essentially prescribing detailed target quotas to be met at all levels of organisation by 2018.⁶

Case law of national courts

Supreme Court

The Court, referring to the case of the *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*,⁷ applied the principles of European and national case law pertaining to sex-based discrimination to the question of whether persons without academic education would be discriminated against by a collective agreement treating persons with an academic qualification differently as to pay and career advancement. The Court confirmed that qualification was a permissible criterion.⁸

Constitutional Court

The Constitutional Court declared that a provision of the Citizenship Act 1965, extending the loss of a father’s citizenship only to his children born in wedlock, was not in conformity with the principle of equality and therefore was no longer to be applied, regardless of the historical context of the case.⁹

Miscellaneous

The Government’s biannual report on reducing women’s disadvantages was made available to Parliament and the public in August 2013, covering the 2011/12 period with contributions by all federal Ministries on their ‘externally effective’ measures against de facto sex discrimination (as opposed to positive action within the administration).¹⁰ It outlined

⁵ Federal Act amending the Equal Treatment Act, the Equal Treatment Commission and Equal Treatment Ombud Act, the Disabled Persons’ Employment Act, the Disabled Persons’ Federal Equal Treatment and the Labour Contract Adaptation Act, OJ No. 107/2013.

⁶ Administrative regulations 4 April 2013 OJ No. II 93/2013 and 13 August 2013 OJ No. II 240/2013, each complete with annexes; www.ris.bka.gv.at, accessed 15 August 2013. See also N. Bei ‘Austria’ in the European Network of Legal Experts in the Field of Gender Equality, G. Selanec and L. Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, EU Commission, 2011, pp. 35-42, available at http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf, accessed 7 October 2013.

⁷ Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [1999] ECR I-02865.

⁸ Supreme Court 19 March 2013, OGH 9 ObA 146/12d – Vienna Health Care Fund (*Wiener Gebietskrankenkasse*), to be found with further references at www.ris.bka.gv.at, accessed 7 October 2013.

⁹ Constitutional Court 27 June 2013, VfGH G 64/2012.

¹⁰ Act on the Federal Government’s Reports concerning the Reduction of Women’s Disadvantages, OJ No. 837/1992, expiring in 2018; Report of the Federal Government concerning the Reduction of Women’s

interventions which resulted in the successful building of human resources, such as an active labour-market policy and various measures taken in education. However, the effects of this can still be seen as somewhat ‘gendered’; although more employment has been generated for women, it mainly consists of part-time jobs. The report concludes by describing economic and social equality, democratic empowerment, gender stereotypes, the ‘glass ceiling’ and domestic violence as unresolved problems, and furthermore presents the first evaluation of gender budgeting which became effective in 2013.

BELGIUM – Jean Jacquemain

Legislative developments

Amendments to the Pay Gap Act

The Act of 22 April 2012 ‘aimed at fighting the pay gap between men and women’ was tainted by a number of technical defects which hindered its effective implementation.¹¹ Consequently, an amending Act had to be promulgated on 12 July 2013.¹² The latter does not require any comments, but a number of interesting elements are to be found in the record of debates on the Bill of law:¹³

- It was confirmed that the Pay Gap Act only applied to the private sector;
- It only applies to enterprises with a workforce of at least 50 employees;
- The annual analytical report on remuneration, segregated by sexes, must be made available to the works council or, if such a body does not exist within an enterprise, to the shop stewards (and not to the Health and Safety Committee, as provided in the original Act). It was confirmed that failing to provide this report is a penal offence, liable to a fine of EUR 250 up to 2 500;
- The federal Minister of Employment repeated that the Gender Pay Act was not meant to force Joint Sector Committees to adopt job classification systems, but only to impose that such existing systems be checked in order to make sure that they are gender neutral, and that any proposal for a new job classification system be submitted to a preventive gender neutrality check;
- The checks mentioned above will be supervised by a department of the federal Ministry of Employment (Directorate-General of Collective Work Relationships), assisted by the Institute for Equality for Women and Men (the ‘Gender Agency’) in an advisory capacity. As long as this directorate-general has not acquired the necessary technical expertise, the assistance of academic or private consultants will be made available by public procurement. Should a Joint Sector Committee fail to take heed of the directorate-general’s comments, the latter is to communicate this to the Minister of Employment, who might decide not to make a collective agreement concerning a faulty job classification system generally binding (by way of a Royal Decree); and
- Finally, in 2008 the social partners updated Collective Agreement No. 25 of the National Labour Council, concerning equal pay for male and female employees, by way of Collective Agreement No. 25ter which already provided that existing job classification systems should be checked in order to make gender neutrality effective. Over the last five years, only 13 Joint Sector Committees admitted that their job classification systems

Disadvantages; Reporting Period 2011-2012 (*Bericht der Bundesregierung betreffend den Abbau von Benachteiligungen von Frauen; Berichtszeitraum 2011 – 2012*), http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III_00435/index.shtml, accessed 26 August 2013.

¹¹ See European Network of Legal Experts in the Field of Gender Equality, *Law Review 2012/1*, European Commission 2012, at p. 37; *Law Review 2012/2* European Commission 2012 at p. 47; and *Law Review 2013/1* European Commission 2013 at p. 51.

¹² *Moniteur belge/Belgisch Staatsblad*, 26 July 2013 (2nd edition), accessible (in French and Dutch) on <http://www.juridat.be>, accessed 22 August 2013.

¹³ *Documents parlementaires/Parlementaire Stukken*, Chambre/Kamer, 2012-2013, no. 2739/003, accessible (in French and Dutch) on <http://www.lachambre.be> or <http://www.dekamer.be>, accessed 22 August 2013.

should be amended, which seems unimpressive given that there are more than 150 such Committees.

Case law of national courts

Labour Court of Appeal in Mons, judgment of 15 March 2013

After informing her employer that she was pregnant, an employee was dismissed with payment of remuneration in lieu of a notice period. She challenged the dismissal both as a breach of the protection of maternity (Article 40 of the Working Conditions Act of 16 March 1971) and as gender discrimination (Article 23 of the Gender Act of 10 May 2007).

In its judgment of 15 March 2013, the Labour Court of Appeal in Mons found that the employer, who carried the burden of proof, had not demonstrated convincingly that the decision to terminate the employment contract was entirely unrelated to the employee's pregnancy.¹⁴ Consequently, the fixed damages provided by Article 40 of the Act of 16 March 1971, equal to six months' pay, were due.

The Court also found that the employer's decision amounted to discrimination under the Gender Act. However, Article 17 of this Act states that 'provisions concerning the protection of pregnancy and maternity are not conducive to any form of discrimination, but are a condition of effective equal treatment of men and women'. Thus, the Court concluded that under the circumstances of the case, the fixed damages provided in Article 23 of the Gender Act (equal to six months' pay as well) would serve the same purpose as those provided in Article 40 of the Working Condition Act, so that an addition of the two protective provisions was not justified.

Labour Court of Appeal in Brussels, judgment of 6 January 2012 and Labour Court of Appeal in Liège (Namur division), judgment of 12 March 2013

These two decisions deserve attention because they illustrate the Courts' growing carefulness as to the rigorous application of the rules which govern the burden of proof in gender equality litigation and which implement Article 19 of Directive 2006/54/EC.

The first case concerns a female employee who, in the course of an artificial insemination treatment, took a five-day sick leave to have the fertilised ova transferred into her uterus. Five days after she had resumed work, she was dismissed with a three-month notice period.

When she challenged her dismissal, the Labour Court in Brussels¹⁵ found that, while in the CJEU Case Mayr¹⁶ the ova had not been transferred yet, in this one they had, but the employee was not yet certain of her pregnancy when she was dismissed. Thus, in order to apply the legal provisions of the protection of maternity (Article 40 of the Working Conditions Act of 16 March 1971, which implements Article 10 of Directive 92/85/EEC), the Labour Court felt it should refer to CJEU for another preliminary ruling. However, in case of wrongful dismissal of a pregnant employee, Article 40 of the Act of 16 March 1971 provides the same fixed damages (equal to six months' remuneration) as Article 23 of the Gender Act of 10 May 2007. Thus, the Labour Court considered it more apposite to follow Mayr and to treat the case as direct discrimination. In its judgment of 31 December 2010, the Labour Court found that the employee had informed her supervisor that her sick leave was related to the artificial insemination treatment, and that the employer had not demonstrated convincingly that the termination of the contract was decided on grounds entirely unrelated to the employee's condition and therefore constituted gender discrimination. The Labour Court consequently awarded the employee fixed damages amounting to EUR 19 313.

However, when the employer appealed against the judgment, the Labour Court of Appeal in Brussels approved the Labour Court's reasoning, but found that for the burden of proof to be shifted to the employer, under Article 33(1) of the Gender Act, it must be established

¹⁴ *Rôle général* no. 2011/AM/367, unreported.

¹⁵ Judgment of 31 December 2010, *Algemene Rol* no. 09-11037, unreported.

¹⁶ Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.

beyond doubt that the employer was duly informed of the employee's condition.¹⁷ For this reason, in its judgment of 6 January 2012, the Labour Court of Appeal ordered both parties to appear in court personally, in order to clarify a number of points. The case seems to be still pending.

In the second case, the local council of the city of Namur had engaged a female architect on a one-year employment contract, which was to serve as probation period for a further contract of indefinite duration. Shortly after starting her job, she informed her employer that she was pregnant, which caused great indignation in her supervisor. When the contract expired, the local council decided not to reemploy her.

Relying on CJEU Case *Jiménez Melgar*,¹⁸ the employee complained of direct discrimination under the Gender Act of 10 May 2007. In its judgment of 13 July 2011,¹⁹ the Labour Court in Namur found that there was *prima facie* evidence of discrimination, and that while the employer had presented several grounds for not renewing the contract as unrelated to the gender discrimination (e.g. various points of criticism as to the quality of the employee's work), their seriousness had not been demonstrated convincingly. Consequently, the Labour Court awarded the employee the fixed damages stipulated by the Gender Act (see above).

The employer appealed against the judgment and on 12 March 2013, the Labour Court of Appeal in Liège (Namur division) mainly approved the Labour Court's reasoning, but found that the 'unrelated grounds' presented by the employer had not been examined with sufficient care, and that the latter must be allowed to produce more evidence, including witnesses' testimonies.²⁰ The case is pending.

Labour Court of Appeal in Brussels, judgment of 8 March 2013

In Belgium, maternity leave for self-employed workers is limited to 8 weeks (9 in case of a multiple pregnancy) during which a woman is entitled to a social security benefit (of EUR 440.50 per week since 1 December 2012) provided she suspends any gainful activity. This 'maternity benefit' is supplemented with a 'maternity support allowance', consisting in 105 free 'service vouchers'. The service voucher scheme is an employment programme aimed at encouraging unemployed persons to perform domestic tasks in private households; the modest remuneration is paid by way of vouchers, which normally the user has to buy.

Entitlement to maternity benefit is conditional on a six-month 'probation period', during which the worker must have contributed to the statutory social security scheme for self-employed persons before applying for the benefit. Maternity support allowance is subject to the same condition.

However, under the Royal Decree of 20 July 1971 concerning sickness and maternity benefits for self-employed persons, previous periods of contribution to the social security scheme for paid workers are taken into account for the entitlement to maternity benefits as a self-employed person. Such is not the case for the entitlement to maternity support allowances, under the Royal Decree of 17 January 2006. Thus, if she has previously been a paid worker, a self-employed woman may be entitled to maternity benefit, but not to maternity support allowance.

In a recent judgment,²¹ the Labour Court of Appeal in Brussels found that this difference in treatment could not be reasonably justified in the eyes of Articles 10 and 11 of the Belgian Constitution, which enshrine the general principles of equality and non-discrimination under the law. Consequently, in compliance with Article 159 of the Constitution, the Court decided that the provision of the Royal Decree of 17 January 2006 under which previous periods of contribution as a paid worker may not be taken into account, must be set aside, so that the claimant was entitled to maternity support allowance.

¹⁷ Judgment of 6 January 2012, *Algemene Rol* no. 2011/AB/230, unreported.

¹⁸ Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2011] ECR I-06915.

¹⁹ *Rôle général* no. 09/1476/A, unreported.

²⁰ *Rôle général* no. 2012/AN/41, unreported.

²¹ Judgment of 8 March 2013, *Journal des tribunaux du travail*, 2013, p. 233.

Although the case did not reveal any dimension of gender discrimination, its background was the transposition of Article 8 of Directive 2010/41/EU.²² Indeed, the Belgian provisions concerning maternity leave for self-employed women (8 weeks) fall far short of the Directive's minimum requirements (14 weeks), but the maternity support scheme is supposed to offer a more realistic way of achieving the Directive's protective goals than a radical lengthening of the leave (as according to the federal Minister for the Self-Employed, many women have to resume their activities for fear of jeopardising their business²³). Thus, the Labour Court of Appeal in Brussels grounded its reasoning on the necessity to give Article 8 of the Directive a suitable implementation by eliminating an unjustified restriction on the entitlement to maternity support allowance. It is now expected that the federal Government will amend the faulty provision of the Royal Decree of 17 January 2006.

BULGARIA – Genoveva Tisheva

Policy developments

The current political situation in Bulgaria is still marked by upheavals, hostilities and citizens' protests. This cycle of instability, which started in February 2013, will inevitably affect the major economic and social indicators, deepen inequalities and provoke intolerance. All these negative trends are already beginning to be observed. Both the low level of trust in the Bulgarian Parliament (a process which started in 2009) and the precarious Government ensured the deterioration of the quality and authority of laws adopted, and slowed down the legislative process. The pervasive nature of the crisis in Bulgaria, labeled a 'crisis of democracy' by the political theorist Ivan Krastev, influenced the work of all state institutions. The functioning of the judiciary, a 'traditional' target of criticism of the European Commission, was already undermined by the general mistrust of citizens.

Alongside this unrest, official sources confirm the unemployment rate during the second quarter of 2013 to be 12.9 %, which represents an increase of 0.6 % compared with the same period in 2012. The long-term unemployment rate for this period was on the rise due solely to the increase of this rate among women.²⁴

In the middle of this political crisis, at the end of September 2013, the World Bank issued its new report *Mitigating the Economic Impact of an Aging Population: Options for Bulgaria*.²⁵ It confirms the severity of the unfavorable demographic trends in the country and assesses the effect of an aging population on economic and public services. In 1960, the average age of a Bulgarian was just over 30. In 2012, the average age was almost 43. Today, only two European countries have populations that are older than Bulgaria: Germany and Italy. By 2050, one in three Bulgarians is projected to be older than 65 and only one in two Bulgarians will be of working age. In order to mitigate the effects of this situation, several steps are recommended, and among them:

- Increasing productivity so that fewer workers produce more;
- Investing in education to keep the skills of an aging population up to date;
- Increasing the labour force by providing employment opportunities for all population groups;
- Providing pensions to all so that no one is left out;
- Improving the health sector so that Bulgarians can enjoy long and healthy lives; and
- Scaling up long-term care so that all those in need of care will receive it.

²² Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

²³ See *La Dernière Heure* (French-speaking daily newspaper), 20 April 2012.

²⁴ <http://profit.bg/news/129-bezrobotitsa-otchete-NSI/nid-111095.html>, accessed 28 September 2013.

²⁵ <http://www.worldbank.org/en/news/press-release/2013/09/20/growing-old-wisely-in-bulgaria>, accessed 28 September 2013.

All the recommendations listed identified above are closely related to the regulation of the labour market, social security and social assistance issues. They affect the situation of women and men in Bulgaria and require adequate legislative and policy measures and a strong gender mainstreaming approach. The current number of women in high decision making positions should be perceived as a resource for carrying through such a policy. In fact, women make up 24 % of parliamentarians and 38 % of ministers. This is a real potential chance for change, given the political instability.

Legislative developments

The plan for the implementation of the recommendations of the CEDAW Committee, adopted by the Council of Ministers on 24 July 2013, is one of the major documents to make up the basis for future legislation and policy on gender equality in the period 2013-2016.²⁶ Based on this plan, the Ministry of Labour and Social Policy initiated the establishment of a working group for the drafting of a Law on Gender Equality. This initiative will, hopefully, lead to the adoption of a new law in spring 2014. There is some skepticism in expert circles, as all previous attempts since 2000 have been abandoned or have failed at different stages of the legislative procedure.

An amendment to the Law on the Social Insurance Budget for 2013 was adopted by the new Parliament and was aimed at increasing the amount of the benefit for child care leave until the child reaches the age of two.²⁷ This is the leave taken by the mother or, with her consent, by the father, or their parents, after the pregnancy and maternity leave of 410 days. The increase is from approximately EUR 120 (LEV 240) per month to approximately EUR 155 (LEV 310) and has been in force since 1 July 2013. The meagre amount allocated by the Bulgarian Government for this purpose, compared with the benefits paid in other EU countries, was contested and challenged by Bulgarian citizens during protests in 2012 and at the beginning of 2013. So, this positive step taken by the current Government was in response to these challenges and it aims to mitigate social tensions before the winter when, over the course of the last few years, we have witnessed an exacerbation of social vulnerabilities. Moreover, further promises were made on the topic at the end of September 2013: the Government is planning to increase the amount of the benefit to approximately EUR 170 (LEV 340) a month.

It is submitted that the legislation and policy in relation to maternity leave, child care leave and parental leave in Bulgaria have to be reviewed and revised in order to ensure more effective gender equality and reconciliation opportunities for both men and women. In this process, the amount of the benefit during child care leave should not be the focus of the discussion but a tool to facilitate equality. Questioning and reconsidering the excessive length of maternity leave is essential, but this will require an extensive public debate and a comprehensive policy. This is, indeed, a sensitive issue which cannot be tackled by fragmented measures. Further delay in this process will only enhance inequalities and aggravate the effect of the unfavorable economic and demographic trends confirmed by the World Bank study mentioned above.

Equality body decisions/opinions

In this section, the compliance with EU standards of the equality body case law will be analysed.

The violation of the right of women to be free from harassment and sexual harassment as a form of discrimination was challenged before the Commission for Protection from Discrimination (CPD) in a number of cases decided in the period 2010-2013. There is presently no public registry or other reliable system for information about the decisions and

²⁶ Decision of the Council of Ministers No. 438/25 July 2013.

²⁷ State Gazette No. 57 of 2013, http://www.nssi.bg/images/bg/legislation/laws/zbdoo_2013.pdf, accessed 9 November 2013.

other acts issued by the CPD. Therefore, the analysis is based on the information made available upon our request.

A recent decision on a severe case of sexual harassment was taken by the CPD in July 2013.²⁸ The acts of discrimination by a colleague of the victim, as well as the failure of the employer to act to prevent sexual harassment, were identified in the environment of a public transport firm. In this decision the issue of discrimination against the female victim is not well discussed or substantiated, nor are the EU and international standards referred to or applied to the case. It took two and a half years for the Equality body to reach a decision on this case, which is a very lengthy procedure in general for a case on sexual harassment, and not in compliance with the deadlines provided by the law. Despite that, this case marks a positive step, especially when compared with previous decisions of the CPD on cases related to complaints for unequal treatment based on sex and sexual harassment.

A central issue of concern is the level of proof required by the CPD in cases of gender discrimination and sexual harassment. Our opinion is that the level applied is in violation of the EU standard for the burden of proof in cases of discrimination. In fact, while in the case cited above the CPD found that the victim managed to prove sexual harassment; not the case in the majority of claims considered. The example of one of the cases left by the Commission without consideration is particularly eloquent.²⁹ In response to a complaint for discrimination based on sex and sexual harassment, the CPD gave a 7-day deadline to the alleged victim '(...) to clarify and identify concrete facts and concrete acts with which harassment in the workplace was committed (...), as well as to present objective evidence for the committed acts(...)'. The woman failed to present such evidence within the time limit and the case was closed. In several other cases the CPD required from the female alleged victims evidence for the unequal treatment and closed the cases.³⁰ It is not surprising that cases involving discrimination based on sex brought before the CPD are scarce.

As one of the most important tools for victims of discrimination, the shifting of the burden of proof should be interpreted and understood in compliance with the definitions in Council Directives 2004/113/EC and 2006/54/EC: 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. It shall not prevent Member States from introducing rules of evidence, which are more favorable to plaintiffs.'³¹

These concepts of the burden of proof and of prima facie discrimination are already sustained by the specialised legal literature on anti-discrimination issues in Bulgaria.³²

The burden of proof rule, according to the current Article 9 of the Law on Protection from Discrimination, states that upon presentation of evidence for prima facie discrimination, the burden of proof shifts to the respondent who has to prove that the right to equal treatment has not been violated. The original Bulgarian text reads that the alleged victim of discrimination has to prove facts from which it may be concluded that there is discrimination, and then the burden of proof shifts to the respondent party.³³

In conclusion, analysis shows that neither the law in force nor the practice concerning the burden of proof in cases of discrimination based on sex and sexual harassment, correspond fully to EU standards. This lack of compliance was addressed through the objections and appeal arguments brought by representatives of women victims of sex discrimination in recent years. The need for this serious gap to be addressed by the legislature and by the practice of

²⁸ Case file No. 111/ 2011.

²⁹ Case file No. 231/ 2010.

³⁰ As in Case files No. 119/2010 and No. 23/ 2011.

³¹ Articles 9(1) Directive 2004/113/EC and 19(1) Directive 2006/54/EC.

³² M. Ilieva *Selected standards of the anti- discrimination law* Sofia, May 2009.

³³ Article 9 of the Law on Protection from Discrimination, full updated Bulgarian version available at <http://lex.bg/laws/ldoc/2135472223>, accessed 20 September 2013.

the relevant institutions in Bulgaria was also raised by the European Commission. This was mentioned through pilot letters in pre-infringement proceedings, and in the fall of 2013 the Bulgarian Government discussed and proposed the respective amendments to the Anti-Discrimination Act. The proposed definition of the shift of the burden of proof is closer to the EU standards. The draft law for amendment is pending before Parliament, and on 16 January 2014 it passed its first reading. The final text is yet to be adopted.

Despite the expected positive outcome for the victims of discrimination, some concerns remain about the compensation for the numerous victims, mainly victims of sex discrimination, who were denied access to justice due to the inaccurate application of the EU principle of the burden of proof. Another problematic area is the lack of understanding and training of the members of the Anti-Discrimination Commission and of the judiciary, an issue which may still represent an obstacle to the realisation of the rights of citizens.

CROATIA – Nada Bodiřoga-Vukobrat

Policy developments

The single most important event that took place in the reporting period was the accession of the Republic of Croatia to the European Union on 1 July 2013. It marks the beginning of a new era for Croatians, who have gained the opportunity to reinforce their rights as EU citizens, and for national judicial and administrative bodies to prove their capacity to fully implement and enforce the EU acquis.

On 18 April 2013 Croatia formally joined the ‘Equal Futures Partnership’ initiative, launched by the United States of America, and adopted the national plan for participation in 2013 and 2014. The goal of this international initiative is to promote active participation of women in two interrelated areas in which they are traditionally underrepresented in almost all countries in the world: politics and entrepreneurship. The measures for empowerment of women will be implemented across four key areas: political involvement, the social and economic status of women in rural areas, women’s entrepreneurship and position in the labour market, and international activities aimed at the empowerment of women. The implementation of the majority of these measures is entrusted to the Office for Gender Equality, which will cooperate with other government offices and Ministries, as well as civil society organisations. Activities of all bodies involved will be coordinated through regular interdepartmental meetings.

On 16 May 2013 Croatia participated in the international IDAHO (International Day against Homophobia and Transphobia) Forum and joined a non-formal initiative at the ministerial level to request from the European Commission the preparation of a comprehensive EU policy and approach to the rights of LGBT (lesbian, gay, bisexual, and transgender) persons.

On 23 January 2013 Croatia became the 26th member of the Council of Europe to have signed the Convention on preventing and combating violence against women and domestic violence. The Convention has not yet been ratified.

Legislative developments

New regulations on fixed-term work were adopted in the first stage of the wider labour law and pension system reform, which is envisaged in the upcoming period. The provisions of the Act on Amendments to the Labour Act entered into force on 26 June and 1 July 2013.³⁴ The use of fixed-term contracts has increased in recent years, with more than 90 % of all new employment contracts being concluded for a fixed term. Women make up the majority of persons employed under fixed-term contracts. The goal of the reform of fixed-term work is to prevent abuse of this type of employment and reinforce workers’ security. Before these

³⁴ Official Gazette 73/2013 of 18 June 2013.

amendments, the total duration of fixed-term employment with the same employee was limited to three years (regardless of whether only one or several contracts were concluded). The usual practice was to conclude several fixed-term contracts, each of a very short duration (e.g. six months). The three-year limit applied to the first, as well as all subsequent fixed-term contracts. Under the new regime, the duration of subsequent fixed-term contracts must not exceed three years, whereas this limitation is not prescribed for the first (or the only) fixed-term contract. In addition, each subsequent fixed-term contract has to include an objective justification for its conclusion.

Case law of national courts

In August 2013, the County Court in Varaždin confirmed the judgment of the Municipal Court in Varaždin in a high-profile case of workplace discrimination based on sexual orientation of a higher assistant employed by Dr Dario Krešić at the University of Zagreb, Faculty of Organisation and Informatics in Varaždin.³⁵ The importance of this case for the future development of case law and enforcement of anti-discrimination legislation cannot be overemphasised, as this was the first court decision confirming discrimination based on sexual orientation in Croatia in an employment relationship.

The Office of the Ombudsperson for Gender Equality has published on its website the full text of the first-instance decision in which the existence of harassment of a subordinate employee at the workplace was found.³⁶ Given that it is generally very difficult to access case law in the area of gender equality, especially first-instance decisions, this practice is commendable and will hopefully continue in the future.

Equality body decisions/opinions

The Ombudsperson for Gender Equality has reported on a case in which the Croatian Institute for Health Insurance denied benefits (salary compensation for sick leave) to a pregnant worker who had concluded an open-ended employment contract only 10 days after having undergone in-vitro treatment.³⁷ Although she was not aware that she was pregnant at the time of the conclusion of the contract, the Croatian Institute for Health Insurance denied her the benefits, arguing that the contract had been concluded with fraudulent intent. Apparently, the legal battle had been going on for three years before the Ombudsperson was informed, but no other information about this case is provided.

Another case reported by the Ombudsperson for Gender Equality concerns one of direct discrimination based on sex, where a breastfeeding mother (police officer) was assigned to work in shifts and at night, without due account being given to the fact that she was still breastfeeding and that she was explicitly against working at night.³⁸ In accordance with her prerogatives, the Ombudsperson for Gender Equality issued a warning and a recommendation to the employer to adjust their work assignment policies to the gender equality legislation in force.

³⁵ Municipal Court in Varaždin, case file number unavailable. Integral text of the first-instance judgment available on <http://www.prs.hr/index.php/nacionalni-dokumenti/442-presuda-opcinskog-suda-zbog-povrede-prava-na-jednako-postupanje-na-osnove-spolne-orijentacije>, accessed 12 September 2013; See also: N. Bodiřoga-Vukobrat, 'Croatia' in: European Network of Legal Experts in the Field of Gender Equality, *Law Review* 2/2012, pp. 54-55, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/eglr_2012-2_web_final_en.pdf, accessed 12 September 2013.

³⁶ Ombudsperson for Gender Equality, <http://www.prs.hr/> accessed 12 September 2013.

³⁷ Ombudsperson for Gender Equality, <http://www.prs.hr/index.php/priopcenja-prs/679-medijsko-pracenje-postupanja-pravobraniteljice-vezano-za-zastitu-trudnica-na-trzistu-rada>, accessed 12 September 2013.

³⁸ Ombudsperson for Gender Equality, case note, <http://www.prs.hr/index.php/odluke-prs/prema-obliku-diskriminacije/neizravna/508-upozorenje-i-preporuka-prs-materinstvo-i-obiteljski-status-neizravna-diskriminacija-2>, accessed 12 September 2013.

Direct discrimination based on sex was also at the core of another case dealt with by the Ombudsperson for Gender Equality.³⁹ The Croatian Institute for Health Insurance refused to treat light bodily injuries suffered by an employee who was physically attacked by her employer as work-related injuries and grant her the related compensation.⁴⁰ The Ombudsperson concluded that the Institute had unlawfully denied the benefits based on an unsubstantiated prejudice that the injuries suffered resulted from a personal relationship between the employer and the employee and were not inflicted in the context of the employment relationship.

Miscellaneous

In May 2013, the European Parliament accepted a report on women's rights in the Western Balkans, prepared by MEP Marije Cornelissen.⁴¹ Croatia was commended in the report for having established the office of Ombudsperson for Gender Equality, which was highlighted as a good practice. Croatian authorities were called on to fully implement the legislation that requires a share of 40 % of women on election lists, since this goal still has not been achieved. Although significant progress has been made in the proper handling of cases of violence against women and gender discrimination, following a targeted training of police officers, further efforts are needed in the field of judicial enforcement. The Croatian Government was also called on to make free legal aid available to victims of gender-based violence and discrimination.

CYPRUS – Lia Efstratiou-Georgiades

Policy developments

The Minister of Justice and Public Order, as Chairman of the National Machinery for Women's Rights, prepared the draft of a bill which aims to regulate matters relating to 'Cohabitation Agreements'. A 'Cohabitation Agreement' may be entered into by two partners who are living together outside lawful wedlock.

The Women's NGOs gave their views on the provisions of the bill. The Trade Unions and Women's NGOs agreed with the provisions of the bill.

Economic crisis in Cyprus increases unemployment

The following results of the Labour Force Survey mainly refer to the 1st quarter of 2013, while comparison is made with the 4th quarter of 2012 and the 1st quarter of 2012.⁴²

Labour force

The labour force (i.e. the employed and the unemployed) participation rate for the age group 15-64 was 73.6 % of the total population in this group. The respective percentage for men was 80.4 % and for women 67.5 %. In the 4th quarter of 2012 the rate was 73.7 % (men 80.9 %, women 67.3 %) whereas in the 1st quarter of 2012 the rate was 73.0 % (men 80.1 % and women 66.6 %).

