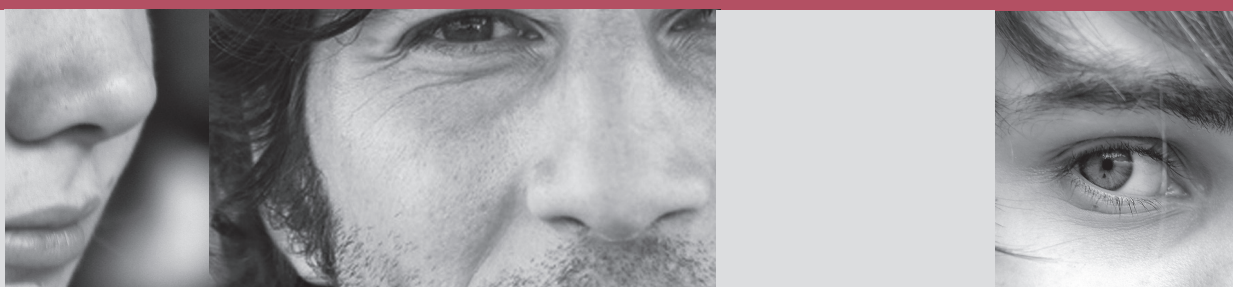




EUROPEAN NETWORK OF LEGAL EXPERTS  
IN THE FIELD OF GENDER EQUALITY



# Sex Discrimination

in Relation to

## Part-Time and Fixed-Term Work

The application of EU and national law  
in practice in 33 European countries



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in 33 European countries

Susanne Burri and Helga Aune

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# Table of Contents

Members of the European Network of Legal Experts in the Field of Gender Equality	vi
<b>Part I</b>	
<b>Executive Summary</b>	1
<i>Susanne Burri</i>	
<b>1. Introduction</b>	1
<b>2. The legislative context of EU law</b>	2
2.1. Treaties and Charter of Fundamental Rights	3
2.2. Directives	3
2.2.1. <i>The Recast Directive</i>	3
2.2.2. <i>The Statutory Social Security Directive</i>	4
2.2.3. <i>The Goods and Services Directive</i>	4
2.2.4. <i>The Part-Time Work Directive</i>	4
2.2.5. <i>The Fixed-Term Work Directive</i>	4
2.3. Soft law	4
2.3.1. <i>Reconciliation of work, private and family life</i>	4
2.3.2. <i>Childcare</i>	5
2.4. Indirect sex discrimination in EU law	5
2.5. Equal treatment of part-time workers and fixed-term workers	7
<b>3. Aims and scope of the national reports</b>	7
<b>4. Part-time work</b>	8
4.1. Definitions of part-time work	8
4.2. General contexts	9
4.2.1. <i>Diversity</i>	9
4.2.2. <i>Problems related to part-time work</i>	9
4.2.3. <i>Impact of part-time work on the gender pay gap</i>	10
4.3. National policies and national collective agreements	10
4.4. CEDAW's obligation to combat stereotypes	11
4.5. National legislation on equal treatment of part-time workers	11
4.5.1. <i>Personal scope and legal definitions of a part-time worker</i>	12
4.5.2. <i>The principle of non-discrimination</i>	14
4.6. Organisation of working time	16
4.6.1. <i>Adjustment of working time in national law</i>	17
4.6.2. <i>Part-time work facilitated for specific groups or situations in national law</i>	18
4.6.3. <i>Influence of workers on working hours in national law</i>	19
4.6.4. <i>Court appeal</i>	20
4.6.5. <i>Collective agreements</i>	20

4.7. Case law and opinions of equality bodies	21
4.8. Involvement of other parties	22
4.9. Statutory social security and pension rights	22
4.9.1. Exclusions of part-time workers in statutory social security schemes	22
4.9.2. Statutory pension rights	23
4.9.3. Unemployment benefits	24
4.10. Self-employment	24
4.11. Access to and supply of goods and services	25
4.12. Gaps in national law	25
4.12.1. Recruitment process	25
4.12.2. Employment conditions and termination of employment	25
<b>5. Fixed-term work</b>	26
5.1. General context	26
5.2. National policies	26
5.3. The Framework Agreement on fixed-term work	26
5.4. National legislation on equal treatment of fixed-term workers	28
5.5. Pregnancy and maternity discrimination	28
5.6. Successive fixed-term contracts	30
<b>6. Effectiveness</b>	31
<b>7. Vulnerable groups</b>	32
<b>8. Conclusions</b>	33
8.1. Sex discrimination in relation to part-time work	33
8.1.1. Equal treatment	33
8.1.2. Organisation of working time	34
8.1.3. Statutory social security and pensions	34
8.2. Fixed-term contracts	34

## Part II

### National Law: Reports from the Experts of the Member States, EEA Countries, FYR of Macedonia and Turkey

<b>AUSTRIA</b>	<i>Neda Bei</i>	37
<b>BELGIUM</b>	<i>Jean Jacqmain</i>	49
<b>BULGARIA</b>	<i>Genoveva Tisheva</i>	59
<b>CROATIA</b>	<i>Nada Bodiřoga-Vukobrat</i>	65
<b>CYPRUS</b>	<i>Lia Efstratiou-Georgiades</i>	75
<b>CZECH REPUBLIC</b>	<i>Kristina Koldinská</i>	84
<b>DENMARK</b>	<i>Ruth Nielsen</i>	91
<b>ESTONIA</b>	<i>Anu Laas</i>	99
<b>FINLAND</b>	<i>Kevät Nousiainen</i>	109
<b>FRANCE</b>	<i>Sylvaine Laulom</i>	120

<b>GERMANY</b>	<i>Ulrike Lembke</i>	128
<b>GREECE</b>	<i>Sophia Koukoulis-Spiliotopoulos</i>	145
<b>HUNGARY</b>	<i>Beáta Nacsa</i>	156
<b>ICELAND</b>	<i>Herdís Thorgeirsdóttir</i>	166
<b>IRELAND</b>	<i>Frances Meenan</i>	177
<b>ITALY</b>	<i>Simonetta Renga</i>	188
<b>LATVIA</b>	<i>Kristīne Dupate</i>	200
<b>LIECHTENSTEIN</b>	<i>Nicole Mathé</i>	210
<b>LITHUANIA</b>	<i>Tomas Davulis</i>	214
<b>LUXEMBOURG</b>	<i>Anik Raskin</i>	223
<b>FYR of MACEDONIA</b>	<i>Mirjana Najcevska</i>	228
<b>MALTA</b>	<i>Peter G. Xuereb</i>	239
<b>THE NETHERLANDS</b>	<i>Rikki Holtmaat</i>	246
<b>NORWAY</b>	<i>Helga Aune</i>	257
<b>POLAND</b>	<i>Eleonora Zielińska</i>	269
<b>PORTUGAL</b>	<i>Maria do Rosário Palma Ramalho</i>	280
<b>ROMANIA</b>	<i>Iustina Ionescu</i>	290
<b>SLOVAKIA</b>	<i>Zuzana Magurová</i>	300
<b>SLOVENIA</b>	<i>Tanja Koderman Sever</i>	309
<b>SPAIN</b>	<i>María Amparo Ballester Pastor</i>	317
<b>SWEDEN</b>	<i>Ann Numhauser-Henning</i>	326
<b>TURKEY</b>	<i>Nurhan Süral</i>	334
<b>UNITED KINGDOM</b>	<i>Aileen McColgan</i>	342
 <b>Annex 1</b>		
<b>Questionnaire</b>		351
 <b>Annex II</b>		
<b>Bibliography</b>		363

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# Part I

## Executive Summary

Susanne Burri\*

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### 1. Introduction

This thematic report of the European Commission's European Network of Legal Experts in the Field of Gender Equality addresses equality issues faced by part-time and fixed-term workers in the 33 countries participating in this Network: the 28 Member States, the EEA countries Iceland, Liechtenstein and Norway; and the FYR of Macedonia and Turkey. The report provides an analysis and assessment of existing gender equality legislation and case law in relation to part-time and fixed-term work, both at EU and at national level.

Disadvantages related to part-time work and/or fixed-term work might amount to forms of indirect sex discrimination, when significantly more women than men work on such employment contracts. Part-time work is more common in Northern than in Southern or Eastern European countries of the EU. In all 33 countries analysed in this report, the share of female part-time employment is higher than the share of male part-time employment.<sup>1</sup> The predominance of women in part-time work is often explained by gender stereotypes related to family responsibilities, but is also linked to gender segregation in employment, in particular in the educational and health sectors. Part-time work is therefore closely related to gender equality issues, for example in relation to pay and the building up of pensions. According to a recent report published by the European Commission - *The Gender Gap in Pensions in the EU* - the pension gap in the EU-27 Member States is on average 39 %. Part-time employment and career interruptions contribute to this gap, making it twice as high as the gender pay gap.<sup>2</sup> The (unadjusted) gender pay gap per hour is on average 16.2 % in the EU; and even 31 % per year, given the high percentage of female part-timers.<sup>3</sup>

Even if women are overrepresented in part-time jobs in all 33 countries, there still are important differences between these countries. According to the most recent available Eurostat statistics on the labour market and labour force, part-time employment as a share of total employment (of respectively men and women) is steadily increasing in the 27 Member States<sup>4</sup> and amounted to 19.2 % of total employment in 2012.<sup>5</sup> On average, one third of women (32.1 %) who worked, did this on a part-time basis compared to less than one out of

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<sup>1</sup> Eurostat, M. Teichgraber, 'European Union Labour Force Survey - annual results 2012. Statistics in focus 14/2013', available on: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Labour\\_market\\_and\\_labour\\_force\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_market_and_labour_force_statistics), accessed 14 June 2013. Note that the statistics provided in the national reports might be different from statistics provided by Eurostat; this may be due to different definitions of part-time work.

<sup>2</sup> ENEGE, F. Bettio et al. *The Gender Gap in Pensions in the EU*, European Commission, DG Justice, 2013, available on: [http://ec.europa.eu/justice/gender-equality/files/documents/130530\\_pensions\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf), accessed 8 July 2013. However, the effects might differ according to what was the dominant job during one's working life, pp. 8-9.

<sup>3</sup> See for information on the gender pay gap for example the information provided on the website of DG Justice and the reports published on this issue on: [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index_en.htm) and [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-7](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-7).

<sup>4</sup> In these statistics, no data on Croatia are included. Croatia acceded to the EU on 1 July 2013.

<sup>5</sup> Eurostat, M. Teichgraber, 'European Union Labour Force Survey - annual results 2012. Statistics in focus 14/2013', available on: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Labour\\_market\\_and\\_labour\\_force\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_market_and_labour_force_statistics), accessed 14 June 2013.

ten men (8.4 %) in the EU-27. Part-time work is by far the most common in the Netherlands, where one out of two employed persons (49.2 %) worked part time (a share of 79.9 % of women's employment and 24.9 % of men's employment). In many other Northern EU countries one out of four employed persons works part time and women are clearly overrepresented. This is the case for the United Kingdom (25.9 %, a share of 42.3 % of women's employment and 11.5 % of men's employment), Germany (25.7 %, a share of 45.0 % of women's employment and 9.0 % of men's employment), Sweden (25 %, a share of 38.6 % of women's employment and 12.5 % of men's employment), Austria (24.9 %, a share of 44.4 % of women's employment and 7.8 % of men's employment), Denmark (24.8 %, a share of 35.8 % of women's employment and 14.8 % of men's employment), Belgium (24.7 %, a share of 43.5 % of women's employment and 9.0 % of men's employment) and Ireland (23.5 %, a share of 34.9 % of women's employment and 13.3 % of men's employment).

The incidence of part-time work is also high in the EEA countries Norway (27.2 %), and Iceland (20.8 %) and in both countries women are also overrepresented in part-time jobs.<sup>6</sup> Part-time work is much less common in Eastern and Southern European countries. Bulgaria has the lowest rate of part-time work (2.2 %, of which 2.5 % women and 2 % men).

The average number of hours worked in part-time jobs is 20.9 hours per week in the EU-27, women working on average slightly more hours: 20.5 than men 19.0. The average number of hours worked ranges from 24.8 hours in Romania to 17.7 in Portugal. In most countries men and women work more or less the same number of hours on average.<sup>7</sup>

The distribution of fixed-term contracts<sup>8</sup> is much less gendered than part-time work. In 2012, 13.7 % of the EU-27 workforce were employed on a contract of limited duration.<sup>9</sup> Women were slightly overrepresented in this group in the EU-27 Member States (14.2 % compared to 13.3 %).<sup>10</sup> Such contracts are most common in Poland, Spain and Portugal, where roughly one out of four workers has a contract of limited duration. Slightly more women than men work on a contract of limited duration. Indirect sex discrimination in relation to temporary contracts is therefore less likely to occur. However, EU law provides not only protection against indirect sex discrimination; unjustified unequal treatment in working conditions of part-timers and workers with temporary contracts is also prohibited. And non-renewal of a fixed-term contract related to pregnancy or maternity is a form of direct sex discrimination.

## 2. The legislative context of EU law

The issue of (indirect sex) discrimination in relation to part-time work and fixed-term work is addressed by Treaty provisions, secondary legislation (directives), case law of the Court of Justice of the EU (hereafter CJEU or Court),<sup>11</sup> soft law and EU policies. The main relevant provisions and legal instruments are summarised below.<sup>12</sup>

<sup>6</sup> Respectively 41.5 % women compared to 14.3 men in Norway and 31.4 % compared to 10.9 % men in Iceland. The Eurostat source does not provide statistics for Liechtenstein, but according to the Office of Statistics of Liechtenstein in the *Beschäftigungsstatistik 2011*, the part-time employment rate was 24.8 %, of which 75.6 % were women: see <http://www.llv.li>, accessed 14 June 2013.

<sup>7</sup> With the notable exception of Denmark, where women work 20.3 hours a week and men 14.7 hours.

<sup>8</sup> In this report the terms 'fixed-term contract' and 'temporary contract' are used interchangeably. These contracts do not include temporary employment agency contracts.

<sup>9</sup> Note that the group with a contract of limited duration as defined by Eurostat is broader than the group working on a fixed-term contract.

<sup>10</sup> Eurostat, M. Teichgraber, 'European Union Labour Force Survey - annual results 2012. Statistics in focus 14/2013', available on: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Labour\\_market\\_and\\_labour\\_force\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_market_and_labour_force_statistics), accessed 14 June 2013.

<sup>11</sup> We will use this abbreviation in this report, although the name of the Court of Justice of the European Communities (ECJ) only changed into the Court of Justice of the European Union with the entry into force of the Treaty of Lisbon in December 2009.

<sup>12</sup> See for a more extensive overview: S. Burri & S. Prechal *EU Gender Equality Law. Update 2010*, European Commission 2010, available on: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9), accessed 10 July 2013.

## 2.1. Treaties and Charter of Fundamental Rights

In the first place, provisions of the two basic Treaties are relevant – The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – as well as the Charter of Fundamental Rights of the EU, which has the same status as Treaty provisions since 1 December 2009 (Article 6(1) TEU). Equality between women and men is included in the common values on which the Union is founded (Article 2 TEU). The promotion of equality between women and men is also listed among the tasks of the Union (Article 3(3) TEU), together with the obligation to eliminate inequalities and to promote equality between men and women in all the Union's activities (Article 8 TFEU). In Article 157 TFEU the principle of equal pay for equal work or work of equal value between men and women is firmly embedded. Article 19 TFEU (an enabling clause) extends the principle of anti-discrimination outside the strict confines of the workplace.

Furthermore, the EU Charter of Fundamental Rights<sup>13</sup> firmly establishes the importance of the concept of equality in Article 20, the principle of non-discrimination in Article 21 and specifically addresses gender equality in Article 23. In addition, the principle of reconciliation of professional and family life is proclaimed in Article 33 of the Charter. These provisions have been interpreted by the Court in relation to parental leave in the *Chatzi* judgment.<sup>14</sup> When interpreting the general principle of equal treatment as enshrined in the Charter and the right to parental leave recognised in Article 33 of the Charter, the CJEU acknowledged in this case the specific situation of parents of twins, which might require special measures with regard to parental leave.<sup>15</sup> The (future) role of the provisions of the Charter in the case law of the CJEU must not lead to an interpretation that would restrict or adversely affect human rights and fundamental freedoms (Article 53).

## 2.2. Directives

### 2.2.1. The Recast Directive

In addition to these Treaties and Charter provisions, the following directives are relevant. In the field of pay and equal treatment in (access to) employment, the Recast Directive<sup>16</sup> incorporated and updated the following – now repealed – directives: Equal Pay Directive 75/117/EEC, Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC, Occupational Social Security Directive 86/378/EEC as amended by Directive 96/97/EC and Burden of Proof Directive 97/80/EC. The Recast Directive provides for the principle of equal treatment between women and men, which means that there must be no discrimination whatsoever – direct or indirect – on grounds of sex. The concept of indirect discrimination is defined in this Directive as follows in Article 2(1)(b):

‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

Harassment and sexual harassment are prohibited (Article 2(1)(c) and (d)).<sup>17</sup>

<sup>13</sup> OJ C 82 of 30 March 2010.

<sup>14</sup> Case 149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010], ECR I-8489.

<sup>15</sup> See considerations 63-74 of the judgment.

<sup>16</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

<sup>17</sup> See on these concepts the report of the European Network of Legal Experts in the Field of Gender Equality, Ann Numhauser-Henning & Sylvaine Laulom *Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, European Commission 2011, available on: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-7](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-7) and from EU Bookshop, accessed 9 July 2013.

### 2.2.2. *The Statutory Social Security Directive*

Statutory Social Security Directive 79/7/EEC applies to statutory social security schemes (including statutory pensions) and social protection as set out in Article 1.<sup>18</sup> Article 4 prohibits both direct and indirect sex discrimination, in particular with reference to family or marital status. This scope is defined in Article 3: the Directive mainly covers statutory schemes that provide protection against the risks of sickness, invalidity, old age, accidents at work and occupational diseases and unemployment. In addition the Directive applies to social assistance schemes (insofar as they supplement or replace the previously mentioned statutory schemes) and family benefits that supplement such schemes. The prohibition of indirect sex discrimination applies to the conditions for accessing these schemes, the obligation to contribute and the calculation of contributions as well as the calculation of benefits and the conditions governing the duration and retention of an entitlement to benefit. Member States may exclude the following from the scope of the Directive: the determination of the pensionable age; advantages granted to retired persons who have brought up children, specifically concerning periods of interruption of employment; old-age or invalidity benefit entitlements connected with the derived entitlements of a spouse; and long-term benefits accorded to a spouse connected with the invalidity, old age, accidents at work or occupational disease of their spouse (Article 7).

### 2.2.3. *The Goods and Services Directive*

The aim of Directive 2004/113/EC is to put into effect the principle of equal treatment between men and women in the field of access to and supply of goods and services (Article 1).<sup>19</sup> However, the content of media, advertising and education are excluded (Article 3(3)). The definition of indirect discrimination is exactly the same as in the Recast Directive (Article 2(b)).

### 2.2.4. *The Part-Time Work Directive*

Part-Time Work Directive 97/81/EC implements the Framework Agreement of the European social partners (annexed to the Directive).<sup>20</sup> The purpose of the Directive is to remove discrimination against part-time workers and to improve the quality of part-time work (see Clause 1(a)). In addition the Framework Agreement purports to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers (see Clause 1 (b)).

### 2.2.5. *The Fixed-Term Work Directive*

The Fixed-Term Work Directive 1999/70/EC is in many regards similar to the Part-Time Work Directive and also implements a Framework Agreement of the European social partners.<sup>21</sup> This agreement has two main goals: First, to improve the quality of fixed-term work (see Clause 1(a)); and second, to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

## 2.3. *Soft law*

### 2.3.1. *Reconciliation of work, private and family life*

The Council Resolution of 29 June 2000 provides that the balanced participation of women and men in both the labour market and in family life is an essential aspect of the development

<sup>18</sup> Council Directive 79/7/EEC, OJ L 6, of 19 December 1978.

<sup>19</sup> Directive 2004/113/EC, OJ L 373, 21 December 2004, pp. 37–43.

<sup>20</sup> Council Directive 97/81/EEC, OJ L 14, of 15 December 1997, p. 9. This Directive was extended to the UK and Northern Ireland with Directive 98/23/EC, OJ L 131, 5 May 1998, p. 10.

<sup>21</sup> Council Directive 1999/70/EC, OJ L 175, of 28 June 1999, pp. 43–48.

of society.<sup>22</sup> Commitment to this has been reiterated on several other occasions. Most notably in some Council and presidency Conclusions. For example, the Presidency Conclusions of 23/24 March 2006 acknowledged the need to promote a better work-life balance and to combat gender stereotypes in the employment market.<sup>23</sup> The importance of family-friendly policies in Europe was again emphasised in Council Conclusions in 2007.<sup>24</sup> This commitment was recently reiterated by the Council in the European Pact for Gender Equality.<sup>25</sup> In the Europe 2020 strategy, a target of 75 % employment rate for women and men aged 20-64 has been set.<sup>26</sup> However, no specific targets have been defined as regards gender equality, in spite of the European Commission's Strategy for Equality between Women and Men 2012-2015.<sup>27</sup>

### 2.3.2. *Childcare*

In 2002, objectives for childcare - the so-called Barcelona objectives - were agreed in the Council.<sup>28</sup> By 2010, Member States should have provided childcare for at least 90 % of children between the age of three and the mandatory primary school age and 33 % of children younger than three. However, a recent report shows that the provision of childcare facilities is still not in line with these objectives.<sup>29</sup> The shortage of good quality and affordable childcare facilities certainly does not facilitate a more balanced share of paid work and care responsibilities between men and women in Europe. As long as women engage in care activities much more than men and gender stereotypes regarding the roles of women and men in society strongly influence choices made by individuals, the overrepresentation of women in part-time work is likely to persist. And with it, also forms of indirect sex discrimination in relation to part-time work.

## 2.4. *Indirect sex discrimination in EU law*

The legal protection against indirect sex discrimination, in particular in relation to part-time work, has strongly developed over the last decades. The CJEU has played a key role in enhancing the protection of women in relation to part-time work and in developing the concept of indirect (sex) discrimination, which is now enshrined in sex equality and anti-discrimination directives.<sup>30</sup>

The first case of the CJEU on this issue was *Jenkins*<sup>31</sup> (published in 1981), followed by landmark case on indirect (sex) discrimination *Bilka*<sup>32</sup> (published in 1986). Many preliminary questions of national courts have since then been answered by the CJEU in relation to the

<sup>22</sup> Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life, OJ C 218, 31 July 2000, pp. 5–7.

<sup>23</sup> Presidency Conclusions of 23/24 March 2006, 777751/1/06 REV 1.

<sup>24</sup> Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the importance of family-friendly policies in Europe and the establishment of an Alliance for Families, OJ C 163, 17 July 2007, pp. 1-4.

<sup>25</sup> Council Conclusions on the European Pact for Gender Equality (2011-2020) (2011/C 155/02).

<sup>26</sup> See for further information and relevant documents: [http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index_en.htm), accessed 10 July 2013.

<sup>27</sup> See for further information: [http://ec.europa.eu/justice/gender-equality/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/index_en.htm), accessed 10 July 2013.

<sup>28</sup> See the Presidency Conclusions of 15/16 March 2002 on: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/71025.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/71025.pdf), accessed 10 July 2013.

<sup>29</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *Barcelona objectives. The development of childcare facilities for young children in Europe with a view to sustainable and inclusive growth*, European Commission, 2013, available on: [http://ec.europa.eu/justice/gender-equality/files/documents/130531\\_barcelona\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/130531_barcelona_en.pdf), accessed 10 July 2013.

<sup>30</sup> See on the concept of indirect discrimination, C. Tobler *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpen Oxford, Intersentia, 2005.

<sup>31</sup> Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.* [1980] ECR 911.

<sup>32</sup> Case 170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.



rights of part-time workers, in particular in relation to pay, working conditions, promotion, occupational social security, pensions and statutory social security.<sup>33</sup> The CJEU case law on indirect sex discrimination in relation to part-time work reflects a broad personal scope of the sex equality directives<sup>34</sup> as even persons working on minor part-time jobs for 7 or 10 hours per week fall under the scope of these directives.<sup>35</sup> The role of the Court was particularly important in ensuring access to occupational pensions for part-time workers, an issue that was not only at stake in the *Bilka* case, but also for example in *Vroege*.<sup>36</sup> This problem is still a topical subject as shown in the national report on **Norway**. In the recent *Elbal Moreno* case,<sup>37</sup> the Court found that legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers to qualify for a contributory retirement pension is contrary to Article 4 of Directive 79/7/EEC on statutory social security schemes. This case is particularly interesting as many women employed in domestic work, caring and cleaning services and in third sector services fall under this rule. The case clearly shows the added value of the concept of indirect sex discrimination in cases that do not fall under the scope of the Part-Time Work Directive (97/81/EC).<sup>38</sup> According to the Constitutional Court of Spain, the legislation at stake is indeed a form of unjustified indirect sex discrimination.<sup>39</sup> The legislative requirement of a minimum of 5 hours of work per day to be entitled to access the pension scheme has been amended. The entitlement will from now on depend on a new concept called partiality coefficient (*coeficiente de parcialidad*), which measures the proportion of working time of a part time worker in relation to a comparable full time worker over certain reference periods.<sup>40</sup> Requirements on working (full) time might be indirectly discriminatory for women who fulfil care activities more often than men. There is however only very scarce case law on this issue. Worth mentioning is the old (staff) case of Ms La Terza who worked for the Court of Justice.<sup>41</sup> The Court had to decide whether interim measures should be granted to a woman with care responsibilities for her two children (12 and 9 years old) in order to enable her to continue working half-time. Her husband was a chauffeur with irregular working hours. The Court granted these interim measures, considering that it could not be ruled out that the refusal to grant an extension for half-time work might cause her and her children ‘serious and irreparable damage’ (consideration 18). This case shows that the Court takes care responsibilities very seriously and that this might require adjustments of the organisation of working time. Also worth mentioning is that recently, the CJEU considered in the disability

<sup>33</sup> See for an overview E. Traversa ‘Protection of Part-Time Workers in the Case Law of the Court of Justice of the European Communities’, *International Journal of Comparative Labour Law and Industrial Relations* Issue 2 (2003), pp. 219-241.

<sup>34</sup> See on this issue the report of the European Network of Legal Experts in the Field of Gender Equality: N. Countouris & M. Freedland, *The Personal Scope of EU Sex Equality Directives*, European Commission 2012, available on: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-7](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-7) and EU Bookshop, accessed 9 July 2013.

<sup>35</sup> See for example Case 171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743 (*Rinner-Kühn*) on the exclusion in national law of payment of sick pay of workers working less than 10 hours per week or 45 hours per month and Case C-435/93, *Francina Johanna Maria Dietz v Stichting Thuiszorg Rotterdam* [1996] ECR 5223 (*Dietz*) on the right to join an occupational pension scheme for workers working less than 7 hours a week.

<sup>36</sup> Case C-57/93 *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

<sup>37</sup> Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] I-000.

<sup>38</sup> See on the exclusion of part-time workers and minimum requirements in a statutory social security scheme in particular Case C-102/88 *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR I-4311 (*Ruzius-Wilbrink*). See on the exclusions of mini-jobs in national provisions on compulsory invalidity insurance and old-age insurance: Case 317/93 *Inge Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-04625 (*Nolte*) and on exclusions of mini-jobs in old-age insurance, sickness insurance and the obligation for employers to pay unemployment insurance contributions: Case 444/93 *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-04741 (*Megner*).

<sup>39</sup> Judgement of the Constitutional Court 61/2013 of 14 March 2013.

<sup>40</sup> Royal Legislative Decree 11/2013, of 2 August 2013.

<sup>41</sup> Case 76/88 R, *Eveline La Terza v. Court of Justice of the European Communities* [1988] ECR 1741.

discrimination case *Ring* that a reduction of working hours may constitute one of the reasonable accommodation measures as required by Article 5 of the Framework Directive 2000/78/EC.<sup>42</sup>

The definition of indirect sex discrimination reflects a two-step test. There must be a presumption of indirect (sex) discrimination: the applicant must establish facts from which it can be presumed that an ‘apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex’.<sup>43</sup> The burden of proof then shifts, and the defendant has to prove that the ‘provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’.<sup>44</sup>

### **2.5. Equal treatment of part-time workers and fixed-term workers**

The test in order to decide whether unequal treatment in the sense of the part-time work and the fixed-term work directives is justified is essentially the same as the objective justification test in case of indirect sex discrimination. However, there is no need to prove the link to sex discrimination. Clause 4(1) of the agreement on part-time work stipulates:

In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

Clause 4(1) of the agreement on fixed-term work is very similar:

In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

This objective justification test applies to any form of unfavourable treatment – whether direct or indirect – of part-time or fixed-term workers. The legal approach to forms of discrimination related to part-time and fixed-term work in EU law is therefore quite similar, both in legislation and case law. This is the main reason why both forms of contract are the topic of this report.

## **3. Aims and scope of the national reports**

The main purpose of this report is to provide information on and an analysis of the practical impact of the relevant gender equality directives as well as possible weaknesses/lacunae in the existing *acquis* and its implementation and application in relation to these two groups of workers in national law. Part of the added value of this report is to determine to what extent gender equality directives and their implementation can and do contribute to further the protection of these categories of workers. As such, the report is not to be about transposition, implementation or application of Directives 97/81/EC and 1999/70/EC, but on EU sex equality law as described in Section 2. However some aspects of the two directives on part-time and fixed-term work might be relevant, e.g. the definition of these two categories of workers, but only to a limited extent.

<sup>42</sup> Joined Cases C-335/11 and 337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S (C-337/11)*, n.y.p. The national court has to assess whether the reduction of working hours represents a disproportionate burden for the employer (consideration 64).

<sup>43</sup> The CJEU provides guidance on how to establish a presumption on indirect sex discrimination with statistics in the Case 167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623. See on the issue of comparisons Section 4.5.1. below.

<sup>44</sup> See also Section 4.5.2. below.

The scope of the report covers rights of part-time and fixed-term workers in the field of labour law, pregnancy and maternity, occupational and statutory social security law and pensions as far as possible. Possibilities to adapt working time and working hours to the needs of workers are also addressed. The report covers pay and (access to) employment (including working conditions and promotion), self-employment, occupational and statutory pension schemes, and (access to) the supply of goods and services. The national reports in Part II of this report describe not only relevant national legislation, but also the case law of national courts and the opinions of equality bodies.

This report aims at identifying gaps in existing legislation both at EU and national level in order to remedy problems faced by part-time workers and fixed-term workers, to provide information on relevant case law and to identify good practices. Questions addressed also include the extent to which forms of systemic discrimination of part-time and fixed-term workers are subjected. To what extent do policies, national legislation, national collective agreements, case law and labour-market policies contribute to weakening gender segregation of the part-time and fixed-term labour market and gender stereotypes in relation to part-time and fixed-term work? The now following sections provide an overview of the main findings of the national reports submitted by the 33 experts participating in the Network.<sup>45</sup> The bibliography annexed to this report mainly contains references provided by the national experts.

## 4. Part-time work

### 4.1. Definitions of part-time work

In most countries, part-time work is defined in relation to full-time working hours: a part-time worker works less than the usual full-time working hours. The full-time working hours might be calculated for example on a daily, weekly, monthly or even yearly basis or on an average period of employment (e.g. **Cyprus, Iceland, Latvia, Malta and Sweden**). In **Luxembourg**, the monthly working time is considered (i.e. 173 hours is a full-time job). In **Ireland** a worker is considered to work part time if (s)he works up to three days a week. Statistics in **Liechtenstein** consider part-time work to cover from 2 % up to 89 % of the time of a full-time job. In **Austria**<sup>46</sup> and **Greece**, the worker's assumption is decisive for statistical purposes.

The national reports show quite some differences with respect to what is considered to be full-time working hours. A part-time worker in one country might therefore be considered a full-time worker in another country. For example in **France**, the full-time working time is 35 hours a week, while it amounts to 40 hours a week in **Romania** and to a maximum of 48 hours a week in **Austria**.

The definitions used in national statistics and the legal definitions, for example in labour law (see Section 4.5.1.), might differ. For example in **Estonia**, part-time work is defined for statistics as work of less than 35 hours a week, while the Employment Contracts Act defines part-time work as shorter than full-time work, which is 40 hours a week. In addition, collective agreements might specify full-time working hours that are lower than the usual working time, as in **Austria** and **Belgium**. However, no part-time contracts may provide a working time of less than one third of the working time available to full-time employees in the same enterprise or activity sector (except in the cleaning sector where the lower limit is one forth).<sup>47</sup> This protective provision requires the employer to pay the minimum number of hours and can in that sense be considered to be a good practice.

<sup>45</sup> Dr Helga Aune, co-author of this report, has provided an extensive overview of the main points addressed in the 33 national reports. This information was very useful when drafting this part of the executive summary.

<sup>46</sup> A person working less than 30 hours a week is always considered as working part time in Austria, while persons working more than 36 hours weekly or more are always considered working full time.

<sup>47</sup> Article 11bis of the Employment Contracts Act of 3 July 1978.



## 4.2. General contexts

The national reports show great variety in part-time employment contexts. However, the problems faced by part-time workers and the sectors in which they work (in particular home-care, catering, cleaning, retail, health and education; sectors where women are often overrepresented) are rather similar.

### 4.2.1. Diversity

Whereas in **the Netherlands** part-time work is a very common feature, this is not the case in countries such as **Bulgaria**, **Croatia** or the **Czech Republic**. In some countries, there has been an increase in part-time work which seems a consequence of the current economic crisis (e.g. **Greece**, **Hungary**, **Iceland**). Measures to combat this crisis sometimes entail a collective reduction of working time in businesses.<sup>48</sup> In countries where part-time work is generally less common or mainly only available in lower positions, some experts state that financial reasons explain why workers prefer to work full time rather than part time (e.g. **Austria**, **Czech Republic**, **Finland**, **France**, **Germany**, **Hungary**, **Latvia**, **Lithuania**). Where flexible work arrangements are available, workers prefer to use these possibilities instead of a part-time job (e.g. the **Czech Republic**). A part-time job is sometimes supplementary to a full-time job (e.g. **Lithuania**) or more (part-time) jobs are combined (e.g. **Latvia and Portugal**).<sup>49</sup> There is evidence in a number of countries that part-time workers are self-employed (**FYR of Macedonia**) or combine a part-time job with self-employment (**Estonia**). In **Hungary** full-time workers often have an additional part-time job, either in a form of employment or self-employment, resulting in a very heavy overwork load. In **Greece** there is evidence that several part-time jobs or a part-time with a full-time job are combined, as wages are very low and constantly cut,

### 4.2.2. Problems related to part-time work

The **German** expert draws attention to the fact that the increase in the employment rate of women is mainly based on part-time, marginal, low-paid and precarious work; and a major part of part-time work is precarious and low-paid work. The experts for **Greece**, **Poland** and the **UK** signal the same problem. In many enterprises in **Greece**, stable work is replaced by precarious work. Experts further mention the reduced income, building up of pensions, career possibilities, training opportunities etc. of part-time workers (e.g. **France**). In **Norway**, the Equal Pay Commission pointed out that in the health sector – a sector with a high rate of female part-time employment - employees were underpaid for decades.

In some countries, it is difficult to fully define problems related to part-time work, due to the high incidence of non-declared work. This is the case in **Greece**, **Latvia** and **Spain** for example.

Specific problems arise in relation to pregnancy and maternity, for example in **Greece**, where women who are pregnant or returning from maternity leave are forced into part-time work and don't dare to complain on this breach of EU law.<sup>50</sup> One of the reasons for the lack of complaints is a fear for victimisation, in particular due to soaring unemployment, which is much higher for women. In addition, there is a sharp rise of litigation costs, the proceedings are too long (the ECtHR has issued a pilot judgment against Greece)<sup>51</sup> and legal aid is inadequate and subject to very strict conditions, coupled with the reduction or suppression of social benefits and services. The Greek Ombudsman and the ILO Committee of Experts on the Application of Conventions and Recommendations have found that women in Greece face

<sup>48</sup> An issue that is not further addressed in this report.

<sup>49</sup> See for data on second jobs in European countries until 2012, Eurostat, *Labour Force Survey*, available on: [http://epp.eurostat.ec.europa.eu/portal/page/portal/employment\\_unemployment\\_lfs/data/main\\_tables](http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_lfs/data/main_tables), accessed 11 July 2013.

<sup>50</sup> Or 'rotation work', a form of part-time work that entails full-time work for fewer days a week or fewer weeks a month or fewer months a year or a combination of these.

<sup>51</sup> ECtHR *Athanasiou v Greece*, 21 December 2010 (final since 21 March 2011).

pregnancy- and maternity-related discrimination in their working conditions, for which complaints are also rare.

In some countries, part-time work is primarily viewed as related to women with family responsibilities (e.g. **Austria, Belgium, Italy, Luxembourg and Portugal**), but in other countries this is not the case (e.g. **Bulgaria, the Czech Republic**). In the **Netherlands** part-time work is viewed positively by employers (90 % of Dutch employers consider part-time workers as professional as full-time workers). However, some prejudices like ‘real men work full time’<sup>52</sup> also exist in this country, where part-time work is so common.

The wishes regarding working time do not always correspond to the actual working time (e.g. **Germany, Ireland**). Many experts mention the problem of involuntary part-time work, when full-time jobs are not available or when part-time workers would prefer a full-time job (e.g. **Bulgaria, Cyprus, France, Finland, Greece, Hungary, Italy, Latvia, Lithuania, FYR of Macedonia, Norway, Poland, Spain, Slovenia** and the **UK**). The **Austrian** expert notes that there is a caveat as to the pertinence of these qualifications, given the fact that the context of part-time work has to be taken into account when interpreting statistics on this issue, in particular the availability of care services and social norms concerning parental roles.

There is little statistical evidence in the national reports that full-timers would like to reduce their working hours, except in **Lithuania, the Netherlands** and **Estonia**.

#### *4.2.3. Impact of part-time work on the gender pay gap*

The gender pay gap is of course influenced by working part time and by career interruptions.<sup>53</sup> However, only a few national reports include specific data on the relation between part-time work and the gender pay gap as regards hourly pay (e.g. **France, Germany, Greece** and the **UK**). The gap in particular seems broader between part-time and full-time workers, not so much between male and female part-time workers (e.g. the **UK**). These effects sum up in Germany: the highest gap in hourly pay exists between female part-time workers and male full-time workers. This might be explained by the fact that women are more often employed in jobs requiring lower skills where they work part time (e.g. **the Netherlands**). In **Greece** it is broader in part-time than in full-time work. According to some experts, there is no relation between part-time work and the gender pay gap (**Denmark** and **Estonia**). However, the gender pay gap is often explained by other factors than working time, for example (indirect) sex discrimination.

#### *4.3. National policies and national collective agreements*

Specific national policies on part-time work are often lacking (e.g. **Belgium, the Czech Republic, Denmark, Ireland, Latvia, Poland, Romania, Slovakia, Slovenia** and the **UK**), or not an issue (e.g. **Sweden**).

In some countries, part-time work is specifically addressed in policies. For example in **Finland**, a tripartite working group has been appointed in order to study the impact of changing working forms. In **France**, a National Interprofessional Agreement was recently concluded on employment security, in order to implement a flexicurity model (combining flexibility with security). One of the aims of the agreement is to limit involuntary part-time work. The agreement includes a minimum of 24 hours a week for part-time employees (except with respect to private individual employers, employees younger than 26 who are still students, or following a written and justified request of the employee). In addition, overtime supplements must be paid.<sup>54</sup> In **Germany, Hungary, Liechtenstein, FYR of Macedonia** and **the Netherlands** national policies aim to increase part-time employment, often as a tool to increase employment rates. In **Liechtenstein**, policies to ensure that flexible work arrangements and part-time work are available for men will be developed.. Such policies might contribute to combat gender stereotypes.

<sup>52</sup> A prejudice signalled also by our **Austrian** expert.

<sup>53</sup> Certain experts explicitly signal this problem (e.g. **Austria, Belgium, Cyprus, Germany** and **Malta**).

<sup>54</sup> This Agreement was implemented by Law No. 2013-504 on 14 June 2013.

#### ***4.4. CEDAW's obligation to combat stereotypes***

Article 5a of the Convention on the Elimination of All Discrimination against Women (CEDAW) requires States Parties to take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

All 28 Member States of the EU have ratified CEDAW and are therefore under the obligation to take appropriate measures in order to comply with this Article. Combatting stereotypes related to part-time work and taking measures to modify the gendered distribution of full-time and part-time work – in particular in relation to reconciliation issues – is such an obligation, about which the States Parties have to report to the CEDAW Committee. In some reports to this Committee, the issue of part-time work is (concisely) addressed (e.g. **Denmark, Estonia, France, Malta, the UK**). The CEDAW Committee's concluding observations to the **Dutch** report 2010 express concern that the Government overestimates the degree to which part-time employment is the result of women's choice, a concern that the **Maltese** Confederation of Women's Organisations shares. Regarding **Iceland**, the Committee expressed its concern about the traditional practices and the stereotypical attitudes about the roles and responsibilities of men and women in family and society. The Committee considers that this could be the cause of the disadvantaged position of women in the labour market. A similar concern is expressed for **Norway**, in addition to concerns about the long-term consequences of part-time work. Part-time work remains common in the Nordic countries (apart from in Finland) despite high childcare coverage. According to the Norwegian and Swedish experts this indicates that the phenomenon of part-time work in these countries is the result of a complex mix of traditional gender roles in work and private life.

It is striking that in their reports to the Committee, many countries do not address the obligation to combat stereotypes in relation to part-time work, in particular given the fact that women are overrepresented in this form of employment and might therefore suffer disadvantages related to part-time work, more than men. EU law is primarily concerned with equal treatment of part-time workers and full-time workers. The obligation of Article 5a CEDAW can therefore have an important added value at national level to combat more structural forms of discrimination. In addition, CEDAW's focus on combatting stereotypes provides a source of inspiration for the interpretation of the concept of gender equality as a fundamental right of EU law (see in particular the Articles 2 and 3(3) TEU and Article 23 of the EU Charter of Fundamental Rights and Section 2.1).

#### ***4.5. National legislation on equal treatment of part-time workers***

One of the two purposes of the Framework Agreement on Part-Time Work which has to be transposed into national law (Directive 97/81/EC) is to combat discrimination of part-time workers and improve the quality of part-time work (Clause 1(1)). The equal treatment provisions of the Part-Time Work Directive have been often implemented in labour and/or civil law and/or anti-discrimination or equality law. Sometimes specific legislation applies (e.g. in **Sweden** and the **UK**).

The advantage of an approach based on a non-discrimination principle of part-timers and full-timers as codified in Directive 97/81/EC compared to the application of the concept of indirect sex discrimination is that no link with sex discrimination is required. It is sufficient to prove that part-time workers are treated less favourably; it is not necessary to establish a presumption of sex discrimination by showing that persons of one sex (usually women) suffer a particular disadvantage compared with a person of another sex. In addition, the personal scope of Directive 97/81/EC is rather broad. Nevertheless, the concept of indirect sex discrimination in relation to pay might have an added value in cases which do not fall under

Directive 97/81/EC due to the lack of direct horizontal effect of directives, Article 157 TFEU having been applicable by national courts in horizontal relationships since 8 April 1976.<sup>55</sup> In addition the material scope of the sex equality directives is much broader than Directive 97/81/EC, as they also include statutory social security and goods and services (see Section 2). Finally specific forms of discrimination, such as (sexual) harassment and pregnancy and maternity discrimination are explicitly prohibited under the sex equality directives, but not addressed in the Part-Time Work Directive.

#### 4.5.1. Personal scope and legal definitions of a part-time worker

According to Clause 2(1) the agreement on part-time work (annex of Directive 97/81/EC) applies to:

part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.

Member States may however exclude workers who work on a casual basis, provided there are objective reasons. Clause (2)(2) reads:

Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid.

The CJEU clarified in the *O'Brien* case that it is up to Member States to define the concept of 'workers who have an employment contract or an employment relationship' and, in particular, to determine whether judges fall within that concept.<sup>56</sup> However, this may not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81/EC, as amended by Directive 98/23/EC. An exclusion from this protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.

Casual workers are only explicitly excluded from equal treatment provisions in two Member States. In **Cyprus**, where workers who work less than 5 hours per week or 8 weeks a year are excluded and in **Denmark**, where the exclusion concerns casual workers in the public sector. However, neither Danish law, nor the collective agreement applicable to the public sector nor case law defines the group of 'casual workers'.<sup>57</sup> In **Austria**, the legal definition of labour relationships excludes the group of so-called free and employee-like (*arbeitnehmerähnliche*) employees. In addition, the high-level managerial staff are exempted from working-time regulations.<sup>58</sup> The public sector – with the exception of federal employees to whom collective agreements apply – is excluded from the Working Time Act. None of the national reports mention exclusions concerning the size of businesses.

The scope of the Framework Agreement is limited by the definition of 'part-time worker' in Clause 3(1), which reads:

the term part-time worker refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

<sup>55</sup> Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [ECR] 1976, 455 (*Defrenne II*).

<sup>56</sup> Case C-393/10 *Dermod Patrick O'Brien v Ministry of Justice*, n.y.p.

<sup>57</sup> The Salaried Employees Act applies only to employees who work at least 8 hours a week, but does not define 'casual workers' either.

<sup>58</sup> Specific groups are further excluded, for example home-workers.

Some countries have no legal definition of ‘part-time worker’ (e.g. **Latvia**<sup>59</sup> and **Poland**), but when a legal definition is given in national legislation, it mostly closely follows the definition of Clause 3(1). The protection against discrimination of part-time workers might therefore also differ from one country to another depending on the normal hours of work of a full-time worker.

The comparable full-time worker is defined in the Directive in Clause 3(2):

The term ‘comparable full-time worker’ means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

The CJEU considered in *Wippel* that a stand-by worker with working hours agreed case-by-case, who works irregularly and has no obligation to accept an employer’s demand to work, can fall under the scope of the Framework Agreement annexed to Directive 97/81/EC.<sup>60</sup> However, in this case Ms Wippel, who did not work on fixed hours, could not compare herself with a full-time worker whose working hours are defined, as well as the organisation of the working time and salary, and who does not have the possibility to refuse work even if they cannot or wish not to do it (considerations 59-60). The Court reached the same conclusion in its interpretation of the provisions of Directive 76/207/EEC (considerations 63-66). In case of ‘vertical cyclical part-time work’,<sup>61</sup> the length of service (which reflects the duration of the employment relationship), not the reduced working time, has to be taken into account to determine the acquisition of pension rights.<sup>62</sup> However, the calculation of the amount of pensions can be proportional to the working time and the corresponding amount of contributions.

In the CJEU-case *Zentralbetriebsrat*, a case on part-time work in which a national provision was at stake, the requirement of a ‘comparable worker’ was not addressed.<sup>63</sup> It would therefore seem that a specific comparator is not required when the discrimination of a group of part-time workers finds its source in legislation or a collective agreement and full-time workers do not suffer a disadvantage. This approach is similar to the interpretation of indirect sex discrimination deriving from legislation or a collective agreement. In *Allonby*, the CJEU considered that a woman could rely on statistics to show that a clause in state legislation was contrary to Article 157(1) TFEU because it discriminated against female workers.<sup>64</sup> Where that provision is not applicable, the consequences are binding not only on the public authorities or social agencies but also on the employer concerned. In such a case, the legislation is the sole source of the difference in treatment. A similar approach was followed by the CJEU in *Kowalska*, a case on collective agreements. The Court considered that ‘where there is indirect discrimination in a clause in a collective agreement, the members

<sup>59</sup> Latvian Labour Law does not provide a definition of ‘part-time worker’, but provides a definition of ‘part-time work’ in Article 134(1).

<sup>60</sup> Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* [2004], I-9483, consideration 40.

<sup>61</sup> In Italy, part-time work can be horizontal when the working time reduction related to a single day, and vertical when the employee works full-time, but only for some periods within the week, month or year.

<sup>62</sup> See on the interpretation of Clause 3 in case of vertical cyclical part-time work, i.e. when a worker did not work during certain periods in a year, for the acquisition of pension rights: Cases C-395/08 and C-395/09, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, [2010] I-5119 (*Bruno and Pettini*), considerations 56-68. In such case the period of acquiring pension rights has to be the same for part-time and full-time workers.

<sup>63</sup> C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010], I-3527.

<sup>64</sup> Case C-256/81 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004], I-873, considerations 81-84.

of the class of persons placed at a disadvantage are entitled to have the same scheme applied to them as that applied to other workers, on a basis proportional to their working time.’<sup>65</sup>

The reports of the experts show that the requirement of a ‘comparable worker’ might indeed be problematic in some cases. This was the case in **Ireland**, for example, where a case on two teachers employed by the same secondary school showed that the school is entitled to treat a teacher paid directly by the school less favourably than a teacher paid by the Department of Education and Science.<sup>66</sup> Sometimes, a legal definition of ‘part-timer’ requires that the comparator has to be employed in the same business (e.g. **Cyprus, Greece**). It might then be more difficult to find such comparator than when broader comparisons are allowed in national law. Another approach is taken in **Malta**, where legislation only states that the comparison has to be made with a full-time employee (not being one with reduced working hours). However, in any case the approach of the Court (in *Zentralbetriebsrat*) can be applied when legislation is at stake.

As regards the principle of non-discrimination of part-time workers compared to full-time workers, allowing a hypothetical comparator is also a remedy for such problems. This is possible under **Spanish** law, for example, which provides an example of a good practice. A comparator is defined in the Spanish Workers’ Statute: it must be a ‘full-time worker of the same company or centre, with the same type of employment contract and who performs identical or similar work’.<sup>67</sup> A hypothetical comparator is allowed, if a comparable worker is not available; then as full-time worker will be considered one who works fewer hours than the maximum established by the collective agreement or, if no collective agreement applies, by legislation.

#### 4.5.2. The principle of non-discrimination

The principle of non-discrimination forms the core provision of the Framework Agreement on part-time work and is defined as follows in Clause 4(1) and (2):

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.
2. Where appropriate, the principle of *pro rata temporis* shall apply.

The Part-Time Work Directive therefore applies only to employment conditions. This provision has direct effect<sup>68</sup> and may not be interpreted restrictively.<sup>69</sup> Employment conditions also cover pay and pensions, which depend on an employment relationship between worker and employer, excluding statutory social security pensions, which are determined less by that relationship than by considerations of social policy.<sup>70</sup>

In many countries, the provisions on equal treatment of part-time workers are drafted very similarly to Clause 4(1) and (2). Sometimes, the same treatment is required for specific working conditions, as in **Malta** and **Greece** for example, where part-time workers are entitled to training facilities and information on part-time and full-time jobs in the same way as full-time employees. However, the **Hungarian** expert signals that part-timers are often offered fewer training facilities and promotion than full-timers. This does not seem to be the case in **Austria**, where equal access to training has to be granted in principle.

<sup>65</sup> Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591, considerations 13 and 19.

<sup>66</sup> An issue that shows similarities with the CJEU Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*. [2002], I-7325 (*Lawrence*).

<sup>67</sup> Article 12.

<sup>68</sup> Case C-486/07 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010], I-3527 consideration 25.

<sup>69</sup> Cases C-395/08 and C-395/09, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, [2010] I-5119 (*Bruno and Pettini*), consideration 32.

<sup>70</sup> See *Bruno and Pettini*, considerations 42-53.

Both direct and indirect discrimination of part-timers can be justified by objective reasons.<sup>71</sup> Interpretations by the CJEU of objective justifications in case law on indirect sex discrimination have provided guidance. The CJEU considered for example in *Roks*, a case on income requirements in Dutch legislation, that budgetary considerations in themselves do not provide an objective justification.<sup>72</sup> Generalisations on part-time workers do not provide an objective justification either, a conclusion the Court reached in *Rinner-Kühn*, *Nimz*, *Hill* and *Seymour*, in which issues related to part-time work were at stake.<sup>73</sup>

The *pro rata temporis* principle does not always apply. For example, in *Zentralbetriebsrat* the Court considered contrary to the equal treatment principle that in case of a change of working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who reduces his working hours from full-time to part-time suffers a reduction in the right to paid annual leave he has accumulated, but not been able to exercise while working full-time, or that he can only take that leave with a reduced level of holiday pay. The proportionally reduced right to paid annual holidays is thus contrary to clause 4.2 of the framework agreement on part-time work.<sup>74</sup>

The issue of overtime is particularly interesting, as it shows different approaches. For example in **Latvia**<sup>75</sup> and **Slovenia**<sup>76</sup> the employer may not impose additional working hours on part-time workers, unless agreed upon in the employment contract. In **Slovenia**, specific groups of workers (workers with family responsibilities, disabled people, people with health problems and partially retired people) who work part time are entitled to a remuneration corresponding to their actual working obligation. They have the same rights and obligations arising from their employment relationship as full-time workers. According to **Romanian** law, overtime work is forbidden in all cases for part-time work contracts. Thus, even a mutually agreed clause in the employment contract regarding overtime work is not lawful. In such cases, the legal sanction is that the contract is considered a full-time work contract. In very exceptional circumstances, overtime work for part-timers is allowed in force majeure cases or in urgent interventions necessary to avoid accidents, or in case of accidents related to work. Scholars say that this provision was adopted to prevent employers using part-time work contracts for positions where full-time work is actually performed.<sup>77</sup> In the **Czech Republic** and **Poland**, overtime cannot be imposed on pregnant women and employees with children younger than one year. In **Belgium**, a national collective agreement stipulates that when overtime is imposed in a recurrent way, the employee may either apply for a revision of the employment contract or for a period of rest corresponding to the overtime. In addition, a Royal Decree provides for pay supplements.<sup>78</sup> In a few countries (e.g. **Austria**, the **Czech Republic**) overtime supplements of 25 % are paid for hours worked above the individually agreed working time (unless otherwise agreed).<sup>79</sup> In **France** part-time workers were until

<sup>71</sup> In **Austria** possible discrimination of part-time workers has to be examined not only under the prohibition of the Working Time Act, but also under the Equal Treatment Act and both provisions are seen as systematically closely linked.

<sup>72</sup> Case C-342/92 *M. A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others* [1994] ECR I-571, consideration 38. This case was about an income requirement in Dutch legislation.

<sup>73</sup> Case 171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1988] ECR 2743, considerations 13-14; Case C-184/89 *Helga Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, consideration 14; Case C-243/95, *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3739, considerations 38-39 and Case 167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623, considerations 75-76.

<sup>74</sup> Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010], I-3527, consideration 35.

<sup>75</sup> Latvian Labour Law allows overtime of part-timers only on the basis of a written agreement between an employer and an employee (Article 134(7)).

<sup>76</sup> Slovenian Employment Relationships Act/1.

<sup>77</sup> Article 105 Paragraphs 1 and 2 of the Romanian Labour Code.

<sup>78</sup> Collective Agreement no. 35 and Royal Decree of 25 June 1990.

<sup>79</sup> In Austria it concerns 'additional time' (*Mehrarbeit*) for which an additional compensation of 25 % per hour was introduced (*Mehrarbeitszuschlag*) in 2007: Paragraph 19d(3a) Working Time Act as amended by OJ No. I 61/2007.

recently not entitled to overtime supplements. However, a proposal to make overtime more expensive for employers has been adopted.<sup>80</sup> Overtime work is now to be paid with a supplement of 10 % until it reaches 1/10th of the working time. Beyond this, if this is recognised by collective agreement, the supplement will amount to 25 %. In **Poland**, the number of working hours after which a part-time employee is entitled to an overtime supplement should be mentioned in the employment contract, in advance. It is however not clear what the consequences are if the contract does not mention such a limit. In **Greece**, pay is increased for overtime on Sundays and holidays, but overtime for supplementary hours up to full-time was repealed in the framework of austerity measures.

The case law of the CJEU on indirect sex discrimination shows that collective agreements which stipulate that part-timers are not entitled to overtime supplements, unless the full-time working time is exceeded, are not contrary to EU sex equality law.<sup>81</sup> However, in *Elsner* and *Voß* the approach of the Court was nuanced. In *Elsner* the Court applied the *pro rata temporis* principle.<sup>82</sup> The case concerned teachers who were only entitled to overtime supplements for hours exceeding three hours above the individual working time. The Court considered that three additional working hours are in fact a greater burden for part-time than for full-time teachers and that this therefore amounted to different treatment of part-timers compared to full-timers (consideration 17). In *Voß* the Court also concluded that there had been different treatment.<sup>83</sup>

According to Clause 4(4) of the Framework Agreement, ‘access to particular conditions of employment might, where appropriate, be subject to a period of service, time worked or earnings qualifications where justified by objective reasons’. The national reports do not show that such thresholds are included in national legislation, but the possibility exists in **Cyprus**, for example. In addition, thresholds might apply to other rights, as in **Austria**, for example. Part-time employees working less than 8 hours per week are not entitled to a compensation for unlawful dismissal and no period of notice applies.

#### 4.6. Organisation of working time

As mentioned in Section 2.4. the concept of indirect discrimination can also apply to situations in which requests to shorten working time are related to care responsibilities. In the preamble of the Framework Agreement, the importance of part-time work in view of facilitating the reconciliation of professional and family life is explicitly mentioned (Preamble 5). The second aim of the Framework Agreement is ‘to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers’ (Clause 1(b)).

The issue of adjustment of working time is addressed in Clause 5, rather reflecting soft law, instead of creating enforceable rights.

Clause 5 reads:

1. In the context of Clause 1 of this Agreement and of the principle of non-discrimination between part-time and full-time workers:
  - (a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;
  - (b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them.

<sup>80</sup> Law No. 2013-504, 14 June 2013. The provisions of the law are now the same as the ANI, a national inter-professional agreement of 11 January 2013.

<sup>81</sup> Joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECR I-5727.

<sup>82</sup> Case C-285/02 *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR I-5861.

<sup>83</sup> Case C-300/06 *Ursula Voß v Land Berlin* [2007] ECR I-10573.



2. A worker's refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned.
3. As far as possible, employers should give consideration to:
  - (a) requests by workers to transfer from full-time to part-time work that becomes available in the establishment;
  - (b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise;
  - (c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time or vice versa;
  - (d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility;
  - (e) the provision of appropriate information to existing bodies representing workers about part-time working in the enterprise.