Employment

The number of employed persons was 375 392. Women accounted for 47.8 % of employed persons.

³⁹ Ombudsperson for Gender Equality, case note, <http://www.prs.hr/index.php/odluke-prs/prema-obliku-diskriminacije/uznemiravanje/505-upozorenje-i-preporuka-uznemiravanje>, accessed 12 September 2013.

⁴⁰ I.e. the right to healthcare and salary compensation, based on compulsory health insurance.

⁴¹ European Parliament, Committee on Women's Rights and Gender Equality *Report on women's rights in the Balkan accession countries* (2012/2255/(INI)).

⁴² www.mof.gov.cy/cvstat, accessed 29 October 2013.

The employment rate, i.e. the number of employed persons aged 20-64, as a percentage of the total population aged 20-64, was 67.4 %. The respective percentages for men and women were 72.9 % and 62.3 %. In the 4th quarter of 2012 the rate was 69.8 % (men 75.6 %, women 64.4 %) whereas in the 1st quarter of 2012 the rate was 70.3% (men 75.6% and women 65.5%).

Part-time employment comprised 12.5 % of total employment (men 9.3 % and women 16.0 %). In the 4th quarter of 2012 the percentage of part-time employment was 11.7 % (men 8.8 % and women 14.9 %) and in the 1st quarter of 2012 the respective percentage was 11.0 % (men 8.3 % and women 13.9 %).

82.7 % of employed persons were employees (wage or salary earners), of whom 14.1 % had a temporary job. The respective percentage for the 4th quarter of 2012 was 83.1 % (with a temporary job 15.9 %) and for the 1st quarter of 2012 was 82.7 % (with a temporary job 13.4 %).

Unemployment

The number of unemployed persons amounted to 15.9 % of the labour force. The unemployment rate for men was 16.2 % whereas for women the rate was 15.4 %. In the 4th quarter of 2012 the number of unemployed persons was 12.7 % (men 13.2 % and women 12.2 %). The respective rate for the 1st quarter of 2012 was 11.1 % (men 12.2 % and women 9.8 %).

Analysing unemployed persons by age shows that the unemployment rate is higher for young persons aged 15-24 (as compared to persons aged 25-64), accounting for 37.5 % of the labour force of that age group (men 39.1 % and women 30.7 %). In the 4th quarter of 2012 the rate was 32 % (men 33.2 % and women 35.8 %). In the 1st quarter of 2012 the respective rate was 26.7 % (men 28.0 % and women 25.1 %) The data show that the rate of unemployed persons is higher for men than for women. The two main reasons are that the female labour force is generally cheaper than the male labour force, and the highest unemployment appears in the construction sector where men are over-represented.

Legislative developments

Law No. 89(I)/2013⁴³ amended the Equal Treatment between Men and Women as Regards Access to and Supply of Goods and Services Law,⁴⁴ to ensure compliance with the decision of the CJEU in *Test-Achats*.⁴⁵ In particular, Article 7 of Law No. 18(I)/2008 was amended with the addition (at the end of Section 2) of a provision that stipulates Section 1 (which prohibits discrimination on the ground of sex in insurance contracts that leads to differences in calculating premiums and benefits) applies to all new insurance contracts, as since 21 December 2012.

Appendix I of the Amendment Law No. 89(I)/2013 added Article 7(2), which provides that new insurance contracts are considered as such, when they enter into force from 21 December 2012 onwards. In addition, Appendix II added Article 7(3), which notes an indicative list of cases in which the collection, storing and use of information about gender (or related to gender) are allowed.

Miscellaneous

In June 2013 the Women's NGOs and the Women's Sections of Trade Unions, which are members of the National Machinery for Women's Rights, established a Committee in order to help women and children living below the poverty line, by organising fund-raising activities. The Committee will also provide assistance in cash and in kind to school children in need.

⁴³ Available via www.cylaw.org.

⁴⁴ Law No. 18(I)/2008.

⁴⁵ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

On 18 October 2013 the National Anti-Poverty Network (Cyprus) organised a seminar under the title 'Restraining unemployment and erasing poverty and social exclusion at the time of economic crisis'.

CZECH REPUBLIC – Kristina Koldinská

Case law of national courts

Constitutional Court decides another case on home birth

The Czech Constitutional Court on the grounds of insufficient evidence and doubts surrounding guilt declared invalid the verdict upon a midwife who had been given a two-year suspended sentence for a fatal mistake during a home birth.⁴⁶ According to the charges the defendant, Koenigsmarkova, had assisted in a complicated home birth despite not holding the necessary authorisation. The new-born baby boy suffered irreversible brain damage due to a lack of oxygen during the delivery. He was transported to a maternity hospital in critical condition and survived only with the aid of a medical apparatus. He died later aged 20 months. The midwife appealed the verdict saying she had not made any professional mistake. Her defence counsel argued that she had always accepted only women without health problems and that the mother had not told her about her previous complications. However, the Appeals Court upheld the previous verdict and the Supreme Court rejected her appellate review as unsubstantiated. She filed a complaint with the Constitutional Court, which subsequently annulled all verdicts in the case.

The courts have previously dealt with a number of cases concerning home births. In the case at issue, the Constitutional Court accepted all of the claimant's arguments (very well written in the claim form), especially regarding the penal procedure which must respect the principle of *in dubio pro reo*. The Constitutional Court did not discuss home births as such; it only confirmed the mother's freedom to choose where to give birth to her baby. The Constitutional Court held that when a mother exercises this freedom, the midwife cannot be automatically penalised when the child dies due to unexpected complications.

There are currently two cases of home births in the Czech Republic pending before the European Court of Human Rights.⁴⁷

Supreme Court decision on sexual harassment

The Czech Supreme Court declared invalid a verdict of the lower courts concerning sexual harassment amounting to discrimination.⁴⁸ The claimant, a female member of a fire brigade, had argued her colleague had sexually harassed her. It was alleged that her male boss had started to cause her problems in their labour relationship and lowered her wage premiums after he found out about her relationship with another man, which she did not intend to end. The Court of First Instance rejected the claim, arguing that the claimant did not provide adequate proof that she had been discriminated against, whereas her employer sufficiently demonstrated that no discrimination occurred at the place of work. The Appeal Court was of a different opinion and reversed the initial decision. However, the Supreme Court annulled the judgment of the Appeal Court due to the insufficient evidence presented by the claimant to demonstrate she had been genuinely harassed and thus discriminated against on ground of her sex.

The rejection of a claimant's discrimination claim based on insufficient evidence to prove the victim was discriminated against is not an uncommon occurrence in the Czech courts. As regards harassment cases, there are no specific procedures, and in this field it is often very

⁴⁶ Case No. I.ÚS 4457/12 of 28 August 2013.

⁴⁷ Application No. 28859/11 *Šárka Dubská v Czech Republic*, Application No. 28473/12 *Alexandra Krejzová v Czech Republic*.

⁴⁸ Case No. 21 Cdo 867/2011 of 29 May 2013.

difficult for the victim to prove that discrimination in the form of harassment has actually taken place.

DENMARK – Ruth Nielsen

Policy developments

Under the present Danish rules on parental leave the father and mother can share the parental leave as they please. If they want the mother to take the whole leave and the father to take no parental leave at all, they are free to do so. In practice women make much more use of parental leave than fathers. When the present Danish Government took office in September 2011 it announced the intention to present legislation earmarking 3 months of the parental leave to be used by men, so that men were to receive the right to take 3 months of parental leave. The mothers' right to parental leave was going to be reduced accordingly. If the father were to choose not to use his right, his entitlement to the three months of parental leave would be lost, since it could not be transferred to the mother.

However, in the beginning of September 2013, the Government announced that it no longer intends to present such legislation, arguing that earmarking part of the parental leave to be used by men would entail the risk of reducing the length of the total parental leave taken by parents because some men were expected not to be willing to use their entitlement to 3 months of parental leave.

Legislative developments

The Act on Equal Treatment between Men and Women as regards Employment and Occupation⁴⁹ was amended with effect from 8 March 2013,⁵⁰ in order to implement Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

The amended Act entitles parents to request flexible working arrangements when returning after a break due to parental leave. In addition, the law specifies that the protection of pregnancy, childbirth or adoption not only applies to dismissal, but also covers less favourable treatment, and that the rules on the burden of proof also apply to this situation. At the same time it states that less favourable treatment obligates the employer to pay compensation.

ESTONIA – Anu Laas

Policy developments

The President of the Republic of Estonia stressed at a meeting with the chairmen of the parliamentary parties in June 2013 that 'when parliamentary parties are no longer trusted, this means that we do not trust our laws, we start to listen to slogans and maybe also elect powers that understand democracy in a way that is much different from what we would want'.⁵¹

Local Government elections took place on 20 October 2013 and the parties drafted their policy ideas for the local Governments for the next four years. Gender issues and non-discrimination were not mentioned in policy debates and programmes. However, 40 % of

⁴⁹ Consolidated Act No. 645 of 8 June 2011, as amended by Section 13 in Act No. 553 of 18 June 2012.

⁵⁰ Act No. 217 of 5 March 2013.

⁵¹ See <http://www.president.ee/en/official-duties/speeches/9152-the-president-toomas-hendrik-ilves-at-a-meeting-with-the-chairmen-of-the-parliamentary-parties-in-kadriorg-7-june-2013/index.html#sthash.GaIOh6wt.dpuf>, accessed 10 September 2013.

candidates were women. Social democrats (SDE) saw emigration as the biggest problem facing Estonia and focused on inclusive policies and activities. The Centre Party (KE) platform tackled the daily concerns of people: transport, medicine prices, pension rises, availability of medical care, and issues related to family doctors.

Pro Patria and Res Publica Union (IRL) focused on criticism of the Centre Party policy and received 17 % of total votes. Every third person in Estonia and every second in Tallinn voted for the Centre Party. The Reform Party (Liberals) and the Social Democratic Party were disappointed in their support nationwide, which was 14 % and 13 % respectively. In rural municipalities many electoral coalitions were successful due to low support for political parties. A share of Internet voters was 24.4 % of the electorate.

Legislative developments

A team of lawyers recently revised the Penal Code (PC).⁵² A bill was drafted by the Ministry of Justice and widely discussed in Government and the media.⁵³ Among several amendments was one to make it illegal for pregnant women to engage in behaviours known to be damaging (smoking, alcohol abuse, etc.) to the foetus. According to a recent survey, 8.3 % of pregnant women are smokers and smoking is the most common unhealthy habit among pregnant women.⁵⁴ It is being discussed whether smoking while pregnant could render women liable to legal sanctions.

Article 129 of the PC entered into force in 2002 and concerns the damaging of an embryo or foetus. Article 129 stipulates that damaging an embryo or foetus by injuring, administering a substance to or performing any other act with regard to the embryo or foetus while it is in the uterus of a woman, if such act results in miscarriage or the death of the embryo or foetus, is punishable by a pecuniary punishment or up to 5 years' imprisonment.⁵⁵ An amendment stresses the importance of foetal health protection and adds the phrase 'knowingly damaging'.⁵⁶

Some NGOs (Estonian Gynaecologists' Society, Estonian Midwives Association, Estonian Sexual Health Association) have opposed the amendment to Article 129.⁵⁷ These NGOs brought arguments against the punishment of pregnant women. They ask whose interests are protected in the case of the imprisonment of pregnant women. If smoking were to become an illegal activity during pregnancy, it would preclude participation in smoking prevention groups. Among such opposing arguments was the quote: 'No woman's life or health shall be put at risk as a consequence of medical treatment being denied to her for any physical or mental condition, or based on others placing a competing value on the foetus she may be carrying'.⁵⁸

These amendments to the PC were open for public debate, and the Bill was sent to Parliament without changes to Article 129 of the PC. The fact that civil society has the willingness and the capacity to contribute to the law-making process is a positive element.

⁵² Penal Code (*Karistusseadustik*), RT I, 05.07.2013, 10 (in effect 1 September 2002, RT I 2001, 61, 364), <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30068K12&keel=en&pg=1&ptyyp=RT&tyyp=X&query=karistusseadustik>, accessed 11 September 2013.

⁵³ (In Estonian) *Amendments to the Penal Code and other related laws. Explanatory memorandum 16 July 2013.* (*Karistusseadustiku ja sellega seonduvalt teiste seaduste muutmise seaduse seletuskiri*).

⁵⁴ Data from the National Institute for Health Development (in Estonian), <http://www.terviseinfo.ee/et/valdkonnad/tubakas/tubakatarvitamine/tubakatarvitisest-estis>, accessed 11 September 2013.

⁵⁵ For a criminal offence, the court may impose a pecuniary punishment of EUR 30 – EUR 500 daily rates. The court shall calculate the daily rate of a pecuniary punishment on the basis of the average daily income of the convicted offender. The court may reduce the daily rate due to special circumstances, or increase the rate on the basis of the standard of living of the convicted offender. The daily rate applied shall not be less than the minimum daily rate. The minimum daily rate shall be EUR 3.20.

⁵⁶ Explanatory Memorandum 16 July 2013, p. 34.

⁵⁷ *Eesti Naistearstide Seltsi, Eesti Õmmaemandate Ühingu ja Eesti Seksuaaltervise Liidu arvamus karistusseadustiku paragrahvi 129 muutmise seaduse eelnõu kohta.*

⁵⁸ *Sexual rights: an IPPF declaration* <http://www.ippfwhr.org/sites/default/files/files/SexualRightsIPPFdeclaration.pdf>, accessed 11 September 2013.

The National Audit Office has stressed the need for a decriminalisation process in Estonian society (almost every second person is listed in the Punishment Register).⁵⁹

Equality body decisions/opinions

The number of employees at the Office of the Commissioner increased from two to eight in 2013.⁶⁰ This represents an important step in both institutional capacity building and the development of equality bodies. The Commissioner has planned to increase the capacity and efficiency of legal advice and legal aid to victims.

According to the Annual Report 2012, the Gender Equality and Equal Treatment Commissioner received 394 communications in 2012.⁶¹ 69 of these communications were discrimination complaints.⁶² The Commissioner identified 11 discrimination cases from these 69 claims. The number of communications has increased every year (in 2011 there were 358 communications, in 2010 288 and in 2009 191 communications). However, in 2012, the number of discrimination claims and identified discrimination cases was lower than in 2011.

The Programme 'Mainstreaming Gender Equality and Promoting Work-Life Balance' aims to enhance protection against discrimination through providing training to those professionals in a position to assist discrimination victims. The project's activities also aim to have a positive impact on the legal awareness of the public on issues of gender equality and are expected to bring about a change in legal culture.

The home page of the Gender Equality and Equal Treatment Commissioner provides poor information, and only a couple of opinions are made accessible to the public.⁶³ This is potentially a result of the legal restrictions on public information.⁶⁴ Article 35 of the Public Information Act (PIA) is widely used for classified information intended for internal use. Article 4(3) of the PIA stipulates that upon granting access to information, the inviolability of the private life of persons shall be ensured. Problems with the Data Protection Inspectorate, which is not an independent body, but is in the administrative sphere of the Ministry of Justice, have been identified.⁶⁵

Article 16 of the Equal Treatment Act (ETA) and Article 15 of the Gender Equality Act (GEA) list the duties of the Gender Equality and Equal Treatment Commissioner. Current activities of the Commissioner appear to be targeted towards the work on individual complaints, training for civil servants and participation in some public meetings; awareness raising about equality and equal treatment is done through publishing activities. In 2011, the Commissioner published a book on gender budgeting,⁶⁶ and a decision about issuing a

⁵⁹ National Audit Office. Opinion, 27 August 2013 no. 6-2/13/15-2. The Punishment Register is a state database holding data about punished persons and their punishments. Since 2012 the Punishment Register has become a part of the state-wide e-File. The current records of the Punishment Register are public – except misdemeanour cases where the person has only one valid misdemeanour record with the main punishment being less than EUR 200 (50 fine units) and with no additional punishment. The Punishment Register also does not publish data about punishments of minors.

⁶⁰ From the EEA and Norway Grants, EUR 700 000 was allotted to capacity building of the Commissioner and the Office, and facilitated the increase of staff from two to eight persons. The Norway Grants facility runs to 31 December 2015.

⁶¹ (In Estonian) *Annual Report 2012 of the Gender Equality and Equal Treatment Commissioner (Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku 2012. aasta tegevuse aruanne)*, Tallinn, 2013, <http://www.svv.ee/failid/Voliniku%202012.%20aasta%20tegevuse%20%C3%BCleuvaade.%20Kokkuv%C3%B5te.pdf>, accessed 13 November 2013.

⁶² In 2011 there were 358 communications and of these 90 were discrimination complaints. The number of communications has increased every year.

⁶³ www.svv.ee, accessed 14 September 2013.

⁶⁴ Article 34 on restricted information and Article 35 on grounds for classification of information as internal, of the Public Information Act (PIA). RT I, 19.12.2012, 5.

⁶⁵ K. Käsper 'Organisational framework of protection of human rights on state level', <http://humanrights.ee/en/annual-human-rights-report/5030-2/organisational-framework-of-protection-of-human-rights-on-state-level/>, accessed 25 October 2013.

⁶⁶ http://www.svv.ee/failid/RNJM%20VEAS_2012_final_bookmargid25012012.pdf, accessed 24 October 2013.

newsletter was taken this year. In October 2013, the Commissioner published two articles on gender equality and gender mainstreaming.⁶⁷

Opinions of the Chancellor of Justice are available through the Chancellor's home page.⁶⁸ There were no opinions in relation to the present report in 2013.

FINLAND – Kevät Nousiainen

Policy developments

Reform of equality law

A reform of Finnish equality law has been under way since 2006, originally with the aim of unifying legislation to cover all prohibited grounds of discrimination and creating a single set of equality bodies, whereas there are at present two separate Acts, one for gender equality and discrimination (Act on Equality between Women and Men), and one for other grounds (Non-Discrimination Act). A report by the Ministry of Justice presented in 2008⁶⁹ set out different models of equality law and seemed to prefer unification.⁷⁰ Due to opposition from the social partners and some other stakeholders, the reform was amended but only in respect of the Non-Discrimination Act. Thus, the two-track model with one Act for gender equality and discrimination on the one hand, and one Act for other forms of discrimination on the other hand, was to be left intact. One of the considerations against unification of bodies was the fear that the resources of the gender equality bodies would be reduced if the equality bodies were amalgamated. In 2009, the Ministry of Justice presented a report on the amendment of the Non-Discrimination Act.⁷¹ The social partners requested and were given more say in the law's preparation, and the final phase of the law's preparation was delegated to the Ministry of Employment and the Economy, as far as the provisions of the Non-Discrimination Act concerning working life were concerned. Finally, a Draft Government Bill was published by the Ministry of Justice in spring 2013.⁷²

While it was decided in an early phase of the reform work that the Act on Equality between Women and Men and the Non-Discrimination Act were to remain separate, and thus gender equality and discrimination were to remain separate areas of equality law with different legal rules and separate equality bodies, the Draft Government Bill proposes that certain equality bodies are to be unified. At present, there are two ombudsmen, one for gender equality (Equality Ombudsman), and another for ethnic discrimination (Minority Ombudsman), and two special bodies (Equality Board for gender equality and National Discrimination Tribunal for ethnic discrimination). The competences of these bodies vary. The provisions that involve working life under the Non-Discrimination Act, irrespective of the ground of discrimination, are supervised by occupational safety authorities, which have no competence under the Act on Equality. The occupational safety authorities, unlike the Equality Ombudsman or Minority Ombudsman, have regional offices, and they have a competence to supervise workplaces, receive information and demand changes in working

⁶⁷ <http://www.svv.ee/failid/Mis%20on%20sooli%C3%B5ime%2C%20kellele%20ja%20milleks%20%28Liivi%20Pehk%29.pdf> and <http://www.svv.ee/failid/Sooline%20vordoiguslikkus%20-%20voti%20paremasse%20yhiskonda%20%28Kadi%20Viik%29.pdf> respectively, both accessed 24 October 2013.

⁶⁸ <http://oiguskantsler.ee/et/seisukohad/viimased-seisukohad>, accessed 16 September 2013.

⁶⁹ Ministry of Justice, *Tasa-arvo- ja yhdenvertaisuuslainsäädännön uudistamistarve ja -vaihtoehdot* (The need to reform equality law and options for reform), *komiteanmietintö* (Committee report of the Non-Discrimination Committee) 2008:1.

⁷⁰ J. Kantola and K. Nousiainen, 'Pussauskoppiin? Tasa-arvolain ja yhdenvertaisuuslain yhtenäistämisestä' (Into the kissing booth? Working toward uniformity in the Finnish gender equality and non-discrimination acts) *Naistutkimus* 2008/2, 6-20.

⁷¹ Ministry of Justice, *Yhdenvertaisuustoimikunnan mietintö* (Committee report of the Non-Discrimination Committee), *komiteanmietintö* (Committee report) 2009:4.

⁷² Ministry of Justice, *Luonnos 12.4.2013: Hallituksen esitys Eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi* (Draft 12.4.2013: Government Bill to the Parliament for Non-Discrimination Act and certain other acts).

conditions under threat of a conditional fine (a fine used as an administrative sanction, to be paid if the offender does not stop behaving in an offending manner). Thus their supervision is considered more effective than that by the national equality bodies, which have no regional units. Co-operation between the representatives both of the employer and of the workforce in occupational safety matters is also well established.

The Draft Government Bill proposes that the two special bodies (the Equality Board for gender equality and the National Discrimination Tribunal for ethnic discrimination) should be unified. The proposed new body, the Non-Discrimination and Equality Board (*Yhdenvertaisuus- ja tasa-arvolautakunta*),⁷³ would be explicitly independent, in spite of being located within a (so far unspecified) ministry. The Board would consist of a full-time chairperson and more members than the present bodies, and the chairperson as well as 7 out of 13 other members should have received legal education. The other members should have expertise in various relevant fields, such as working life, education, economy and public service, or in problems of discrimination. Members should be women and men in equal numbers. The Board would be nominated by the Government.

The proposal leaves intact the provisions in the Act on Equality between Women and Men on who may bring cases to the board. Under the Act on Equality, only the Equality Ombudsman and the social partners have a right to take cases to the present Equality Board, and this provision would remain in force. This would mean that there would be even greater disparity concerning remedies available to persons discriminated against under the Act on Equality, and under the Non-Discrimination Act. The proposed new Non-Discrimination Act would provide an individual remedy to victims of discrimination, who would have a right to bring cases to the new Board.

Thus, the proposed reform of Finnish equality law would retain separate acts on gender equality on the one hand and other equalities on the other hand. At present, gender equality law has a broader scope and more comprehensive provisions than the Act that covers discrimination on grounds other than sex. This disparity would to some extent disappear. However, the right to individual remedy through a low threshold equality body would not be available for victims of sex discrimination, which is not a satisfactory solution from the point of view of gender equality. Further, there are no very clear rules in the proposed legislation about how to proceed in cases involving several discrimination grounds (multiple and intersectional discrimination). As gender is typically very often involved in these cases, it is important for the purposes of gender equality that clear rules are established for multiple discrimination grounds.

Amendment of provisions on equality planning under the Act on Equality

In October 2012 the Finnish Ministry of Social Affairs and Health nominated a working group to prepare a proposal for amending the provisions on equality planning in the Act on Equality between Women and Men. More precisely, the proposal was to concentrate on the positive duty which requires employers to assess the pay gap between women and men in the workplace. The working group presented a report on 25 June 2013.⁷⁴ The report includes a proposal for a Government Bill that would introduce some amendments to the present positive employer duty on equality planning. While EU law does not require that any specific type of positive duty to promote gender equality by means of equality planning is introduced by the Member States, Directive 2006/54/EC requires the Member States to encourage employers to promote equal treatment, and also to inform employees regularly about equal

⁷³ It is difficult to translate the names of the two equality acts and bodies, as both *yhdenvertaisuus* and *tasa-arvo* should be translated as equality. Since the Non-Discrimination Act (*Yhdenvertaisuuslaki*) was enacted in 2004, the word *yhdenvertaisuus* has been understood to refer to other equalities than gender equality, which is referred to as *tasa-arvo*. Thus, while both equality acts and bodies have similar tasks and work with equality issues, *yhdenvertaisuuslaki* is usually translated into English as Non-Discrimination Act.

⁷⁴ *Työelämän tasa-arvosuunnitelmaa koskevien tasa-arvolain säännösten tarkistaminen. Sosiaali- ja terveysministeriö* 2013, available at www.stm.fi/julkaisut/nayta/-/julkaisu/1859193#fi, accessed 20 October 2013.

treatment within the workplace. In Finland, the provisions on equality planning fulfil this obligation.

Under Section 6 of the Act on Equality as it stands now, every employer has a duty to promote gender equality at work, and to promote equal conditions of work, especially those concerning pay. More precise provisions apply to employers with 30 or more employees, who must prepare an equality plan together with the representatives of the workforce (Section 6(a)). The plan must contain a report on gender equality in the workplace, specify measures to promote equality including equal pay, and make an assessment of measures that have been undertaken on the basis of a former plan. Producing a report on equal pay is generally known as ‘pay charting’ or ‘pay mapping’ (*palkkakartoitus*). Section 6(a) came into force as part of an amendment of the Equality Act in 2005. Since then, both Finnish social partners and the ministry that is responsible for gender equality matters (Ministry of Social Affairs and Health) have made studies of the implementation of this provision.⁷⁵

These studies have shown that most employers of 30 or more employees have made equality plans required by the Act on Equality, and have also undertaken the obligatory pay charting exercise. The studies showed, however, that pay was generally studied without an analysis of what the pay consists of. Often comparisons were made merely of the overall pay received by each employee, without paying attention to the components of which it consists. Certain sectors of the labour market seemed to neglect the duty more often than others, and smaller employers more often than bigger ones. The study undertaken by the Ministry of Social Affairs and Health showed that, even though employers generally carry out the pay charting exercise and other equality planning measures required by the Act on Equality, the implementation of the measures listed in the equality plan seems to remain half-hearted. There may not be real follow-up of the effects of the measures, and the employees are not always aware of the requirements or even the existence of the plan. When the former Government presented a report on gender equality to Parliament in 2010,⁷⁶ Parliament stated that the provisions on ‘pay charting’ in the Act on Equality should be amended.

The working group nominated by the Ministry of Social Affairs and Health was thus a result of the information from the studies mentioned above on the one hand, and the statement by Parliament on the other hand. The working group consisted of representatives of the responsible Ministry and of the social partners. An expert representing the Equality Ombudsman was also nominated, as well as two independent experts, one of whom acted as the chairperson. In the way that is normal for matters that concern working life, law preparation was thus very much in the hands of the social partners.⁷⁷

The aim of the proposal presented by the working group was to clarify the duty to produce and implement an equality plan, including the pay charting exercise, in such a way as to effectively promote both gender equality in the workplace and also equal pay. The manner in which the workforce should participate in the exercise is specified more clearly in the proposal, which means that the trade union representatives and other employee representatives would have a clearer role in the procedure than under the present wording of the Act. The duty to undertake ‘pay charting’ remains an employer’s duty, however. The provision on equality planning now in force requires that the plan is to be made every year, but the amendment would allow it to be made biennially. The employer’s duty to inform the workforce about the equality plan is clarified in the proposal.

A new section on ‘pay charting’ is to be inserted in the Act, which specifies more clearly how the exercise is to be carried out. ‘Pay charting’ should make it clear that no groundless pay differentials exist between women and men employed by an employer. The exercise

⁷⁵ Studies undertaken by the Ministry have been reported in studies made in 2008-2009, and in a more extensive study reported in 20012 (*Report by the Ministry of Social Affairs and Health 2012:19*). The social partners have made inquiries to their members.

⁷⁶ *Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta* (The Government’s report to the Parliament on Equality Between Women and Men), EK 51/2010 vp.

⁷⁷ As an expert member of the working group, the author of this report recorded that the representatives of the social partners negotiated on the main points of the proposal, which were then adopted into the proposal of the working group.

should proceed by first dividing the workforce into groups on the basis of their tasks or requirements involved in these tasks. If unexplained pay differentials seem to exist, their causes are to be ascertained. If there are no acceptable grounds for the gender pay differentials, the employer should take measures to correct the situation. The nature of the necessary measures is left open, as the measures needed depend on the causes of the differentials, but they would involve changes in the pay system. The amendment would leave intact the prohibition on pay discrimination under the Act on Equality as such.

The proposed amendment would improve the position of the trade union representatives and other representatives of the employees to participate in the process of equality planning. The majority of the working group presented no arguments for its decision to turn the annual planning period into a biennial one. The unexpressed motivation for allowing longer intervals than the Act requires at present clearly was that if employers are to provide more extensive 'pay charting', they should not be required to do it every year. The formulation of the new section on 'pay charting' still gives relatively open guidelines concerning the way in which 'pay charting' is to proceed, especially as to how relevant comparison groups are to be formed in order to reveal unacceptable differentials. The provision also is somewhat unclear as to which different parts or types of pay are to be taken into consideration. The critique of the proposed provision presented here was originally expressed in the dissenting opinion by Professor Kevät Nousiainen to the report of the working group, dated 14 June 2013 and attached to the working group report.

FRANCE – Sylvaine Laulom

Policy developments

On 3 July, Najat Vallaud-Belkacem, Minister for Women's Rights, presented draft legislation on equality between women and men to the French Council of Ministers. After the election of a new socialist President on 6 May 2012, one of the first measures adopted was the nomination of a Government which respects parity between men and women. As promised during the campaign, the Government also includes the Ministry of Women's Rights (run by Najat Vallaud-Belkacem). In addition to this post, Belkacem is the Government's spokesperson. It was clear that the Government wanted to propose a new bill on equality.

The legislative proposal intends to adopt a comprehensive approach to equality aiming at enhancing gender equality in all fields and spheres.⁷⁸ In brief, the objectives are to:

- Make progress in the area of professional equality between women and men;
- Fight against women's precarious economic situations;
- Protect women against violence;
- Ensure that they are afforded equal dignity and respect in society; and
- Ensure the fair representation of women in society.

The project includes:

- Important measures in the scope of professional equality;
- Guarantees to assure alimony payments;
- Protection for women victims of violence; and
- Measures for the generalisation of parity and equality.

Under the proposed legislation, parental leave would be subject to the most radical reform with the aim of encouraging more men to take paternity leave. The right to parental leave will remain the same, but not the conditions of the social benefit for the parent who takes parental leave. Until now, the 'supplement for free choice of working time' (*Complément de libre choix d'activité*; CLCA) has been paid for six months for a family's first child and for three years for further children. In the project, the CLCA will be paid for another period of six

⁷⁸ See *Projet de loi pour l'égalité entre les femmes et les hommes*, <http://www.senat.fr/dossier-legislatif/pjl12-717.html>, accessed 29 August 2013.

months for a family's first child, if the other parent is taking parental leave. Thus a period of one year's paid parental leave will be recognised for the first child if both parents share parental leave. For other children, the CLCA will be reduced to 2.5 years unless parental leave is shared, in which case the benefit is paid for three years. The proposed rules will not apply to single families.

Other measures are also provided. The divorced parent who fails to pay alimony will see the funds owed taken directly from his/her social benefits. Companies that fail to respect gender equality will be excluded from public contract tenders, while sports federations will also face penalties for shunning equality, such as a suspension of the accreditation needed to have access to grants. Fines for political parties that fail to respect gender parity in legislative elections will be doubled.⁷⁹

The proposal does not contain many rules on equality at work and none on equal pay because the Government wanted to leave the social partners to negotiate on these issues. On 8 July 2013, employers' organisations and three of the five representative trade unions (CFE-CGC, CFDT, CFTC) signed a national inter-professional agreement (*Accord national interprofessionnel*) on the quality of working life and professional equality.⁸⁰ However the content of the agreement is rather weak. This is why the remaining two representative trade unions (CGT and CGT-FO) refused to sign it. One of the main areas of disagreement was the merger of the annual mandatory negotiations on gender equality and negotiations on the gender pay gap. The trade unions that did not sign the agreement were strongly opposed to merging the negotiations. In the end, the national inter-professional agreement settled on creating a link between both sets of negotiations, rather than a full merger. The legislature has been asked to define the terms of this 'link'. The agreement contains a series of measures to 'improve the quality of life at work, the reconciliation of time and professional equality'

The proposal will be discussed in Parliament and it is very likely that the content will be amended. The Government has also indicated that the national inter-professional agreement on the quality of working life and professional equality will lead to amendments to the bill, which will integrate the agreement. The content of the agreement could be improved but it is far from certain that the Government and Parliament will do it.

Case law of national courts

In a long expected decision on 19 March 2013,⁸¹ the Social Chamber of the *Cour de Cassation* ruled that the dismissal of an employee from her job at a private nursery school (Baby Loup Association) for refusing to remove her Islamic veil at work amounted to religious discrimination. The decision is about discrimination on the ground of religion. However, it is also about the refusal not to wear an Islamic veil, a matter that only concerns women. The internal rules of the nursery contained a general clause on secularism and neutrality applicable to all jobs in the company. For the *Cour de Cassation*, such a clause is invalid and the dismissal of an employee for serious misconduct on the grounds that she violated the provisions of this clause constitutes discrimination on grounds of religious conviction and must be declared void. The Court explained that because the Baby Loup nursery was a private institution whose staff did not provide a public service, the principle of secularism (*laïcité*) did not apply.

In another decision on the same day,⁸² the Court upheld the dismissal of a healthcare technician for refusing to remove her Islamic veil on the grounds that she worked for an

⁷⁹ The actual rule provides for a reduction of the money given to a political party when the difference between the number of candidates of each sex exceeds 2 % of the total number of candidates. The amount of money is reduced by a percentage equal to 75 % of the gap relative to the total number of candidates.

⁸⁰ The text of the National Inter-professional Agreement is available at http://www.cfdt.fr/upload/docs/application/pdf/201307/ani_du_19_juin_2013_sur_la_qualite_de_vie_au_travail.pdf, accessed 29 August 2013. Also see, EIROnline 7 July 2013, http://www.eurofound.europa.eu/eiro/2013/07/articles/fr1307041i.htm?utm_source=EIRO&utm_medium=RSS&utm_campaign=RSS, accessed 29 August 2013.

⁸¹ Cass. Soc. 19 March 2013, No. 11-28845 and 12-11690, Bulletin.

⁸² Cass. Soc. 19 March 2013, No. 12-11690, Bulletin.

organisation that provided a public service. In this case, the *Cour de Cassation* stated for the first time that the principles of neutrality and secularism in the public service are applicable to all public services and include those provided by private bodies. If the provisions of the Code du Travail are intended to apply to agents of a primary health insurance fund, they must always be subjected to constraints resulting from the fact that they provide a public service – which especially prohibits them from expressing their religious beliefs by external signs, in particular by clothing. The dismissal of the employee was therefore upheld.

These two decisions, especially the decision regarding the dismissal of the employee working in the private nursery, have been strongly criticised by very diverse groups (MPs, feminist associations, religious groups, and so on) and the difference between the two cases has not always been understood, i.e. between public services and private ones. The Baby Loup case has also been criticised by many women's organisations. The French Interior Minister Manuel Valls criticised the ruling against the nursery school, which according to him, has called secularism into question.

Miscellaneous

In June, the Ministry of Employment publishes an annual report on collective bargaining, which presents the general figures on collective agreements concluded in the year before. The last report published in 2013 confirms the previous tendencies of collective bargaining on equality. Certainly because of the existing legal incentives, the number of collective agreements on equality continues to increase in 2012 both at sectoral level and at company level. The content of the agreements is also slowly improving and some good practices are presented. However, the report also notices that some of the agreements are lacking concrete measures to improve the situation of women, particularly in terms of company wages.⁸³

GERMANY – Ulrike Lembke

Policy developments

Federal parliamentary elections: gender equality was not a topic

Federal parliamentary elections took place on 22 September 2013. Although nearly all of the competing political parties emphasised the importance of gender equality and agreed with the political demands of the Women's Council (the umbrella organisation of German women's organisations⁸⁴), gender equality was not a core element of the electoral campaigns. Electoral advertising and public debates did not focus on gender equality, the advancement of women, the gender pay gap, underpaid part-time work, female poverty in old age or problems of sexual harassment and discrimination. The only explicit equality issue of the electoral campaigns was the question of an adoption right for homosexual couples.

Ministry for Family, Senior Citizens, Women and Youth on gender equality: not working

The competent and responsible ministry for gender equality in Germany is the Ministry for Family, Senior Citizens, Women and Youth. There are no major initiatives for gender equality for the period under review. On the contrary, major parts of the ministry's website, such as those concerning politics for women and men, women and employment, protection from violence against women, as well as equality and inclusion, have not been updated since March 2013.⁸⁵ The exceptions are the prospects for boys and men as well as information for pregnant women. Moreover, the activity report of the Federal Government on gender equality shows that measures taken do not include binding statutory regulations (e.g. to tackle the gender pay

⁸³ Ministère du travail, *La négociation collective en 2012*, Bilan et Rapport, La documentation française 2013.

⁸⁴ Women's Council on parliamentary elections: <http://www.frauenrat.de/deutsch/aktionen/bundestagswahl-2013.html>, accessed 15 September 2013.

⁸⁵ See: <http://www.bmfsfj.de/BMFSFJ/gleichstellung.html>, accessed 21 September 2013.

gap or to promote women to leading positions) or relevant economic interventions and that the majority of these measures have already expired or will expire in 2014.⁸⁶

‘Feminised’ university regulations: gender and language

In April and May 2013, the University of Leipzig decided on amendments to its Academic Statute. In connection with the amendments, the gender-sensitive language of the statute was criticised. The Academic Senate spontaneously opted for the continuous use of female designations within the statute, including a remaining possibility for male academic staff to be referred to in masculine forms.⁸⁷ There was broad media coverage which was scandalised by the ‘feminisation’ of academia, but drew attention to the lack of gender equality in academia (see below) as well. The University of Potsdam followed the example of Leipzig, but the use of female designations was restricted to the internal rules of procedure for the Academic Senate.⁸⁸

Legislative developments

Gender equality in the field of employment

On 13 June 2013, the Federal Parliament rejected two drafts on gender equality presented by the Social Democratic Party (*Sozialdemokratische Partei, SPD*) and the Greens.⁸⁹ The drafts demanded legislative action to promote gender equality, naming concrete measures such as the adoption of the draft on equal pay,⁹⁰ statutory minimum wages, amendments to the regulations on marginal work (so called mini-jobs), the adoption of an equal opportunities act for private employers, a statutory minimum gender quota on company boards, better reconciliation of working and family life, the expansion of child care facilities, a statutory entitlement of part-time workers to return to full-time employment, better conditions for part-time parental leave and a functioning concept of home care leave.⁹¹

Amendment of the Higher Education Act of Hamburg

The Higher Education Act of Hamburg is to be amended in winter 2013/14. Several parts of the draft law concern questions of gender equality. Academia is one of the central and one of the most challenging fields for gender equality in Germany. More than 50 % of the students, nearly half of the graduates and some 40 % of the doctoral candidates are female. But only 20 % of all professorships and 15 % of the well-paid chairs are held by female academics. Academia is a deeply traditional institution reluctant towards structural change, and as a result it suffers gravely from gender stereotypes. Explicit measures for the advancement of women are the subject of controversial discussion; many academics reject them vigorously.

Within the draft law, explicit measures for the advancement of women are replaced by a ‘gender-neutral’ concept of promotion for the under-represented sex. Unfortunately, the draft does not identify the comparison group for the under-representation but mentions the colleges and faculties in general, thus raising concerns that female professors may not be appointed due to the number of female students or doctoral candidates. History has shown that more female students or even doctoral candidates do not change the gender imbalance among the chairs.⁹² Furthermore, a federal programme facilitated the growing number of female

⁸⁶ Social Report of the Federal Government 2013, pp. 37-45, <http://dip21.bundestag.de/dip21/btd/17/143/1714332.pdf>, accessed 21 September 2013.

⁸⁷ See: http://www.zv.uni-leipzig.de/service/presse/pressemeldungen.html?ifab_modus=detail&ifab_uid=a6b964c0bb20130922224331&ifab_id=4994, accessed 22 September 2013.

⁸⁸ See: <http://www.uni-potsdam.de/pm/news/up/date/2013/07/04/2013-107.html>, accessed 22 September 2013.

⁸⁹ See Plenary Protocol of 13 June 2013, pp. 31417-31428, <http://dip21.bundestag.de/dip21/btd/17/17246.pdf>, accessed 23 September 2013.

⁹⁰ See Documents of the Federal Parliament (*Bundestags-Drucksache*) 17/9781 of 23 May 2012, <http://dip21.bundestag.de/dip21/btd/17/097/1709781.pdf>, accessed 23 September 2013.

⁹¹ See Documents of the Federal Parliament (*Bundestags-Drucksache*) 17/12487 of 26 February 2013, <http://dip21.bundestag.de/dip21/btd/17/124/1712487.pdf>, and 17/12497 of 27 February 2013, <http://dip21.bundestag.de/dip21/btd/17/124/1712497.pdf>, both accessed 23 September 2013.

⁹² See studies under <http://www.gesis.org/cews/informationsangebote/statistiken/>, accessed 23 September 2013.

professors.⁹³ The comparison group for under-representation can only be the corresponding salary group of professorships or chairs.

The draft contains a well-intentioned statutory gender quota of 40 % for all academic committees with devastating effects for female professors. Administrative work within academia is unavoidable, but higher burdens of this work can be an obstacle to reputable scientific research and international networking. Professors are the statutory majority in academic committees and, due to their very small number, female professors would be obliged to work on these committees much more often than their male colleagues to achieve the 40 % gender quota. Without compensatory measures for the female professors as the significantly under-represented sex within their academic group, the well-intentioned gender quota will turn out to be a serious attack on gender equality in academia.

The draft regards male equal opportunity commissioners as normal, holding out the possibility of colleges or universities with no female equal opportunity commissioner. This does not accord with reality and the needs of female academics or the respective case law (see below).

Case law of national courts

Reimbursement of costs for private childcare

On 12 September 2013, the Federal Administrative Court decided that parents may be entitled to a reimbursement of the costs for private child care when the local authority responsible failed to offer the statutory guaranteed place in a kindergarten.⁹⁴ The court required timely application by the parents, fulfilment of statutory conditions for the entitlement to a kindergarten place and unreasonableness of postponement of the child care.

Under Section 24(3) of the Social Code No. 8 as amended by the Act on the Support of Children of 10 December 2008, every child from the age of one year is entitled to early childhood education and care in a kindergarten from 1 August 2013.⁹⁵ The lack of child care opportunities is one of the main obstacles for gender equality and female participation in working life in Germany. The costs for the necessary development and establishment of child care institutions to offer places for every child were divided between national, state and local authorities. However, especially in southern and western states, tens of thousands of kindergarten places are still lacking (January 2013: 150 000 places). Many parents insist on their statutory entitlement and the respective local authorities can only offer part-time kindergarten places, places in institutions far away from the family or no places at all.⁹⁶ Many parents will take legal action against the respective local authorities. But the court proceedings may take years, successful claims might not be enforceable and damages can only be awarded when parents can prove a concrete loss of earnings, which many may not be able to do.

⁹³ Due to the federal Female Professors Programme, universities and universities of applied sciences developing successful concepts of gender equality can receive federal funding for up to three lifetime professorships for women. The first programme ran from 2007 until 2012, the second programme will run from 2013 until 2017. For further information see: www.bmbf.de/de/494.php, accessed 7 November 2013.

⁹⁴ Federal Administrative Court, judgment of 12 September 2013, 5 C 35/12, <http://www.bverwg.de/presse/pressemitteilungen/pressemitteilung.php?jahr=2013&nr=66> (press release), accessed 23 September 2013.

⁹⁵ Act on the Support of Children (*Kinderförderungsgesetz*) of 10 December 2008, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 2403, available at <http://www.bmfsfj.de/BMFSFJ/gesetze/did=133282.html>, accessed 23 September 2013.

⁹⁶ See newspaper article dealing with the problems of implementation of the Act on the Support of Children of 18 May 2013: <http://www.welt.de/wirtschaft/article116322291/Rechtsanspruch-auf-Kita-Platz-ist-kaum-einklagbar.html>, accessed 23 September 2013.

Gender-segregated swimming lessons

On 11 September 2013, the Federal Administrative Court decided that a Muslim female pupil is not entitled to an exemption from coeducational swimming lessons.⁹⁷ The court abandoned its previous case law on this matter with the argument that the applicant could wear a so-called 'burkini'. It held that further risks such as the sight of male pupils wearing swimwear has to be tolerated and that the risk of unintentional contact could be minimised by the way in which the swimming lessons are organised.

Male equal opportunity commissioners

On 14 August 2013, the Administrative Court of Arnsberg decided that the rejection of a male applicant for the post of an equal opportunity commissioner does not violate superior law.⁹⁸ The main tasks of equal opportunity commissioners were to tackle discrimination against women in employment and working life and to offer advisory and consultancy services in cases of sexual harassment and harassment on the grounds of sex/gender. A male person could not adequately perform these tasks. Therefore, the preference for female applicants did not violate superior equality law because the statutory decision in favour of a female equal opportunity commissioner was an appropriate measure to compensate for disadvantages on the grounds of sex/gender and, moreover, because the sex/gender of the applicant constituted a genuine and determining occupational requirement under the General Equal Treatment Act. With this ruling, the Administrative Court followed a decision of the Federal Labour Court in 2010 on the justification of the preference for female applicants for the post of an equal opportunity commissioner.⁹⁹

Imposed pregnancy counselling

On 22 July 2013, the Federal Administrative Court confirmed that imposed pregnancy counselling by a religious group immediately in front of a certified pregnancy information centre can be abolished by the respective police authority.¹⁰⁰ The Court held that imposed pregnancy counselling violated the rights of personality and privacy and was incompatible with German regulations on the protection of the unborn child. Neither the freedom of speech nor religious rights could justify the grave breaches of confidentiality, privacy and intimacy, caused by imposed 'counselling' on the questions of pregnancy and abortion.

Equality body decisions/opinions***Second report of the federal anti-discrimination authority***

On 13 August 2013, the federal anti-discrimination authority and the federal anti-discrimination commissioners published their second report on discrimination in the fields of education and employment.¹⁰¹ The report shortly enumerates problems of gender equality in the field of employment such as a significantly gender-segregated labour market, the high proportion of women in part-time work and in marginal employment, the gender-specific division of (care/family and professional) work, pregnancy discrimination, the lack of transparency in wages especially in collective agreements, and the lack of effective means for the practical implementation of the principle of equal pay. In the field of education, persisting gender stereotypes and heterosexism are the major challenges.

⁹⁷ Federal Administrative Court, judgment of 11 September 2013, 6 C 25/12, <http://www.bverwg.de/presse/pressemitteilungen/pressemitteilung.php?jahr=2013&nr=63> (press release), accessed 23 September 2013.

⁹⁸ Administrative Court of Arnsberg, judgment of 14 August 2013, 2 K 2669/11, http://www.justiz.nrw.de/nrwe/ovgs/vg_arnsberg/j2013/2_K_2669_11_Urteil_20130814.html, accessed 23 September 2013.

⁹⁹ Federal Labour Court, judgment of 18 March 2010, 8 AZR 77/09, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=14441>, accessed 23 September 2013.

¹⁰⁰ Federal Administrative Court, judgment of 22 July 2013, 6 B 3/13, <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=220713B6B3.13.0>, accessed 23 September 2013.

¹⁰¹ *Second Report on Discrimination in the fields of education and employment*, <http://dip21.bundestag.de/dip21/btd/17/144/1714400.pdf>, accessed 21 September 2013.

GREECE – Sophia Koukoulis-Spiliotopoulos**Policy developments*****Social criteria for public procurement***

It has become a frequent practice of public authorities (the State, legal persons governed by public law, local authorities and other entities of the public sector) to conclude contracts with undertakings providing cleaning and/or security services for their premises (public office buildings, public hospitals, and so on). Such undertakings are mostly ‘temporary-work agencies’, which, acting as ‘direct employers’, hire workers and then ‘lend’ them temporarily to other (indirect) employers, for whom they work on fixed-term contracts. Cleaners performing temporary work of this sort are overwhelmingly women, very often migrants. Although the setting-up and activities of such companies and their obligations, along with the indirect employers’ obligations, are regulated by law,¹⁰² working conditions, including pay, are very bad and most of these workers are not insured as they should be, while control is inadequate.¹⁰³

So, there is extensive direct and indirect gender discrimination and often multiple discrimination (on grounds of sex and ethnic origin or nationality in case of EU citizens), in breach of the gender equality and non-discrimination directives and the Greek legislation transposing them.¹⁰⁴ However, these women very rarely dare to claim their rights for fear of victimisation, lack of proof and fear of acquiring a ‘bad name’ in the labour market. These fears are growing along with unemployment, which is soaring in Greece and much higher for women: in June 2013 the official unemployment rate was 27.9 % (31.9 % females, 24.9 % males), the highest in the EU.¹⁰⁵ The undocumented immigrant women are even more vulnerable.

We will summarily present recent legislative measures, which aim to strengthen the control on temporary-work agencies in the areas of cleaning and security and thus to combat the exploitation of temporary workers.

Legislative developments

An article included in a recent Act is complementing and modifying the provisions of a previous Act regarding contracts awarded by public authorities (the State, legal persons governed by public law, local authorities and other entities of the public sector) for the provision of cleaning and/or security services.¹⁰⁶

The Introductory Report to the new provisions

According to the Introductory Report (IR) to the bill which became Act 4144/2013,¹⁰⁷ the new provisions are aimed at ‘enhancing the preventive control of the reliability and

¹⁰² Articles 113-133 of Act 4052/202012, OJ A 41, of 1st March 2012, which aim to transpose Directive 2008/104/EC on temporary agency work, OJ L 327, of 5 December 2008, p. 9.

¹⁰³ See Institute of Labour (INE) of the General Confederation of Labour (GSEE) and the Confederation of Civil Servants’ Trade Unions (ADEDY) *Labour relationships in the cleaning sector – Results of an empirical research*, Athens, 2009: <http://www.inegsee.gr>; Greek National Commission for Human Rights ‘Workers’ rights and working conditions in the context of contract works’ *Annual Report 2009*: <http://www.nchr.gr>, both accessed 15 September 2013.

¹⁰⁴ Mainly Act 3896/2010 transposing Directive 2006/54/EC (recast) (gender equality in employment and occupation), OJ A 207, of 8 December 2010; Presidential Decree 176/1997, as amended by Decree 41/2003, transposing Directive 92/85/EEC (maternity protection), OJ A 150, of 15 July 1997, and OJ A 44, of 21 February 2003; Act 4075/2012, Articles 48-54, transposing Directive 2010/18/EU (parental leave), OJ A 89, of 11 April 2012; and Act 3304/2005 transposing Directives 2000/43/EC and 2000/78/EC (non-discrimination on other grounds), OJ A 16, of 27 January 2005.

¹⁰⁵ Hellenic Statistical Authority: <http://www.statistics.gr>, accessed 15 September 2013.

¹⁰⁶ Article 22 on ‘the combat against offences regarding social security and the labour market’ of Act 4144/2013, OJ A 88 of 18 April 2013, complementing and modifying the provisions of Article 68 of Act 3863/2010, OJ A 115 of 15 July 2010.

¹⁰⁷ See the Greek Parliament’s website: <http://www.hellenicparliament.gr>, accessed 15 September 2013.

trustworthiness of candidates and tenderers by the contracting authority, so that those who have recently committed a serious professional offence be excluded *ab initio* from the award of a public contract’.

The IR recalls that ‘the European Commission, within the framework of the implementation of Directive 2004/18/EC, is attaching great importance to the choice of tenderers in accordance with social criteria, such as compliance with labour and social security legislation’. In this respect, the IR quotes the Commission’s guide ‘Buying Social: a Guide to Taking Account of Social Considerations in Public Procurement’, which stresses that ‘candidates who have not achieved a particular pattern of social behaviour are excluded, in certain circumstances, from the award of public contracts’. The IR further mentions that, according to this guide, ‘the best value for money for the services provided includes social aspects (compliance with labour legislation etc.), as the award of the contract to a reliable and socially responsible tenderer leads to the smooth implementation of the contract and increased benefits for the State, which “is buying” services of the highest possible quality for its citizens’.

The IR also quotes a report of the Greek Ombudsman, where it is stated that ‘the award of a public contract by a public authority to a private tenderer does not exempt the former from its specific obligation to ensure the respect and protection of the rights of all those involved, in particular of the workers, nor does it allow it to shift totally the responsibility to the general controlling mechanisms. On the contrary, the choice of a tenderer activates the general duty of the authorities to respect rights, in the form of the specific duty of awarding authorities themselves to see to the effective implementation of the provisions for the protection of rights, at all stages of the procedure, i.e. at the stage of the response to the call for tenders and the assessment of the tenders as well as at the stage of the execution and delivery of the services or work’.

The new provisions

The new provisions repeat the requirements set out by previous legislation, namely that the contracting authority must ask the companies providing cleaning and/or security services to include in their tender, *inter alia*:

- (a) The number of workers to be employed for the performance of the services;
- (b) The working days and hours;
- (c) The collective agreement eventually covering the workers;
- (d) The budget allocated to the pay of these workers;
- (e) The amount of the social security contributions; and
- (f) In the case of cleaners, the square metres to be cleaned by each worker.

The contract must also include these data, as well as a specific clause requiring the application of labour and social security legislation and the legislation on health and safety of the workers and the prevention of professional risks.

As the Labour Inspectorate (LI) is empowered to impose fines on employers who infringe labour legislation, the new provisions stipulate that ‘the decisions of the LI by which a fine is imposed on a company providing cleaning and/or security services shall be inserted in a “Register of Infringing Cleaning and/or Security Services’ Companies”, to be kept by the LI. The contracting authority shall, immediately upon expiry of the time period for the submission of tenders, file a written request with the LI for the supply of a certificate indicating all the decisions imposing a fine, which have been issued against each candidate for the award of the contract. This certificate is sent to the contracting authority within fifteen days of the filing of the request. In case the certificate is not supplied within this time period, the authority is entitled to proceed to the conclusion of the contract.’

Among the provisions of labour legislation the implementation of which is controlled by the LI are those related to gender equality, including those implementing the gender equality and the non-discrimination directives (see above under Policy Developments).

The contracting authority may exclude candidate companies providing cleaning and/or security services due to a ‘serious professional offence’, including ‘the imposition by the LI,

at least twice in the course of the three-year period preceding the expiry of the time period for submitting tenders, of a fine amounting to at least EUR 10 000, for infringements of labour legislation of “high” or “very high” severity’.¹⁰⁸

The contract must include the data and the clause on the application of labour, social security and health and safety legislation already required by previous legislation (see above). The new provisions specify that, in the absence of the said data and clause, the contract is null and void. The previous and the new legislation also require the termination of the contract if the contracting company does not honour its obligations, including those mentioned above. If an infringement of these obligations is found at the time the contract comes to an end, the rights of the contracting company ‘shall not be satisfied’. However, in such a case, the user of the services pays the workers’ wages.

These new provisions, if they are properly applied, can improve the situation of temporary workers. However, their effective implementation depends on the LI, which is admittedly weak, due to understaffing and lack of adequate material means, which it deplors in its own reports.¹⁰⁹ The situation is worsening in this respect, due to increasing and drastic budget cuts and the reduction of personnel in all public services, which are made in compliance with the Memoranda of Understanding signed by the European Commission, acting on behalf of the Euro area Member States, and the Hellenic Republic, in the framework of the EU/International Monetary Fund programme of assistance to the Greek economy.¹¹⁰

The ineffectiveness of the LI, in particular due to the above measures, and the crucial need to strengthen it by ensuring sufficient human and material resources, is also stressed by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in its Report to the International Labour Conferences of 2013, regarding the implementation by Greece of ILO Convention No. 81 on Labour Inspection.¹¹¹

HUNGARY – *Beáta Nacsa*

Policy developments

A two-thirds majority of the middle-right FIDESZ Party (Hungarian Civic Union) and its ally, the small KNDP (Christian-Democratic Party) passed the fifth modification of the Fundamental Law (the replacement of the previous Constitution), which was enacted by the same coalition less than two years ago without any support from the opposition. The continual modification of the Fundamental Law provides a ground for the criticism that the Fundamental Law is used by the governing coalition as a tool in the daily political struggle, through which any idea of the ruling coalition can be forced on society without engaging in any dialogue with the opposition or civil society.

According to the expressed intention of the ruling political powers, the fifth modification aimed to bring the regulations of the Fundamental Law into line with the requests formulated by the Hungarian Constitutional Court, the European Commission, the Council of Europe and the Venice Commission, though this view is debated by certain human rights NGOs.¹¹² From a gender perspective, the most important feature of the fifth modification is that it did not alter the notion of family. This notion of the family was introduced by the fourth modification of the Fundamental Law, which establishes that a family is based on the marriage of a man and a

¹⁰⁸ The infringements of labour legislation are graded according to their severity in the decision of the Minister of Labour and Social Security No. 2063/D1 632, OJ B 266 of 18 February 2011.

¹⁰⁹ See Labour Inspectorate annual reports: <http://www.ypakp.gr>, accessed 15 September 2013.

¹¹⁰ See S. Koukoulis-Spiliotopoulos ‘Greece: Legal effects of the economic crisis on gender equality issues’ European Network of Legal Experts in the Field of Gender Equality, Law Review No. 2/2012, European Commission, at pp. 79-85, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-2_web_final_en.pdf, accessed 4 November 2013.

¹¹¹ Observations (CEACR) adopted 2012, published 102nd ILC session (2013), Labour Inspection Convention, 1947 (No. 81) Greece: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3086753:NO, accessed 4 November 2013.

¹¹² E.g. Hungarian Helsinki Committee, Eotvos Karoly Institute, Hungarian Civil Liberties Union

woman; thereby excluding heterosexual cohabiting couples and same-sex couples from the concept of a 'family'.

Despite the criticism, the Government continued with its policies which emphasise women's caring roles in both family and society, rather than embracing women's full participation in all areas of life. Negative trends concerning women in the labour market are present: the unemployment rates of women grew while those of men decreased,¹¹³ and the employment rates of women stagnated while those of men showed an increase,¹¹⁴ mainly due to public employment programmes. The Hungarian State was unable to cushion the effects of the credit crunch, lay-offs, and the weakening of the Hungarian Forint, and could not protect the most vulnerable groups in society, including inactive and unemployed women, single parents, and a significant number of public employees among which women are overrepresented. Social policy measures increased the negative effects of the crisis through extreme cuts in unemployment benefits and social assistance. The (neo-) conservative policies, including social and family policies, have together increased poverty and inequalities, and 'grew the differences not only between social classes but also between women and men and between Roma and non-Roma Hungarians'.¹¹⁵ 46.6 % of the Hungarian population is considered to be poor in the light of the criteria set up by the EU 2020 Strategy, and 73 % of single parent families belong to this group.¹¹⁶ Despite this, the laws on the outstandingly generous family tax allowance are still in force, supporting the better-off families at the expense of the poorer ones, and especially harming the financial interests of single parent families.¹¹⁷

No policy change took place following the publication of the report of the CEDAW Committee which urged the governing coalition to review its policies on several matters, including:

- The revision of its family and gender equality policies in such a fashion that family policies do not restrict the full enjoyment of rights by women in regard to non-discrimination and equal opportunities;
- Carrying on with the gender impact assessment of current and future laws; and
- Allocating adequate resources to the Equal Treatment Authority in order to facilitate the complaints mechanism for women, to strengthen co-operation with women's NGOs, and to promote equal participation of women in public and political life and decision-making (and so on).¹¹⁸

In relation to practising the fundamental right of assembly, human rights NGOs also pointed out that the police, and especially the Counter Terrorism Centre (*Terrorelhárítási Központ, TEK*),¹¹⁹ systematically infringes the law and circumvents case law based on final and

¹¹³ First release. Hungarian Central Statistical Office. 2013. No. 128.