In *Michaeler* and *Subito* the CJEU considered that a requirement that copies of part-time employment contracts have to be sent to authorities within 30 days is contrary to Clause 5(1)(a).<sup>84</sup> *Bruno* and *Pettini* clarify that a discriminatory measure contrary to Clause 4 is also contrary to Clauses 1 and 5(1).<sup>85</sup>

#### 4.6.1. Adjustment of working time in national law

While the EU provisions on working-time adjustments (permanent or temporary possibilities to transfer from part-time to full-time work and vice versa) are rather weak, national law of some countries offers more possibilities to realise working-time wishes of workers. A strong statutory right to adjust working time exists in the **Dutch** national legislation, although limited to the private sector<sup>86</sup> and enterprises of at least 10 employees. The employee's request for changes in working time may only be denied by the employer in the event of compelling reasons, i.e. financial, organisational, safety, staff composition or scheduling problems. In **Greece**, part-timers have priority among workers of the 'same category' for a full-time job. In **Austria**, civil servants are entitled to part-time work and to a return to full-time work without giving specific reasons.<sup>87</sup> A (conditional) right to work part time exists in **France**, **Germany**, **Greece**, **Latvia** and **Lithuania**, for example.

In **Belgium**, there is no legal provision concerning a right to either part-time or full-time work; this is left to contractual agreements. However, in the public sector, a reduced working-time regime exists (4 days week) to fit an employee's wishes. This scheme does entail public expenses as the employer pays allowances towards social security benefits even for the time that the employee does not work, one of the reasons why the scheme has become a target for recent budgetary reductions. In 2012, the right to temporarily reduced working time was restricted to a maximum of 5 years.

In some countries, part-timers who would like to increase their working time enjoy preferential treatment, as in **Finland**, **Germany**, **Norway** and **Spain**, for example. In **Finland**, the employer has the duty to offer more hours to those already employed.<sup>88</sup> In **Norway**, the employer has to provide for a preferential right to increased working time of part-time workers rather than to hire a new employee. This right is subject to two conditions: the employee has to be qualified for the position and the expansion of the position is not of major inconvenience to the enterprise.<sup>89</sup> In **Spain**, part-time workers who have been working in the company for at least three years also have a preferential right to occupy an available

<sup>84</sup> Joined cases 55/07 and 56/07 *Othmar Michaeler (C-55/07 and C-56/07), Subito GmbH (C-55/07 and C-56/07) and Ruth Volgger (C-56/07) v Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen* [2008] ECR I-3135, consideration 30.

<sup>85</sup> Cases C-395/08 and C-395/09, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, [2010] I-5119 (*Bruno and Pettini*), consideration 81.

<sup>86</sup> A similar right exists for the public sector.

<sup>87</sup> Section 50 of the Civil Servants Act.

<sup>88</sup> Chapter 2, Section 5 of the Employment Contracts Act. This right also applies to fixed-term workers.

<sup>89</sup> Section 14-3 of the Working Environment Act.

full-time job. The same is true for workers who were initially contracted full time and have voluntarily become part-time workers. The rest of the part-time workers do not have a preferential right to work become full-time workers, but their applications have to be taken into consideration by the employer, who is obliged to provide reasons for his/her decision. Employers in addition have the obligation to inform part-time workers about any full-time positions that become available.<sup>90</sup> Similar obligations for employers to inform workers on the availability of part-time and full-time jobs exist for example in **Estonia** and **Liechtenstein**. In **Latvia**, an employer has the obligation to transfer an employee who requests a change in working time to full-time work or part-time work if there is such possibility in an undertaking.<sup>91</sup>

Employers in **Bulgaria, Cyprus, Croatia, Liechtenstein, Poland, Romania, Sweden** and **Turkey** have the legal obligation to take working-time requests into consideration. In the **UK**, employees with at least 26 weeks' continuous service with an employer have a right to request a flexible working schedule, which might include reduced working hours. However, no general right to work part time or full time exists in this Member State. The same is true for **Finland, Germany, Luxembourg** and **Slovenia**. Mutual agreements between employer and employee are of course possible and collective agreements might offer more rights than national legislation (e.g. **France** and **Sweden**).

A provision providing explicit protection against dismissal related to a request on working time exists in **Cyprus, Germany, Greece** and **Latvia**, for example.

#### 4.6.2. *Part-time work facilitated for specific groups or situations in national law*

In some countries part-time work is facilitated for specific groups or situations, often related to care responsibilities, pregnancy, maternity or the health of relatives or the employee. This is the case in the **Czech Republic**, for example, where part-time work is facilitated for male and female employees with children under the age of 15, pregnant employees and employees caring for a bedridden person.<sup>92</sup> In **Slovakia** similar rights exist. In both countries, the employer might refuse such request for serious operational reasons.<sup>93</sup> The **Italian** law provides priority in access to part-time work when the employee's relative suffers from cancer, when (s)he assists a live-in relative who is not self-sufficient or cares for a child younger than 13 or a disabled child.<sup>94</sup> In **Latvia**, part-time work is facilitated for pregnant workers, for the duration of the 'maternity period',<sup>95</sup> throughout the entire period of breastfeeding, and for employees who have a child younger than 14 or a disabled child younger than 18. In **Lithuania**, the working day or week might be reduced at the employee's request in relation to her/his health condition, in case of pregnancy, if a woman has recently given birth or is breastfeeding. An employee raising a child until it reaches the age of three, as well as an employee who solely raises a child until it reaches the age of fourteen or a child with limited functional capacity until it reaches the age of eighteen years is also entitled to such working-time reduction. In addition the same applies at the request of an employee under the age of eighteen, a disabled employee or an employee nursing a sick family member. The aforementioned persons should submit appropriate opinions or certificates issued by competent authorities to verify their status. The employer cannot refuse such request.<sup>96</sup> In **Greece**, a transferrable paid working time reduction is granted by law or collective agreement after maternity leave to parents of young children in the public and the private sector. However, as this matter was removed from the ambit of national collective agreements in the private sector, the length of the reduction is unclear. In some countries, part-time parental

<sup>90</sup> Article 12 of the Workers Statute.

<sup>91</sup> Latvian Labour Law (Article 135(4)).

<sup>92</sup> Section 241 Paragraph 2 of the Labour Code. See also **Latvia**.

<sup>93</sup> See also **Romania** and **Slovenia**.

<sup>94</sup> Decree 61/2000, Article 12bis. See also **Austria** and **Norway**.

<sup>95</sup> This period lasts for one year after child-birth and in addition for the entire period of breastfeeding. Currently there is a legislative proposal pending in the Parliament to restrict 'maternity period' with regard to breastfeeding until a child reaches the age of 2.

<sup>96</sup> See Section 146 of the Labour Code.

leave or other forms of leave, for example to care for (older) relatives, are available (e.g. **Austria, Finland, France, Germany, Spain and Sweden**).<sup>97</sup>

Specific possibilities to adjust working time after returning from maternity and/or parental leave<sup>98</sup> exist in **Bulgaria, Croatia, Cyprus, Ireland, Latvia, Norway, Poland and Spain**, for example. Working-time reduction of one or a few hours per day is sometimes (also) possible (e.g. **Cyprus, Italy, FYR of Macedonia, Estonia and Romania**). No such specific rights are available to workers in **Denmark and Luxembourg**. However, parental-leave arrangements obviously offer possibilities in addition to maternity leave.

#### 4.6.3. *Influence of workers on working hours in national law*

The issue of the organisation of working hours or working-time schedule is not addressed explicitly in the Framework Agreement. The issue is addressed implicitly in Clause 1(2), as the Framework Agreement aims to contribute to the flexible organisation of working time ‘in a manner which takes into account the needs of employers and workers’. The organisation of working hours is of key importance for workers who combine work with family responsibilities, as some flexible working-hours schedules imposed by the employer might be particularly problematic for such workers. Therefore influence on their working hours is crucial.

In some countries, legislation explicitly addresses the issue of (flexible) working hours. For example in **Croatia**, part-time workers have to give their prior consent to changes in working hours. There is a legal obligation for employers in **Bulgaria** to consider requests of employees on working hours. In **Malta**, the Employment and Industrial Relations Act qualifies as discriminatory treatment ‘all actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.’<sup>99</sup> Changes to working hours under a flexibility clause entitles the worker in **Italy** to an increase in remuneration and to a right of notification of at least five days from the employer.

In **Austria**, the Supreme Court in principle does not allow one-sided arrangements that permit the employer to decide on the quantity as well as on the specific moment in time that the work has to be performed (this includes the various forms of work on demand, consensus etc.).

While these examples provide the workers with some tools to influence their working hours, the **Spanish** expert points out some problems: Workers hold a certain influence over their working hours because the working-time reduction for family responsibilities can apply whenever they decide.<sup>100</sup> Law 3/2012, however, has reduced employees’ prerogatives in this respect in two ways: First, the reduction of working time that can be requested based on parental reasons has to be on a daily basis. This means that the worker will not have the right to accumulate the daily reduction of time over a week, and apply it to only one day of that week, for example, as was possible before. Second, for the first time, the possibility has been introduced that collective agreements can establish the criteria for the concrete determination

<sup>97</sup> The issue of leaves is not addressed in this report. See the European Network of Legal Experts in the Field of Gender Equality *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in 30 European Countries*, European Commission 2008, available on: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9), accessed 11 July 2013.

<sup>98</sup> See in particular Clause 6(1) of Directive 2010/18/EU, OJ L 68, of 18 March 2010, p. 13, which reads: ‘In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers’ and workers’ needs.’

<sup>99</sup> Article 26(2).

<sup>100</sup> Article 3, Section 6 Workers Statute. See on this issue the judgement of the ECtHR *Mateos vs. Spain* (Application No. 38285/09). The applicant was unable to use her right to a working time reduction before her child was six years old due to the length of proceedings, and she received no compensation either. The ECtHR concluded that Articles 6(1) and 14 ECHR had been breached.

of working-time reduction. This legislation allows the negotiators to decide the timeframe in which the reduction of working time has to take effect. The flexibility of working hours has also weakened the position of workers in **Hungary**. The concept of indirect sex discrimination might be applied when forms of flexibility of working hours are in conflict with care responsibilities of workers.<sup>101</sup>

#### 4.6.4. Court appeal

Some experts explicitly mention that decisions on working time and working hours might be appealed in court: e.g. the **Czech Republic**, **Greece**, the **Netherlands**, **Norway**, **Romania**, **Slovakia**, **Spain** and **Sweden**. In the **UK**, the right to request flexible working time does include a right of access to the Employment Tribunal, but the only complaints which may be made concern the subjection of the employee to detriment for having made a request, or a failure on the part of the employer to comply with the proper procedures, rather than a challenge to the substantive response to the request. However, here once more, the application of the concept of indirect sex discrimination would not be subject to such limitations in the access to justice.

#### 4.6.5. Collective agreements

In most countries, there is not much explicit attention for issues relating to part-time work in national collective agreements. However, experts of a few countries report that unions are concerned about the growth of part-time work which might endanger full-time job opportunities (e.g. **Belgium**,<sup>102</sup> **Greece**, **Lithuania**, **Spain**<sup>103</sup> and **Turkey**) or just consider part-time work as other a-typical work relationships, which should be avoided (e.g. **Croatia**).

In some countries, part-time work has recently come to be viewed more positively (e.g. **Germany**<sup>104</sup> and **Italy**). In **Ireland** a Code of Practice on Access to Part-Time Working has been adopted. In **France**, social partners have the obligation to negotiate on gender equality and working time (including part-time work) at enterprise and sectoral level.<sup>105</sup> The **Finnish** expert believes that collective agreements can complement legislation and are particularly important in sectors with a high incidence of part-time work. In **Denmark**, part-time work is allowed under collective agreements, but the employer must offer part-time jobs of at least 15 hours a week.

In most countries, national collective agreements (if any) either repeat the legislative provisions on equal treatment between part-time and full-time workers or define the interpretation of this principle (sometimes linking it to gender equality). In **Sweden**, special rules on working time and remuneration in collective agreements are frequent. For example in the municipal sector agreement, extra hours up to full time are remunerated with 120 % of ordinary wages, whereas overtime exceeding the ordinary full time is paid at a rate of 180 - 240 %. In **Norway**, unions challenge all thresholds that do not provide equal treatment of part-time workers with full-time workers, an example of a good practice.

Collective agreements do not often address issues regarding opportunities for part-time work.<sup>106</sup> However, in some countries the issue of flexible working clauses, flexible hours and/or maximum criteria for overtime<sup>107</sup> is addressed in collective or sectoral agreements or such agreements facilitate (temporary) part-time work (e.g. **Italy**). In **Poland**, unions managed to include some favourable provisions in the anti-crisis package, benefiting parents,

<sup>101</sup> In **Austria** the latest amendment to the Equal Treatment Act explicitly included the fact of having children into the legal definition of 'sex': prohibition of direct or indirect discrimination 'on grounds of sex, in particular referring to the *family status or the circumstance that someone has children*', OJ L 107/2013, entry into force: 1 August 2013.

<sup>102</sup> As early as in 1981, the social partners agreed on a national collective agreement on part-time work (no. 35), admitting the need to regulate such forms of work.

<sup>103</sup> Even if Spanish unions have such concerns, there is no evidence that this happens in practice. In fact, there is not much part-time work in Spain.

<sup>104</sup> This does not include the so-called mini-jobs.

<sup>105</sup> See also **Luxembourg**.

<sup>106</sup> However see the national reports on **Cyprus**, **Finland**, **France**, **Germany**, **Italy**, **Slovakia** and **Romania**.

<sup>107</sup> See **Belgium**.

who take care for a child under the age of fourteen or another family member in need of personal care. In such cases the employee may request the employer to allow him to work on an individual time schedule. The employer should take the application into account if the organisation of work within the company allows it and must justify a refusal in writing. The collective agreements in health and education in **Romania** offer the possibility to reduced working time to parents of children under the age of six.

#### 4.7. Case law and opinions of equality bodies

Many experts report that there are no cases or only very few cases specifically addressing issues related to part-time work in their country. One of the reasons might be fear of victimisation, as signalled by the **Croatian** and **Greek** experts. No cases are reported in the national reports of **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Iceland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Poland**, **Romania**, **Slovakia** and **Turkey**. In **France**, there have been very few cases on the interpretation of the principle of equal treatment in relation to part-time work. However, in 2012, the *Cour de cassation* has applied the concept of indirect sex discrimination in a case on part-time work. The *Cour de cassation* confirmed that a measure based on part-time work, which mainly concerned women and could not be justified, was discriminatory.<sup>108</sup>

The CJEU has often had the opportunity to interpret the application of the concept of indirect sex discrimination in relation to part-time work, when national courts of e.g. Germany, the Netherlands, Spain or the UK asked preliminary questions (see Section 2.4). The national reports of **Austria**, **Belgium**, **Finland**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **FYR of Macedonia**, **Malta**, the **Netherlands**, **Norway**, **Portugal**, **Slovenia**, **Spain**,<sup>109</sup> **Sweden** and the **UK** provide references and overviews of national case law. The cases described concern indirect sex discrimination in relation to part-time work, equal treatment of part-time workers and working-time and working-hours arrangements. In **Austria**, the Equal Treatment Commission explicitly refers to stereotypes as a probable discriminatory criterion in individual cases.

No contradictions with CJEU case law in relation to part-time work have been signalled by the national experts. However, the **Greek** expert expresses concerns regarding the correct application of the constitutional norm imposing sex equality and the concept of indirect discrimination, as well as the non-application of the burden of proof rule, which would provide great added value, according to this expert. Concerns about the value of this concept in practice are expressed by the **Norwegian** expert, referring to the underlying and complex issues of structural forms of gender discrimination in a gender-segregated employment market and part-time work being systematically dominant in female professions. Given the difficulties to prove indirect sex discrimination, the **Dutch** expert considers the principle of equal treatment of part-timers of added value. However, if courts, such as the French *Cour de cassation* (see above) do not require specific statistics, the burden of proof of indirect sex discrimination in relation to part-time work would be easier.

The expert for the **UK** mentions another shortcoming of the indirect sex discrimination concept, stating that part-time working men or men wishing to work part time cannot rely on this concept. This expert considers that the added value of the concept of indirect sex discrimination lies in the fact that the comparator requirement of the Part-Time Workers Regulations is such that the Regulations are of very limited value to the majority of part-time women, and also that the Regulations do not provide any right to work part time. According to the **German** expert, German higher courts are not too eager to detect and judge indirect sex discrimination, especially not in private employment relationships or in connection with the regulations of collective agreements. Only in very rare cases, do German higher courts consider gender stereotypes to be a legal problem, and they never refer to CEDAW. The

<sup>108</sup> Cass. Soc. 3 July 2012, no. 10-23013.

<sup>109</sup> See Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] I-000.

provisions of CEDAW (see Section 4.4) played no apparent role in the cases described by the national experts. It might be questioned whether a true gender equality approach, taking into account the obligation to combat gender stereotypes as required by Article 5a CEDAW, would not also allow men to rely on the concept of indirect sex discrimination, given the fact that both part-time working women and men suffer disadvantages related to part-time work.<sup>110</sup>

#### **4.8. Involvement of other parties**

In most countries, experts consider that other parties (private and public stakeholders, equality bodies or NGOs) have not played an important role in the topical areas of this report. However, in **Austria** diverse parties agreed on a National Action Plan on Equality of Men and Women in the Labour Market 2010, which can be considered as a good practice. In **Croatia**, the Ombudsperson for Gender Equality plays an active role; the same is true for the **Greek** Ombudsman and the **Greek** National Commission for Human Rights and in **Lithuania**, for the Equal Opportunities Ombudsman and various NGOs. The National Commission for the Promotion of Equality and some NGOs (for example the National Women's Council) play an important role in **Malta**. In **Luxembourg**, the Ministry in charge of Equal Opportunities runs a programme on positive action measures, including actions on working time.

#### **4.9. Statutory social security and pension rights**

##### *4.9.1. Exclusions of part-time workers in statutory social security schemes*

No (explicit) exclusions of part-time workers in statutory social security schemes were reported by the experts of **Belgium, Bulgaria, Croatia, Cyprus, Denmark, France, Greece, Iceland, Italy, Latvia, Liechtenstein, Lithuania, FYR of Macedonia, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain**<sup>111</sup> and **Turkey**. The **Greek** expert highlights a specific problem which might be indirectly discriminatory: the unit on the basis of which the length of insurance is calculated is the working day. This disadvantages those not working continuously, on a daily basis.

Some groups are explicitly excluded from (some) statutory social security schemes in a few countries. In **Germany**, statutory social security schemes (unemployment, healthcare, work accidents, retirement) automatically apply to all employees and persons in vocational training independent of their regular weekly working time. However, employees in mini-jobs (especially those who work in private households) are not covered by these social security schemes. Since January 2013, mini-jobs are subject to mandatory pension scheme contributions. In the **Netherlands**, there are no exclusions either as the main rule, but for some categories of employment relationships the possibility to be covered is restricted to those who work at least two days a week. Also excluded are domestic staff who work less than four days a week for a private employer. These workers have the right to sick pay for six weeks, while other employees have the right to be paid during 104 weeks in case of illness. The term 'domestic staff' covers housemaids/cleaning, child-minding and nursing. Flex-workers and home-workers are also covered by statutory social security schemes, but the requirement is that they have had their employment relationship for at least 30 days, and the income must amount to at least 40 % of the minimum income as regulated by law. The main rule in the **Czech Republic** is also that part-time workers are not excluded from statutory social security schemes, but workers working with a so-called 'agreement of performance of work' are not insured under the statutory pension, nor under the sickness scheme, if the

<sup>110</sup> This interpretation would be in line with the aim of Article 5a CEDAW, which reads: 'States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;'. See also the preamble to the Convention.

<sup>111</sup> Except the situation at stake in the *Elbal Moreno* case.

remuneration does not exceed EUR 400. In **Estonia**, workers on short-term service contracts (authorisation agreement and other service contracts for less than three months) have no right to statutory social security.

Minimum earning requirements apply in some countries to certain statutory social security schemes (e.g. **Austria**). In **Cyprus**, the coverage of the General Social Insurance Scheme and the right to a pension applies only when the weekly wages are at least EUR 174 per week for the year 2013. In **France**, access to some security rights, like health insurance, is available for workers who can prove to have worked as least 60 hours a month or to have earned at least 60 times the hourly minimum wages (or have worked at least 120 hours a semester or 1200 hours a year). For those who do not fulfil these conditions, there is a system of free healthcare for people with low incomes. In the **UK**, access to statutory social security and pension schemes is dependent on the payment of national insurance contributions, which are paid by those earning in excess of the lower earnings limit (currently EUR 125 (GBP 107) per week). In this country, part-time workers are disproportionately excluded from participation because of their low earnings, but not directly or explicitly because of their part-time status.

#### *4.9.2. Statutory pension rights*

As regards pension rights, no specific exclusions of part-time workers were reported by the experts of **Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Greece, Latvia, Liechtenstein, Lithuania, FYR of Macedonia, Malta, Norway, Poland, Portugal, Romania, Slovenia, Spain, Turkey** and the **UK**. However, the building up of (statutory) pension rights in many countries depends on duration and earnings. This is the case in **Cyprus, Finland, Hungary, Iceland, Italy, Slovakia** and **Sweden**, for example. In **Greece**, the unit for calculating the length of insurance is the working day. So, those not working continuously need many more years in order to be entitled to a pension.

In some systems, the acquisition of pension rights depends on a minimum number of hours, often combined with minimum earning requirements. For example in **France**, part-time workers in the private sector who work a minimum of 200 hours per trimester and earn at least 40 % of the minimum wage can obtain a full year of pension rights. In the public sector, a trimester of part-time work counts as a trimester of full-time work. Part-time workers also have the possibility to contribute as if they were full-time for their pension rights. In **Ireland**, pension schemes or arrangements do not apply to a part-time employee whose normal hours of work are less than 20 % of the normal hours of work of a comparable full-time employee. In **Luxembourg**, a minimum of 64 hours per month is required in order to benefit from pension rights. In **Hungary**, all time worked for which contributions were paid constitutes the service period, provided that the amount of salary reaches the minimum wage. Those part-time workers who work at least half of the statutory working time (thus four hours) are treated as if they work in a full-time job according to the calculation of the service period, provided the salary after which contribution is paid reached the minimum wage. However, to workers employed in conditions detrimental to their health a different system applies: the right to early retirement only exists when such work was performed for at least 15 years, 8 hours a day. This condition has to be fulfilled in order to be entitled to a so-called transition state pension in the public sector. Part-timers therefore have no right to such pension at all, but have to pay contributions to the Transition State Pension Fund, which seems to be a form of indirect sex discrimination.

Since January 2013, mini-jobs in **Germany** have been subject to mandatory pension scheme contributions, but employees can make exemption requests. Many will do so because of the costs involved and the very small amounts they might be entitled to in the end.

Working part time often means less contributions to pensions based on workers' contributions, which entails less pension and is one of the causes of the gender pension gap (see for example **Belgium, Iceland, Italy, Latvia, Lithuania, Norway** and **Slovakia**).

#### 4.9.3. Unemployment benefits

Some minimum hours, duration of employment and/or earning requirements apply in certain countries in order to qualify for unemployment benefits. Such requirements often exclude part-timers with minor jobs from such benefits. This is for example the case in **Cyprus**, where a part-time worker is not entitled to benefits from the Redundancy Fund unless (s)he has worked for at least 18 hours per week during the last two years prior to termination of employment. In the **Czech Republic**, a worker is entitled to unemployment benefits if (s)he earns more than half the minimum wage.<sup>112</sup> The **Swedish** unemployment law requires that a worker has worked for at least 80 hours per month for six months during the year prior to unemployment or has been employed for 480 hours within 6 months. In **Finland**, exclusions from unemployment benefits and sick pay are related to the duration of employment.<sup>113</sup> In **Austria**, the thresholds on the applicability of the statutory time limits for giving notice to employees are considered problematic.

The **Italian** expert highlights another problem, i.e. the 'involuntary unemployment requirement'.<sup>114</sup> Such requirement often has a negative impact on so-called vertical part-timers, who work only certain periods. The Court of Cassation (and the Constitutional Court) have denied unemployment benefits to those workers, in relation to the periods of suspension of work, on the assumption that the inactivity during those periods is voluntary, as it is part of the working-time agreement existing between the employer and the vertical part-timer.<sup>115</sup>

As regards unemployment benefits, the **German** law provides an example of a good practice: Under certain circumstances, employees who reduce their working time from full-time to part-time beyond 80 % and become unemployed shortly after this reduction are entitled to unemployment benefits in the amount that they would have received before the reduction.<sup>116</sup> A similar approach is followed in **Spain**, since the entry into force of the Organic Law of Effective Equality between women and men.<sup>117</sup> The salary that is taken as a reference to determine the unemployment benefits in the case of time reduction because of family reasons is the full-time salary that was paid before the working-time reduction.<sup>118</sup> These approaches are in line with the *Meerts* case, in which the CJEU considered that the calculation of the compensation in the event of dismissal should not be based on the reduced salary due to parental leave when the dismissal took place.<sup>119</sup>

#### 4.10. Self-employment

None of the national reports provides specific information on the relation between self-employment and part-time work, as data on this issue are lacking in all countries participating in the Network. Two experts consider the issue of self-employed persons working part time as not gender related (the **Netherlands** and **Slovakia**). Some experts mention the probability of problems regarding loans, given the lower income of part-time self-employed persons. However, no studies are available which could corroborate this estimate (i.e. **Croatia**, **France**, **Ireland**, **Norway**, **Portugal**, **Spain** and the **UK**). In Germany, a self-employed side-job is not subject to mandatory health insurance contributions when it is performed for less than 20 hours per week and does not constitute the major part of the income.

<sup>112</sup> See also **Turkey**.

<sup>113</sup> Unemployment Security Act (1290/2002).

<sup>114</sup> Meaning that the employee is not voluntarily unemployed

<sup>115</sup> Corte di Cassazione SU 6/2/2003, no. 1732, Corte di Cassazione 26.3.2007, no. 7298 and Corte Costituzionale 24.3.2006, no. 121.

<sup>116</sup> Section 150(2)(5) of Social Code No. III.

<sup>117</sup> Law 3/2007.

<sup>118</sup> Article 37(5) Workers Statute.

<sup>119</sup> Case C-116/08 *Christel Meerts v Proost NV* [2009] ECR I-63. The Court interpreted in this case Clause 2.6 and 2.7 of the Framework Agreement on parental leave (Directive 96/34/EC).



#### ***4.11. Access to and supply of goods and services***

There is even less information available on the relationship between part-time work and the access to and supply of goods and services. Some experts estimate that when income level plays a role for some services (e.g. financial services), this might disadvantage part-time workers (e.g. **Bulgaria, Estonia, Ireland, Latvia, Luxembourg, Poland, Slovakia, Slovenia** and the **UK**). However, data to support this estimate are lacking in all countries analysed in this report.

#### ***4.12. Gaps in national law***

The experts were asked to identify specific remaining gaps in national law. It should be noted that many problems have already been identified above. However, experts mentioned some additional problems and gaps.

##### ***4.12.1. Recruitment process***

As regards gaps in national law with respect to the recruitment process, some experts consider the employer's obligation to provide information on the availability of part-time and full-time jobs inexistent or too weak (e.g. **Finland** and **Liechtenstein**). In **Lithuania**, the recruitment process basically means a public announcement of vacancy for a full-time job, and only afterwards a situation of working part time might be created due to personal reasons on the side of the worker. The other way around is an exception. In this country, new positions in the public service are always full-time positions. Some experts signal that questions are frequently asked on family status, number of children, available help etc. (e.g. **Hungary, Latvia** and **Portugal**).

The lack of measures to facilitate access to part-time work, in particular in higher managerial functions, is perceived as a gap by some experts (e.g. **Latvia, Luxembourg, Poland**, and the **UK**). A few experts mention the over-use of part-time positions in certain sectors (in particular health and education) due to budgetary constraints (e.g. **Norway, FYR of Macedonia, Romania**). In these sectors, there is a lack of full-time jobs (e.g. **Croatia, Cyprus, Denmark, Greece, Malta, Slovakia, Spain** and the **UK**).

The **Norwegian** Government took an interesting initiative when earmarking EUR 3 127 972 (NOK 25 million) for various projects at the level of individual enterprises to address involuntary part-time work. The aim is to find alternative ways to organise work and thus create more full-time positions. In addition, a tripartite co-operation group between the social partners and the Government (Ministries) is mandated to further gender equality at the workplaces, including addressing involuntary part-time work (which is explicitly mentioned). This is an example of a good practice.

##### ***4.12.2. Employment conditions and termination of employment***

Some experts point out specific problems concerning employment conditions (such as a lack of legislative provisions on access to bonuses in **Finland**, for example). The expert for the **UK** calls attention to the fact that it is well established that blocking access of part-time workers to occupational pension schemes is likely to amount to unlawful indirect sex discrimination. Because part-time workers are often segregated into relatively poor jobs they are often disadvantaged when it comes to training and promotion etc. The Part-Time Workers Regulations do not address this because of the requirement for (narrowly defined) actual comparators who do not typically exist in the workplaces where many part-time workers are found. The lack of possibilities to (temporarily) adapt working time and working hours to the needs of workers is also seen as a gap by some experts (e.g. **Hungary, Latvia** and **Poland**). In **Greece**, female part-timers are disadvantaged regarding maternity benefits, as the previous length of employment threshold is higher than that of sickness benefits.

There is no evidence in the national reports that part-timers are forced out of employment because they want to work part time, or are forced out after applying for an increase in their work amount. This seems to occur in **Greece** for example, but there are no official data.

## 5. Fixed-term work

### 5.1. General context

In some countries, women are slightly more often employed on fixed-term contracts than men according to the national data provided by the experts (e.g. **Austria, Croatia, Estonia, France, Italy, Lithuania, FYR of Macedonia, the Netherlands, Norway, Spain, Sweden** and the **UK**). In a few countries, men slightly more often work on a fixed-term employment contract (e.g. **Finland, Hungary, Latvia** and **Poland**).<sup>120</sup> Fixed-term work therefore – generally speaking – is no gender issue. However, fixed-term contracts often apply in sectors where women are overrepresented (e.g. **Ireland, Greece**). Given these figures, it is unlikely that the concept of indirect sex discrimination can be applied to discrimination related to this form of employment contract, unless many more women than men (or the opposite) are represented in the disadvantaged group.

In some countries, new hires are offered fixed-term contracts more often (e.g. **Finland** and **Hungary**). Some experts signal that in particular younger workers are offered such contracts (e.g. **Finland** and **Germany**). Data on the gender pay gap in relation to fixed-term work are not available. However, in **Finland**, the gender pay gap is largest among younger employees and in 2009, 29 % of all female employees under 35 worked fixed term, while only 12 % of male employees in the same age group did so.<sup>121</sup>

### 5.2. National policies

Fixed-term contracts are generally considered to be an exception to the norm, which is a permanent contract. National policies are therefore often aimed at promoting stable work relationships. For example in **France**, fixed-term contracts are considered as a factor of job precariousness and one of the causes of the segmentation of the labour market. The French regulations on fixed-term contract therefore restrict the use of fixed-term contracts in various ways. Specific regulations apply in the public sector. The general rule is that fixed-term contracts cannot have the aim or effect of occupying in the long term a job linked to the normal and permanent activity of the company. In the **Netherlands**, an agreement concluded in April 2013 between the social partners and the Government includes the intention to reduce fixed-term contracts.<sup>122</sup> In **Greece**, fixed term contracts of long duration which expired upon age limit were converted by law into contracts of indefinite duration, while dismissals were generally facilitated and redundancy compensation was reduced. This concerns mainly the ‘wider’ public sector, where women constitute the vast majority.

### 5.3. The Framework Agreement on fixed-term work

The Framework Agreement adopted by the European Social Partners on fixed-term work (Directive 1999/70/EC) is framed similarly to the Framework Agreement on part-time work.<sup>123</sup> In both agreements, the principle of non-discrimination is codified. However, where the Framework Agreement on part-time work is aimed at facilitating opportunities for part-time work (see Section 4.6), preventing abuse of fixed-term contracts is a prominent aim of the agreement on fixed-term work. The purpose of the agreement on fixed-term work is twofold (Clause 1):

<sup>120</sup> No difference exists in this respect in **Germany**. For the remaining countries no sex-segregated data were reported.

<sup>121</sup> *Suomen virallinen tilasto* (Official Statistics Finland) *Työvoimatutkimus 2012: Vastentahtoisesti määräaikaiset*, [http://www.stat.fi/til/tyti/2012/13/tyti\\_2012\\_13\\_2013-03-05\\_kat\\_004\\_fi.html](http://www.stat.fi/til/tyti/2012/13/tyti_2012_13_2013-03-05_kat_004_fi.html), accessed 15 April 2013.

<sup>122</sup> See <http://www.rijksoverheid.nl/nieuws/2013/04/11/kabinet-en-sociale-partners-eens-over-sociale-agenda-voor-arbeidsmarkt-van-de-21e-eeuw.html>, accessed 11 April 2013, for the main features of the new ‘social agenda’.

<sup>123</sup> Council Directive 1999/70/EC, OJ L 175, of 28 June 1999, pp. 43–48.

- (a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
- (b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

The personal scope of the agreement is defined in Clause 2: it applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.<sup>124</sup> The concept of ‘fixed-term worker’ is defined in Clause 3:

1. For the purpose of this agreement the term ‘fixed-term worker’ means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.
2. For the purpose of this agreement, the term ‘comparable permanent worker’ means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

A comparison therefore has to be made with a comparable permanent worker in a way that is similar to the comparison required by Clause 3(1) and (2) of the agreement on part-time work (see Section 4.5.1.). This need for a comparator probably will not apply when the discrimination finds its direct source in legislation or a collective agreement.

According to case law of the CJEU, the Fixed-Term Work Directive also applies to employment contracts and employment relationships in the public sector.<sup>125</sup>

The core provision on the principle of non-discrimination, Clause 4, reads:

1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.
2. Where appropriate, the principle of *pro rata temporis* shall apply.
3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.
4. Period-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of service qualifications are justified on objective grounds.

This provision has direct effect.<sup>126</sup> The case law of the CJEU clarifies that an allowance based on length of service falls under ‘employment conditions’,<sup>127</sup> and the same is true for occupational pensions.<sup>128</sup> The concept of objective grounds has to be interpreted similarly to the indirect sex discrimination objective justification test (see Section 2.4.). It requires the unequal treatment at issue to ‘be justified by the existence of precise and concrete factors,

<sup>124</sup> Some exceptions are mentioned in Clause 2.

<sup>125</sup> Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057 (*Adeneler*); C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECR I-7213 (*Marrossu and Sardino*); Case C-180/04 *Andrea Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECR I-7251 (*Vassallo*); Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109 (*Del Cerro Alonso*); Case C-117/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* [2011] ECR I-7906 (*Rosado Santana*) and Joined Cases C-302/11 to C-305/11 *Rosanna Valenza (C-302/11 et C-304/11), Maria Laura Altavista (C-303/11), Laura Marsella, Simonetta Schettini and Sabrina Tomassini (C-305/11) v Autorità Garante della Concorrenza e del Mercato*, n.y.p.

<sup>126</sup> Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-2483 (*Impact*).

<sup>127</sup> Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109 (*Del Cerro Alonso*).

<sup>128</sup> Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-2483 (*Impact*).

characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose'.<sup>129</sup> The CJEU considered in *Cerro Alonso* that Clause 4(1) of the Framework Agreement must be interpreted as meaning that 'it precludes the introduction of a difference in treatment between fixed-term workers and permanent workers which is justified solely on the basis that it is provided for by a provision of statute or secondary legislation of a Member State or by a collective agreement concluded between the staff union representatives and the relevant employer' (consideration 59).

Article 6(2) of the Framework Agreement addresses the issue of training facilities and promotion and reads:

As far as possible, employers should facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility.

#### **5.4. National legislation on equal treatment of fixed-term workers**

The provisions on equal treatment of fixed-term workers are generally included in non-discrimination law and/or labour law. The equal treatment principle is often framed very similarly to Clause 4(1) and (2) of the Framework Agreement (e.g. **Cyprus, Germany, Greece, Ireland, Romania, Turkey** and the **UK**). Sometimes only a general prohibition of discrimination applies, as in the **Czech Republic** and **Slovenia**. In all countries the legislation applies to all businesses, although contracts with temporary employment agencies are sometimes explicitly excluded.<sup>130</sup> No thresholds were reported in relation to specific employment rights. However, for example in **France**, employees employed for a short period of time may not qualify for working conditions for which a certain duration of employment contract is required, such as a bonus or an annual bonus.

#### **5.5. Pregnancy and maternity discrimination**

A specific problem related to fixed-term contracts, in particular in relation to the non-renewal of such contracts, is pregnancy and maternity discrimination.<sup>131</sup> Many experts consider it likely that pregnancy and maternity discrimination occurs in their country, but often no reliable data are available to support this statement (e.g. the **Czech Republic**,<sup>132</sup> **Denmark, Finland**,<sup>133</sup> **Latvia**,<sup>134</sup> **Romania, Spain, Sweden** and the **UK**). A recent study conducted by the Ombudsperson on Gender Equality in **Croatia** provided the empirical background for the existing public presumptions on the discrimination of pregnant workers and jobseekers and female workers and jobseekers with child-caring responsibilities.<sup>135</sup> One third of respondents confirmed unequal treatment by their employer on account of pregnancy-related or maternity-related rights. In most cases (34.1 %), the discrimination occurred by non-renewal of fixed-term agreements, 21.2 % of respondents were fired and 16.4 % were transferred to inferior jobs. 52 % of respondents who worked during pregnancy or who were taking care of children

<sup>129</sup> Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109 (*Del Cerro Alonso*), consideration 58.

<sup>130</sup> See similarly Case C-290/12 *Oreste Della Rocca v Poste Italiane SpA*, n.y.p.

<sup>131</sup> See on this issue the report of the European Network of Legal Experts in the Field of Gender Equality *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in 33 European countries*, European Commission 2012, available on: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-8](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8), accessed 17 July 2013.

<sup>132</sup> The expert signals the non-renewal of fixed-term contracts of pregnant women in education. However, no case law is available.

<sup>133</sup> The expert signals in particular pregnancy discrimination and access to training facilities and promotion.

<sup>134</sup> A statement supported by the Latvian Confederation of Free Trade Unions and the Ombudsman.

<sup>135</sup> Presentation of research is provided in the Annual Report of the Ombudsperson for Gender Equality for 2012, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

were denied promotion because the employer considered that they would not be able to meet the job requirements on account of their motherhood and caring responsibilities. Almost a third of respondents (27.8 %) claimed that the employer pressured them into replacing their open-ended contracts by fixed-term contracts. 63 % of respondents believed that the employer refused to renew their expiring fixed-term contracts on account of their pregnancy-related or maternity-related rights. Conducting such a study (in this case by an Equality Body) is an example of a good practice.

Pregnancy and maternity discrimination amounts to direct sex discrimination, which can only be justified by the exceptions provided in the directives.<sup>136</sup> The CJEU considered in *Melgar* that the prohibition of dismissal in Article 10 of Pregnancy Directive (92/85/EC) applies both to employment contracts for an indefinite period of time and to fixed-term contracts. However, non-renewal of a fixed-term contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex (consideration 47).<sup>137</sup> This case law was correctly applied by labour courts in **Belgium**.<sup>138</sup> The discrimination was established, unless the employee failed to produce any element of a *prima facie* case<sup>139</sup> or the employer was able to prove that the grounds of dismissal were entirely foreign to the employee's pregnancy.<sup>140</sup> Similar cases are found in **Cyprus, Germany, Ireland, Lithuania, Poland, Portugal and Slovenia**. In the **Netherlands**, the high number of such cases before the Institute for Human Rights is an indication that pregnancy discrimination still happens in practice. The same is true for **Norway**. In the **Netherlands**, the Equality Body NIHR reports that 44 % of women with fixed-term contracts state that their contracts had not been renewed (partly) because of their pregnancy.

In **Finland** an employer's conduct is directly discriminatory, if s/he employs a pregnant woman on a fixed-term contract because she is pregnant, or uses successive fixed-term contracts for a young woman in order 'to break the chain' when she becomes pregnant.

In **Greece**, the practice of non-renewal of a contract of a pregnant woman is approved by case law.<sup>141</sup> The cases are addressed as dismissal cases. The judgments accept that the protection of women who are pregnant or have recently given birth against dismissal<sup>142</sup> also applies to fixed-term contracts, but consider that it does not extend beyond their expiry. The Greek expert rightly points out that the courts should examine, in accordance with CJEU case law, whether the non-renewal of the fixed-term contract might be motivated by the worker's state.<sup>143</sup> The approach of the Greek courts to this issue might be in breach with EU law.

Another problem of pregnancy and maternity discrimination in relation to fixed-term contracts is found in **Poland**. The special employment protection during pregnancy and maternity leave, does not apply to a female employee on a trial period not exceeding one month (Article 177 Paragraph 2 LC). According to Paragraph 3 of this provision, an employment contract concluded for a fixed term is extended until the date of birth, yet only if it is to terminate after the third month of pregnancy.<sup>144</sup> If for example such a contract would be concluded with a woman who is in early pregnancy (less than 12 weeks), it would

<sup>136</sup> Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941 (*Dekker*).

<sup>137</sup> Case C-438/99 *Melgar* [2001] ECR I-6915. In this case contrary to Article 2(1) and 3(1) of Council Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which is now repealed by the Recast Directive (see Section 2.2.1.).

<sup>138</sup> Labour Court in Namur, judgment of 28 April 2003, *Chroniques de droit social*, 2004, p.100 with J. Jacquemain's case note.

<sup>139</sup> See e.g. Labour Court in Nivelles, judgment of 14 September 2006, *Chroniques de droit social*, 2008, p. 31.

<sup>140</sup> Labour Court of Appeal in Liège, judgment of 12 March 2013, *Rôle general* no. 2012/AN/41, unreported.

<sup>141</sup> Supreme Civil and Penal Court, Civil Section, 1341/2005, 317/2011.

<sup>142</sup> Article 15 of Act 1483/1984, OJ A 153, of 8 October 1984, as subsequently amended, prohibits dismissal during pregnancy and for eighteen months after childbirth or for a longer period in case of absence of the woman from work due to pregnancy-related illness, unless there is a serious ground.

<sup>143</sup> Case C-438/99 *Melgar* [2001] ECR I-6915.

<sup>144</sup> The above extension does not apply to women employed for substitution (Article 177 Paragraph 31 LC).

terminate with the date specified therein, i.e. approximately 6 months before delivery. In such event, the woman would neither acquire the right to maternity leave, nor to parental leave, since at the time of delivery she would have been unemployed longer than 6 months. She also would not acquire any rights to maternity benefits, because social care provisions do not provide for such possibility after health insurance has been terminated. The expert also critically assesses the exclusion of the possibility to extend the duration of a fixed-term contract (until the moment of delivery) for a female employee with whom a contract for substitution has been concluded. Usually the substitution is associated with maternity leave of another employee, employed for an indefinite term, which means that the leave may last for months or even years. In such case, depriving the substitute employee of the right to extend the contract until childbirth, automatically resulting in depriving her of her right to maternity benefits, can be seen as discrimination against this group of employees.

The **Portuguese** Labour Code, in contrast, offers an example of a good practice in the protection of pregnant women or women on maternity leave, in relation to the termination of their fixed-term contracts. The employer has the obligation to communicate to the Equality Agency (*CITE*) the reason why the contract is not renewed.<sup>145</sup> This communication is meant to facilitate action on the part of the Labour Inspection Service. The worker may possibly be reinstated by court order, on the grounds of unlawful dismissal based on gender discrimination, if it becomes evident that the contract was not renewed on account of the pregnancy or maternity leave.

In **Croatia**, a collective agreement gives an example of a good practice: it provides for the possibility that the fixed-term contract does not expire during pregnancy or use of pregnancy-related and maternity-related rights of workers, if the worker complies with all conditions and there is a need for the performance of the work concerned.<sup>146</sup>

### 5.6. Successive fixed-term contracts

Combating the abuse of successive fixed-term contracts is one of the two aims of the Framework Agreement on Fixed-Term Work (Directive 1999/70/EC). Clause 5 specifies the obligations of the Member States in this respect and reads:

1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
  - (a) objective reasons justifying the renewal of such contracts or relationships;
  - (b) the maximum total duration of successive fixed-term employment contracts or relationships;
  - (c) the number of renewals of such contracts or relationships.
2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
  - (a) shall be regarded as 'successive'
  - (b) shall be deemed to be contracts or relationships of indefinite duration.

Clause 6(1) in addition provides that:

Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers. Such information may be provided by way of a general announcement at a suitable place in the undertaking or establishment.

<sup>145</sup> Article 144(3) of the Labour Code.

<sup>146</sup> The Ombudsperson for Gender Equality *The Analysis of Collective Agreements from the aspect of gender equality, equal opportunities and work-life balance* 2009, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>, accessed 9 April 2013.

In most countries, legislation specifies the conditions under which fixed-term contracts can be offered and/or provides a maximum period for a fixed-term contract (e.g. **Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Greece, Hungary, Latvia, FYR of Macedonia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Turkey**). The maximum period is sometimes rather long, such as in **Hungary**, where it is five years.<sup>147</sup> In **Finland**, fixed-term contracts are not allowed if the number of successive fixed-term contracts, their overall duration or these contracts taken together show that the employer has a permanent need for labour. In **Sweden** there is no maximum time limit for how long a person may be hired on fixed-term contracts, but legislation includes a list of situations in which fixed-term are allowed.<sup>148</sup> In the **UK**, there are conditions determining when it is legal to offer fixed-term contracts under national legislation, save for the normal prohibitions on discrimination. After four years of continuous employment on a succession of fixed-term contracts, employment will become permanent unless the use of the fixed-term contract is objectively justified. The expert considers the fact that employers can avoid successive fixed-term contracts from becoming permanent by engineering breaks in the employee's continuity of employment as an obvious weakness, as is the fact that the Fixed-Term Employees Regulations apply only (as their name suggests) to employees, and not to workers.

In most countries, the same rules apply to all employers regardless of size or sector. However, for example in **Cyprus**, specific rules apply to some jobs in the public sector. The same is true in **Greece**. The **Czech** expert signals the wide use of fixed-term contracts in education in the past, where sometimes collective agreements allowed annual contracts to be renewed many times. In **Italy**, the legislation on successive fixed-term contracts does not apply to public administration in the education and health sectors.<sup>149</sup> In **Portugal** certain types of work which are explicitly mentioned by law may be performed under fixed-term contracts, even if there is no temporary need: academic researchers, artists and students may have fixed-term contracts.

Some experts signal the lack of systemic control (e.g. **Greece**) and the lack of effective sanctions (e.g. **Spain**).

## 6. Effectiveness

The issue of effectiveness of equal treatment legislation is crucial. National experts mention difficulties faced by claimants when bringing cases to court, such as the length of proceedings,<sup>150</sup> the costs<sup>151</sup> and/or insufficient legal aid, which hinder effective application of the equal treatment principle in general (e.g. **Croatia, Greece, Portugal**).

Given the lower incomes of part-time workers, financial aspects might be even more problematic, but there are no specific impediments related to part-time or fixed-term work in most countries. A specific problem occurs in **Cyprus**, where a worker who works less than 18 hours per week cannot apply to the Industrial Tribunal (unless there is a claim for unpaid wages) and is also not entitled to compensation from the Redundancy Fund. The restricted access to justice seems a clear breach of EU law, in particular Article 17 of the Recast Directive.

<sup>147</sup> Amendments to Latvian Labour Law would provide an extension to the current maximum term of three to five years.

<sup>148</sup> See the Employment Protection Act (1982:80). There is a reasoned opinion on this issue by the European Commission, Brussels 22 February 2013 (Infringement number 2007/4835).

<sup>149</sup> This exclusion, which seems to involve a lack in protection against the abuse of such contracts, is currently being considered by the Constitutional Court as well as by the CJEU for the education sector (a sector which, in addition, has an abundance of female employees (Decree 16 April 1994, No. 297)), where fixed-term contracts can also be used to compensate for a general lack of staff, which is not for exceptional or temporary reasons.

<sup>150</sup> In **Ireland**, the Equality Tribunal has delays of up to three years before a claim is heard. The ECtHR has often condemned **Greece** and has even issued a 'pilot judgment'. See *Athanassiou v. Greece*, Application No. 50973/08, 21 December 2010.

<sup>151</sup> In **Slovenia** and **Greece**, for example, no low-cost complaints system exists.



Many experts mention the role of Equality Bodies, who often provide aid free of charge (e.g. **Austria, Croatia, France, Latvia, Liechtenstein, Lithuania, Luxembourg, Norway, Portugal**). However, equality bodies mostly have no possibility to impose sanctions such as compensation or reinstatement (e.g. **Bulgaria, Croatia, the Czech Republic, Germany, Hungary, Latvia, Norway**). In addition, some equality bodies face a lack of funding and personnel (e.g. **Estonia**). The experts of **Lithuania** and **Portugal** emphasise the role of Labour Inspectorates. Unions can also contribute to the effective application of non-discrimination norms (e.g. **Belgium, Luxembourg and Norway**). In the **UK**, national law does not allow class actions as such<sup>152</sup> (see Article 17(2) of the Recast Directive, which addresses the role of e.g. anti-discrimination associations). The **Norwegian** expert considers that the income requirement for free legal aid might sometimes be too low, but the main concern is the small number of cases in Norway.

In **Italy**, an upper limit of compensation has been considered contrary to the requirements for effective and dissuasive sanctions required by EU law.<sup>153</sup> This expert considers the lack of systematic and effective control a serious gap. In **Belgium**, the Gender Act of 10 May 2007 introduced fixed damages equal to six months' pay, which is due to a victim of gender discrimination unless she/he can demonstrate that the resulting damages were higher. Six months' pay is a standard amount in labour law, and the CJEU seems to have accepted that it is adequate under the Recast Directive<sup>154</sup>, but given that such fixed damages completely fail to stem the present flow of dismissals related to pregnancy/maternity, the Belgian expert questions the effectiveness of this remedy. In **Spain**, it might be questioned whether the sanctions in case of violation of the provisions on successive fixed-term contracts have a deterrent effect, as the compensation to be paid depends on the fixed-term worker's seniority in the company, which is generally low. In the **UK**, no awards can be made under the Part-Time Work Regulations for injury of feelings, a possibility which exists in (sex) discrimination cases.

## 7. Vulnerable groups

In addition to specific problems related to part-time work (see Section 4.2.) and fixed-term work (see Section 5.1.), some national experts highlight gender issues disadvantaging particular specific groups. For example in **Germany**, women with disabilities do not benefit from labour market programmes to the same extent as men with disabilities do. In 2009 only 38.8 % of women with disabilities obtained in-service labour market integration assistance in comparison to 61 % of men with disabilities. They are also directed towards mini-jobs as a substitute for jobs, as they are assumed to face longer odds of labour market integration. As a result, women with disabilities have a distinctly lower income than men with disabilities, also due to their lower labour-market participation.<sup>155</sup> In **Greece**, disabled women and women from weaker economic backgrounds suffer from the dismantling of the welfare state and the constant cuts in social benefits and services. A few experts mention the vulnerable position of women from (some) ethnic minority groups or migrant women, who often have had little education, face language problems and have small incomes (e.g. performing domestic or cleaning work). They might experience forms of multiple and/or intersectional discrimination, suffering disadvantages related to different discrimination grounds at the same time (e.g. **Austria, Germany, Greece, Iceland, Norway, Spain** and the **UK**).<sup>156</sup> However,

<sup>152</sup> The same is true for **Belgium** and **Greece**.

<sup>153</sup> See in particular Case C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367 (*Marshall II*).

<sup>154</sup> In Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECR-I-8511 (*Paquay*).

<sup>155</sup> CEDAW Alternative Report Follow-up Germany 2011 submitted by German Women's Rights Organisation, February 2009, pp. 7-8, available on <http://www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html>, accessed 7 April 2013. The expert for **Estonia** also mentions the vulnerable position of disabled women, in addition to women speaking Russian instead of Estonian. See also the reports on **Italy** and **Norway**.

<sup>156</sup> See on this issue the report of the European Network of Legal Experts in the Field of Gender Equality, S. Burri & D. Schiek *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender*



the expert for the **Netherlands** reports that there is no evidence in this country that women from ethnic minorities are at a disadvantage with regard to being employed on a part-time or fixed-term contract. The same applies to women with disabilities. However, highly educated women more often work full time than women with lower education. The **Hungarian** expert highlights the vulnerable position of women belonging to the Roma minority, who are especially exposed to poverty due to the rarity of workplaces in the countryside, and workplace discrimination. The **Austrian** expert mentions the weak position of those combining part-time and fixed-term employment, in particular in sectors where women are overrepresented.

## 8. Conclusions

### 8.1. Sex discrimination in relation to part-time work

The incidence of and problems related to part-time work show great variety in the 33 countries analysed in this report. The differences between the Northern European countries on the one hand, and the Southern and Eastern European countries on the other hand are striking. In the Netherlands, part-time work is very common and often viewed positively, while this is by far not the case for example in Bulgaria. Part-time work is most common in typical female professions, as is the case in Norway. According to the Norwegian expert, the incidence of part-time work is the result of gender stereotypes and considering part-time work as solely a gender issue works contra-productive. In this country, unions actively try to change the part-time norm to a full-time norm in these professions.

In all countries, women are overrepresented in part-time jobs and therefore suffer disadvantages related to part-time work, such as not earning enough income to reach economic independence, having less career opportunities and building up lower pensions, in particular when employed in precarious (minor) part-time jobs.<sup>157</sup> An obligation to provide a minimum number of hours (e.g. 15 hours a week), such as in Danish collective agreements, is meant to combat such precariousness. Quality part-time work can contribute to increased labour-market participation of women. However, structural forms of discrimination are hard to combat and as the Norwegian expert points out, a two-track approach of sex equality legislation on the one hand, and specific norms on part-time work on the other hand is problematic, if gender stereotypes and structural forms of gender discrimination are only considered when applying sex equality norms. In addition, until now the obligation to combat gender stereotypes as required by Article 5a CEDAW only scarcely seems to be applied in relation to part-time work; such obligation can contribute to address more structural forms of discrimination in relation to part-time work. EU law primarily offers tools in the field of equal treatment of part-time and full-time workers. But with the application of the concept of indirect sex discrimination, effects of underlying structural forms of discrimination in employment in relation to part-time work can be addressed. This is even more important given that the disadvantaged situation of women has been exacerbated in several countries by both the financial crisis and austerity measures.

#### 8.1.1. Equal treatment

The concept of indirect sex discrimination may also have added value in situations that do not fall under the scope of Directive 97/81/EC, in particular in the field of access to employment, employment protection and statutory social security. Given the strict and sometimes problematic requirements concerning the comparator in the Part-Time Work Directive, the

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*discrimination?* European Commission 2009, available on: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9), accessed 19 July 2013.

<sup>157</sup> See on the influence of the economic crisis the report of EGGE (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 from EU Bookshop: <http://bookshop.europa.eu/en/the-impact-of-the-economic-crisis-on-the-situation-of-women-and-men-and-on-gender-equality-policies-pbDS3113806/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L>, accessed 17 July 2013.

concept of indirect sex discrimination may sometimes be applied instead. National case law shows that courts do not always require specific statistics when part-time work is at stake. In addition, the approach of the CJEU to objective justifications for indirect sex discrimination is also followed by the CJEU when interpreting the non-discrimination provision of the Part-Time Work Directive, therefore contributing to consistency and legal certainty.

The issue of overtime is interesting, as it shows different approaches in national law. In some countries, overtime cannot be imposed on specific groups. Recurrent overtime can sometimes lead to a permanent extension of working time. In some countries, overtime supplements must be paid for hours worked above the individual working time. Again, the case law of the CJEU on indirect sex discrimination in relation to overtime of part-timers may – to a certain extent – have added value (*Elsner and Voß*).

### *8.1.2. Organisation of working time*

The EU norms on the organisation of working time are rather weak and as the Portuguese expert states: ‘the legal system shows a structural contradiction, because on the one hand, it puts in place rights and measures related to working time that are intended to promote the reconciliation of family and working life, while on the other it allows and encourages working-time arrangements that are opposed to that reconciliation’. Some flexible working-time schedules and working hours imposed by employers on short notice are hard to reconcile with care responsibilities. The concept of indirect sex discrimination might have an added value to combat working hours that conflict with care responsibilities.

Possibilities to adjust working time are welcomed by some experts, who also stress the importance of providing information to workers on part-time and full-time job opportunities in the enterprise or company. In addition, changing a full-time job into a part-time job and vice versa should be possible, both on a permanent or temporary basis. This would fit into a life-cycle approach, in which working-time adjustments corresponding to the needs of workers – in particular in relation to care responsibilities – can be adjusted in the course of life. The Swedish expert also points out shortcomings of the right to shorten working time, as at the same time this may form a trap for women traditionally taking up a larger part of care responsibilities. She also considers that the right to extend working time can be criticised regarding the employer’s right to organise his/her business in a certain way implying certain part-time structures – i.e. certain part-time positions – without really scrutinising the need for this. A similar view is taken by the Norwegian expert. Plans to organise working time based on the wishes of workers at the level of the enterprise can (partly) remedy such shortcomings, provided that they are gender neutral and that the results in practice are regularly assessed. Sometimes national equality legislation requires the adoption of equality plans at the level of enterprises, including policies on part-time work.

### *8.1.3. Statutory social security and pensions*

In some countries, certain groups in which women are overrepresented are explicitly excluded from statutory social security schemes. High minimum hours or earning requirements might be indirectly discriminatory for women and have to be objectively justified. When the daily hours of work form the basis for the calculation of benefits in social security, this might disadvantage workers who work only few hours daily or not continuously.

## **8.2. Fixed-term contracts**

The main sex discrimination problem identified in relation to fixed-term contracts concerns the non-renewal of such an employment contract in relation to pregnancy. There is quite some national case law on this issue. However, due to the lack of data and studies on sex discrimination in relation to fixed-term contracts it is impossible to provide a complete picture of the wide extent of this problem. Some equality bodies have developed specific policies to address pregnancy discrimination more in general. While in most countries there is legislation limiting the use of successive fixed-term contracts, systematic control and practical implementation of these measures is often a weak point in some countries.

The national reports in Part II provide information on and an assessment of national policies, legislation, collective agreements and case law on part-time and fixed-term work, and identify gender equality issues. The reports will hopefully facilitate an exchange of information and contribute to a better use of EU law and national law to combat both direct and indirect sex discrimination.