<http://www.ksh.hu/docs/eng/xftp/gyor/mun/emun21307.pdf>, accessed 20 January 2014.

¹¹⁴ First release. Hungarian Central Statistical Office. 2013. No. 127.

<http://www.ksh.hu/docs/eng/xftp/gyor/fog/efog21307.pdf>, accessed 20 January 2014.

¹¹⁵ D. Szikra 'Austerity Policies and Gender Impacts In Hungary'. Working paper. Friedrich Ebert Stiftung Budapest May 2013. http://www.fesbp.hu/common/pdf/austerity_gender_hungary_2013.pdf, accessed 14 October 2013.

¹¹⁶ Inequalities and polarisation in Hungarian Society (*Egyenlőtlenség és polarizálódás a magyar társadalomban*) http://www.tarki.hu/hu/research/hm/monitor2012_teljes.pdf, accessed 5 November 2013.

¹¹⁷ A family with one or two children may deduct EUR 35.7 (HUF 10 000) /month/child tax, while a family with three or more children may deduct EUR 117 (HUF 33 000)/month/child. The maximum tax deduction could only be utilised by those families whose gross monthly income reached EUR 1 600 (HUF 500 000), which is twice the average income. Consequently only the most well-off families could fully enjoy the generous family entitlement, while the poorer families get less support from the state than they got under the previous legislation.

¹¹⁸ CEDAW Committee, *Concluding Observations on the combined seventh and eighth periodic reports of Hungary adopted by the Committee at its fifty fourth session*, 11 February – 1 March 2013, CEDAW/C/HUN/CO/7-8, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.HUN.CO.7-8.doc>, accessed 14 October 2013.

¹¹⁹ <http://tek.gov.hu/>, accessed 14 October 2013.

binding judgments of the judiciary, when it closes the streets around the house of the Prime Minister when small demonstrations (involving 10 people) are planned to be held protesting against certain Government decisions. According to the courts, no demonstration can be prohibited on the single basis that it is intended to be held in the presence of a ‘protected person’.¹²⁰ Still, TEK continues to do so,¹²¹ and has previously prevented demonstrations by women on the issue of domestic violence.

Legislative developments

Following tortuous debates within and outside Parliament, the very first criminal law regulations against domestic violence were inserted into the modification of the Criminal Code in 2013. The title of the new crime is ‘Violence among relatives’ (*Kapcsolati erőszak*). The new law has been seriously criticised because it interprets the notion of domestic violence very narrowly. The new law provides for more serious sanctions only if an already existing crime is committed against a relative regularly. The other crimes referred to are: battery, libel, the violation of personal freedom, and coercion. If the crime is not perpetrated on a regular basis, the general rules are applied. In this regard the new law is not instituting new types of crimes which would reflect on the specific features of domestic violence, but simply increases, to a certain extent, the applicable punishment in cases of regular commitment against a relative. The text of the new law might give the impression, by putting a specific emphasis on regular commitment of the specific crimes, that beating or coercing a relative once is tolerable in a close relationship. The new law also makes it punishable if, on a regular basis, a relative seriously violates the other relative’s human dignity or is engaged in any degrading and violent conduct, or misappropriates or conceals any assets from conjugal or common property, and thus causes serious deprivation. This form of the crime is prosecuted only upon private motion.

The new law furthermore ignored all the views expressed by the NGOs participating in the preparatory committee, which called for:

- Violence among ex-partners to be punished;
- Public prosecution of actions of domestic violence; and
- The incorporation of psychological harassment or economic dependency into the criminal legislation.

The NGOs also criticised the fact that the legislation did not follow the recommendations of the CEDAW Committee generally, nor specifically in the field of domestic violence; and Hungary did not join the Istanbul Convention on domestic violence either.¹²²

Equality body decisions/opinions

In a case from earlier this year (2013), the complainant claimed that her managerial position at a university was terminated during her maternity leave because of her motherhood.¹²³ The university defended itself by claiming that it had to terminate the managerial position because the university department could not be left without a manager for a long period of time. The continuation of managerial tasks could only be safeguarded by the termination of the complainant’s contract and a new application procedure.

The Equal Treatment Agency (ETA) refused to accept the university’s argument, due to the inconsistencies between the university’s argument, and the facts themselves. Following a correspondence between the university and the Minister responsible for exercising the right of appointment for the position concerned, the Minister terminated the claimant’s position at

¹²⁰ ‘Protected person’ is a term used by the relevant state security laws.

¹²¹ <http://tasz.hu/politikai-szabadsagjogok/tek-arroganciaja-hatartalan>, accessed 5 November 2013.

¹²² Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=210>, accessed 5 November 2013.

¹²³ Case No. 135/2013 ETA.

the end of October. The complainant returned to work just two days after her position was terminated. The ETA found an infringement of the right to equal treatment, and reasoned that the university could not exempt itself from liability for discriminatory termination of the managerial position because, at that point in time, there was no need to terminate the position as the complainant was just about to return. The published decision does not contain any reference that a sanction was applied by the ETA. The university challenged the decision in the courts.

The lack of sanctions is contrary to Article 18 of Directive 2006/54/EC, which orders the application of real and effective compensation or reparation which is dissuasive and proportionate to the damage suffered.

ICELAND – *Herdís Thorgeirsdóttir*

Policy developments

The law on gender quotas in public limited and private limited companies became effective on 1 September 2013, stipulating that the quota of women on the board of directors must not be lower than 40 %, and the same applies for the reserve directors. The law applies to companies where there at least fifty employees or more on a regular basis.

The proportion of women on the boards of companies was only 3 % a few months before the above law became effective. Women's rights associations issued declarations urging women to volunteer to take seats on the boards of directors.¹²⁴

The representation of women on the boards of pension funds was a positive exception. Women represented 44 % on the boards of directors of all the pension funds in Iceland before the law became effective.¹²⁵

Equality body decisions/opinions

The University of Iceland advertised the job of an editor with the University publication office. A woman submitted a case to the Gender Equality Complaints Committee (hereinafter the Complaints Committee) as she considered herself a victim of a contravention of the Gender Equality Act No. 10/2008. The woman held that the man who was hired had been less qualified than she was. The Complaints Committee reasoned that when regard was had to education, work experience (the man had been working as a secretary for Members of Parliament) and 'communication skills', the claimant and the one who was appointed 'are at least equally qualified'. Furthermore, the Complaints Committee pointed out that there were significantly fewer men than women working for the University of Iceland, including with the University publication office. The Complaints Committee found that the employer had met the burden of proof required under Article 26 Paragraph 1 of the Gender Equality Act No. 10/2008, and did not find the employer to be in breach of the Act.¹²⁶

Miscellaneous

Iceland ranks number one in the Global Gender Gap Index of the World Economic Forum for 2012, meaning that Iceland was judged to have the smallest gender gap.¹²⁷ This Index is a framework for capturing the magnitude and scope of gender-based disparities and tracking their progress. The Index benchmarks national gender gaps on economic, political, education and health criteria, and provides country rankings that allow for effective comparisons across regions and income groups, and over time. The rankings are designed to create greater

¹²⁴ http://www.mbl.is/frettir/innlent/2013/03/17/konur_bjodi_sig_fram_i_stjornir_fyrirtaekja/, accessed 24 September 2013.

¹²⁵ <http://www.fka.is/um/frettir/nr/124>, accessed 24 September 2013.

¹²⁶ Case No. 2/2013, <http://www.urskurdir.is/Felagsmala/KaerunefndJafnrettismala/>, accessed 13 September 2013.

¹²⁷ http://www3.weforum.org/docs/WEF_GenderGap_Report_2012.pdf, accessed 25 November 2013.

awareness among a global audience of the challenges posed by gender gaps and opportunities created by reducing them.¹²⁸

IRELAND – Frances Meenan

Policy developments

Parental leave

At present, employed mothers are entitled to 26 weeks paid maternity leave (and 16 weeks unpaid additional maternity leave) and each parent is entitled to 14 weeks unpaid parental leave. The Minister for Children commissioned an expert group to provide a detailed report on the early years strategy for children aged between zero and six years. The Report provides that, within five years, there should be provision for one year's paid leave after the birth of each child (that is an extension of parental leave which is to be paid parental leave following paid maternity leave) and two weeks' paid paternity leave should also be introduced.¹²⁹

Transgender legislation

The Minister for Social Protection published the draft heads of the Gender Recognition Bill 2013 in July 2013, which Bill provides for legal recognition to the acquired gender of transgender persons.¹³⁰ There is no provision to amend the employment equality legislation, therefore any claimant may have to rely on the gender and disability grounds.

Legislative developments

There have been no legislative developments except for the Protection of Life during Pregnancy Act 2013.¹³¹ The purpose of the Act is to protect human life during pregnancy; to make provision for reviews at the instigation of a pregnant woman of certain medical opinions given in respect of pregnancy; and to provide for an offence of intentional destruction of unborn human life. The Act repeals sections 58 and 59 of the Offences Against the Person Act 1861 which provided that it was an offence to procure an abortion. In summary, it may be permissible to carry out a medical procedure in respect of a pregnant woman in the course of which or as a result of which an unborn life is ended, where there is a real and substantial risk of loss of the woman's life from a physical illness or from suicide. There are strict provisions in the Act in respect of medical opinion and the publication of regulations is awaited. The Act has not yet come into operation.

Case law of national courts

Sexual harassment of teacher

In *A Female Teacher v Board of Management of a Secondary School*, the complainant was employed as a teacher by the respondent and was in her probationary period.¹³² In the course of her employment, she made allegations to the respondent that she had been subjected to sexual harassment by a number of male pupils. The complainant was ultimately dismissed during the probationary period of her employment. She alleged that she was discriminated against in relation to her conditions of employment on grounds of gender and that her dismissal was a reaction to complaints of sexual harassment made to the respondent and therefore constituted victimisation. The complaints included excessive supervision by the

¹²⁸ http://www3.weforum.org/docs/GGGR12/MainChapter_GGGR12.pdf, accessed 16 September 2013.

¹²⁹ Department of Children and Youth Affairs *Right from the Start* Report of the Expert Advisory Group on the Early Years Strategy, September 2013. <http://www.dcy.gov.ie/documents/policy/RightFromTheStart.pdf>, accessed 11 November 2013.

¹³⁰ <http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx>, accessed 1 October 2013.

¹³¹ <http://www.irishstatutebook.ie/2013/en/act/pub/0035/index.html>, accessed 1 October 2013.

¹³² [2013] ELR 16 (available on www.westlaw.ie, accessed 25 November 2013).

principal and damage to her car, but, more importantly, she did not provide evidence that she was dismissed because she was a woman nor was she subject to greater scrutiny because she was a woman. Accordingly, it was decided that she was not discriminated against in relation to these matters. The next issue were the claims of sexual harassment. The complainant argued that the management did not take appropriate steps to stop the male pupils from sexually harassing her or other female teachers. The complaints included use of bad and suggestive language and also sexually suggestive drawings on copybooks. The respondent argued that it took all reasonable steps to prevent such harassment. The equality tribunal considered that the words spoken by the pupils were mere assertions and the alleged perpetrators denied saying the words. There was evidence of the crude drawings and this constituted a *prima facie* case of sexual harassment. Other teachers gave evidence that there was not a culture of sexual harassment in the school and were satisfied that disciplinary measures were effective. Taking into account the school's policies, it was considered that the respondent could avail itself of the defence of having taken such steps as are reasonably practicable to prevent sexual harassment taking place. The effectiveness of the complainant as a teacher was not in question and there was no criticism of her ability to teach. From the evidence, it would appear that the complainant was dismissed because she made allegations of sexual harassment. The complainant sought reinstatement, but it was considered that it would not be in everybody's interests to order reinstatement in view of the obvious breakdown in relations within the school. The complainant was awarded compensation by the equality tribunal taking into account the devastating impact of the loss of her job on a salary of EUR 50 000 per annum to earning EUR 300 per week as a part-time teacher. An order was made for EUR 75 000 being 18 months' salary and, as it did not include any element of remuneration, it was not subject to income tax.

Volunteers

Consideration was given as to whether the Employment Equality Acts 1998-2011 apply to a volunteer.¹³³ The Irish employment equality legislation prohibits discrimination on a number of grounds including race and religious belief. The legislation transposes Directives 2006/54/EC, 2000/43/EC and 2000/78/EU. The issues involved in this case would apply equally to a claim on the gender ground. On appeal, the High Court considered that a volunteer in the Irish police reserve (the Garda Reserve) is a volunteer and therefore does not fall within the scope of the definition of employee in the legislation. The appellant is a member of the Irish Sikh community and in accordance with the requirement of his Sikh faith does not shave his beard and wears a turban. At a certain stage in his training, he was advised that he had to wear the Garda uniform, including a Garda hat, and would not be permitted to wear a turban. Section 2 of the Employment Equality Act 1998 expressly includes a member of the Garda Síochána as an employee falling within the scope of the Act. Section 15(6) of the Garda Síochána Act 2005 provides that a reserve member of the Garda is a volunteer and does not perform his or her functions as a member under a contract of employment. The Court stated that even if this statutory provision were not present, a member of the Garda Reserve was not an employee nor a person who agreed personally to execute any work or service (an independent contractor) as there was no 'mutuality of obligation' between the parties for the performance of work. Furthermore, the concept of 'volunteer' is inconsistent with the principle of mutuality and the statutory provisions make it clear that the reserve member is a volunteer.

As regards vocational training, Section 12(2) of the 1998 Act defined 'vocational training' as 'any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity...'. It was considered that when one looks at the facts of this case, it cannot be said that training for the Garda Reserve is 'vocational training', as

¹³³ *Commissioner of An Garda Síochána v Oberoi* [2013] IEHC 267, Feeney J., 30 May 2013. www.courts.ie accessed 1 October 2013.

training for the Garda Reserve is not a vocational or occupational activity. Finally, such training would have to be for a job and not for a volunteer position.

Promotions

The complainant was employed as a senior lecturer in the School of Business and Law in University College Dublin.¹³⁴ In 2007, the respondent held a round of promotions for the position of professor. This process was not a competitive process in which candidates were ranked in order of merit, and there was no set number of candidates to be chosen. The complainant applied and although she met the requisite standards, she was not promoted. She was one of 19 applicants for promotion to professor. Four of these applicants were women and 15 were men. Two women and six men were promoted to the grade of professor. The committee which made the appointments comprised 12 men and one woman. No records, notes or deliberations of the committee were retained. The complainant considered that she had been denied promotion on grounds of gender in contrast to the six men who were promoted. Furthermore, under the relevant criteria she considered her achievements to be equal if not superior to the six male candidates promoted.

The Labour Court stated that it will not look beyond a decision concerning promotion unless there is clear evidence of unfairness in the selection process or manifest irrationality in the result. Discrimination will not be inferred provided the qualifications or criteria expected of a candidate are matters for the employer in each case. In addition, these criteria must be neither directly nor indirectly discriminatory nor applied inconsistently between candidates. In this case, the complainant made out a *prima facie* case of discrimination due to the unequal gender composition of the appointments committee and the absence of any record of the committee's deliberations. The Court stated that the composition of the committee gave rise 'to considerable disquiet. It is now universally accepted that an appropriate gender balance within selection boards is an essential prerequisite to the effective attainment of full equality of opportunities of men and women in employment. That is particularly so in professions and occupations in which women have traditionally been under-represented. The constitution of a selection board comprising 12 men and one woman must be regarded as inherently inimical to the achievement of full gender equality in access to senior appointments within the respondent's university.' Notwithstanding the complainant making out a *prima facie* case of discrimination, the respondent discharged the onus which it bears to prove that the complainant's gender was not a factor and that it was more probable than not that the complainant's gender was not a factor which influenced the decision not to appoint her to the position of professor.

In this case, the Labour Court was critical of the composition of the selection committee and the failure to keep notes of the interview. However, in addition, the Labour Court noted that there was proportionately a higher number of successful female applicants than male applicants. The number of female applicants was small, however, and arguably should not have borne the persuasive weight to succeed in overturning the inference of discrimination. In response to such argument, however, there was no fixed number of promotions. The determination of the Labour Court gives us little information on the academic credentials of the complainant and the other candidates. In respect of the complainant, the selection committee considered inter alia that there was a lack of evidence of publications in refereed journals, limited PhD supervision and a lack of academic leadership. This determination was appealed to the High Court. Mr. Justice Cooke delivered his judgment on 8 November 2013 and in upholding the Labour Court determination stated that the candidates were not competing with one another and there was no limit on the number of promotions that might be

¹³⁴ *O'Higgins v UCD* [2013] ELR 146; ADE/12/30; [2013] IEHC 508.
<http://www.labourcourt.ie/en/Cases/2013/January/EDA131.html>, accessed 11 November 2013.
<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/58c717d006f8165d80257c2b005670a0?OpenDocument>, accessed 25 November 2013.

granted and that the decision as to whether the candidate merited promotion was in accordance with the designated criteria.¹³⁵

ITALY – Simonetta Renga

Policy developments

The Letta Government came into office on 28 April 2013. The programme of the Government, read in Parliament by the Prime Minister, provided for growth as an instrument of social progress and inclusion. Opportunities were due to increase in the first place for young people and women, in a word for all those who are currently excluded from social advancement and rights. Letta has always promoted, during his political career, the principle of ‘women and children first’. In his programme this principle is to be implemented through fiscal incentives, social services and reconciliation policies. The promise was: not just employment but employment of quality and equal opportunities. The first step for him was a Government formed with a great number of women as Ministers. Nevertheless, the Government is now struggling with a lack of public finances and against a recession. In terms of practical achievements, the balance is quite poor for women. Act No. 99/2013 does indeed provide for the promotion of employment for unemployed people and for active labour market policies, but with a focus on young people and not specifically on women. Moreover, the Government had originally a Minister for Equal Opportunities, Josefa Idem, who was forced to resign following a fiscal scandal on 24 June 2013. As a consequence, the responsibilities of the Ministry were passed on to the Deputy Minister of Labour, Maria Cecilia Guerra. Therefore, at present, the Ministry of Equal Opportunities no longer exists, which is not a good political signal.

Legislative developments

Domestic violence and persecutory acts

Decree No. 93 of 14 August 2013 recently strengthened measures aimed at preventing and tackling crimes such as domestic violence, sexual violence, and ‘persecutory acts’ (stalking).

It included where the victim is under age (under the age of 18, and not only under 14 years old as previously provided) in a case involving aggravating circumstances in connection with penal sanctions for domestic violence. The list of aggravating circumstances has also been enlarged to include the crime of sexual violence in the case where the victim is pregnant or he/she is the spouse (even if separated or divorced) or the ‘partner’ (even if not cohabiting).

New rules pay particular attention to the enforcement of protection against persecutory acts, which were introduced into the Italian legal system by Decree No. 11/2009, of 3 February 2009.

Under Decree No. 93/2013, similar to cases of sexual violence, for persecutory acts the victim’s complaint cannot be withdrawn and there is an aggravating circumstance where the victim is or was the spouse, or the crime is committed through the use of the Web.

Moreover, as regards amendments to the code of criminal procedure, constant information on the course of the trial must be provided to the victim, together with information on the possibility to obtain protection for witnesses in a case where they are under age or particularly vulnerable. For cases of flagrance in domestic violence, the possibility to make an arrest in the act, as well as the issuance of an urgent restraint order to the perpetrator to keep away from the home (following the authorisation from a judge) where there is an actual threat to life or the personal health of the victim, have been provided.

Finally, some further changes implemented the Istanbul Convention on Preventing and Combating violence against women and domestic violence,¹³⁶ recently ratified by Act No.

¹³⁵ [2013] IEHC 508. <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/58c717d006f8165d80257c2b005670a0?OpenDocument>, accessed 25 November 2013.

77/2013. Victims of the above mentioned crimes can ask for free legal assistance (making an exception to higher income limits), and foreigners can obtain a special residence permit for reasons of protection. Article 3 of Decree No. 93/2013 specifically concerns measures aimed at preventing domestic violence. It empowers a police superintendent to issue a warning to the person who has been reported as the perpetrator of the crime, whether committed or simply attempted, after obtaining some information by the police and with no need of a report by the victim himself or herself. Domestic violence includes all non-occasional acts of physical, sexual, psychological or economic violence, which take place within the family, between spouses or partners, irrespective of whether they are or were cohabiting or not. In these cases the suspension of a driving licence up to three months can also be used as a preventive measure. In addition, Decree No. 93/2013 provides for an absolute priority in trials for cases of domestic violence, sexual violence, sex with a minor, corruption of a minor, gang sexual violence and persecutory acts. It means that the timing is quicker compared with other trials as they benefit from a 'preferential track'.

Finally, under Article 5 of Decree No. 93/2013, an 'Extraordinary Plan' to tackle such crimes will be issued by the Minister for Equal Opportunities, including multiple measures aimed at prevention, at strengthening anti-violence centres and social services, increasing the protection of victims, improving professional training of experts, gathering figures on these cases and carrying out positive actions.

The issue of Decree No. 93/2013 can be deemed to be a further and important step towards better protection of woman against violence. Certainly, stronger sanctions have been provided, together with further precautionary measures and some improvements in the protection of the victim and possible witnesses. Nevertheless, criticisms have already been raised on the merely repressive nature of this intervention and on the lack of funding which risk depriving it of any effectiveness. In particular, it has been underlined that the Decree is extremely weak as regards prevention, which is crucial to combat violence and no attention at all has been paid to the professional training of experts and to health and social help/assistance aimed at the rehabilitation of the perpetrator. The Extraordinary Plan itself is unlikely to work at no cost, just being sustained by the scant resources of the Minister for Equal Opportunities. Moreover, the recent campaigns of awareness promoted by the Department for Equal Opportunities at the Prime Minister's Office gave good results and the numbers of telephone calls to a special 24-hour line increased from 2 249 in January 2012, to 6 137 in May 2013. This clearly shows an increasing need to intervene which requires increased funding.

White resignation and self-employment

Decree No. 76 of 28 June 2013, which provided further changes in the reform of the labour market issued by Decree No. 276/2003 and already amended several times, extended provisions on white resignations¹³⁷ of working parents and of workers in general, to some atypical forms of self-employment contracts, such as the so-called contracts on project and the joint ventures (*associazione in partecipazione*). These rules on the protection against white resignations are to be applied only if they are consistent with the general rules of such autonomous working relationships.

Under Article 55 of Act No. 151/2001, as modified by Decree No. 76/2013, in the above cases also, the termination of a contract which occurs from the beginning of pregnancy to the third year of the child must be signed in front of an inspector of the Minister of Labour. The

¹³⁶ Council of Europe Convention No. 210 signed in Istanbul on 11 May 2011.

¹³⁷ White resignations are resignation letters without a date which women are asked to sign, so to be used by the employer to make the worker resign when needed (e.g. if the worker becomes pregnant, although this is certainly not the only reason for using such 'white resignations'). For more information, see R. Simonetta 'Italy' in European Network of Legal Experts in the Field of Gender Equality, S. Burri, E. Caracciolo Di Torella, and A. Masselot, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*, pp. 146-154, European Commission 2012, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final.en.pdf, accessed 10 November 2013.

same rule applies to the father as well as to adoptive parents or persons who have been given official custody of a child from birth/entering the family.

The general mechanism of validation for all workers' resignations provided by Article 4 of Act No. 92/2012 is enforceable following the amendment introduced by Decree No. 76/2013, which means that the termination must be validated by the employment services, or by the bodies specified by national collective agreements, or by the filling in of a specific form to be sent to the employment service. The employer who uses white resignations forms will be liable to an administrative or, under certain conditions, a penal sanction.

The extension of the rules on resignation to the termination of contracts on project or *associazione in partecipazione*, mentioned above, is in line with the tendency to increase the level of protection for insecure working relationships so as to bring them (and their 'costs' for the undertaking) closer to the working conditions of employees. Such contracts, which are autonomous, are very similar to employment contracts and have been often used just to avoid the higher social security contributions provided for employment relationships.

These amendments could be particularly relevant to women, as female representation in these categories is quite high. Nevertheless, the real effectiveness of the provisions mentioned above depends on the interpretation of the clause 'where consistent' which has not yet been clarified. In particular, leaving aside administrative or even penal sanctions which can be applied to the employer in cases of white resignation, but have no direct impact on the working relationship, the consequence of the lack of validation is the 'suspension of the resignation. This could turn out to be a good form of protection if accompanied by an award of damages although, from this point of view, we must also take into consideration that workers on insecure contracts hardly ever bring employers to court.

LATVIA – Kristine Dupate

Legislative developments

On 12 August 2013 the Cabinet of Ministers submitted to Parliament a proposal for amendments to the Labour Law, which was passed for the first reading to the commissions on 5 September 2013.¹³⁸

The amendments envisage several changes in the law which fall within the scope of EU gender equality law. The draft amendments envisage a restriction of the length of the special maternity protection period with regard to breastfeeding. Currently, special maternity protection for breastfeeding is applicable to the entire period of breastfeeding. The amendments envisage a limitation of such protection until a child is 2 years old. The explanatory note to these amendments is very short with regard to the need to make such a restriction.¹³⁹ It just mentions the need to find a balance between the interests of the employers and the employees. The Ministry of Welfare also stresses that restriction of the right to special protection on account of breastfeeding is seen as a measure to stimulate the elimination of discrimination against women in the labour market in general.¹⁴⁰

Further, it is proposed to amend Article 153 of the Labour Law so that the right to child-care leave is given not only to the biological and adoptive parents, but also to the members of a foster family and to legal guardians. However, the conditions regarding the length of such leave differ from the usual parental leave. Normally each worker is entitled to child-care leave

¹³⁸ Proposal of the Amendments to the Labour Law (*Grozījumi Darba likumā*) No.756/Lp11, available in Latvian at the home page of the Parliament (*Saeima*) (<http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/1016FA82F40AC4EFC2257BC50037F713?OpenDocument>), accessed 15 September 2013.

¹³⁹ Explanatory Note to the Proposal of the Amendments to the Labour Law (*Grozījumi Darba Likumā*) No.756/Lp1, available in Latvian at the home page of the Parliament (*Saeima*), <http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/1016FA82F40AC4EFC2257BC50037F713?OpenDocument#b>, accessed 15 September 2013.

¹⁴⁰ Telephone interview with a Director of Employment Relationship and Employment Protection Policy Department, 2 May 2013.

of 18 months in total until a child attains the age of 8. Foster parents (including legal guardians) will be entitled to child-care leave until a child attains the age of 18 months. In addition, if according to Article 156(3) of the Labour Law the time spent by parents on parental leave has to be considered as time actually worked for the purposes of seniority, then in contrast time spent on child-care leave for foster parents will not be taken into account for such a purpose.

Article 156 will be amended so as to regulate the return from child-care leave before the agreed time, which currently is not regulated at all. It is envisaged that returning from parental leave before the end of the agreed term will be possible by mutual agreement between an employer and an employee. Where the right to take parental leave has expired (for example, following the death of a child), an employee will have a right to return to work after two weeks' notice to an employer.

Case law of national courts

On 27 December 2011 the Supreme Court of Latvia decided to refer a case regarding the obligation to provide the same or equivalent post after the return from parental leave, to the CJEU for a preliminary ruling.¹⁴¹ The Supreme Court raised the following questions.

1. Does Directive 96/34/EC¹⁴² preclude an employer from taking any action which might result in a female employee on parental leave losing her post after returning to work?
2. Does the answer to the previous question differ if the reason for that action is the economic recession in a Member State, resulting in the optimisation of the number of civil servants by abolishing posts?
3. Must the assessment of an applicant's work and merits (which takes into account his/her latest annual performance appraisal as a civil servant, and his/her results before parental leave) be regarded as indirect discrimination when compared with the fact that the work and merits of other civil servants who have continued in active employment (taking the opportunity, moreover, to achieve further merit) are assessed according to fresh criteria?

On 20 June 2013 the CJEU made a decision providing the answers to the questions referred.¹⁴³ The CJEU found that Directive 96/34/EC does not preclude the assessment of a worker who has taken parental leave in the context of the abolition of a post with a view to transferring that worker to an equivalent or similar post consistent with that worker's employment contract. However, since women take parental leave far more often than men, an employer is under an obligation to act in conformity with the principle of non-discrimination.

Taking this into account, an employer may provide an assessment of a worker on parental leave (even in his/her absence); however such assessment must be carried out on the basis of absolutely identical criteria and must include all workers concerned with the abolition of a particular post. Further, Directive 96/34/EC precludes a situation where an employer provides a worker, after parental leave, with a similar post which is due to be abolished. In the Court's opinion, an opposite finding would render nugatory the right of a worker who has taken parental leave.

On 23 August 2013 the Supreme Court made a decision overruling a previous decision of the Regional Court on account of the fact that it did not determine if:

- The assessment procedures of a claimant and other colleagues concerned with the abolition of a particular post were conducted on the basis of different criteria;
- A post where the claimant was transferred was to be considered as similar or equivalent; and

¹⁴¹ The decision in case No.SKA-398/2011 (not published).

¹⁴² Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19 June 1996, paras 4-9.

¹⁴³ Case C-7/12 *Nadežda Riežniece v Zemkopības ministrija ir Lauku atbalsta dienests* [2013] ECR n.y.r., available at <http://curia.europa.eu/juris/liste.jsf?language=lv&td=ALL&jur=C,T,F&num=7/12v>, accessed 15 September 2013.

- An employer knew already at the time of a transfer of a claimant to a new post that it was due to be abolished.¹⁴⁴

Thus the Supreme Court completely followed the findings of the preliminary ruling of the CJEU.

Miscellaneous

The statistics for the second quarter of 2013 demonstrate a dramatic increase in housewives, i.e., by 30.2 %, or in other words, 14 100 persons. The data show that this is a tendency in the group of persons aged 45-54, where the number of economically inactive persons has increased by 10 600 persons; an increase of 31.9 %.¹⁴⁵

These statistics have been explained by analysts by the fact that people aged 45-54 earn more than other groups, and have stable incomes and places of work. It leads to the situation where more and more spouses of such persons decide to carry out domestic tasks instead of working. Analysts base such an assumption on the fact that economically inactive persons in the 45-54 years age group are predominantly those who have reached a higher educational standard, which suggests that their spouses enjoy the same social status and respectively high earnings.

The author agrees with such assumptions and furthermore explains them through the facts of the gender equality situation. Latvia, compared with other EU Member States, has always enjoyed a high employment rate for women (approximately 62 %).¹⁴⁶ In addition, part-time employment is small scale in general (around 9 % of all employees: men accounting for 7 %, and women for 11 %). This means that the vast majority of employed women work full-time. At the same time, data demonstrate that women suffer considerably from a double burden; they work full-time in paid work and in addition each week spend 12 hours more than men on family responsibilities. Such situations may lead to a point where women in families with certain level of financial security wish to take a career break or, in other words, a break from the double burden.

LIECHTENSTEIN – Nicole Mathé

Policy developments

Gender Equality Office

The Government decided in its session of 23 April 2013 to recall the report concerning the combination of the tasks of the Office for Social Services, the Office for Foreigners and Passports, and the Gender Equality Office into an Office for Social Affairs and Society.¹⁴⁷ The report was recalled from Parliament in order to be revised by the new Ministry of Society. After the formation of the new Government, the report will be revised by the new

¹⁴⁴ The decision in case No.SKA-7/2013, available in Latvian at the home page of the Supreme Court <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-administrativo-lietu-departaments/hronologiska-seciba/2013-hronologiska-seciba/>, accessed 15 September 2013.

¹⁴⁵ Out of a total of 60 800 housewives in Latvia. *Strauji pieaug izglītotu pusmūža māsaimnieču skaits* (Number of middle-aged housewives rapidly increases), www.apollo.lv, 14 August 2013, available in Latvian at <http://www.apollo.lv/zinas/strauji-aug-izglitotu-pusmuza-majsaimniecu-skaits/581679>, accessed 5 November 2011. Central Statistical Bureau of Latvia available in Latvian at http://data.csb.gov.lv/Menu.aspx?selection=SocialeIkgad%C4%93jie+statistikas+dati\Nodarbin%C4%81t%C4%ABba&tablelist=true&px_language=lv&px_type=PX&px_db=Sociale&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 13 January 2014.

¹⁴⁶ Central Statistical Bureau of Latvia available in Latvian at http://data.csb.gov.lv/Menu.aspx?selection=SocialeIkgad%C4%93jie+statistikas+dati\Nodarbin%C4%81t%C4%ABba&tablelist=true&px_language=lv&px_type=PX&px_db=Sociale&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 13 January 2014.

¹⁴⁷ Press release by the Liechtenstein Information Office, dated 23 April 2013, <http://www.llv.li/amtsstellen/llv-ikr-pressemittellungen/pressemittellungen-alt.htm?pmid=184042&lpid=3789&imainpos=2165>, accessed 13 September 2013.

Ministry of Society, which is now competent in the field of gender equality issues. The planned measures for restructuring the various offices mentioned above will therefore be reviewed and possibly adapted.

Gender Equality Commission

The Ministry of Society accepted the resignation of the Commission for Gender Equality and thanked the Commission for its work.¹⁴⁸ The resignation took place before the end of its term of office. The resignation of the Gender Equality Commission was meant as a protest against the specific situation concerning the Gender Equality Office in recent years. The administrative structural reform is still going on in Liechtenstein and the Gender Equality Office has only had an interim director since 16 April 2013. Because of the recall by the government in April 2013 of the report regarding the reorganisation of the Gender Equality Office, it has still to be decided how the Gender Equality Office is to be organised and at which place in the administration it will function in the future. As it has been a rather long and unclear procedure up to now concerning the Gender Equality Office, the resignation of the Gender Equality Commission was intended to send out a signal. The Ministry of Society confirms that it will guarantee in any case the continuation of the operative tasks of the Gender Equality Office in the near future.

Equal opportunities prize

The first prize in the Equal Opportunities Prize competition this year went to the Parents Child Forum for its project 'Women's Round Tables' (*Femmes Tische*) where women discuss educational and health topics in their own mother tongue directed by a moderator who also speaks German.¹⁴⁹ In this way, women with a migration background are reached and can obtain information about specialist departments and helplines.

The two recognition prizes went to the Economic Chamber for its project 'Homework Lobby' (*HALO die Hausaufgaben-Lobby*) and to the NGO *infra* in cooperation with the trade union LANV for their project 'Mobbing at the Workplace'. The Homework Lobby offers young people help with their homework during the period when they do their apprenticeship. The project Mobbing at the Workplace is to create an information brochure for victims and employers and organise information events for the general public to raise awareness of the topic.

The Equal Opportunities Prize has been awarded annually by the Government for 12 years now. The prize of EUR 16 000 and the accompanying art object Equal Opportunities (*Chancengleichheit*) and two recognition prizes, each of EUR 4 000, honour and help finance projects in the fields of gender equality, handicap, migration and integration, social disadvantage, age and sexual orientation.¹⁵⁰ Candidates admitted for consideration for the award are enterprises, organisations, private initiatives and individuals. The proposed projects should be ready to start in the near future and should have a lasting effect. The prizes were presented on 8 March 2013 to the best projects to be supported.

Legislative developments

Law of Names

On 20 March 2013 the report of the Government regarding the Law of Names was published for feedback, which could be given up until 14 June 2013 by the general public.¹⁵¹ This reform will modernise the Law of Names in Liechtenstein. As before, a common family name

¹⁴⁸ Press release by the Liechtenstein Information Office, dated 15 May 2013, <http://www.llv.li/amtsstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=184576&lpid=3789&imainpos=2165>, accessed 13 September 2013.

¹⁴⁹ Press release by the Liechtenstein Information Office, dated 8 March 2013, <http://www.llv.li/amtsstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=178962&lpid=3789&imainpos=2165>, accessed 13 September 2013.

¹⁵⁰ The 'art object' is a specific, symbolic artistic object, passed from winner to winner.

¹⁵¹ http://www.llv.li/pdf-llv-rk_vernehmlassungsbericht_namensrecht.pdf, accessed 13 September 2013.

for both spouses is possible, but spouses will also have the possibility of keeping their own name after marriage. The option to create a double name will still exist. Children will have the common family name of the spouses or one of the parents' names, if parents keep their own name after marriage. No formal amendments have been made yet.

Miscellaneous

Business Day 2013

The annual Business Day took place for the sixth time in Vaduz on 21 May 2013 and focused on the topic 'New chances in challenging times'.¹⁵² 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. The Business Day is well established and has been sold out for the last five years when 500 people from Liechtenstein, Switzerland and Austria have participated. Its focus is also the integration of societies, knowledge and cultures.

Reconciliation of family and profession

A public conference was organised by the Gender Equality Office, the Ministry of Society and *infra* as well as LANV.¹⁵³ The title of the conference was 'Reconciliation of family and profession – an advantage for women AND men!'. An increasing number of people wish to have a sound work-life balance where they can find time for the family and also for a fulfilling professional life. Most couples want to reconcile family and profession but only a few of them achieve a satisfactory realisation of this aim. The conference also addressed especially the situation of men in the above context. Nine out of ten men wish to reduce their workload in order to have more time during the week for family duties as fathers. Most of them would like to reduce up to 20 % of their working time but the major obstacles for men are the lack of support from employers, gender stereotypical role models and the reality of the income situation. Moreover, most men fear that a reduction of working time will have negative consequences on their career opportunities. For companies it makes sense to promote reconciliation between family and professional life because they get more content employees who are mostly highly productive.

LITHUANIA – Tomas Davulis

Case law of national courts

Following the reasoning established by the CJEU in *Feryn*,¹⁵⁴ the right of an NGO to lodge a complaint with the Office of Equal Opportunities Ombudsman has been confirmed by an administrative court in Lithuania. The European Foundation of Human Rights (EFHR) brought a complaint to the Office of Equal Opportunities Ombudsman about a discriminatory job advertisement of a company. The advertisement invited 'girls who want to work and earn' to work for the company. The Office of Equal Opportunities Ombudsman had dismissed the

¹⁵² Press release by the Liechtenstein Information Office, dated 21 May 2013, <http://www.llv.li/amtstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=184698&lpid=3789&imainpos=2165>, www.busstag.li, accessed 13 September 2013.

¹⁵³ Press release by the Liechtenstein Information Office, 7 June 2013, <http://www.llv.li/amtstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=185148&lpid=3789&imainpos=2165>, accessed 13 September 2013.

¹⁵⁴ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187.

complaint, motivated to do so by the lack of objective data relating to the infringement. In addition, it was noted that the EFHR did not have the right to appeal because it was not representing an individual whose rights had been violated. At the revision stage, the EFHR drew particular attention to the fact that the position taken by the Office of Equal Opportunities Ombudsman did not comply with the legislation and current practice of the CJEU. On 6 May 2013 the Vilnius Regional Administrative Court satisfied the claim of the EFHR in full. The Court ruled that the Office of Equal Opportunities Ombudsman:

- Did not ascertain the presence or absence of the action stated in the complaint;
- Did not adjudicate on the question of legitimacy of this action; and
- Did not decide what facts or evidence approved or denied the violation of the law.

The Vilnius Regional Administrative Court also concluded that any natural or legal person has the right to submit a complaint to the Office concerning the violation of equal rights.

The case supplies new evidence that non-governmental organisations may lodge complaints with, and appeal against the decisions of, the Office of Equal Opportunities Ombudsman both of which are uncommon in Lithuania. The Court also confirmed that a discriminatory job advertisement has to be considered as an independent violation which does not require a specific victim.

LUXEMBOURG – Anik Raskin

Policy developments

Gender quotas in the private sector

On 22 January 2011, the Minister of Equal Opportunities announced that she had not ruled out introducing a legal obligation for quotas in the private sector. At first, she wants employers to put efforts into establishing gender-mixed work teams until 2014. At present, no precise percentage has been discussed.

In February 2012 the Ministry of Equal Opportunities presented an update on figures on the participation of women in decision-making in the private sector. The percentage of women on boards has increased from 16 % in 2003 to 20 % in 2011. This includes all companies run by a board. In Luxembourg, only eight societies are listed on the Stock Exchange; a probable explanation for why the discussions on gender quotas are not concentrated on listed societies.

From March 2012 to June 2012, FEDIL-Business Federation Luxembourg organised four conferences focussing on gender diversity in business. In July 2012, the FEDIL and the Ministry of Equal Opportunities presented a report on the topic, including the conclusions of the conferences.¹⁵⁵ The objectives of the conferences were to:

1. Inform people about the situation in Luxembourg in terms of gender diversity;
2. Discuss the key issues in gender diversity; and
3. Share existing good practices and outline ways to implement organisational solutions that help positively modify opinions regarding gender diversity.

The central question was of course: quotas or not quotas? The answer given by all the panellists was: no quotas. The main reason mentioned was the usual one, namely that people have to get positions because of their talent and not because of their gender.

A recent study from the National Council of Women of Luxembourg showed that the majority of Luxembourgish citizens share the same point of view.¹⁵⁶

It seems obvious that communication on quotas has to be improved and that it is important to communicate that appointing people by quotas does not mean appointing

¹⁵⁵ http://www.fedil.lu/fileadmin/user_upload/publications/divers/Fedil_Gender_Diversity_web.pdf, accessed 12 September 2013.

¹⁵⁶ <http://www.cnfl.lu/site/sondage%202013.pdf>, accessed 16 November 2013.

talentless people. Quotas are about giving talented people who are discriminated against because of their gender the opportunity to be appointed.

Equal pay

The Ministry of Equal Opportunities launched an improved version of the online tool LOGIB, which can be used by employers to make an evaluation of the pay structure of their employees and to identify a gender pay gap.¹⁵⁷ The new version of the tool is said to be easier to handle. Recently, the Minister of Equal Opportunities said that she was thinking about making it obligatory for large employers to use LOGIB.

On 6 September 2013, a Member of Parliament introduced a proposal for legislation in the field of equal pay. The content of the proposal has not yet been published (12 September 2013).

Legislative developments

Goods and services

Since 5 July 2012, the content of media and advertising as well as education within the scope of the law that implemented Directive 2004/113/EC,¹⁵⁸ has been included in the scope of the law's protection (Access to Goods and Services Act¹⁵⁹).

On 15 May 2013 Parliament adopted a law,¹⁶⁰ which amends the law transposing Directive 2004/113/EC in order to comply with the judgment in *Test-Achats* from the Court of Justice of the European Union.¹⁶¹

Domestic violence

The law on domestic violence was amended on 30 July 2013.¹⁶² The aim of the modification was to increase protection for victims and children in cases of domestic violence. The period during which the perpetrator has to leave the common home was extended from 10 to 14 days and a safety boundary has been introduced for the victim. The rights of the perpetrator have been strengthened by the introduction of an appeal against such measures. This new right was contested by women's rights organisations. Their fear was that an appeal against the provisional measure, which forces him/her to leave the home, would have a suspensive effect. If that were the case, the measure would have been unworkable. The Government assured the organisations that the appeal would not be suspensive, but this is not specified in the new law.

Pension reform

A reform to pension rights was adopted in December 2012. The reform does not include mandatory individualisation of pension rights, although the Women's Labour Committee proposed mandatory individualisation.¹⁶³

¹⁵⁷ <https://logib-lux.personalmarkt.de/>, accessed 12 September 2013.

¹⁵⁸ OJ L 373/37 of 21 December 2004.

¹⁵⁹ JO L Act. No. 137 of 5 July 2012.

¹⁶⁰ Available via: http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public/lut/p/b1/jYy9DsIgFEafxSfg9oIFRtpSpGoTSmosi2Ewpkl_FuPzi5uLsd_2JeccEsiQ7QGQUwBGriQs8TU-4nNclzh9fshvFVaXzjIEwx0DbHTDe99SifiEDN-AKCWCNe50LFPVeLrNRyF8Z9RZS9kXYKHMvH_ZFKuE2H35MwT-PazzncxhqmuHdm84KvHq/dl4/d5/L2dJQSEvUU3t3QS80SmtFL1o2X0QyRFZSSTQyMEc3UTQwMkpFSjdVU04zRzk2/&id=6456, accessed 12 September 2013.

¹⁶¹ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

¹⁶² http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/146/249/124458.pdf, accessed 12 September 2013.

¹⁶³ See A. Raskin 'Luxembourg' in European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* 2/2012, European Commission, at p. 106, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-2_web_final_en.pdf, last accessed 25 October 2013.

Social dialogue

On 25 February 2013, the Minister of Work and Employment introduced Bill No. 6545 in Parliament in order to reform the 'social dialogue'.¹⁶⁴ Thus employees' delegation rules have now been adopted. Regarding gender equality one change has to be highlighted. At present, there is a specific employees' representative in charge of gender equality in firms with a minimum number of employees. According to the bill, the competence of the 'equality representative' will be extended to other grounds of discrimination. By extending the competences of the 'equality representative', this person will have to deal with many grounds of discrimination. Most of the grounds concern minorities and discrimination on the ground of gender risks getting out of focus. This is what has already happened since the competences of some municipal services in charge of gender equality were extended. The global goal of 'diversity' seems to weaken the issue of gender equality.

Miscellaneous

National elections

National elections were held on 20 October 2013 in Luxembourg. One-third of the candidates running for elections were women yet the issue of gender equality was not one of the main subjects being debated during the campaign.

34.4 % (34.1 % in 2009) of the candidates were women. In terms of results, 14 directly elected members of Parliament were women (15 in 2009).¹⁶⁵ The Parliament in Luxembourg numbers 60 members.

FYR of MACEDONIA – Mirjana Najcevska

Policy developments

On 24 March 2013 the local elections for members of municipal councils and municipal mayors were conducted in 84 municipalities in the Republic of Macedonia and in the city of Skopje. In the 2013 elections some progress was made as 26 of the 350 candidates for mayors were women, four of whom were elected (in the municipalities of Bogdanci with 6 977 inhabitants, Gradsko with 3 127 inhabitants, Kisela Voda with 51 429 inhabitants, and Tetovo with 77 570 inhabitants). The first Albanian woman mayor was elected in the town of Tetovo (where members of the Albanian community are in the majority). 405 of 1 347 elected councillors are women. The current percentage of women in municipal councils is 40 % in four municipalities, 30-40 % in 37 municipalities, and 20-30 % in 34 municipalities, but in six municipalities the percentage is far below the legal minimum, and remains below 20 %. However, the number of women (64) heading electoral lists is still small (only 18 % are women).¹⁶⁶ Gender equality issues were not included in the electoral programmes of the main political parties.

On the other hand, in 2013 the Government restarted the campaign on family values under the title 'Family and children are our greatest treasure'.¹⁶⁷ The campaign is focused on the traditional role of men and women in the family, supporting the birth of as many children as possible. In every video of the campaign, it is underlined that women do not want to give birth because they are pursuing education and a career. This perception is supported by the Orthodox Church (which is recognised by the Government as the upholder of family values).¹⁶⁸

¹⁶⁴ <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6545>, accessed 12 September 2013.

¹⁶⁵ <http://www.cnfl.lu/site/communique%20de%20presse%20resultats.pdf>, accessed 16 November 2013.

¹⁶⁶ http://217.16.84.26/images/lok2013/KANDIDATI_sovet.pdf, accessed 4 May 2013.

¹⁶⁷ http://www.youtube.com/watch?v=TET8xzS_7eY and <http://www.youtube.com/watch?v=We7IH0mh3A8>, both accessed 23 October 2013.

¹⁶⁸ <http://www.youtube.com/watch?v=oLj0xB8bSMk>, accessed 23 October 2013.

Legislative developments

On 10 June 2013, Parliament adopted the Law on pregnancy termination (Law on abortion).¹⁶⁹ The draft Law on abortion entered the Parliamentary procedure without any public or professional discussion, by means of the so-called ‘shortened procedure’ (which is meant for not very important laws or for minor changes that do not affect the wider population). Women expressed their dissatisfaction through demonstrations in front of Parliament¹⁷⁰ as well as through several NGOs.¹⁷¹

After these demonstrations in front of Parliament, a day of discussion took place among women Members of Parliament and NGO representatives but without any effect on the previously drafted text of the Law.¹⁷² However, it should be noted that even some women from the governing political parties expressed their frustration with the proposed Law.¹⁷³

The new Law does not solve some of the problems already existing in the old Law of 1972 which was amended in 1976. For instance, there was a deadline of 10 weeks for legal abortion. However, this already short deadline for abortion is further reduced by: a very long procedure for obtaining permission for abortion; a long list of necessary documents that are to be collected by women as part of the procedure; and an actual removal of urgency as an element in the procedure at any level (the urgent procedure is no longer mentioned). The procedure is also restrictive compared with the old one. For instance, the free choice of women is limited by a compulsory approval for abortion from the parents of a pregnant minor or an obligatory consultation with the husband. After this phase, there must be obligatory consultations with a doctor who must explain ‘the possible advantages of continuing with the pregnancy’. Furthermore, the ‘content and method of the consultation under Paragraph 3 of this Article shall be prescribed by the Minister of Health by a special act’.

In a traditionally male dominated society such as that in Macedonia, such procedures and restrictions could lead to unwanted births or illegal abortions.

On 1 August 2013 a group of 48 Members of Parliament (mostly from the ruling VMRO-DPMNE party, with two leaders from the coalition parties) proposed amendments to the Constitution of the Republic of Macedonia, regarding the status of marriage.¹⁷⁴ They do not propose an exact formulation; however, they insist that the change defines marriage solely as a union between one man and one woman, and any other form of union for life is of no legal effect. Furthermore, the Constitution should also provide that only such a marriage, as well as a single parent family, can be the basis for adopting a parentless child. Although the proposal has not been signed by those Members of Parliament of other religions (except the Orthodox Church), in its reasoning there is a claim that ‘all the religions in the FYR of Macedonia define marriage as the union of one man and one woman’. If the proposed changes took place, it would mean that no gay/lesbian couple could adopt a parentless child; and the current equality of marriage with an ‘out-of-wedlock union’ (Article 13 of the Family Law) would be put under a question mark. Thus, many women living outside of marriage might lose the right to inherit their partner's properties; the supporting rights (and duties) concerning members of a family based on an out-of-wedlock union would thus be removed or at least put on a less firm footing; and the system of adoption of parentless children, or at least the conditions and criteria for adoption (Articles 100(a)-102 of the Family Law), now based on an ‘adopting

¹⁶⁹ <http://www.sobranie.mk/ext/materialdetails.aspx?Id=9ee9d63b-1c63-4329-ba6b-7e105ea858f1>, accessed 23 October 2013.

¹⁷⁰ <http://www.novamakedonija.com.mk/NewsDetal.asp?vest=53013910174&id=9&setIzdanie=22891>, accessed 23 October 2013.

¹⁷¹ <http://hera.org.mk/?p=1618> and http://www.mhc.org.mk/system/uploads/redactor_assets/documents/429/Quarterly_Report_April_-_June_2013.pdf, both accessed 23 October 2013.

¹⁷² <http://www.time.mk/cluster/0c8ca2cc01/javna-rasprava-za-predlozeniot-zakon-za-prekin-na-bremenosta.html>, accessed 23 October 2013.

¹⁷³ <http://www.time.mk/cluster/0c8ca2cc01/javna-rasprava-za-predlozeniot-zakon-za-prekin-na-bremenosta.html>, accessed 23 October 2013.

¹⁷⁴ <http://www.sobranie.mk/ext/materialdetails.aspx?Id=6d79d5a5-1691-4412-bdd7-720df3bd9790>, accessed 23 October 2013.

person', would need to be changed to a system whereby only a married man and woman (or a single parent) would be able to adopt such a child.

On 31 May 2013 the Macedonian Parliament adopted the Law on Protection from Harassment in the Work Place (hereafter the Anti-mobbing Law), removing psychological and gender harassment from the general context of discrimination. In its Article 8(1)(3), even the 'unfounded differentiation in cases of unequal treatment of employees on any ground of discrimination' will not be treated as harassment by this Law.¹⁷⁵ In this way harassment is not seen as discrimination (as opposed to the situation under the Law on prevention and protection from discrimination).

The Anti-mobbing Law lays down a ban on any kind of harassment, as well as a concept of 'abuse of the rights on harassment' (Article 4), defining sexual harassment as 'every verbal, non-verbal or physical behaviour of a sexual character aimed at or constituting a violation of dignity ... and which causes a feeling of fear or creates inconvenience or humiliation'.¹⁷⁶

The very concept of this Anti-mobbing Law is apparently in contradiction to the previously adopted Law on Labour Relations and/or the Antidiscrimination Law, which basically are in line with the Recast Directive (2006/54/EC), establishing a general framework for equal treatment in employment and occupation. They both define harassment as a form of discrimination. The Anti-mobbing Law not only does not provide that, but it also even denies any relation to discrimination. And yet, it uses parts of the definitions given in the Labour Law concerning harassment and sexual harassment,¹⁷⁷ and the definition of mobbing as psychological harassment in the workplace.¹⁷⁸ It thus creates a combination of psychological and sexual harassment – only without (general) harassment.

A concept of 'abuse of the rights on harassment' is introduced in Articles 4 and 16 being the knowledge of the employee who has initiated the harassment procedure that 'there were no reasons' for such a procedure, or using that procedure to acquire some material or non-material benefit. This abuse is punishable by a disciplinary procedure (Article 29).

Miscellaneous

Promoting regressive traditional models for division of roles and family values

The increasing trend of promoting regressive traditional models for the division of roles and family values continues with even greater intensity.

A senior official in the Ministry for Labour and Social Politics gave a statement to the media that: 'The tide of emancipation from Western countries affects women. Women were the most discriminated against creatures, but under the tide of emancipation from Western countries, now we have a situation where they are pursuing education and a career, and they are postponing getting married. People are giving up the stereotypes that the dominant partner, the man, must be respected. And as a result the smallest hassle results in divorce.'¹⁷⁹

After the reaction of several NGOs, there was no answer from the Government. However, the President of the Commission against discrimination, Dushko Minovski, responded that he could not give any comments without permission from his superiors.¹⁸⁰ In this light, it is becoming very difficult to understand the independence of the Commission for protection from discrimination chaired by Mr. Minovski.¹⁸¹

The anti-abortion campaigns are again active and new videos (supported by the Government) have been released through various media.¹⁸²

¹⁷⁵ <http://www.sobranie.mk/ext/materialdetails.aspx?Id=6a805ab0-9118-408e-a81a-512ff38a291a>, accessed 23 October 2013.

¹⁷⁶ Article 5 of the Anti-Mobbing Law.

¹⁷⁷ Article 9 of the Anti-Mobbing Law.

¹⁷⁸ Article 9(a) of the Anti-Mobbing Law.

¹⁷⁹ <http://republika.mk/?p=110112>, accessed 23 October 2013.

¹⁸⁰ <http://24vesti.mk/diskriminira-li-komisijata-protiv-diskriminacija>, accessed 23 October 2013.

¹⁸¹ <http://www.kzd.mk/mk/za-kzd/clenovi/68-dusko-minovski>, accessed 23 October 2013.

¹⁸² https://www.youtube.com/watch?feature=player_embedded&v=M8_RQxb-BIk, accessed 23 October 2013.

In July 2013, the Ministry of Education announced the termination of gender studies at the Faculty of Philosophy at the Saints Cyril and Methodius University in Skopje.¹⁸³ At the same time, the Ministry supported the opening of the new 'Family Studies' programme, directed towards the promotion of family values, the protection of the family, and the increase of the fertility rate in Macedonia.¹⁸⁴ This action is in contradiction with the strategy for gender equality (2013-2020) adopted by the Assembly of the Republic of Macedonia on 20 February 2013, in which gender studies are recognised as an important part of education.

MALTA – Peter G. Xuereb

Policy developments

The new Labour Government took office in March 2013. In relation to policy, the new Government has since confirmed most of the priorities that had been subject to debate during the election campaign. One innovation is the creation of a new Ministry for Social Dialogue, Consumer Affairs and Civil Liberties. This is the first time that civil liberties have featured in the name of a Government ministry. Other new initiatives have been taken, such as a pilot project in anticipation of possible transition to a general policy of mixed-sex education in all state schools. It was also immediately announced by the Government that the law would be amended to permit a transsexual to marry after gender reassignment surgery, as part of a wider policy on civil rights and equality. In general terms, before the election in March, the new Prime Minister went on record as saying that a Labour Government would update the Social Security Act and address anomalies found in the law which are based on the concept that husbands are the breadwinners and women's place is in the home.¹⁸⁵ He has also promised that the law on equality will be strengthened to ensure better equality between men and women and to have more effective remedial action when there was discrimination, and that his Government would appoint more women to government boards, based on their competence.

Legislative developments

A bill has been presented in Parliament entitled the Civil Code (Amendment) Act. The aim of the bill is 'to remove the legal obstacles for persons who have undergone a legally recognised change in the sex into which they were born from being considered as pertaining to the acquired sex for all intents and purposes of civil status, including marriage, and from obtaining copies of their full birth certificate showing appurtenance to the acquired sex...'.¹⁸⁶ In short, this move heralds a fundamental shift in the position taken by the Maltese courts in the *Joanne Cassar* case, which had declared that the Civil Code did not permit such marriage.¹⁸⁷ In this, the most celebrated case before these courts in recent years, the

¹⁸³ www.fzf.ukim.edu.mk/index.php/mk/?option=com_content&view=article&id=574&Itemid=282&lang=mk-MK and <http://telma.com.mk/index.php?task=content&cat=1&rub=6&item=29510>, both accessed 23 October 2013.

¹⁸⁴ www.fakulteti.mk/news/13-07-09/zapochnuvat_ semejnite_studii_rodovite_vo_miruvanje.aspx and <http://grid.mk/read/news/505592070/4288787/kje-se-formira-institut-za-semejni-studii>, accessed 23 October 2013.

¹⁸⁵ *Muscat promises more gender equality*, Times of Malta, 11 January 2013, at <http://www.timesofmalta.com/articles/view/20130111/local/muscat-promises-more-gender-equality.452824>, accessed 6 September 2013.

¹⁸⁶ Bill No.5 of 2013, Government Gazette n. 19 075, of 16.04.2013, available at <http://www.justiceservices.gov.mt/LegalPublications.aspx?pageid=31&type=2>, accessed 4 September 2013.

¹⁸⁷ *Joanne Cassar Loses Transsexual Marriage Case*, Times of Malta, 23 May 2011, at <http://www.timesofmalta.com/articles/view/20110523/local/joanne-cassar-loses.366791>, accessed 2 May 2013. *Settlement between Joanne Cassar and the Government Signed*, The Independent, 16 April 2013, at <http://www.independent.com.mt/articles/2013-04-16/news/settlement-between-joanne-cassar-and-government-signed-1402109962/>, accessed 4 September 2013. *Updated: Malta and Cassar reach out of court settlement*, di-ve.com, 3 May 2013, at <http://www.di-ve.com/news/updated-malta-and-cassar-reach-out-court-settlement>, accessed 4 September 2013. Constitution of Malta, at <http://justiceservices.gov.mt/LOM.aspx?pageid=27&>

Constitutional Court declared that there was no remedy at law for the applicant who was seeking the right to marry.¹⁸⁸ The applicant had brought proceedings in the European Court of Human Rights in Strasbourg. The Government agreed to pay the applicant compensation, and presented this Bill in Parliament. In July 2013, it became Act No. VII of 2013.¹⁸⁹

Equality body decisions/opinions

The main equality body in Malta, the National Commission for the Promotion of Equality (NCPE), does not take decisions. It deals with complaints by seeking an amicable solution. The NCPE's Annual Report for 2012 was presented at a launch conference in May.¹⁹⁰ It is therein reported that the number of complaints lodged and investigated totalled 17 in 2012, 11 of which were presented by females and 6 by males across all areas of discrimination. The number of complaints relating to gender discrimination totalled 12.¹⁹¹

Miscellaneous

Equality Body's Annual Report for 2012

The NCPE has focused on gender since its inception but its remit was widened in 2012 to include discrimination relating to gender identity, religion or belief, sexual orientation, and race and ethnic origin. The NCPE's Annual Report for 2012, now published, states that throughout 2012 it continued receiving and investigating complaints, carrying out research, providing feedback to documents, conducting awareness raising campaigns, providing training, answering requests for information and auditing companies for the certification of the equality mark.¹⁹² The report gives general insight into the work and priorities of the NCPE. Although issued somewhat later in the year than in previous years it follows the format of the more recent general reports.¹⁹³ The Minister's message at page 6 highlights the Government's priorities, namely to increase the female participation rate in the labour market, to legislate on civil unions as well as on the right of transsexual persons to marry after gender reassignment surgery, and to address the problem of the harassment and bullying of homosexual students in schools. New projects include a project on 'Enhancing Equal Rights' and another on 'Gender Balance in Decision-Making'. At page 17, the report highlights the key initiatives taken by the public administration in furtherance of its equality policy.