## Part II

### National Law: Reports from the Experts of the Member States, EEA Countries, FYR of Macedonia and Turkey

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AUSTRIA – Neda Bei

#### I. PART-TIME WORK

##### 1. General information

Data on working time are gathered within the framework of the quarterly micro-census. The qualification as part-time worker (including self-employment) is based on self-identification (*Selbstzuordnung*).<sup>1</sup> For purposes of statistical plausibility persons usually working less than 30 hours are always considered as working part time, while persons normally working more than 36 hours per week or more are always considered as working full time.<sup>2</sup> 25.8 % of the persons questioned identified themselves as working part time from October until December 2012; 8.8 % being men and 45.8 % women. Throughout 2012, the average activity rate (*Erwerbstätigenquote*) was 72.5 %, (77.8 % men, 67.3 % women). The increase of the overall average activity rate by 0.4 % since 2010 is mainly a result of the increase of part-time work; the rate of workers rose by 0.5 % in 2011 to 25.7 %. This includes self-employed persons who have a minor impact on the part-time rate. In other words, 25.1 % of the economically active persons were employees (*unselbständig Erwerbstätige*) working part-time, consisting of 7.6 % part-time working male and 44.5 % part-time working female employees.<sup>3</sup> From another angle, part-time employment can be seen as the most frequent form of atypical employment which, at the same time, has the highest participation of women. The gender pay gap is persistent in all forms of atypical employment. Austrian data establish a clear correlation between part-time employment, female employment and low-paid branches. The most significant private sector in this regard is services (*Dienstleistungen*); particularly telling data are established for gastronomy and trade,<sup>4</sup> and jobs in agriculture are also identified.<sup>5</sup> On average, the annual gross earnings of female employees are 39 % lower than those of men; half of the ‘gender pay gap’ can be explained by women’s shorter annual and/or weekly

<sup>1</sup> The Austrian micro-census is based on the ILO concept, defining economic activity or work including self-employment (*Erwerbstätigkeit*) for one normal work hour weekly at the minimum; methodical description at [http://www.statistik.at/web\\_de/fragebogen/private\\_haushalte/mikrozensus/index.html](http://www.statistik.at/web_de/fragebogen/private_haushalte/mikrozensus/index.html), accessed 7 May 2013.

<sup>2</sup> Part-time work of less than 12 hours weekly is classified separately (*geringfügige Beschäftigung* within the statistical meaning), T. Geisberger & K. Knittler ‘Niedriglöhne und atypische Beschäftigung in Österreich’, *Statistische Nachrichten* 6/2010 pp. 449-461, at p. 450, footnote 4; pp. 450 ss.

<sup>3</sup> All data to be found at the website of Statistik Austria under ‘Arbeitsmarkt’, <http://www.statistik.at>. Compare furthermore ‘Erwerbstätigen-, Arbeitslosen- und Teilzeitquoten’ since 1996; source: Statistik Austria, in: Arbeiterkammer Wien (ed.) *Wirtschafts- und sozialstatistisches Taschenbuch 2012*, Vienna (Ueberreuter) 2012, p. 86, [http://statistik.arbeiterkammer.at/erwerbsttaetigenquoten\\_und\\_arbeitslosenquoten.html](http://statistik.arbeiterkammer.at/erwerbsttaetigenquoten_und_arbeitslosenquoten.html), all accessed 15 March 2013.

<sup>4</sup> T. Geisberger & K. Knittler ‘Niedriglöhne und atypische Beschäftigung in Österreich’, *Statistische Nachrichten* 6/2010 pp. 449-461, graphic tables 5 and 6.

<sup>5</sup> J. Wagner et al. *Potenziale für qualifizierte Teilzeitarbeit in Österreich. Eine empirische Untersuchung in ausgewählten Betrieben* Vienna, Industriewissenschaftliches Institut 2009, pp. 7 ss. (study on behalf of the Labour Market Service, the Austrian Economic Chambers *WKO* and the Federation of Austrian Industries *IV*). Data from 2008 place female agricultural and silvicultural workers with wages of EUR 5.40 per hour at the utmost bottom of the ‘income pyramid’, P. Gregoritsch et al. *Geschlechtsspezifische Einkommensunterschiede. Indikatoren für ein Monitoring* Vienna, Federal Chancellery 2009, p. 24; cf. tables 4 and 5; <http://www.frauen.bka.gv.at/DocView.axd?CobId=32618>, accessed 4 March 2013.

working time, and the other half appears to be the consequence of *inter alia* non-linear careers. The income differences between women and men increase with age and become increasingly clear after retirement, sometimes amounting to up to 100 % of the median.<sup>6</sup>

There may be a certain caveat as to the notion of ‘voluntary’ part-time work.<sup>7</sup> The wish to work longer or shorter hours as documented by studies gives a quite differentiated picture as to gender, age and actual working time.<sup>8</sup> The availability of full-time jobs and the wages actually earned appear to be decisive factors in this regard, part-time jobs being viewed as a temporary solution, while full-time jobs are equated with security.<sup>9</sup> Part-time work implies constructions of gender; it is viewed as a reduced form of work, particularly with the specific aim to reconcile work and family life, whereas work that suggests prestige, power and money is considered beyond the ambit of the part-time sphere.<sup>10</sup> Data on the actual reasons for women to work part time present family-connected reasons certainly as an important motivation, but the data collected by Bergmann et al. also indicates the wish to work more hours if childcare facilities were more available and open at more suitable hours. Biffl considers persevering traditional gender role models as the main reason that young married women reduce their working time after having given birth, while young fathers expand their working time, furthermore explaining the large number of part-time workers in Austria and its impact on the gender pay gap.<sup>11</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Issued within the framework of the European Employment Strategy, the Austrian National Action Plan Employment (NAP) 1998-2002 addressed part-time work and ‘qualified part-time’ work (briefly) in a social partners’ policy agreement on modernising the organisation of work. This became an important incentive for discussion in the years to follow.<sup>12</sup> The Government’s working programme for 2008 until 2013 addressed part-time work in several contexts, for example envisaging to improve and extend the existing provisions on part-time

<sup>6</sup> G. Biffl *Die ökonomische Situation der Frauen in Österreich. Frauenbericht 2010 II.3* Vienna, Federal Chancellery 2010, pp. 467 s. [http://www.bka.gv.at/studien/frauenbericht2010/Frauenbericht\\_Teil2\\_3Biffl.pdf](http://www.bka.gv.at/studien/frauenbericht2010/Frauenbericht_Teil2_3Biffl.pdf), accessed 15 May 2013; see in particular Ch. Mayrhuber et al. *Erwerbsarbeit, Teilzeitarbeit und ihre Bedeutung für das Lebens Einkommen* Vienna, Labour Market Service / WIFO 2010.

<sup>7</sup> According to the European Commission’s experts group on Gender and Employment, rates of ‘involuntary’ and ‘voluntary’ part-time work ‘can only be interpreted with information about the level of collective care services and of social norms concerning maternal employment, and with reference to the overall rate of part-time work’. J. Rubery et al. (eds.) *Indicators on Gender Equality in the European Employment Strategy*, Report by the Expert Group on Gender and Employment to the European Commission, Manchester 2001, pp. XVI ss., even suggested that the notion of ‘(in)voluntary’ part-time work should be abandoned in favour of ‘long’ and ‘short’ part-time work.

<sup>8</sup> N. Bergmann et al. *Qualifizierte Teilzeitbeschäftigung in Österreich. Bestandsaufnahme und Potentiale* Vienna, Federal Chancellery 2004 (reprint 2008) collected detailed gendered data on employees wishing for longer or shorter working time, tables 83 and 84, p. 184 s. Overall, more female – 171 200 – than male employees – 88 800 – wish to work more hours; <http://www.bka.gv.at/DocView.axd?CobId=20859>, accessed 15 March 2013.

<sup>9</sup> Oral communication courtesy Ms D. Lutz about I. Putz *Arbeitszeitwünsche von Teilzeitbeschäftigten* SORA (Institute for Social Research and Analysis), Vienna 2006, an unpublished survey of one thousand persons on behalf of the Federal Chamber of Labour (n = 1 000).

<sup>10</sup> R.M. Dackweiler & S. Rosenberger ‘Geschlecht, Karriere und Politik als Beruf: “Informelle” Teilzeitarbeit von leitenden BeamtInnen mit politischem Mandat’ *ÖZP* 32 (2003) 4 pp. 403-415, <http://www.oezp.at/pdfs/2003-4-03.pdf>, accessed 6 May 2013.

<sup>11</sup> G. Biffl *Die ökonomische Situation der Frauen in Österreich. Frauenbericht 2010 II.3* Vienna, Federal Chancellery 2010, p. 467.

<sup>12</sup> See the interdisciplinary evaluation study of N. Bergmann et al. *Qualifizierte Teilzeitbeschäftigung in Österreich. Bestandsaufnahme und Potentiale* Vienna, Federal Chancellery 2004 (reprint 2008) on behalf of the Federal Minister for Women Affairs and Public Service; see furthermore N. Bergmann et al. *Qualität von Teilzeitbeschäftigung und die Verbesserung der Situation von Frauen am Arbeitsmarkt. Analyse und Umsetzungsbeispiele* Vienna, Federal Chancellery 2010.

work for the needs of specific groups, and stressing that ‘qualified part-time work for women and men’ is a means to reconcile family and work. ‘Qualified part-time work’ is defined in the chapter on equality (*Gleichstellung*) in the world of work, which includes access to extension of working time, promotion opportunities, and access to all forms of basic and advanced professional training at enterprise level as well as to qualification in general. In addition to emphasising the intention to strengthen the participation of women in full-time employment while paying particular attention to high-quality jobs capable of providing a living, the Government declared their intention to promote part-time work for women and men by raising awareness of its effects and possibilities.<sup>13</sup> In 2010, the Minister for Women’s Affairs and Public Service presented a further National Action Plan for Equality of Women and Men in the labour market, addressing part-time and full-time employment once more.<sup>14</sup> The Austrian reports to the CEDAW Committee on the implementation of Article 5 CEDAW are minimalistic.<sup>15</sup>

### 2.1.2. Equal treatment

In the private sector, part-time work presents itself when, on average, the agreed working time is less than either the statutory normal working time or the working time stipulated by collective norms.<sup>16</sup> While legislation presupposes a normal working time of 8 hours daily and 40 hours weekly, it allows alternative models of distributing normal working hours (particularly by collective agreements) at branch level, and to a certain extent also at enterprise level. If a collective agreement applies, the normal working time is defined by the collective agreement.<sup>17</sup> According to §19d(6) of the Working Time Act, part-time workers/employees must not be disadvantaged as compared to full-time workers/employees, unless objective reasons justify a different treatment.<sup>18</sup> The definition mentioned and the prohibition of discrimination of part-time workers were introduced (in addition to other provisions pertaining to the contractual side of working time regulations in general) as a new section into the Working Time Act in 1992. The same legislation explicitly introduced the notion of indirect discrimination into the Equal Treatment Act, and the preparatory parliamentary materials specifically referred to the discrimination of part-time workers.<sup>19</sup> The

<sup>13</sup> Republik Österreich, Regierungsprogramm 2008-2013. <http://www.bka.gv.at/DocView.axd?CobId=32965>, accessed 30 May 2013, p. 158, p. 183.

<sup>14</sup> Federal Chancellery - Federal Minister for Women and Public Service *Nationaler Aktionsplan Gleichstellung von Frauen und Männern am Arbeitsmarkt* Vienna, June 2010, <http://www.bka.gv.at/DocView.axd?CobId=40025>, accessed 15 May 2013. When presenting this NAP, the Minister pointed out that the recent increase of women’s activity rate in the labour market is due to the increase of part-time work not able to secure one’s living. Furthermore, she addressed part-time work in the higher management echelons.

<sup>15</sup> Part-time is, however, addressed in connection with education and with Article 11 CEDAW, 7<sup>th</sup> / 8<sup>th</sup> Austrian CEDAW report to the United Nations (2011), pp. 11-14; p. 36, <http://www.frauen.bka.gv.at/DocView.axd?CobId=44455>. When presenting the combined 7<sup>th</sup> and 8<sup>th</sup> Austrian report to the CEDAW Committee in February 2013, the Government’s representative referred to the NAP for Equality of Women and Men in the Labour Market (June 2010) mentioned. He pointed out qualified part-time work, the raising of the rate of labour force participation and of full-time employment of women as strategic goals of this NAP. He also pointed out that ‘Austrian girls and boys show a stereotypical behaviour when choosing a type of school, and later an occupation’, so that girls were overrepresented in business, social and commercial vocational schools, but vastly underrepresented in industrial-technical schools. Thus the Ministry for Education would focus inter alia on the diversification of educational and career choices and the breaking down of stereotypes, [http://www2.ohchr.org/english/bodies/cedaw/docs/statements/StatementAustria\\_54thCEDAWsession.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/statements/StatementAustria_54thCEDAWsession.pdf), pp. 2 s., all accessed 15 June 2013.

<sup>16</sup> § 19d (1) Working Time Act (*Arbeitszeitgesetz* - AZG), OJ No. 461/1969 as amended by the Labour Law Corollary Act (*Arbeitsrechtliches Begleitgesetz*) OJ No. 833/1992.

<sup>17</sup> §1a, 4 Working Time Act; G. Löschnigg *Arbeitsrecht* Vienna, ÖGB-Verlag 2011, pp. 410-417. ss.

<sup>18</sup> §19d(6) first sentence Working Time Act, OJ No. 461/1969 as amended by OJ No. 833/1992. Collective agreements may extend the normal daily working time to up to 10 hours; the calculation of working hours (*Durchrechnung*) over periods of longer than a week, i.e. up to one year, applies to full-time workers only and may result in a working time of 56 hours weekly. Probably, this enormous flexibility is the reason why the Austrian legislator refrained from referring to comparable full-time workers.

<sup>19</sup> §11 Equal Treatment Act OJ No. 166/2004 as last amended by OJ No. 17/2011, formerly §2(2) Equal Treatment Act OJ No. 833/1992 as prepared by Governmental RV 664 BlgNR 16.GP, referring to Cases



addressees of the prohibitions of discrimination in the Working Time Act and in the Equal Treatment Act are individual employers and the parties to collective agreements at enterprise as well as at branch level.

Regardless of the size of a business, the Working Time Act applies to ‘labour relationships of all kinds’ (*Arbeitsverhältnisse aller Art*). This definition includes workers and employees, but excludes both employee-like (*arbeitnehmerähnliche*) persons and ‘free employees’ (persons with a ‘free service contract’ or *freie Dienstnehmer*).<sup>20</sup> High-echelon managerial staff, i.e. employees with decisive influence on high-level management decisions (*leitende Angestellte*), are generally exempted from working time regulations.<sup>21</sup> Further exemptions from the personal scope of the Working Time Act are defined to correspond with the typical fragmentation of Austrian Labour Law. Firstly the public sector is excluded, with the exception of federal employees to whom collective agreements apply.<sup>22</sup> Furthermore, the provisions concerning part-time employees do not apply to specific groups of workers, such as workers within the meaning of the Rural Labour Code,<sup>23</sup> workers within the scope of the Janitors’ Act,<sup>24</sup> and home workers. Whereas analogous prohibitions of discrimination against part-time workers are to be found in various provisions applying to the public sector (particularly to federal civil servants, agricultural and silvicultural workers), they are not found in the Janitors’ Act or the Home Work Act.<sup>25</sup> Further labour legislation excludes part-time workers: the Employees’ Act exempts employees from the applicability of the minimum periods for giving notice if their working time is less than one fifth of the 4.3 fold normal weekly working time per month, or the 4.3 ratio of this amount per week (e.g. less than 34.6 hours per month, amounting to eight hours per week for a 40-hour working week; less than

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C-170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 01607 and *Cand C-96/80 Jenkins v Kingsgate* [1981] ECR 911.

<sup>20</sup> On this point all commentators agree unequivocally, compare for instance K. Grillberger (ed.) *Arbeitszeitgesetz* Vienna, Manz 2011 p.4; F. Schrank *Arbeitszeitgesetze I* Vienna, Linde 2008, p. 37. §1151(1) Civil Code differentiates between employment (labour) relationships on the one hand, and work contracts (*Werkverträge*) on the other, a basic dichotomy well known to many legal systems. If a person commits herself/himself to ‘services’ (*Dienstleistung*) for another over a certain period, there is an employment (labour) contract as opposed to producing a certain achievement for remuneration (work contract; *Werkvertrag*). The basic and intentionally flexible §1151(1) Civil Code lacks precision, however, since it fails to define ‘services’. It was up to the courts and to legal scholars to develop the criteria of the typological dichotomy mentioned. *Personal dependency* is considered the essential criterion for an employment (labour) relationship, a criterion which necessarily is to be understood as a flexible combination of other criteria according to the need for protection in individual cases. If there is no personal dependency, the Austrian legal system assumes a so-called free service contract (*freier Dienstvertrag*), an ‘in-between’ category regrettably not mentioned in §1151(1) Civil Code. For the purposes of social security and tax law, persons with a free service contract or *free employees* are considered self-employed. §4(4) General Social Security Act (*Allgemeines Sozialversicherungsgesetz – ASVG*) OJ No. 189/1955 as amended by OJ Nos. 201/1996, 411/1996, I 139/1997, I 138/1998, I 99/2001, again introduces a further ‘in-between’ category and defines *employee-like persons* as persons, for whose employment the criteria of personal and economic dependency prevail over the criteria of self-employment; without being wholly dependent workers/employees, they are subject to a mandatory insurance *sui generis*. See for this and for further references, N. Bei ‘Austria’ in the European Network of Legal Experts in the Field of Gender Equality, Nicola Countouris and Mark Freedland, *The Personal Scope of the EU Sex Equality Directives*, pp. 19-27, 22, European Commission, 2012, , available at [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/personal\\_scope\\_eu\\_sex\\_equality\\_directive\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf), accessed 22 October 2013.

<sup>21</sup> §19d(3) Working Time Act OJ No. 461/1969 as amended by OJ No. 833/1992; high-level managerial staff (*leitende Angestellte*) is overall exempted from the Working Time Act, cf. § 1(2)8 AZG.

<sup>22</sup> Legislation applying to the public sector, overall comprising more than 20 federal and provincial statutes, would require a separate assessment which could not be dealt with here. It may be pointed out that federal contractual public employees (*Vertragsbedienstete*) working for 12 hours (less than a third of the prescribed full-time working week) were exempted from the scope and thus from the protection of the Contractual Employees Act until 2010; § 1(3)2 Contractual Employees Act OJ No. 86/1948, repealed by OJ No. I 111/2010.

<sup>23</sup> OJ No. 287/1984.

<sup>24</sup> OJ No. 16/1970.

<sup>25</sup> §10a Rural Labour Code, OJ No. 287/1984 as amended. The Janitors’ Act was repealed by legislation as to employment contracts concluded since 30 June 2000, but still applies to those concluded before 1 July 2000, § 31(5) Janitors’ Act OJ No. 16/1970 as last amended by OJ No. I 111/2010.



33.1 hours per month, amounting to 7.6 hours per week for a 38.5-hour working week, and so on).<sup>26</sup>

Part-time workers are entitled to the same basic pay as full-time workers. Technically, they do not work overtime, but ‘additional time’ (*Mehrarbeit*) for which an additional compensation of 25 % per hour was introduced (*Mehrarbeitszuschlag*) in 2007.<sup>27</sup> In particular, part-time workers are disadvantaged if full-time workers receive higher pay for the identical work done in identical hours, meaning that part-time workers must not receive lower pay than full-time workers for the identical hours of work.

The *pro rata temporis* principle is allowed for calculating the entitlement to annual holidays.<sup>28</sup> In principle the calculation of other entitlements based on working time has to take into account the amount of additional time that was worked regularly.<sup>29</sup> This also includes the entitlement to pensions at enterprise level. Voluntary social benefits are to be granted at least *pro rata*. The *pro rata temporis* principle is, however, not allowed for the rights under the Labour Constitution Act such as the entitlement to elect workers’ representatives. A different disadvantageous treatment of part-time workers is only allowed if, firstly, there are justified objective reasons (*sachlich gerechtfertigt*), and secondly if the different treatment will not result in discrimination.<sup>30</sup> Thus, equal access to training has to be granted in principle.

In principle, possible discrimination of part-time workers has to be examined not only under the prohibition of the Working Time Act, but under the Equal Treatment Act on grounds of indirect sex discrimination as well. The pertaining provisions are seen as closely linked.<sup>31</sup> The prohibition of direct and indirect discrimination under the Equal Treatment Act in principle applies to all aspects of the employment relationship.<sup>32</sup> The personal scope of equal treatment legislation is essentially broader than that of working time legislation; the Equal Treatment Act for the private sector includes employee-like persons, trainees, and, with regard to the access to employment, also free employees. In addition, the most recent

<sup>26</sup> *Kündigungsfrist*; §20(1) Employees Act OJ No. 292/1921 as last amended by Article 8 OJ No. I 58/2010. R. Mosler ‘*Arbeitsrechtliche Probleme der Teilzeitbeschäftigung*’, *DRdA* 1999, 338 mentions furthermore inter alia the Actors’ Act OJ No 441/1992 and the Journalists’ Act OJ (StGBI) No.88/1920 as amended, requiring a main, not merely additionally exercised, occupation for the basic protection at the termination of employment according to the Civil Code (§§1156, 1159 and 1159a ABGB)(provisions applying to other media workers, Private Drivers Act (*Privat-KraftwagenführerG*)).

<sup>27</sup> § 19d(3a) Working Time Act as amended by OJ No. I 61/2007; if a collective agreement provides for less than 40 weekly hours as the normal working time, the full-time workers technically work ‘additional hours’ as well until they reach 40 hours; only then are they, in principle, entitled to overtime pay, regularly an additional 50 % of the hourly wages; §§6, 10 Working Time Act. On the equal treatment of part-time and full-time workers if a collective agreement provides for a normal working time of less than 40 hours, that is, shortens the statutory working time (‘multiple reduction of working time’ applying to part-time workers), see G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, p. 414, R. Gleissner ‘*Diskriminiert der Mehrarbeitszuschlag?*’ *RdW* 2008, 608, 657, and D. Lutz/K. Mayr ‘*Mehrarbeitszuschlag bei Teilzeit und kollektivvertraglich verkürzte Arbeitszeit*’, *ecolex* 2009, 756. The Supreme Court held that a collective agreement providing that all workers should receive an additional compensation of 50 % for any working hours exceeding the normal 38 working hours laid down in the collective agreement and part-time workers should receive no additional compensation for the first two hours exceeding 38 hours, but 25 % for each additional hour until reaching 38 hours, therefore did not discriminate against part-time workers. OGH 28.6.2012, 8 ObA 89/11p –§5 KV-BAGS (collective agreement for workers and employees employed by members of the employers’ association in health and social occupations).

<sup>28</sup> Supreme Court OGH 28.1.1998, 9 ObA 390/97m; however, reducing the entitlement to holiday originating from periods of full-time work is not allowed; CJEU Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] ECR I-3527; Tyrolean Contractual Employees’ Act (*Tiroler Vertragsbedienstetengesetz*).

<sup>29</sup> §19(4) Working Time Act; Supreme Court OGH 18.5.1999, 8 ObA 173/98v – regularly provided premiums, ‘13<sup>th</sup> and 14<sup>th</sup> wages’ (*Sonderzahlungen*).

<sup>30</sup> According to G. Heilegger et al. *Arbeitszeitgesetz*<sup>3</sup> Vienna, ÖGB-Verlag, pp. 476 ss., an objective justification for the better treatment of full-time workers in cases of performance-based pay (premiums) cannot be found. It is furthermore not allowed to exclude part-time workers from hardship allowances, Supreme Court 9 ObA 90/04. ARD 5575/1/2005.

<sup>31</sup> Compare for instance R. Mosler, ‘*Arbeitsrechtliche Probleme der Teilzeitbeschäftigung*’, *RdA* 1999, 338.

<sup>32</sup> In particular to recruitment, pay including voluntary benefits at enterprise level, professional training, advancement, all other working conditions in general, termination and (sexual) harassment §§2 – 7 Equal Treatment Act OJ No. I 66/2004 as amended by OJ Nos. I 98/2008 and 7/2011.

amendment to the Equal Treatment Act explicitly included the fact of having children into the legal definition of ‘sex’.<sup>33</sup>

### 2.1.3. Organisation of working time

Quantity (*Ausmaß*) and schedule (*Lage*; exact hour, day) of part-time work have to be agreed upon.<sup>34</sup> Any change of the initial agreement must also be agreed upon. Generally, a worker has to be given notice of such an intended change by the employer at least two weeks in advance; changes are allowed on the grounds of objective justified reasons on the employer’s side. Workers may refuse if they have ‘reasons worth considering’ (*berücksichtigungswürdige Gründe*), in particular part-time workers may refuse additional working hours on the ground of such reasons. These provisions modify the principles applying to changes of working time of full-time workers by the employer, but the obligatory weighing of interests essentially remains the same.<sup>35</sup> As legislation provides for the requirement of an existing agreement, but regulates neither details nor the consequences of a lack thereof, the courts’ case law is decisive. In principle, the Supreme Court does not allow one-sided arrangements that permit the employer to decide on the quantity of work as well as the specific moment in time that the work has to be performed.<sup>36</sup>

National legislation does not provide for a general right to work part time, for a right to work full time, or for a right to change from one form of working time to the other. However, civil servants are entitled to part-time work without specific reasons and to return to full-time work.<sup>37</sup> The various models of parental leave and parental part-time leave include a right to return to full-time work.<sup>38</sup> Furthermore, employees in certain cases of pre-retirement (*Gleitpension*) and employees older than 50 caring for family members in not merely transient situations are entitled to demand a reduction of their working time, the latter also being entitled to return to full-time work (*Betreuungsteilzeit*).<sup>39</sup> Further specific entitlements to a reduction of working hours are to be pointed out:

- older employees, particularly prior to retirement (*Altersteilzeit*): not identical to the *Gleitpension* mentioned;<sup>40</sup>
- employees caring for a dying family member (*Familienhospiz*) are entitled to demand reduced working hours (or unpaid leave) over a regular period of three months and six

<sup>33</sup> § 1 Equal Treatment Act OJ I 2004/66 as amended by OJ I 2011/7. While the legislation has prohibited direct or indirect discrimination ‘on grounds of sex, in particular referring to the marital or family status’ in an employment relationship and in the world of work (§§3, 4 Equal Treatment Act OJ No. I 66/2004 as amended by OJ Nos. I 98/2008 and 7/2011), the amended provisions each read ‘on grounds of sex, in particular referring to the family status or the circumstance that someone has children’, OJ I 107/2013, entry into force: 1 August 2013.

<sup>34</sup> Cf. the obligation to lay down in writing the essential content of an employment contract including the working time immediately after beginning the employment relationship, § 2(1)AVRAG.

<sup>35</sup> §§ 19d(2), (3) Working Time Act; for full-time workers: § 19c Working Time Act.

<sup>36</sup> This includes the various forms of work on demand, on demand and consensus, furthermore capacity-oriented working time models (*KAPOVAZ*). Such arrangements are not considered (genuine) agreements. They are, in other words, considered as offending good morals and therefore as null or partly null. G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, pp. 414 ss., pp. 450 ss. Cf. Supreme Court 13.11.2003 8ObA86/03k – ‘demand-consensus’, part-time work; OGH 8.8.2002 8ObA 277/01w, CJEU Case C-313/02 *Wippel* [2004] ECR I-9483, OGH 22.12.2004 8ObA 116/04y – nullity in parts – part-time, fixed-term work.

<sup>37</sup> § 50 Civil Servants Act, OJ No. 333/1979 as amended.

<sup>38</sup> §§ 15h – 15p Maternity Protection Act OJ No. 221/1979 as amended by OJ No. 124/2004; §§ 8 – 8h Fathers’ Leave Act as amended by OJ No. I 64/2004. It should be noted, however, that the entitlement to conclude an agreement on parental part-time leave with the employer is limited to enterprises (*Betriebe*) employing more than 20 workers/employees, § 15h(1)2 Maternity Protection Act, § 8(1)2 Fathers’ Leave Act.

<sup>39</sup> ‘*Gleitpension*’: § 14(1), ‘*Betreuungsteilzeit*’ § 14(2) Labour Contract Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*, AVRAG) OJ No. 459/1993 as amended by OJ No. I 1997/139.

<sup>40</sup> Based not on labour-law provisions, but on the requirements for the so-called ‘old-age part-time money’ (*‘Altersteilzeitgeld’*), a benefit of the unemployment insurance as defined by § 27 Unemployment Insurance Act OJ No. 609/1977 as last amended by OJ No. I 35/2012. This benefit is paid over a maximum period of five years and compensates for the reduced income, G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, pp. 425 s. with numerous references.

- months at the maximum, and they are entitled to return to their previous working time;<sup>41</sup> and
- the same principles apply to employees caring for a seriously ill child (*Begleitung von schwersterkrankten Kindern*), the regular period being five months and nine months at most.<sup>42</sup>

Very recently, similar provisions have been introduced on part-time work for purposes of formation (education, training; *Bildungsteilzeit*) and for specific necessities arising from the care of family members, from one to three months (*Pflegezeit*).<sup>43</sup> Finally, models for reducing working time by collective agreement at branch or enterprise level should be pointed out as well, although technically they might not be considered part-time workers within the meaning of labour law (*Solidaritätsprämienmodell*; *Kurzarbeit*).<sup>44</sup>

#### 2.1.4. Assessment

The flexibility at statutory level and the opening for further flexibility by collective agreements at branch level and in certain cases at enterprise level can be considered strengths of national legislation. The effects of the explicit prohibition of discrimination of part-time work on the assessment of women's work in general may have induced a gradual change of attitude in social politics which was traditionally oriented on full-time work.<sup>45</sup> However, some characteristics of national legislation are problematic in the light of effective protection against the discrimination of part-time workers and against indirect sex discrimination. The fragmented notion of workers, notably the numerous exemptions of branches with high female participation, from the personal scope of working time legislation, and the further legal exemptions of part-time workers from other labour law legislation, may overall be in conformity with the national legislator's margin of appreciation, which is allowed by Directive 97/81/EC. However, they could be considered indicators of possible indirect discrimination by legislation. The so-called gender impact assessment in the preparatory legislative process is merely formal and does not require legislation to address gender stereotypes explicitly. On the contrary, the recently introduced specific forms of part-time work designed for care, as described above, might reinforce the traditional stereotyped gender roles.

## 2.2. Collective agreements

There are no national collective agreements in Austria.<sup>46</sup>

<sup>41</sup> §14a Labour Contract Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz, AVRAG*) OJ No. 459/1993 as amended by OJ No. I 89/2002 and OJ No. I 135/2009; G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, p. 426.

<sup>42</sup> §14b Labour Contract Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz, AVRAG*) OJ No. 459/1993 as amended by OJ No. I 135/2009.

<sup>43</sup> *Bildungsteilzeit* according to §11a AVRAG as introduced by the Social Law Amendment Act (*Sozialrechts-Änderungsgesetz*) OJ I 67/2013, complementing §11 AVRAG on unpaid leave for the same purpose, accompanied by an unemployment benefit, see G. Krapf 'Das neue Bildungsteilzeitgeld' *DRdA* 2013/5, to appear; *Pflegezeit* introduced by draft legislation (planned entry into force: 1 January 2014) introducing inter alia §§11c, 11d AVRAG and presently pending before the second chamber of Parliament, *Arbeitsrechts-Änderungsgesetz 2013 (ARÄG)* 9079 BlgNR 24. GP, [http://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR\\_09079/index.shtml](http://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_09079/index.shtml) accessed 17 July 2013.

<sup>44</sup> G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, pp. 422, 427.

<sup>45</sup> G. Heilegger et al. *Arbeitszeitgesetz*<sup>3</sup> Vienna, ÖGB-Verlag p. 475.

<sup>46</sup> The wide coverage by collective agreements at federal branch level given, the 530 collective agreements at federal as well as at regional branch level is not regularly nor systematically assessed as regards part-time work. Cf. however S. Mengl 'Zur Diskriminierung von Teilzeitbeschäftigten in Kollektivverträgen' *ecolex* 2005, 143.

### 2.3. Case law

In 1995, the Equal Treatment Commission (private sector) issued an opinion on the regime applied by the Pharmaceutical Wages Fund (*Pharmazeutische Gehaltskasse*) to the advancement of part-time employees in the wages scheme according to the *pro rata temporis* principle, with the Fund acting in lieu of individual employers. In view of the fact that the greater part of employed pharmacists have been (and still are) women, the Commission considered these regulations as indirect sex discrimination regarding pay, inter alia not justifiable by allegedly less professional experience.<sup>47</sup> The Constitutional Court, reaching the same conclusions, repealed the pertaining legal provisions.<sup>48</sup> The Constitutional Court's decision directly applied Union Law, which had major repercussions in the Austrian legal system. A further important opinion concerned the collective agreement for part-time employees of banks who, having been overall excluded from internal pension schemes until 1996, were discriminated against by a new regime which, although including part-time employees, took less account of part-time employees.<sup>49</sup>

#### 2.3.1. Assessment

As opposed to the courts, the Equal Treatment Commission used to refer explicitly to gender-based stereotypes as a potentially discriminatory criterion in individual cases.<sup>50</sup> It may be pointed out however, that courts are often reluctant to refer to international obligations in general, including the CEDAW.

### 2.4. Involvement of other parties

The involvement of the social partners is traditionally essential. While, for instance, the National Action Plan Employment 1998-2002 as described was developed essentially on a tripartite basis, the National Action Plan Equality of Women and Men in the Labour Market 2010 was based on a broader collaboration, including researchers and women's NGOs. This may also be pointed out as good practice. On the other hand, conservative family organisations are known to oppose more adequate childcare facilities.

## 3. Statutory social security and pension rights

### 3.1. Exclusions

In the private sector, the social security system is mandatory for all workers and employees (compulsory social insurance); the threshold for entering the system is legally defined as a monetary value that is raised annually (*Geringfügigkeitsgrenze*).<sup>51</sup> Social security contributions are paid by both workers and employers as soon as the gross salary exceeds this threshold. Benefit entitlements either start immediately (for sickness benefits, or after legally defined waiting periods (for pension benefits and for unemployment benefits). The threshold

<sup>47</sup> S. Feigl *Anträge an die Gleichbehandlungskommission* Federal Ministry for Social Security and Generations, Vienna [without year], case G 4(1995), pp. 235 ss., <http://www.bka.gv.at/DocView.axd?CobId=20616> accessed 15 July 2013.

<sup>48</sup> Constitutional Court 11 December 1998 G 57/98 – discrimination of part-time pharmacists as to pay, advancement and pension rights according to the *Bundesgesetz über die Pharmazeutische Gehaltskasse für Österreich*, OJ No. 254/1959 as amended by OJ. No. 04/1985, (*GehaltskassenG*).

<sup>49</sup> Equal Treatment Commission 10.12.1998, *Loseblattsammlung* <http://www.bka.gv.at/DocView.axd?CobId=36112> accessed 15 July 2013. S. Feigl *Anträge an die Gleichbehandlungskommission* Federal Ministry for Social Security and Generations, Vienna (without year), case G 4 (1995), pp. 235 ss. p.22, trade chain employing only part-time working women.

<sup>50</sup> For instance S. Feigl *Anträge an die Gleichbehandlungskommission* Federal Ministry for Social Security and Generations, Vienna (without year), case G 4(1995), pp. 235 ss. p.22, trade chain employing only part-time working women.

<sup>51</sup> §4 General Insurance Act OJ No. 189/1955 as amended; in 2013, the threshold being presently EUR 386.80 monthly, OJ No. II 441/2012.

for an income earned in addition to unemployment benefits equals the threshold for entering the compulsory social insurance, so that someone earning more than the threshold will no longer be considered unemployed. As unemployment benefits are calculated as a percentage of former earnings, re-entering the workforce with diminished wages may however later result in lower unemployment benefits. There are no specific requirements in order to be entitled to parental leave that might exclude or disadvantage part-time workers. To be eligible for statutory parental leave according to the Maternity Protection Act (*Mutterschutzgesetz*) for women and the Fathers' Leave Act (*Väterkarenzgesetz*) for men, a regular employment contract is required, but without any restrictions as to working time.<sup>52</sup>

### 3.2. Assessment

The various exemptions regarding workers earning less than the threshold mentioned above (*geringfügig Beschäftigte*) are allowed by the pertaining directives, but are *de facto* most detrimental to women.

## 4. Self-employment

Technically, self-employed persons, who are supposedly autonomous in their working hours, can only be working part-time *de facto*, but not *de jure* as working time legislation (i.e. the Working Time Act) does not apply to them. This is also true for the so-called free service contracts (*freie Dienstverträge*). Statistically, self-employed part-time work is not significant.<sup>53</sup>

## 5. Access to and supply of goods and services

Not enough relevant information was available on this topic.

## 6. Are there any gaps in national law?

### 6.1. Gaps in the area of (access to) employment

Discrimination in the recruitment process is broadly covered by the Equal Treatment Act. In practice however, childcare responsibilities and the lack of adequate childcare institutions represent the main problem. With regards to accessing higher management functions, the persistence of traditional gender roles in managerial culture is a barrier to effective change.<sup>54</sup> To a certain extent and in the long run, documentation and analysis by research may prove helpful to establish good practices in enterprises.

As to the termination of employment contracts, legal scholars agree on the non-conformity of Austrian legislation with pertinent EU law on two points: firstly, the high thresholds of §20(1) of the Employees' Act as described (time limits for giving notice).

<sup>52</sup> Free employees, that is persons with a so called free service contract (*freier Dienstvertrag*) who are included into all compulsory social insurance schemes applying to self-employed persons and accordingly have access to all benefits (e.g. maternity benefits), but who consequently do not have regular employment contracts, are excluded completely from the scope of both Acts (for maternity protection – which regulates parental leave for women – and parental leave).

<sup>53</sup> In 2011, the part-time rate was 25.2 %, meaning that 8.9 % of the economically active men and 44.0 % of the economically active women were working part time. This includes self-employed persons who, when working part time, have but a minor impact on the part-time rate, e.g. 0.1 % in 2011. In other words, 25.1 % of the economically active persons were employees (*unselbständig Erwerbstätige*) working part time (7.6 % part-time working male and 44.5 % part-time working female employees). The relative statistical insignificance of part-time working self-employed persons is even more accentuated for 2012, the overall part-time quota of 25.7 % having been identical to the share of employees working part time (7.7 % part-time working male and 45.4 % part-time working female employees). See Statistik Austria at [www.statistik.at](http://www.statistik.at), accessed 26 July 2013.

<sup>54</sup> N. Bergmann et al. *Qualifizierte Teilzeitbeschäftigung in Österreich. Bestandsaufnahme und Potentiale* Vienna, Federal Chancellery 2004 (reprint 2008), pp. 88.

Secondly, labour law permits employers to terminate employment without giving any reason, and they will do so if workers prove not employable enough (in practice individual workers will yield to pressure and refrain from bringing their case before the courts). This is only counterbalanced by the possibility to fight dismissal (*Kündigung*) at the labour courts on specific legislative grounds. Discrimination of part-time workers could possibly only be fought as indirect sex discrimination under the Equal Treatment Act.<sup>55</sup>

## 6.2. Gaps in other areas

With the exception of the Equal Treatment Act, there are no other legal provisions pertaining to the non-discriminatory access of part-time workers to goods and services.

# II. FIXED-TERM WORK

## 1. General information

According to data from 2009, fixed-term work was the second most frequent form of atypical employment with a high participation of women: 5.3 % of the labour force (*unselbständige Erwerbstätige*) was working on a fixed-term contract in their main occupation, 53 % of them women (compared to a rate of 48 % female participation in the labour force).<sup>56</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

There is no general political commitment which is comparable to the Government's and social partners' commitment regarding part-time work (see 2.1.1.). The Federal Ministry for Labour, Social Affairs and Consumer Protection holds that the Directive applies only to employment relationships (employment contracts) and not to work-contracts (*Werkverträge*) nor to free service contracts (*freie Dienstverträge*) and that, furthermore, this assessment is in conformity with Article 2 of the Directive, referring to national laws and practice.<sup>57</sup> The overall legal approach is casuistic, meaning that there are no general criteria determining when a fixed-term contract would be allowed. Although fixed-term contracts are often determined by date, as is for instance required by many collective agreements, other ways are allowed in principle, but resolute conditions are prohibited. The labour courts apply the general prohibition against contractual conditions offending good morals (§879 of the Civil Code). The sanction is nullity, and further consequences include either the extension of the time limit in case of premature termination, or the transformation into a permanent contract.<sup>58</sup> Fixed terms in contract work (*Arbeitskräfteüberlassung*) are prohibited in principle, but allowed when justifiable reasons apply.<sup>59</sup>

<sup>55</sup> §§105(3),(3a) Labour Constitution OJ No. 22/1974 as amended. Although courts have developed a broad case law as regards criteria such as the dismissal being unsocial (*sozialwidrig*), this does not include possible discrimination concerning part-time work, which was not addressed by legislation either. Legal scholars therefore suggest to include part-time work into the catalogue of banned reasons for dismissal (§105 Labour Constitution). J. Egger *Arbeits- und Sozialrecht in der EU und die österreichische Rechtsordnung*<sup>2</sup> Vienna, ÖGB-Verlag 2005, p. 374; R. Mosler 'Arbeitsrechtliche Probleme der Teilzeitbeschäftigung' *RdA* 1999.

<sup>56</sup> T. Geisberger and K. Knittler 'Niedriglöhne und atypische Beschäftigung in Österreich', *Statistische Nachrichten* 449 - 461 6/2010, pp. 450 s.

<sup>57</sup> Informal communication courtesy of Ms S. Piffl-Pavelec, Federal Ministry for Labour, Social Affairs and Consumer protection. However, a critical view may be taken on this attitude, explaining it by the Ministry's reluctance to urge the social partners to reach the necessary basic agreements about the personal scope, particularly the notions of worker and free employees.

<sup>58</sup> See G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, pp. 255-265.

<sup>59</sup> §11 Contract Work Act OJ No. 196/1988 as amended.

### 2.1.2. Equal treatment

In 2002, Directive 1999/70/EC was transposed by introducing a statutory prohibition of discrimination and the obligation to inform workers about permanent positions in the enterprise.<sup>60</sup>

By legislation introduced in 1992 ('antidiscrimination package'), pregnant workers' fixed-term contracts were extended by law until the beginning of maternity leave.<sup>61</sup> The Equal Treatment Act applies to fixed-term contracts.<sup>62</sup> A discriminatory dismissal whilst in the probation period entitles the employee to claim extension of the employment contract before a court. Furthermore, the termination of a fixed-term contract on grounds of sex or due to the fact that the employee had presented not unjustified claims under the Equal Treatment Act gives the employee the choice either to request a declaratory judgment that a permanent employment contract exists, or to accept the termination and to claim damages (compensation of financial loss and also of moral damages).<sup>63</sup>

### 2.1.3. Successive fixed-term contracts

According to the Supreme Court's case law, series of successive fixed-term contracts ('chain contracts') are to be examined case by case: although in principle prohibited, justified social or economic reasons may apply.<sup>64</sup> The fixed-term contract may be renewed once, but a second renewal will already have to be examined, applying strict standards.<sup>65</sup> For certain groups, legislation explicitly permits successive fixed-term contracts.<sup>66</sup>

### 2.1.4. Assessment

Legal scholars criticise the transposition of Directive 1999/70/EC by §2b of the Austrian Labour Contract Law Act (AVRAG) as not specific enough and as full of legal uncertainties. They suggested that at least the principles of the Supreme Court's case law on successive fixed-term contracts should be explicitly integrated into legislation.<sup>67</sup>

## 2.2. Collective agreements

There are no national collective agreements in Austria.

<sup>60</sup> §2b AVRAG OJ No. 459/1993 as amended by OJ No. I 52/2002. This legislation applies to all businesses independently of size. However, again the fragmented personal scope and numerous exemptions (inter alia public sector; agri- and silviculture, home work, and to some extent also domestic workers) have to be pointed out; on the other hand, provisions on fixed-term work include various norms exempted from the AVRAG, such as those applying to agri- and silvicultural workers, to public contractual employees, to janitors and others; G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, 255.

<sup>61</sup> §10a Maternity Protection Act OJ No. 221/1979 as amended by OJ No. 833/1992, cf. Hopf et al. *GIBG. Gleichbehandlung - Antidiskriminierung* Vienna, Manz 2009, p. 151 with reference to CJEU C-438/Jimenez-Melgar.

<sup>62</sup> Employment on probation (*Probearbeitsverhältnis*) is dogmatically differentiated from a fixed-term contract in labour law, but there can be no doubt that this is a most important example of a time limit applied. This differentiation and the related controversies were impediments to an effective protection against discrimination under the Equal Treatment Act, until equal treatment legislation clarified the matter in 2008, explicitly including fixed-term contracts. H. Hopf et al. *GIBG. Gleichbehandlung - Antidiskriminierung* Vienna, Manz 2009, apostilles 9 and 137 to §3, p. 141, pp. 198 ss. referring to OGH 8.7.1999, 8 ObA 188/99a – termination of employment on probation, disabled employee.

<sup>63</sup> §12(7) Equal Treatment Act OJ No. I 66/2004 as amended by OJ No. I 98/2008; see H. Hopf et al. *GIBG. Gleichbehandlung - Antidiskriminierung* Vienna, Manz 2009, to § 3 apostille 133, p. 194; apostilles 137, 138, pp. 198 ss; furthermore to §12 sub-apostille 83, p. 428.

<sup>64</sup> Cf. for instance OGH 26.11.2012 9 ObA 102/12.

<sup>65</sup> G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, apostille 5/16, p. 259, referring inter alia to OGH 3.4.1973 4 Ob 26/73.

<sup>66</sup> Programme makers and other journalists employed by the Austrian Broadcast Organisation; services in private households according to the *Dienstleistungsscheckgesetz* OJ I No. 45/2005; personal assistants of Members of Parliament. Specific regulations furthermore apply to universities. G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, pp. 183, 259 ss.

<sup>67</sup> J. Egger *Arbeits- und Sozialrecht in der EU und die österreichische Rechtsordnung*<sup>2</sup> Vienna, ÖGB-Verlag 2005, p. 377, referring to G. Griesser 'Allgemeiner Kündigungsschutz für befristete Arbeitsverhältnisse?', *RdW* 2003, 147 and Jöst/Risak, 'Aktuelle Neuerungen im Arbeitsrecht' *ZAS* 2002, p. 97 (99 pp.).

### 2.3. Case law

In addition to the comprehensive case law on successive contracts mentioned above, a Supreme Court decision held that prior to the explicit amendment of 2008, the termination of employment on probation was discriminatory under the Equal Treatment Act.<sup>68</sup>

### 2.4. Involvement of other parties

The social partners, including the Chambers of Agriculture, are traditionally involved. It should be mentioned that the public sector (health, education), the agricultural sector, and non-profit organisations such as the Red Cross (organising transports to hospitals) or the Caritas Socialis (providing inter alia care for the elderly) apparently have vested interests in fixed-term work.

## 3. Statutory social security and pension rights

Access to social security benefits is tied to legally defined periods of time during which workers are either insured through work-related contributions or through drawing unemployment benefits or sickness benefits (waiting periods). Again the inclusion into social security insurance depends on earning above the social security threshold. The required minimum waiting periods for eligibility for old-age benefits are not very extensive (15 years in all, of which at least 7 years have to result from actively earning an income above the social security threshold for people born from 1955 onwards). There are no minimum requirements, thresholds or provisions disadvantaging fixed-term workers as to acquiring statutory social security or pension rights in labour law. The statutory umbrella organisation of all social security authorities (*Hauptverband der Sozialversicherungsträger*) is legally required to store all information about time spent in active employment or drawing social security benefits, so that the completion of required waiting periods can be accessed by authorities as soon as applications are filed. As regards pensions, details regarding every period spent in employment, in unemployment or drawing sickness benefits are stored and taken into account for pension entitlements, no matter when they were acquired (so that someone working in Austria for 15 years in their youth could draw a pension at 65 even if he or she left the country afterwards). The applicability of statutory parental leave regulations, however, depends on whether there is an active employment contract at the time when leave is required.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

The system of public-law monitoring by the labour inspectorates, i.e. monitoring (excessive) working hours, does not include powers to monitor contractual obligations, particularly pay. According to §19d(6) of the Working Time Act, the burden of proof shifts to the employer in case of conflict; the employer has to prove that disadvantages of part-time workers were not caused by the part-time work itself. The Supreme Court's case law holds that the employer has to present justified social or economic reasons for fixed-term employment.<sup>69</sup> For their members (workers/employees, unemployed persons, employee-like persons, all essentially in the private sector) the Chambers of Labour provide advice on all labour law and social security matters, and represent their members before the labour courts and social courts. They bear the costs of proceedings, provided the case is not pointless and does not involve a strong

<sup>68</sup> H. Hopf et al. *GLBG. Gleichbehandlung - Antidiskriminierung* Vienna, Manz 2009, p.226, referring inter alia to OGH 4.5.2006 9 ObA 81/05 k.

<sup>69</sup> G. Löschnigg *Arbeitsrecht*<sup>11</sup> Vienna, ÖGB-Verlag 2011, apostille 5/25.



procedural risk. The Equal Treatment Ombud provides advice for individuals seeking to enforce their rights under the Equal Treatment Act, but can bring them to court only in certain cases.

The Equality Commission for the private sector is an administrative organ giving non-binding opinions. Only the courts are considered tribunals within the meaning of Article 6 of the ECHR whose decisions will be binding and enforceable.

## **2. Vulnerability, multiple/intersectional discrimination**

All groups mentioned in the questionnaire are vulnerable. It may be recalled that the first studies on sexual harassment pointed out part-time workers as a risk group (regularly low placement in the entrepreneurial hierarchy, interrupted and scarce presence at the workplace). Furthermore, combined part-time and fixed-term employment may be allowed under the Directives, but is a major discrimination factor and more frequent in certain sectors than in others, e.g. in low-paid branches with a high participation of women, including agriculture, health services, gastronomy, trade, and also education (teaching contracts).

### **BELGIUM – Jean Jacqmain**

## **I. PART-TIME WORK**

### **1. General information**

The author would like to emphasise that this report is mainly concerned with ‘part-time work’ constituting the subject that was decided or agreed upon at the start of an individual work relationship, rather than a form of temporary reduction of the working time in the course of a full-time work relationship. This distinction is important because while part-time employment contracts are used in both the public and private sectors, tenured appointments in public services are exclusively full-time (with the exception of teaching positions in education which may be, and indeed frequently are, part-time).

Women represent 46.9 % of the paid workforce in Belgium, but only 35 % of workers in full-time employment, as 81 % of all workers in part-time employment are female. Viewed from another angle, these data mean that 44.3 % of women and 9.3 % of men in paid employment work part time. Overall, 26.6 % of the workforce is in part-time employment.

Generally part-time employment means that the employee concerned works less than the normal working time applicable to her/his employer’s enterprise or institution. So, 38 hours per week unless a collective agreement or a particular regulation provides for shorter hours (the definition of full-time employment in education is quite different as it is only based on actual teaching time, e.g. 22 hours per week in the upper years of secondary education).

Not surprisingly, part-time work is concentrated in certain sectors: healthcare, accommodation and catering, cleaning; or jobs such as till operators in supermarkets.

The author has no statistics concerning persons who want to work part time but cannot find a suitable job. According to the official study regarding the motives of part-time work, the option ‘caring for children and other dependents’ ranked only second, chosen by 18.8 % and 4.5 % of female and male interviewees respectively. The most frequently chosen option (33 % of women and 25.5 % of men) was ‘Other personal or family motives’, an undefined aggregate which likely includes those very satisfied with part-time work as well as those who are not, but do not explain why. The option ‘Does not want to work full time’ was chosen by 11.6 % of women and 8.4 % of men. ‘Has another part-time occupation’ was chosen by 3.1 % of women and 6.4 % of men, but there is no indication as to whether that refers to paid or self-employed work.

The impact of part-time work on the pay gap is massive. According to the latest data available<sup>70</sup> (2008), the gap was 10 % when calculated on an hourly wage basis, but 23 % on a yearly income basis.

The widely shared notion that part-time work is for women with family duties is therefore a stereotype, unconfirmed by the much more complex reality of available jobs and motives for accepting them. In contrast, the notion is more valid when applied to temporary and voluntary reduction of the working time within a full-time work relationship.

## **2. Legislation, (national) collective agreements and case law**

### **2.1. Policies and legislation at national level**

#### *2.1.1. National policies*

National policies concerning part-time work are consistently reactive and never proactive. Given that labour law was originally based on a model of (male) full-time employment (starting in 1889), the employers' change of strategy in certain sectors since the beginning of the 1980s demanded an adaptation of labour legislation. Later, successive employment crises generated the notion that a part-time job was better than no job at all, so that adaptations of social security legislation also became necessary. However it cannot be said that part-time employment was ever openly promoted as desirable, and no political decision-maker has ever risked advocating the slogan that 'one job and a half' would be sufficient for a married couple.

Consequently, there have been no attempts to promote part-time employment, whether or not in relation to stereotypes negatively portraying certain categories. In contrast, there have been several successive waves of encouragement of voluntary and temporary reduction of working hours, usually aimed at making jobs available to unemployed (and benefit-entitled) persons. Such encouragements were offered primarily to 'workers with family duties'; a gender-neutral and politically correct way of saying 'women'. However, confessing that family duties are still shared most unequally remains a social taboo. To give an example, the career-break scheme (including its part-time variants) was introduced in 1985 in the public sector without any particular motive being required for application. Such reluctance was abandoned quite recently for budgetary reasons and, under already introduced measures or others still in preparation, the career-break scheme is being restricted in the public sector for two purposes: for younger workers; the reconciliation or furtherance of education, and for senior workers; an incentive to remain at least partly active as long as possible.

#### *2.1.2. Equal treatment*

At federal level,<sup>71</sup> anti-discrimination legislation consists of three Acts of 10 May 2007: the Gender Act, aimed at transposing all EU directives concerning gender equality; the Race Act, aimed at transposing Directive 2000/43/EC; and the Discrimination in General Act, aimed at transposing Directive 2000/78/EC but with additional criteria (some of them mentioned in Article 21 TFEU, such as 'language' or 'fortune') to the four envisaged in the Directive. None of these Acts specifically mentions part-time work, but they can all be used if discrimination is alleged in respect of the relevant form of occupation.

Directive 97/81/EC was formally transposed by the Act of 5 March 2002, which was later amended to stipulate that it must not be used to justify discrimination under any of the Acts mentioned above.

However, in the private sector, adopting the Act of 5 March 2002 appeared to be rather a futile exercise, given that Collective Agreement no. 35 of the National Labour Council, made

<sup>70</sup> Institut pour l'égalité des femmes et des hommes, *Femmes et hommes en Belgique. Statistiques et indicateurs de genre*. Edition 2011, pg. 123.

<sup>71</sup> Each of the federate authorities (Communities and Regions) has its own legislation, applicable e.g. to the workforce of its own public services. However, those various instruments are usually copied from the federal ones, and do not require any special attention in this report.

generally binding by a Royal Decree of 21 September 1981, already guaranteed the principles enshrined in the European Framework Agreement on part-time work.

As mentioned in 1. above, part-time work is any schedule with fewer working hours than the normal full-time hours applicable to the workforce of an enterprise. However, Article 11bis of the Employment Contracts Act of 3 July 1978 provides that no part-time contracts may provide a work schedule with less than one third of the working time applicable to full-time employees in the same enterprise or sector. Exceptions to this rule may be allowed by Royal Decrees or Collective Agreements for certain categories of enterprises or personnel (e.g. the cleaning industry, where the lower limit is one fourth). Article 11bis is a protective provision under which pay is due on the basis of the applicable lower limit when an employee is occupied illegally under a schedule with fewer hours. The legislation mentioned above applies to all enterprises and there are no thresholds to any rights.

Articles 152 through 156 of the Multi-Purpose Act of 22 December 1989 provide that an employer must inform part-time workers of any vacancies for jobs entailing a longer working time, for which they have priority to apply. However, an ancillary Royal Decree was needed to make those provisions effective, which has never been adopted.

CA no. 35 provides that when overtime is imposed by the employer in a recurrent way (i.e. over a quarter, at least one hour per week beyond the time specified in the contract), the employee may apply either for a revision of the contract or for additional hours of rest corresponding to the overtime. Moreover, a Royal Decree of 25 June 1990 provides for pay supplements, in an extremely complicated way.

Concerning dismissal, there is now unanimity in case law and academic opinion, which consider that payment in lieu of notice must be calculated on the basis of part-time remuneration, in contrast with the raging controversy regarding dismissal during a temporary reduction of a full-time occupation (see 2.3.1. below).

There is absolutely no case law which might reveal any disputes regarding the application of the *pro rata* principle, enshrined in CA no. 35 and the Act of 5 March 2002, to other aspects of a work relationship. For instance, part-time workers are eligible as members of work councils, but there has never been any litigation comparable to the German cases of the CJEU.<sup>72</sup>

Finally, Article 171 of the Multi-Purpose Act of 22 December 1989 provides that in the absence of a written contract for part-time work, as stipulated by Article 11bis of the Employment Contracts Act, the occupation is presumed to be full-time. However, after strong litigation and several amendments to the provision, it is now interpreted as only creating a presumption in favour of the Social Security Office (so that the employer must pay contributions corresponding to full-time occupation), while in litigation against the employer the employee herself/himself must bring evidence that she/he was occupied full-time.

### 2.1.3. Organisation of working time

There are no legal provisions concerning a right to either part-time or full-time work. Obviously, within the sphere of contractual employment, there may be room for negotiation on individual working time. For instance, in a state-subsidised charity, an employee may be offered a choice between half, three-quarters or full-time employment, and the possibility to apply for a later modification of the chosen schedule. Still, unless the written contract so provides, this is no enforceable right.

As described above, legislation only provides for formulas for a temporary reduction of working time, either for reconciliation purposes or to fit an employee's wishes. The regulations applicable to public services used to be more generous in this respect than those of the private sector. However, given that those schemes entail expenses (as during the time when the employee does not work, he/she remains entitled either to an allowance paid by the employer or to a social security benefit), they have become easy targets for recent measures of

<sup>72</sup> Cases C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e. V. v Monika Bötzel* [1992] ECR-I-3589, C-457/93 *Kuratorium für Dialyse und Nierentransplantation v Lewark* [1996] ECR-I-243 and C-278/93 *Edith Freers and Hannelore Speckmann v Deutsche Bundespost* [1996] ECR-I-1165.

budgetary savings. In 2012, the right to a 4-day working week, which the Job Redistribution Act of 10 May 1995 had instituted for all staff members (below the middle management rank) of public services without any time limit, was restricted to a maximum of 5 years. Moreover, the federal Government is now preparing an alignment of the career-break scheme, applicable in the public sector, to the time-credit scheme of the private sector. Up until now, a tenured staff member (again below the middle management rank) was entitled to a career break of a maximum of 5 years full-time and 5 years part-time without having to state the purpose of the leave. This right will be limited to 1 year unconditionally and a maximum of 4 years if the leave is used for purposes of family care or further education (while seniors over 50 or 55 remain entitled to a part-time career break until they retire). In the private sector, the right to time credit is unconditional for 1 year and conditional for 3 or 5 more years. (There is also an unlimited right to a part-time career break/time credit for senior workers).