Equality in the tourism sector

The Malta Tourism Authority recently embarked on a new EU-funded project – Retaining and Attracting People within Tourism through Diversity Management (ESF Operational Programme II Cohesion Policy 2007-2013). The aim of this project is to identify the issues affecting the employability of workers within the tourism industry by addressing retention and recruitment challenges, including the question of retention and recruitment of women employees.¹⁹⁴

[mode=chrono](http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono), accessed 4 September 2013. Marriage Act, Chapter 255 of the Laws of Malta, at <http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono>, accessed 3 April 2013. Civil Code, Chapter 16 Laws of Malta, at <http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono>, accessed 4 September 2013.

¹⁸⁸ *Joanne Cassar v Direttur tar-Registru Pubbliku u l-Avukat Generali*, 23 May 2011, Case Civil Appeal Number 43/2008/1.

¹⁸⁹ Act No. VII of 12 July 2013, available at <http://justiceservices.gov.mt/LegalPublications.aspx?pageid=30&type=1>, accessed 12 November 2013.

¹⁹⁰ NCPE reports can be viewed at www.equality.gov.mt, accessed 2 September 2013.

¹⁹¹ Brief summaries of some cases are given at page 27 of the Annual Report.

¹⁹² NCPE reports can be viewed at www.equality.gov.mt, accessed 2 September 2013.

¹⁹³ An overview of the state of equality in Malta as seen by NCPE is given at page 16, while a run through of the NCPE's work during 2012 runs from pages 19 to 55.

¹⁹⁴ R. Lepre, *Gender issues in tourism*, Times of Malta, 7 July 2013 at <http://www.timesofmalta.com/articles/view/20130707/business-news/Gender-issues-in-tourism.477003>, accessed 7 September 2013.

Major National Council of Women Malta event on women on company boards

The National Council of Women Malta continues to organise important events in the area of gender equality, the latest being a major event on the subject of women on company boards.¹⁹⁵ Women in decision-making positions, flexible work arrangements, the way company boards operate, the gender pay gap, and the need to tackle myths about men and women and stop stereotyping were a few of the subjects that featured in this public dialogue event.¹⁹⁶

THE NETHERLANDS – Rikki Holtmaat**Policy developments*****Committee set up to examine position of domestic workers***

In the Netherlands, between 290 000 and 500 000 people carry out domestic work in private households. When they work for less than four days a week for the same private household, only part of Dutch labour law applies to these workers. The ministerial regulation Services at Home (*Regeling dienstverlening aan huis*) 2007 defines the minimum rights of domestic workers. These rights differ considerably from other employees' rights, one example being that domestic workers have a right to be paid for only 6 weeks of illness while other employees have this right for 104 weeks.

Domestic workers are also not insured under compulsory social security insurance. They can choose to join voluntary insurance schemes for sickness, unemployment and disability, but these tend to be rather expensive as the employer does not need to contribute to the insurance premiums. This group is therefore systematically treated unfairly in comparison with other employees. Even the Government uses this exception a lot in the area of providing social services to elderly and disabled people.¹⁹⁷ The large majority of domestic workers is made up of women.¹⁹⁸ It can therefore be argued that this exceptional situation amounts to indirect discrimination against women.

In 2011, the Convention concerning Decent Work for Domestic Workers (International Labour Organisation (ILO) Convention no. 189) set labour standards for domestic workers. This Convention entered into force in September 2013. The Dutch Government has agreed to the Convention, but has made it clear that it would not ratify the Convention and that the ministerial regulation Services at Home 2007 would remain in force.

The Dutch Minister for Social Affairs and Employment has now appointed a special committee to examine the consequences of a possible ratification of this ILO Convention, as well as to conduct research on other ways to improve the position of domestic workers.¹⁹⁹ The committee is expected to publish its report in December 2013. The Cabinet will make up its mind on this subject on the basis of this report.

It is questionable whether the administrative burden for an individual employer within a private household can count as a justification for the exclusion of domestic workers from

¹⁹⁵ Madi Sharma international speaker for women on board event, Malta Independent, 6 September 2013, <http://www.independent.com.mt/articles/2013-09-04/company-news/madi-sharma-international-speaker-for-women-on-board-event-2500919299/> accessed 6 September 2013. See also http://www.europarlmt.eu/en/news_events/events/events_2013/events_2013-september/Womenonboard.html accessed 6 September 2013.

¹⁹⁶ Gender balance on company boards: more women, more profits, Malta Today, Friday 13 September 2013. A full press report is available at <http://www.maltatoday.com.mt/en/businessdetails/business/businessnews/Gender-balance-on-company-boards-more-women-more-profits-20130913#.UmpjUigaULU.email> accessed 26 October 2013.

¹⁹⁷ See for a court case about this situation the European Network of Legal Experts in the field of Gender Equality, *Law Review 2012/1*, European Commission, pp. 91/92.

¹⁹⁸ See also: L. Bijleveld & E. Cremers *Een baan als alle andere?: De rechtspositie van deeltijd huishoudelijk personeel*, Vereniging voor Vrouw en Recht Clara Wichmann, Leiden 2010.

¹⁹⁹ The Minister's letter to Parliament about the new committee: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/05/17/kamerbrief-over-instelling-commissie-dienstverlening-aan-huis.html>, accessed 12 August 2013.

compulsory social security schemes. However, when social insurance for these workers becomes compulsory and employers will have to pay part of the premiums, the risk is that the pre-1990s situation returns, i.e. that most domestic workers will disappear into the black labour market. It remains to be seen whether the newly appointed committee will find a solution to this conundrum.

New Emancipation Policy Memorandum

In May 2013, the Minister of Education, Culture and Science presented the Government's Emancipation Policy Memorandum for the period 2013-2016.²⁰⁰ The Memorandum covers both women's emancipation and LGTB rights. In the Memorandum, the Minister explained that she wants women's emancipation to be placed back on the political agenda, as 'women's emancipation needs constant maintenance'. Contrary to earlier policy documents on emancipation policies, this Minister wants to actively encourage women's emancipation, particularly aiming at an increase of the percentage of economically independent women, since she considers economic independence to be the basis of equality between men and women.²⁰¹

Although the percentage of women working has been rising in recent decades (currently it is 64 %), 48 % of women are still not economically independent, mainly due to the extraordinarily large number of Dutch women working part-time.²⁰² The Memorandum stresses the risks involved in economic dependence, e.g. the risk that the wage earner loses his job – which is a high risk in times of economic crisis, that the marriage ends in divorce,²⁰³ or that the husband dies. In such situations, the woman who has chosen to look after the children or who for years has only had a small part-time job, often ends up in a situation of being largely dependent on social welfare benefits. Women should avoid this poverty trap, according to the Minister.

More concretely, in the area of women's emancipation the Memorandum repeats the plans agreed in the Coalition Agreement of November 2012 to make some minor adjustments to equal treatment legislation. It further stresses that the Minister considers it a priority to look at women's (low) labour participation in the light of the economic crisis. She also wants to give more attention to the social safety of women, girls and LGTB people, meaning that they should be safe from harassment and sexual violence in public areas. And finally, the Minister announces further study of the causes and consequences of the higher success rates of girls as compared to boys in both primary and secondary education.

Legislative developments

After years of lobbying by LGBT organisations and following the advice from the Council of Europe, the Dutch House of Representatives has adopted a Bill that amends gender registration.²⁰⁴ It is expected that the Senate will soon pass the Bill without any problem.

²⁰⁰ The subjects of women's emancipation and LGTB rights have been assigned to this Minister. The Emancipation Memorandum 2013-2016 can be viewed at: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/05/10/hoofdlijnenbrief-emancipatiebeleid-2013-2016.html>, accessed 19 May 2013.

²⁰¹ A person is considered economically independent by Statistics Netherlands (CBS) if he/she earns at least 70 % of the legal minimum income.

²⁰² The percentage of employees working part-time is 17 % for male employees and 73 % for female employees, see A. Merens et al. *Emancipatiemonitor* Den Haag: CBS 2012, p. 59. It is important to note that the part-time jobs held by women on average involve more hours than before, a development that can easily be discerned by comparing the 2001 and 2011 figures.

²⁰³ Nowadays, one-third of all new marriages end in divorce.

²⁰⁴ Report by the Commissioner for Human Rights, Mr Thomas Hammarberg on his visit to the Netherlands. Commissioner for Human Rights, 2009, p. 42. Point 32 states: 'Abolish the legal condition of sterilisation and other compulsory medical treatment as a requirement for legal recognition of a person's gender identity.' The full document can be viewed at: <http://www.schipholwakes.nl/REPORT%20BY%20THE%20COMMISSIONER%20FOR%20HUMAN%20RIGHTS%20MR%20THOMAS%20HAMMARBERG,%20ON%20HIS%20VISIT%20TO%20THE%20NETHERLANDS.pdf>, last accessed 3 May 2013. The Bill is registered as

Contrary to the old legal requirements in the Civil Code (CC), a transgender individual no longer needs to have undergone medical treatment, and the condition of infertility that applied to both men and women has been abolished. The criterion to change the official sex designation will be a person's durable conviction that he or she belongs to the opposite sex, rather than physical characteristics. In the new system, an officially recognised expert is required to officially establish the conviction of the transgender person. This renders it possible to change the official registration without a court being involved. In general, the legislative changes make it less difficult for transgender persons to ensure that the records included in the municipal database correspond with their 'true' sex, which also means that gender designation on other documents, such as diplomas, can be changed. The Bill is a clear recognition of the rights of transgender persons, a group that receives less attention than bisexuals and homosexuals. Therefore, the changes are an essential improvement of the position of transgender people in Dutch society.

National case law

Supreme Court judgment on the rights of on-call workers

Fixed-term, part-time, on-call and zero-hours contracts are prevalent in the Dutch labour market, not to mention contracts for workers with temporary employment agencies, freelance contracts, et cetera. Disadvantages related to these new variants of employment contracts might amount to forms of indirect sex discrimination, when significantly more women than men work on such employment contracts, which in the Netherlands is the case for (inter alia) part-time work and on-call contracts.²⁰⁵ A recent judgment of the Dutch Supreme Court (*Hoge Raad*) on the rights of on-call employees, therefore, is interesting with a view to women's equal rights in employment.²⁰⁶

Article 7:628a of the CC entitles each employee with a contract of less than 15 hours per week to a minimum of three hours pay per work shift, even if this shift lasts less than three hours, in order to protect the rights of part-time and on-call workers. This provision proves to be very important for some sectors where it is common to work short shifts, resulting in much of the case-law of the lower courts focusing on the exact explanation of this provision.

In the case at hand, a female cab driver worked multiple times per day for periods shorter than three hours. Sometimes these three-hour periods were overlapping (i.e. she returned home and was called for a new shift within three hours from the start of the first shift). The woman stated before the Supreme Court that, in cases like these, she should not only obtain the equivalent of three hours pay, but also that for each new shift she could rely on Article 7:628a CC and obtain another three hours pay. This claim could *de facto* result in six hours pay, even if both shifts were within a time period of three hours.

Until now, the lower courts have always ruled in similar cases that, if the second shift started and ended within three hours from the start of the first shift, the employer only had to pay once for three hours. Surprisingly, the Supreme Court has now interpreted the provision in the CC in favour of on-call workers, thereby considerably strengthening their legal position. From now on, each new shift gives a right to three hours pay, even if this results in double pay.

Tweede Kamer 2012-2013, Kamerstukken 33351, No. 1, and was passed by the House of Representatives on 9 April 2013.

²⁰⁵ Statistics Netherlands ('CBS', the Dutch government bureau responsible for collecting and processing data) determined that 3 % of the workforce was employed under on-call contracts in 2011. See <http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2012/2012-3628-wm.htm>, accessed 30 July 2013.

²⁰⁶ Supreme Court 3 May 2013, ECLI:NL:PHR:2013:BZ2907. The full text can be retrieved using the case's LJN-number (BZ2907) at www.rechtspraak.nl, accessed 21 October 2013.

The Hague Court of Appeal judgment on equal rights of workers with different patterns of working time

Unequal treatment on the ground of working time is prohibited in the Netherlands by Article 7:648 CC. This Article prohibits different treatment between employees on the basis of a difference in working time, unless this can be objectively justified. In practice, this provision is important for women who very often work part-time. When they get unfavourable working conditions, they do not have to state that this amounts to indirect discrimination on the ground of sex, but can directly rely on this provision.

The Hague's Court of Appeal ruled on the exact scope of this provision in a recent case between Europe Container Terminals (ECT) and 30 (some former) employees of this company.²⁰⁷ On the basis of a collective agreement, different pay schedules are used, each schedule having its own specific characteristics and conditions. The differences between the conditions of these various schedules result in employees who work under a non-stop schedule working less hours for the same monthly wage. They de facto receive an hourly wage that is almost 8 % higher than the wage that employees under other schedules receive, although these employees perform the same work. The 30 claimants stated that these differences are in violation of Article 7:648 CC and therefore demanded their wages to be equalised.

The Court of Appeal judged that the parties to the collective agreement had agreed to the differences and that they were also able to put an end to them. In such a situation, a judge needs to take a modest or restrained position. Article 7:648 CC allows for a difference in working conditions 'for objective reasons', for example if the work is performed under different conditions, as was the situation in the case at hand. The Court therefore rejected the employees' claims.

With this judgment, the Court has left quite a lot of space to the parties to a collective agreement to construct different pay schemes for various groups of workers who in fact perform the same work although under different conditions in terms of their work schedules, because it did not want to interfere with the freedom of the social partners. One could say that the meaning of Article 7:648 CC has been considerably restricted by the Court.

Miscellaneous

Increase of women on company boards

In September 2013, the seventh edition of the yearly *Dutch Female Board Index* was published.²⁰⁸ This index provides an overview of the presence of women on the executive board and supervisory board of Dutch companies, covering all 85 listed companies. Currently, for the first time since the launch of the Index, more than half of the companies have at least one woman on either the executive or supervisory board.

In November 2012, the European Commission proposed a gender quota stipulating that 40 % of the non-executive board posts need to be occupied by women by 2020. According to the compiler of the *Female Board Index*, Professor Lückérath (Tilburg University), the EU quota will be met by listed Dutch companies, if the percentage of female members of supervisory boards continues to rise at the current pace. During the last year, already 24 of the 69 new-appointed supervisory board members were female. The number of women on executive boards however continues to be very low, with barely one out of every twenty executive directors being female. This percentage has been on the rise, but only minimally over the last year, from 4.1 % to 4.7 %. Perhaps the percentage will increase over the next

²⁰⁷ The Hague Court of Appeal, 9 July 2013, ECLI: NL:GHDHA:2013:2265. The full verdict can be retrieved using <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2013:2265>, accessed 12 August 2013.

²⁰⁸ The index can be found using: <http://knowledge.tiasnimbas.edu/sites/default/files/femaleboardindex2013.pdf>, accessed 9 September 2013.

years as a result of the greater number of female supervisory board members, as predicted by professor Lückcrath in an interview with daily newspaper *De Volkskrant*.²⁰⁹

In advance of the European quota regulation, the Netherlands has already introduced a legal target to ensure that a minimum of at least 30 % of both executive and supervisory board members are female. From January 2013 onwards, companies that fail to meet this goal are obliged to explain in their annual report why the target has not been met and how they intend to ensure a more even distribution in the future. No further sanctions are included however and the legislation is set to expire by 2016 (with the possible introduction of new legislation). Up until now, no listed company has met the legal target.

First woman to stand for elections on behalf of Reformed Party

The Reformed Political Party (*Staatkundig Gereformeerde Partij*, SGP) is an orthodox Protestant political party in the Netherlands. The SGP believes that the Netherlands should be governed in accordance with ‘the ordinances of God’. From the foundation of the party in 1918 onwards, the SGP has always taken the stance that women should not have active or passive voting rights, which has led to severe criticism from women’s organisations and human rights NGOs. A long series of court procedures in the Netherlands eventually ended in July 2012 when the European Court of Human Rights in Strasbourg rejected an appeal by the SGP. In response to this judicial decision, an SGP party congress, held in March 2013, decided to remove obstacles for women with regard to the right to stand for election.

On 26 August 2013, Ms. Janse-van der Weele became the first-ever woman to stand for election as a SGP candidate, after being elected front runner for the municipal elections of 2014 in Vlissingen. Janse was only nominated by the Party’s local division after six men refused to stand as a candidate. The SGP currently does not hold a seat in the municipal council of Vlissingen.

Women’s rights organisations have responded favourably to the news. The SGP’s National Board, however, was stated to be disappointed, referring to the Party’s manifesto (which still states that women have a different role in the public domain from men) and emphasised that the party will continue to fight for its members’ ‘inner convictions’.²¹⁰

NORWAY – Helga Aune

Policy developments

National Elections for Parliament – new incoming Government

The Government resigned after the loss of the platform of the Labour Party (AP – *Det norske Arbeiderpart*) with the two coalition parties (*Sosialistisk Venstreparti* (SV) and The Centre Party (*Senterpartiet* (SP)). The Government lost majority after the parliamentary elections on 8 and 9 September 2013.²¹¹ The winners of the election comprised a coalition of two parties: The Conservative Party of Norway (*Høyre* (H)) and the Progress Party (*Fremskrittspartiet* (FrP)), and formed the new Government on 16 October 2013. The Government is supported in Parliament from two parties; Norway’s social liberal party (*Venstre* (V)) and The Christian Democrats (*Kristelig Folkeparti* (KrF)). The Government may change the gender equality policy as it is been stated by that they want less state interference in the private choices of families. For example, the father’s quota is to be reduced by four weeks, presumably starting

²⁰⁹ This interview can be retrieved at <http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3504662/2013/09/06/Aantal-vrouwen-in-top-bedrijfsleven-stijgt-snel-maar-blijft-zeer-laag.dhtml>, accessed 9 September 2013.

²¹⁰ The National Board’s statements can be found in this article in Dutch daily *De Volkskrant*: <http://www.volkskrant.nl/vk/nl/2824/Politiek/article/detail/3498861/2013/08/26/Wellicht-meer-stemmen-SGP-met-Janse.dhtml>, accessed 1 September 2013.

²¹¹ <http://www.regjeringen.no/nb/dep/smk/aktuelt/nyheter/2013/statsministeren-varsler-avskjed.html?id=735409>, accessed on 16 September 2013.

from 1 July 2014.²¹² The Government argues that this is a means of returning to more self-governing for families without the state telling people how to live their lives.

Legislative developments

There have been two major legislative changes in the Working Environment Act (WEA) and the Gender Equality Act. Changes were enacted by Parliament in June and the new Act/provisions are due to come into force on 1 January 2014. Due to the new political landscape, however, changes may still occur.

Legislative amendments to the WEA

(Involuntary)Part-time workers' right to work

On 15 March 2013, the Government presented various proposals for amendments to the WEA in an effort to combat involuntary part-time work.²¹³ Approximately 40 % of all employed women in Norway work part-time. Involuntary part-time work is when employees wish to work more, but are unable to get employment contracts for longer hours (larger positions²¹⁴). The problem is especially prevalent in the health sector, education and retail industry. These are all sectors where the norm is for the workplace to be organised with many part-time positions rather than full-time positions. The proposed amendments were:

- New section 14-1: an obligation on the part of employers to have, at least once a year, consultations with the employees' representatives on the use of part-time work at the enterprise.
- New section 14-3, third paragraph: when an employee has made use of the preferential right to expand their position to either full-time or increased working time in a part-time position (according to section 14-3 first and second paragraph), the employer has an obligation to discuss/consult with the employee about the matter before making a decision.
- New section 14-4 a: this section introduces a completely new right into the WEA providing a right for part-time workers to an employment contract for a position equal to the average of the actual time worked during the last 12 months, unless the employer can provide documentation showing that the need for the extra work is no longer present.
- New section 14-4 b: this section regulates the effects of violations of a part-time worker's right to a position according to section 14-4 a. The court may, after a request from the employee, state that the employee is awarded such a position (equal to the average of the last 12 months of working). In addition the employee may be awarded damages.

Discussions in Parliament were on 4 June 2013 and the amendments were enacted in Parliament on 14 June 2013. The amendments will come into force on 1 January 2014.

The amendments seem to be adequate steps towards addressing the structural part of the unequal treatment of men and women in the Norwegian employment market. In reality, women in certain professions are systematically met by an expectation of having to work part-time. The protection against discrimination at the individual level does not provide much help in these cases where the problem is at the structural level.

²¹² The term 'father's quota' refers to the period of parental leave that is reserved for fathers and these weeks may not be transferred to the mother of the child.

²¹³ The Government's proposal (Prop. 83 L (2012-2013): <http://www.regjeringen.no/nb/dep/ad/dok/regpubl/prop/2012-2013/prop-83-l-20122013.html?id=717709>). The Parliament's working plan: <http://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=56767>. Both accessed on 16 September 2013.

²¹⁴ Not necessarily full-time.

New Gender Equality Act

On 22 March 2013, the Government presented its proposals for a new Gender Equality Act.²¹⁵ In general the Government states that the main reason for not proposing one common Act for all grounds of discrimination is that it is so important that the gender aspect remains clear and visible. However, to make it most user friendly for the public, the Government proposed a common design with a common system of Chapters and Sections for all the anti-discrimination Acts. It is stated in the preparatory works that the intention is not to alter the content of the former Act of 1978, but to transform it into the new design. How far this has been successfully achieved remains to be seen.

Discussions in Parliament took place on 10 June 2013. It was enacted in Parliament in June 2013. The Act is to come into force on 1 January 2014.

Case law of national courts

There is one court case from the Labour Court regarding a threshold requirement in connection with the right of part-time workers to join the additional occupational pension system. The case, which is in line with the CJEU's ruling in *Bilka*,²¹⁶ is the Labour Court's judgment of 21 June 2013, case no. 20/2013, *Landsorganisasjonen i Norge med Fagforbundet mot Kommunesektorens organisasjon (KS)*.²¹⁷ The threshold in a collective agreement requiring 14 hours weekly work in order for a worker to be part of the additional pension system was deemed illegal and discriminatory, in violation of the protection against discrimination for part-time workers in the WEA chapter 13, based on the Part-time Directive. However, the trade unions' claim for membership of the additional occupation pension system for those who had been discriminated against since the implementation of the Part-time Directive was not accepted by the Court. The Court returned the challenge to the social partners, declaring that even though the limit of 14 hours was illegal, it did not mean that 'a limit' may be illegal and this was for the parties to decide. The trade unions state that they view the limit to be zero and what remains are the negotiations on how the correction is to be carried out, for those who already are retired, for those who are retired but still working some hours, and for those currently working.

The Labour Court's judgment of 21 June is very important and must, in the view of the expert, have consequences for similar thresholds of 14 hours weekly work for membership, in occupational additional pension Acts.²¹⁸ The Labour Court referred extensively to the case law of the EU Court of Justice.²¹⁹

POLAND – Eleonora Zielińska

Policy developments

Recently, positive policy developments took place, which raise hopes for a certain shift in the current approach to equal treatment of women and men in employment, eventually leading to a decrease in discrimination in this respect. One of the signs of this change is the Government engaging in certain forms of publicity, of an informational and educational character, aiming

²¹⁵ The Government's proposal (Prop. 88 L (2012-2013)), available at www.regjeringen.no/nb/dep/bld/dok/regpubl/prop/2012-2013/prop-88-l-20122013.html?id=718741, and the Parliament's working plan, available at www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=56875, both accessed 16 September 2013.

²¹⁶ Case C-170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1896] ECR I-01607.

²¹⁷ <http://www.fagforbundet.no/> and <http://www.lo.no/>, both accessed 16 September 2013.

²¹⁸ *Lov om Statens Pensjonskasse* 28 July 1949 no. 26 Section 5, *Foretakspensjonsloven* 24 March 2000 no. 16 Section 3-5 og *innskuddspensjonsloven* 24 November 2000 no. 81 Section 4-2.

²¹⁹ Namely, Cases C-393/10, *O'Brien v Ministry of Justice* [2012] 2 CMLR 25; C-307/05, *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-07109; C-285/11, *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [2012] ECR nyr; joined Cases C-395/08 *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini* and C-396/08 *Daniela Lotti and Clara Matteucci* [2010] ECR I-05119; and C-4/02 *Schönheit* [2003] ECR I-12575.

at promoting among employee-fathers the various forms of parental leave recently introduced into the Labour Code.²²⁰ It goes without saying that greater participation by men in household activities and childcare significantly not only helps their female partners to return to professional activities but also enables fathers to take advantage of the experience gained and skills acquired during childcare, after returning from leave. Among those publicity activities were TV spots and several projects which were aimed at encouraging fathers to take up these parental leave opportunities and to increase the awareness of employers.²²¹ The purpose of the successful combination of work and family responsibilities is also served by a new initiative of the Minister of Labour and Social Policy: at the Ministry of Labour and Social Policy a specially equipped room has been created, allowing parents to carry out their work while being with their child. This allows employees, who find themselves in situations where they have nobody to leave their children with, to bring them to work and still be able to perform their duties.²²²

In this context, the appointment in June 2013, by the Minister of Internal Affairs, of a Plenipotentiary for Equal Treatment in the uniformed services, responsible to the Minister, deserves to be evaluated in a positive light. The purpose, amongst others, of the Plenipotentiary, currently a woman, will be to monitor the situation and prepare reports on the equal treatment of men and women in the uniformed services. Additionally a telephone hotline was established, allowing for anonymous reporting of abuse with regard to issues of equal treatment in the uniformed services.²²³ Until now, the police was the only uniformed service, which did not have a plenipotentiary for equal treatment.

Recently several interventions were also made by the Human Rights Defender, the body designated to perform tasks regarding the implementation of the principle of equal treatment, which is not usually very active in the field of equal treatment of women and men (see below).

Legislative developments

Entering into force of the Labour Code amendments aimed at better reconciliation of family and professional obligations

*Parental leave prolonged*²²⁴

On 17 June 2013 the amendments to the Labour Code,²²⁵ which entitled parents of all children born after 31 December 2012 to a new, extended paid leave, came into force. This new leave consists of 20 weeks maternity leave, six weeks additional maternity leave and 26 weeks parental leave. Not only parents employed on full-time employment contracts benefit from this longer leave, but also those working on service and civil contracts and entrepreneurs. The changes include maximum flexibility in the sharing of leave between parents (only the first 14 weeks of leave, directly after delivery, may be used exclusively by the mother). In order to avoid misunderstanding, several editorial changes have been made to the Labour Code. Not

²²⁰ www.rodzicielski.gov.pl, accessed 28 August 2013.

²²¹ Those projects, among others 'Dads on leave' (*tatusiowy*), co-financed from EU funds, or the campaign 'Take a vacation, father', organised by the daily newspaper *Gazeta Wyborcza*, aim to identify possible ways for men to actively engage in the role of a father, while developing their careers, and to show ways of dealing with criticism in the workplace and where to look for support in tackling the new social role. Article in *Gazeta Wyborcza* from 28 August 2013 'Tatusiowie na tatusiowym. Tacy sami'. See also: <http://www.rownoscpici.pl/aktualnosci/1,56.html>, accessed 15 September 2013.

²²² <http://www.mpips.gov.pl/aktualnosci-wszystkie/ministerstwo/art,6343,pokoj-do-pracy-dla-rodzica-z-dzieckiem-w-mpips.html>, accessed 15 September 2013.

²²³ <https://msw.gov.pl/pl/aktualnosci/10993,dok.html>, accessed 27 August 2013.

²²⁴ Polish law uses different terms to describe paid and generally unpaid leave. The first one, i.e. paid leave, recently introduced in addition to paid maternity and paternity leave, is called '*urlop rodzicielski*' which corresponds with the English term 'parental leave'. For unpaid parental leave in the meaning of Directive 2010/18/EU, the term '*urlop wychowawczy*' is used in Polish, which is better translated as 'child-care leave'.

²²⁵ The law of 12 July 2013 on the amendment of the Labour Code and selected other laws, Journal of Laws (JoL) of Republic of Poland, 2013, item 896 (*Ustawa a dnia 28 maja 2013 o zmianie ustawy kodeks pracy i wybranych ustaw*, Dz.U. 2013, poz. 896).

all the anticipated changes have been adopted, however. It was expected that the duration of paternity leave (currently two weeks) would also be extended.²²⁶

Changes to regulations regarding unpaid child-care leave

On 1 October 2013 the Law of 26 July 2013 entered into force, amending the Labour Code.²²⁷ The aim of this Law was the adjustment of the provisions regarding child-care leave in line with the provisions of Council Directive 2010/18/EU, implementing the revised Framework Agreement on Parental Leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC. As a result of this change, the possibility to take the 36 months of child-care leave has been extended until the child reaches the age of five (previously it was up to the age of four). Additionally, each parent (or carer) has been granted the exclusive, non-transferable right to take one month out of those 36 months for herself or himself. Only if a person is the sole parent or carer, may he or she use the leave in its entirety. The duration of child-care leave, which the parents or carer may use simultaneously, was also increased. The leave now amounts to four, instead of three months and may be divided up into five parts (instead of four).

The child-care leave for self-employed persons (including farmers and helping spouses), as well as students and unemployed persons, was introduced by the Law on the amendments of the Law on social security.²²⁸ The introduction of child-care leave for self-employed persons, on similar conditions as for employees, was justified by pro-nationalist governmental policy aimed at counteracting the decreasing birth rate observed in Poland.²²⁹ The contributions to social insurance during the time of child-care leave are paid from a state budget, and the time of leave will be included into the term of employment required for receiving the social insurance benefits.

Changes with regard to provisions on organisation of employment

On 23 August 2013, amendment to the Labour Code came into force,²³⁰ which permanently introduces flexible working hours and longer periods of calculation of up to 12 months. The introduction of flexible working hours is, in principle, subject to the decision of the employer, but it has to be introduced in agreement with staff representatives. The aim of these changes is to enable employers to adjust working hours depending on the amount of orders received by a business. The period during which employers may compensate employees for overtime work with time off work (which may be granted even after many months), instead of paying a bonus for working overtime, will be extended. For many employees this could mean significant income reduction, because the reality is in Poland that often only overtime work can ensure a fair income. The amendments mentioned above to the Labour Code have caused a lot of hard feeling and have been subject to anti-government demonstrations, organised by all of the trade unions. Even though it was not explicitly set out in the demands presented to the Government, it is obvious that the new working-time regulation, while applying to all employees in general, will at first impact mostly on areas such as food processing or trade and services, where the majority of employees are women.

²²⁶ Draft Law Amending the Labour Code. Parliamentary Print No 666 (extension of paternal leave). <http://orka.sejm.gov.pl/Druki7ka.nsf/0/C49681DC759D5EF4C1257A6900371969/%24File/666.pdf>, accessed 20 January 2013.

²²⁷ JoL, 2013 pos. 1028.

²²⁸ Jol 2013 pos. 983 of 26 July 2013. This Law has changed selected others laws, for example the Law on social security for farmers and the Law on freedom of economic activities.

²²⁹ Compare with the reasoning of the draft Law. *Sejm Print* No. 939, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=939>, accessed 17 November 2013.

²³⁰ The law of 12 July 2013 on the amendment of the Labour Code, *Journal of Laws of Republic of Poland*, 2013, item 896 (*Ustawa a dnia 12 lipca 2013 o zmianie ustawy kodeks pracy*, Dz.U. 2013, poz. 896).

Case law of national courts

A precedent case of mobbing in the military services

The commanding officer of a military facility in Kraków is being accused of taking advantage of his position and tormenting mentally and physically one of his subordinate female officers (a doctor), with whom he used to be earlier in a relationship. According to the state attorney, even though the alleged activity took place in private arena, it is also significant with regard to the professional sphere. The woman has asked her superiors for a transfer to another facility, but it has not been granted.²³¹ The case is pending. This is the first case connected with sex discrimination in the military to go before a court.

Problems with formulating a claim in a situation bordering on both violation of equal treatment and mobbing

The Mayor of the city Golub-Dobrzyń won a case before the labour court in Toruń, the subject of which was a mobbing accusation against him by one of his female subordinate employees. The unfavourable ruling for the claimant in this case is, to a large extent, the result of a wrong formulation of the claim, despite the fact that she was assisted by an attorney.²³² The problem was that the claimant had given up her request for compensation for unjustified dismissal from work, only asking instead for EUR 11 000 (PLN 45 000) for 'health problems caused by the mobbing'. The judges found however that her illness and her 11-month long absence from her employment position at the Mayor's Office had no relation to the alleged misconduct towards her. In this situation the court decided that it was not necessary to establish if the mayor really had behaved improperly towards the claimant, which could have been considered to be sexual harassment or mobbing. The ruling of the court raises doubts, given the fact that in this case another court had previously ruled in the claimant's favour, awarding her the requested compensation. In that ruling, the court found the defendant to be guilty of addressing the claimant with comments like: 'you look like a lesbian', 'I hate old hags', or making moves bearing the signs of sexual harassment. However, the Court of Second Instance overruled this due to procedural faults.²³³ This case proves what unexpected problems may occur in practice, regarding the application of provisions on equal treatment in situations where the Labour Code and anti-mobbing regulations coexist.

Equality body decisions/opinions

Lodging of a case at the Constitutional Tribunal by the Human Rights Defender, concerning the loss of the right to social benefits in connection with providing care for a disabled person

The Defender in her application to the Tribunal²³⁴ applied for a declaration that Article 11 paragraphs 1 and 3 of the Act of 7 December 2012 amending the law on family benefits and other acts,²³⁵ is incompatible with the principle of trust in the state and the law and the principle of acquired rights, deriving from Article 2 of the Constitution. Justifying this motion, the Defender claimed that she was addressed with numerous complaints from people who, under the previous provisions of the law on family benefits, received care allowances.²³⁶ As a result of amendments to the provisions of this Act, those persons retained the right to

²³¹ http://wiadomosci.gazeta.pl/wiadomosci/1,114871,14467693,Precedensowy_proces_o_mobbing_w_wojsku, accessed 16 September 2013.

²³² http://torun.gazeta.pl/torun/1,90288,13744016,Blad_w_procesie_o_mobbing_w_urzedzie_Wadliwe_roszczenie.htm, accessed 16 September 2013

²³³ http://torun.gazeta.pl/torun/1,90288,13744016,Blad_w_procesie_o_mobbing_w_urzedzie_Wadliwe_roszczenie.html#ixzz2f9XFZRcC; http://torun.gazeta.pl/torun/1,35576,12140975,Wygladasz_jak_lesbijka_Mobbing_za_42_tys_zl.html#TRrelSST#ixzz2f9WwOrfp; and http://torun.gazeta.pl/torun/1,90288,13629132,Sad_o_mobbing_nowe_fakty_z_pracy_burmistrza.html#TRrelSST#ixzz2f9YTPycl, all accessed 16 September 2013.

²³⁴ Case RPO/723319/13/III/1113.2 RZ.

²³⁵ JoL 2012, item 1548.

²³⁶ <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=1730636>, accessed 25 August 2013.

care benefits on the current level only until 30 June 2013. After this date the decisions granting them such care benefits terminated by virtue of the law. The Defender claimed that the persons applying for care allowances in the past had acted in trust in the state and its laws, thus making important decisions about their lives and families, e.g. on termination of employment because of the necessity to provide care for a disabled person. They had the right to expect continuity of a benefit which had been provided to them in an administrative decision. In her motion, the Defender did not raise the argument that the challenged statutory change is a manifestation of indirect discrimination based on sex. Although the wording of the regulation is gender neutral, in practice however the limitations resulting from it will mainly affect women, because in the vast majority of cases it is women who give up work in order to be able to continue caring for a disabled family member.

Intervention of the Human Rights Defender concerning the absence of explicit powers of control of the State Labour Inspectorate, for providing legal protection against discrimination for people working under civil law contracts

On 13 June 2013, the Human Rights Defender asked the Chairman of the Senate Commission for Family and Social Policy to consider the initiation of legislative work on the amendment of Article 10 of the Act of 13 April 2007 on the National Labour Inspectorate.²³⁷ In the course of the Defender's investigation proceedings in the case of a person working on the basis of a civil law contract, laid off because of her sexual orientation, it was revealed that the National Labour Inspectorate only controls the observance of labour law provisions, whereas the provisions of the Anti-discrimination Act, which apply to persons employed under civil law contracts, are not considered to be labour law provisions. In the case of persons employed on the basis of a civil law contract, the Inspectorate may only examine matters of safety and health conditions at the workplace and legality of employment but not discrimination cases. The Defender indicated this as an obvious gap in the law.

Miscellaneous

Intervention of the Government Plenipotentiary for Equal Treatment concerning specific parking places for fathers with children

The Government Plenipotentiary for Equal Treatment intervened with regard to the unequal treatment of men by the hypermarket chain Real, where special parking spaces were designated, reserved only for mothers with children. In response to the intervention, the head of one of the Real hypermarkets reported that, at his store, notices stating 'place for the mother of a child' had been replaced by notices stating 'place for clients with a child'.²³⁸

PORTUGAL – Maria do Rosário Palma Ramalho

Legislative developments

No major changes have been introduced in gender equality law,²³⁹ since all efforts are still concentrated on the legislation and political measures designed to meet the financial and economic crisis that Portugal is still facing.

Nonetheless, some measures are worth mentioning in three areas: equal opportunities for men and women in the labour market; the presence of women on decision-making bodies; and positive action to favour the access to employment of women or other categories of employees.

²³⁷ JoL of 2012, pos. 404, with amendments, id: RPO/704986/12/I/4.1.5 RZ, see

<http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=1728372>, accessed 25 August 2013.

²³⁸ <http://rownetraktowanie.gov.pl/interwencje/w-sprawie-dyskryminacji-ojcow-przyjezdajacych-z-dziecmi-na-zakupy-do-hipermarketu-real>, accessed 28 August 2013.

²³⁹ In the period covered by this Law Review: February – September 2013.

Equal opportunities for men and women in the labour market

The Government issued Resolution No. 13/2013 (*Resolução do Conselho de Ministros*), of 8 March 2013, aimed at actively promoting equal opportunities and equal results for men and women in the labour market, namely by reducing the wage gap, by promoting a balanced reconciliation of family and working life, by promoting the social responsibility of companies, and by reducing the segregation of the labour market.

To meet these goals, the Resolution establishes that the Government will take the following measures:

1. Prepare and publish a report on the wage gap, sector by sector;
2. Prepare a paper directed to the social partners on possible strategies to promote gender equality in collective agreements;
3. Promote action within companies related to care facilities and in order to promote the use of flexible working-time arrangements;
4. Prepare and publish an annual report on good practice of companies in the area of social responsibility;
5. Adopt legislative measures intended to promote positive action in favour of the employment of the under-represented sex in various professional activities; and
6. Integrate a gender dimension into all specific measures adopted to promote employment.

Women in decision-making

Following Government Resolution No. 19/2012, of 8 March 2012, that aimed to promote the participation of women on the boards of public and private companies, a new piece of legislation has been approved that implements this Resolution's objective in a specific area.

Law No. 67/2013, of 28 August 2013, that establishes the general features of independent administrative agencies for the monitoring of economic activity both in the private and public sectors, establishes that at least 33 % of the members of the board of these agencies must be women and at least 33 % must be men, and that the presidency of this board must be alternately occupied by persons from each sex.²⁴⁰ The fact of being integrated in the legislation that establishes the general features of monitoring agencies for economic activity increases the importance of this provision, because from now on all agencies will have to cope with this requirement.

Unemployment: positive action justified by gender discrimination, age discrimination and other grounds of discrimination

Some legislative measures have been approved in 2012 and in 2013, to fight the present high rate of unemployment.

A significant measure is Measure 'Estímulo 2013', created by the Ordinance (*Portaria*) No. 106/2013, of 14 March 2013. In this programme, the state gives financial support to employers who hire unemployed persons (provided they have been in that situation for more than 6 months, or for more than 3 months if they are over 45 years old, responsible for a family, or hold a very low level of formal education). This financial support corresponds to 50 % of the salary, within certain upper limits, to be paid for a period that can go up to 18 months (in case of open-ended labour contracts) or to 6 months (in case of fixed-term contracts).²⁴¹

However, the value of this support rises to 60 % in the following situations that deal with gender discrimination and with other grounds of discrimination:

1. People living on social security allowance (*rendimento social de inserção*);
2. Disabled people;
3. People up to 25 years old or over 50 years old;
4. Women with a very poor level of education; and

²⁴⁰ Article 17 No. 8 of Law No. 67/2013, 28 August 2013.

²⁴¹ Article 3 No. 2 and Article 5.

5. Workers of the under-represented sex in economic sectors with a majority of workers of the other sex.²⁴²

This measure is a good example of positive action in the area of employment that takes into consideration gender discrimination, age discrimination and also discrimination on economic grounds as factors that make the (re-)employment of those groups even more difficult than in other situations.

ROMANIA – Iustina Ionescu

Policy developments

On 9 May 2013, the Ministry of Internal Affairs (*Ministerul Afacerilor Interne* (MAI)) adopted an order to set up a 'green line' (free telephone line and email communication) where its employees may report directly the cases of sexual harassment or discrimination occurring at the workplace. No hierarchical reporting is needed in such cases, in comparison with complaints by employees on any other internal issues.²⁴³

The adoption of this policy was recommended in an internal assessment of sexual harassment affecting female employees within the structures of the MAI. The assessment was carried out in January 2013, in response to an incident that received extensive media attention: on 26 December 2012, a police woman stabbed her superior; in her defence, she alleged her superiors raped her. The assessment did not find 'a phenomenon' of sexual harassment, only a number of cases (undisclosed) and 'factors favouring sexual harassment' (obstacles to promotion at the workplace, predominantly male hostile working environment, and gender bias that distorts professional credibility).²⁴⁴

In order for the green line mentioned above to be an effective mechanism, other measures recommended by the internal assessment also need to be implemented, such as:

- Carrying out an information campaign on discrimination at the workplace;
- Introducing explicit provisions in the internal regulations forbidding discrimination and sexual harassment; and
- Introducing an internal resolution procedure.

It is equally important that the persons in charge of handling the green line are trained specifically to address such cases.

Legislative developments

First, a newly adopted amendment of the Gender Equality Law²⁴⁵ is not in compliance with Article 9(2) of Directive 2010/41/ EU, on the defence of rights. According to Article 35(2) of the Law, the right of non-governmental organisations and trade unions to represent or assist a

²⁴² Article 5 No. 3.

²⁴³ Ministry of Internal Affairs, Order No.60 of 9 May 2013 regarding the setting up of the telephone number and e-mail address for the reporting of acts/facts of discrimination, harassment behaviour or similar treatment against the personnel of the Ministry of Internal Affairs, as well as introducing certain organisational measures (*ORDIN nr. 60 din 9 mai 2013 privind înființarea liniei telefonice și a adresei de posta electronică pentru sesizarea actelor/faptelor de discriminare, a comportamentelor de hărțuire sau a tratamentelor similare îndreptate împotriva personalului Ministerului Afacerilor Interne, precum și pentru stabilirea unor măsuri organizatorice*), published in the Official Journal No.271 of 14 May 2013.

²⁴⁴ Article in the official publication of the Ministry of Internal Affairs, available on http://www.revistapentruapatrie.ro/index.php?option=com_content&id=687%3Ahruirea-sexual-nu-este-un-fenomen-in-mai&Itemid=2, accessed 2 September 2013.

²⁴⁵ Law No. 115 of 24 April 2013 for the approval of the Emergency Ordinance No.83/2012 to amend the Gender Equality Law (*Legea Nr.115 din 24.04.2013 pentru aprobarea OUG Nr.83 din 04.12.2012 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse și de tratament între femei și bărbați*), published in the Official Journal No.240 of 25 April 2013.

person exposed to discrimination on the ground of sex remains limited to administrative procedures. The text is more limited than its previous version which provided for this right in court proceedings too. It also differs from the right to legal standing in judicial and administrative procedures which is recognised for non-governmental organisations in cases of discrimination on other grounds, according to Article 28 of the Anti-discrimination Law.²⁴⁶ Thus, this new amendment creates a less favourable situation for persons exposed to discrimination on the ground of sex than persons exposed to discrimination on other grounds.

Second, the Anti-discrimination Law²⁴⁷ has been amended twice in the last two months, – the first time by the Government, the second time by Parliament. These amendments were made as a result of external pressure, in the context of the monitoring carried out by the European Commission regarding the transposition of Directives 2000/43/EC and 2000/78/EC and a preliminary ruling that was pending at the time before the Court of Justice of the European Union (also regarding the transposition of Directive 2000/78/EC).²⁴⁸

It is important to mention three significant changes that strengthen the anti-discrimination mechanism in Romania. First, the new definition of the concept of the burden of proof, which has been adopted, is finally in compliance with the Directives, thereby preventing the opening of an infringement procedure against Romania.²⁴⁹ Second, another salutary change is the increase in the levels of administrative fines that may be imposed by the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării* (CNCD)); they now range from EUR 230 (RON 1 000) to EUR 23 000 (RON 100 000), compared with EUR 90 (RON 400) to EUR 1 860 (RON 8 000) previously.²⁵⁰ Third, the six-month time limit for issuing an administrative fine will be calculated from the time when the CNCD issued a decision,²⁵¹ in order to ensure effective enforcement of the remedy in accordance with the preliminary ruling of the Court, mentioned above.

Case law of national courts

A High Court of Justice and Cassation (*Inalta Curte de Casatie si Justitie* (ICCJ)) judgment issued in April 2013 makes some clarifications that change the jurisprudence regarding discrimination.²⁵² First, the ICCJ condemns the practice of the CNCD not to issue administrative fines in cases where the six-month term from the time the facts expired. Second, the ICCJ states that all appeals against the CNCD's decisions should be examined by the courts only after all the parties who were called before the CNCD have also been subpoenaed to appear in court procedures. Third, the ICCJ states that in cases where the CNCD finds discrimination, it is mandated according to the law to apply an administrative sanction such as the administrative fine; the 'recommendation' issued by the CNCD is not an administrative sanction prescribed by law, but only a measure that can be ordered in cases

²⁴⁶ Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007.

²⁴⁷ Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007.

²⁴⁸ Case C-81/12 *ACCEPT v Consiliul Național pentru Combaterea Discriminării* [2013], n.y.p. Ruling dated 27th April 2013.

²⁴⁹ Law No. 61 of 21 March 2013 (*Legea nr.61 din 21 martie 2013 pentru modificarea Ordonanței Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Article 1.(2), published in the Official Journal No.158 of 25 March 2013.

²⁵⁰ Emergency Government Ordinance No. 19 of 27 March 2013 (*Ordonanța de Urgență nr.19 din 27 martie 2013 pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Article I.(5), published in the Official Journal No.183 of 2 April 2013.

²⁵¹ Law No.189 of 25 June 2013 (*Legea nr.189 din 25 iunie 2013 privind aprobarea Ordonanței de urgență a Guvernului nr.19/2013 pentru modificarea și completarea Ordonanței Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Article I.(2), published in the Official Journal No.380 of 27 June 2013.

²⁵² *Inalta Curte de Casatie si Justitie, Decision No.5026 of 17 April 2013* (issued in the File No.1490/2/2011).

where no discrimination was found by the CNCD. The recent CJEU judgment on the Romanian case *ACCEPT v Consiliul National pentru Combaterea Discriminarii* explicitly states that a system of sanctioning that is purely symbolic is neither effective nor proportionate; it is therefore not dissuasive, an element required by Article 17 of the Directive 2000/78/CE.²⁵³

The case is the result of an administrative complaint introduced before the CNCD against public statements made by Mr Teodor Baconschi on 11 February 2011. Mr Baconschi, at the time Minister of Foreign Affairs, declared that especially within the Roma community there were some 'physiological problems regarding criminality'.²⁵⁴

SLOVAKIA – Zuzana Magurová

Policy developments

Nationwide Strategy to Protect and Support Human Rights in the Slovak Republic

The Ministry of Foreign and European Affairs of the Slovak Republic is preparing the Nationwide Strategy to Protect and Support Human Rights in the Slovak Republic (herein: the Strategy), which is the first coherent draft document devoted to the protection of human rights. The strategy is a founding document for a comprehensive revision of the existing human rights policy and aims to construct an integrated system of protection and support of human rights, including the more efficient functioning of all related institutions and mechanisms. Notably, the editorial team preparing the Strategy was represented by, among others, members of the Slovak Government Council for Human Rights, National Minorities and Gender Equality.

The Strategy triggered a debate, in particular concerning the gender equality agenda, but also within LGBTI communities, whose rights would be strengthened, at least generally. The Catholic Church, a number of NGOs and the conservative political wing, which have concerns about the traditional family, strictly oppose the draft of the Strategy and have led a long-term organised campaign against it. The Chairman of the Council for Human Rights, National Minorities and Gender Equality, who is responsible for the Strategy's final version, received a number of e-mails demanding that issues pertaining to the rights of homosexuals are not included in the final version. The representatives of the Ministry claim that they have received e-mails with a request to overload the mailbox of the Minister in charge of the preparation of the strategy. Some strong opponents of human rights proceeded to use personal invective, harsh insults and hateful threats, which they sent to the Secretary of the Council. The Ministry disapproves of this campaign and has warned its organisers that pressure of this kind is inadmissible.²⁵⁵

The Conference of Bishops issued an official declaration on the issue of gender equality, pointing out that the adoption of so-called gender ideology was refuting the Holy Scriptures which talk about the creation of a man and a woman. They also issued an appeal to people calling for the restoration of the family, claiming that the efforts being used to enforce alternative forms of partnerships were becoming increasingly stronger. In its letter addressed to the Minister of Foreign Affairs, the Conference of Bishops of Slovakia invited him not to use the term 'gender equality' in the strategy and to wholly omit the chapter devoted to the LGBTI community.

²⁵³ Case C-81/12 *ACCEPT v Consiliul Național pentru Combaterea Discriminării* [2013] n.y.p. Ruling dated 27th April 2013.

²⁵⁴ <http://www.realitatea.net/mai-multe-ong-uri-cer-demisia-ministrului-baconschi-pentru-declaratii-rasiste-700526.html>, accessed 2 September 2013.

²⁵⁵ Statement of the Ministry of Foreign and European Affairs of the Slovak Republic on the seditious campaign against the human rights strategy is available at [http://www.foreign.gov.sk/servlet/content?MT=/App/WCM/main.nsf/vw_ByID/ID_C0B1D004B5A332B2C1257627003301E7_EN&OpenDocument=Y&LANG=EN&TG=BlankMaster&URL=/App/WCM/Aktualit.nsf/\(vw_ByID/ID_BA21566C7152549AC1257BDE003EF86D\)](http://www.foreign.gov.sk/servlet/content?MT=/App/WCM/main.nsf/vw_ByID/ID_C0B1D004B5A332B2C1257627003301E7_EN&OpenDocument=Y&LANG=EN&TG=BlankMaster&URL=/App/WCM/Aktualit.nsf/(vw_ByID/ID_BA21566C7152549AC1257BDE003EF86D)), accessed 18 September 2013.

The main task of the Slovak public institution (*Matica Slovenská*) is to strengthen patriotism among people and to support Slovak culture. In its 'open letter' to the Minister of Foreign Affairs, it strongly opposed the gender equality agenda in the draft Strategy. According to *Matica Slovenská*, promoting gender equality and gender ideology automatically results in discrimination against the traditional family and traditional education.

In addition, it is surprising that the Slovak National Centre for Human Rights, the equality body in Slovakia, has not taken any supportive standpoint on the draft Strategy in favour of strengthening the principle of gender equality. On the contrary, it has accentuated the strengthening of issues surrounding children, Roma and people with disabilities. This indicates that the Centre does not sufficiently fulfil 'gender equality body' role.

The preliminary draft strategy should initially have been submitted to the Government before the end of September. But because of the wave of criticism, the Minister wants to hold a broad discussion on this draft to try to find a compromise acceptable to the majority. Consequently, he has postponed its approval until next year.

Legislative developments

Proposal to amend four 'social' Acts

In July the Ministry of Labour and Social Affairs submitted a proposal for amendments to four 'social' Acts: Act on the Assistance Provided to Those in Need (*Zákon o hmotnej núdzi*), Act on Parental Benefit (*Zákon o rodičovskom príspevku*) Act on Child Birth Allowance (*Zákon o príspevku pri narodení dieťaťa*), and Act on Children's Allowance (*Zákon o prídavku na dieťa*). By adopting these amendments, the Ministry is trying to save public expenditure.

One of the proposals is to withdraw child allowance from families having many children. These benefits would be provided only to parents taking care of no more than three children. At present, all parents of dependent children (up to 25 years of age or until the end of study) are entitled to child benefits, regardless of the amount of income (the current amount of benefits is EUR 23.10 per month per child and they are paid to approximately 1.15 million parents). However, the conditions of payment are to be tightened up, e.g. it will be monitored whether children have actually started school, etc.

The liveliest discussion was stirred up by the draft Act on Parental Benefit t, which is expected to change the principle of provision of this benefit. It is proposed that the parental benefit should only be paid to those parents who decide to take care of their child themselves and therefore not carry out any gainful activity. From January 2014, parents would lose the option to receive this benefit and to work without limitation at the same time. As it is predominantly women who are the primary carers for children, it would be women who would be more adversely affected by this proposed change. At present, 140 000 persons receive this benefit, but it cannot be determined how many of them work. If the Act is adopted, a working mother will only be entitled to contribution for child care (i.e. for a child below three years of age). This will be paid to her to cover the amount that she needs to pay for nursery schools or a nanny, but not more than EUR 260 per month.

The Ministry believes that to work and simultaneously receive the parental benefit opposes the basic logic of the benefit, which should compensate for the income lost by taking care of a child. According to the draft Act, the payment of parental benefit itself should be modified. Those mothers who were working before childbirth and paid contributions to the sickness insurance scheme, will receive parental benefit of EUR 260 per month until their child reaches the age of two, and then EUR 160 until the child reaches the age of three. Uninsured mothers would be entitled to an allowance at a lower rate during the whole period of their maternity leave. At present both groups of mothers are entitled to a benefit of EUR 199.60, the justification being that it is a state benefit which is not paid on the basis of merit. The employment of a mother before childbirth is sufficiently taken into account in the maternity allowance (social endowment provided by Social Insurance Agency), which she receives in the first phase of childcare during maternity leave.

Case law of national courts

Discrimination against women in the field of employment

Based on available information from Janka Debrecéniová,²⁵⁶ the civic association Citizen, Democracy and Accountability (CDA) is providing full legal representation to two female claimants who allege sex discrimination in the field of employment. Both of the cases are now pending before second instance courts.

The first case (initiated in August 2009) is a case of a very highly qualified woman working in a sector dominated by men (forestry) and in a public institution (National Forestry Centre) directly accountable to the Ministry of Agriculture. After a man whom the claimant had replaced as a director-general of a department of the Ministry of Agriculture in the late 1990s became a director of the National Forestry Centre (in October 2008), a series of discriminatory acts towards the claimant started at the National Forestry Centre and resulted in the claimant's discriminatory dismissal (in March 2009). Although the claimant won the proceedings before the first instance court, that court avoided any discrimination-related reasoning in its judgment. Therefore, the claimant requested that the court should augment its judgment and adequately refer to the issue of discrimination which had been the dominant cause of the claimant's dismissal and which also represented the dominant share of the claimant's allegations and line of reasoning before the court. At the same time, the defendant appealed and the case is now to be decided by a second instance court.

The second case (initiated in August 2010) concerns a woman who had been employed by the Ministry of Interior in a unit of fire-fighter services, also dominated by men. The claimant became pregnant in a probationary period and was dismissed immediately 'without the reason being given' for the dismissal. Although the relevant Slovak legislation (valid at the time of the dismissal) enabled the Ministry to terminate employment in a probationary period 'without giving a reason', the Ministry ignored a directly effective provision of EU directives (Article 10 of Directive 92/85/EEC, and Article 2 Section 2(c) of Directive 2006/54/EC) prohibiting employers from terminating employment relationships with pregnant women, unless duly justified reasons for this termination connected to pregnancy exist and unless these reasons are provided in writing. Although the claimant won the case at first instance, the first instance court did not provide sufficient legal reasoning based on the relevant national, EU and international law relating to discrimination against women.

Equality body decisions/opinions

The Slovak National Centre for Human Rights

The Slovak National Centre for Human Rights (the Centre) was established in 1994 and its tasks were extended in accordance with the Antidiscrimination Act in 2004,²⁵⁷ when it started to fulfil the functions of an equality body. The functioning of the Centre in the last three years has been criticised not only by human rights NGOs but also by the Government Council for Human Rights, National Minorities and Gender Equality.²⁵⁸

The Centre is currently unable to ensure fully the real and effective fulfilment of functions in the areas of support and assurance of equal treatment and protection of human rights. It does not have a special division on gender equality with sufficient funding and gender equality experts.

²⁵⁶ Janka Debrecéniová is a lawyer at CDA www.odz.sk, providing legal representation in both of the cases. The text concerning the cases is an extract from her unpublished work and is published with her consent. CDA is an NGO which specialises in gender discrimination cases.

²⁵⁷ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on the amendment of certain Acts (Antidiscrimination Act).

²⁵⁸ In June 2011 the analytical report on the activities of the Centre noted, among other deficiencies, that the Centre did not have sufficient capacity in the area of equal treatment and only very few cases of discrimination have been brought to the courts by the Centre and not one has been successfully resolved. The suggestion was to transform the Centre into an Equality Body and transfer its competences in the area of human rights to the Public Defender of Rights (the Ombudsman). Due to the fall of the former Government, the transformation of the Centre was postponed.

Between 2012 and 2013, the Centre does not provide any information on its website on its activities, projects or publications. Information concerning experts working in the Centre and the members of advisory body is also not provided.²⁵⁹ During May, the Centre published on its website a report on the observance of human rights including the observance of the principle of equal treatment for the year 2012 (the report).²⁶⁰ A part of the report is devoted to discrimination concerning (a) workers human rights' abuses by foreign employers, and (b) protection of pregnant women from discrimination because of 'chain pregnancies' (a literal translation by which the Centre describes pregnancies that follow each other without a break in between) and temporary compensatory measures. However, the report only contains a summary of legislation in force and very formal recommendations. It is in any case not clear why only these two problems were selected.

In the period under review the Centre did not hand down any decision or opinion. It did not publish on its website its critical opinion on the strategy (mentioned above), and in particular any recommendations for its completion. It notifies the results of the survey implemented by the EU Agency for Fundamental Rights (FRA) concerning the LGBTI community in the EU, but it did not take a supportive standpoint on the inclusion of this issue and the issue of gender equality in the strategy.