The above developments leave untouched the ‘special schemes’ of career break/time credit: for assistance to a terminally ill family member (up to 2 months); for parental leave (4 months full-time or 8 months half-time or 20 months 1/5 time); and for care for a seriously ill family member (up to 2 years). This last scheme was recently adapted (in the form of an exception to the advance notice which the employee normally has to give the employer) to cover the case of unforeseen hospitalisation of a sick or wounded child – an obvious transposition of Clause 7 (on time off) of the revised Framework Agreement on parental leave (Directive 2010/18/EU). Clause 6 of the revised Agreement, on adaptation of working time after the end of parental leave, has been copied into the various relevant regulations, but nobody seems to know how it can be applied in practice.

As to return from maternity leave, the only reconciliation measure provided by legislation is the following. Provided that the employee has ‘saved’ at least 2 weeks of the optional antenatal leave (which are normally used to lengthen the compulsory 9-week postnatal leave), she is entitled to use those 2 weeks in single days, to be taken over a 4-month period according to a schedule agreed upon with the employer.<sup>73</sup>

#### 2.1.4. *Assessment*

Legislation is generally adequate if the *pro rata* principle is accepted as the compass for handling part-time work. As mentioned above, on a theoretical level full-time work remains the legal norm and the only desirable form of employment; part-time work is viewed as a self-generating phenomenon, irresistible and needing no encouragement. Obviously it entails various adverse consequences for women, but indirect gender discrimination remained unacknowledged for quite a long time. However, the obligation to transpose Directive 97/81/EC corrected certain regulations that gave ground to such discrimination (see 2.3.1. below).

As to individual adaptation of working time, moderately generous schemes were made available – always in a gender-neutral form – as long as they also served the purpose of job creation. When the latter objective was abandoned, these schemes became burdensome for the public budget and an easy target for austerity policies. Gender neutrality then served as whitewashing on adverse effects for women, and there is no sign that the Gender-Mainstreaming Act of 12 January 2007, which should have prevented such effects, was taken any heed of.

## 2.2. *Collective agreements*

### 2.2.1. *Policies*

Theoretically, social partners still adhere to full-time work as the standard. However, when certain sectors began to promote part-time work as necessary to the organisation of enterprises, trade unions started to demand that it be regulated; hence CA no. 35.

The situation is entirely different in the public sector, where Collective Agreements do not apply and where full-time work remains the norm for tenured appointments (with the

<sup>73</sup> Article 39 of the Working Conditions Act of 16 March 1971.

exception of education). Consequently, part-time work was only introduced as a possibility to individually reduce working time; when the authorities submitted the draft bill of law for negotiation, the trade unions warily approved. Under the new Act of 10 April 1995, the 4-day week was a great success, so much so that the unions tried to defend it as a *droit acquis* against the federal Government's austerity measures.

By way of exception, part-time employment contracts are widely used in the public sector. As CA no. 35 is not applicable in the public sector, discrimination against part-time employees, and underlying indirect discrimination against women, was only eliminated when Directive 97/81/EC had to be transposed (see 2.3.1 below).

### 2.2.2. *Equal treatment*

As mentioned above, CA no. 35 (revised in 2000 by CA no. 35bis in order to comply with Directive 97/81/EC) is based on the *pro rata* principle, including in remuneration, which is envisaged in all its components. The provisions aimed at preventing the employer from increasing the fixed working time without the employee's consent have been summed up above.

### 2.2.3. *Organisation of working time*

There are no national CAs concerning the organisation of working time.

### 2.2.4. *Assessment*

Although CA no. 35 never considered the gender dimension, as it was only intended to prevent discrimination against part-time workers (sixteen years before the European Framework Agreement) it must be regarded as satisfactory, given that the CJEU's case law on gender discrimination in part-time work generally validated the *pro rata* principle, except when it entailed excessive consequences.

The protection provided against imposed overtime (see above) is certainly better than what the CJEU found acceptable in cases such as *Helmig* and others.<sup>74</sup>

## 2.3. *Case law*

### 2.3.1. *Cases/opinions of equality bodies*

Case law related to gender discrimination in part-time work (and, indeed, to part-time work itself) is extremely scarce; the Equality Agency (Institute for Equality of Women and Men) has never produced any opinions in this respect. The only landmark case which can be quoted is from nearly 30 years ago; an enterprise that was experiencing financial trouble decided to convert the contracts of all of its employees who were not 'heads of family' (under tax and social security law), i.e. essentially women, from full-time to part-time. Thirteen women went on strike in protest, for which they were dismissed. The Labour Court found that this constituted victimisation under the Sex Discrimination Act in force at the time.<sup>75</sup>

In the public services, where CA no. 35 is not applicable, staff members with part-time employment contracts were denied seniority pay increments until Directive 97/81/EC had to be transposed. When finally a woman claimed for arrears which concerned periods of employment prior to the transposition, the Labour Court of Appeal relied on EU law and the CJEU's case law and found indirect discrimination against women.<sup>76</sup>

Part-time career breaks/time credits, and particularly their special variant part-time parental leave, are the only currently active sources of litigation which have focused on the

<sup>74</sup> Joined cases: C-399/92 *Stadt Lengerich v Angelika Helmig*; C-409/92 *Waltraud Schmidt v Deutsche Angestellten-Krankenkasse*; C-425/92 *Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV*; C-34/93 *Dagmar Lange v Bundesknappschaft Bochum*; C-50/93 *Angelika Kussfeld v Firma Detlef Bogdol GmbH*; and C-78/93 *Ursula Ludewig v Kreis Segeberg*, [1994] ECR-I-5727.

<sup>75</sup> Labour Court in Charleroi, judgment of 12 November 1984, *Revue de droit social/Tijdschrift voor sociaal recht*, 1984, p. 420 with C. Pichault's case note.

<sup>76</sup> Labour Court of Appeal in Brussels, judgment of 17 December 2010, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2012, p.29 with J. Jacqmain's case note.

issue of payment in lieu of notice in case of dismissal: should the payment be based on the part-time or full-time remuneration? The *Hof van cassatie/Cour de cassation*'s case law obstinately insisted on the part-time remuneration. This position was upheld by the Constitutional Court, which moreover ruled out any possible gender discrimination.<sup>77</sup> Finally, in compliance with the CJEU's *Meerts* decision,<sup>78</sup> the relevant legal provision (Article 105 of the Act of 22 January 1985) was amended, but strictly only as far as parental leave was concerned. Litigation has therefore continued concerning other forms of part-time career break/time credit. Quite recently, the Labour Court of Appeal in Ghent<sup>79</sup> found that *Meerts* should be applied extensively (i.e. beyond a parental leave situation) in order to prevent indirect gender discrimination, whereas the Labour Court of Appeal in Brussels<sup>80</sup> maintained the traditional view.

## 2.4. Involvement of other parties

The author has nothing of use report under this heading. As mentioned above, part-time work is still considered a form of employment less desirable than full-time work, for obvious financial reasons. It is only regarded as desirable when a) the alternative is no work at all, or b) it fits various personal considerations or family duties. Given that employers keep offering a large number of part-time positions, there appears little point to promote part-time work.

Quite to the contrary, the legal provisions aimed at giving part-time workers a priority right in access to further employment might be regarded as indirectly favourable to women, but they are not implemented effectively.

## 3. Statutory social security and pension rights

### 3.1. Exclusions

Statutory social security is structured in different insurance schemes, each covering a different risk. The only scheme that imposes minimal thresholds (i.e. minimum amounts of contributions as a condition of entitlement to benefits) is the Healthcare and Sickness Insurance Scheme. However, contributions are due in any case and may be completed by voluntary personal payments, so that technically there is no exclusion from this scheme.

Any period of work is taken into account for the calculation of pension benefits. The reduced remuneration corresponding to part-time work is one of the main causes for the overall gap of 23 % between men and women in the amount of retirement benefits.

As to industrial accidents and occupational diseases, benefits paid during temporary disability are based on the part-time remuneration, while a notional full-time pay is the reference in case of permanent disability.

In the Unemployment Insurance Scheme, extremely intricate provisions are aimed at preserving the entitlement to full benefits (in case of further full-time unemployment) or supplementing part-time pay if an employee is forced (by economic circumstances in the enterprise) to accept a reduction of his/her working time or if an unemployed person finds part-time occupation. Full entitlement to benefits (in case of unemployment) is also preserved when a full-time worker reduces her/his working time for family care reasons.

Finally, the Family Benefits Insurance Scheme is the only scheme in which the amount of the benefits is fixed and therefore independent of the beneficiary's remuneration or working time.

There is absolutely no case law to report on this issue.

<sup>77</sup> Judgment no. 51/2008 of 13 March 2008, *Journal des tribunaux du travail*, 2008, p. 149.

<sup>78</sup> Case C-116/08 *Christel Meerts v Proost NV* [2009] ECR-I-10063.

<sup>79</sup> Judgment of 14 January 2013, *Algemene Rol* no. 2010/AG/376, unreported.

<sup>80</sup> Judgment of 15 March 2013, *Algemene Rol* no. 2012/AB/294, unreported.

### 3.2 Assessment

All that can be said here is that the treatment of part-time work in statutory social security is consistent with the general passive approach of part-time work described above. Still, the Belgian system is free of some especially controversial issues which have been submitted to the CJEU.<sup>81</sup>

### 4. Self-employment

There is nothing to report on this issue.

### 5. Access to goods and supply of goods and services

There is nothing to report on this issue.

### 6. Are there any gaps in national law?

#### 6.1. Gaps in the area of (access to) employment

##### 6.1.1. Recruitment process

As far as the author knows, the situation can vary widely from one part-time intensive sector to the next. As to the cleaning industry and till operator positions in supermarkets, the supply of womanpower far exceeds demand, so that the employer's preference for part-time jobs goes unchallenged. The ratio is completely reversed in healthcare, so that part-time employment (and, indeed, temporary agency work) seems to fit many employees' personal wishes. In this sector, unsocial working hours (night and weekend shifts) appear to be a more serious issue than full-time or part-time work.

There are no particular initiatives or good practices to mention. There is no lack of study and evaluation groups, but this is essentially due to the fact that sectors such as cleaning and healthcare (nursing and menial tasks) now attract large numbers of persons of foreign nationality or origins. Consequently, attention for 'diversity' tends to underrate the gender factor.

##### 6.1.2. Employment conditions

Again, existing legislation is satisfactory to prevent discrimination against part-time workers, insofar as the *pro rata* principle is considered as an adequate safeguard.<sup>82</sup> The absence of case law, or even of complaints submitted to the Institute for Equality of Women and Men, prevents any legal approach of discrimination in practice.

Similarly, there is nothing to report as to the application of legislation which implements Directive 92/85/EEC.<sup>83</sup>

##### 6.1.3. Termination of the employment contract

Again, there is no case law indicating that in itself an employee's preference for part-time or full-time work would give ground to dismissal. Indeed, the following observation comes to mind: so far, the right of each party to terminate a permanent employment contract without revealing any motive, provided they give notice, is essential to the Employment Contracts Act. Consequently, there are a large number of provisions to restrict an employer's right of dismissal under various circumstances, e.g. pregnancy. One might therefore think that the absence (either in legislation or in CA no. 35) of any specific protection for an employee who

<sup>81</sup> E.g. in Cases C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR-I-4625 and C-444/9 *Megner and Scheffel v Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR-I-4741, or in Case C-385/11 *Elbal Moreno* [2012] (unreported).

<sup>82</sup> The author finds it useful to mention that a test of this adequacy is offered by Case C-476/12 *Österreichischer Gewerkschaftsbund v Verband Österreichischer Banken und Bankiers*, now pending at the CJEU.

<sup>83</sup> Working Conditions Act of 16 March 1971.

applies for longer-time employment indicates that no risk of victimisation has ever been envisaged.

## **6.2. Gaps in other areas**

There is nothing to report on this issue.

# **II. FIXED-TERM WORK**

## **1. General information**

According to a very rough assessment (based on the aggregation of various forms of unstable employment, including temporary agency work), 10 % of female and 7 % of male employees have fixed-term contracts. There is no information available as to the impact of this difference on the pay gap. Most probably, any such impact would result from the seniority factor in pay scales.

Under the Employment Contracts Act of 3 July 1978, the normal form of employment is the contract for an indefinite period of time. The fixed-term contract is a variant of the former, subject to restrictive conditions as to its termination. However, there is no restriction as to the conclusion of a first fixed-term contract. Fifteen years ago, the conditions of renewal of such contracts were eased, but this did not result in any explosive growth. Yet, extension of fixed-term contracts was stimulated considerably when they served one of the two following purposes: a) as an instrument of programmes aimed at giving young people a first chance of work experience (see below); or b) by nature, as the instrument of temporary agency work (Directive 2008/104/EC), which does not seem to fall within the scope of the present report.

This situation is entirely different in the public services. Although employment contracts (including fixed-term contracts, under the same conditions as in the private sector) are used more and more extensively, the normal form of employment remains the tenured appointment, an extremely desirable type of fixed-term work. Indeed, a tenured staff member enjoys guaranteed employment until the retirement age. Obviously there are provisions for premature termination of the work relationship, such as dismissal on disciplinary grounds, discharge on health grounds (with entitlement to a pension) or the staff member's voluntary resignation, but these provisions do not include redundancy on economic grounds. This dimension is worth mentioning, as Directive 1999/70/EC is concerned with fixed-term employment and not only fixed-term contracts.<sup>84</sup> As an exception, the fluctuations in the number of pupils and students is deemed to justify that a young teacher's career begins with a succession of short fixed-term appointments before she/he is finally given tenured employment.

## **2. Legislation, (national) collective agreements and case law**

### **2.1. Policies and legislation at national level**

#### **2.1.1. National policies**

There is no current policy to mention, except the continuation of the 'first-job contract' scheme for young people (usually dubbed 'Rosettas', from the Dardenne brothers' movie). Under this scheme (introduced by an Act of 24 December 1999), all employers must offer positions (up to 3 % of their workforce) to unemployed persons under the age of 26, on fixed-term contracts of 12 months (or 24 months half time). The remuneration is 90 % of the normal pay for the position concerned, and there is a substantial reduction of the employer's contributions to social security.

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<sup>84</sup> See CJEU, Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* [2011] (unreported).



### 2.1.2. *Equal treatment*

Belgium has transposed Directive 1999/70/EC by way of an Act of 5 June 2002 ‘concerning the principle of non-discrimination in favour of employees with fixed-term contracts’, but this was a very formal exercise as existing legislation did not include any discrimination regarding scope, thresholds or working conditions.<sup>85</sup> Obviously, there are practical restrictions to the use of certain rights (e.g. no trade union will include an employee with a 2-year contract in its list of candidates for the election of workforce representatives in a works council, which is a 4-year appointment). The Employment Contracts Act of 3 July 1978 (Article 40) provides that in the event of dismissal on other than serious grounds, payment in lieu of notice is due: the amount is equal to twice what would be due if the contract had been for an indefinite period of time, or to the remuneration corresponding to the time which would have remained according to the contract, if this results in a lower amount.

Under Article 10 of the same Act, the renewal of a fixed-term contract transforms it into a permanent contract, unless the employer can demonstrate that the renewal was justified by the nature of the job or by other legitimate considerations. However, under Article 10bis the succession of up to 4 contracts, each of at least 3 months and for a total maximum duration of 2 years, requires no justification. Under certain circumstances the Labour Inspectorate may allow a succession of contracts, each of at least 6 months, up to a maximum duration of 3 years.

Rather recently, some cases of refusal to renew fixed-term contracts for reasons connected with maternity have been reported: see 2.3. below.

### 2.1.3. *Successive fixed-term contracts*

As suggested above, there are no legal restrictions on the use of fixed-term contracts, except as far as renewal is concerned.

There is no information or no case law concerning the reasons behind the statistical gender difference reported in II.1 above.

### 2.1.4. *Assessment*

As such, the legal provisions concerning fixed-term contracts do not raise any criticism. The only related case law concerns dismissal, especially after a first contract has been renewed. The author cannot provide any further information on this issue.

## 2.2. *Collective agreements*

Probably because the legal provisions are regarded as satisfactory, there are no collective agreements to mention.

## 2.3. *Case law*

The only related case law covers some (rare) occurrences in which a fixed-term contract was not renewed because of the employee’s pregnancy. The labour courts<sup>86</sup> correctly complied with the CJEU’s decision,<sup>87</sup> unless the employee failed to produce any element of *prima facie* evidence<sup>88</sup> or the employer was able to prove that the grounds for dismissal were entirely foreign to the employee’s pregnancy.<sup>89</sup>

<sup>85</sup> Indeed, there has never been any hesitation in considering remuneration as an element of working conditions. Therefore, the development in the case law of the CJEU as observed in Cases C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR-I-7109 and C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR-I-2483 did not cause any surprise in Belgium.

<sup>86</sup> Labour Court in Namur, judgment of 28 April 2003, *Chroniques de droit social*, 2004, p.100 with J. Jacquemain’s case note.

<sup>87</sup> In Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR-I-6915.

<sup>88</sup> See e.g. Labour Court in Nivelles, judgment of 14 September 2006, *Chroniques de droit social*, 2008, p. 31.

<sup>89</sup> Labour Court of Appeal in Liège, judgment of 12 March 2013, *Rôle general* no. 2012/AN/41, unreported.

## 2.4. Involvement of other parties

See I.2.4. above.

The following aspect is worth speculating upon. The Employment Contracts Act of 3 July 1978 contains numerous differences in the treatment of manual (blue collar) and intellectual (white collar) workers. In judgment no. 125/2011 of 7 July 2011, the Constitutional Court decided that these differences could not be justified under the principle of equality before the law (Articles 10 and 11 of the Constitution) and had to be abolished by 8 July 2013 at the latest.

One of these differences concerns unfair dismissal. While this issue must be adjudicated under tort law when a white-collar worker is involved, Article 63 of the Act of 3 July 1978 provides for special protection of blue-collar workers. However, it is only applicable to permanent contracts. This might give ground to indirect discrimination against women,<sup>90</sup> although there is no relevant case law.

Currently, within the National Labour Council the social partners' positions are so irreconcilable that they are not expected to come to any agreement on how to comply with the Constitutional Court's decisions, so that the federal Government (itself deeply divided) is currently working hard to eliminate the differences between white-collar and blue-collar workers. However, one may fear that no sustained attention will be paid to the gender dimension of the issues (such as the one mentioned above) which must be dealt with.

## 3. Statutory social security and pension rights

Statutory social security provisions do not entail any exclusion of fixed-term workers.

As to statutory leaves, the only potential issue which the author could identify is the following. In the private sector, Directives 96/34/EC and 2010/18/EU concerning parental leave have been transposed by way of two instruments: Collective Agreement no. 64 of the National Labour Council and the Royal Decree of 29 October 1997. Both instruments make the right to parental leave conditional on the employee having been employed by the employer for at least 12 months in the 15 months preceding the time that she/he applies for the leave. This condition is probably more difficult to meet for an employee with a fixed-term contract than for permanent employees, which means that there might be undetected gender discrimination in the access to parental leave. No related case has ever been brought to court.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

Given the scarcity of relevant case law concerning part-time and fixed-term work, the author cannot do more than provide general information.

The main support to workers claiming against their employers or against social security institutions (whether or not on grounds of discrimination) is provided by the trade unions, although in a surprising number of cases (perhaps as many as 50 %) claimants are not union members and must therefore pay their own counsel's fees. The recent (2008) introduction of the 'winner takes all' principle (i.e. the losing party must contribute to the winner's fee costs) does not seem to have considerably modified the situation.

The creation (in 2002) of the Institute for Equality of Women and Men (the 'Gender Agency'), which is competent both to advise victims of gender discrimination and to take legal action in its own name, has not resulted in any spectacular developments, mainly because of the Institute's highly limited financial and human resources.

<sup>90</sup> Compare with the CJEU's decisions in Case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* [1993] ECR-I-6185 and C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR-I-623.

Class action as such does not yet exist in Belgian judicial proceedings law, although the notion is now strongly supported in academic opinion.<sup>91</sup>

The Gender Act of 10 May 2007 introduced fixed damages equal to 6 months' pay, which is due to a victim of gender discrimination unless she/he can demonstrate that the resulting damages were higher. Six months' pay is a standard amount in labour law, and the CJEU seems to have accepted that it is adequate under the Recast Directive,<sup>92</sup> but given that such fixed damages completely fail to stem the present flow of dismissals related to pregnancy/maternity, one must question the effectiveness of this remedy.<sup>93</sup>

## 2. Vulnerability, multiple/intersectional discrimination

Again, part-time work and, to a smaller extent, fixed-term work are generally considered as 'better than nothing' forms of employment, unless the workers concerned have personal reasons to accept or desire them. Against the background of unequal distribution of family duties, obviously such forms of employment are particularly destined for women who are affected by various social handicaps, but there is no systematic effort to document this perception, let alone to do anything to change the situation.

### BULGARIA – Genoveva Tisheva

## I. PART-TIME WORK

### 1. General information

Data from the National Statistical Institute<sup>94</sup> regarding the labour force for 2012 show that the employment rate among persons aged 15 to 64 was 58.8 %, the employment rate for men being 61.3 % and for women 56.3 %. The employment rate among persons aged 20 to 64 was 63 %, the male indicator being 65.8 % and the female 60.2 %.

According to the main results and trends from the labour market survey for the first half of 2010, published on the webpage of the Confederation of Independent Trade Unions (the so-called *KNSB*),<sup>95</sup> in Bulgaria, the predominant form of employment for this period in Bulgaria was full-time employment (97.6 %) and the ratio of part-time workers/employees was only 2.4 %.

Part-time work was observed as a phenomenon among people over 60 and young people under 25. Education is a very important factor, the ratio of part-time workers/employees with lower education being 3 to 4 times higher than that of those with higher education.

Sex was not observed as a separate factor in this area at macro level. This factor is most probably relevant in conjunction with other factors. The differences observed in the ratio of part-timers can be attributed to education, training, age and involvement in certain economic activities.

About two thirds of the part-time workers/employees are involved in this form of employment not voluntarily but out of economic pressure/impossibility to find full-time employment. The number of voluntary part-time workers/employees is higher among self-

<sup>91</sup> See A. Puttemans et al. 'Projet de loi relative aux procédures de réparation collective' *Revue de droit de l'ULB*, Vol. 2010 no. 1 p. 175.

<sup>92</sup> In Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECR-I-8511.

<sup>93</sup> See J. Jacquemain 'Belgium' in: European Network of Legal Experts in the Field of Gender Equality, A. Masselot, E. Caracciolo Di Torella and S. Burri, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood* European Commission, November 2012, p. 48, accessed via [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/discrimination\\_pregnancy\\_maternity\\_parenthood\\_final.en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final.en.pdf) on 12 July 2013.

<sup>94</sup> <http://www.nsi.bg/otrasal.php?otr=26>, accessed 24 May 2013.

<sup>95</sup> [www.knsb-bg.org](http://www.knsb-bg.org), a special study carried out by Prof. Lalko Dulevski and Prof. Hristo Maleshkov, accessed 24 May 2013, on [http://www.knsb-bg.org/index.php?option=com\\_content&view=article&id=2203%3A2012publ01&catid=78%3A2010-07-14-11-40-42&Itemid=136&lang=bg](http://www.knsb-bg.org/index.php?option=com_content&view=article&id=2203%3A2012publ01&catid=78%3A2010-07-14-11-40-42&Itemid=136&lang=bg), accessed 24 May 2013.

employed persons. Here, again, the level of education is a relevant factor, since persons with lower education are more often compelled to accept part-time jobs. Sex is not identified as a factor determining the freedom to choose or accept a part-time job. Men prevail in both categories: among those employed part time voluntarily and among those compelled to accept such employment.

A lower level of full-time employment is found in the agricultural sector, in forestry and fishery as well as among low-skilled workers. A relatively high ratio of persons working full time is found among managing jobs, high-skilled jobs and production workers, and machine and transport operators.

The research mentioned above also shows that the average length of weekly working time of female part-time workers/employees compared to that of men in the same position was about 2-3 hours higher for the period reviewed.

No specific definition of part-time work exists in national statistics, apart from a reference to the term used in Article 138 of the Labour Code<sup>96</sup> which stipulates that parties can agree on work for part of the legally defined working time.

According to EUROSTAT data from April 2012, Bulgarians work part time but many would like to work more and about 40 % of the part-time workers or employees (or 26 000 persons) would like to work full time instead.<sup>97</sup> A major difference in the general attitude towards part-time work in Bulgaria as compared to Western EU countries is that part-time work is not perceived as an opportunity. This attitude can also be attributed to the lower average level of remuneration in Bulgaria compared to other EU countries. Due to all these factors, according to EUROSTAT data from April 2013, Bulgaria has the lowest percentage of part-time employees aged 15 to 74 as a percentage of the total number of employees (2.4 %).<sup>98</sup>

No additional data was found about the further impact of the economic crisis and the rise of unemployment on part-time work and possible implications for gender equality.

The trends mentioned above are confirmed by the national study on working conditions performed by the Balkan Institute on Labour and Social Policy from May 2012.<sup>99</sup> One of the conclusions from this study is that part-time work continues to be an unpopular and not very widespread practice in Bulgaria. According to data collected by the Balkan Institute, 66 % of the part-time workers and employees are women. The difference in findings on the female share of part-time workers between the two studies (the study by the KNSB and that of the Balkan Institute) can be explained by the different periods: the first study covers the situation in 2010 and the second survey was published in 2012. In addition to this, the difference can be explained by differences in the researchers' approaches, the Balkan Institute being a private NGO with its own methods. The author assumes the data should be presented as they are – different periods, different methods: they can even be contradictory in these circumstances. This also means that trends vary, within the general assessment that part-time work is not popular in Bulgaria and the least widespread compared to all other EU countries.

The explanation of why women, possibly, are more strongly represented in part-time work can be attributed to the fact that they are more involved in care work for children and the elderly, perhaps because they have trouble negotiating in the new market conditions, are more likely to have lower education levels and are more often long-term unemployed, etc. There is no data about persons combining several part-time jobs, or combining a part-time job with self-employment. There is no data on the percentage of full-time workers who would like to reduce their working time.

No statistics or research have been found on the impact of part-time work on the gender pay gap. Part-time work is not viewed as specifically related to women in relation to family responsibilities.

No cases are known that are related to discrimination on the grounds of part-time work.

<sup>96</sup> <http://lex.bg/laws/ldoc/1594373121>, Bulgarian version of the LC, accessed 24 May 2013.

<sup>97</sup> [http://epp.eurostat.ec.europa.eu/portal/page/portal/labour\\_market/publications](http://epp.eurostat.ec.europa.eu/portal/page/portal/labour_market/publications), accessed 24 May 2013.

<sup>98</sup> [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-19042013-BP/EN/3-19042013-BP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-19042013-BP/EN/3-19042013-BP-EN.PDF), accessed 24 May 2013.

<sup>99</sup> <http://bilsp.org/index.php?t=185>, accessed 19 April 2013.

The author's view and the view of the experts consulted is that in order to answer most of the specific questions on the policy on part-time work and its gender implications, there is a current need for specific research, with an explicit focus on the gender dimensions of part-time work. Given the absence of such specific research, it is not possible to make an assessment regarding many of the questions.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

According to Article 138 of the Labour Code, the parties to a labour contract can agree on work for part of the legally defined working time/part-time work. In such cases they define the duration and the distribution of the working time. The monthly duration of the working time of part-time workers and employees is shorter than the working time of other workers and employees working under a labour contract in the same enterprise who perform the same or similar work, but they cannot be treated in a less favourable way compared to these other colleagues only because they are part-time workers/employees. They can benefit from the same rights and have the same obligations, apart from the cases where, according to the law, some rights are conditioned on the duration of working time, on seniority or on the acquired qualification.

Part-time work proportionally affects salaries and all compensations related to the level of remuneration, including social security payments for the different types of leaves, including maternity leave. In case of part-time work for 4 hours a day, which is half of the legally established working time, seniority is recognised as a seniority period in the same way as full-time employment. Seniority is understood to be a recognition of the period of employment, as length of service, which is logical. There is no inequality concerning payment, which is proportional to the time of real work allocated. From that point of view, the requirements of the Directive have been met and the difference is legitimate. The opposite solution would constitute discrimination against those working full time.

In fact, according to Article 355 Paragraph 1 of the LC, the time during which the worker has worked at least half of the hours of the legally required working time is recognised as one day of length of service. One month in which a worker works at least 21 days under the conditions of a five-day working week counts as one month of service.

The same equal treatment of part-time workers applies to regular paid leave, which is equally long for full-time and part-time workers/employees who work for at least half of the working time (according to Articles 155 and 355 of the Labour Code according to the regulations on seniority, working time and various types of leave).

In addition to the working time established by agreement between the two parties, Article 138a of the Labour Code provides for the possibility for the employer to establish part-time work for up to three months in one calendar year, upon prior agreement with the trade unions and with the representatives of the workers and employees. The duration of the working time cannot be less than half of the duration that is the basis for the calculation of the working time according to the law.

#### ***2.1.1. National policies***

Promoting part-time employment is one of the policy measures that was introduced by the Government in 2009, as a measure in times of crisis and high unemployment. Concluding part-time contracts for 4 working hours per day was encouraged through funds allocated to employers under a scheme funded by the European Structural Funds in order to limit lay-offs and to soften the effects of the crisis.<sup>100</sup> The measures were agreed between the Government, the employers' organisations and the trade unions.<sup>101</sup>

<sup>100</sup> This statement derives from various media sources from the period 2009-2010. One of these sources is quoted below. The specific target regarding part-time work dates from 2009 and no specific results are quoted

### *2.1.2. Equal treatment*

Equal treatment of persons working full time and those working part time is regulated in general by the Anti-Discrimination Law and by the provisions regarding non-discrimination of the Labour Code. Additional guarantees for equality are provided in Article 138 of the Labour Code mentioned above.

### *2.1.3. Organisation of working time*

Bulgarian legislation is in compliance with Parental Leave Directive 2010/18 in relation to the right of the worker or employee to ask the employer for flexible or part-time work upon her/his return from maternity or childcare leave. According to the new Article 167b of the Labour Code, since the beginning of 2012, the worker or employee has the right to suggest to the employer a change in the labour contract for a certain period. The employer is obliged to consider this suggestion, to see if such change can be accommodated. The employee can ask for part-time work, or for flexible working hours, can ask to be released from the duty to work shifts, etc. He/she can also ask to be allowed to work from home. The changes in the working time for a certain period are agreed in writing between the parties. The employer is only obliged to consider this suggestion, to see if there is an opportunity to accommodate such change. There is no absolute obligation. The provision is very recent and the author does not know of any available case law.

The rights of part-time workers related to non-discrimination can be enforced under the Anti-Discrimination Law before the Commission for Protection from Discrimination or before a court.

### *2.1.4. Assessment*

Bulgarian legislation regarding part-time work is in compliance with EU standards in the field of part-time work and in the field of gender equality. There are no specific gender equality provisions or relevant practices regarding the regulation of part-time work.

## **2.2. Collective agreements**

The author does not know of any collective agreements that regulate this issue.

## **2.3. Case law**

There is no case law on this issue.

## **3. Statutory social security and pension rights**

The minimum income for insurance for those employed in part-time work is calculated as follows: the minimum monthly income for insurance for the profession that is the insured person's main economic activity is divided by the number of legally defined working hours for the month in question. The amount found is then multiplied by the number of concrete hours and days of actual work.

The rules for the calculation of social security benefits are provided in Article 40 of the Social Insurance Code (SIC).

### **3.1. Exclusions**

No specific exclusions have been identified.

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officially. However, the social research data in the introduction indicates that it did not help much to change the perception and the practice of part-time work.

<sup>101</sup> <http://stroitelstvo.info/show.php?storyid=735369>, accessed 24 May 2013.

### **3.2. Assessment**

Based on the information provided on legislation and policy in the field of part-time work, the author's assessment is that they are formally in compliance with EU equal treatment legislation.

### **4. Self-employment**

There are no special provisions and there is no case law related to the issues of self-employed persons working part time.

### **5. Access to goods and supply of goods and services**

No special provisions address this specific issue. Concerning the access to bank loans and mortgages in practice, any possible disadvantages for part-time workers/employees might be related to the monthly salary required to guarantee the payments. Depending on the terms and conditions of the loan, banks require a guarantee for certain minimum monthly amounts.

### **6. Are there any gaps in national law?**

#### **6.1. Gaps in the area of (access to) employment**

No specific gaps have been identified. As mentioned above, this form of employment is not popular enough to have sufficient data to assess the practice, and any related gaps.

#### **6.2. Gaps in other areas**

There is nothing to report on this issue.

## **II. FIXED-TERM WORK**

### **1. General information**

According to the main results and trends from the labour market survey for the first half of 2010, published on the webpage of the Confederation of Independent Trade Unions in Bulgaria,<sup>102</sup> the predominant form of employment in Bulgaria was the permanent labour contract: this was true in 96.4 % of the cases, compared to 3.6 % of persons working on a fixed-term contract. An increasing number of fixed-term contracts was observed, however, for the second trimester of 2010, among persons over 60. The level of education was identified as a major factor in terms of job security and in most cases higher education ensures a permanent contract. Sex was not identified as a factor influencing the type of employment contract. There is an equal balance between women and men with respect to the length of the periods of fixed-term contracts. About 75 % of those working on a fixed-term contract were compelled to accept this condition. Men prevail among the persons who were compelled to accept such a contract, as well as among those who work under a fixed-term contract voluntarily.

No additional data was found about the further impact of the economic crisis and increasing unemployment on the practice of fixed-term contracts and possible implications for gender equality.

<sup>102</sup> [http://www.knsb-bg.org/index.php?option=com\\_content&view=article&id=2203%3A2012publ01&catid=78%3A2010-07-14-11-40-42&Itemid=136&lang=bg](http://www.knsb-bg.org/index.php?option=com_content&view=article&id=2203%3A2012publ01&catid=78%3A2010-07-14-11-40-42&Itemid=136&lang=bg), accessed 24 May 2013.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

An employment contract may be concluded for an indefinite period or for a fixed term. Fixed-term contracts are regulated in Article 68 of the Labour Code. In order to protect the employee/worker, the legislator limits the possibilities for the conclusion of fixed-term employment contracts by listing them explicitly. Fixed-term contracts can be concluded for a definite period which must not be longer than 3 years, insofar as a law or an act of the Council of Ministers does not provide otherwise; until completion of some specified work; for substitution of an employee who is absent from work; for work in a position which is to be occupied through a competitive examination until someone is employed in that position; for a certain mandate, where such has been specified by the respective body; or for a trial period.

A fixed-term employment contract can be concluded for casual, seasonal or short-term work and activities, as well as to hire workers or employees in enterprises that have been declared bankrupt or have gone into liquidation.

As an exception, a fixed-term employment contract may be concluded for a period of not less than one year and for work and activities that are not of a casual, seasonal or short-term nature. Such an employment contract may also be concluded for a shorter period upon request in writing by the worker or employee.

Any employment contract concluded in violation of these principles is considered as a contract of indefinite duration.

According to Article 69 of the Labour Code, a fixed-term contract becomes a permanent contract if the worker or employee continues to work for five or more days after the expiry of the term of the contract, without the objection of the employer.

#### *2.1.1. National policies:*

No specific national policies have been identified.

#### *2.1.2. Equal treatment*

Equal treatment of persons working full time, including under a fixed-term contract, is regulated in general by the Anti-Discrimination Law and by the provisions on non-discrimination in the Labour Code. Additional guarantees for equality are provided in Article 68 Paragraph 2 of the Labour Code mentioned above.

According to the latter, workers and employees under a fixed-term contract have the same rights and obligations as those working under a contract of indefinite duration.

They cannot be treated in a less favourable way compared to workers and employees with a contract of indefinite duration who perform the same or similar work. They can benefit from the same rights and have the same obligations, apart from cases where, according to the law, some rights are conditioned on acquired skills or qualification. If there are no workers doing the same or similar work, workers under a fixed-term contract cannot be treated less favourably compared to the rest of the workers.

The rights of workers under a fixed-term contract related to non-discrimination can be enforced under the Anti-Discrimination Law before the Commission for Protection from Discrimination or before a court.

#### *2.1.3. Successive fixed-term contracts*

The legal conditions for fixed-term contracts have been described above, in 2.1. No specific issues of discrimination based on sex have been identified regarding legislation, nor is there any research data to indicate this.

#### *2.1.4. Assessment*

Legislation regarding rights of persons working under a fixed-term contract is in compliance with the respective EU standards. No specific gender equality issues have been identified in legislation and practice, or from research data.



## 2.2. Collective agreements

There is no information available on fixed-term contracts where collective agreements are concerned.

## 3. Statutory social security and pension rights

No specific exclusions have been identified in this field.

# III. HORIZONTAL PROVISIONS

## 1. Effectiveness

There are no specific problematic issues in the protection of the rights of persons working part time or under a fixed-term contract.

Under anti-discrimination law, compensation can be awarded in cases of discrimination brought before a court. The Equality Body – the Commission for Protection from Discrimination – cannot award any compensation for discrimination. There have been no specific cases regarding discrimination based on part-time work and/or fixed-term contracts where compensation was sought.

## 2. Vulnerability, multiple/intersectional discrimination

No studies are available on this issue.

# CROATIA – Nada Bodiřoga-Vukobrat

## I. PART-TIME WORK

### 1. General information

The Labour Act (LA) defines part-time work as ‘any working time shorter than the full working time’ (Article 43(4) LA).<sup>103</sup> The full working time is limited to 40 hours per week (Article 43(2) LA). Although the LA provides for the possibility to stipulate shorter full working time in other laws, collective agreements, agreements between workers’ councils and employers, as well as in individual labour contracts, this possibility is hardly used and a 40-hour working week is the rule in Croatia. The definition of part-time work for the purposes of applying the Act on Contributions<sup>104</sup> (i.e. the payment of statutory contributions for health, pensions, safety at work and unemployment insurance) complies with the definition in the LA. National statistics are based on the definition of full and part-time work in the LA.

Traditionally, part-time work is of marginal importance in Croatia. Its share of the total number of employed persons is around 9 % and has slightly increased over the last few years (from 8.8 % in 2008 to 9.0 % in 2009 and 9.7 % in 2010).<sup>105</sup> The regular annual Employers’ Survey, conducted by the Croatian Employment Service, compiles data on part-time work in legal entities. It analyses the needs of the labour market, including new employment and changes in employment in comparison with the previous period, as well as employers’ projections for the upcoming period. However, it does not include employment in public

<sup>103</sup> Official Gazette 149/09 and 61/11.

<sup>104</sup> Official Gazette 84/08, 152/08, 94/09, 18/11, 22/12 and 144/12.

<sup>105</sup> *Report on the implementation of the Joint Assessment of the Employment Policy Priorities of the Republic of Croatia for 2010; Report on the implementation of the Joint Assessment of the Employment Policy Priorities of the Republic of Croatia for 2009*, <http://kenny2.bnet.hr/mingorp.hr/defaulteng.aspx?id=1126>, accessed 12 April 2013.

administration, its findings are limited to only the number of the newly employed in the observed period and it does not contain gender disaggregated data.<sup>106</sup> The 2012 Employers' Survey shows that out of all newly employed persons in 2011, only 5.1 % were on part-time work contracts.<sup>107</sup> The projections for 2012 were even lower, with the share of part-time work contracts in the planned new employment dropping to 3.8 %.<sup>108</sup>

The percentage of women in paid employment stands at approximately 46 %.<sup>109</sup> The female employment rate is around 32-34 %.<sup>110</sup> Data on the percentage of females working part time are not provided in regular statistical publications and information. Crucial policy documents such as the Joint Assessment of the Employment Policy Priorities for Croatia (JAP) provide information on part-time employment and conclude that it is a predominantly female phenomenon in Croatia.<sup>111</sup> In 2006, the share of part-time work in total employment was 9.4 %; 11.7 % of women compared to 7.5 % of employed men worked part time in the same period.<sup>112</sup>

There is anecdotal evidence that the share of part-time contracts is more common in the area of elementary and high school education (due to the nature of the work), in agriculture<sup>113</sup> and in manufacturing. However, no actual figures are available.

In general, part-time work in Croatia is under-researched, probably due to its minor role in overall employment. The main reason for this is that the labour market is underdeveloped and rather rigid. Although part-time workers are paid *pro rata temporis*, as are contributions for statutory insurance (since the legislative amendments in 2009), part-time workers otherwise have equal rights as full-time workers. If the previous duration of employment with the same employer is important for the acquisition of certain rights, the periods of part-time employment will be considered to be full-time employment (Article 43(8) LA). A part-time worker has to give his or her consent for working overtime and a rescheduling of the working hours, which is not required from a full-time worker.

A possibility of combining more part-time jobs is allowed, provided that the total working time does not exceed 40 hours a week (the full working time).<sup>114</sup> A combination with self-employment is also conceivable. However, official statistics which show the impact of

<sup>106</sup> Part-time work in public administration is strictly limited to two cases: if the internal rules of that state body specifically prescribe the possibility of certain positions being performed part time or if there is a need for full-time work in a position occupied by a civil servant who works reduced working hours (special protective category). See Regulation of the Government of the Republic of Croatia on the possibility to work away from the employer's business premises and on part-time work, Official Gazette 33/06.

<sup>107</sup> This implies that almost half of the total part-time jobs exist in public administration.

<sup>108</sup> Croatian Employment Service, *Anketa poslodavaca 2012* (Employers' Survey 2012), Zagreb, 2012. Since 2008 when the recorded share of part-time contracts in new employment was 3.5 %, the share of new part-time contracts hovers steadily around 5 %.

<sup>109</sup> In February 2013, it was at 46.33 %. Croatian Bureau of Statistics, First Release L 9.2. 1/2: Persons in paid employment, by activities, February 2013. Persons in paid employment are all persons who have entered into a work contract with the employer for a fixed or unspecified period of time, irrespective of the type of ownership and of whether they work full time or less.

<sup>110</sup> Female employment/population ratio was 34 % in 2011 and 31.9 % in the last quarter of 2012. See Croatian Bureau of Statistics, Statistical Information 2012, Zagreb, 2012 and Labour Force Survey 2012, <http://www.dzs.hr/>, accessed 12 April 2013.

<sup>111</sup> *Joint Assessment of the Employment Policy Priorities of the Republic of Croatia*, 2008, <http://kenny2.bnet.hr/mingorp.hr.aspx?id=1126>, accessed 10 April 2013.

<sup>112</sup> *Joint Assessment of the Employment Policy Priorities of the Republic of Croatia*, 2008. These figures include part-time employment in public administration. The share has been growing from 10.5 % in 2002, but seems to have hovered at similar levels since then. An assessment for 2004 shows that female part-time employment was nearly twice that of male part-time work: 11.1 % of female as opposed to 6.8 % of male part-time workers (as a percentage of the total employment). See M. Zuber 'Radna i socijalna prava zaposlenih u nepunom radnom vremenu u Hrvatskoj', *Revija za socijalnu politiku* 13(1) 2006, pp. 173-188. See also Current position of Women in the Croatian Labour Market – Assessment Report, 2011, <http://www.wlmcroatia.eu/index.php/rezultati/dokumenti>, accessed 10 April 2013, 86, where it is estimated that 9.1 % of employed women worked on part-time contracts in 2009.

<sup>113</sup> The average hours usually worked for women in agriculture stood at 30.8 in 2011 (compared to 34.3 hours for men). Croatian Bureau of Statistics, Statistical Information 2012, Zagreb, 2012.

<sup>114</sup> Article 43(6) LA. Civil servants require prior consent for the conclusion of part-time work with another employer.

these entitlements are not available. There are no accurate statistics on the percentage of full-time workers who would like to work part time.

There are no available studies to investigate the specific impact of part-time work on the gender pay gap. The average women's salaries as a percentage of men's in 2010 was 90.2 %. According to a study from 2010, the relatively low (unadjusted) wage gap in Croatia can be contrasted with the factual gender wage gap which arises from differing rewards and which is almost twice as high as the 'raw' gap.<sup>115</sup> The widest gap is recorded in traditionally female-occupied sectors, such as human health and social work activities, education, financial and insurance activities and manufacturing.<sup>116</sup> In 10 areas of activities with above average gross pay, women make up the majority of employees in only three areas. However, in below average paid sectors, this ratio shifts to 5:3 at the expense of women.<sup>117</sup> In addition to the horizontal segregation in the labour market, the vertical segregation is also the cause of the gender pay gap.<sup>118</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time work has only recently come into the political focus, as part of the strategy to promote the better utilisation of flexible working arrangements. The Minister of Labour and the Pension System, Mirando Mrsić, has announced the drafting of the Act on Part-time Work.<sup>119</sup> The aim is to facilitate part-time work; however, no specific proposals have yet been tabled. Currently, it seems that neither gender implications nor facilitating part-time work for specific groups of workers are given much attention and the debate mostly revolves around the idea of allowing simultaneous part-time labour contracts exceeding the statutory prescribed full working time (40 hours per week).

Gender stereotypes and part-time work are not widely debated in Croatia. However, given the generally low prevalence of part-time work, it is probably mostly associated with the right of women who have recently given birth and mothers to work half-time (meaning half of the full working time) in accordance with the Act on Maternity and Parental Benefits. Part-time work is not addressed within the framework of reporting to the CEDAW Committee.<sup>120</sup>

#### 2.1.2. Equal treatment

Article 5(4) LA prohibits direct and indirect discrimination in the field of work and working conditions, including access to employment, promotion, vocational guidance, vocational training, advanced vocational training and retraining, in accordance with special laws (i.e. the Gender Equality Act). This prohibition applies to part-time work as well. Regarding the working conditions of part-time workers, Article 43(5) LA refers to an analogous application

<sup>115</sup> The results of this research reflect the gap in part-time work as well, because it was based on information on the usual monthly net wage and the usual hours worked per week, thus making it possible to calculate the hourly wage rate. Further research is needed to establish whether the pay gap is due to a violation of the principle of gender equality or other unobserved characteristics of employees and jobs. D. Nestić 'The Gender Wage Gap in Croatia – Estimating the Impact of Differing Rewards by Means of Counterfactual Distribution', *Croatian Economic Survey*, Vol. 12, No. 1 April 2010 pp. 83-119.

<sup>116</sup> Croatian Bureau of Statistics, *Women and men in Croatia 2012*, Zagreb, 2012.

<sup>117</sup> The Ombudsperson for Gender Equality, *Annual Report 2012*, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

<sup>118</sup> Women make up 69.6 % of all employees in financial and insurance services, a sector with the highest recorded average gross salaries. At the same time, this sector has the widest gap in average salaries: women's salaries amounted to only 70.7 % of men's. See The Ombudsperson for Gender Equality, *Annual Report 2012*, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

<sup>119</sup> <http://www.mrms.hr/okrugli-stol-o-reformi-radnog-zakonodavstava/>, accessed 12 April 2013.

<sup>120</sup> The latest available report is the combined second and third period report for 2005, which is mostly concentrated on the media gender stereotypes in the implementation of Article 5(a) CEDAW. <http://daccess-dds-ny.un.org/doc//N03/582/64/PDF/N0358264.pdf?OpenElement>, accessed 12 April 2013.

of the guarantees provided for fixed-term workers. Under Article 11(1) and (4) LA, the employer must guarantee equal working conditions to workers employed under fixed-term and open-ended contracts, including education and training possibilities. The employer is also liable to inform fixed-term workers of the possibility of concluding open-ended contracts, which implies the same obligation regarding part-time and full-time working arrangements. The duration of part-time employment for the same employer is calculated as full-time employment, when it comes to the acquisition of certain rights (i.e. the minimum duration of periods of notice, the right to severance pay). Material allowances (e.g. transport allowances) are equal for part-time and full-time workers. The statutory minimum wage applies *pro rata* to part-time employment.<sup>121</sup> Any work longer than part time or full time, in cases of force majeure, an extraordinary increase in business and similar cases, is deemed to be overtime (Article 45(1) LA). It is currently limited to eight hours per week, i.e. 32 hours per month or 180 hours per year and has to be remunerated (Article 86 LA).<sup>122</sup>

### 2.1.3. Organisation of working time

The organisation of working time in Croatia is rather rigid and adjustments, especially to accommodate workers' needs, basically depend on the employer's preference. The employer is entitled to determine the schedule of working hours, except where it is regulated by regulation, a collective agreement, an agreement between the workers' council and the employer or labour contract.

The employer 'shall consider' the request of a full-time worker to switch to part-time work and vice versa, provided that the employer has the possibility to accommodate such work.<sup>123</sup> The wording of this provision indicates that there is no obligation for the employer to accept that request. However, part-time workers are in a comparably better position than full-time workers when it comes to overtime and the rescheduling of working hours, for which their prior consent is needed (Article 45(6) and Article 47(11) LA).

Several modalities of part-time work (more precisely, working for half of the full working time) are prescribed under the Act on Maternity and Parental Benefits:<sup>124</sup>

- a 'regular' entitlement to half-time work (in lieu of additional maternity leave or parental leave);
- half-time work due to intensified care for a child under three years;
- half-time work due to care for a child with developmental disorders.

No corresponding measures exist for other situations (e.g. care for older relatives).

### 2.1.4. Assessment

The general impression is that the formal gender equality in Croatia is not matched by factual equality. Although the caseload handled by the Ombudsperson for Gender Equality keeps rising every year (especially in the area of gender discrimination in employment, working conditions and social security, which comprised 58.5 % of all new cases in 2012), the number of court proceedings is still very low.<sup>125</sup>

<sup>121</sup> The right to the minimum wage (defined as the gross wage for full-time work) belongs to 'every worker in the Republic of Croatia' (Article 3(1) of the Minimum Wage Act). Actually, due to the application of the personal tax allowance, a worker working half-time may end up receiving more than half of the minimum wage received by a full-time employee.

<sup>122</sup> Even if it is still less than full-time work. See Opinion of the Ministry of Labour and Pension System of 3 November 2010, <http://www.mmrs.hr/pitanje/clanak-43-puno-i-nepuno-radno-vrijeme/>, accessed 10 April 2013.

<sup>123</sup> Article 43(9) LA.

<sup>124</sup> Act on Maternity and Parental Benefits, Official Gazette 85/08, 110/08 and 34/11.

<sup>125</sup> The Ombudsperson for Gender Equality, *Annual Report 2012*, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013. An extensive search of the case-law database of the Supreme Court *SuPra* does not find any results in the legislative directory for the search: Gender Equality Act, whereas the search: Anti-Discrimination Act offers only two results. The subject-matter directory yields more results: approximately 20 results for the search: prohibition of discrimination; discrimination; or discrimination – prohibition and the fight against discrimination, most of which are labour disputes for the annulment of the termination of the labour contract or the payment of salary.

Another remark that should be made is that the gender-dimension of part-time work is not appropriately highlighted and discussed, given that part-time work is regarded mainly as a flexible employment arrangement and a tool for reviving the labour market. However flexible part-time work may become in the future, it will never be feasible and it will probably not significantly increase without the implementation of accompanying family-friendly policies.

The only legally distinct, ‘protected’ category of part-time workers are those under the Act on Maternity and Parental Benefits, while an equivalent status for persons taking care of elderly or other dependent family members is not prescribed, despite the proclaimed promotion of non-institutional types of care.

## **2.2. Collective agreements**

### *2.2.1. Policies*

Social partners do not traditionally pay much attention to part-time work. A study conducted in 2009 shows that only about one fifth of the collective agreements in force in 2008 and 2009 contained additional provisions on part-time work, mainly in the public sector.<sup>126</sup> The main reasons for this probably lie in the weak economy and labour market, as well as the (still) relatively rigid labour legislation. Until 2009, the cost of hiring a part-time worker for employers was even comparatively higher than for a full-time worker, since obligatory contributions were paid on an equal calculation basis. Even after this provision was changed, employers have reluctantly sought part-time workers, since they have equal material rights as full-time workers, which includes a presumption of full-time work for severance pay and cancellation notices. For the trade unions, part-time work is just another form of precarious employment which is best avoided.

### *2.2.2. Equal treatment*

National collective agreements hardly touch upon the issue of part-time work, leaving its regulation to the fall-back provision of the Labour Act or autonomous regulation at the level of employers.

### *2.2.3. Organisation of working time*

The same remark as for the previous point applies. No special guarantees regarding part-time work are provided. There is an example of a collective agreement regulating full-time work with a duration shorter than the legally prescribed maximum (i.e. 40 hours a week), but with the provision that longer working hours (up to 40 hours a week) are not deemed as overtime and are not remunerated as such, which was declared illegal.<sup>127</sup>

### *2.2.4. Assessment*

The main problem is that collective agreements have never taken a step further towards a more explicit regulation of part-time work than the legislative provisions contained in the Labour Act and other special laws.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

In case PRS 01-03/12-58, the Ombudsperson for Gender Equality received a complaint by a woman claiming to have been discriminated against on account of her gender in the workplace. She worked full time as a secretary, based on an open-ended contract. During the time she was on maternity leave, her employer hired another person to perform her job with an open-ended contract. Upon her return from maternity leave, her employer offered to

<sup>126</sup> The Ombudsperson for Gender Equality, *The Analysis of Collective Agreements from the aspect of gender equality, equal opportunities and work-life balance*, 2009, <http://www.prs.hr/index.php/analize-i-istrazivanja/-3/-analiza-kolektivnih-ugovora>, accessed 9 April 2013.

<sup>127</sup> See Opinion of the Ministry of Labour and Pension System of 3 November 2010, <http://www.mmrs.hr/pitanje/clanak-43-puno-i-nepuno-radno-vrijeme/>, accessed 10 April 2013.



transfer her to the position of a receptionist, on a part-time basis, justifying the transfer by business reasons. Out of fear of victimisation, the claimant declined the Ombudsperson's advice to instigate court proceedings and agreed to the transfer.<sup>128</sup>

### 2.3.2. *Assessment*

The previously described case vividly illustrates the general reluctance of women to seek protection against discrimination in court proceedings and explains the generally low amount of anti-discrimination court cases. Faced with uncertain economic prospects, the long duration and the cost of the court proceedings, victims of discrimination often prefer to keep their mouth shut and keep their jobs.

### 2.4. *Involvement of other parties*

The Ombudsperson for Gender Equality plays a particularly active and positive role in the promotion of gender equality in all fields of life, especially employment and working arrangements. Apart from receiving and dealing with individual complaints from persons claiming that they have been discriminated against on account of their gender, the Ombudsperson for Gender Equality conducts independent analyses of specific fields to detect any occurrences of discrimination (for example, the Analysis of collective agreements,<sup>129</sup> the Analysis of case law in the field of gender equality,<sup>130</sup> the Analysis of gender pay gap,<sup>131</sup> etc.). The Ombudsperson also actively cooperates with civil society organisations in promoting and raising the level of awareness of gender equality issues.

## 3. Statutory social security and pension rights

### 3.1 *Exclusions*

There are no exclusions from statutory social security schemes and old-age statutory pension schemes for part-time workers. All statutory contributions for social security and pension schemes are paid *pro rata temporis*. The same applies for the calculation of years of service for the acquisition of a pension.<sup>132</sup> The statutory retirement age for women and men will be gradually equalised by 2030.<sup>133</sup> The right of women to continue working even after reaching the required retirement age (until reaching the retirement age currently prescribed for men) is confirmed in a Judgement of the County Court in Varaždin.<sup>134</sup> There is no corresponding case law for women working part time, but the same reasoning should apply.

The right to health protection is an inseparable right, belonging equally to full-time and part-time workers.

Any type of employment, part-time included, is a ground for losing the unemployment status and unemployment benefits.<sup>135</sup> Consequently, any transition to employment means losing one's unemployment status and being erased from the registry of the unemployed. An

<sup>128</sup> The Ombudsperson for Gender Equality, *Annual Report 2012*, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

<sup>129</sup> The Ombudsperson for Gender Equality, *The Analysis of Collective Agreements from the aspect of gender equality, equal opportunities and work-life balance*, 2009, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/-analiza-kolektivnih-ugovora>, accessed 9 April 2013.

<sup>130</sup> The Ombudsperson for Gender Equality, *The Analysis of case law in the field of gender equality*, 2010, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-4/181-istrazivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010>, accessed 8 April 2013.

<sup>131</sup> The Ombudsperson for Gender Equality, *The Analysis of the Gender Pay Gap*, 2010, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/179-uzroci-jaza-u-placama-muskaraca-i-zena-na-hrvatskom-trzistu-rada-istrazivanje-u-2010>, accessed 8 April 2013.

<sup>132</sup> Article 25(3) of the Pension Insurance Act (Official Gazette 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07, 79/07, 35/08, 40/10, 130/10, 61/11, 114/11 and 76/12).

<sup>133</sup> Article 26 of the Act on Amendments to the Pension Insurance Act (Official Gazette 121/10).

<sup>134</sup> County Court Varaždin, Gž-473/03 of 20 December 2002.

<sup>135</sup> Article 17(1) and Article 48(1) of the Act on Employment Mediation and Unemployment Rights (Official Gazette 80/08, 94/09, 121/10, 25/12, 118/12 and 12/13).

unemployed person refusing to take a job offered (whether part time or full time) without valid grounds will lose his or her unemployment status. The qualifying period for unemployment benefits is at least 9 months of employment over the last 24 months. The time spent in employment is calculated in accordance with the pension insurance regulations, as well as the time spent on sick leave, that is parental, adoptive parent or guardian's leave after the termination of employment or service, if during that time the employee was receiving salary compensation in accordance with health insurance regulations.<sup>136</sup> This implies that the right to unemployment benefits will be comparably more difficult to attain for part-time workers, because they will have to be working for at least 18 months in the preceding 24 months. Part-time workers (as well as other persons who are not deemed as unemployed) are entitled to register as job seekers with the Croatian Employment Service in order to look for (additional or other) employment.<sup>137</sup>

The qualifying period for the acquisition of the right to remuneration of salary arising under the Act on Maternity and Parental Benefits is a minimum 12 months of uninterrupted service, or 18 months of service with interruptions in the preceding two years.<sup>138</sup> Regardless of whether the employment is full time or part time, the employed or self-employed parent is guaranteed a remuneration of salary based on the minimum amount of 50 % of the calculation basis.<sup>139</sup>

### **3.2 Assessment**

Access to unemployment benefits is comparably more difficult for part-time workers, which might have a negative impact on gender equality and the position of women in the labour market.

## **4. Self-employment**

There is no information on the potential disadvantages faced by part-time self-employed persons. However, since bank loans primarily depend on the assessment of the overall financial capacity of the client, if part-time earnings are generally low, it could certainly have a negative impact on the granting of loan facilities.

## **5. Access to goods and the supply of goods and services**

There is no information on the potential disadvantages faced by part-time workers in the area of access to and the supply of goods and services. The same reservation as in the preceding point applies.

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### **6.1.1. Recruitment process**

There is no evidence pointing to specific discrimination in the recruitment process for part-time jobs or reserving part-time job offers only for persons of one gender. However, bearing in mind the generally low share of part-time jobs in total employment, the fact that the

<sup>136</sup> Article 37(1) and (2) of the Act on Employment Mediation and Unemployment Rights (Official Gazette 80/08, 94/09, 121/10, 25/12, 118/12 and 12/13).

<sup>137</sup> Article 13(1) of the Act on Employment Mediation and Unemployment Rights (Official Gazette 80/08, 94/09, 121/10, 25/12, 118/12 and 12/13).

<sup>138</sup> Article 24(8) of the Act on Maternity and Parental Benefits, Official Gazette 85/08, 110/08 and 34/11. If this condition is not met, the beneficiary is entitled to a remuneration of salary based on the amount of 50 % of the calculation basis.

<sup>139</sup> Article 24(9) of the Act on Maternity and Parental Benefits, Official Gazette 85/08, 110/08 and 34/11. The same amount is guaranteed to unemployed beneficiaries under Article 30(1) of the Act on Maternity and Parental Benefits.

majority of part-time work is reserved for the education and health sector (predominantly female sectors) indicates that accepting part-time offers in these areas may be the only option for female workers.

## II. FIXED-TERM WORK

### 1. General information

Contrary to part-time work, fixed-term work is not uncommon in Croatia. Although the share of fixed-term employment contracts in Croatia is rather low (13 %), the trend of using fixed-term contracts has been on the rise in recent years.<sup>140</sup> Women make up the majority of persons employed on fixed-term contracts (52.9 %). Out of all newly employed women in 2011 (87 747), only 8.4 % signed a contract for an indefinite period (7 450). Fixed-term contracts mean lower costs for employers, particularly since rules on regular notice periods and severance pay do not apply.<sup>141</sup> However, two protective mechanisms for a limitation on the use and abuse of fixed-term contracts apply: there has to exist an objective reason justifying the conclusion of a fixed-term contract (such as the performance of a certain task, etc.) and the maximum duration of successive contracts must not exceed three years.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

Open-ended contracts are the rule, fixed-term contracts are an exception. However, given the general trend of using fixed-term contracts in uncertain economic circumstances, the upcoming reform of the labour legislation intends to address the uncertainties surrounding the conclusion of fixed-term contracts. According to the current discussions, the novelties include the obligation to state an objective justification in each successive fixed-term contract. In addition, any amendment or annex to the existing fixed-term contract, which results in the prolongation of the contractual agreement, will be deemed as a successive fixed-term contract.<sup>142</sup>

##### 2.1.2. Equal treatment

The legislation on fixed-term contracts applies to all undertakings.

Under Article 11(1) and (4) LA, the employer must guarantee equal working conditions to workers employed under fixed-term and open-ended contracts, including education and training possibilities. The employer is also liable to inform fixed-term workers of the possibility of concluding open-ended contracts.

<sup>140</sup> In fact, most persons leaving the unemployment register are hired on fixed-term contracts, usually first-time jobseekers and other newly employed persons. Fixed-term contracts in Croatia tend to be for very short periods (less than 6 months). See *Joint Assessment of the Employment Policy Priorities of the Republic of Croatia*, 2008 and S. Cazes & A. Nesporova 'Combining flexibility and security for employment and decent work in the western Balkans', *South-East European Review for Labour and Social Affairs* 2/2006. The share of persons working under fixed-term contracts among the total number of employees increased from 11.6 % in 2009 to 12.3 % in 2010. See Report on the implementation of the *Joint Assessment of the Employment Policy Priorities of the Republic of Croatia for 2010*; Report on the implementation of the *Joint Assessment of the Employment Policy Priorities of the Republic of Croatia for 2009*, [http://keny2.bnet.hr/mingorp.hr/default\\_eng.aspx?id=1126](http://keny2.bnet.hr/mingorp.hr/default_eng.aspx?id=1126), accessed 12 April 2013.

<sup>141</sup> Under Article 110 LA, an ordinary cancellation of a fixed-term contract is only possible if this is specifically stipulated in the contract itself. Under Article 119 LA, an employee is entitled to severance pay if the employer terminates the labour contract after two years of continuous employment. Since fixed-term contracts automatically end upon the expiry of a stipulated deadline, there is usually no need for the termination of a contract which would trigger the application of the rules on severance pay.

<sup>142</sup> Article 3 of the current draft Act on Amendments to the Labour Act; not yet published.



A recent research conducted by the Ombudsperson on Gender Equality provided the empirical background for the existing public presumptions on the discrimination of pregnant workers and jobseekers and female workers and jobseekers with child-caring responsibilities.<sup>143</sup> One third of respondents confirmed unequal treatment by their employer on account of pregnancy or maternity-related rights. In most cases (34.1 %), the discrimination occurred by the non-renewal of fixed-term agreements, 21.2 % of respondents were fired and 16.4 % were transferred to inferior jobs. Some 52 % of respondents who worked during pregnancy or who are taking care of children were denied promotion because their employer considered that they would not be able to meet the job requirements on account of their motherhood and caring responsibilities. Almost a third of respondents (27.8 %) claim that their employer pressured them into replacing their open-ended contracts with fixed-term contracts. 63 % of respondents believe that their employer refused to renew their expiring fixed-term contracts on account of their pregnancy or maternity-related rights.

### *2.1.3. Successive fixed-term contracts*

According to the definition from Article 10 LA, fixed-term labour contracts are concluded for a definite period in case of employment the termination of which is previously determined by objective terms, i.e. by a specific time limit, the performance of a specific task or the occurrence of a specific event. Successive fixed-term contracts may not exceed three years, except where a special act or collective agreement provides for longer periods, based on objective justification. An interval shorter than two months does not interrupt the three-year limitation. Special conditions for the conclusion of fixed-term contracts for civil servants apply in accordance with the Act on Civil Servants,<sup>144</sup> where the duration is limited to one year (except where such a contract is concluded to replace the temporarily absent worker) and the prior consent of the central administrative authority is needed.<sup>145</sup> Fixed-term civil service may not be transposed into open-ended civil service.<sup>146</sup>

Given that pregnancy and maternity-related circumstances do not prevent the expiration of a fixed-term contract, this opportunity is frequently used by Croatian employers to get rid of unwanted workers, especially women who return from maternity/parental leave.

The circumvention of the statutory prescribed limited duration of successive fixed-term contracts is not uncommon, and it is mostly achieved by applying intervals between contracts or the conclusion of contracts for another job in the job classification or creating a new job within the existing job classification system applicable with a certain employer.

### *2.1.4. Assessment*

The applicable legislative framework and institutional mechanisms of protection are still not appropriately utilised in Croatia, and the factual gender inequalities in the Croatian labour market still persist. Again, fostering adequate family-friendly policies might alleviate the pressure traditionally faced by women when it comes to family and child-caring responsibilities.

## **2.2. Collective agreements**

Only 11 out of 120 analysed collective agreements in 2009 contained additional provisions regulating fixed-term contracts, mostly by limiting the total duration of one or successive

<sup>143</sup> The presentation of research is provided in the *Annual Report of the Ombudsperson for Gender Equality for 2012*, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

<sup>144</sup> Civil Servants' Act, Official Gazette 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12 and 49/12.

<sup>145</sup> Article 61(2) of the Civil Servants' Act, Official Gazette 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12 and 49/12.

<sup>146</sup> Article 61(9) of the Civil Servants' Act, Official Gazette 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12 and 49/12.

fixed-term contracts, but some allowed for a prolongation of that period.<sup>147</sup> An example of good practice is where a collective agreement provided for the possibility that the fixed-term contract does not expire during pregnancy or the use of pregnancy and maternity-related rights of workers. Another good example is prescribing the obligation of the employer to offer the conclusion of an open-ended contract to a worker after one year of a fixed-term contract, if the worker complies with all conditions and there exists a need for the performance of that job.<sup>148</sup>

### 2.3. Case law

Where successive fixed-term contracts were concluded for the performance of tasks other than the ones which the claimant actually performed for the respondent, even where a number of successive contracts were concluded with the Agency for Temporary Employment and where the duration of successive fixed-term contracts exceeded the legally prescribed maximum, it was deemed that the claimant and the respondent had concluded the open-ended contract and the respondent was ordered to return the claimant to her job.<sup>149</sup>

In the Analysis of the Ombudsperson for Gender Equality on the causes of the pay gap between men and women in the Croatian labour market conducted in 2010, several main areas have been identified as deviating from the criteria developed in the case law of the Court of Justice of the EU.<sup>150</sup> First, the basic salary in Croatian companies is often fixed in the employment contract for a defined workplace and working assignments, which includes rewarding the results achieved in the period before the definition of the basic pay, and not according to the degree of complexity of the workplace itself. Another area of inconsistency can be seen in the fact that Croatian companies link the amount of pay to the years of service, which could be indirectly discriminatory for women in terms of equal pay for work of equal value. If this practice should lead to lower wages for a greater number of women than men, the employer should prove that it is necessary for the accomplishment of legitimate business goals. Another issue is the insufficiently transparent system of the workplace systematisation, i.e. the system for evaluating the workplace complexity.

### 2.4. Involvement of other parties

Non-governmental organisations play a significant role in promoting and implementing gender equality policy, by raising public awareness and participating in public legislation debates. About 50 women's NGOs are active and form part of the 'Women's Network Croatia' which unites organisations, groups and initiatives that recognise discrimination against women in economic and political life.<sup>151</sup>

## 3. Statutory social security and pension rights

There are no exclusions from social security and pension rights for fixed-term workers. Special provisions regarding the prolonged pension service time applies for seasonal fixed-term workers.<sup>152</sup>

<sup>147</sup> The Ombudsperson for Gender Equality, *The Analysis of Collective Agreements from the aspect of gender equality, equal opportunities and work-life balance*, 2009, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>, accessed 9 April 2013.

<sup>148</sup> The Ombudsperson for Gender Equality, *The Analysis of Collective Agreements from the aspect of gender equality, equal opportunities and work-life balance*, 2009, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>, accessed 9 April 2013.

<sup>149</sup> Supreme Court of the Republic of Croatia, Revr-376/09 of 10 November 2009.

<sup>150</sup> <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/179-uzroci-jaza-u-placama-muskaraca-i-zena-na-hrvatskom-trzistu-rada-istrazivanje-u-2010>, accessed 3 October 2012.

<sup>151</sup> Current position of Women in the Croatian Labour Market – Assessment Report, 2011, <http://www.wlmcroatia.eu/php/rezultati/dokumenti>, accessed 10 April 2013.

<sup>152</sup> Article 14 LA.

### III. HORIZONTAL PROVISIONS

#### 1. Effectiveness

Generally speaking, the duration and cost of court proceedings are the most common deterring factors for the effective implementation of the principle of equality guaranteed by law. A fear of losing one's existing job or being perceived as a 'troublemaker', with diminished chances for future employment or promotion might also explain the low amount of court proceedings concerning gender discrimination in general, especially in employment relations.

On the other hand, this area of discrimination is most commonly the subject of complaints to the Ombudsperson for gender equality. The procedure before the Ombudsperson is free of charge, but the Ombudsperson has no authority to reach binding decisions and the parties cannot expect the same effectiveness that a binding court decision could bring. The Ombudsperson is also regarded as a sort of adviser on whether it would be wise to pursue court proceedings or not.

The Act on Free Legal Assistance prescribes conditions for free legal assistance, based on the economic needs of the applicant.<sup>153</sup> Free legal assistance refers to primary and secondary legal assistance (i.e. legal advice, representation in court proceedings, etc.), as well as a waiver of court fees and expenses in the court proceedings.

#### 2. Vulnerability, multiple/intersectional discrimination

Fixed-term employment is especially burdensome for pregnant women and women with child-caring responsibilities. Faced with the immediate and far-reaching consequences of litigation or losing their jobs, these women are not ready to resort to institutional mechanisms for the protection of their rights, out of fear for their and their family's existence. More than half of respondents in the survey conducted by the Ombudsperson for Gender Equality<sup>154</sup> declared that they either would not or are not sure whether they would report their employer to the labour inspection in case of discrimination. 51.5 % of respondents declared that they would not initiate court proceedings against their employer, while 35.2 % of respondents declared that they are sure that they would not sue the employer on account of pregnancy discrimination.

### CYPRUS – Lia Efstratiou-Georgiades

#### 1. PART-TIME WORK

##### 1. General information

According to the 2012 Labour Force Survey prepared by the Statistical Service of the Republic of Cyprus regarding the total number of persons employed, 47.6 % were women and 52.4 % were men.<sup>155</sup> Part-time employment comprised 11.7 % of total employment (women 14.9 %, men 8.8 %). The main reason given for part-time employment was 'the person could not find a full-time job', a view taken by 43.3 % of people employed in part-time work. A second reason, given by 24.9 % of people employed in part-time work, was 'other personal or family reasons'.

<sup>153</sup> Act on Free Legal Assistance, Official Gazette 62/08, 44/11, 81/11.

<sup>154</sup> The Ombudsperson for Gender Equality, *Annual Report 2012*, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

<sup>155</sup> [www.mof.gov.cy/cvstat](http://www.mof.gov.cy/cvstat), accessed 5 June 2013.

The average number of working hours per week for full-time work was 41.5 hours (women 40.8 hours, men 42.2 hours), while for part-time work the average number of working hours was 20.4 hours (women 20.7, men 19.8).

Part-time work is defined in Part-Time Employees (Prohibition of Discriminatory Treatment) Law No. 76(I)/2002 as follows: “part-time employee” means an employee, under a contract of employment, or in such other circumstances leading to the conclusion that there exists an employer – employee relationship, whose hours of work, calculated on a weekly basis, or as an average over a period of employment of one year, are less than the normal hours of work of a comparable full-time employee’.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

#### ***2.1.1. National policies***

Part-Time Employees (Prohibition of Discriminatory Treatment) Law No. 76(I)/2002 entered into force on 1 January 2003. A first amendment of the Law entered into force on 16 February 2007 (Law No. 14(I)/2007), concerning the powers and duties of the inspectors, and a second amendment (Law No. 55(I)/2007) entered into force on 30 February 2008, regarding part-time employment on a casual basis. The purpose of the above Laws is to eliminate discrimination against part-time employees, improve the quality of part-time work, promote the development of part-time work on a voluntary basis, and contribute to the flexible organisation of working time, taking into account the needs of both employers and employees.

Until recently trade unions, both in the public and the private sector, did not favour part-time work. This approach has recently started to change, particularly in the private sector, mainly due to the increased participation of women in the labour force. More recently part-time work has become more common than before in the private sector, due to the current economic situation.

In the public sector part-time workers can be found only among hourly-paid staff in the field of cleaners and they are mainly women.

#### ***2.1.2. Equal treatment***

Law No. 76(I)/2002 as amended applies to all part-time employees, except part-time employees who work on a casual basis and some full-time employees affected by partial unemployment. A part-time employee who works on a casual basis is defined as someone whose total period of employment, at the same employer, does not exceed 8 weeks per calendar year, with a maximum continuous period of employment not exceeding 3 weeks, or whose total period of continuous employment does not exceed 5 hours per week. Full-time employees affected by partial unemployment, that is to say, by a collective temporary reduction of their normal working hours for financial, technical or structural reasons, are also beyond the Law’s scope.

As mentioned above, a part-time employee is an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time employee, who is employed by the same business. ‘Comparable full-time employee’ means a full-time employee who works in the same business where the part-time employee works, who has the same kind of employment contract or relationship as the part-time employee and carries out the same or similar duties to those carried out by the part-time employee, having regard to other factors such as seniority, qualifications and skills. Where there is no comparable full-time employee in the same business, the comparison must be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, other collective agreements or practice.

With regard to the principle of non-discrimination the Law provides that with respect to employment terms and conditions, a part-time employee must not be treated in a less favourable manner than the comparable full-time employee only by reason that he/she works

part time, unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* is to apply, meaning that where a comparable full-time employee is entitled to a specific level of remuneration or other benefit, the part-time employee is entitled to such remuneration or other benefit, which is directly proportional to the number of hours he/she works each week, compared to the weekly number of working hours of the comparable full-time employee. The conditions for access to particular conditions of employment by part-time employees must be reviewed periodically with regard to the principle of non-discrimination. Every part-time employee is entitled to equal terms and conditions of employment and to equal treatment and is afforded the same protection as that given to a comparable full-time employee, in particular with regard to salary and benefits, the social insurance scheme, termination of employment, protection of maternity, annual leave, public holidays, parental leave and sick leave.

Part-time employees are also entitled to equal treatment and enjoy the same level of protection as that provided to a full-time employee in relation to:

- the right to join and participate in the activities of a union, the right to collective bargaining and the right to act as an employees' representative;
- health and safety at work; and
- protection from discrimination in employment and occupation.

### 2.1.3. Organisation of working time

Where justified on objective grounds, the Minister of Labour and Social Insurance and/or the social partners may, where appropriate, make the access of a part-time employee to particular conditions of employment dependent on the period of service, the length of employment and the employee's qualifications on which his/her earnings are based.<sup>156</sup>

Each employer is to ensure that the transfer of an employee from full-time to part-time employment or the opposite, in the event of any vacancies in the business, takes place on a voluntary basis.<sup>157</sup> An employee's refusal to be transferred from part-time employment to full-time employment or the opposite, should not in itself constitute a reason for the termination of his/her employment, without prejudice to the termination of the employee's employment in accordance with relevant legislation, collective agreements and practice, for other reasons such as may arise from the operational requirements of the business concerned.

An employer is required, as far as possible, to give consideration to requests of employees to transfer from full-time to part-time employment, or the opposite, should the opportunity arise. The employer must also provide timely information on any vacancies of part-time or full-time employment available in the business, and must also introduce measures to facilitate access to part-time employment at all levels of the business, including skilled and managerial positions.<sup>158</sup>

Also, the Law No. 76(I)/2002 as amended provides that measures to facilitate access of part-time employees to vocational training are to be introduced. Finally, employers are required to provide appropriate information to the employees' organisations with regard to part-time employees employed by the business.

The Ministry of Labour and Social Insurance may, after consultation with social partners, identify, deal with and, where necessary, eliminate obstacles of a legal or administrative nature which may limit the opportunities for part-time employment.

The Industrial Tribunal has exclusive jurisdiction regarding disputes of a civil nature arising from the provisions of the Law, provided that any part-time employee whose hours of work are less than those specified in the Termination of Employment Laws are excluded. Termination of Employment (Amendment) Law No. 79(I)/2002 provides that an employee must work not less than 18 hours per week in order to have the right to apply to the Industrial Tribunal. However, if the claim is related to wages an applicant is allowed access to the Industrial Tribunal even if he/she works less than 18 hours per week.

<sup>156</sup> Article 6(3)(a) Law No. 76(I)/2002 as amended.

<sup>157</sup> Article 8(1) Law No. 76(I)/2002 as amended.

<sup>158</sup> Article 9 Law No. 76(I)/2002 as amended.

For a period of 9 months from the birth of her child or from the day maternity leave starts in case of adoption, a working mother has the right to either interrupt her employment for one hour or to arrive at work one hour later or leave work one hour earlier every day. It is noted that the one-hour excuse period is considered and is paid as working time.

An employee, when returning from parental leave, may request changes to his/her working hours and/or patterns for a set period of time. The employer must consider and respond to such requests, taking into account both employers' and employees' needs (Article 5(1) and (2)) of Maternity Protection Law No. 100(I)/97 as amended.

#### *2.1.4. Assessment*

With regard to direct and indirect discrimination in national legislation, the requirement that one must work 18 hours or more in order to apply to the Industrial Tribunal is troubling, and indicative of indirect discrimination.

### **2.2. Collective agreements**

#### *2.2.1. Policies*

There are no national collective agreements in Cyprus. Generally, there are only sectoral and enterprise-level collective agreements. The Law provides that social partners, acting in accordance with the procedures set out in collective agreements, must identify, deal with and, where necessary, eliminate obstacles of a legal or administrative nature, which may limit the opportunities for part-time employment.

#### *2.2.2. Equal treatment*

In compliance with the gender equality laws, social partners must ensure that collective agreements have no provisions which violate the principle of gender equality.

#### *2.2.3. Organisation of working time*

As provided in the Law, the Ministry of Labour and Social Insurance regularly invites the social partners to examine existing collective agreements with a view to revising or readjusting such agreements in order to remove any provisions which limit free choice or opportunities for part-time employment.

#### *2.2.4. Assessment*

In Cyprus collective agreements are gentlemen's agreements and currently have no force of law, but are used as a tool to promote gender equality, to comply with EU law and to eliminate any direct or indirect discrimination against one sex.

### **2.3. Case law**

There is no case law on this issue.

### **2.4. Involvement of other parties**

In Cyprus, private or public stakeholders have not, until now, played an important role in promoting part-time work, but they comply with the provisions of the relevant laws which protect the rights of part-time workers.

## **3. Statutory social security and pension rights**

### **3.1. Exclusions**

The General Social Insurance Scheme (GSIS), with universal coverage of the working population and applying pension entitlement conditions and accrual factors, is sufficiently flexible and responds to the need of mobility in the labour market. All persons, either self-

employed or employees are covered by the GSIS. The GSIS is financed by contributions from insured persons, employers and the State. The amount of pension depends on the duration of insurance and on the insured earnings.

A part-time worker is covered by the GSIS and has a right to pension provided his or her weekly wages are EUR 174 (for the year 2013). In my opinion this income requirement might amount to indirect sex discrimination.

A part-time worker is not entitled to benefits from the Redundancy Fund unless he has worked for at least 18 hours per week during the last two years prior to termination of employment. In practice this means that part-time workers are unable to attain equal rights to full-time workers, and there is thus arguably a need to amend the Termination of Employment Law on the issue of redundancy.

### **3.2. Assessment**

There is no discrimination between men and women in the relevant laws.

## **4. Self-employment**

There are no disadvantages faced by self-employed persons working part-time regarding the access to financial services.

There is no case law and there are no opinions of equality bodies regarding equal treatment pertaining to part-time self-employed persons, nor are there any legislative provisions and/or collective agreements on this matter.

## **5. Access to goods and supply of goods and services**

There are no disadvantages faced by part-time workers in the area of access to and supply of goods and services and there are no legislative provisions or collective agreements which address discrimination of part-time workers in the access to and supply of goods and services.

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

There are no separate studies regarding gender pay gaps in relation to part-time or fixed-term workers.

As the majority of workers in the health, cleaning, clerical, sales and education sectors are female, it can be stated that female part-time workers in these sectors are overrepresented. There are no initiatives at local or national level to change the organisation of employment at workplaces and under the present financially difficult circumstances it is not expected that there will be such initiatives in the near future.

#### *6.1.1. Recruitment process*

Law No. 76(I)/2002 does not lack effective protection against discrimination of part-time workers in relation to access to employment.

#### *6.1.2. Employment conditions*

As mentioned above part-time and fixed-term workers have the same rights with respect to employment conditions as permanent workers including the rights of pregnant women to avoid exposure to occupational risks.

#### *6.1.3. Termination of the employment contract*

There is no evidence of part-time workers being forced out of employment because they want to work part time and nor is there any evidence that they are forced out after application for an increase of their number of working hours.

## **6.2. Gaps in other areas**

Further to what has been mentioned above, the fact that the number of women in part-time employment is larger than that for men contributes to the gender pay gap, which is now 21 % approximately. In addition, women are generally employed in low-paid jobs, thus enlarging the gender pay gap.

## **II. FIXED-TERM WORK**

### **1. General information**

According to the 2012 Labour Force Survey, 83.1 % of total employment were employees, and 15.9 % of them were working under fixed-term contracts.

There are no sex-segregated data on fixed-term work and there are no statistics or findings on the impact of fixed-term work with regard to the gender pay gap.

### **2. Legislation, (national) collective agreements and case law**

#### **2.1. Policies and legislation at national level**

##### *2.1.1. National policies*

Fixed-Term Work Employees (Prohibition of Discriminatory Treatment) Law No. 98(I)/2003 entered into force on 25 July 2003. Its purpose is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and prevent any misuse arising from the use of successive fixed-term employment contracts or relationships. An Amendment Law concerning the powers and duties of the inspectors entered into force on 16 February 2007 (Law No. 13(I)/2007).

The Law No. 98(I)/2003 as amended applies to fixed-term employees employed with an employment contract or relationship. It does not apply in cases of basic vocational training relationships and apprenticeship schemes and in cases of employment contracts or relationships which have been concluded within the framework of specific public or publicly supported training, integration and vocational retraining programmes.

The Law defines a ‘fixed-term employee’ as a person with an employment contract or relationship entered into directly between an employer and an employee where the end of this contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event (Article 2 Law No. 13(I)/2007).

When, in relation to specific terms and conditions of employment, a pre-service period is required, this period must be the same for the fixed-term employees as for comparable permanent employees, except where a different length of pre-service period is justified on objective grounds.

When an employer employs an employee on a fixed-term employment contract, either following renewal of the contract or otherwise, and this employee has previously been employed for a total period of thirty months or more on a fixed-term employment contract (irrespective of the number of successive renewals of fixed-term contracts), the contract will be deemed in all circumstances to be an employment contract of indefinite duration. Any provisions in this contract which limit the duration of the employment contract will be void unless the employer can prove that the employment of the employee on a fixed-term employment contract can be justified on objective grounds. The law provides that objective grounds exist especially when:

- the needs of the business for the completion of a specific task are temporary;
- the employee temporarily replaces another employee;
- the details of a specific task justify the fixed-term duration of the contract;
- the fixed-term employee is employed on probation;



- the employment on a fixed-term contract is the result of the implementation of a judicial decision; and
- the employment on a fixed-term contract refers to employment in the Armed Forces of the Republic (Five-Year Petty Officers Volunteer Service).

When a fixed-term contract of a duration of not less than thirty months is considered of an indefinite duration, the employee's services cannot be terminated unless the conditions/requirements of Termination of Employment Law No. 25/67 as amended apply.

Law No. 98(I)/2003 provides that the employer must inform fixed-term work employees of vacancies available in the establishment or business, so that it is ensured that they have equal opportunities to access permanent positions of employment. Furthermore, when possible, the employer must facilitate the access of fixed-term employees to vocational training, in order to ensure the enhancement of their career development and occupational mobility.

An employer who contravenes any provision of the above Law will be guilty of an offence and will be liable, on conviction, to a fine not exceeding EUR 5 125.80 or to imprisonment of up to three months or to both sentences.

The Minister of Labour and Social Insurance may appoint inspectors to whom the Law gives special powers as follows: to enter into a workplace in order to carry out checks, investigations or examinations in order to ascertain the application of the Law and to hear complaints concerning a dispute that may arise and try to solve it. If the dispute is not solved, the inspector must prepare a written statement which can be presented before the Industrial Tribunal if the case is brought before it (Article 12B and Article 12C).

### 2.1.2. *Equal treatment*

With respect to employment terms and conditions, the Law provides that a fixed-term employee must not be treated less favourably than a comparable permanent employee, solely because he/she is employed on a fixed-term contract or in a fixed-term relationship unless different treatment is justified on objective grounds (Article 5(I) and (2)). Where appropriate the principle of *pro rata temporis* applies, meaning that where a comparable permanent employee is employed with specific terms and conditions of employment, the fixed-term employee will be employed with the same terms and conditions of employment, proportionately to his/her period of employment, based on a comparison of the period of employment of the comparable permanent employee.

'Comparable permanent employee' means an employee with an employment contract or relationship of indefinite duration, employed in the same business, engaged in the same or similar work/occupation, with due regard given to qualifications or skills. Where there is no comparable permanent employee in the same business, the comparison must be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with the relevant legislation, other collective agreements or practice.

Another provision which safeguards non-discrimination provides that fixed-term employees are to be taken into consideration in calculating the threshold above which workers representative bodies may be constituted in the business, in accordance with existing legislation, collective agreements or practice.

### 2.1.3. *Successive fixed-term contracts*

Hiring Process of Fixed-Term Employees in the Public Service and Other Related Matters Law No. 25(I)/2011 regulates matters related to fixed-term contract employees in the public service, excluding the army, the police and the educational service. According to this Law a 'fixed-term contract employee' is an employee who is hired under a private-law employment contract of a fixed duration which is justified on objective grounds within the provisions of Fixed-Term Work Employees (Prohibition of Discriminatory Treatment) Law No. 98(I)/2003 in the following cases: a) for a maximum period of six months to satisfy a temporary need, b) for carrying out a specific task within a specified period, c) for a period not exceeding two

years to satisfy a specific need of a temporary nature in hospitals and their speciality departments, in the Ministry of Labour and Social Insurance, in the Ministry of Education and Culture (for Educational Psychologists and School Assistants), in the Prisons Department, in the Civil Aviation Department and some other Departments. Hiring takes place on the basis of a table which is prepared by a special committee and is based on professional and other qualifications of the applicants.

The Hiring Process of Casual Employees in Public and Educational Services Laws of 1995 to 2011 set out the procedure for hiring public employees and teachers to satisfy seasonal or periodic or unpredictable needs for a duration which normally does not exceed 15 working days.

Furthermore, the Law provides that educational service teachers can be hired to satisfy casual needs (e.g. replacing teachers on sick leave or maternity or study leave) from September of one year to June of the following year. Also in the medical services, doctors and nurses are hired under fixed-term contracts of 15 days' duration or 6 months' duration, depending on the needs of the service.

In the public sector fixed-term hirings take place in Ministries according to their needs. In case of successive fixed-term contracts concluded under the aforementioned Laws, even if the total duration of the hiring exceeds thirty months, the employment does not become of indefinite duration.

In the private sector persons are generally hired on fixed-term contracts.

The provisions of Law No. 98(I)/2003 as amended are binding on employers, as mentioned above. A fixed-term employee has all the rights that a comparable permanent employee has on the basis of the principle of *pro rata temporis*.

The conditions under which fixed-term contracts are offered do not differ as to size or type of employer (state/private).

There are no official data to show that more women than men are hired on fixed-term contracts.

#### 2.1.4. Assessment

There are no forms of direct or indirect sex discrimination in Laws Nos. 98(I)/2003 and 13(I)/2007.<sup>159</sup> These matters are covered under a) Equal Pay Between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law No. 177(I)/2002 as amended, b) Equal Treatment between Men and Women as regards Access to Employment and Vocational Training Law No. 205(I)/2002 as amended, c) Equal Treatment between Men and Women in Occupational Social Security Schemes Law No. 133(1)/2002 and d) Equal Treatment between Men and Women in the Access to and Supply of Goods and Services Law No. 18(I)/2008 as amended.

The aforementioned Laws a), b) and c) implement Directives 75/117/EEC, 76/207/EEC, 84/378/EEC, 97/80/EC (Recast Directive 2006/54/EC).

## 2.2. Collective agreements

In Cyprus collective agreements are gentlemen's agreements and currently have no force of law, but are used as a tool to promote gender equality, to comply with Community law and to amend or eliminate any direct or indirect discrimination against one sex.

Collective agreements are mainly drawn up as gender-neutral or gender-blind, with the exception of maternity provisions. Any provision in a collective agreement or individual contract of employment which is contrary to the Laws mentioned in 2.1.4. above is repealed.

References to male/female positions in collective agreements and individual contracts have been abolished. Employers are obliged to protect all employees by taking all proper measures which promote the principle of equality between men and women.

<sup>159</sup> There is no court case law on the matter and since 2006 there have been no other opinions/decisions of the Ombudsman other than that mentioned in Section 2.3 (below).

### 2.3. Case law

There is no court case law on this issue. There are opinions/decisions of the Ombudsman, e.g.: *Ombudsman (Cyprus Equality Authority), Annual Report 2006*.<sup>160</sup> Two female employees were working on a temporary basis (fixed-term) in the public sector, one since 2002 and the other since 2003. Their services had been hired using consecutive contracts. Their contracts were not renewed after they expired because they were absent on maternity leave. Both women were rehired after the end of their maternity leave. The investigation brought to light that the way the cases of these two women were dealt with was not an isolated incident but was actually part of the general policy of the Public Administration and Personnel Department (PAPD) not to extend contracts of temporary employees who were absent on maternity leave. In her report the Ombudsman expressed the opinion that the above policy constitutes direct and unlawful discrimination on the ground of sex, which is prohibited by the Equal Treatment of Men and Women in Employment and Vocational Training Law and called upon the PAPD to terminate such policy.

### 2.4. Involvement of other parties

The Labour Advisory Body which consists of the Government, trade unions and employers associations' representatives, plays a particularly positive and important role in the fields of rights generally, including the rights of fixed-term workers.

As good practice, the case of the Cyprus Telecommunications Authority (CYTA) can be mentioned. CYTA is a public stakeholder that uses good practices in order to reconcile work and family life of its employees, such as flexible working hours and if an employee has special problems he/she can ask to work on a personal time schedule as long as these problems exist. CYTA is also studying the creation of a nursery and kindergarten near places of work. The University of Cyprus provides paid parental leave (70 % of salary), has a kindergarten and organises seminars and other activities for parents and children. The Crowne Plaza Hotel in Limassol has flexible working hours and provides care and occupation to the children of its employees.

## 3. Statutory social security and pension rights

See above section on Part-time work, point 3.1 (exclusions) on the General Social Insurance Scheme (GSIS).

A fixed-term worker is covered by the GSIS and has the right to a pension provided his/her weekly wages are EUR 174 for the year 2013.

A fixed-term worker is not entitled to benefits from the Redundancy Fund unless he/she has worked for at least 18 hours per week during the last two years prior to termination of employment.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

No major difficulties have been noted in enforcing rights of part-time or fixed-term workers. All workers, whether full-time, part-time or fixed-term, enjoy the same protection provided by the law. One problem which can be mentioned is that a worker who works less than 18 hours per week cannot apply to the Industrial Tribunal and is not entitled to compensation from the Redundancy Fund. The procedure before the Industrial Tribunal lasts 9-12 months and the costs are low. Law No. 76(I)/2002 as amended and Law No. 98(I)/2003 as amended do not include any provisions regarding financial or other support for individuals seeking to

<sup>160</sup> [www.ombudsman.gov.cy](http://www.ombudsman.gov.cy), accessed 5 June 2013.

enforce their rights. However, trade unions and some NGOs, such as Women's Association *Protoporia*, offer their members advice and limited financial support. There are no studies addressing the difficulties involved in obtaining access to legal redress with respect to rights regarding part-time workers' positions. Applications to the Ombudsman and to the Committee of Equality in Employment (under the Ministry of Labour and Social Insurance) are free of charge but these bodies are not entitled to award damages or compensation.

## 2. Vulnerability, multiple/intersectional discrimination

There is no evidence that women are at a particular disadvantage with regard to being part-time employed and/or on fixed-term contracts.

Generally, it can be stated that the non-discrimination provisions of the Constitution safeguard equal treatment of all persons.<sup>161</sup> In particular, as regards persons with disabilities, Persons with Disabilities in the Broader Public Sector Law No. 127(I)/2000 as amended by Laws Nos. 57(I)/2204, 72(I)/2007, 102(I)/2007 and 146(I)/2009, allows positive measures and more favourable treatment in employment for such persons.

### CZECH REPUBLIC – Kristina Koldinská

## I. PART-TIME WORK

### 1. General information

Many Czech employees use the option of working flexible hours, which is the most important instrument for the reconciliation of family and working life in the Czech Republic. For monetary reasons, part-time work is not so popular.<sup>162</sup> Families are materially better off when an agreement regarding flexible working time can be reached between employer and employee.

There are approximately 3 740 000 employees in the Czech Republic. In 2011, the female employment rate was 49.5 %, while the male employment rate was 67.5 %. In the same year, 196 000 women and 70 000 men worked part-time, meaning that women represented 5.2 % of part-time employees, while men represented 1.9 %.<sup>163</sup> Most part-time employees worked as service workers, professionals, technical and associated professionals, and clerks.<sup>164</sup>

There are no national statistics on the percentage of full-time workers who would like to reduce their working time.

Part-time work is not really considered as specifically related to women in relation to family responsibilities.<sup>165</sup>

<sup>161</sup> Articles 28(1) and 28(2).

<sup>162</sup> For example, according to a recent OECD study, only 5.6 % of Czech women work part time. See OECD, *Babies and Bosses: Reconciling Work and Family Life*, 2007, p. 16.

<sup>163</sup> Data available on [http://www.czso.cz/csu/2012edicniplan.nsf/kapitola/1413-12-r\\_2012-14](http://www.czso.cz/csu/2012edicniplan.nsf/kapitola/1413-12-r_2012-14), accessed 8 April 2013.

<sup>164</sup> Data available on [http://www.czso.cz/csu/2012edicniplan.nsf/t/F000369263/\\$File/1413124414.pdf](http://www.czso.cz/csu/2012edicniplan.nsf/t/F000369263/$File/1413124414.pdf), accessed 8 April 2013.

<sup>165</sup> More detailed information can be found in V. Haberlová & R. Kyzlinková *Rodinné potřeby zaměstnanců (Family needs of employees)* Praha VÚPSV, 2009, available on [http://praha.vupsv.cz/Fulltext/vz\\_304.pdf](http://praha.vupsv.cz/Fulltext/vz_304.pdf), accessed 8 April 2013.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time work is not specifically addressed in policy documents.

The adjustment of working time (especially the reduction of working time) is regulated by a legal provision on part-time work. Section 80 of Act No. 262/2006 Coll., the Labour Code (hereafter the 'Labour Code'), states: 'Where part-time work has been agreed, the employee concerned is entitled to wages or salary corresponding to his working hours under the part-time arrangement.' On the basis of this provision, it is also possible to agree to a temporary reduction in working time. This depends entirely upon an agreement between employer and employee.

Part-time work is facilitated for specific groups of workers through Section 241 Paragraph 2 of the Labour Code, which states 'Where a female or male employee taking care of a child who is under 15, or a pregnant female employee, or an employee who can prove that he or she, mostly on his or her own, systematically cares for a mainly or fully bedridden person, requests to work only part-time or requests some other suitable adjustment to his or her weekly working time and/or hours, the employer is obliged to comply with such a request, unless this is impossible for serious operational reasons.'

In the Czech Republic there is rarely any discussion on part-time work. Any such discussion generally concerns employers who do not wish to employ part-time workers, and an employer who does so is seen as a good example for others. In the Czech Republic, part-time work is not discussed as a potentially gender-stereotyping phenomenon.

#### 2.1.2. Equal treatment

The main existing national measures intended to combat discrimination and implement the principle of equal treatment, are the aforementioned Labour Code and the Anti-Discrimination Act (Act No. 198/2009 Coll.). Neither of these pay any special attention to part-time work.

There is no specific legal definition of a part-time worker. The Labour Code only provides for the possibility to agree to a shorter working time. This agreement must be concluded between employer and employee.

Czech labour legislation is applicable to all businesses; SMEs are not excluded from the scope of application.

In practice, working conditions apply to part-time workers in the same way as they do to full-time workers.

The Labour Code regulates pay according to the proportionality principle. Section 80 of the Labour Code states that 'Where part-time work has been agreed, the employee concerned is entitled to a wage or salary corresponding to his working hours under the part-time arrangement.'

With regard to overtime, Section 78 Paragraph 1(i) defines overtime for part-time workers according to the logic of part-time work itself. According to this provision, overtime for part-time workers amounts to any work exceeding their predetermined weekly working hours. Moreover, part-time workers must not be ordered to work overtime. All employees who work overtime are entitled to their normal wage and to a supplement of 25 % of their average earnings, unless the employer and employee have agreed that instead of a supplement the employee will take compensatory time off for the overtime hours he or she worked.<sup>166</sup> According to Section 241 Paragraph 3 of the Labour Code, it is prohibited to employ pregnant women to work overtime. An employee who cares for a child of less than one year old must not be ordered to work overtime. If a breastfeeding woman works part-time (but for at least

<sup>166</sup> Section 114 of the Labour Code.

half a standard working week) she is entitled to one 30-minute breastfeeding break for each child until the child reaches the age of one.<sup>167</sup>

As regards training facilities, promotion, workers' representatives, and dismissal, there are no specific provisions for part-time workers in Czech legislation. Equal treatment is generally guaranteed by the Anti-Discrimination Act and Section 16 of the Labour Code, which states that an employer must safeguard equal treatment for all employees as regards the employees' working conditions, remuneration, vocational training and promotion.

The legislation regulating the legal profession can be considered an example of indirect discrimination against part-time workers. To become a legal professional, it is obligatory to have been registered for at least three years as a legal trainee. Section 37 of Act No. 85/1996 Coll., on the legal profession, states that a legal trainee must be a person whose name has been entered in the Register of Legal Trainees, maintained by the Czech Bar Association. The Bar must enter into the Register of Legal Trainees the name of every person who (among other conditions) has been employed by a lawyer or company for a certain number of weekly working hours under special legislation. If a trainee only works part-time, he or she cannot be registered as a legal trainee. Therefore, the time during which he or she works part-time at a law firm will not be counted towards the minimum three years of legal practice required.

### *2.1.3. Organisation of working time*

The main existing national legal measures in place to facilitate the development of part-time work on a voluntary basis have already been described. The Labour Code also details measures regarding the flexible organisation of working time. The employee and employer may agree on flexible working time, composed of basic working time and eligible working time. During basic working time, the employee is obliged to be present at the workplace and perform work, whereas during eligible working time the employee is able to select when his/her working time starts and when it finishes. This rule applies to all employees with flexible working time, with no exceptions.

The provision on flexible working time is applied in light of the above-cited Section 241 of the Labour Code, so that the employer is obliged to comply with any request for flexible working time if this is possible in operational terms. This also applies to women returning from maternity leave or to men returning from parental leave. This provision is quite generous, as it applies to all employees caring for a bedridden person or a child until the age of 15.

In general, Czech legislation does not provide for an explicit entitlement to work part-time or to work full-time. This is to be agreed between employer and employee.

The right to adjust working time is acquired only by specific groups of persons: those who care for children, and those who care for bedridden people. Otherwise, it is possible for employees to reduce or to increase working time (from a smaller part-time to a bigger part-time job, or to a full-time position), but only upon agreement between employer and employee. There is no specific entitlement to such adjustments for the employee.

### *2.1.4. Assessment*

Czech legislation is quite generous with regard to the possibility to work part-time, especially for those with caring responsibilities. However, the reduction of working time to a part-time job is used infrequently in the Czech Republic. On the one hand, employers do not like to agree to a reduction of working hours, and on the other, employees rarely ask for such a reduction. One of the main motivations to reduce working time is to compensate the ending of the entitlement to parental leave, available until the child's third birthday and used especially by mothers. After this, women try to return to full-time work and use childcare facilities (kindergartens). It is even less common for an employee to ask to reduce their working time in order to care for an elderly family member; homes for the elderly are often used instead.

As indicated, the provisions on working time are gender neutral and no form of indirect sex discrimination has been identified in national legislation.

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<sup>167</sup> Section 242 of the Labour Code.

Legislation could therefore be labelled as sufficiently ‘gender sensitive’. The problem is how it works in practice, as part-time work and working time adjustments are still used infrequently. This is not an issue that would fill newspapers or fuel social debate, which is why it is also difficult to identify any good practice to be followed by other countries.

## **2.2. Collective agreements**

### *2.2.1. Policies*

To the knowledge of the author, there are no special policies of social partners in relation to part-time work. Social partners in the Czech Republic have not historically opened up to part-time work. Employers in practice oppose part-time work, but this is not admitted and there is no particular debate on part-time work as part of social dialogue.

### *2.2.2. Equal treatment*

National collective agreements do not normally regulate part-time work.

### *2.2.3. Organisation of working time*

National collective agreements do not normally regulate the organisation of working time to facilitate the development of part-time work on a voluntary basis.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

There are no cases relating to part-time workers and equal treatment.

## **2.4. Involvement of other parties**

No other parties are involved in the field of rights of part-time workers.

## **3. Statutory social security and pension rights**

### **3.1. Exclusions**

Classic part-time work is not excluded from statutory social security schemes. It should be mentioned, however, that there is one type of *de facto* part-time work excluded from social security schemes. Work performed outside a regular labour relationship under a so-called ‘agreement on performance of work’ is not insured in the statutory pension scheme, nor covered by sickness insurance, if the remuneration does not exceed EUR 400 (CZK 10 000). There is no dominant gender aspect to this exclusion, as the agreements on performance of work are used by all employees who wish to perform some minor work for an employer, and there is no reason or will to establish a full employment relationship. On the other hand, it is true that an agreement on performance of work is often used by parents on parental or maternity leave in order to contribute towards the family budget, and to be able to work from home or only for a certain amount of hours. However, the fact that this activity is not insured is seen as more of an advantage. The employee is not obliged to contribute from this income to social security schemes; a logical conclusion as a person who cares for a child until the age of four, for example, is already insured (periods of parental leave are seen as insured periods).

Entitlement to unemployment benefits depends not on the form of the job (full-time, part-time or precarious), but on the wage earned from such work. There is no entitlement to unemployment benefits if the person concerned has a job in which he or she earns less than half the minimum wage.<sup>168</sup>

Legislation on statutory leaves does not exclude or disadvantage part-time workers, as holiday entitlements, for example, correspond to working time. Parental leave or maternity

<sup>168</sup> Sections 25 and 39 of Act No. 435/2004 Coll., on employment.

leave do not depend on the type of job, and whether the employee works part-time or full-time is irrelevant. The employer is obliged to provide the leave until the relevant child reaches a certain age.

### **3.2. Assessment**

Czech legislation can be assessed as being in line with the EU *acquis* on gender equality.

## **4. Self-employment**

Self-employed persons working part-time are not particularly disadvantaged in the area of financial services. Providers of financial services are not specifically interested in the length of working time, but more in the stability of the job and amount of income.

There are no national legislative provisions or national collective agreements that address issues of equal treatment pertaining to part-time self-employed persons. Therefore there is no case law or opinion of the equality body to be reported.

Little attention is afforded to the equal treatment of self-employed persons, and even less to the equal treatment of self-employed persons working part-time.

## **5. Access to and supply of goods and services**

No special disadvantages facing part-time workers in the area of access to and supply of goods and services can be reported. Banks providing loans or mortgages apply very strict policies and they are generally very difficult to get, as persons who apply for such services have to prove a stable and sufficient income. It is not of any interest to a bank how intensive the job is; the main issue is whether the income is high enough. A person who only works part-time might therefore be disadvantaged due to the probability of such a person fulfilling the pre-requisite income requirement is lower compared to a person working full-time.

The author has no further information as regards possible longer waiting periods for insurances or higher premiums than justified, based on the application of the *pro rata temporis* principle.

There are no national legislative provisions or national collective agreements that address discrimination against part-time workers in the access to and supply of goods and services.

There is no case law or opinion of the equality body on these issues.

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### **6.1.1. Recruitment process**

It should be observed that legislation provides protection against discrimination in general, including discrimination against part-time workers, but the effectiveness of such legislation is potentially disputable. There is no explicit protection of part-time workers against discrimination, which might be a problem. Current practice shows that employers do not like to employ part-time workers. In fact, if during a job interview a person expresses his/her preference to work part-time, it is probable another candidate who wishes to work full-time will get the job instead.

It cannot be said that there is a lack of full-time positions in certain professions/sectors such as the health, cleaning and education sectors. As in other countries, female employees are not so much forced into part-time work but simply overrepresented in these sectors. As demonstrated at the beginning of this report, this is because part-time work is not popular in the Czech Republic.



### 6.1.2. *Employment conditions*

In general, it is difficult to imagine a situation where a part-time worker would obtain a very high position of employment. However, in the Czech context it is difficult to identify indirect sex discrimination in practice.

There are no specific problems with women who work part-time, or the implementation of the Pregnant Workers Directive. Employers in general are quite used to adjusting working conditions or working hours for pregnant workers, and in this part-time workers are included.

### 6.1.3. *Termination of the employment contract*

There is no evidence of part-time workers forced out of employment because they wish to work part-time, but this is not to say that it doesn't occur. Employers generally do not like to reduce the working hours of their employees.

## 6.2. *Gaps in other areas*

There is nothing to report on this issue.

## II. FIXED-TERM WORK

### 1. General information

No data on fixed-term work are available to the general public.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. *Policies and legislation at national level*

##### 2.1.1. *National policies*

There are no special national policies regarding fixed-term work.

##### 2.1.2. *Equal treatment*

The Czech Republic has only general legislation in place regarding fixed-term work with no special focus on combating discrimination. The Labour Code only provides for general protection against any abuse of fixed-term work that aims to avoid the strict legislation on dismissal. Section 39 of the Labour Code states that a fixed-term relationship between parties may be agreed for a total maximum period of 3 years, and must not be extended or prolonged more than twice. These defined periods might be regarded as too long and insufficiently protective. In fact, according to existing legislation, it is possible to conclude successive fixed-term contracts for 9 years in total (3+3+3 years). After a period of 3 years, the former fixed-term relationship is no longer taken into account. Some authors have proposed amendments to current legislation in order to improve the transposition of Directive 1999/70.<sup>169</sup>

A proposal for amendment of the above-cited provision of the Labour Code is currently in legislative process. If it is approved (which is highly probable), it should reintroduce further paragraphs into Section 39 of the Labour Code allowing the employer to disregard the aforementioned restrictions on fixed-term contracts if there are serious operational reasons, and if agreed with a trade union.<sup>170</sup>

<sup>169</sup> See e.g. A. Klikar *Pracovní poměr na dobu určitou ve světle národní úpravy a evropského práva* (Fixed-term employment in the light of national legislation and European law), available on <http://www.epravo.cz/top/clanky/pracovni-pomer-na-dobu-urcitou-ve-svetle-narodni-upravy-a-evropskeho-prava-86862.html>, accessed 8 April 2013.

<sup>170</sup> The proposal was approved on 27 March 2013 by the Chamber of Deputies, it also has to be approved by the Senate and signed by the President (to follow the legislative process of this proposal see <http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=876&CT1=0>, accessed 30 April 2013).

The aforementioned rule applies to all businesses. There are no special working conditions applicable to fixed-term workers and the principle of equal treatment is not dealt with specifically.

There is no precise evidence that fixed-term contracts are not being renewed for reasons connected to pregnancy, maternity, or parental leave. However, it is rather likely that this frequently occurs;<sup>171</sup> in Czech labour legislation the protection of mothers and parents is quite strong and employers prefer employees who have no care responsibilities.

#### *2.1.3. Successive fixed-term contracts*

If it is the first contract offered, it is always legal to offer a fixed-term contract. Fixed-term contracts are frequently used, and approximately 70 % of employees in the Czech Republic may be employed on a fixed-term contract.<sup>172</sup> If a new employment relationship is established, many employers use a fixed-term contract, e.g. for one year, and only then the contract is renewed for an indefinite period.

The conditions for extending or renewing fixed-term contracts (Section 39 of the Labour Code, see above) do not differ according to the size or type of employer.

There are no data or research available on whether there are any specific problems exist concerning women and fixed-term contracts.

#### *2.1.4. Assessment*

National legislation should provide more explicit protection to workers with fixed-term contracts for cases where they are not extended due to pregnancy or maternity or other caring responsibilities.

### **2.2. Collective agreements**

There are no policies of social partners in relation to fixed-term work.

### **2.3. Case law**

There are no cases that reflect an interpretation of the principle of equal treatment in relation to fixed-term work.

There are some cases relating to successive fixed-term contracts, but the principle of equal treatment was not addressed in any. This is problematic; for a significant period schools used successive fixed-term contracts for teachers in such a way that the contract lasted only throughout the school year, meaning that during the school holiday the teacher was not paid and did not have any guarantees of being hired again for the following school year. This in fact constituted indirect sex discrimination, as most teachers are women. If a woman fell pregnant, her contract was not renewed. Unfortunately however, no case law exists where a female teacher has argued that she was directly discriminated against by such a practice. Legislation has since changed, and it is now prohibited to apply successive fixed-term contracts in such a way.

### **2.4. Involvement of other parties**

No other parties are particularly involved in the issue of fixed-term work.

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<sup>171</sup> Many Internet discussions and questions posted on more or less legal servers show that this is one of the main concerns of pregnant women (see e.g. [www.genderstudies.cz](http://www.genderstudies.cz) and [www.pulnapul.cz](http://www.pulnapul.cz), both accessed 30 April 2013).

<sup>172</sup> J. Jakubka *Řetězení pracovních poměrů na dobu určitou – nedořešený problém poslední novely*, Národní pojištění, Časopis Národního pojištění 8-9/2002, available on <http://www.cssz.cz/cz/casopis-narodni-pojisteni/archiv-vydanych-cisel/clanky/casopis-narodni-pojisteni-c-8-9-2002-clanek-1.htm>, accessed 30 April 2013.

### 3. Statutory social security and pension rights

Statutory social security schemes and pension insurance are neutral as regards fixed-term contracts. Income thresholds exist (as explained in the section on part-time work, above), but these do not specifically affect fixed-term work. There are no special provisions regarding this type of employment contract. National legislation is in line with the EU *acquis* on gender equality.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

The author does not know of any difficulties related to enforcing rights in relation to the position of part-time or fixed-term workers. National law does not provide for hands-on support, financial support, or advice for individuals seeking to enforce their rights.

In the Czech Republic, it is possible to submit a complaint to a public defender of rights in cases where a person feels that they have been discriminated against. Bringing a complaint is free of charge, but the public defender of rights does not have the competence to award damages or compensation, nor can he represent a victim in legal proceedings. This concerns all victims of discrimination, including those asserting discrimination on the grounds of part-time or fixed-term work.

### 2. Vulnerability, multiple/intersectional discrimination

There is no further information available.

## DENMARK – Ruth Nielsen

## I. PART-TIME WORK

### 1. General information

In the Danish register-based labour-force statistics (RAS) the extent of working time of employees is calculated as either full-time or part-time.<sup>173</sup> An employed person is considered as being in full-time employment if:

- the person is full-time insured under an unemployment insurance fund scheme;
- the person works as a seafarer;
- the person is not insured under an unemployment insurance fund scheme and has a working week of 27 hours or more;
- the person is not insured under an unemployment insurance fund scheme and there is no information on the extent of working time.

An employed person is considered as being in part-time employment if:

- the person is part-time insured under an unemployment insurance fund scheme;
- the person is not insured under an unemployment insurance fund scheme and has a working week of less than 27 hours

75 % of the Danish labour force works full time, 25 % works part time.

<sup>173</sup> The statistical information is taken from the website of Danmarks Statistik, [www.dst.dk](http://www.dst.dk), accessed 28 June 2013.

In Denmark 69.5 % of women at working age (15-64) are in the labour force, 72.5 % of men in that age group are in the labour force. A little over 15 % of the male workforce works part time, and the same applies to approximately 38 % of women.

Part-time work is more common in typical women's jobs in the social, health and education sector, than in other sectors.

In the public debate it is often said that part-time work is involuntary, but as far as the author knows there is no certain evidence regarding whether this is true, and the same applies to the combination of several (minor) part-time jobs.

To the author's knowledge there is no evidence that people combine a part-time job with self-employment.

To the author's knowledge there are no statistics on the percentage of full-time workers who would like to reduce their working time.

The hourly pay for part-time work is not generally lower than the hourly pay for full-time work. A person who works 10 hours per week, of course, receives lower wages than a person who works 30 or 40 hours per week. In Denmark, this is not usually considered a gender pay gap, because it is obvious that there is a legitimate reason other than gender for the pay difference.

Part-time work is often used by young persons of either sex who are students or who in other ways combine education/vocational training with some employment.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

#### ***2.1.1. National policies***

There is no general national Danish policy on part-time work. For example, there is no Danish parallel to the Norwegian proposal for legislation against involuntary part-time work.<sup>174</sup>

Some trade unions have a policy with regard to part-time work. For example, the trade union for pre-school pedagogues writes on their homepage that they work towards limitation of the employer's right to announce vacant positions as part-time jobs. They probably assume that part-time work is often involuntary among their members.

During the last few years, there has been much debate in Denmark on whether Article 5 of the Framework Employment Directive (2000/78/EC) means that a reduction in working time may constitute one of the accommodation measures which the employer is required to apply to enable an employee with a disability to remain in his or her job. The Salaried Employees' Union (HK) which is one of Denmark's largest trade unions, with a female majority among its members and many part-time workers, has brought cases on this issue before the Danish courts, including Ring and Werg, in which preliminary questions were presented to the CJEU, which on 11 April 2013 ruled that Article 5 of the Directive must be interpreted as meaning that a reduction in working time may constitute one of the accommodation measures referred to in that Article.<sup>175</sup> It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working time, as an accommodation measure, represents a disproportionate burden on the employer.

There is not much discussion in Denmark about part-time work as a symptom of gender stereotypes and what the legal obligation of CEDAW Article 5a is in this regard. Part-time work was addressed on pp. 47-54 of the Seventh Periodic Report by the Government of Denmark on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women, May 2008.<sup>176</sup> This report stresses that the employment market is highly gender-segregated, with more women being employed in the public sector. On part-time work the following is stated in the report: 'There are more than four times as

<sup>174</sup> Prop. 83 L (2012–2013). *Endringer i arbejdsmiljøloven mv. (søksmålsrett for fagforeninger mv., overtredelsesgebyr og ufrivillig deltid)*.

<sup>175</sup> Cases C 335/11 *Jette Ring v Dansk almennyttigt Boligselskab* [2013] and C 337/11 *Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display* [2013] (neither yet reported).

<sup>176</sup> See [http://miliki.dk/fileadmin/ligestilling/PDF/cedaw\\_rapport2008.pdf](http://miliki.dk/fileadmin/ligestilling/PDF/cedaw_rapport2008.pdf), accessed 14 April 2013.

many women as men who work between 30 and 34 hours a week. For those who work between 20 and 29 hours a week, there are close to three times as many women as men.'

Denmark ratified CEDAW in 1983 but has not incorporated it into Danish law. Denmark is traditionally a dualist (as opposed to a monist) country. This means that public international law and national law are regarded as two separate legal systems. In case of conflict, Danish law takes precedence over public international law. Treaties that Denmark has ratified (e.g. CEDAW) are only binding in the external relation between Denmark and other States, not internally in Denmark, e.g. for employers in Denmark. Treaty provisions only become Danish law if the Danish legislator chooses to adopt a Danish law incorporating the Treaty. It has been discussed whether Denmark should incorporate CEDAW into Danish law,<sup>177</sup> but there is a political majority against it. CEDAW therefore cannot be invoked before Danish courts. Danish law must, however, be interpreted in conformity with Denmark's public international law obligations. In the author's view there are no other further-reaching obligations in CEDAW Article 5a than in EU law and Danish legislation implementing EU law on sex discrimination.