Miscellaneous

*Concluding observation of the UN Committee on Economic, Social and Cultural Rights*²⁶¹

In July 2013 the Government dealt with the Concluding observation of the UN Committee on Economic, Social and Cultural Rights (CESCR) to the second periodical report of Slovakia on the implementation of the International Covenant on Economic, Social and Cultural Rights.

The CESCR is worried by the pay gap between men and women, who carry out the same work, which is increasing very quickly. It therefore recommended that Slovakia steps up its efforts in this area, in particular through the effective application of existing laws, including the Labour Code and the Antidiscrimination Act, by increasing the number of audits, and by imposition of sanctions. The Committee also expressed concern over the high unemployment rate of women, and recommended that Slovakia increases its efforts to remedy this situation. The Committee is also worried about the persistent inequality between men and women, as regards their representation at different levels in the public sector, in bodies with decision-making powers and in political parties, and recommended the adoption of appropriate measures and the introduction of effective surveillance mechanisms. The Committee requested that Slovakia provides, in its next periodic report, detailed information on any Government policies, programmes and measures adopted to contribute to the effective implementation of the legislation on equality between men and women, including the representation of women at the various levels of Government and public administration.

SLOVENIA – Tanja Koderman Sever

Policy developments

Activities of the Ministry of Labour, Family and Social Affairs

The Ministry of Labour, Family and Social Affairs prepared a draft of the Parental Protection and Family Benefits Act. This newly proposed law aims to enhance equal opportunities for men and women in the labour market by encouraging more fathers to take paternity and parental leave. Its entry into force is scheduled for the year 2014. The main reason for its adoption is the implementation of the EU *acquis* in Slovenian legislation. According to the

²⁵⁹ www.snsfp.sk, accessed 18 September 2013.

²⁶⁰ The Centre publishes yearly a report on the observance of human rights and also a report on the observance of the rights of the child. www.snsfp.sk, accessed 18 September 2013.

²⁶¹ UN Doc. [E/C.12/SVK/2](http://www.unhcr.org/refugees/doc/E/C.12/SVK/2), 30 April-19 May 2012.

Ministry, parental care and parental leave play an important role in reducing inequalities between women and men in the labour market since they allow women to remain active in the labour market after giving birth. In addition, the Ministry aims to promote a more equal distribution of obligations and care responsibilities between women and men. The proposal introduces the terms 'maternity leave' and 'parental leave'.²⁶² According to the Bill, the maternity leave of 105 days can only benefit the mother, 260 days of parental leave is shared between the mother and the father, and 30 days of this parental leave is non-transferable for each parent. The Bill has gone through the process of a one-month public consultation. In response, more than 50 comments were received, mainly opposing the measure of 30 days of non-transferable parental leave for fathers. Opponents argued that this measure reduces the existing right, including its flexibility, and therefore prevents parents from choosing how to exercise their rights to parental leave.

Activities of the Advocate of the Principle of Equality

The Advocate of the Principle of Equality, formerly a specialised body for the prevention and elimination of discrimination within the Office for Equal Opportunities, now works as one of the employees at the Ministry of Labour, Family and Social Affairs following the abolishment of the Office for Equal Opportunities. The Advocate is no longer independent, and receives no special budget for his work, activities, or projects. The Ministry of Labour, Family and Social Affairs covers his salary.

The Advocate reacted to comments of employers' representatives who stated that the draft of the Parental Protection and Family Benefits Act regarding non-transferable 30 days parental leave for fathers did not present the right solutions. The Advocate was appalled when finding that employers perceive 'responsible' parenthood of workers as problematic. In his view, some of the objections against the proposal of legislative changes regarding the non-transferable 30 days of parental leave for fathers emphasise the importance of soft measures, such as awareness-raising among fathers and employers.

At the International Women's Day the Advocate repeated his concern that obvious problems regarding discrimination are underestimated. In his opinion strong mechanisms to prevent and eliminate discrimination must be guaranteed, in particular regarding the implementation of effective legal remedies. He underlined that such mechanisms in Slovenia do not exist or are ineffective. Finally, he again emphasised the need to establish an independent specialised body for protection against discrimination in accordance with EU legislation.

Ombudsman activities

The Human Rights Ombudsman submitted their Annual Report for 2012 to the National Assembly. The Ombudsman pointed out that the respect for human rights by a country in financial crisis is difficult. Nevertheless, compensation for the violation of rights is even more expensive. According to her, the crisis should not be used as an excuse for human rights violations.

Legislative developments

New labour law reform

The new labour market legislation, which consists of the Employment Relationships Act (hereinafter the ERA) and the amendments to the Labour Market Regulation Act, was adopted by the National Assembly at the beginning of March 2013, and entered into force on 12 April 2013. The main objectives of the reform are to reduce the gender segregation of the labour market and to increase its flexibility. The reform therefore restricts the conclusion of fixed-term contracts, and some violations, such as harassment and bullying and the failure to meet obligations regarding the adoption of general acts, have been newly defined as offences.

²⁶² The term *materinski dopust* replaced *porodniški dopust*; and the term *starševski dopust* replaced *posvojiteljski dopust* and *dopust za nego in varstvo otroka*. However, we have already used the same English terms before.

Law on Emergency Measures in the Field of Labour Market and Parental Care

The Law on Emergency Measures in the Field of Labour Market and Parental Care was adopted in July 2013 and entered into force on 1 August 2013. The new law provides incentives for employers to employ workers that are younger than 30. This might positively affect women, since the unemployment rate of women is higher than the unemployment rate of men. It negatively affects by introducing an upper limit of maternity allowance, paid by the State, which now cannot be higher than twice the monthly average salary in the Republic of Slovenia. Previously, there was no upper limit for maternity allowance.

Case law of national courts

Although gender discrimination is not so rare in Slovenia, victims of discrimination rarely decide to bring a gender equality case before court. This is why there has been no case law worth mentioning in the area of gender equality in the past six months.

One of the reasons may lie in the existing system of legal protection against discrimination which is not as effective as it should be. Legal remedies mainly exist on paper and are not effective, user-friendly or dissuasive. Furthermore, assistance to victims of discrimination is not independent or effective.

Equality body decisions/opinions

In this reporting period, no significant cases have been decided by the Advocate of the Principle of Equality nor have any opinions been issued by the Advocate in the area of gender equality.

Miscellaneous

Press release of the National Statistical Office

According to the data of the National Statistical Office on structural statistics on earnings,²⁶³ women in Slovenia earn less than men, although they are better educated. Women with lower education on average earned 13.5 % less than their male colleagues, women with secondary school education on average 10.6 % less than their male colleagues and women with higher education on average 18.4 % less than their male colleagues. In addition, women are underrepresented in decision-making positions in the area of economy. In December 2012, only 26 % of members of the management in large and medium-sized enterprises were women.

SPAIN – María Amparo Ballester Pastor

Policy developments

On 5 April 2013 the Council of Ministers adopted the II National Strategic Plan for children and adolescents (2013-2016).²⁶⁴ Within the objective of supporting families, the National Strategy proposes measures to improve the availability of infant schools during the working day of the parents. In addition, the National Strategy reinforces the monitoring of companies' compliance with parental leaves and other working parents' rights.

On 26 July 2013 the Council of Ministers approved the National Strategy for the eradication of violence against women (2013-2016).²⁶⁵ It contains around 260 measures

²⁶³ *Strukturna statistika plač*, Slovenija, 2011, available at https://www.stat.si/novica_prikazi.aspx?id=5007, accessed 16 January 2014.

²⁶⁴ II National Strategic Plan for children and adolescents (2013-2016), http://www.observatoriodelainfancia.msssi.gob.es/documentos/PENIA_2013-2016.pdf, accessed 2 September 2013.

²⁶⁵ National Strategy for the eradication of violence against women http://www.lamoncloa.gob.es/ConsejodeMinistros/Referencias/_2013/refc20130726#Mujeres, accessed 3 September 2013.

aimed to increase the efficiency of the fight against gender violence. The budgetary allocation is EUR 1.5 billion. Its objectives are the following: a) to prevent and to educate: the cooperation of the media is considered essential; b) to improve the victim's assistance and protection: the monitoring will be strengthened of prisoners convicted of gender-based violence when they benefit from prison leave, and the manipulation of electronic bracelets will be punished; c) to give special attention to vulnerable groups: the Government will change the current law of gender violence to include children as victims of gender-based violence; and d) to incorporate other forms of gender-based violence: the new Penal Code will criminalise forced marriages and a specific protocol will be developed to fight female genital mutilation.

Legislative developments

Legal implementation of the Test-Achats ruling

In *Test-Achats*²⁶⁶ the CJEU declared Article 5.2 of Directive 2004/113/EC invalid with effect from 21 December 2012. The Court of Justice considered that by enabling Member States to maintain without temporal limitation an exemption from the unisex rule laid down in Article 5.1, Article 5.2 runs counter to achieving the objective of equal treatment between men and women in relation to the calculation of insurance premiums and benefits, which is the purpose of Directive 2003/114/EC as defined by the legislature in the insurance field, and is therefore incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union.²⁶⁷ With the objective to implement this CJEU ruling, a new piece of legislation has been approved in Spain. Final Provision 14 of Law 11/2013 of 26 July (*Disposición Final 14 de la Ley 11/2013*)²⁶⁸ modifies the consolidated text of the Law on Management and Supervision of Private Insurance, approved by Royal Legislative Decree 6/2004 of October 29 2004, adding a new twelfth additional provision with the following wording: 'Equality of treatment between women and men. Within the scope of Directive 2004/113/EC, of the Council of 13 December 2004, concerning the application of the principle of equality of treatment between women and men in the access to and supply of goods and services, no differences may be established, in the calculation of the rates of insurance contracts, between women and men in the premiums and benefits for insured persons, if they consider sex as a factor of calculation.'

Legal implementation of the Elbal Moreno ruling

In its ruling in *Elbal Moreno*²⁶⁹ the CJEU established that the requirements stipulated in Spanish legislation for part-time workers' access to a retirement pension were contrary to Article 4 of Directive 79/7/EEC.²⁷⁰ For part-time workers it was previously established that five hours of work were equivalent to a day of work (Additional Provision 7 of the General Law of Social Security (*Disposición Adicional 7 de la Ley General de Seguridad Social*)). This system made it difficult to obtain access to a pension for part-time workers who worked a few hours a day, a week or a month, since fifteen years of work were the minimum required in the Spanish social security system. The same issue was also raised in the Spanish Constitutional Court, which also ruled that this legal provision constituted indirect discrimination on grounds of sex.²⁷¹ The main issue of the debate was how the Spanish

²⁶⁶ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

²⁶⁷ Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of *Test-Achats*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:011:0001:0011:EN:PDF>, accessed 3 September 2013.

²⁶⁸ Additional Provision 12 of Law 11/2013, <http://www.boe.es/boe/dias/2013/07/27/pdfs/BOE-A-2013-8187.pdf>, accessed 3 September 2013.

²⁶⁹ Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] n.y.r.

²⁷⁰ OJ L 6/24 of 19 December 1978, p. 2.

²⁷¹ Constitutional Court decision 61/2013 of 14 March 2013, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23370>, accessed 4 September 2013.

requirements for pensions should be reformed to correct the adverse effect that it has on part-time workers. The question was of great significance because the latest social security reforms in Spain have resulted in a general reduction in benefits and the legislative change demanded by the CJEU and the Spanish Constitutional Court would result in an increase in the number of persons who have access to retirement benefits. Royal Legislative Decree 11/2013 of 2 August 2013 has modified Additional Provision 7 of the General Law on Social Security, establishing that the minimum time of work required in order to have access to pensions has to be reduced proportionately depending on the duration of the working day of the part-time worker. From now on the minimum working time required for part-time workers to obtain access to a retirement pension will depend on a new concept called part-time ratio coefficient (*coeficiente de parcialidad*), which measures the proportion of working time of a part-time worker in relation to a full-time comparable worker. The minimum working time required for pensions will be reduced according to this coefficient.

Case law of national courts

The decision of the Supreme Court of 25 January 2013²⁷² settled an issue related to the dismissal of a woman who had passed from a full-time contract to a part-time contract for family care reasons (this right is regulated in Article 37.5 of the Workers Statute). In another Judgment, 92/2008 of 21 July 2008, the Constitutional Court had already ruled that all unfair dismissals that happened in the situations established in Article 108 of the Act regulating social jurisdiction, Law 36/2011 of 10 October 2011 (pregnancy, maternity leave and parental leaves) had to be considered null and void, irrespective of the actual intention (discriminatory or not) of the employer. The Constitutional Court argued that Article 108 of the Act regulating social jurisdiction, Law 36/2011 of 10 October 2011, was not intended to penalise discriminatory behaviours but rather to apply automatic consequences to certain situations related to maternity and family care as a mechanism of positive action. The same issue arose in the decision of the Supreme Court that recently gave rise to the Judgment of the Supreme Court of 25 January 2013, given that the employer of the female worker who had been dismissed when she had passed from a full-time contract to a part-time contract for family care reasons argued that, even though the dismissal did not have a fair cause, he did not act for discriminatory reasons. The Supreme Court applied the same argumentation given by the Constitutional Court before and ruled that the dismissal had to be considered null and void.

SWEDEN – Ann Numhauser-Henning

Case law of national courts

There are two significant cases to report in the area of sex discrimination dating from the last six months.

The first case is Labour Court 2013 No. 29. This case was brought by a salesperson in a retail store selling ladies' underwear. Salespersons were required to wear a sign with their name and bra cup size on every occasion. The claimant alleged that this amounted to (1) harassment on the grounds of sex, alternatively, (2) sexual harassment or (3) direct discrimination according to the Discrimination Act.²⁷³ The argument concerning direct discrimination was that only women have breasts and wear a bra – compare the CJEU's judgment in the Dekker case.²⁷⁴ The employer denied all types of discrimination and argued that the requirement was justified as valid factual information to assist female customers in choosing a bra. The Labour Court did not agree and found the requirement to amount to

²⁷² Appeal number 1144/2012 (*recurso 1144/2012*).

²⁷³ 2008:567.

²⁷⁴ Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941.

harassment on the grounds of sex: it was proven that the requirement made the claimant uncomfortable and that this was known to the employer, it was regarded as very personal information and as by no means justified by objective reasons, meaning that the claimant's dignity had thus been violated. Indemnification was set at EUR 5 800 (SEK 50 000).

This is an example of what can be regarded as harassment on the grounds of sex, whereas previously cases regarding this type of issue were mostly found to concern sexual harassment.

The second case is Labour Court 2013 No. 64 and concerned alleged pay discrimination on the grounds of sex. It was presented by the trade union 'Vision' was about the question whether a female employee at a Nursing Institution dealing with the treatment of small children and their parents (*behandlingssekreterare*) was discriminated against on grounds of gender when receiving less pay than a recently employed male colleague. The work performed by the two employees at stake was claimed to be 'equal or of equal value'. The employer did not agree but there was no systemic job evaluation presented since their tasks evidently were very similar. The assessment concentrated on one particular skill of the man (knowledge regarding a special method of investigation) claimed to be of special value by the employer. The Court came to the conclusion that the two were in a comparable situation and that the work was 'equal or of equal value', resulting in a *prima facie* case of pay discrimination. The employer did, however, justify the pay differences by the specific value of the male employee due to his special skills and no discrimination was found to be present.

Court proceedings do not formally rely on any special job evaluation system. However, in the proceedings of individual cases the parties present their arguments (and witnesses, and experts, and so on) before the Labour Court, and the Court itself interprets these arguments. This case is interesting since cases regarding pay discrimination are very scarce in Sweden. After Labour Court 2001 No. 76, there had been no further case law on these issues until this case was delivered on 21 August 2013. The 2013 case is yet another example where the Labour Court finds that the claimant has shown the jobs compared to be of equal value, but ends up concluding that despite this fact, no pay discrimination had occurred.

TURKEY – Nurhan Süral

Policy developments

Democratisation package

A new democratisation package was introduced on 30 September 2013 presenting a number of reforms on issues regarding political rights, such as election thresholds, party organisation, and propaganda in non-Turkish languages. Measures of interest to gender issues included the confirmation of the establishment of an Anti-Discrimination and Equality Board, the removal of legal barriers for women with headscarves to take up public posts, the intention to increase penalties for hate crimes, and the intention to criminalise illegal force and intervention in personal life styles.

Reconciliation of work and family responsibilities package

Demographic ageing is accelerating. The combination of a smaller working population and a larger share of retired people will cause additional strains on the welfare systems. According to the Turkish Statistical Institute Population Projections 2013-2075, of February 2013,²⁷⁵ the proportion of the elderly population as a part of the total population will increase to 10.2 % in 2023, and will be 20.8 % in 2050 and 27.7 % in 2075, respectively. The Government wants to encourage women to have more children. Therefore, the Ministry of Labour and Social Security is working on a package to improve the reconciliation of work and family responsibilities for working women.

²⁷⁵ <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=15844>, accessed 8 October 2013.

Legislative developments

Removal of legal barriers for women with headscarves to take up public posts

Following the democratisation package of 30 September 2013, the quite detailed By-Law on the Garments of Public Personnel²⁷⁶ issued by the military Government following the 12 September 1980 military takeover was amended on 8 October 2013.²⁷⁷ With this amendment, women with headscarves may hold public offices. Those who have to wear formal suits (uniforms), military personnel, police officers and judges and prosecutors, are excluded. For the excluded public services, the issue is left to the discretion of these organisations as the headscarf ban is a result of their own internal regulations/practices.

On 19 August 2013, the Ombudsman's office, on a complaint filed by a female civil servant warned not to wear a headscarf at work, concluded that the headscarf ban was against human rights, the principle of equality, freedom of religion and conscience, freedom of employment contracts, the understanding of justice, the law, the principles of good governance, the Constitution and international agreements, and decided to recommend the Government to remove the ban.²⁷⁸

The CEDAW Committee asked Turkey to evaluate and provide more information on the impact of the headscarf ban in the fields of education, employment and health, together with political and public measures taken to eliminate any discriminatory consequences of the ban.²⁷⁹

Law No. 6495 calls back civil servants dismissed after 28 February 1997 on the basis of disciplinary proceedings.²⁸⁰ If they have not lost qualifications for entry into public offices, they may apply within a period of three months to be reappointed to befitting positions (Article 43). 28 February 1997 is the date of the so-called 'post-modern coup d'état' following which a large number of civil servants wearing a headscarf were dismissed.

New regulation on land registry

The term 'conjugal home' was used for the first time in Article 194 of the 2001 Civil Code.²⁸¹ If the conjugal home is owned by one of the spouses, the other spouse may apply to the land registry to have it defined as conjugal home so that it must not be sold without his/her consent. This was practised easily until an injunction order was issued by the 10th Chamber of the Council of State on 13 June 2011, following which the Land Registry started requiring a court decision to define the common domicile as conjugal home. The Grand Administrative Chamber of the Council of State²⁸² annulled this injunction order on 12 November 2012 and notified the applicant on 18 March 2013. On the same date, the Directorate of Land Registry²⁸³ issued an online notice stating that a court order will no longer be required.²⁸⁴

The new Land Registry Regulation became effective on 17 August 2013.²⁸⁵ The Regulation follows the Civil Code and the online notice, specifying the procedure to have a home defined as a conjugal home. To achieve this, it will suffice to submit a copy of the civil status ID²⁸⁶ together with a domicile instrument (certificate),²⁸⁷ to be obtained from the central/local directorates of civil registration and nationality (Articles 17/2, 49c).

²⁷⁶ *Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelik*, Official Gazette, 25 October 1982, No. 17849.

²⁷⁷ Official Gazette, 8 October 2013, No. 28789.

²⁷⁸ *Kamu Denetçiliği Kurumundan memurlar için başörtüsü çıkışı*, Star, daily newspaper, 21 August 2013.

²⁷⁹ <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.TUR.CO.6.Add.1.pdf>, accessed 20 March 2013.

²⁸⁰ Law Amending a Number of Laws and Statutory Decrees (*Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), Law No. 6495, Official Gazette 2 August 2013, No. 28726.

²⁸¹ *Türk Medeni Kanunu*, Law No. 4721, Official Gazette 22 November 2001, No. 24607.

²⁸² *Danıştay İdari Dava Daireleri Kurulu*.

²⁸³ *Çevre ve Şehircilik Bakanlığı Tapu ve Kadastro Genel Müdürlüğü Tapu Dairesi Başkanlığı*.

²⁸⁴ <http://www.istanbulbarosu.org.tr/images/haberler/23294678-010.pdf>, accessed 8 October 2013.

²⁸⁵ *Tapu Sicili Tüzüğü*, Official Gazette 17 August 2013, No. 28738.

²⁸⁶ In Turkish: *Medeni hâli gösterir nüfus kayıt örneği*.

²⁸⁷ In Turkish: *Yerleşim yeri belgesi*.

New regulations on prohibition of night work

Article 101/2 of the Civil Servants Law states that a female civil servant can perform night work until the 24th week of her pregnancy unless she presents a medical certificate stating otherwise.²⁸⁸ For the period between the 24th week of pregnancy and one year following the delivery there was an absolute prohibition of night work. Law No. 6495²⁸⁹ extends this one-year period to two years.

There has been a change as regards the prohibition of night work for female workers. According to the new By-Law²⁹⁰ on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, 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 a one-year period (previously six months) following delivery 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 one-year night work prohibition may be extended based on a medical certificate (Article 8).

New By-Law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries

A new By-Law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries²⁹¹ became effective on 16 August 2013. As the former one,²⁹² it draws on Directive 92/85/EEC especially as regards the part on risks related to chemical, physical and biological agents, to certain industrial processes, to certain movements and postures and to physical and mental stress, pregnancy accommodation, and definitions given of a 'pregnant worker', a 'worker who has recently given birth,' and a 'breastfeeding worker'. However, unlike the former By-Law, it has been issued on the basis of Article 30 of the Law on Occupational Health and Safety, not the Labour Law.²⁹³

The new By-Law can be summarised as follows:

- It provides for provisional measures to protect pregnant workers and workers who have recently given birth or are breastfeeding against risks, and includes an outright ban on their exposure to certain chemical, physical and biological agents (listed in Annexes). These agents are defined in the By-Law on Health and Safety Measures for Works with Chemicals²⁹⁴ that draws on Directives 1998/24/EC, 1991/322/EEC, 2000/39/EC, 2006/15/EC, and 2009/161/EU;
- A pregnant or a nursing worker cannot be obliged to work for more than 7.5 hours a day (Article 9);
- Employers employing 100-150 female workers have to establish a nursing room located at most 250 metres away from the workplace, for female workers to nurse their children below the age of one. Employers employing more than 150 female workers have to establish a nursing room and a day nursery (crèche) for children between 0-60 months old. Children of 60-66 months old may also be cared for in these facilities if their parents consider it too early to enrol them for primary education.²⁹⁵ The number of male workers with custody over children as a result of their wife's death or a divorce has to be added to

²⁸⁸ *Devlet Memurları Kanunu*, Law No. 657, Official Gazette 23 July 1965, No. 12056.

²⁸⁹ Law Amending a Number of Laws and Statutory Decrees (*Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), Law No. 6495, Official Gazette 2 August 2013, No. 28726.

²⁹⁰ A by-law is an implementing legal instrument.

²⁹¹ *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette 16 August 2013, No. 28737.

²⁹² *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette 14 July 2004, No. 25522.

²⁹³ *İş Sağlığı ve Güvenliği Kanunu*, Law No. 6331, Official Gazette 30 June 2012, No. 28339.

²⁹⁴ *Kimyasal Maddelerle Çalışmalarda Sağlık ve Güvenlik Önlemleri Hakkında Yönetmelik*, Official Gazette 12 August 2013, No. 28733.

²⁹⁵ Enrolment of 66-month-olds for primary education is obligatory, but enrolment of 60 to 66-month-olds is optional.

- the figures necessitating the establishment of nursing rooms and day nurseries. Employers may cooperate to establish a common nursing room and/or day nurseries. Outsourcing (agreements with nurseries authorised by public authorities) is also possible for the provision of such services. If the day nursery is more than 250 metres away from the workplace, the employer is to provide transport services (Articles 13 and 14); and
- Nursing rooms and day nurseries have to be under the medical surveillance of the workplace physician. The criteria regarding physical environment, qualifications of the personnel, meals to be served, education, and notification of the local labour offices of these facilities are specified in great detail (Articles 15-23).

UNITED KINGDOM – Aileen McColgan

Policy developments

On 6 September 2013 the Coalition Government published the outcome of the review of the Public Sector Equality Duty (PSED) announced in May 2012. The PSED requires public authorities to pay ‘due regard’ to the need to eliminate discrimination, promote equality and foster good relations between people of different groups defined by reference to ‘protected characteristics’.²⁹⁶

Concern had been expressed by many equality advocates that the review had been announced, the worry being that the Government might be intending to repeal this duty. The review did not propose repeal, concluding instead that the PSED should be subject to a full review in 2016 (when it will have been in force for five years).²⁹⁷ The review did recommend, however, that ‘the Government should consider whether there are quicker and more cost-effective ways of reconciling disputes relating to the PSED’ than by way of Judicial Review (JR).

This is a matter for real concern given the assault which has been launched by the Coalition Government on JR (a core mechanism by which the legality of public body decision making is policed). Having already tightened the rules for some types of judicial review and proposed significant reductions to the level of public funding available for judicial review, on 6 September 2013 the Government announced a public consultation on further changes which, specifically in relation to the PSED, asks for suggestions of methods other than judicial review by which the duty could be enforced.²⁹⁸ The tone of the consultation suggests that JR is regarded as a disproportionate tool for the enforcement of what appears to be regarded as a relatively technical matter (compliance with the PSED).

Legislative developments

The Equality Act 2010 was amended in September 2013 to remove the provisions on third-party harassment from Section 40 of the Act. The Enterprise and Regulatory Reform Act 2013 (Commencement No. 3, Transitional Provisions and Savings) Order 2013²⁹⁹ brought into force Section 65 of the Enterprise and Regulatory Reform Act 2013, which amends Section 40 of the Equality Act 2010. The change will take effect in relation to harassment taking place after 30 September 2013. Prior to amendment, Section 40 allowed an employer to be held responsible for harassment of its staff by third parties (e.g. customers or contractors) where the harassment had happened at least twice, the employer knew about it and had not taken reasonable steps to prevent it. This was regarded by the Coalition Government as imposing undue burdens on business.

²⁹⁶ Section 149 of the Equality Act 2010.

²⁹⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf, accessed 3 October 2013.

²⁹⁸ <https://consult.justice.gov.uk/digital-communications/judicial-review>, accessed 3 October 2013.

²⁹⁹ SI 2013/2227.

The implementation of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 from 29 July 2013 has had the effect that tribunal fees are now payable by claimants. The rules require the payment of EUR 300 to submit a discrimination claim and a further EUR 1120 prior to hearing by an Employment Tribunal, with fees of EUR 475 and EUR 1420 to lodge and pursue an appeal to the Employment Appeal Tribunal. Some people on very low incomes will be exempt from the obligation to pay fees, but most claimants will be required to meet them as a condition of the claim. In a separate consultation on a reform of remission rules it has been proposed that court fees of up to EUR 1180 will be remitted if a person's disposable capital does not exceed EUR 3500 and their disposable income (in the case of a single childless adult) EUR 1280 per month, whereas fees will be between 1180 EUR and 4725 EUR if the claimant's capital does not exceed 9 500 EUR, with the same limits for disposable income. The trade union UNISON has applied to the High Court for judicial review of the measure, arguing that it will make it 'virtually impossible' for workers to exercise their employment rights.

Case law of national courts

In *North & Ors v Dumfries and Galloway Council*³⁰⁰ the Supreme Court considered the proper scope of comparators in equal pay claims, most such claims requiring an actual comparator. The Equality Act provides that a claimant may use as her/his comparator an employee (of the opposite sex) who is employed by the employer or an associated employer at the same establishment or at an establishment at which 'common terms and conditions of employment are observed either generally or for employees of the relevant classes'. In *North* the Supreme Court ruled that, where claimants seek to rely on comparators employed at a different establishment, the legislation does not require there to be a 'real possibility' of the comparators doing the same, or broadly similar, jobs at the claimants' place of work.

The claimants were employed by the local authority at schools as classroom assistants, learning assistants and nursery nurses while their comparators were employed by the authority elsewhere as road workers, groundsmen, refuse collectors, refuse lorry drivers and a leisure attendant. The men's terms and conditions were set by the Green Book, the collective agreement for manual workers, while the women's were set by a collective agreement known as the Blue Book. The tribunal was satisfied that, had the men been employed in the women's establishments, their terms and conditions would have been controlled by the Green Book, and that they were suitable comparators (subject to the establishment of equal value with the claimants' jobs) regardless of the fact that there was no 'real possibility' that the men could be employed at the claimants' establishment to do the same or broadly similar jobs to the ones they did at their current place of work. The Supreme Court further held that, had they taken the view that domestic legislation required such a possibility, the relevant provision would have to have been disapplied to achieve conformity with EU law (in particular, the decision in *Lawrence v Regent Office Care Ltd*³⁰¹).

The other important case law developments have related to victimisation. There are now contradictory decisions of the domestic courts on whether the Equality Act 2010 provides a remedy for victimisation which took place after the termination of the employment relationship. In *Rowstock Ltd v Jessemey*,³⁰² the EAT ruled that it did not. In *Onu v Akwiwu*,³⁰³ a differently constituted EAT ruled that post-employment victimisation is regulated by the Equality Act 2010, reasoning that the drafters of the Act must have been familiar with the earlier case law which prohibited such victimisation, and that the failure of the drafters explicitly to exclude it from the Act must be taken to mean that it was included. Further, even if that had not been the case, an EU-law compatible construction would have

³⁰⁰ [2013] IRLR 737.

³⁰¹ [2003] ICR 1092.

³⁰² [2013] IRLR 439.

³⁰³ [2013] IRLR 523.

achieved the same end. The EAT in *Onu* granted permission to appeal to the Court of Appeal in this case and the appeal ought to be heard before January 2014.

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