CEDAW only protects girls and women against sex discrimination, not boys and men. In Denmark, many think that boys and men are as much (and maybe even more) victims of sexual stereotyping as girls and women. In the Danish educational system, for example, girls and women have outperformed boys and men and many argue that this is partly because Danish schools, universities, etc. are more adapted to the needs of girls/women than to those of boys/men.

### 2.1.2. *Equal treatment*

Danish sex discrimination legislation prohibits both direct and indirect sex discrimination. If a decision or measure is unfavourable for part-time workers and if many more workers of one sex than of the other sex work part time in the area at issue, this will constitute indirect sex discrimination unless it is justified by a legitimate aim and the unfavourable treatment does not go further than necessary to obtain the legitimate aim. There is no explicit mention of part-time work in Danish sex discrimination legislation and there is practically no case law on part-time work as indirect sex discrimination.

In the private sector, the Danish Part-Time Work Act<sup>178</sup> which implements the Part-Time Work Directive<sup>179</sup> provides that if employees are not covered by a collective agreement, guaranteed rights apply that are at least equivalent to the provisions of Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, the Collective Agreement of 9 January 2001 on the implementation of the Directive on Part-Time Work concluded between the Confederation of Danish Trade Unions and the Danish Employers' Confederation. In the public sector, the provisions of framework agreements on implementation of the Part-Time Work Directive concluded between public-sector employers and the trade unions for public-sector employees apply.

The aforementioned collective agreements define part-time workers in the same way as the Directive, i.e. the term 'part-time worker' refers to an employee whose normal hours of work are less than the normal hours of work of a comparable full-time worker. Employees working on a casual basis are excluded from the part-time work provisions in the public sector.

Danish sex discrimination legislation and the specific part-time work legislation are applicable to all businesses including small and medium-sized enterprises (SMEs).

Under Section 1(2) of the Salaried Employees Act, the employee must work at least 8 hours per week to be a salaried employee within the meaning of this Act.

<sup>177</sup> See *betænkning 1407/2001 om inkorporering af konventioner i dansk ret* (Government report 140/71 on the incorporation of international Treaties into Danish law).

<sup>178</sup> Consolidation Act no. 815 of 26 September 2002.

<sup>179</sup> 97/81/EC.

Basic pay per hour must be the same for part-time and full-time work, i.e. the *pro rata temporis* principle applies. The Danish rules on part-time work are interpreted in accordance with the underlying Part-Time Work Directive as interpreted by the CJEU.

#### *2.1.3. Organisation of working time*

The employer is entitled to decide on whether to employ staff on a part-time or a full-time basis, unless the employer has limited this right by collective agreement with a trade union, which is often the case (see below). As the main rule, the individual worker has no right to part-time work or to adjustment of working time. The aforementioned disability cases (see footnote), gave persons with disabilities the right to work part time if this was a necessary accommodation measure. Section 4a of the Danish Part-Time Work Act provides that in the course of employment an employee and an employer have the right to agree that the employee will work part time regardless of direct or indirect barriers or limitations to part-time work in a collective agreement, custom or practice. Requirements in a collective agreement etc. for a limit of a maximum of 15 hours per week are allowed. This means that the employer is required in the collective agreement to offer jobs for at least 15 hours.

There is no right for workers to work part time in order to be able to meet family responsibilities. Upon returning from maternity leave there is no right to work reduced hours for a certain period of time to facilitate the combination of work and family obligations. There is no right to reduced working time based on a need to care for elderly relatives.

#### *2.1.4. Assessment*

In the author's view there is no indirect sex discrimination related to part-time work in Danish legislation.

### **2.2. Collective agreements**

#### *2.2.1. Policies*

Historically, Danish trade unions, in particular in male-dominated sectors of the economy, had a negative attitude towards part-time work and some collective agreements prohibited part-time work. Today, part-time work is generally allowed under collective agreements, but there is often a limit so that an employer must offer jobs for at least 15 hours a week.

#### *2.2.2. Equal treatment*

The aforementioned collective agreements, to which there is reference in the Part-Time Work Act, generally repeat the content of the Part-Time Work Directive.

#### *2.2.3. Organisation of working time*

For information on the main collective agreements, see 2.1.2. above.

#### *2.2.4. Assessment*

The references in the Part-Time Work Act to collective agreements give the social partners a prominent role in implementing the Part-Time Work Directive. The model used in the Part-Time Work Act has not been repeated in later legislation on other issues.

The author is not aware of any forms of indirect sex discrimination in national collective agreements.

Danish legislation on part-time work is gender-neutral and not gender-sensitive and does not address gender stereotypes as an underlying matter.

There are no examples of 'good practices' that the author knows of or considers worth being followed by other countries.

## 2.3. Case law

### 2.3.1. Cases/opinions of equality bodies

There are no landmark cases and generally there are few cases on part-time work in Denmark. CEDAW Article 5a – as far as the author knows – has never been used in the legal argumentation before the courts, but it is mentioned in literature.<sup>180</sup> Because of Denmark's dualist tradition, it is hardly relevant in an internal Danish context, see Section 2.1.1. above. In addition, many people in Denmark see gender equality as a matter of relevance to both men/boys and women/girls, and regard CEDAW's limitation to prohibiting discrimination against women as irrelevant in highly developed countries like the EU countries.<sup>181</sup>

### 2.3.2. Assessment

The author believes that there are no shortcomings in the application of the principle of equal treatment/the concept of indirect sex discrimination in Denmark. There is no Danish case law on part-time work contradicting the case law of the Court of Justice of the European Union.

There are no examples of 'good practices'.

## 2.4. Involvement of other parties

For information on collective agreements and social partners, see Section 2.2. above. There are no other private or public stakeholders, other than the legislator/Government, that play a particularly important role in the field of rights of part-time workers in Denmark.

The author does not know of any particularly good practices which have been initiated by the social partners or other private or public stakeholders which could be relevant in the area of indirect discrimination on the ground of part-time work, nor can the author identify reluctant or obstructive bodies or restrictive views (e.g. due to political and/or religious or cultural reasons, cf. CEDAW Article 5a). For information on CEDAW's limited relevance in Denmark, see above.

## 3. Statutory social security and pension rights

### 3.1. Exclusions

No categories of part-time workers are explicitly excluded from statutory social security schemes and/or old-age statutory pension schemes. There are no minimum requirements, thresholds or provisions that disadvantage part-time workers as regards working time for acquiring statutory social security or pension rights. Some feminist writers traditionally claim that women working part time are treated unfavourably compared to full-time workers in regard to pension.<sup>182</sup> A recent report<sup>183</sup> by the Danish Supplementary Labour-Market Pension Fund (Arbejdsmarkedets Tillægspension: ATP) however, showed that when all kinds of

<sup>180</sup> See for example: S. Jørgensen, 'Deltidsbeskæftigelse og kønsdiskrimination' (Part-time employees and gender discrimination) *Juristen*, No. 2, pp. 36-42, April 2009; M. Carneiro 'Work-life balance: is there a genuine choice? A case of indirect sex discrimination' in: S. Troels Poulsen & S. Jørgensen (eds.), *Frit valg – Velfærd i Den Europæiske Union* (Free choice – Welfare in the European Union), pp. 145-159, Jurist og Økonomforbundets Forlag 2011; M. Stigelund Kiel 'Kvinder og pension i et kønsperspektiv' (Women and Pension in a gender perspective) *Forskningscenteret WELMA, Det Juridiske Fakultet, Københavns Universitet*. This article is a revised version of a presentation by M. Stigelund Kiels oplæg at the Conference: 'Køn & Ret' (Gender and Law) 12-14 September 2012 in Copenhagen. The article was accepted for publication in 2013.

<sup>181</sup> See for example R. Nielsen, *Civilretlige diskriminationsforbud*, Copenhagen 2011.

<sup>182</sup> See S. Jørgensen, 'Deltidsbeskæftigelse og kønsdiskrimination' (Part-time employees and gender discrimination) *Juristen*, No. 2, pp. 36-42, April 2009 and M. Carneiro, 'Work-life balance: is there a genuine choice? A case of indirect sex discrimination' pp. 145-159 and M. Stigelund Kiel, 'Kvinder og pension i et kønsperspektiv' (Women and Pension in a gender perspective). orskningscenteret WELMA, Det Juridiske Fakultet, Københavns Universitet.

<sup>183</sup> *Kvindens pension stort set upåvirket af barsel, orlov og deltid*, ATP-rapport, faktum om pension, investering og samfund no. 113, Februar 2013, available in Danish on [http://www.atp.dk/wps/wcm/connect/43bfe4804eb4f62993a4d3b6ad9abbd9/faktum\\_113.pdf?MOD=AJPERES](http://www.atp.dk/wps/wcm/connect/43bfe4804eb4f62993a4d3b6ad9abbd9/faktum_113.pdf?MOD=AJPERES), accessed 28 June 2013.



pensions available in Denmark, i.e. private pensions, labour-market pensions and Statutory Social Security are taken into consideration, women receive approximately the same amount of money in pension, irrespective of whether they have worked part time or full time and whether they have taken a lot of parental leave or no leave at all. This is due to the fact that the Danish social security system redistributes money between persons with higher and lower incomes so that persons (in practice primarily women) who have not earned any pension rights on the basis of their own work receive extra high social security benefits in order to equalise the economic situation in old age for those who have worked for many years and those who have not worked very much.

In Denmark it is possible to participate in an unemployment insurance scheme both as a full-time and as a part-time member.<sup>184</sup>

There are no specific requirements in order to be entitled to statutory leaves (e.g. parental leave) which might exclude or disadvantage part-time workers. There is no specific case law on these issues.

### **3.2. Assessment**

The author sees no problems in the Danish law as described above in light of the EU acquis on gender equality.

## **4. Self-employment**

The author is not aware of any potential disadvantages faced by self-employed persons working part time, e.g. in the access to financial services (bank loans). Generally, banks take the customer's economic situation into consideration when granting loans, no matter what the reason for this situation might be.

There are no Danish legislative provisions and/or national collective agreements which address issues of equal treatment pertaining to part-time self-employed persons. The author does not know of any case law and/or opinions of equality bodies on these issues.

## **5. Access to and supply of goods and services**

The author is not aware of any disadvantages faced by part-time workers in the area of access to and supply of goods and services, e.g. in the access to financial services (mortgages, bank loans), longer waiting periods for insurances or higher premiums than justified by the application of the principle *pro rata temporis*.

The Gender Equality Act prohibits both direct and indirect discrimination in the access to and supply of goods and services. There are no specific provisions on part-time work and there is no case law.

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### **6.1.1. Recruitment process**

Under Danish labour law, it is part of the employer's managerial prerogative to choose whether they offer jobs on a part-time or a full-time basis, unless the employer has limited this prerogative through a collective agreement (see above). The underlying Part-Time Work Directive does not give any employee a right to work part time. Danish law which allows the employer to choose whether or not they want to recruit part-time workers is fully compatible with the Directive on this point. It is therefore meaningless in regard to valid law as it stands at present to ask whether Danish law lacks effective protection against discrimination of part-time workers in relation to access to employment. There is no right – neither under EU labour

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<sup>184</sup> See Section 53 of the Act on Unemployment.



law nor under Danish labour law – for an employee to be recruited either on a full-time or a part-time basis. An employer's lawful exercise of their preference for either part-time or full-time work does not constitute indirect sex discrimination – neither under EU law nor under Danish law.

In the care sector many employers prefer to offer part-time jobs. The trade unions try to change this. The author knows of no good practices worth reporting.

#### *6.1.2. Employment conditions*

The author does not know of any problems with women who work part time and the implementation of Article 5 of the Pregnant Workers Directive (92/85), e.g. the requirement that the employer is to temporarily adjust the working conditions and/or working time or hours of pregnant workers to avoid exposure to occupational risks.

#### *6.1.3. Termination of the employment contract*

The author does not know of any evidence of part-time workers being forced out of employment because they want to work part time, or the opposite, part-time workers being forced out after application for an increase in their work amount.

## **II. FIXED-TERM WORK**

### **1. General information**

Fixed-term work is not very often used in Denmark. To the extent that it is used, this applies equally both in female-dominated and in male-dominated sectors. As far as the author knows there are no statistics of findings on the impact of fixed-term work with regard to the gender pay gap.

### **2. Legislation, (national) collective agreements and case law**

#### ***2.1. Policies and legislation at national level***

##### *2.1.1. National policies*

Before the implementation of the Fixed-Term Work Directive, employers were free under Danish labour law regarding whether they wanted to recruit staff on fixed-term contracts.

##### *2.1.2. Equal treatment*

In 2003, Denmark implemented the Fixed-Term Work Directive.<sup>185</sup> Danish legislation<sup>186</sup> is applicable to all businesses, including small and medium-sized enterprises. The Danish Implementation Act provides for equal treatment of fixed-term workers and other employees. The underlying EU rule requires Member States to introduce one or more of the following measures:

- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) a maximum duration of successive fixed-term employment contracts or relationships; or
- (c) a maximum number of renewals of such contracts or relationships.

Denmark has primarily chosen Option a): Fixed-term contracts can only be renewed if there are objective reasons to do so.

It has occurred that women complained of their fixed-term contracts not being renewed for reasons connected to pregnancy, maternity, or parental leave but in general – in the cases brought before the Equal Treatment Board or the courts – there has not been any evidence that

<sup>185</sup> 1999/70/EC.

<sup>186</sup> *Bekendtgørelse af lov om tidsbegrænset ansættelse*, Consolidation Act No. 907 of /2008.

this was actually the case. There is no maximum time limit on how long a person may be hired on fixed-term contracts.

#### *2.1.3. Successive fixed-term contracts*

It is generally legal for a Danish employer to offer fixed-term contracts under Danish legislation.

There are no differences depending on the size or type of employer (State/private). The author is not aware of any specific problems of women relating to fixed-term contracts, e.g. that young women are more often offered a fixed-term contract than young men. There are no data or studies available which show such findings.

#### *2.1.4. Assessment*

The author does not believe that there is indirect sex discrimination in Danish legislation on fixed-term work.

### **2.2. Collective agreements**

The social partners do not seem to have a joint practice on fixed-term work. There is only a small number of collective agreements that include this issue.

### **2.3. Case law**

There are no landmark cases of Danish courts and/or equality bodies that reflect the interpretation of the principle of equal treatment in relation to fixed-term work. There are no contradictions between Danish law and the case law of the Court of Justice of the European Union. There are no examples of ‘good practices’ that the author would consider worth being followed by other countries.

### **2.4. Involvement of other parties**

For information on collective agreements and social partners, see Section II 2.2. above. There are no other private or public stakeholders, other than the legislator/Government, that play a particularly important role in the field of rights of fixed-term workers in Denmark.

The author does not know of any particularly good practices which have been initiated by the social partners or other private or public stakeholders which could be relevant in the area of indirect discrimination on the ground of fixed-term work.

## **3. Statutory social security and pension rights**

No categories of fixed-term workers are explicitly excluded from statutory social security schemes and/or old-age statutory pension schemes.

There are no minimum requirements, thresholds or provisions to be met that disadvantage fixed-term workers with regard to working time in order to acquire statutory social security or pension rights.

There are no specific requirements to be met in order to be entitled to statutory leaves (e.g. parental leave) which might exclude or disadvantage fixed-term workers.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

The author is not aware of any difficulties linked to the enforcement of rights regarding the position of part-time or fixed-term workers (e.g. length of procedure, or cost of proceedings).

There are no special rules on financial support and/or advice for individuals seeking to enforce their rights but the general rules on these issues apply.

The author is not aware of any studies which address the difficulties involved in obtaining access to legal redress for rights regarding part-time and fixed-term workers' positions.

There has been no increase in the number of Danish class actions after the implementation of the Recast Directive.

The author is not aware of any remedies or compensation which fail to dissuade transgressors or fail to adequately compensate the victim of violations of rights of part-time workers or fixed-term workers. In Denmark the Complaints Board for Equality can award compensation if indirect discrimination is found against part-time or fixed-term workers.

## 2. Vulnerability, multiple/intersectional discrimination

As set out in Section I 2.1.1. above, a reduction in working time may constitute one of the accommodation measures which the employer is required to apply to enable an employee with a disability to remain in his or her job.

### ESTONIA – Anu Laas

## I. PART-TIME WORK

### 1. General information

Data on part-time work varies according to the source and methodology used. For example, Eurostat uses self-reported working time in order to compile comparative data and also presents a lower rate of part-timers in Estonia.<sup>187</sup> According to the Estonian Labour Force Survey in the 4<sup>th</sup> quarter 2012, 89.5 % out of employees aged 16-74 worked full-time and 10.5 % part-time.<sup>188</sup> According to Eurostat in 2010, 11 % worked part-time and 5 % held a second job in Estonia.<sup>189</sup>

The definition of 'part-time' only slightly differs within national law and statistics. Working time is regulated by the Employment Contracts Act (ECA),<sup>190</sup> Article 43(1) of which defines part-time work as shorter than full-time work (40 hours a week). However, within some professions full-time work is calculated at less than 40 hours per week; the majority of school and kindergarten teachers work full-time at 35 hours for example. The working time of educational staff is established by the Regulation of Government of the Republic.<sup>191</sup> National statistics define less than 35 hours a week as part-time work, except the occupations where a shortened working time is prescribed by law.<sup>192</sup>

<sup>187</sup> <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00159>, accessed 28 March 2013.

<sup>188</sup> Working-age or labour-age population is the group used as the basis when examining the economic activity of the population, comprised of those aged 15-74, who are generally the objects of a labour force survey.

<sup>189</sup> [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php?title=File:Persons\\_working\\_part-time\\_or\\_with\\_a\\_second\\_job\\_2000-2010\\_%28%25\\_of\\_total\\_employment%29.png&filetimestamp=20111117143058](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Persons_working_part-time_or_with_a_second_job_2000-2010_%28%25_of_total_employment%29.png&filetimestamp=20111117143058), accessed 6 April 2013.

<sup>190</sup> Employment Contracts Act (*Töölepingu seadus*). RT I, 22.12.2012, 30 (in Estonian). The Act is available in English at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXX060K2&keel=en&pg=1&ptyvp=RT&tyvp=X&query=t%F6%F6lepingu+s>, accessed 2 April 2013.

<sup>191</sup> Working time of educational staff, Regulation of the Government of Republic No. 113, 25 June 2009 (*Haridustöötajate tööaeg* Vabariigi Valitsuse määrus nr 113, 25 juuni 2009, RT I 2009, 36, 248).

<sup>192</sup> Statistics Estonia: definitions, [http://pub.stat.ee/px-web.2001/1\\_Databas/Social\\_life/09Labour\\_market/14Work\\_organisation/ML04.htm](http://pub.stat.ee/px-web.2001/1_Databas/Social_life/09Labour_market/14Work_organisation/ML04.htm), accessed 27 March 2013.

At the end of 2012, female labour force participation and women's employment rates were 62.5 % and 57 % respectively.<sup>193</sup> Estonia has targets to increase employment among the 20-64 age group to 72 % in 2015 and 76 % in 2020.<sup>194</sup>

At the end of 2012 16% of part-time employees were underemployed.<sup>195</sup> In 2010, 11.4 % of parents with children under 8 years old reduced their working hours in order to take care of their child(ren). Of those parents, 7.6 % were men and 20.3 % were women. In 2010, part-time work was influenced both by employees' gender and the age of their children, the biggest share of part-time employees being women with children aged up to 2 years.<sup>196</sup> Additional income may be available to more parents, but the manner in which parental benefit is calculated does not encourage parents to combine work with bringing up children.<sup>197</sup>

Young people and retired people tend to combine part-time jobs more than other age groups. Beerkens et al. found that in university students aged 23 and younger, 35 % worked part-time and 17 % worked full-time.<sup>198</sup> In the age group of 24 years and above, 19 % worked part-time and 64 % worked full-time. Increased emphasis on the availability of part-time jobs for retired people and the need for appropriate adjustments (e.g. workplaces) are examples of the targets set out in the active ageing strategy for 2013-2020.<sup>199</sup> Post-retirement working is necessitated by financial constraints, and the involvement of older people is regarded as important for a more inclusive society.

Self-employment is often combined with additional full or part-time jobs, predominantly due to a need for additional income.

In 2009, according to the Work Life Survey, employees were asked about their working time preferences, and approximately 18.9 % of all employees responded that they would like to hold a part-time position.<sup>200</sup> This preference was expressed by one quarter of women, 10 % of men, one quarter of young people (aged 15-24) 50 % of employees aged 65-74 and one third of employees within both state and local government agencies and senior official and professional sectors. All other groups had lower interest.

In Estonia in 2011, an adjusted gender pay gap was 30.9 %.<sup>201</sup> Anspal and Rõõm have found that taking into account the number of hours worked reduces the unexplained gender pay gap by very little.<sup>202</sup>

<sup>193</sup> Database of the Statistics Estonia, [www.stat.ee](http://www.stat.ee), accessed 27 March 2013.

<sup>194</sup> In 2011 the employment rate of the age group 20-64 rose, reaching 70.1 %. Long-term unemployment remained an acute problem. The 'Estonia 2020' competitiveness strategy is Estonia's strategy for achieving the 'Europe 2020' objectives. Source: <http://www.valitsus.ee/en/government-office/estonia-2020>, accessed 8 April 2013.

<sup>195</sup> 'Underemployed' refers to a part-time worker who is willing to work additional hours and is currently (within two weeks) available to do so.

<sup>196</sup> Statistics Estonia. <http://www.stat.ee/58022>, accessed 2 April 2013.

<sup>197</sup> In Estonia paid parental leave is rather long. Together the maternity and parental benefits are paid for a period of 575 days. The parental benefit is paid to the parent who stays at home with the child (mother or father) and is paid after the maternity leave benefit. As the parental benefit is intended to replace the loss of income after the birth of the child, working during this period is quite strictly regulated. It is possible to receive income from work at the time when parental benefit is being paid, but only up to the amount of parental benefit received (EUR 290 in 2013). If income above this level is received, the amount of the benefit in that month will be reduced. This rule and calculation formula is planned to change due to complaints submitted by the Chancellor of Justice.

<sup>198</sup> M. Beerkens et al. 'University studies as a side job: causes and consequences of massive student employment in Estonia', *Higher Education* 61. No. 6 2011 pp. 679-692.

<sup>199</sup> Several articles about the national ageing strategy and senior employment analysed in a journal of social work 'Sotsiaaltöö' 4, 2012 (in Estonian, summary in English, p. 62). [http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Sotsiaaltoojakiri/2012/sotsiaaltoojakiri\\_nr4\\_2012.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Sotsiaaltoojakiri/2012/sotsiaaltoojakiri_nr4_2012.pdf), accessed 2 April 2013.

<sup>200</sup> Survey methodology is accessible through the Database of Statistics Estonia [http://pub.stat.ee/px-web.2001/1\\_Databas/Social\\_life/19Worklife\\_quality/12Working\\_time/WQU\\_01.htm](http://pub.stat.ee/px-web.2001/1_Databas/Social_life/19Worklife_quality/12Working_time/WQU_01.htm), accessed 2 April 2013.

<sup>201</sup> In order to tackle the high gender pay gap, Estonia has carried out a gender pay gap survey and has planned a new project titled 'Increased availability of Gender Pay Gap Statistics' in cooperation with the Statistics Estonia in 2013-2014.

<sup>202</sup> S. Anspal & T. Rõõm *Gender Pay Gap in Estonia: Empirical Analysis 2011*, [http://www.sm.ee/fileadmin/meedia/Dokumendid/ljaanded/Publikatsioonid/2011/pay\\_gap\\_Estonia.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/ljaanded/Publikatsioonid/2011/pay_gap_Estonia.pdf), accessed 28 March 2013.

The gender pay gap has been more than 25 % during the last decades in Estonia. Kirch et al. have studied opinions of civil servants about high gender pay gap in 2004-2005,<sup>203</sup> who attempted to explain its presence with following arguments (answered as ‘very important’):

- women’s work has less value (30 %);
- women’s work is less appreciated (29 %);
- entrepreneurs think that it is men who should provide for their families (25 %);
- women do not negotiate their salary (25 %);
- women are systematically discriminated by the segregation of the labour market (21 %);
- men’s jobs require more responsibility 9 %); and
- men work more effectively than women (4 %).

In Estonia individually agreed upon wages are dominate, and remuneration payable for such work is written in employment contracts. Additional payments and payments are set by pay regulations of the company. A comparison of employment protection legislation indices in 2008 and 2012 of Estonia shows that the sub-indicator for regular contracts has decreased, and as a result of the new Employment Contracts Act the regulation of regular contracts has become more stringent than before.<sup>204</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1 Policies and legislation at national level

#### 2.1.1. National policies

The Government of the Republic Action Programme 2011-2015<sup>205</sup> has a goal to promote a family friendly state. It overlooks methods to reconcile work and family obligations and an active labour market policy to increase the employment rate and employability.<sup>206</sup> However, policy and legal measures for increasing a part-time working are moderately developed.

In June 2010, amendments to the Social Tax Act (STA) were made to bring the unemployed back to the labour market. Flexible social tax payment was expected to encourage employers to create additional part-time jobs.<sup>207</sup>

In Estonia part-time work is rather modest. Due to low wages most people prefer to work full-time. In 2013 a minimum gross monthly salary in Estonia is EUR 320 and a minimum social tax paid by employers is EUR 95.70 a month. To encourage employers to employ students work, persons on the care leave, retired persons, disabled persons and persons with care obligation for part-time work, it is possible to pay social tax based on real calculated monthly wage, if the gross wage is lower than 290 euros a month.<sup>208</sup> This regulation takes into account the high labour tax wedge and supports more flexible working options for people who require social security (social tax paid by the state).

<sup>203</sup> M. Kirch et al. *Capacities of the Estonian civil servants in the field of Gender Mainstreaming Pre-training and post-training study prior and after training of civil servants*, Tallinn 2005 available at: <http://gender.sm.ee/failid/Preposteng.doc>, accessed 3 April 2013.

<sup>204</sup> K. Urke & T. Rõõm ‘Employment Protection Legislation Index’ p. 23 in: N. Viilmann & O. Soosaar (ed-s) ‘Labour Market Review 2/2012’, Bank of Estonia 2012. [http://www.eestipank.ee/sites/default/files/publication/en/LabourMarket/2012/labor\\_market\\_review\\_2\\_2012\\_eng.pdf](http://www.eestipank.ee/sites/default/files/publication/en/LabourMarket/2012/labor_market_review_2_2012_eng.pdf), accessed 2 April 2012.

<sup>205</sup> Programme in English available at <http://valitsus.ee/en/government/Programme>; Reports at <http://valitsus.ee/en/government/73846/government-summarised-today-the-fulfilment-of-action-programme-in-2012>, both accessed 2 April 2013.

<sup>206</sup> The labour market and social policies of the government coalition aim to increase people’s income and social security and improve their quality of life. It aims to carry out active labour market policy and to reduce unemployment among young people and persons with disabilities. Flexible childcare options to help parents to return faster to the labour market and increase the incomes of families and more services for the elderly including better elderly care are provided.

<sup>207</sup> Social Tax Act (*Sotsiaalmaksuseadus*), RT I, 29.12.2012, 14, available in English at: [http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50009K10&keel=en&pg=1&ptyyp=RT&tyyp=X&query=sotsiaal\\_maksuseadus](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50009K10&keel=en&pg=1&ptyyp=RT&tyyp=X&query=sotsiaal_maksuseadus), accessed 12 April 2013.

<sup>208</sup> Social tax is 33% of the gross payment. For the above mentioned persons a social tax is paid by the state or municipality.

Ten years ago 10 % of women were voluntarily working part-time, 8 % were working part-time because of the employer's will.<sup>209</sup>

Gender sensitive national reports are rare. The Ministry of Foreign Affairs made efforts to prepare the fifth and sixth periodic report to the CEDAW Committee in 2012.<sup>210</sup> It could be reported that gender stereotypes and rigid gender roles have been tackled in many projects during the last decade.

### 2.1.2. Equal treatment

The Equal Treatment Act (ETA) was amended in February 2012 to include an article concerning equal treatment of part-time employees, employees who have concluded fixed-term employment contracts and employees who perform duties by way of temporary agency work.<sup>211</sup> This requirement is applicable for all undertakings.

Article 11.1(3) of the ETA defines a 'comparable employee' as an employee working for the same employer who is engaged in the same or a similar work, with due regard being given to their qualifications and skills.

Employees working part-time are entitled to the same rights as employees working full-time. Career breaks are possible if the employer and employee agree on it, but the law does not provide special rules. Part-time employees are entitled to vacation periods equal to full-time employees.

Some problems with part-time workers and agency workers arise from the atypical working hours; a part-time employee could be easily excluded from social aspects and information, and could therefore miss training offers.

### 2.1.3. Organisation of working time

Article 4(1) of the ETA defines an employee as a person employed under an employment contract or a contract for the provision of services, an official or any other person set out in the Article 2 of the Public Service Act (PSA).<sup>212</sup> Persons applying for employment or advertising services are also deemed to be employees. Employment contracts set out working conditions, working and rest time. They should refer to the rules of organisation established by the employer and to a collective agreement (if applicable) with regard to the employee. If an employee works under the supervision of an employer, it constitutes work within the employment contract and so provides social security and paid holidays. Flexible working hours should be agreed between employer and employee. Roosalu states that the Estonian labour market offers a high degree of working time flexibility, e.g. allowing for work from home and telework.<sup>213</sup>

In a case which concerned an employer who didn't hire a suitable job applicant due to the applicant's preference to adjust working time with a child-care schedule, the Gender Equality and Equal Treatment Commissioner (GEETC) found no discrimination. This was due to the

<sup>209</sup> L. Hansson et al. 'Töö' (Work) in L. Hansson (ed.) *Valikud ja võimalused: argielu Eestis aastatel 1993-2003* ('Options and opportunities: everyday life in 1993-2003') at p. 84 Tallinn, TPÜ Rahvusvaheliste ja Sotsiaaluuringute Instituut 2004.

<sup>210</sup> Unfortunately it seems this report has not yet been sent to the CEDAW Committee and is not yet accessible. The deadline was in November 2012.

<sup>211</sup> Article 11.1 of the ETA, RT I, 06.07.2012, 22, <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXX006K4&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5rdse>, accessed 10 April 2013.

<sup>212</sup> PSART I, 06.07.2012, 1 (in Estonian). The PSA was amended and came fully into force on 1 April 2013 (official legal translation into English not yet available). The new PSA updated the organisation of public service in Estonia and provided for the legal status of an official. The Act created preconditions for establishing a simple, clear and effective system of assessment of officials. <https://www.riigiteataja.ee/akt/106072012001>, accessed 13 April 2013.

<sup>213</sup> T. Roosalu 'Taking Care of Children and Work in Estonian Society: Running out of Post-Socialist Time?' (*Kuidas hoitakse lapsi ja töö Eesti ühiskonnas: ikka veel hädas postsotsialistliku ajaga?*) Doctoral Dissertation. Tallinn University 2012 [http://e-ait.tulib.ee/195/1/roosalu\\_triin.pdf](http://e-ait.tulib.ee/195/1/roosalu_triin.pdf) accessed 4 April 2013.



fact that the comparable group of employees were found to have rigid working time and shifts.<sup>214</sup>

The procedure and conditions for resolution of individual labour disputes between employees and employers are stipulated in the Individual Labour Dispute Resolution Act<sup>215</sup> and are resolved by the labour dispute committees at the Labour Inspectorate (LI) and courts.

Flexible working hours and shifts are very dependent on company profile and size. In bigger companies employees have little or no influence over their working hours. Childcare services are provided by the municipalities, not companies.

The GEETC made previous findings of discrimination relating to a job applicant's family responsibilities. One case was made public to exemplify the Commissioner's opinion.<sup>216</sup> Employers should inform employees about working possibilities and keep records of working time. Employers should notify full-time employees of the possibility of part-time work and vice-versa, with due regard to the employee's knowledge and skills.<sup>217</sup>

Article 11(3) of the Gender Equality Act (GEA) stipulates that employers should promote gender equality, create working conditions which are suitable for both women and men and enhance the reconciliation of work and family life, taking into account the needs of employees.<sup>218</sup> Provisions concerning the special protection of women in connection with pregnancy and child-birth are not seen as discrimination.<sup>219</sup>

Article 10 of the Occupational Health and Safety Act (OHSA) concerns pregnant and breastfeeding employees.<sup>220</sup> Breastfeeding mothers with a child under 18 months can take either one half hour breastfeeding break every three hours, or one one hour break per day. The state fully compensates the breaks with the exception of mothers who receive parental benefit for raising a child. Breaks are refunded to the employer by the state.

#### 2.1.4. Assessment

The effectiveness of the activities of the LI has improved each year, the institution is more visible and public awareness about labour relations has increased.<sup>221</sup> The LI has increased counselling services (free of charge and available in office), information days and campaigns.

Work purchase can be facilitated through employment contracts or service contracts, but employment contracts offer more guarantees to the work seller. Employees with employment contracts, authorisation agreements or service contracts could be regarded as employees, but the latter group is disadvantaged in relation to social security and paid holidays.

## 2.2. Collective agreements

### 2.2.1. Policies

Collective bargaining is regulated with the Collective Agreements Act (CAA).<sup>222</sup> Approximately one third of employees are covered by collective bargaining in Estonia.

In Estonia some employees would like to have part-time work, but due to low salaries full-time work is preferred by the employees. Roosalu noted that some people who would like

<sup>214</sup> Annual report 2011 of the Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku 2011. aasta tegevuse*) (in Estonian) pp. 11-14.

<http://www.svv.ee/failid/Voliniku%20tegevuse%20aruanne%202011.pdf>, accessed 3 April 2013.

<sup>215</sup> Individual Labour Dispute Resolution Act (*Individuaalse töövaidluse lahendamise seadus*), RT I, 26.03.2013, 7 (in Estonian).

<sup>216</sup> The Gender Equality Act and <http://www.svv.ee/index.php?id=522>, accessed 14 April 2013.

<sup>217</sup> Article 28(2)(10) of the ECA <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXX060K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%F6%F6lepingu+s> accessed 2 April 2013.

<sup>218</sup> Gender Equality Act, RT I 2004, 27, 181; RT I, 26.04.2013, 9.

<sup>219</sup> Article 5(2)(1) of the GEA.

<sup>220</sup> Occupational Health and Safety Act (OHSA), RT I 1999, 60, 616; RT I, 06.07.2012, 60.

<sup>221</sup> Data and statistics from the LI.

<sup>222</sup> Collective Agreements Act (*Kollektiivlepingu seadus*), RT I, 29.03.2012, 12.

to combine work and family have difficulty finding a part-time job.<sup>223</sup> 72 % employers think that combining work and family life is very important.<sup>224</sup>

#### *2.2.2. Equal treatment*

Information about regulation of part-time work in collective agreements was not available.

#### *2.2.3. Organisation of working time*

There was no information available about national collective agreements in the organisation of working time.

#### *2.2.4. Assessment*

Only some collective agreements were available online, part-time work was not addressed in the Chapters of working time.

### **2.3. Case law**

#### *2.3.1. Cases/opinions of equality bodies*

Cases and opinions of equality bodies on equal treatment in connection with part-time work and collective agreements are missing.

### **2.4. Involvement of other parties**

Trade unions are involved in negotiations of the annual minimum wages and employee protection. Today, in the law making process many social partners are involved and opinions offered. Rights of workers are not tackled separately for part-time and full-time workers.

Involvement in the public consultation process is possible but in practice the third sector (civil movement, NGO's, NPO's etc.) is limited in resources. The use of modern technology has made the law making process inclusive. For example, at the Ministry of Justice the Electronic Coordination System for Draft Legislation is held. This e-Law system is an online database for draft legislation and it allows the public to access every piece of draft law that has been submitted since February 2003.

## **3. Statutory Social Security and Pension rights**

### **3.1. Exclusions**

Persons working with the authorisation agreements may be disadvantaged compared to those with employment contracts, particularly in relation to social security and pension rights. Short term service contracts (authorisation agreements and other service contracts for a duration of less than three months) do not provide for social security. Service contracts (for 3 months or more), give more possibilities for the employee to apply for social tax payments from the employer. Article 5(1) (5) of the Health Insurance Act (HIA) stipulates that the employer should pay the social tax if the employee is not a self-employed or legal person.<sup>225</sup>

<sup>223</sup> T. Roosalu 'Taking Care of Children and Work in Estonian Society: Running out of Post-Socialist Time?' (*Kuidas hoitakse lapsi ja töö Eesti ühiskonnas: ikka veel hädas postsotsialistliku ajaga?*). Doctoral Dissertation, Tallinn University 2012. [http://e-ait.tlulib.ee/195/1/roosalu\\_triin.pdf](http://e-ait.tlulib.ee/195/1/roosalu_triin.pdf), accessed 6 April 2013.

<sup>224</sup> Statistics Estonia. [www.stat.ee](http://www.stat.ee), accessed 12 April 2013.

<sup>225</sup> Health Insurance Law (*Ravikindlustuse seadus*), RT I, 31.12.2012, 11 (in Estonian), <https://www.riigiteataja.ee/akt/131122012010?leiaKehtiv> accessed 5 April 2013.



#### 4. Self-employment

Self-employed persons (*FIEs*) have for many years been in a somewhat worse situation than employees of companies.<sup>226</sup> The funded pension system in Estonia began in 2002, but sole traders were only granted access in 2004. Sole trading (as a form of economic activity) is mostly chosen due to the inexpensive and simple registration, omitted requirement for starting capital, and simpler accounting. But *FIEs* have unlimited liability for debts incurred in business. The number of self-employed persons has been in decline since 2007. There were 29 464 self-employed persons in 2011 in Estonia.<sup>227</sup>

Legislative attention to self-employed persons has been increased due to the transposition of equality directives in recent years. Transposition of the new Self-Employment Directive 2010/41/EU<sup>228</sup> occurred in June 2012 and amendments to the Social Tax Act (STA) and to other related Acts entered into force in August 2012.<sup>229</sup> The amendments ensured equal treatment of self-employed women and men, elimination of restrictions on enterprise and accessible social benefits for men and women. Self-employed persons should pay the quarterly social tax themselves as advance payment. The rate of social tax is 33 %.

#### 5. Access to goods and supply of goods and services

Part-time workers with employment contracts are entitled to the same rights as full-time workers, but as previously mentioned, may be disadvantaged when it comes to making and maintaining social contacts, and benefitting from dissemination of information (for example due to atypical working time). Members of trade unions have some advantages compared with non-members as leaders of the unions take care of information sharing.

Part-time workers may suffer restricted access to financial services (e.g. mortgages, bank loans) due to lower income. These part-time workers are distinguished from ‘odd-job part-timers’, who also hold full-time employment.

#### 6. Are there any gaps in national law?

##### 6.1. Gaps in the area of (access to) employment

###### 6.1.1. Employment conditions

National law give a right for pregnant employee to demand adjustments in working conditions and working time.<sup>230</sup>

<sup>226</sup> Kirsipuu & Teder have found that sole traders have been before 2004 in a somewhat worse situation than companies with respect to the income tax and the social insurance tax. The funded pension system in Estonia began in 2002, but sole traders had an access only in 2004. Source: M. Kirsipuu & J. Teder *Sole traders – neglected partners in the Estonian economy* Tallinn 2004 pp. 47-68.

<sup>227</sup> infutik.mtk.ut.ee/www/kodu/RePEc/mtk/febpdf/febook28-03.pdf, accessed 5 April 2013.

<sup>228</sup> 29 464 self-employed persons amounts to 4.2 % of the labour force (aged 15-74 years). Source: Statistics Estonia.

<sup>229</sup> Directive 2010/41/EU of the European Parliament and of the Council 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 OJ L 180, 15 July 2010, paragraphs 1–6.

<sup>230</sup> Social Tax Act. RT I, 02.07.2012, 8.

<sup>230</sup> Article 18(1) of the ECA: ‘A pregnant employee and an employee who has the right to pregnancy and maternity leave have the right to demand that the employer temporarily provide them with work corresponding to their state of health if the employee’s state of health does not allow for the performance of the duties prescribed in the employment contract on the agreed conditions’.

### 6.1.2. Termination of the employment contract

The amended ECA came into force in 2009. Compared with the former ECA, termination by the employer of the employment contract is less regulated. Usually a dismissed employee will then apply to the LI and to the court.

An employer may not terminate an employment contract on the following grounds:

1. if the employee is pregnant or has the right to pregnancy and maternity leave (Article 92(1)(1) of the ECA);
2. if the employee performs important family obligations (Article 92(1)(2) of the ECA); and
3. if the full-time employee does not wish to continue working part-time or the part-time employee does not wish to continue working full-time (Article 92(1)(5) of the ECA).

Employers may not terminate an employment contract on these above mentioned grounds, but may do so during these circumstances.

Information about court cases on dismissals due to working time has not been made available to the public.

### 6.2. Gaps in other areas

Low income of many part-time workers could be a major problem today and in the future. Atypical working time could also cause social isolation. Company culture is very important to overcome the isolation problem.

Estonia holds an indexed pension system, and part-time workers have poorer pension prospects due to lower earnings. The index depends with equal weights (50 %-50 %) on the increase of social tax revenues and the increase of consumer price index. Individual earnings are compared with the sum of social tax and one indexed pension year could be many times smaller (for example 0.222). The state old-age pension depends more and more on the amount of social tax paid for each specific person or the amount of his or her salary during his or her entire life of employment.<sup>231</sup>

## II. FIXED-TERM WORK

### 1. General information

In 1998, 57 % of employed men and 70 % of employed women had a permanent employment contract. In 2003, the respective share of data between men and women was 74 % and 81 %.

Between 1998-2003 fixed term-contracts have declined,<sup>232</sup> has and this continued throughout 2004-2009. According to statistical data in 2009, 6.7 % of all employees held fixed-term contracts.<sup>233</sup> Female employees at fixed-term work amounted to 7 % of the total working female population, with the respective data for males amounting to 6.3 %. In trade and services fixed-term contracts make up 9 % and are more widespread than in other economic sectors.

Implementation Report Directive 1999/70/EC found the fixed-term employment rate (2.6 %) low in Estonia in 2006.<sup>234</sup> Nurmela reports that fixed-term contracts represented

<sup>231</sup> <http://www.pensionikeskus.ee/?id=1781>, accessed 4 July 2013.

<sup>232</sup> L. Hansson et al. 'Tööd' (Work) in L. Hansson (ed.) *Valikud ja võimalused: argielu Eestis aastatel 1993-2003* (Options and opportunities: everyday life in 1993-2003) p. 85 Tallinn, TPÜ Rahvusvaheliste ja Sotsiaaluuringute Instituut 2004.

<sup>233</sup> Work by temporary or fixed-date contract or by oral contract or agreement. Source: Database of Statistics Estonia. [http://pub.stat.ee/px-web.2001/I\\_Databas/Social\\_life/19Worklife\\_quality/10Work\\_organisation/10Work\\_organisation.asp](http://pub.stat.ee/px-web.2001/I_Databas/Social_life/19Worklife_quality/10Work_organisation/10Work_organisation.asp), accessed 31 March 2013.

<sup>234</sup> M. Sargeant 'Implementation report Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and ETUC', (2007) Human European Consultancy and Middlesex University.

approximately 3 % of the employment contracts in 2007.<sup>235</sup> According to official statistics a share of fixed-term contracts is higher.<sup>236</sup>

Fixed-time work is performed not only under employment contracts. Some of this work is made in the frameworks of the contracts of services or authorisation agreements. Usually the service (work) is offered by the contractor personally, but personal work is not required (Article 635 LOA). It is also presumed that an employee shall perform the mandate in person, but the right to use the assistance of third parties is provided for (Article 622 of the LOA).

According to the ECA it is presumed that an employment contract is entered for an unspecified term. Concerning the equal treatment of fixed-term and open-ended employment contracts, Estonia has transposed Council Directive 1999/70/EC and the Annex thereto.<sup>237</sup>

In Estonia successive fixed-term contracts in academia and art sector are widespread. However, the law protects employees against abusive renewals of fixed-term contracts and complies with the requirements of the Directive on Fixed-term Work. The main problem concerns poor implementation. In October 2012 the European Commission asked Estonia to provide fixed-term staff in universities and in the cultural sector with protection against successive fixed-term employment contracts as required by Directive 1999/70/EC.<sup>238</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

An employment contract could be made for a fixed term up to five years, but reasons should be justified by the employer. Usually it is due to a temporary increase in work volume or performance of seasonal work.

Article 10(1) ECA states, that if more than two successive contracts have entered into a fixed-term employment contract for similar work or extended the fixed-term contract more than once in five years, the employment relationship should be deemed to have been entered into for an unspecified term from the start. In 2012 a restriction on successive fixed-term employment contracts was expanded to include performers of temporary agency work.<sup>239</sup>

Fixed-term contracts are widespread in some activities like science and performing arts. Problems with fixed-term contracts are rarely debated in media and employees' knowledge about labour law is poor. As the unionisation rate is low and individual contractual relations are dominating, the employer's position in the recruitment process is stronger.<sup>240</sup>

If duties are performed by way of temporary agency work, an employment contract may be entered into for a fixed-term also if it is justified by the temporary characteristics of the work in a user undertaking (Article 9(1) of the ECA).

Employers should notify their employees of the duration of the employment contract and the reason for entry into an employment contract for a fixed-term (Article 6(2) of the ECA).

An employee is entitled to protection against dismissal during a probation period, the duration of which is automatically a maximum of four months from the date that he or she

<sup>235</sup> <http://www.eurofound.europa.eu/ewco/studies/t0812019s/ee0812019q.htm>, accessed 7 April 2013.

<sup>236</sup> Work by temporary or fixed-date contract or by oral contract or agreement. Source: Database of Statistics Estonia.

<sup>237</sup> Directive 1999/70/EC, OJ L 175, of 10 July 1999, pp. 43-44; Annex, OJ L 175, of 10 July 1999, pp. 45-48.

<sup>238</sup> Press release on 24 October 2012, 'The Commission's request takes the form of a 'reasoned opinion' under EU infringement procedures. At the time of writing, Estonia has two months to notify the Commission of measures to ensure full compliance with its obligations. Otherwise, the Commission may decide to refer Estonia to the EU's Court of Justice.' This reasoned opinion No. 2010/2044 was forwarded to other ministries. Officials of the Ministry of Education and Research encourages involvement of social partners and stakeholders for position paper. A preliminary answer from Estonia from December 2012 was not accessible on 31 March 2013. <http://ec.europa.eu/social/main.jsp?langId=en&catId=157&newsId=1707&furtherNews=yes>; [http://www.baltic-course.com/eng/baltic\\_states/?doc=65020](http://www.baltic-course.com/eng/baltic_states/?doc=65020); <http://news.err.ee/society/03c012b6-296d-4c87-903d-265564ca97a1>, accessed 31 March 2013

<sup>239</sup> Article 10(2) of the ECA, RT I, 22.12.2012.

<sup>240</sup> 11 % of employed persons were members of a trade union in 2009. Source: Statistics Estonia.

commences employment, unless otherwise agreed in the individual or collective employment contract.<sup>241</sup> Termination of an employment contract during a probation period is somewhat simpler than during the later phases of employment.<sup>242</sup>

### *2.1.2. Equal treatment*

Equality legislation is applicable for all employers despite the size of the company.

### *2.1.3. Successive fixed-term contracts*

Successive fixed-term contracts for similar work are prohibited, but this prohibition is detrimented by weak enforcement mechanisms.

## **2.2. Collective agreements**

Some collective agreements are available, but no information about fixed-time work is publicly available. The LI carries out and resolves petitions of persons on working environment issues and aims to resolve individual labour disputes pursuant to procedures prescribed by law. Helpline is supported by the ESF programme and lawyers consult questions in connection with employment contracts, organisation of working and rest time, wages, and collective agreements. The LI explains how to solve labour disputes in committees and in court. The most common cases are connected with financial claims in labour relations, dismissal and working conditions.

## **2.3. Case law**

Presently there are no cases in Estonia. However, it could be easy to apply a violation of Articles 9 (employer should justify a reason for fixed-term contract) and Article 10 (restriction on consecutive entry into and extension of employment contract for fixed-term) of the ECA. This could be explained by low legal awareness in connection of successive fixed-term contracts for the same work.

## **2.4. Involvement of other parties**

Stakeholders for the fixed-term workers' rights do not exist or are invisible. In connection with the reasoned opinion by the EC on fixed-term staff in universities and in the cultural sector in Estonia, the Ministry of Education and Research consulted with the Union of the Tartu University and found that the Union is not interested to stop successive fixed-term contracts due to better employee protection against dismissal. However, the Union has poor resources to gather information from their members. It could be said that often social partners are represented by some people who take the responsibility for whole organisation without the ability to fully consult its members.

Involvement in law making process is possible in theory, for example the above mentioned electronic Coordination System for Draft Legislation (e-Law) which attempts to make law making transparent. Resources to make a contribution on voluntary basis are poor and the role of social partners is consequently modest.

## **3. Statutory Social Security and Pension rights**

Part-time and fixed term employees have social security and pension rights. For every employee a minimum monthly social tax should be paid. The monthly minimum rate is established each year by the Government. Social tax should be paid by the employer(s) or by

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<sup>241</sup> The Article 86(1) of the ECA stipulates a maximum length of a probationary period, which is four months. Article 86(2) of the ECA allows non-application or shortening of probationary period, which may be agreed on in the employment contract.

<sup>242</sup> The Article 86 of the ECA regulates a cancellation of employment contract during probationary period. ECA, RT I 2009, 5, 35; RT I, 22.12.2012.

the State. Therefore part-time employees earning less than a monthly minimum wage, are not attractive to employers due to the high tax wedge (employer should pay the monthly minimum). Low salaries lead to low sick leave money and low pensions.

Estonian case law has stated that even if the person has been employed under consecutive fixed-term contracts, his or her entire work career will be considered from the conclusion of the first fixed-term contract.

### **III. HORIZONTAL PROVISIONS**

#### **1. Effectiveness**

Many projects promoting gender equality in labour market and other areas of life have been carried out but a sustainable and systematic approach, also required in legal acts, is still poorly developed. For example, Article 11 GEA requires that employers should promote gender equality collect sex-disaggregated statistical data concerning employment that allow, if necessary, the relevant institutions to monitor and assess whether the principle of equal treatment is complied with in employment relationships. The procedure for the collection of data and a list of data shall be established by the Government of the Republic by a regulation. The GEA was adopted in 2004, but this data collecting regulation is still missing. This is a clear example of how weak implementation standards hinder the aims of policies and legislation.

Procedures at the labour dispute committees are not so time consuming as procedures in the courts. Additionally, the procedure for obtaining an opinion from the GEETC is time consuming, due in part to missing personnel in the Office of the Commissioner.

There is no fee for a claim on labour dispute, but if the case is lost in court a fee is required for the solicitor. The resolution of collective labour disputes by the Public Conciliator is also free of charge.

Lawyers of the LI provide face-to-face legal advice, also advice by help lines and Internet.

The Office of the GEETC has functioned on a basis of couple of person's enthusiasm. Additional funding was received from the Norwegian Financial Mechanism in 2013, and subsequently the number of employees of the Office has increased to six.

#### **2. Vulnerability, multiple/intersectional discrimination**

Part-time and fixed-term employment has increased over the last few years. Some causes could be seen in recovery strategies from economic recession and in legal development (e.g. the new ECA, adopted in 2009, has increased employers' power in labour relations (for example there is now less restrictions for cancellation of employment contract). Economic uncertainty and a turbulent market have encouraged the creation of more part-time jobs and fixed term and service contracts.

Fixed-term employment is more common among men.

## **FINLAND – Kevät Nousiainen**

### **I. PART-TIME WORK**

#### **1. General information**

Women work part time more often than men do: 20 % of Finnish women and 11 % of men worked part time in 2011. Part-time work is common in the private services sectors and uncommon in industry and building, and more common in typically female sectors of the

labour market than in male ones.<sup>243</sup> Reasons for working part-time work also differ per gender. Men tend to work part time either when they study or at the end of their career, while women in the age group of 25-44 often work part time in order to combine work with childcare; practically all persons who stated they worked part time in order to take care of children or other family members were women. Women also more often than men worked part time because full-time work was not available, so that approximately 90 000 women and 30 000 men worked part time for that reason. The number of women working part time unwillingly in 2011 was 58 000, and that of men only 24 000.<sup>244</sup>

Part-time work has recently increased among women and decreased among men. Still, part-time work is not as prevalent in Finland as it is in many other countries, including other Nordic States. Half of the Finnish labour force consists of women, and 80 % of them work full time. Thus, Finnish statistics on the length of overall full-time working hours are based on the working hours of both men and women, whereas in many other European countries, statistics on full-time working hours reflect the hours worked by men only. This fact explains the comparatively short national working hours.<sup>245</sup> The weekly working hours in Finland in 2011 in full-time work were the shortest hours in Europe. However, when part-time workers are included in the calculation, the average working hours per week are just above European average working time.

According to a recent report by a tri-partite working group installed by the Ministry of Employment and the Economy, approximately 40 % of women in other Nordic States work part time, against 20 % of Finnish women.<sup>246</sup> The difference is explained by different labour market traditions and also differences in the social welfare systems, which are not adapted to match the part-time model.<sup>247</sup> Most parents of older children who work part time in order to combine work with family life are women, but even so, part-time work is uncommon. About 9 % of mothers of children aged 3 to 6 work part time, and 94 % of parents who use part-time work combined with home care leave for children under three are women.<sup>248</sup> Altogether, it is quite unusual for parents of small children to work part time. The most common pattern of combining work and family life in Finland is either working full time and relying on childcare services, or staying at home full time on family-related leave. In this pattern, problems connected to combining work and family life appear in the context of fixed-term work, rather than part-time work.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

The main provisions on part-time employment are in the Employment Contracts Act (55/2001) and in the Working Hours Act (605/1996). Further, there are provisions on the annual holidays of the part-time employed under the Annual Holidays Act (162/2005). Social welfare legislation contains provisions on partial benefits related to part-time work. Under the Employment Contracts Act, Chapter 2 Section 2(2), the employer must not use terms of

<sup>243</sup> Suomen virallinen tilasto (SVT, Finnish official statistics), Työvoimatutkimus (Labour Force Survey), on <http://www.stat.fi/til/tyti/index.html>, accessed 10 April 2013, Liitetaulukko 19. Osa-aikatyölliset sukupuolen ja osa-aikatyön mukaan vuosina 2010-2012, 15-74 –vuotiaat (Attachment table 19. Part-time employees by gender in years 2010-2012, ages 15-74).

<sup>244</sup> A. Haataja 'Osa-aikatyö näkyväksi Suomessakin' (Part-time work should be made visible even in Finland), *Työpoliittinen Aikakauskirja* 4/2011.

<sup>245</sup> Tilastokeskus (Statistics Finland) *Naisten korkea työllisyysaste selittää Suomen sijoitusta kansainvälisessä vertailussa* (Women's high level of employment explains average length of Finnish working week), [http://www.stat.fi/artikkelit/2012/art\\_2012-09-24\\_002.html?s=4](http://www.stat.fi/artikkelit/2012/art_2012-09-24_002.html?s=4), accessed 7 May 2013.

<sup>246</sup> *Osa-aikatyötä selvittäneen työryhmän muistio* (Report by a working group on part-time work), Ministry of Employment and the Economy, reports 6/2013.

<sup>247</sup> H. Hytti *Disability policies and employment* Finland compared with the other Nordic Countries, KELA Social Security and Health Research Working Papers 62/2008.

<sup>248</sup> M. Salmi & J. Lammi-Taskula *Perhevapaat ja työelämän tasa-arvo* (Family-related leaves and gender equality in working life) Ministry of Employment and Economy, 24/2009.

employment that are less favourable for fixed-term and part-time employment than those that are applicable to other employment relationships, merely because of the duration of the employment contract or the working hours, unless there is a proper and justified reason to do so. This provision is based on Directives 97/81/EC and 1999/70/EC and applies to all employers. Equal treatment is regulated by legislation, by the Employment Contracts Act, the Act on Equality between Women and Men (609/1986) and the Non-Discrimination Act, which covers discrimination grounds other than sex.

### *2.1.1. National policies*

Recently, legislative provisions on part-time work have been drawn up by the tripartite working group mentioned above. The working group report is also a prominent national policy paper on issues related to part-time work. The working group was installed based on the present Government Programme, which states that the impact of changing forms of working are to be studied. Another working group that studied trends in the use of labour had noted two different trends: in many sectors, part-time employment is seen as a positive option to be developed, whereas in other sectors, a considerable number of people worked part time involuntarily. The working group on part-time work studied both the problem of involuntary part-time work, on the one hand focusing on the provisions regarding the employer duty under Chapter 2 Section 5 of the Employment Contracts Act to offer more work to part-time workers, and on the other hand focusing on family-related leaves and working time provisions, both of which have an impact on the position of persons wishing to work reduced hours. The working group concentrated on the provisions on part-time work under the Employment Contracts Act, and left aside legislation on municipal and state employment, the former under the Act on Municipal Employees (304/2003) and the Act on State Civil Servants (750/1994), although even these Acts contain provisions on turning a full-time contract into a part-time one, and the Act on Municipal Employees contains an employer duty to offer more work to an employee working part time.

Strictly speaking the working group did not discuss part-time work in terms of gender stereotypes, nor has the issue been discussed at Finland's CEDAW reporting sessions. In the working group report, as well as in other contexts, reconciliation of work and family life was discussed, and currently from the point of view that so few parents (in practice mothers) use the option of combining part-time family-related leave and part-time work. In 2011, the option of using part-time parental leave was used by only 85 parents.<sup>249</sup> The working group concluded that combining part-time work with family-related leave could help parents keep in touch with working life and secure their position in the labour market better than in the present system where parents (in practice mothers) are completely absent from the labour market for a longer period.<sup>250</sup>

The working group also held hearings in order to consider the conditions in part-time work in a field with many part-time jobs, i.e. retail trade. Involuntary part-time work was presented as a problem on the employees' side. The employees claimed that it is easier for the employer to engage new part-time workers than to reorganise work by dividing extra hours to persons already working part time, although legislation requires such a reorganisation. There were examples of good practices as to how hours can be organised in a better manner. It is usually simpler for the employer to hire new part-time workers when extra work is needed than to rearrange the work. Some employers, e.g. the large supermarket chain K-City Market Oy, regularly distribute extra hours among part-time workers according to a plan and by using text messages to reach the persons willing to work more hours. The plan is monitored on an annual basis. The pay of part-time workers in retail trade is often so low that they have to apply for social aid, and due to the manner in which working time is organised, the part-time workers cannot accept work from other employers. Extra hours are further offered on such short notice that it is impossible to arrange childcare in order to accept these extra hours. On the other hand, it may be problematic if the employee does not accept the extra hours offered,

<sup>249</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, pp. 15-16.

<sup>250</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, p. 43.

as the Working Hours Act provides that the employee has to work extra hours, if s/he has agreed to working extra hours, and the Act allows consent to extra work for an unspecified number of hours to be given. The working group noted that, as the consent to work extra hours is a central condition in an employment contract, both parties should be made aware of the implications of this condition. The employees also complained about often hearing about availability of extra work only after the employer had already employed a new person, even when the employer had a duty to offer extra work to a part-time worker under Employment Contracts Act Chapter 2 Section 5.<sup>251</sup>

The tripartite working group saw many possibilities of increasing part-time work in Finland, and assumed that more flexibility will be needed both by employers and employees in the future. On the other hand, a considerable number of employees work part time involuntarily, especially in the services sector. The employees who work part time also have a low income. The working group noted that for involuntary part-time workers, more work could be offered by improving the organisation of work-roster arrangements, by sector-specific collective agreements, as well as by enterprise- and workplace-based arrangements.

### 2.1.2. *Equal treatment*

There is no general legal definition of part-time work. The length of the regular hours of a full-time employee is defined by collective agreement, and when an employee's working hours are shorter, s/he is considered a part-time worker. What is considered part-time work therefore depends on the number of hours worked by an employee as compared to the regular hours under the collective agreement in a certain sector, and therefore varies by sector. There need not be any grounds given for offering part-time work. An employment contract may be concluded for part-time work, or a former full-time contract may be turned into a part-time contract. If an employer turns a full-time job into a part-time one on a permanent basis, the provisions under Employment Contracts Act Chapter 7 Section 11 are to be followed. A full-time contract may be turned into a part-time one without the employee's consent only if there are grounds for dismissal, and the compensation paid to the employee in such cases is defined under Chapter 12 Section 1 of the Employment Contracts Act. On the other hand, lay-off rules are followed when the employer needs to shorten the hours of an employee for a shorter period. An employer turning a full-time employment contract into a part-time one needs to start negotiations under the Act on Cooperation between the Employer and Personnel (449/2007). Under the Act on Cooperation Section 12, the employer has the duty to provide employee representatives with information on the number of persons in fixed-term and part-time work. The employer has to draw up a personnel plan together with the employee representatives, and the plan has to include principles to be followed as to the use of different forms of employment, and guidelines on how these principles are monitored.

The conditions of work in part-time employment relations are applied on the basis of the pro rata temporis principle. The benefits are to be related to the length of working hours, when possible. There is case law on the matter.<sup>252</sup> The working group on part-time work noted that there may be collective agreement clauses on how different bonuses are to be calculated on the basis of working hours, but the group could not conduct further study on whether such bonuses were calculated on the basis of what was agreed in the employment contract, or on the basis of actual working hours.<sup>253</sup> Both case law and doctrine as to the access to bonus programmes seem to have assumed that almost any criteria concerning working time may be acceptable, provided that employees are informed of these criteria.<sup>254</sup>

<sup>251</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, pp. 37-40.

<sup>252</sup> The Labour Court decided that the pro rata temporis principle is to be applied to employees on partial retirement as to their right to have shorter working hours on the basis of a collective agreement, decision TT: 2001-52.

<sup>253</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, pp. 26-27.

<sup>254</sup> S. Kääriäinen *Työnantajan yksipuolisesti myöntämä tulospalkkio: juridinen luonne sekä määrä- ja osa-aikaisten työntekijöiden asema tulospalkkion ansainnassa* (Bonus given by the employer: the position of fixed-term and part-time employees in earning the bonus) Edilex.fi/lakikirjasto/6984.



In practice, disputes often concern the employer's duty to offer work to part-time workers, especially as to how such work is to be divided among the part-time workers. The legislation in force does not provide an answer to this question.

### *2.1.3. Organisation of working time*

The national legislation does not provide a general right either to work part time or full time. The employer and the employee may agree under Chapter 4 Section 2(2) of the Employment Contracts Act that the employee works part time during the parental leave period, and during that time the employee is entitled to partial parental benefits under the Sickness Insurance Act Chapter 9 Section 9. Both parents may use their right to part-time work and thus take care of the child at home.

An employee who has worked with the same employer for six months during the last 12 months even has the right to partial home care leave. Home care leave, unlike maternity, paternity and parental leave, is not covered by an income-related benefit. A flat-rate benefit is available until the child is three, but only if the child is not in public day care. The right to partial leave lasts until the child is in its second year in primary school (usually 8 years old), but then even without a flat-rate benefit. The parent of a disabled or sick child may be on partial family leave until the child is 18 years old. The employer may refuse to allow partial leave only if the leave causes serious problems that cannot be avoided by reasonable adjustments of work, under Employment Contracts Act Chapter 4, Sections 4 and 5.

Provisions concerning situations where an employee wishes to work part time for other social or health reasons are in Working Hours Act Section 15. The employer must seek to organise work so as to allow the employee to work part time. A fixed-term contract for a maximum of 26 weeks at a time must be concluded between the employer and the employee in such cases. The employer is required to seek to organise work so that an employee wishing to start part-time retirement can do so. The employee has no absolute entitlement to work part time for social or health reasons, or for partial retirement. Where a part-time worker has worked full time or a full-time worker part time for a longer period, his or her employment contract may be interpreted as having implicitly changed even without an explicit new contract.

The main provision to protect the involuntary part-time employees is the duty of the employer to offer more work to those already employed, if these persons have the required skills and experience for the task. Under Chapter 2 Section 5 of the Employment Contracts Act the employer who needs more employees has to offer more hours to all part-time employees even when they have not expressed a wish to work full time. Only when an employment contract has been made part time at the employee's request, or an employee has expressly informed the employer that s/he is not willing to work full time, the employer does not have the duty to offer extra work. Even fixed-term part-time employees have a similar right to extra work.<sup>255</sup> The burden of proof concerning the employer's duty to offer more work to part-time employees is divided, so that first the employee has to show that work that should have been offered to a part-time employee has been offered to a new employee, and then the employer has to prove that these tasks could not have been given to a part-time employee.

Under Chapter 6 Section 6 of the Employment Contracts Act, the employer has a duty to re-employ a person who has been dismissed for economic or production reasons, but the duty to offer more work to a part-time employee takes priority over the re-employment duty. The employer may choose which part-time employee is offered the extra work, if there are several part-time workers, provided the employer does not choose the employee on discriminatory grounds.

### *2.1.4. Assessment*

National legislation contains provisions that aim to both facilitate part-time work for persons who wish to work part time for reasons connected to reconciling family life with work, or for

<sup>255</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, pp. 27-28.

social and health reasons. The number of employees who currently use the option for family-related purposes seems to be quite small, and the tripartite working group mentioned above proposes that the option should be facilitated further. It seems, however, that mothers who use the option of using the so-called home care leave which merely carries a flat-rate benefit either have no job and are therefore not even in the position to request part-time work, or are not interested in the option (95 % of parents on home care leave are mothers). The income from part-time work would remain too low to be an incentive to work part time even for mothers on a flat-rate family-related benefit. If part-time work is increasingly offered as a way to improve participation in working life for women with small children, this solution does not help women earn a sufficient individual income or promote their careers, as part-time work is usually not common in jobs with high pay or good career prospects. The provision on the employer's duty to offer extra hours to part-time workers is important in the sense that involuntary part-time work is relatively common.

## **2.2. Collective agreements**

### *2.2.1. Policies*

As noted above, the social partners are involved in the tripartite negotiations concerning labour-law developments. Part-time work has become common in certain sectors, and the social partners have adapted to the situation accordingly. The tripartite working group's conclusions are explained above.

### *2.2.2. Equal treatment*

Legislation does not define how an employer should divide extra hours among part-time workers, as long as the employer does not select the part-time worker on a discriminatory basis. There have been clauses on how the extra hours are to be divided in collective agreements, or there have been enterprise- or workplace-specific agreements on the matter. For example, the collective agreement on tourist, restaurant and hotel services work contains a recommendation that the rules on how extra hours are offered should be agreed upon in local agreements.<sup>256</sup>

### *2.2.3. Organisation of working time*

The tripartite working group mentioned above does not refer to any specific arrangements made in order to facilitate part-time work through collective agreements. The collective agreements in the retail sector contain clauses that include more explicit rules about how extra work is to be offered to part-time workers.<sup>257</sup>

### *2.2.4. Assessment*

The collective agreement system is important to complement legislation in fields where part-time work is commonly used. The 'gender sensitivity' of the collective agreements seems to be premised on the fact that part-time work is often used in highly gender-segregated fields. As part-time work is more prevalent for women and sectors with a female workforce, issues related to reconciliation of work and family life are necessarily often present. Yet, it seems that in fields such as retail trade, collective agreements may provide more extensive protection than legislation, and that the problems that female employees meet are to some extent noted by the social partners.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

The Equality Ombudsman who monitors the Act on Equality has not paid special attention to part-time work, which may be seen in the light of the relatively small role that part-time work

<sup>256</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, p. 31.

<sup>257</sup> *Osa-aikatyötä selvittäneen työryhmän muistio*, pp. 39-40.

as a gendered problem plays in Finland. The Labour Court, which decides cases concerning collective agreements, has issued a number of decisions on part-time work, and the Labour Court also gives opinions to other courts in such matters. For example, the Labour Court has decided cases concerning what is to be considered part-time work under different collective agreements, and has upheld the *pro rata temporis* principle in part-time work.

- Case TT:2009-64 is an opinion on a case where a clause in a collective agreement limited the use of part-time work, but was open to the interpretation that the collective agreement prevented the use of the provision of the Employment Contracts Act on the duty of the employer to offer extra work to part-time workers. The Court stated that if such an interpretation was intended, it should have been stipulated clearly.
- Case TT:2006-53 defined part-time and full-time work on the basis of the number of weekly hours that are regular or on average fewer than the working hours under the collective agreement to be applied. In the said case 37.5 hours per week was considered as full-time work.
- Case TT:2006-79 concerned a collective agreement that lacked a definition of part-time work, but used the terms ‘part-time’ and ‘full-time’ work inconsistently in certain clauses.
- Case TT:2004-77 concerned the right of an employee on partial care leave to a bonus according to the *pro rata temporis* principle.
- Case TT:2001-51 referred to the *pro rata temporis* principle both in the Employment Contracts Act and in Directive 97/81/EC.
- Supreme Court Case 2008:28 concerned the access of part-time workers to a bonus programme, and in this case the Court interpreted *pro rata temporis* in favour of the part-time workers, but stated that the employer had the right to set a date at which the employee should still be employed in order to participate in the programme.<sup>258</sup>

### 2.3.2. *Assessment*

The case law of the Labour Court seems to follow the case law of the Court of Justice.

## 2.4. *Involvement of other parties*

Parties other than the legislator and the social partners do not seem to have played a role.

## 3. **Statutory social security and pension rights**

### 3.1. *Exclusions*

Unemployment benefits under the Unemployment Security Act (1290/2002) are based on previously earned income, if a person qualifies for such benefit, and otherwise the unemployed person is entitled to a flat-rate benefit. A person who has not regularly been active in the labour market or who has received the maximum of days entitling to an income-based benefit will receive the flat-rate benefit. This means that exclusions are based on the duration of the employment, but not on working part time. The income that entitles an individual to income-based benefits is defined in a regulation (1332/2002) by dividing the income by the number of days included in the period that is the basis for the income. A person who starts working part time at the employer’s request may receive partial unemployment benefits, and a person who is only partly self-employed may also receive partial benefits. An unemployed person who is offered a job may lose his or her unemployment benefits, but under Chapter 2 a, Section 5 of the Unemployment Security Act, a person who is offered part-

<sup>258</sup> Finnish case law is found in electronic form in the Finlex Data Bank, on <http://www.finlex.fi/en/>, last accessed 27 May 2013. The Data Bank contains information on case law of the Supreme Court, the Supreme Administrative Court, the Labour Court as well as certain other courts, but case information is only available in the national languages Finnish and Swedish.

time work which would yield an income that is lower than the unemployment benefits may justly refuse to take such work.

Under the Employment Contracts Act Chapter 2 Section 2, an employee is entitled to half pay for 9 days in case of sickness if s/he has worked one month, and full pay if the employment relation is of longer duration. Practically all collective agreements contain better conditions, and in most of them the duration of pay during sickness is related to the period of employment. There is no threshold based on part-time work. The Act mentions full pay, but does not define what is covered by this term. Legal doctrine usually refers to pay based on regular time. Even collective agreements seldom define what is meant by full pay in this context.

No part-time work is explicitly excluded from old-age statutory pension schemes. The Employment Pensions Act (395/2006), Chapter 4, contains the rules on how pensions are calculated. All income in any form earned each year is taken into account, and increases the pension by 1.5 % until the insured person turns 53. After that, the percentage is 1.9 % until the insured person turns 63, and after that 4.5 %. Maternity, paternity and parental leave benefits are also taken into account. There is a possibility for partial retirement.

### **3.2. Assessment**

It is clear that, as part-time work is twice as common among women as it is among men, also social security and pension rights based on part-time work may disadvantage women. However, I cannot find grounds for claiming that Finnish legislation could be construed as indirectly discriminatory.

### **4. Self-employment**

There is no information available regarding specific disadvantages in this area.

### **5. Access to goods and supply of goods and services**

There is no information available regarding specific disadvantages in this area.

### **6. Are there any gaps in national law?**

#### **6.1. Gaps in the area of (access to) employment**

##### *6.1.1. Recruitment process*

While legislation contains an employer's duty to offer extra work to part-time employees when recruiting new personnel, access to information concerning such extra work is not efficiently regulated.

##### *6.1.2. Employment conditions*

The matter of access to bonus systems is not covered by legislation.

##### *6.1.3. Termination of the employment contract*

There is no information available regarding this point.

#### **6.2 Gaps in other areas**

There is no information available regarding this point.

## II. FIXED-TERM WORK

### 1. General information

Fixed-term work is relatively common in Finland, and it is more common among women than it is among men. In 2012, 12 % of men and 18.4 % of women worked on a fixed-term contract, including both full-time and part-time fixed-term work. Part-time fixed-term work is also more common among women than it is among men (5.5 % against 2.8 % respectively). The number and percentage of fixed-term employees has remained relatively constant for a some time now.<sup>259</sup> 25 % of the fixed-term workers did not want to have a permanent job, but the majority of persons working fixed term did so because they could not obtain permanent work. For women, the percentage of new jobs for a fixed period is larger than that for men (59 % against 46 % respectively).<sup>260</sup> Among younger employees, the gender gap is largest. In 2009, 29 % of all female employees under 35 worked fixed term, while only 12 % of men in the same age group did so. Among academic women, 16 % worked fixed term in 2010, but the figures were much higher for those under 35. 33 % of academic women and 15 % of men in that age group worked part time. Women's fixed-term contracts were also shorter than those of men, and often represented what in Finnish are called *pätkätyö* (stump job).<sup>261</sup> Fixed-term work is prevalent in the public sector, and among typical women's occupations such as teaching. When universities were turned into independent units and were no longer part of state administration, the number of fixed-term jobs in state administration diminished considerably. Universities with their tenure track and project funding systems have a large number of fixed-term employees. Fixed-term work generally became more usual in the 1990s, but even more so among women and especially young women.<sup>262</sup> The serious depression in Finland at the time was one of the causes of the increase of such jobs, but even the introduction in the 1980s of the right for parents to stay at home on 'home care leave' to care for children under 3 on a flat-rate benefit may have increased the tendency to employ women of child-bearing age only in temporary jobs. The prevalence of fixed-term work in the public sector is related to the high number of women in public employment.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

In the 1990s, before the implementation of Directive 1999/70/EC, Finnish law and legal practice on 'chaining' fixed-term jobs was very lenient. The Supreme Court held in a decision in the 1990s that there was an objective reason justifying the renewal of more than 90 successive fixed-term contracts, motivated by a need for stand-by personnel in a home for the elderly.<sup>263</sup> A gender impact assessment of the Act on Employment Contracts of 2001 was made, and one of the findings was that the protection against discriminatory use of fixed-term work was not sufficient even under the new Act.<sup>264</sup> Further, an assessment of the need for

<sup>259</sup> *Suomen virallinen tilasto* (Official Statistics Finland) *Työvoimatutkimus* 2012 (Labour Force Surveys), Tilastokeskus [http://www.stat.fi/til/tyti/2012/13/tyti\\_2012\\_13\\_2013-03-05\\_tau\\_024\\_fi.html](http://www.stat.fi/til/tyti/2012/13/tyti_2012_13_2013-03-05_tau_024_fi.html), accessed 15 April 2013.

<sup>260</sup> *Suomen virallinen tilasto* (Official Statistics Finland) *Työvoimatutkimus* 2012: Vastentahtoisesti määräaikaiset, [http://www.stat.fi/til/tyti/2012/13/tyti\\_2012\\_13\\_2013-03-05\\_kat\\_004\\_fi.html](http://www.stat.fi/til/tyti/2012/13/tyti_2012_13_2013-03-05_kat_004_fi.html), accessed 15 April 2013.

<sup>261</sup> Information presented by Akava (Confederation of Unions for Professional and Managerial Staff in Finland), *Tilastotietoa määräaikaistyösuhteista* (Statistics on fixed-term work). The persons described here as academic are members of the Akava, which is the central labour union for people with academic education.

<sup>262</sup> H. Sutela 'Määräaikaiset työsuhteet tasa-arvon näkökulmasta' (Fixed-term employment relations from the point of view of equality) in A.-M. Lehto & H. Sutela *Tasa-arvo työoloissa* (Equality in conditions of work), Tilastokeskus, Työmarkkinat 19/1999, 127-141; H. Sutela, J. Vänskä & V. Notkola *Pätkätyöt Suomessa 1990-luvulla* (Stump jobs in Finland in the 1990s), Tilastokeskus 2001.

<sup>263</sup> Supreme Court Decision KKO 1996:105.

<sup>264</sup> H. Kajastie 'Työsopimuslakikomitean mietintö uudeksi työsopimuslaiksi' (The report on the new Employment Contracts Act) in: *Vaikuttaako sukupuoli? Työsopimuslakiesityksen arviointia tasa-arvon näkökulmasta* (Does gender have an impact? Assessment of the proposal for an Employment Contracts Act from an equality

legal amendments was made in 2005.<sup>265</sup> Finally, the provisions on fixed-term work were amended in 2011. The present provisions under Employment Contracts Act Chapter 1, Section 3 stipulate that if an employer has concluded a fixed-term contract with an employee without an objective reason it is to be considered as permanent. As to successive fixed-term contracts, they are not allowed if their number, overall duration or accumulated total taken together show that the employer has a permanent need for labour. The preparatory works regarding this provision state that it is not prohibited to offer a new fixed-term contract for a stand-by position with an employee who has already worked under a temporary contract. When a number of successive contracts is concluded, the stronger is the assumption that the need for labour is permanent. Finland has chosen the option under Directive 1999/70/EC to require an objective reason for fixed-term work, but now there is also an element of limiting the number of such contracts.

### 2.1.2. *Equal treatment*

The Employment Contracts Act applies to all businesses. The working conditions under fixed-term contracts are not governed by any specific regulations, but it is certainly more difficult for the fixed-term worker to obtain equal access to training and promotion. The most problematic issue is the gendered question of pregnancy protection in the context of fixed-term work, especially where successive fixed-term contracts are in question. On the other hand, having a fixed-term contract causes delays in starting a family.<sup>266</sup>

### 2.1.3. *Successive fixed-term contracts*

The present formulation of Chapter 1 Section 3 of the Employment Contracts Act is explained above. The provision does not differentiate between small and large employers or public and private employers. It is clear that women are offered more successive fixed-term contracts than men. For men temporary jobs are usually ‘traditional’ as they are used in short-term work proper, or as trial periods before being hired in a permanent job. For women, temporary jobs are used in tasks that as such do not require the job to be time-limited. For example, municipalities that employ a large number of women in social, educational and health services also need a large number of stand-by workers during the family-related leaves of their permanent workers. Yet, few municipalities employ stand-by personnel on a permanent basis, even though the need is permanent.<sup>267</sup> In addition to the Employment Contracts Act, even the Act on Equality between Women and Men, Section 8(1)2 prohibits as sex discrimination the employer to place a person in a disadvantageous position at recruitment or dismissal or concerning conditions of work due to pregnancy, giving birth or other reason related to sex. An employer’s conduct is directly discriminatory, if s/he employs a pregnant woman in a fixed-term job because she is pregnant, or uses successive fixed-term contracts for a young woman in order to ‘break the chain’ when she becomes pregnant. However, also where an employer’s recruitment practice has a more disadvantageous impact on women than on men, indirect discrimination may be at hand. As working on a fixed-term contract is often involuntary, seen as a burden to family planning and a clear majority of fixed-term workers for many large employers such as municipalities are women of child-bearing age, the provisions regarding successive fixed-term contracts may even leave room for indirect sex discrimination. Especially large employers that predominantly employ women, such as municipalities, tend to use fixed-term work as the form of employment for women of that age,

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perspective), Tasa-arvojulkaisu 2000:8, Tasa-arvoaltuutetun toimisto, Sosiaali- ja terveysministeriö, Helsinki 2000, pp. 47–66.

<sup>265</sup> K. Palanko-Laaka *Määräaikaisen työn yleisyys, käytön lainmukaisuus ja lainsäädännön kehitystarpeet* (Prevalence and legality of fixed-term work and the need to develop legislation) Työhallinnon julkaisu 359/työministeriö 2005.

<sup>266</sup> H. Sutela *Määräaikainen työ ja perheellistyminen Suomessa 1984-2008* (Fixed-term work and family formation in Finland 1984-2008), Dissertation, Tampere University 2013, <http://tampub.uta.fi/handle/10024/67983>, accessed 7 May 2013.

<sup>267</sup> K. Palanko-Laaka *Määräaikaisen työn yleisyys, käytön lainmukaisuus ja lainsäädännön kehittämistarpeet* (The use and legality of fixed-term work and the needs of law amendment), *Työministeriö* (Ministry of Labour) 2005, *Työhallinnon julkaisu* (Publications on labour administration) 359 ; H. Sutela 2013, 25.

and this disadvantages more women than men especially in that age group, and the usage cannot be justified as necessary.<sup>268</sup> Where successive fixed-term contracts are used for women, they may also be made in order to avoid the pregnancy-related protection under the Employment Contracts Act.<sup>269</sup> The recent amendment of the provisions on fixed-term contracts in the Employment Contracts Act does not necessarily address the problem of indirect discrimination.

#### *2.1.4. Assessment*

The strength of Finnish law may be that problems related to fixed-term work are well known, and there is abundant case law on the matter. The weakness is the lack of recognition of patterns of indirect sex discrimination.

### **2.2. Collective agreements**

The issue of fixed-term contracts has been treated as a matter for tripartite negotiations, but as far as is known it has not been addressed in collective agreements.

### **2.3. Case law**

There is a huge amount of case law on fixed-term work on the basis of the Employment Contracts Act: over 140 decisions by the Labour Court and also a large number by the Supreme Court and Supreme Administrative Court. Most of the decisions precede the latest legislative amendment, however. A relatively recent case concerns the right of a company that provided day-care services to employ personnel on successive fixed-term contracts, because the company sold the services to a municipality, which renewed the contract of the company on a yearly basis. The Supreme Court considered that there was an objective reason to conclude fixed-term contracts.<sup>270</sup> In another recent case, the Supreme Court decided that the requirement of objective reason is to be considered from the point of view of the company which hires out employees to a receiving company, and not from the point of view of the latter company. A hiring company had concluded a fixed-term contract with an employee under which the time of employment ended when the contract period with the receiving employer ended. As the end of the contract was not connected to any objective reason related to the work of the employee that would have been defined in the contract, the employment contract was to be considered permanent.<sup>271</sup> The Labour Court decided in 1999 that when the employer gave as objective ground for a fixed-term contract the need for stand-by personnel, but the contract was in no way connected to the absence of one or several individual employees, the contract was to be considered permanent.<sup>272</sup>

### **2.4. Involvement of other parties**

Social partners have been very much involved in assessment and amendment of the terms of fixed-term employment. The Equality Ombudsman has kept the problems related to pregnancy and fixed-term work on her agenda.

## **3. Statutory social security and pension rights**

Unemployment benefits under the Unemployment Security Act, as explained above, are based either on previously earned income, if a person qualifies for such benefits, and otherwise the

<sup>268</sup> O. Anttila 'Määräaikaiset palvelussuhteet ja tasa-arvolain mukainen välillisen syrjinnän kielto' (Fixed-term employment contracts and the prohibition against indirect discrimination under the Act on Equality) *Lakimies* 1/2006, pp. 42-64.

<sup>269</sup> O. Anttila 2006.

<sup>270</sup> Supreme Court decision KKO:2010:11.

<sup>271</sup> Supreme Court decision KKO:2012:10.

<sup>272</sup> Labour Court decision TT: 1999-11.

unemployed person is entitled to a flat-rate benefit. A person who has not regularly been active in the labour market or who has received the maximum of days entitling to an income-based benefit will receive the flat-rate benefit. This means that exclusions are based on the duration of the employment. While the job history of an employed person does not need to be continuous in order for him/her to qualify under the income-based benefit scheme, there may be more relevant discontinuities for persons on temporary contracts. Under the Employment Contracts Act Chapter 2 Section 2, an employee is entitled to half pay for 9 days in case of sickness if s/he has worked one month, and full pay if the employment relation is of longer duration. As collective agreements offer better conditions, but mostly the duration of pay during sickness is related to the period of employment, fixed-term workers may be disadvantaged. Fixed-term work is not excluded from old-age statutory pension schemes.

### **III. HORIZONTAL PROVISIONS**

#### **1. Effectiveness**

There are no provisions that would enhance access to justice in the area.

#### **2. Vulnerability, multiple/intersectional discrimination**

Women with less education tend to work part time. They also use the option of remaining at home on the flat-rate home care benefit, and may therefore be especially vulnerable, as their access to employment after a longish period of staying at home is even more difficult than it would be without such long absences from work. However, also highly educated women in the academic world and in experts' positions very often work on fixed-term contracts.

## **FRANCE – Sylvaine Laulom**

### **I. PART-TIME WORK**

#### **1. General information**

A part-time worker is legally defined as any employee whose working hours are less than the full-time working hours (i.e. 35 hours a week). Since the late 1970s the number of people in part-time work has rapidly increased in France, rising from 6 % of the working population to 17.2 % by January 1999. This increase was not continuous: after an important increase in the nineties due to the introduction of specific measures to encourage part-time work through financial incentives, there was a slight decrease from 1999 to 2002 because of the adoption of the so-called Aubry legislation which imposed a general reduction in working time and cut the financial support to part-time work. In the nineties, the Government's main objective was to promote the use of part-time work within the framework of an employment policy focussed on encouraging widespread individual reductions in working time in the interests of work sharing. This policy was given up in 2000 when the legislator adopted a new regulation of working time and of part-time jobs. Since then, part-time work is now slowly increasing even although, with the regulation enacted in 2000, it provides less flexibility for companies than before.

In 2011, almost 4.2 million workers worked part-time, and part-time workers represented 18.7 % of the working population. On average, part-time workers work 23.2 hours a week against 39.6 for full-time workers which is 40 % less than full-time workers. Most part-time workers are women. Women represent 80.2 % of part-time workers and 30.1 % of women work part-time for 6.7 % for men. The tertiary sector (more specifically education, health, social services, personal services and commerce) is the main source of part-time jobs, with almost 90 % of all part-time workers concentrated in these sectors. Part-time workers



generally earn less than full-time workers (on an hourly base) and they usually have lower qualifications, 1 out of 3 part-time workers declare that they work part-time because they could not find a full-time job. These workers are younger and less educated than the others. 16 per cent of part-time workers have several jobs.<sup>273</sup>

According to the Observatory of Inequalities,<sup>274</sup> the first factor explaining wage inequality is part-time work. Men also more frequently than women work overtime. According to a guide published by the Defender of Rights, working time and part-time jobs play an important role in the gender pay gap. Part-time work, voluntary or not, often goes with part-time careers, fewer promotions, and less vocational training and pensions.<sup>275</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Since the election of a new President and a new Parliament, in May and June 2012, a new policy on equality between men and women has been promoted and part-time work is addressed in this policy. In the ‘Big Social Conference’ organised by the Government, with the social partners, in July 2012, to define the future issues to be negotiated, one round-table discussion was dedicated to gender equality and some discussions dealt with part-time work. The consequences of part-time work for gender occupational equality are acknowledged. According to the report distributed in this round-table discussion, part-time work has important consequences for women’s careers, wages and pensions.<sup>276</sup> Non-voluntary part-time work has been increasing since 2003 and even when it is voluntary, it reflects the fact that women are still mainly responsible for childcare. After the ‘Big Social Conference’, social partners negotiated and concluded a National Interprofessional Agreement (ANI) on employment security on 11 January 2013.<sup>277</sup> The main aim of the ANI is to implement a flexicurity model. In the ‘security’ part of the agreement, one provision regards part-time work and women. As required by the Government, the agreement contains some measures in order to limit forced part-time work. The ANI has set a minimum of 24 hours per week for part-time employees, except with respect to individual private employers, employees younger than 26 who are still students, or based on a written and justified request of the employee. Overtime work must be paid with an increase of 10 % until it reaches 1/10<sup>th</sup> of the working time agreed in the employment contract; beyond this, the increase will amount to 25 %.<sup>278</sup> The ANI clearly represents an effort to reduce the use of very small part-time work contracts and also to reduce some of the flexibilities induced by part-time work by making overtime more expensive. The mechanisms defined in the ANI are complex and it leaves much room for collective bargaining at sectoral and enterprise levels.

Part-time work is also facilitated in France for specific groups of workers (see 2.1.3.), especially for workers with children (parental leave can be taken on a part-time basis). However, currently there are debates in France on a possible reduction of parental leave, which is mainly taken by women. Speaking at a convention on equality in March 2013, the

<sup>273</sup> All these figures come from the French National Institute of Statistics: *Le temps partiel en 2011* DARES analyses, January 2013, no.005.

<sup>274</sup> <http://www.inegalites.fr/spip.php?article972>, accessed 3 June 2013.

<sup>275</sup> M. Becker, S. Lemi re, R. Sivera *Guide pour une  valuation non discriminante des emplois   pr dominance f minine*, D fenseur des droits, <http://www.defenseurdesdroits.fr/sites/default/files/upload/guide-salaire-egal-travail-valeur-egale.pdf>, accessed 17 April 2013.

<sup>276</sup> *La Grande Conf rence Sociale* 9-10 July 2012, ‘Table ronde  galit  professionnelle – Qualit  de vie au travail’, Dossier documentaire, [www.travail-emploi.gouv.fr/IMG/pdf/table\\_ronde\\_egalite\\_prof\\_QVT.pdf](http://www.travail-emploi.gouv.fr/IMG/pdf/table_ronde_egalite_prof_QVT.pdf), accessed 3 June 2013.

<sup>277</sup> *ANI du 11 janvier 2013 pour un nouveau mod le  conomique et social au service de la comp titivit  des entreprises et de la s curisation de l’emploi et des parcours professionnels des salari s*, [http://www.cfdt.fr/docs/application/pdf/2013-01/ani\\_du\\_11\\_janvier.pdf](http://www.cfdt.fr/docs/application/pdf/2013-01/ani_du_11_janvier.pdf) accessed 16 April 2013.

<sup>278</sup> This Agreement was implemented by Law No. 2013-504 on 14 June 2013. See also Articles L 3123-17 and L 3123-10 of the Labour Code.

French president, François Hollande, said the reform was necessary to ensure women spend less time out of work, which can harm their career prospects, and to encourage second parents – in most cases fathers – to share the burden of parental leave. In France parental leave can be taken by either parent at the end of the maternity leave, but statistics show it is taken up by mothers in 96 % of cases. Under the proposed changes, parental leave will be reduced from a maximum of three years for parents with two or more children to two and half years. However, an additional six months' leave could be taken, but only by the father. For parents with one child, the six months will also be extended to one year, but only if the additional six months are taken by the father. The question will remain whether fathers, whose salary is often higher than that of their partners, will be attracted by the idea of giving up work to stay at home and look after their children. The Government insists the reform will not cost the Government anything. Further details on the legislation are expected to be announced in May and will form part of a new equality law being drawn up by the French Government. The French reports to the CEDAW Committee also address part-time work. One of them stresses that one of the reasons for the rise in female employment is the large-scale involvement of women in part-time work but the consequences of part-time work on wages is also stressed.<sup>279</sup>

### 2.1.2. *Equal treatment*

The principle of equality of rights between part-time employees and full-time employees was established in 1982. The principle applies to every part-time worker and to every business. Small and medium-sized enterprises are not excluded from the scope of application and nor are part-time jobs, regardless of the hours worked. Except as regards the very broad issue of pay, where the *pro rata temporis* rule applies, France has opted for the identical rights approach. Thus with respect to the calculation of rights linked to length of service the law places part-timers on an equal footing with full-time employees and the factor taken into account is the duration of the contractual relationship concerned, not the number of hours worked. Similarly, application of the principle of equality does not entail any special provisions as regards annual paid holidays, nor may the probationary period be longer for part-timers. This rule of identical rights also applies in relation to promotion and to vocational training. In the case of collective rights, part-time employees have the same status as full-time employees as regards the right to vote and to stand as candidate. If part-time workers work extra hours above their normal contractual hours, they are not entitled to an overtime rate of pay. However, a Bill is currently being discussed in Parliament and should soon be adopted (see above). According to the proposal, overtime will become more expensive (see above).

### 2.1.3. *Organisation of working time*

One of the aims of the regulation on part-time work adopted in 2000 was to take control of the flexibility resulting from part-time work especially as regards the organisation of working time and to offer employees better guarantees, particularly as regards the voluntary nature of this form of work. Since then, the Labour Code recognises the right for a worker to work part time. That right should preferably be organised by collective agreement (L.3123-6 of the Labour Code), but in the absence of any such agreement the law prescribes the procedure to be followed (L.3123-7 of the Labour Code). The employee concerned initiates the procedure by informing the employer in writing of his or her wish to transfer to a part-time job, stating in that letter the desired working hours and the date envisaged for their introduction. The letter of request must be sent at least six months in advance. The employer is required to reply within three months, and above all can refuse such a request on two grounds: either because no comparable job exists in the company, or because he or she can demonstrate that the transfer requested will have harmful consequences for production and the company's satisfactory operation. The decision of an employer to refuse the request can be challenged in court, but there have been no known decisions of the *Cour de cassation* on this issue. Workers can also request annualised part-time hours (L. 3123-7 of the Labour Code). On the basis of

<sup>279</sup> See the French reports published on <http://www.un.org/womenwatch/daw/cedaw/reports.htm>, accessed 16 April 2013.

their family commitments employees can request a reduction in their working hours in the form of one or more weeks' leave of absence. This offers employees with dependent children, for example, the opportunity to reduce their working time to correspond with the dates of the school year. Since 1981, part-time workers also have a priority right to full-time jobs available in the company and the same right is given to full-time workers regarding part-time jobs (L.3123-8).<sup>280</sup>

Certainly, the most important right in France regarding part-time work and family responsibilities is the right to a parental leave of up to three years on a part-time basis (L. 1225-7 of the Labour Code). All employees with children under three can ask for parental child-raising leave, whatever the size of the company they work for. The employees may either stop work or work part time. The application can be made at any time between the end of maternity leave and the child's third birthday, or after the adoption of a child under 16. The only condition that the employees must satisfy is to have worked for at least one year in the company at the time that the child is born. The length of parental leave is one year, and can be renewed three times. If the employees decide to work part time, it cannot be shorter than 16 hours a week. There are some other rights for leaves for family reasons (e.g. to take care of elderly relatives) but not to reduce working hours for these reasons.

#### 2.1.4. *Assessment*

One of the most pressing problems is non-voluntary part-time work and the current proposal (see above) to impose a minimum number of hours per week on a part-time contract is insufficient. In addition, the policies for the reconciliation of work, private and family life, despite not being directly targeted towards women have an impact upon them. For example, parental leave or leave to take care of sick relatives are mostly taken by women. This has negative consequences for their position in the labour market and there is a need to involve fathers in these leaves.

### 2.2. *Collective agreements*

Since 1982, social partners have the legal obligation to negotiate at enterprise and sectoral levels on working time and since 2001 on gender equality (L2241-3 of the Labour Code). The organisation of part-time work is generally included in these negotiations. Moreover, some provisions of the Labour Code on part-time work may be adapted through collective bargaining, especially at sectoral level. This is an incentive to conclude agreements on this topic. Finally, the Bill adopted in May 2013 stipulates an obligation to negotiate an agreement in the sectors that employ at least one third of part-time workers on the organisation of part-time work. These sectors will certainly conclude agreements in the near future.

As a consequence, part-time work is a subject for social partners to negotiate and there are collective agreements at company levels and sectoral levels on part-time work. However, it is difficult to analyse the position of social partners in relation to part-time work and to give an overview of these agreements, as their content may strongly differ from one enterprise to another and from one sector to another.

Provisions on part-time work in collective agreements may either be found among the provisions on working time (where usually they will not address the gender specificity of part-time work) or the provisions on equality between men and women. According to a report,<sup>281</sup> the issue of balance between work and family life is present in almost all agreements. However, the principles and the measures recommended focus primarily on women (improving working conditions and return from maternity leave), or imply a target group that is largely female (part-time work related to the family, parental leave). The

<sup>280</sup> An extension of working time is also possible in the event of parental leave, and when there is agreement between the worker and the employer.

<sup>281</sup> B. Grévy & Ph. Dole *Rapport sur l'égal accès des femmes et des hommes aux responsabilités professionnelles et familiales dans le monde du travail* Inspection générale des affaires sociales, la Documentation française, June 2011, <http://www.ladocumentationfrancaise.fr/rapports-publics/114000300/index.shtml>, accessed 29 May 2013.

assumption seems to be that the company has little influence on how employees choose to spend their time, as to what should be regulated by the private sector and what by public policy. Some agreements contain provisions on parenthood but very often they just reproduce the legal obligation of the company, e.g. stating that parental leave may be taken by women and men, and do not generally address the gendered characteristics of part-time work.

Many agreements also stipulate a right for workers to work part time or to work full time, in order to limit involuntary part-time work.<sup>282</sup> Some good practices have been reported.<sup>283</sup> For example in the trade sector, some agreements intend to develop voluntary part-time work by developing, among other measures, the recognition of multi-skills programmes (Auchan, Carrefour, Casino) allowing workers to have different tasks in the company. It seems that the volume of non-voluntary part-time work is decreasing.

### 2.3. Case law

There have been very few cases on the interpretation of the principle of equal treatment in relation to part-time work. However, in 2012, the *Cour de cassation* applied the concept of indirect discrimination in a case regarding part-time work.<sup>284</sup> The decision was based on Article 141 TFEU, as it was about an occupational pension scheme where the benefits for part-time workers were less significant than for full-time workers. The *Cour de cassation* confirmed that a measure based on part-time work, which concerned mainly women and could not be justified, was discriminatory.

## 3. Statutory social security and pension rights

Part-time workers are not explicitly excluded from statutory social security schemes. However, part-time work may have some consequences for social security rights. Regarding pension rights, to take into account their situation, part-time workers in the private sector who work a minimum of 200 hours per trimester and earn at least 40 % of the minimum wage can obtain a full year of pension rights. In the public sector, a trimester of part-time work counts as a trimester of full-time work. Part-time workers also have the possibility to contribute for their pension rights as if they work full-time.

To have access to some security rights such as health insurance, workers must prove that they have worked as least 60 hours a month or have earned at least 60 times the hourly minimum wages (or have worked at least 120 hours per semester or 1200 hours per year). For those who do not fulfil these conditions, there is a system of free healthcare for those on low incomes.

Regarding unemployment benefits, it is now possible to combine a part-time job (which does not exceed 110 hours a month and whose wage should not exceed 70 % of the wage received before the loss of work) and unemployment benefits.

## 4. Self-employment

Self-employed persons working part-time may have difficulties in accessing financial services such as bank loans because of their lower income, but there is no information available on this specific issue.

<sup>282</sup> J. Bué, F. Rey, D. Roux-Rossi 'Etude sur l'impact de la négociation de branche sur l'évolution des pratiques de recours au travail à temps partiel' (June 2011) Laboratoire Interdisciplinaire pour la Sociologie Economique UMR CNRS 3320, Paris, Conservatoire National des Arts et Métiers, [http://www.lise.cnrs.fr/sites/IMG/pdf/temps\\_partiel\\_version\\_11\\_janvier\\_2012\\_copie-2.pdf](http://www.lise.cnrs.fr/sites/IMG/pdf/temps_partiel_version_11_janvier_2012_copie-2.pdf), accessed 17 April 2013.

<sup>283</sup> B. Grévy Rapport préparatoire à la concertation avec les partenaires sociaux sur l'égalité professionnelle entre les femmes et les hommes Tome 2, Annexes Juillet 2009, <http://travail-emploi.gouv.fr/IMG/pdf/TOME2.pdf>, accessed 17 April 2013.

<sup>284</sup> Cass. Soc. 3 July 2012, no.10-23013.

## 5. Access to goods and supply of goods and services

There is no information available regarding disadvantages faced by part-time workers in the area of access to and supply of goods and services.

## II. FIXED-TERM WORK

### 1. General information

In France, 86.5 % of workers are full-time workers and 9.5 % of the working population work on a fixed-term contract. 2.4 % of workers are agency workers.<sup>285</sup> The number of fixed-term contracts is increasing with the crisis and 81.7 % of hiring is through fixed-term contracts.<sup>286</sup> Women are more often than men employed on a fixed-term contract. 10.7 % of female employees and 6.5 % of men are employed in jobs with fixed-term contracts. At every age, women are more often hired than men in a fixed-term relationship.<sup>287</sup> There are no specific statistics on the impact of fixed-term work with regard to the gender pay gap. However, because of their career interruptions women usually have less seniority than men in the enterprise and this is one of various causes of the gender pay gap.<sup>288</sup>

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

Fixed-term contracts are considered as a factor of job precarity and one of the causes of the French segmentation of the labour market. The French regulations on fixed-term contracts restrict the use of fixed-term contracts in various ways. Specific rules apply in the public sector. The general rule is that fixed-term contracts must not have the object or the effect of durably occupying a job associated with the normal and permanent activity of the company. Moreover, a fixed-term contract can only be concluded for specific grounds: replacement, temporary increase in activity, seasonal jobs, jobs for which, in some sectors defined by decree, it is usual not to hire workers on an open-ended contract. The main concern of the legislator is to avoid the use of fixed-term contracts to fill permanent jobs. Only jobs of a temporary character may justify the recourse to fixed-term contracts. The end of the fixed-term contract must specifically be specified in the contract. Renewable once, it cannot exceed 18 months, including renewal, with some exceptions. This maximum is not applicable to seasonal contracts and contracts concluded to replace an employee.

A new proposal is currently under discussion in Parliament to implement the national agreement concluded in January 2013 (see above). To encourage the recruitment of workers on permanent employment contracts, the social partners agreed to introduce rules to discourage the overuse of short-term contracts. The current employer's contribution of 4 % to unemployment insurance will be increased to 7 % on 1 July 2013 for short-term contracts of less than one month. It will be 5.5 % for contracts lasting between one and three months, and 4.5 % for contracts of more than three months. This type of contract is widely used in the hotel and restaurant sector, and in the entertainment business. Some short-term contracts will not be affected by this, such as those used for replacement jobs, seasonal jobs or when employees are hired on permanent contracts when their short-term contract expires. Temporary agency work is also excluded.

<sup>285</sup> *Une photographie du marché du travail en 2011* Insee Première, no. 1415, September 2012.

<sup>286</sup> Dares indicateurs *Les mouvements de main d'œuvre au 3<sup>ème</sup> trimestre 2012* March 2013, no.017.

<sup>287</sup> Dares Analyses, September 2012, no.056.

<sup>288</sup> Dares Analyses *Les écarts des salaires entre les hommes et les femmes en 2009*, March 2012, no.016.



### 2.1.2. *Equal treatment*

Under L. 1242-14 of the Labour Code, ‘Unless specific legislation provides for the contrary and with the exception of the provisions concerning termination of employment contract, which are not applicable, the legal and conventional provisions as well as those resulting from customary practice applicable to employees bound by an employment contract of indefinite duration, also apply to employees bound by a contract of fixed-term employment’. Fixed-term workers must enjoy treatment similar to that given to those on permanent contracts. Equality regards pays and all working conditions in the broad sense. Fixed-term workers must not receive lower remuneration than that paid to a permanent employee without seniority. The concept of remuneration includes all wages and bonuses given directly or indirectly in cash or in kind, to employees of the business. The principle of equality does not only apply to remuneration but also applies to any working condition applicable to employees. The Labour Code stipulates that working conditions include ‘the duration of work, night work, weekly rest and public holidays, health and safety, and the work of women, children and young workers’. In general fixed-term workers must benefit from all advantages granted to permanent employees without exception. The principle of equal treatment is applicable to all businesses. These advantages may come from statutory legislation or collective agreements concluded at national, sectoral or company level. Fixed-term workers must, however, like all other employees, meet any conditions of service to which some rights are subordinate. Employees hired under fixed-term contracts for short periods may thus be denied the benefits of a minimum duration of work (seniority bonus, compensation for absence due to sickness, annual premium). For example, for fixed-term employees to vote for and be elected as workers’ representatives, they need to fulfil a certain length of service.

Fixed-term workers also have the right to a specific indemnity allowance at the end of the contract to compensate for the precarious character of their jobs. The compensatory mechanism is a 10 % indemnity allowance based on the total remuneration received by the worker at the end of the contract.

### 2.1.3. *Successive fixed-term contracts*

If the contract is concluded to replace a worker on leave or for seasonal jobs it is possible to have successive fixed-term contracts without any specific limits imposed. However, courts may always check if the succession of fixed-term contracts is not used for a permanent job and there have been several cases regarding this issue.<sup>289</sup> For example, in Case no. 11-18020, a worker was employed from 1997 to 2009 in successive fixed-term contracts to replace various workers of the company. For the Supreme Court, during this period, the worker’s activities were almost continuous, and the job and the wages were the same in all fixed-term contracts. This meant that the job was permanent and not temporary. The main risk concerning replacement is that the fixed-term contract can become a way to regulate the lack of staff in the company. To limit such risk, a fixed-term contract can only be signed for the replacement of one employee at a time. This employee must be hired to replace a specific employee, whose name and qualifications must be mentioned in the contract.

### 2.1.4. *Assessment*

The French legal framework on fixed-term contracts is detailed and it intends to strictly regulate the use of these contracts. The all idea of the legislation is that fixed term contracts must be used only for a temporary activity. However, in practice, the effectiveness of this legal framework could be compromised by the use of successive contracts. It is however difficult to know if women are more affected than men, and I am not aware of form of indirect discrimination in the legislation.

<sup>289</sup> See for example, Cass. soc. 13 June 2012, no.11-10198 or Cass. Soc. 19 September 2012, n.o11-18020.

## 2.2. Collective agreements

On 11 January 2013, the social partners in France reached an agreement on labour market reform (see above). The agreement has been conceived as a flexicurity agreement, and it contains a proposal on fixed-term contracts dealing with the security part of the agreement. To encourage the recruitment of workers on permanent employment contracts, the social partners agreed to introduce rules to discourage the overuse of short-term contracts (see above). However, it is doubtful that this measure will be enough to discourage employers from proposing fixed-term contracts to workers.

Otherwise, it seems that fixed-term contracts are not a very important issue for social partners at sectoral or enterprise levels, although there is some collective bargaining on the issue, e.g. when an agreement is needed to implement specific fixed-term contracts.

## 2.3. Case law

Failure to respect the limits defined by regulations creates the risk for the employer to see the court requalify the relationship as a permanent one. Most of the claims concern the requalification of fixed-term contracts. When employees have been hired on successive fixed-term contracts for months or years, the *Cour de Cassation* checks whether the jobs held by those concerned, in the same job for long periods, cannot be associated with normal activities and standing of the company and therefore have the character of permanent labour relations. There are few cases on the application of the principle of equal treatment and these are not related to sex discrimination. For example, the *Cour de Cassation* has held that the equal treatment principle applies to fixed-term workers and that a difference in the status of workers could not justify a difference in wages.<sup>290</sup>

## 2.4. Involvement of other parties

No involvement.

## 3. Statutory social security and pension rights

The same rules apply to fixed-term and part-time workers. A specific problem regards some types of statutory leave and especially parental leave, as workers need to have a one-year length of service to have these rights. This condition does not contradict the Directive on parental leave which allows Member States to restrict the right of workers to parental leave by a period of work qualification and/or a length of service qualification, which must not exceed one year.

# III. HORIZONTAL PROVISIONS

## 1. Effectiveness

There are no specificities in the situation of part-time workers and fixed-term workers when enforcing their rights. French law provides legal aid if necessary and workers can also submit their cases to the French Equality Body. The maximum net income in 2013 to obtain legal aid at the rate of 100 % is EUR 929 per month, a sum that is increased by EUR 167 for each of two dependent persons living in the household and EUR 106 for each of any other dependent persons. Up to EUR 1393, there is partial legal aid. The mechanisms of compensation are the same as in other areas.

<sup>290</sup> Cass. Soc. 16 February 2012, no.10-21864.

## 2. Vulnerability, multiple/intersectional discrimination

The skills of female part-time workers are often lower than those of other workers, especially when part-time work is not voluntary. A large part of the working poor are currently women working part time.<sup>291</sup>

### GERMANY – Ulrike Lembke

## I. PART-TIME WORK

### 1. General information

The employment rate of women in Germany has been growing steadily since 2001,<sup>292</sup> but this increase is mainly based on part-time, marginal, low-paid and precarious work.<sup>293</sup> The total number of women's working hours has not been growing.<sup>294</sup> Female part-time employees in West Germany have the shortest working week of all European workers.<sup>295</sup>

Of all employed persons in 2011, 69 % were employees subject to social security, 11 % were self-employed and 12 % did precarious work only; 8.8 % of all employees paying into social accounts performed a low-paid side-job.<sup>296</sup> 27 % of all dependent employees worked part time.<sup>297</sup> Unfortunately, the combination of several (minor) part-time jobs by the same employee is not included in the statistics.<sup>298</sup> 1.3 million employees are 'topping up' their income from unemployment benefits under the Social Codes despite doing paid work: 44 % of them work in jobs which are subject to social security, 36 % perform mini-jobs and 10 % are self-employed; only 42.3 % of them work part time.<sup>299</sup>

In 2011, the employment rate of women reached 71 % (men: 81 %); of these female employees, 46 % (men: 10 %) worked part time, and 17 % (= 1.4 million, men: 25 % = 0.5 million) of the female part-time employees would have preferred to work full time.<sup>300</sup> 55 % of the female part-time employees (men: 9 %) indicated that they worked part time because of family-related work such as raising children or caring for dependent elderly or disabled relatives.<sup>301</sup> Due to family responsibilities, 1.9 million women and 0.1 million men did not participate in the labour market at all in 2011.<sup>302</sup>

<sup>291</sup> *Le temps partiel en 2011* DARES analyses, January 2013, no.005.

<sup>292</sup> See Federal Employment Agency *Arbeitsmarkt 2011* pp. 60-61, Nürnberg 2012, <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2011.pdf>, accessed 7 April 2013.

<sup>293</sup> Strongly criticised in: I. Kurz-Scherf & A. Scheele (eds.) *Macht oder ökonomisches Gesetz? Zum Zusammenhang von Krise und Geschlecht*, Münster 2012.

<sup>294</sup> First Equality Report of the Federal Government, Bundestag document No. 17/6240, p. 111, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=174358.html>, accessed 7 April 2013.

<sup>295</sup> See First Equality Report of the Federal Government, Bundestag document No. 17/6240, p. 114, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=174358.html>, accessed 7 April 2013.

<sup>296</sup> See Federal Employment Agency *Arbeitsmarkt 2011* pp. 12-13, Nürnberg 2012, <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2011.pdf>, accessed 7 April 2013.

<sup>297</sup> See <https://www-genesis.destatis.de/genesis/online/link/tabelleErgebnis/12211-0011>, accessed 7 April 2013.

<sup>298</sup> See [http://statistik.arbeitsagentur.de/nn\\_280848/Statischer-Content/Grundlagen/Methodische-Hinweise/BST-MethHinweise/SvB-und-GB-meth-Hinweise.html](http://statistik.arbeitsagentur.de/nn_280848/Statischer-Content/Grundlagen/Methodische-Hinweise/BST-MethHinweise/SvB-und-GB-meth-Hinweise.html), accessed 7 April 2013.

<sup>299</sup> See Institute for Employment and Qualification, press release of 15 April 2013, <http://www.iaq.uni-due.de/aktuell/presse/2013/130415.php>, accessed 15 April 2013.

<sup>300</sup> See National Statistics Agency *Frauen und Männer auf dem Arbeitsmarkt* pp. 6, 30, Wiesbaden 2012, <https://www.destatis.de/DE/Publikationen/Thematisch/Arbeitsmarkt/Erwerbstaetige/BroeschuereFrauenMaennErArbeitsmarkt.html>, accessed 7 April 2013.

<sup>301</sup> See National Statistics Agency *Frauen und Männer auf dem Arbeitsmarkt* p. 42, Wiesbaden 2012, <https://www.destatis.de/DE/Publikationen/Thematisch/Arbeitsmarkt/Erwerbstaetige/BroeschuereFrauenMaennErArbeitsmarkt.html>, accessed 7 April 2013.

<sup>302</sup> See National Statistics Agency *Frauen und Männer auf dem Arbeitsmarkt* p. 46, Wiesbaden 2012, <https://www.destatis.de/DE/Publikationen/Thematisch/Arbeitsmarkt/Erwerbstaetige/BroeschuereFrauenMaennErArbeitsmarkt.html>, accessed 7 April 2013.



Part-time work is – especially for women – more common in some professions than in others, e.g. in car retail trade and repair (women working part time: 48.5 %, men working part time: 13 %), hotels and restaurants (women: 31 %, men: 19 %), financial services (women: 33 %, men: 5 %), public administration (women: 45 %, men: 11 %), education (women: 51 %, men: 27 %), health and social work (women: 42 %, men: 18 %), social and personal services (women: 37.5 %, men: 14 %) and private households (women: 41.5 %, men: 28 %).<sup>303</sup>

In statistics and general discourse, part-time employment means working less than 32 hours per week. Under Section 2 of the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz, TzBfG*),<sup>304</sup> a part-time employee is a person whose regular weekly working time is shorter than the regular weekly working time of a full-time employed person. The regular weekly working time depends on the profession, the organisation of work and collective agreements. In 2010, the average weekly working time in Germany was 37.7 hours for full-time employed persons – but in fact, male full-time employees worked 41 hours per week and female 39.8 hours per week.<sup>305</sup> The weekly working time does not meet the needs of the employees: Male full-time employees would prefer to work 5 hours less per week, female part-time employees would prefer to work 3 hours more per week.<sup>306</sup>

Generally, couples with under-age children are not satisfied with their working times and the respective division of paid and family labour between them:<sup>307</sup> Only 6 % of the couples interviewed wish the father to work full time and the mother not working at all, but 14 % actually live the male breadwinner model. 40 % of the couples interviewed wish the father to work full time and the mother to work part time, but for 57 %, this is reality. 13 % of the couples interviewed prefer both parents working full time and 16 % do so. 38 % of the couples interviewed wish both parents to work part time for 30 hours per week with an equal division of family labour, but only 6 % could realise this model. This means that 60 % of the parents interviewed would prefer other than their actual working times. The main reasons for not realising the preferred model are that the family income would become too low, that the incomes of the parents are too different, fears of disadvantages in the parents' working life, lack of consent by the employer and lack of childcare institutions.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

National policies and legislation aim at an increase of part-time work in compliance with minimum social standards. The effects are controversial, mostly due to the fact that there are very different and specific forms of part-time work.

#### 2.1.1 National policies

Part-time work cannot be assessed in a uniform way. On the one hand, part-time work is a means to make working time more flexible and is therefore hoped to increase the female employment rate and improve the reconciliation of working and family life. According to the 'Monitor Family Life 2012' study, parents with under-age children wish to have more flexible working times and more possibilities for working from home and part-time work.<sup>308</sup> One aim

<sup>303</sup> See Federal Employment Agency *Arbeitsmarkt 2011* pp. 133 and 140, Nürnberg 2012, <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2011.pdf>, accessed 7 April 2013.

<sup>304</sup> *Teilzeit- und Befristungsgesetz* of 21 December 2000, Official Journal (*Bundesgesetzblatt, BGBl.*), part I, p. 1966, <http://www.gesetze-im-internet.de/tzbfG/BJNR196610000.html>, accessed 7 April 2013.

<sup>305</sup> See [http://www.boeckler.de/wsi-gdp\\_arbeitszeiten\\_10.pdf](http://www.boeckler.de/wsi-gdp_arbeitszeiten_10.pdf), accessed 7 April 2013.

<sup>306</sup> See [http://www.boeckler.de/impuls\\_2012\\_04\\_6.pdf](http://www.boeckler.de/impuls_2012_04_6.pdf), accessed 7 April 2013.

<sup>307</sup> The following data can be found in an up-to-date study by forsa *Wenn Eltern die Wahl haben* pp. 16-17, Berlin April 2013, [http://www.eltern.de/c/pdf/ELTERN\\_forsa-Studie\\_Wahl.pdf](http://www.eltern.de/c/pdf/ELTERN_forsa-Studie_Wahl.pdf), accessed 10 April 2013.

<sup>308</sup> Ministry for the Family, Senior Citizens, Women and Youth (ed.) *Monitor Family Life 2012*, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung2/Pdf-Anlagen/monitor-familienleben-2012,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, accessed 7 April 2013.

of the Part-Time and Fixed-Term Employment Act was to increase part-time work in order to promote gender equality.<sup>309</sup>

In March 2013, the Chancellor and the Minister for the Family, Senior Citizens, Women and Youth held a meeting with the leading associations of the German business community and the German Trade Union Confederation.<sup>310</sup> They agreed upon the importance of flexible working times for a family-friendly working world. They did not decide on proposed measures to facilitate the change between full-time and part-time work and vice versa, but on a regular report which will list the progress and shortcomings in the field of family-friendly working life to maintain public awareness regarding these matters.

More than 4 600 companies and institutions are members of the corporate network ‘Success Factor Family’ which aims for family-friendly companies and organisation of working time.<sup>311</sup> The Ministry for the Family, Senior Citizens, Women and Youth published guidelines for family-oriented organisation of working time including best practices.<sup>312</sup> But only 65 % of part-time employees working more than half of the regular weekly working hours and only 53 % of part-time employees working less than half of the regular weekly working hours can confirm that working part time did not adversely affect their career.<sup>313</sup> In its 2007 state report to the CEDAW Committee, the German Government had praised the increase of part-time work as an appreciated means of increasing female employment and better reconciliation.<sup>314</sup>

The Alternative Report did not confirm this judgment: ‘However, the increase in the proportion of women working reported here was mainly achieved by redistributing the volume of employment among women, who are found to a disproportionately high degree in part-time jobs, especially in marginal part-time jobs of up to 18 hours a week. [...] Usually these jobs do not provide an independent livelihood. The negative effects of the various forms of atypical employment are compounded by the fact that part-time work is often linked to fixed-term contracts or combined with a mini- or midi-job’.<sup>315</sup> A major part of part-time work is precarious and low-paid work. In its concluding observations, the CEDAW Committee expressed its concern about the fact that the growth in female labour market participation has mainly resulted in an increase in female part-time employment, and about the concentration of women in part-time, fixed-term and low-paid jobs.<sup>316</sup> The Committee encouraged the German State to step up its efforts to assist women and men in striking a balance between family and employment responsibilities, inter alia by ensuring that part-time employment is not taken up almost exclusively by women.

Starting in the second half of the 1990s, various reforms aimed to make the German labour market more flexible and to reduce labour standards and welfare benefits. A core element of these reforms was the establishment of so called mini-jobs (with an income of up to EUR 400). Mini-jobs are not subject to statutory social security but to tax advantages. Mini-jobs are not a phenomenon typical only in private households – every second company

<sup>309</sup> According to the explanatory memorandum to the draft of the Part-Time and Fixed-Term Employment Act, Bundestag document No. 14/4374, October 2000, p. 1, <http://dip21.bundestag.de/dip21/btd/14/043/1404374.pdf>, accessed 7 April 2013.

<sup>310</sup> See <http://www.bmfsfj.de/BMFSFJ/familie.did=196590.html>, accessed 7 April 2013.

<sup>311</sup> See <http://www.erfolgsfaktor-familie.de/>, accessed 7 April 2013.

<sup>312</sup> Ministry for the Family, Senior Citizens, Women and Youth (ed.) *Familienbewusste Arbeitszeiten. Leitfaden für die praktische Umsetzung von flexiblen, familienfreundlichen Arbeitszeitmodellen*, Berlin 2012, available on <http://www.bmfsfj.de/BMFSFJ/Service/themen-lotse.did=163862.html>, accessed 7 April 2013.

<sup>313</sup> See Parent Survey by the Ministry for the Family, Senior Citizens, Women and Youth 2013, p. 10, [http://www.erfolgsfaktor-familie.de/data/downloads/webseiten/Elternumfrage\\_2013.pdf](http://www.erfolgsfaktor-familie.de/data/downloads/webseiten/Elternumfrage_2013.pdf), accessed 7 April 2013.

<sup>314</sup> Sixth periodic report of states parties, Germany, CEDAW/C/DEU/6, p. 49, available on <http://www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html>, accessed 7 April 2013.

<sup>315</sup> CEDAW Alternative Report submitted by the Alliance of German Women’s Organisations, November 2008, p. 18, available on <http://www.institut-fuer-menschenrechte.de/de/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html>, accessed 7 April 2013.

<sup>316</sup> CEDAW Committee, Concluding observations on Germany of 12 February 2009, CEDAW/C/DEU/CO/6, pp.7-8, available on <http://www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html>, accessed 7 April 2013.

in Germany also employs so-called mini-jobbers.<sup>317</sup> The leading branch is the hotel and restaurant industry where mini-jobbers form one third of the staff, followed by personal services (25 %), retail sale (23 %), agriculture (17 %) and food and beverage (16 %).<sup>318</sup> In 2011, one employment relationship in five in Germany was a mini-job; 66 % of all employees performing a mini-job did not participate in any other (paid) employment relationship and 67 % of the latter were female.<sup>319</sup> It is impossible to live on a mini-job income in Germany and the fear is that mini-jobs have transformed from the idea of a temporary additional income for wives and mothers to a more permanent poverty trap especially for women.<sup>320</sup>

Reforms of the mini-job system continue to cause controversial debates. With the First Equality Report of the Federal Government in 2011, experts strongly recommended to terminate the promotion of mini-jobs and to facilitate the change between full-time and part-time work in both directions and promote possibilities of part-time work with 30 hours per week as well as alternative equality-friendly working time models.<sup>321</sup> Many experts agreed on the identification of mini-jobs as an often involuntary form of employment and a poverty trap, especially for female employees, and thus on the recommendation for the termination of their then-present promotion.<sup>322</sup> In September 2012, the governing parties presented a draft law on the expansion of mini-jobs,<sup>323</sup> which became law and entered into force on 1 January 2013. Now, the so-called mini-job covers work with an income of up to EUR 450 and mini-jobs are subject to mandatory pension scheme contributions with the possibility of exemption. The mandatory pension scheme contributions are a fine idea to the extent that every year in a mini-job counts as a contribution year for pension schemes, but the marginal contributions cannot build up to a significant amount and therefore do not prevent poverty in old age. In March 2013, the party of the Greens demanded a re-definition of mini-jobs as work with an income of up to EUR 100 with the exception of mini-jobs in private households.<sup>324</sup>

### 2.1.2. Equal treatment

Section 4(1) of the Part-Time and Fixed-Term Employment Act contains a strict prohibition of discrimination of dependent part-time employees. There are no exclusions of any groups of part-time employees. They have to be treated in the same way as comparable full-time employees<sup>325</sup> unless there is an objective reason for different treatment. The measurement of justification of a different treatment complies with the strict benchmarks of the Court of Justice of the European Union.<sup>326</sup> Generally, part-time employees are entitled to the same working conditions such as organisation of working time, holidays, training facilities, promotion, maternity protection and protection against dismissal. Under Section 4(1)(2) Part-Time and Fixed-Term Employment Act, part-time employees are to be paid strictly following the *pro rata temporis* principle. (Why this means that part-time employees are not paid

<sup>317</sup> See C. Hohendanner & J. Stegmaier 'Umstrittene Minijobs', *LAB-Kurzbericht* 24/2012, p. 4 December 2012, <http://doku.iab.de/kurzber/2012/kb2412.pdf>, accessed 6 May 2013.

<sup>318</sup> See C. Hohendanner & J. Stegmaier 'Umstrittene Minijobs', *LAB-Kurzbericht* 24/2012, p. 4 December 2012, <http://doku.iab.de/kurzber/2012/kb2412.pdf>, accessed 6 May 2013.

<sup>319</sup> See Boeckler Foundation, [http://boeckler.de/impuls\\_2012\\_01\\_4-5.pdf](http://boeckler.de/impuls_2012_01_4-5.pdf), accessed 7 April 2013.

<sup>320</sup> First Equality Report of the Federal Government, Bundestag document No. 17/6240, pp. 153-154, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=174358.html>, accessed 7 April 2013.

<sup>321</sup> First Equality Report of the Federal Government, Bundestag document No. 17/6240, p. 155, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=174358.html>, accessed 7 April 2013.

<sup>322</sup> For example: A. Herzog-Stein et al. (eds.) *Minijobs*, WSI-Mitteilungen 1/2012, [http://www.boeckler.de/wsi\\_38633.htm](http://www.boeckler.de/wsi_38633.htm); R. Waltermann 'Mindestlohn oder Mindesteinkommen?', *Neue Juristische Wochenschrift*, 2010, p. 801-807; R. Zimmer 'Geringfügige Beschäftigung von Frauen – ein prekärer Zustand' in: C. Hohmann-Dennhardt et al. (eds.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 296-310, Baden-Baden, Nomos 2010; resolutions of the 68<sup>th</sup> Deutscher Juristentag 2010, p. 5, [http://www.djt.de/fileadmin/downloads/68/68\\_djt\\_beschluesse.pdf](http://www.djt.de/fileadmin/downloads/68/68_djt_beschluesse.pdf), both accessed 7 April 2013.

<sup>323</sup> See <http://dipbt.bundestag.de/dip21/btd/17/107/1710773.pdf>, accessed 7 April 2013.

<sup>324</sup> See <http://www.handelsblatt.com/politik/deutschland/reformvorschlag-gruene-wollen-minijobs-massiv-einschraenken/8000550.html>, accessed 7 April 2013.

<sup>325</sup> See G. Meinel et al. *Teilzeit- und Befristungsgesetz. Kommentar* Section 4 para 23, München 4th ed. 2012.

<sup>326</sup> G. Meinel et al. *Teilzeit- und Befristungsgesetz. Kommentar* Section 4 para 30, München 4th ed. 2012.

overtime supplements until they work more than a full-time employee remains unsolved.<sup>327</sup>) Under Section 10 of the Part-Time and Fixed-Term Employment Act, employers are obliged to provide for equal training facilities for part-time employees unless there are urgent opposing operational reasons.

More than 80 % of all dependent part-time employees are female.<sup>328</sup> For this reason discrimination of part-time employees is broadly considered to be indirect sex discrimination as well<sup>329</sup> and therefore prohibited under the General Equal Treatment Act<sup>330</sup> (*Allgemeines Gleichbehandlungsgesetz, AGG*).

### 2.1.3. Organisation of working time

There is no general right to work part time or to work full time under German law. But employees may request a reduction of their working time under Section 8 of the Part-Time and Fixed-Term Employment Act. The law applies to the private and the public sector and to all employees except civil servants. Conditions for a reduction are that the employer employs more than 15 persons, that the employee has worked for her/him more than six months and that there are no opposing operational reasons. Opposing operational reasons exist when the reduction would cause a considerable impairment of organisation, working conditions or safety in the company, or disproportionate costs. Further opposing operational reasons can be stated by collective agreements. In many cases, employers will fail to prove that there is an organisational concept which is strictly incompatible with the request for reduction.<sup>331</sup> When the employer refuses his consent, the employee can file a complaint before the competent labour court.

Employees may not be dismissed because of their refusal to change from part-time work to full-time work or *vice versa* under Section 11 of the Part-Time and Fixed-Term Employment Act. There is no right to an increase of working time, but the employer generally has to prefer requesting suitable part-time employees when filling a full-time vacancy under Section 9 of the Part-Time and Fixed-Term Employment Act.

Civil servants can request a reduction of their working time under Sections 72a-72d of the Federal Civil Service Act (*Bundesbeamtengesetz, BBG*) or under the states' civil service legislation. They can request temporary part-time work in the amount of at least half of the regular working time without further conditions unless there are opposing operational reasons. The period of part-time work can be extended. At any time, the civil servant can request an increase of the working time or a return to full-time work unless there are opposing operational reasons. A civil servant's request for part-time work due to family responsibilities (care for children under the age of 18 or dependent relatives) can only be refused due to *urgent* opposing operational reasons. A caring civil servant is entitled to a reduction of less than half of the regular working time for a period of up to twelve years. During parental leave, civil servants are entitled to work part time for up to 30 hours per week.

Upon returning from maternity leave, mothers are entitled to parental leave for up to three years. During parental leave, parents are not allowed to work more than 30 hours per week. During and/or after parental leave, parents may request a reduction of their working

<sup>327</sup> The Federal Labour Court, judgment of 25 July of 1996, 6 AZR 138/94, decided that extra working time beyond the agreed part-time hours is not overtime as long as it does not exceed full-time working hours, and in addition followed the Helmig approach of the CJEU. Calling this case law into question: D. Schiek 'Das Teilzeit- und Befristungsgesetz. Neue Paradigmen der Regulierung sogenannter atypischer Beschäftigung?', *Kritische Justiz* (2002), pp. 18-44 (36).

<sup>328</sup> See <https://www-genesis.destatis.de/genesis/online/link/tabelleErgebnis/12211-0011>, accessed 7 April 2013.

<sup>329</sup> D. Schiek 'Das Teilzeit- und Befristungsgesetz. Neue Paradigmen der Regulierung sogenannter atypischer Beschäftigung?', *Kritische Justiz* 2002, pp. 18-44 (26-27); U. Sacksofsky *Mittelbare Diskriminierung und das Allgemeine Gleichbehandlungsgesetz* Berlin, June 2010, passim; Antidiskriminierungsstelle des Bundes, [http://www.antidiskriminierungsstelle.de/DE/Service/Tipps\\_fuer\\_Unternehmen/Leitfaden/leitfaden.html](http://www.antidiskriminierungsstelle.de/DE/Service/Tipps_fuer_Unternehmen/Leitfaden/leitfaden.html), accessed 7 April 2013.

<sup>330</sup> *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 1897.

<sup>331</sup> See G. Meinel et al. *Teilzeit- und Befristungsgesetz. Kommentar* Section 8 para 53, München 4th ed. 2012.



time under Section 15(7) of the Federal Law on Parental Allowance and Parental Leave<sup>332</sup> (*Bundeselterngeld- und Elternzeitgesetz, BEEG*). Conditions are that the employer employs more than 15 persons, that the employee has worked for her/him more than six months, that the working time is reduced to 15-30 hours per week for at least two months and that there are no *urgent* opposing operational reasons. Parents have the right to work in the amount of their former part-time employment during parental leave as well as the right to return to their former working time (e.g. full-time) after parental leave under Section 15(5)(4) of the Federal Law on Parental Allowance and Parental Leave.

Employees have a right to reduce their working time for a period of up to six months when they need to care for dependent relatives at home under Section 3(1) of the Law on Home Care Leave<sup>333</sup> (*Pflegezeitgesetz, PflZG*). Conditions are that the employer employs more than 15 persons and that the need for home care is officially confirmed. An employee's request for part-time work can only be refused due to *urgent* opposing operational reasons<sup>334</sup> under Section 3(4) of the Law on Home Care Leave. An employee's request for home care leave may not be the cause of dismissal under Section 5 of the Law on Home Care Leave. Under the new Law on Family Home Care Leave<sup>335</sup> (*Familienpflegezeitgesetz, FamPflZG*) employees can agree with their employer about a reduction of working time down to at least 15 hours per week due to home care leave for a period of up to two years. The special feature of this home care leave is the possibility for the employee to continuously receive the major part of his/her former salary during the leave. This maintenance of income is financed by an advance payment of the employer who can take out an interest-free loan from the State under Section 3 of the Law on Family Home Care Leave.

#### 2.1.4. Assessment

The legal requests regarding reduction of working time independent of sector, sex or family duties are very much to be welcomed. They might promote the integration of female employment careers in working life, tackle gender stereotypes and prevent gender discrimination.<sup>336</sup> But the change from part-time to full-time or extended part-time work should be promoted as well. (As mentioned above, 1.4 million female part-time employees would prefer to work full time.) The legislator should offer the possibility of temporary agreements on a reduction of working time.<sup>337</sup> Moreover, the condition that the employer's operational concept remains intact for employees' requests for a reduction of working time to be successful has to be critically evaluated.<sup>338</sup>

The concept of family home care leave could be a 'good practice' worth being followed by others, but employees do not take advantage of this opportunity: Only 147 employees have taken home care leave since January 2012.<sup>339</sup> The Federal Government intends to arrange for an external evaluation of the law by experts. Critics say that the law does not meet the needs of employees with home care tasks, such as wage payment in cases of emergency home care

<sup>332</sup> Gesetz zum Elterngeld und zur Elternzeit (*Bundeselterngeld- und Elternzeitgesetz, BEEG*) of 5 December 2006, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 2748.

<sup>333</sup> Gesetz über die Pflegezeit (*Pflegezeitgesetz*) of 28 May 2008, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 874, 896.

<sup>334</sup> This does not include organisational difficulties, additional costs for the establishment of part-time workplaces or a general refusal of the employer against part-time work, see M. Kossens *Pflegezeitgesetz und Familienpflegezeitgesetz. Basiskommentar* Section 3 PflZG para 64, Frankfurt/Main 2<sup>nd</sup> ed. 2012.

<sup>335</sup> Gesetz über die Familienpflegezeit (*Familienpflegezeitgesetz, FPfZG*) of 6 December 2011, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 2564.

<sup>336</sup> See E. Kocher 'Erwerbstätigkeit von Frauen' in: B. Rudolf (ed.) *Geschlecht im Recht* pp. 234-235, Göttingen, Wallstein-Verlag 2009; D. Schiek 'Das Teilzeit- und Befristungsgesetz. Neue Paradigmen der Regulierung sogenannter atypischer Beschäftigung?', *Kritische Justiz* 2002, pp. 18-44 (40).

<sup>337</sup> See resolutions of the 68<sup>th</sup> Deutscher Juristentag 2010, p. 6 No. 7 (b), [http://www.djt.de/fileadmin/downloads/68/68\\_djt\\_beschluesse.pdf](http://www.djt.de/fileadmin/downloads/68/68_djt_beschluesse.pdf), accessed 7 April 2013.

<sup>338</sup> See E. Kocher 'Prozedurale Individualisierung im Erwerbsleben – Gestaltungsansprüche als rechtliches Instrument der Integration' *Zeitschrift für Rechtssoziologie* 1/2010, pp. 65-79 (72-73).

<sup>339</sup> See Bundestag Document 17/12330, p. 2, <http://dipbt.bundestag.de/dip21/btd/17/123/1712330.pdf>, accessed 7 April 2013.

leave, a legal entitlement to (longer) home care leave, and the right to return to an equivalent post after home care leave.<sup>340</sup>

The principle of equal treatment of part-time employees is a necessary social minimum which lacks actual implementation in working life reality. One problem is that, due to the flexibilisation, some sectors (especially those with low-paid and precarious work) cannot provide a comparable full-time employee because there are none left.<sup>341</sup> It is possible to use a hypothetical comparator but due to the floating criteria of comparability this will seldom result in sufficient solutions.<sup>342</sup>

Moreover, part-time employees suffer serious discrimination, especially in mini-jobs. The average wages are significantly lower<sup>343</sup> and the negotiating position of part-time employees and mini-jobbers is generally weak.<sup>344</sup> Many of them do not know that they are entitled to the same rights as full-time employees, and only some of them are organised in trade unions or work in companies with works councils.

Contrary to expectations, mini-jobs do not serve as a ‘bridge’ to the normal labour market.<sup>345</sup> Especially female employees get stuck in mini-jobs where they suffer lowest pay and often devaluation of their qualifications. Mini-jobs are not compatible with the adult-worker model. They promote gender stereotypes, create dependencies (see social security), and cause precarious working lives and poverty in old age as well as current poverty due to their exceptionally poor pay.<sup>346</sup>

## 2.2. Collective agreements

Collective agreements can be concluded between a trade union and an employers’ association or between a trade union and a single employer. Currently, there are 68 000 collective agreements in Germany, among them 506 declared to be generally applicable by the Ministry of Labour and Social Affairs. However, the Ministry neither publishes these agreements nor makes them accessible in any other way.<sup>347</sup>

### 2.2.1. Policies

Previously, the policies of the (West German) trade unions were characterised by the struggle for permanent full-time employment and often guided by the male breadwinner model.<sup>348</sup> But the trade unions have opened up to the promotion of women’s labour market integration and

<sup>340</sup> See [http://www.awo.org/aktuelles-und-presse/presse/einzelansicht/?tx\\_ttnews\[tt\\_news\]=601&cHash=4132eb6a8b9f59d683b6d7e72bffa0d02](http://www.awo.org/aktuelles-und-presse/presse/einzelansicht/?tx_ttnews[tt_news]=601&cHash=4132eb6a8b9f59d683b6d7e72bffa0d02), accessed 7 April 2013.

<sup>341</sup> See R. Zimmer ‘Geringfügige Beschäftigung von Frauen – ein prekärer Zustand’ in: C. Hohmann-Dennhardt et al. (eds.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 296-310 (301), Baden-Baden, Nomos 2010.

<sup>342</sup> For example see Federal Labour Court, judgment of 14 December 2011, 5 AZR 457/10, and judgment of 12 January 1994, 5 AZR 6/93.

<sup>343</sup> Less than half of the income in regular employment relationships, see D. Voss & C. Weinkopf ‘Niedriglohnfaller Minijob’, *WSI-Mitteilungen* 01/2012 pp. 5-12 (8), Boeckler Foundation, available under [http://www.boeckler.de/wsi\\_38633.htm](http://www.boeckler.de/wsi_38633.htm), accessed 7 April 2013.

<sup>344</sup> See R. Zimmer ‘Geringfügige Beschäftigung von Frauen – ein prekärer Zustand’ in: C. Hohmann-Dennhardt et al. (eds.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 296-310 (298), Baden-Baden, Nomos 2010.

<sup>345</sup> See C. Klenner & T. Schmidt ‘Minijobs – eine riskante Beschäftigungsform beim normativen Übergang zum Adult-Worker-Model’ *WSI-Mitteilungen* 01/2012 pp. 22-31, Boeckler Foundation, available on [http://www.boeckler.de/wsi\\_38633.htm](http://www.boeckler.de/wsi_38633.htm), accessed 7 April 2013.

<sup>346</sup> See Ministry for the Family, Senior Citizens, Women and Youth (ed.) *Frauen im Minijob. Motive und (Fehl-)Anreize für die Aufnahme geringfügiger Beschäftigung im Lebenslauf* Berlin, Oktober 2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/Pdf-Anlagen/Frauen-im-Minijob.property=pdf.bereich=bmfsfj.sprache=de.rwb=true.pdf>, accessed 7 April 2013.

<sup>347</sup> See Ministry of Labour and Social Affairs, [http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/-verzeichnis-allgemeinverbindlicher-tarifvertraege.pdf?\\_\\_blob=publicationFile](http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/-verzeichnis-allgemeinverbindlicher-tarifvertraege.pdf?__blob=publicationFile), April 2013, p. 5, accessed 7 April 2013.

<sup>348</sup> See H. Schwitzer ‘Der weite Weg zu ERA – Frauendiskriminierung in den Tarifverträgen der Metall- und Elektroindustrie’ in: C. Hohmann-Dennhardt et al. (ed.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 346-360, Baden-Baden 2010.

better reconciliation of work and family life. Nowadays, the trade unions strongly support the flexible organisation of working time to the benefit of the employees and the possibility of voluntary part-time work. They reject involuntary reductions of working hours and the promotion of mini-jobs due to their fatal impact on women's employment careers.<sup>349</sup>

Because full-time employment of women is more common and wages are significantly lower in this part of the country, East German trade unions are very cautious concerning part-time work. They prefer permanent full-time employment for women and men.

### 2.2.2. *Equal treatment*

Discrimination in collective agreements regarding working conditions and pay is prohibited under Sections 2(1)(2) and 7(2) of the General Equal Treatment Act. Moreover, collective agreements are generally covered by the prohibition of discrimination under Section 4(1) of the Part-Time and Fixed-Term Employment Act. The prohibition applies to the personal scope of collective agreements as well as to differentiating contents.<sup>350</sup> In the past, the exclusion of certain groups of part-time workers could easily be justified,<sup>351</sup> nowadays the courts guarantee non-discriminatory application to all employees.<sup>352</sup> Concerning the contents, judicial review has been diminished due to the constitutional freedom of collective bargaining.

### 2.2.3. *Organisation of working time*

Under Section 11(1) of the general collective agreements for white-collar workers with the public services,<sup>353</sup> applications for a reduction of working time due to family responsibilities (care for under-age children or dependent relatives) are privileged. The federal, state or local employer can only reject the application due to *urgent* operational reasons. The reduction of working time must be limited to a period of up to five years; upon request, the period can be extended accordingly. Section 10 of these general collective agreements contains the possibility of establishing 'working time accounts'.<sup>354</sup>

### 2.2.4. *Assessment*

On the one hand, the social partners are very important for the implementation of the principle of equal treatment and for fundamental changes in working life, especially concerning regular working hours and the reconciliation of private and working life. On the other hand, it is well known that collective agreements are a major cause of the considerable gender pay gap in Germany, traditionally favouring the male breadwinner model and devaluing 'female' professions as well as part-time work.<sup>355</sup> It is impossible to evaluate 68 000 unpublished collective agreements but working life reality in Germany raises doubts on whether the social partners have exploited their full potential yet.

<sup>349</sup> See <http://www.dgb.de/presse/++co++9f8aea72-8feb-11e2-adf4-00188b4dc422/@/@index.html?k:list=Arbeit&k:list=Teilzeit>, accessed 7 April 2013.

<sup>350</sup> G. Meinel et al. *Teilzeit- und Befristungsgesetz. Kommentar* Section 4 para 33, München 4th ed. 2012.

<sup>351</sup> Federal Labour Court, judgment of 30 August 2000, 4 AZR 563/99.

<sup>352</sup> Federal Labour Court, judgment of 15 October 2003, 4 AZR 594/02; G. Meinel et al. *Teilzeit- und Befristungsgesetz. Kommentar* Section 4 para 34, München 4th ed. 2012.

<sup>353</sup> *Tarifvertrag für den öffentlichen Dienst (TVöD)*, available on [http://www.tarif-oed.de/tvoed\\_uebersicht](http://www.tarif-oed.de/tvoed_uebersicht), und *Tarifvertrag für den öffentlichen Dienst der Länder (TV-L)*, available on [http://www.tarif-oed.de/tv\\_laender\\_uebersicht](http://www.tarif-oed.de/tv_laender_uebersicht), both accessed 7 April 2013.

<sup>354</sup> *Arbeitszeitkonten* in German: The process by which an employee can 'bank' hours or days of work against future time off, i.e. he or she can work more hours or days in exchange for taking the equivalent time off at some point in the future.

<sup>355</sup> See H. Pfarr 'Entgeltgleichheit in kollektiven Entgeltsystemen' in: H. Oetker et al. (ed.) *Festschrift 50 Jahre Bundesarbeitsgericht* pp. 779 *et seq.*, Munich 2004.

## 2.3. Case law

### 2.3.1. Cases/opinions of equality bodies

In April 2001, the Federal Labour Court decided that employers may not pay lower salaries based on the smaller number of working hours, the higher flexibility and the part-time employee's status as a student.<sup>356</sup> Due to the principle of contractual freedom, the employer might differentiate between individual employees, but the employer must not generally establish different levels of pay connected with the weekly working time.

#### *Promotion*

In November 2011, the Federal Administrative Court had to decide on the unlawful denial of promotion for a female part-time worker in the civil service.<sup>357</sup> The applicant claimed compensation because her promotion had been denied because of her part-time work and she had therefore suffered gender discrimination. The claim for compensation was rejected under German law because of the absence of fault on the part of the employer. Moreover, the applicant was not awarded compensation resulting from the breach of Directive 76/207/EC (non-fault liability) because the Court was unable to verify a sufficiently serious breach of a superior (European) rule of law for the protection of the individual.<sup>358</sup>

#### *Amount of parental allowances*

In December 2011, the Federal Social Court decided on regulations for calculating the amount of parental allowance when both entitled parents take parental leave and work part time simultaneously, instead of taking parental leave one after the other and stopping work entirely during the period of leave while the other parent works full time.<sup>359</sup> The parental allowance cannot be claimed by both parents for 14 months – not even when both work part time and earn accountable incomes – but can only be claimed by these parents one after the other for up to 14 months. Thus, the applicants were awarded a parental allowance amounting to only half the amount which parents would have been awarded if they had taken parental leave one after the other and stopped work during the period of leave while the other parent worked full time. The Court decided that the law on parental leave and parental allowance neither violates the constitutional protection of the family, especially the freedom of decision on the optimal division of labour between the parents, nor the principle of equality, especially gender equality.

#### *Occupational pension schemes*

Following the case law of the CJEU, the Federal Labour Court has developed effective protection against gender discrimination with regard to occupational pension schemes, and especially indirect discrimination of (mostly female) part-time employees. In particular, it has held that the employer may not exclude part-time employees from occupational pension schemes, and it required the employer to conclude pension agreements that provide for different classes of workers according to their working hours.<sup>360</sup>

#### *Indirect sex discrimination*

Generally, the labour courts have identified many forms of discrimination of part-time employees as indirect sex discrimination and their judgments were in accordance with (and in

<sup>356</sup> Federal Labour Court, judgment of 25 April 2001, 5 AZR 368/99.

<sup>357</sup> Federal Administrative Court, judgment of 9 November 2011, 2 B 93.11, <http://www.bverwg.de/pdf/2711.pdf>, accessed 7 April 2013.

<sup>358</sup> In many Labour Court decisions the fault of the employer is required, even where it is established that (gender) discrimination was present.

<sup>359</sup> Federal Social Court, judgment of 15 December 2011, B 10 EG 1/11 R, <http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=en&sid=788c2c2061fdd5b3aa2896736c9f1058&nr=12332&pos=0&anz=34>, accessed 7 April 2013.

<sup>360</sup> Federal Labour Court, judgment of 4 March 1989, 3 AZR 490/87, *Neue Zeitschrift für Arbeitsrecht (NZA)* 1990, p. 25; judgment of 23 January 1990, 3 AZR 58/88, *NZA* 1990, p. 778; judgment of 20 November 1990, 3 AZR 613/89; and judgment of 5 October 1993, 3 AZR 695/92, *NZA* 1994, p. 315.



succession of) the respective case law of the CJEU.<sup>361</sup> However, the Federal Labour Court recently seems to have been avoiding decisions on discrimination of part-time employees as far as involving indirect sex discrimination. Even when the claim is explicitly based on the (correct) assertion of indirect sex discrimination, the Court has restricted its decisions to the application of the principle of equal treatment under Section 4(1) of the Part-Time and Fixed-Term Employment Act.<sup>362</sup> State labour courts might be willing to examine violations of the principle of equal treatment as well as of the prohibition of gender discrimination.<sup>363</sup> In recent years, the Federal Constitutional Court has only once paid attention to indirect sex discrimination of part-time employees.<sup>364</sup> The Court considered the lower pension schemes for part-time civil servants (based on a very complex calculation including working hours and length of service) to be incompatible with the Constitution and carefully explained the concept of indirect sex discrimination. It is very noteworthy how the Court emphasised the fact that the claimant was a civil servant and that the Court therefore did not have to decide on the application of the concept of indirect sex discrimination to private employers.

### 2.3.2. Assessment

There are remarkably few current decisions of higher courts available which deal with indirect sex discrimination of part-time employees.<sup>365</sup> German case law follows the case law of the CJEU – and lower courts submit their proceedings with questions on the possibility of indirect sex discrimination of part-time employees to the CJEU.<sup>366</sup> But German higher courts are not too eager to detect and judge indirect sex discrimination, especially not in private employment relationships or in connection with the regulations of collective agreements. Only in very rare cases do German higher courts consider gender stereotypes to be a legal problem, and they never refer to CEDAW.<sup>367</sup>

### 2.4. Involvement of other parties

The main actors are from national policies and social partners, see above at points 2.1.1. and 2.2.1.

## 3. Statutory social security and pension rights

Statutory social security schemes (unemployment, healthcare, work accidents, retirement) automatically apply to all employees and persons in vocational training independently of their regular weekly working time. The unemployment benefits of part-time employees are lower due to their previous lower income.

Under certain circumstances, employees who reduce their working time from full-time to part-time beyond 80 % and become unemployed shortly after the reduction are entitled to unemployment benefits in the amount that they would have received before the reduction under Section 150(2)(5) of the Social Code No. III.

<sup>361</sup> See U. Sacksofsky *Mittelbare Diskriminierung und das Allgemeine Gleichbehandlungsgesetz* Berlin, June 2010, passim; G. Meinel et al. *Teilzeit- und Befristungsgesetz. Kommentar* Section 4 para 8-10, München 4th ed. 2012.

<sup>362</sup> See Federal Labour Court, judgment of 5 August 2009, 10 AZR 634/08, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=b23e7044c9bfeae77645d2f971066e1e&nr=13765&pos=6&anz=7>, accessed 7 April 2013.

<sup>363</sup> State Labour Court of Hessen, judgment of 8 April 2011, 3 SaGa 343/11: exclusion of an application due to the part-time work of the (female) applicant violates Section 4 TzBfG and the principle of gender equality.

<sup>364</sup> Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07, [http://www.bundesverfassungsgericht.de/entscheidungen/ls20080618\\_2bvl000607.html?Suchbegriff=Teilzeit+mittelbare+Diskriminierung](http://www.bundesverfassungsgericht.de/entscheidungen/ls20080618_2bvl000607.html?Suchbegriff=Teilzeit+mittelbare+Diskriminierung), accessed 7 April 2013.

<sup>365</sup> No serious exception is State Labour Court of Nordrhein-Westfalen, judgment of 16 September 2011, 19 Sa 2114/10: obiter dictum and civil service.

<sup>366</sup> See Labour Court of Nienburg, judgment of 4 September 2012, 2 Ca 257/12 Ö, concerning the application of the *pro-rata* principle to holiday entitlements.

<sup>367</sup> To the knowledge of the expert, there are no cases where gender stereotypes and part-time work are discussed.

Former part-time employees who receive unemployment benefits can reject offers for work due to poor pay more easily when they agree to work full time in the future.<sup>368</sup>

Employees working in two part-time jobs with statutory insurance and losing one of them can receive ‘part-unemployment benefits’ under Section 162 of the Social Code No. III (*Sozialgesetzbuch III*) while still working in their second job.<sup>369</sup>

### 3.1. Exclusions

According to Social Code No. IV (*Sozialgesetzbuch IV*), employees in mini-jobs (especially those who work in private households) are not covered by these social security schemes. Since January 2013, mini-jobs are subject to mandatory pension scheme contributions, but employees can request for exemption. Many will do so because of the costs involved and the very small amounts they might be entitled to in the end.

During maternity leave, employees are entitled to maternity allowances in the amount of their last net income. Maternity allowances are financed by sharing the costs between the statutory health insurance and all employing enterprises in a complicated contribution procedure. Female employees in mini-jobs, however, are not normal members of the statutory health insurance. They are either voluntarily insured or covered by their spouse’s statutory insurance (or they are privately insured which is very expensive). Women who are voluntarily insured under the statutory health insurance including sickness benefits are entitled to maternity allowances in the amount of these sickness benefits (usually 70 % of their former income), and therefore it makes more sense to request for continued remuneration.<sup>370</sup> Female mini-jobbers with dependent coverage are not entitled to normal maternity allowances but will only receive a special maternity allowance of up to EUR 210 in total.<sup>371</sup>

### 3.2. Assessment

There is no solution to the problem that unemployment benefits as well as pensions of part-time employees are significantly lower due to their previous lower income. ‘Part-unemployment benefits’ and the regulation in Section 150(2)(5) of the Social Code No. III try to offset some of the burden. It has to be noted, however, that pay discrimination in general and the gender pay gap in particular aggravate the problem beyond any explanation as part of the *pro rata* principle. Generally, every part-time job should be subject to mandatory social security and mini-jobs should be limited to necessary exceptions (which would not include the frequently quoted students with side-jobs which are already subject to special regulations in the Social Codes).

## 4. Self-employment

One of the main ideas of self-employment is the autonomy of the organisation of working hours. In some sectors its realisation is easier than in others. However, the question of working part time is only important for self-employed persons when starting their self-employment or when working self-employed as a side-job. The Federal Social Court decided that a statutory provision on the admission to the self-employed practice of psychotherapy does not include gender discrimination and therefore does not violate the provisions of Directives 76/207/EEC and 86/613/EEC when requiring work experience in the amount of not

<sup>368</sup> See Federal Employment Agency, 04/2012, p. 6, <http://www.arbeitsagentur.de/zentraler-Content/A07-Geldleistung/A071-Arbeitslosigkeit/Publikation/pdf/GA-Alg-140.pdf>, accessed 7 April 2013.

<sup>369</sup> See [http://www.arbeitsagentur.de/nn\\_169984/Dienststellen/RD-N/Schwerin/AA/Presse/Presseinformationen/2012/2012-36.html](http://www.arbeitsagentur.de/nn_169984/Dienststellen/RD-N/Schwerin/AA/Presse/Presseinformationen/2012/2012-36.html), accessed 7 April 2013.

<sup>370</sup> In some cases female mini-jobbers are entitled to (short-time) continued wage payment in case of ‘sickness’ leave, and in some cases they are entitled to maternity allowances paid by their employer under the Maternity Protection Act, but it is extremely difficult to access consistent information on this topic.

<sup>371</sup> See <http://www.mutterschaftsgeld.de/Merkblatt.htm>, accessed 7 April 2013.

less than half of the regular working hours (12-15 hours weekly).<sup>372</sup> A self-employed side-job is not subject to mandatory health insurance contributions when it is performed less than 20 hours per week and does not constitute the major part of the income.

## 5. Access to goods and supply of goods and services

There are no clear disadvantages which are faced by part-time employees in the access to financial services or private health insurances due to their status as part-time workers. Disadvantages are caused by the financial situation and the income and can therefore be faced by low-paid full-time employees as well. Employees earning more than EUR 450 per month and less than approximately EUR 50 000 per year are automatic members of the statutory health insurance. Since 2011, employees no longer automatically lose their membership in private health insurances when they start working part-time after parental leave under new regulations in the Social Codes.

## 6. Are there any gaps in national law?

### 6.1. Gaps in the area of (access to) employment

Part-time work (including mini-jobs) has to be fully covered by independent statutory social security. Statutory minimum wages would contribute to the elimination of pay gaps between part-time and full-time as well as male and female employees. A statutory right to increase working time and/or to return to former full-time employment would considerably improve the reconciliation of family and working life and the female labour market integration and might encourage more male employees to work part time (temporarily), thus changing the idea of standard labour conditions to the benefit of non-standard employees.

On 18 April 2013, the German Parliament discussed a draft law on part-time employment presented by the parliamentary group of the Social Democratic Party (*Sozialdemokratische Partei, SPD*). The draft includes a statutory right to return to former full-time employment, e.g. by concluding fixed-term temporary reductions of working time lasting between six months and five years.<sup>373</sup> Moreover, any requests for a reduction of working time (independent of special family duties such as care for underage children or dependent relatives) have to be accepted by the employer, unless there are *urgent* opposing operational reasons. The draft's further intentions are to accelerate increases of working time and to make judgments on the rights of changing working times more effective. Finally, the works councils are entitled to receive the necessary information to become more active in the organisation of working times to the benefit of the employees. In the parliamentary discussion, the governing parties showed that they intend to reject the draft law.<sup>374</sup> The draft was referred to the competent parliamentary committees.

### 6.2. Gaps in other areas

The gender pay gap in Germany remains at 23 %.<sup>375</sup> Probably due to the fact that part-time employees earn significantly lower wages than full-time employees, the gender pay gap with regard to part-time employment only does not exceed 6.4 %.<sup>376</sup> Among part-time employees,

<sup>372</sup> Federal Social Court, judgment of 19 July 2006, B 6 KA 18/05 B.

<sup>373</sup> See SPD 'Mehr Zeitsouveränität für Beschäftigte – Teilzeitarbeit gestalten' Bundestag document 17/13084 of 16 April 2013, <http://dip21.bundestag.de/dip21/btd/17/130/1713084.pdf>, accessed 18 April 2013.

<sup>374</sup> See the plenary protocol of the Federal Parliament 17/234 of 18 April 2013, pp. 29260-29274, <http://dip21.bundestag.de/dip21/btp/17/17234.pdf>, accessed 19 April 2013.

<sup>375</sup> See [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/03/PD12\\_101\\_621.html](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/03/PD12_101_621.html), accessed 7 April 2013. The gender pay gap is one of the major obstacles to the necessary change from the breadwinner model to sufficient family incomes, see I. Dingeldey & K. Gottschall (eds.) *Vom Ernährerlohn zum Familieneinkommen?* WSI-Mitteilungen 3/2013, [http://www.boeckler.de/index\\_wsi-mitteilungen.htm](http://www.boeckler.de/index_wsi-mitteilungen.htm), accessed 15 April 2013.

<sup>376</sup> See [http://boeckler.de/wsi-gdp\\_entgeltungleichheit\\_05.pdf](http://boeckler.de/wsi-gdp_entgeltungleichheit_05.pdf), accessed 7 April 2013.

the gender pay gap is even found to be partially reversed: Female unskilled part-time workers earn 6.2 % *more* than their male unskilled colleagues.<sup>377</sup> This indicates that part-time work is not accepted as appropriate employment for men, at least in certain fields. In the light of the stereotype of male full-time and female part-time work, it is not surprising that the pay gap between female part-time employees and male full-time employees ranges from 12.6 % (unskilled) to 26 % (leading position).<sup>378</sup>

Official statistics identify the higher rate of women working in part-time and precarious employment as one of three main causes of the gender pay gap in Germany.<sup>379</sup> Mostly for family reasons, women reduce their working time at an age when their male colleagues are awarded their first significant pay rises.<sup>380</sup> The change from full-time to part-time work can cause a serious decline in the professional career.<sup>381</sup>

## II. FIXED-TERM WORK

### 1. General information

Connotations of fixed-term work are generally negative for employees, because the idea of fixed-term employment is combined with the threat of future unemployment and the impossibility of long-term planning. On the other hand, many employers appreciate the flexibility, and fixed-term employment contracts increasingly seem to be used as a *de facto* two-year probationary period.

The amount of fixed-term work has been growing slightly in Germany, but no gender gap has been found. In 2011, 15 % of female and male employees were working under a fixed-term employment contract, the vast majority of them under the age of 25.<sup>382</sup> Almost half of the employment contracts that are currently concluded is limited in time and the fear is that the number of female employees facing a fixed-term offer will increase.<sup>383</sup>

The gender pay gap in Germany remains at 23 %.<sup>384</sup> Probably due to the fact that fixed-term contract employees earn significantly lower wages than permanent employees, the gender pay gap with regard to fixed-term work is less than 15 %.<sup>385</sup> The pay gap between female fixed-term workers and male permanent workers is 33 %.<sup>386</sup>

<sup>377</sup> See [http://boeckler.de/wsi-gdp\\_entgeltungleichheit\\_05.pdf](http://boeckler.de/wsi-gdp_entgeltungleichheit_05.pdf), accessed 7 April 2013.

<sup>378</sup> See [http://boeckler.de/wsi-gdp\\_entgeltungleichheit\\_05.pdf](http://boeckler.de/wsi-gdp_entgeltungleichheit_05.pdf), accessed 7 April 2013.

<sup>379</sup> See [https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/VerdiensteArbeitskosten/VerdienstunterschiedeMaennerFrauen/Aktuell\\_Verdienstunterschied.html](https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/VerdiensteArbeitskosten/VerdienstunterschiedeMaennerFrauen/Aktuell_Verdienstunterschied.html), accessed 7 April 2013.

<sup>380</sup> First Equality Report of the Federal Government, Bundestag document No. 17/6240, p. 138, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=174358.html>, accessed 7 April 2013.

<sup>381</sup> First Equality Report of the Federal Government, Bundestag document No. 17/6240, p. 140, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=174358.html>, accessed 7 April 2013.

<sup>382</sup> See National Statistics Agency *Frauen und Männer auf dem Arbeitsmarkt* p. 32, Wiesbaden 2012, <https://www.destatis.de/DE/Publikationen/Thematisch/Arbeitsmarkt/Erwerbstaetige/BroeschuereFrauenMaennerArbeitsmarkt.html>, accessed 7 April 2013.

<sup>383</sup> See C. Hohendanner 'Befristete Arbeitsverhältnisse. Auch Mann trägt kurz', *IAB-Forum* 1/2012 pp. 62-67.

<sup>384</sup> See [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/03/PD12\\_101\\_621.html](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/03/PD12_101_621.html), accessed 7 April 2013.

<sup>385</sup> See [http://boeckler.de/wsi-gdp\\_entgeltungleichheit\\_10.pdf](http://boeckler.de/wsi-gdp_entgeltungleichheit_10.pdf), accessed 7 April 2013.

<sup>386</sup> See [http://boeckler.de/wsi-gdp\\_entgeltungleichheit\\_10.pdf](http://boeckler.de/wsi-gdp_entgeltungleichheit_10.pdf), accessed 7 April 2013.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

The German legislator regards permanent employment contracts as normal and is interested in the continued existence of this state of affairs.<sup>387</sup> Nevertheless, nearly 40 % of the employees under the age of 35 working with the public services have fixed-term contracts.<sup>388</sup> Many employers and their associations consider the statutory protection against dismissal in Germany to be too strict and therefore appreciate the possibility of fixed-term contracts as a necessary compensation. Employees and trade unions are opposed to fixed-term employment contracts, especially to successive ones, due to their long-term insecurity in career, life and family planning.

#### 2.1.2. Equal treatment

Section 4(2) of the Part-Time and Fixed-Term Employment Act contains a strict prohibition of discrimination of fixed-term employees. There are no exclusions of any groups of fixed-term employees. They have to be treated in the same way as comparable permanent employees unless there is an objective reason for different treatment. Fixed-term employees are entitled to bonus payments in the proportion of their employment period.<sup>389</sup> Under Section 19 of the Part-Time and Fixed-Term Employment Act, employers are obliged to ensure equal training facilities for fixed-term employees unless there are conflicting urgent operational reasons.

If an employer refuses to conclude a permanent employment contract successive to a fixed-term contract for the sole reason that an employee has asserted his/her (equal) rights, the employee is entitled to compensation under Section 612a of the Civil Code (*Bürgerliches Gesetzbuch, BGB*) and Section 15 of the General Equal Treatment Act, but cannot claim the conclusion of a permanent employment contract.<sup>390</sup> The limitation in time of an employment contract itself must not violate the prohibition of discrimination under Sections 2 and 7 of the General Equal Treatment Act.<sup>391</sup>

#### 2.1.3. Successive fixed-term contracts

Employment contracts can be concluded for a limited period when there is an objective reason under Section 14(1) of the Part-Time and Fixed-Term Employment Act: because of only temporary operational needs, for young people having just completed their training or studies, as a temporary substitute for another employee, due to the specific nature of the work, as a probationary period, due to reasons regarding the person of the employee, for a post financed by an explicitly limited budget and because of a court settlement. There are no further statutory limitations (in time or number) to the conclusion of fixed-term employment contracts with an objective reason under the applicable law.

<sup>387</sup> According to the Explanatory Memorandum to the draft of the Part-Time and Fixed-Term Employment Act, Bundestag document No. 14/4374, October 2000, p. 12, <http://dip21.bundestag.de/dip21/btd/14/043/1404374.pdf>, accessed 7 April 2013.

<sup>388</sup> See [http://www.dgb.de/themen/++co++6364b66a-0ee3-11e2-8355-00188b4dc422/@/@index.html?search\\_text=befristung&x=0&y=0](http://www.dgb.de/themen/++co++6364b66a-0ee3-11e2-8355-00188b4dc422/@/@index.html?search_text=befristung&x=0&y=0), accessed 7 April 2013.

<sup>389</sup> See Ministry for Labour and Social Affairs (ed.) *Teilzeit – Alles, was Recht ist* pp. 93-94, Berlin, September 2011, [http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a263-teilzeit-alles-was-recht-ist.pdf?\\_\\_blob=publicationFile](http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a263-teilzeit-alles-was-recht-ist.pdf?__blob=publicationFile), accessed 7 April 2013.

<sup>390</sup> Federal Labour Court, judgment of 21 September 2011, 7 AZR 150/10, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=58f3d58a72e52a27c2f336c56710dc88&anz=10&pos=4>, accessed 7 April 2013.

<sup>391</sup> See Federal Labour Court, judgment of 6 April 2011, 7 AZR 524/09, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=8ad21e3e7a20b62d22600d6c7b6bf748&nr=15366&pos=0&anz=1>, accessed 7 April 2013. The Court decided on direct age discrimination.



For a period of up to two years in total, fixed-term employment contracts can be concluded without an objective reason under Section 14(2) of the Part-Time and Fixed-Term Employment Act. Within these two years, a fixed-term contract can be extended twice but the fixed-term employment may not exceed the two-year period. Under Section 14(2)(3) of the Part-Time and Fixed-Term Employment Act, the number of extensions or the period may be the subject of collective agreements and thus differ from statutory regulations. A fixed-term contract without reason cannot be concluded with an employee who worked for the employer before, irrespective of whether she/he worked under a fixed-term or permanent contract.

Until four years after the new establishment of a company, fixed-term employment contracts can be concluded without an objective reason for a period of up to four years in total under Section 14(2a) of the Part-Time and Fixed-Term Employment Act.

For a period of up to five years in total, fixed-term employment contracts can be concluded without an objective reason under Section 14 (3) of the Part-Time and Fixed-Term Employment Act when the employee is older than 52 years and had been unemployed for at least four months immediately prior to the employment. Within these five years, the fixed-term contract can be extended any number of times.

Invalid fixed-term employment contracts are regarded as permanent contracts under Section 16 of the Part-Time and Fixed-Term Employment Act. They can only be terminated under the provisions of the Protection against Dismissal Act (*Kündigungsschutzgesetz, KSchG*).

Employers are obliged to inform fixed-term employees about vacant posts with permanent contracts under Section 18 of the Part-Time and Fixed-Term Employment Act. The information may be provided by general announcement.

#### 2.1.4. Assessment

The protection of employees working under fixed-term contracts has been improved with regard to the possibility of fixed-term contracts without reason and by introduction of the strict equal treatment principle for fixed-term employees, which was new to German law. The compatibility with European law of the limited protection of employees older than 52 years under Section 14(3) of the Part-Time and Fixed-Term Employment Act is doubtful.<sup>392</sup> The lack of restrictions to the conclusion of successive fixed-term contracts with an ‘objective reason’ does not meet the intention to ‘prevent abuse arising from the use of successive fixed-term employment contracts or relationships’ of Council Directive 1999/70/EC. Furthermore, law and policies do not address the problems of employees with fixed-term precarious or atypical employment contracts.

On 18 April 2013, the German Parliament discussed a draft law on the restriction of fixed-term contracts for junior researchers presented by the parliamentary group of the Social Democratic Party (*Sozialdemokratische Partei, SPD*). The draft intends to prevent abuse of the possibility of (successive) fixed-term employment contracts in the academy by establishing minimum durations for work contracts and harmonising work contracts and autonomous research and qualification.<sup>393</sup> In the parliamentary discussion, the governing parties showed that they intend to reject the draft law.<sup>394</sup> The draft was referred to the competent parliamentary committees.

The number of male and female employees working under a fixed-term contract is equal in Germany nowadays. Therefore the concept of indirect sex discrimination does not apply. The increase of fixed-term employment contracts for young people having just completed their training or studies might cause discriminatory effects on women due to their lack of maternity protection in the event of pregnancy: If they fall pregnant, their job comes to an

<sup>392</sup> Judicial experts recommend to terminate Section 14(3), see resolutions of the 68<sup>th</sup> Deutscher Juristentag 2010, p. 6, [http://www.djt.de/fileadmin/downloads/68/68\\_djt\\_beschluesse.pdf](http://www.djt.de/fileadmin/downloads/68/68_djt_beschluesse.pdf), accessed 7 April 2013.

<sup>393</sup> See SPD ‘Entwurf eines Ersten Gesetzes zur Änderung des Gesetzes über befristete Arbeitsverträge in der Wissenschaft’ Bundestag document 17/12531 of 27 February 2013, <http://dip21.bundestag.de/dip21/btd/17/125/1712531.pdf>, accessed 18 April 2013.

<sup>394</sup> See the plenary protocol of the Federal Parliament 17/234 of 18 April 2013, pp. 29302-29310, <http://dip21.bundestag.de/dip21/btp/17/17234.pdf>, accessed 19 April 2013.

end, even if their employment was originally expected to continue.<sup>395</sup> But no current data is available.

## 2.2. Collective agreements

In collective agreements, social partners are allowed to adopt rules on the number of extensions or the period of fixed-term contracts without reason that may differ from statutory limitations. The Federal Labour Court decided that a collective agreement providing for fixed-term contracts which can be extended for four times for a period of up to 42 months is compatible with the law.<sup>396</sup> The Court emphasised that the facilitation of successive fixed-term contracts by collective agreements is conceived as an exception for specific cases and may not be abused by the social partners.

## 2.3. Case law

The Federal Labour Court significantly influenced the regulatory status of successive fixed-term employment contracts. In July 2012, the Federal Labour Court reviewed its idea of how to prevent abuse arising from the use of successive fixed-term employment contracts. In the first case decided, the applicant worked as a substitute for employees on parental or special leave under 13 successive fixed-term employment contracts between July 1996 and December 2007. The employer was a District Court. After a submission to the CJEU,<sup>397</sup> the Federal Labour Court held that successive fixed-term contracts with an objective reason can be found to be illegal under exceptional circumstances, which were fulfilled in the relevant case.<sup>398</sup> On the same day, the Court decided that 4 successive fixed-term employment contracts between March 2002 and November 2009 did not indicate an abuse of the possibility of concluding employment contracts for limited periods.<sup>399</sup> A comparable claim, explicitly based on the assertion of indirect sex discrimination of female fixed-term employees, was rejected by the regional court due to lack of proof that the vast majority of fixed-term substitutes in education are female and with reference to the protection of the mostly female employees who were substituted.<sup>400</sup>

In April 2011, the Federal Labour Court decided that a fixed-term contract without reason can be concluded with an employee who had worked for the employer before on condition that the former employment relationship had been terminated at least three years before.<sup>401</sup> The Court explained that an overly rigorous restriction of successive fixed-term contracts might become a recruitment barrier.

<sup>395</sup> CEDAW Alternative Report submitted by the Alliance of German Women's Organisations, November 2008, p. 20, and CEDAW Supplementary Shadow Report by the German Women Lawyers Association, November 2008, p. 6, available on <http://www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html>, both accessed 7 April 2013.

<sup>396</sup> Federal Labour Court, judgment of 15 August 2012, 7 AZR 184/11, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2012&anz=58&pos=1&nr=16304&linked=urt>, accessed 7 April 2013.

<sup>397</sup> Case C-586/10 *Bianca Küçük v Land Nordrhein-Westfalen* [2012] (not yet published).

<sup>398</sup> Federal Labour Court, judgment of 18 July 2012, 7 AZR 443/09, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2012&anz=54&pos=0&nr=16291&linked=ur>, accessed 7 April 2013.

<sup>399</sup> Federal Labour Court, judgment of 18 July 2012, 7 AZR 783/10, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=1917db9e07b3819057d944ed90785a12&nr=16291&pos=0&anz=1>, accessed 7 April 2013.

<sup>400</sup> Labour Court of Düsseldorf, judgment of 3 November 2010, 4 Ca 5638/10.

<sup>401</sup> Federal Labour Court, judgment of 6 April 2011, 7 AZR 716/09, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2011&anz=30&pos=5&nr=15353&linked=ur>, accessed 7 April 2013.

## **2.4. Involvement of other parties**

The main actors are from national policies and social partners, see above at points 2.1.1. and 2.2.

## **3. Statutory social security and pension rights**

Fixed-term employment is a subject of statutory social security schemes (unemployment, healthcare, work accidents, retirement). The entitlement to unemployment benefits requires 360 days of paid work within the last two years, which might be a serious problem for fixed-term employees.<sup>402</sup> Employees having worked less than 360 days (e.g. due to fixed-term employment) are only entitled to unemployment assistance. When the drawing of unemployment benefits is interrupted by a fixed-term employment of less than two years, the fixed-term employee enjoys protection of the status quo of his entitlement to unemployment benefits.<sup>403</sup> Unemployed persons who receive unemployment benefits cannot reject a job offer because it is fixed-term work.<sup>404</sup>

# **III. HORIZONTAL PROVISIONS**

## **1. Effectiveness**

The statutory rights to request reductions of working time may offer some possibilities of changing the working environment.<sup>405</sup> However, as mentioned before, indirect sex discrimination of part-time or fixed-term employees is not a topic with high priority in legislation and case law. And the principle of equal treatment lacks implementation in working life reality, especially for precarious or low-paid part-time or fixed-term employees. Moreover, access to the courts is ensured for individuals who claim to have been the victim of (gender) discrimination. Anti-discrimination interest organisations do not have standing in court, but may only support individual claimants. The federal anti-discrimination authority has no power to support individuals in anti-discrimination suits, and cannot impose any fines for discrimination. As long as the most vulnerable and least organised groups of employees are expected to fight discriminatory employment relationships by individual action, there will be little change.

## **2. Vulnerability, multiple/intersectional discrimination**

Vulnerable groups of female employees are migrants and women with disabilities as well as women with precarious employment contracts and lower income. ‘Women with disabilities do not benefit from labour market programmes to the same extent as men with disabilities do. In 2009 only 38.8 % of women with disabilities obtained in-service labour market integration assistance in comparison to 61 % of men with disabilities. They are also directed towards mini-jobs as a substitute for jobs, as they are assumed to face longer odds of labour market integration. As a result, women with disabilities have a distinctly lower income than men with disabilities, also due to their lower labour market participation.’<sup>406</sup> Female migrants are more

<sup>402</sup> See D. Schiek ‘Das Teilzeit- und Befristungsgesetz. Neue Paradigmen der Regulierung sogenannter atypischer Beschäftigung?’, *Kritische Justiz* 2002, pp. 18-44 (40).

<sup>403</sup> See <http://www.erwerbslos.de/images/stories/dokumente/rechtshilfen/flyerbefristung.pdf>, accessed 7 April 2013.

<sup>404</sup> See Federal Employment Agency, 04/2012, p. 7, <http://www.arbeitsagentur.de/zentraler-Content/A07-Geldleistung/A071-Arbeitslosigkeit/Publikation/pdf/GA-Alg-140.pdf>, accessed 7 April 2013.

<sup>405</sup> See E. Kocher ‘Prozedurale Individualisierung im Erwerbsleben – Gestaltungsansprüche als rechtliches Instrument der Integration’, *Zeitschrift für Rechtssoziologie* 1/2010, pp. 65-79.

<sup>406</sup> CEDAW Alternative Report Follow-up Germany 2011 submitted by German Women’s Rights Organisation, February 2009, pp. 7-8, available on <http://www.institut-fuer-menschenrechte.de/de/menschenrechts>



affected by precarious employment than male migrants or employees without a migrant history.<sup>407</sup> The intersections of part-time and fixed-term employment contracts and of low-paid and precarious work are not covered by legislation or case law.<sup>408</sup>

## GREECE – Sophia Koukoulis-Spiliotopoulos

### I. PART-TIME WORK

#### 1. General information

‘The distinction between full-time and part-time work is based on the spontaneous answer of the person asked the relevant question’,<sup>409</sup> i.e. on the worker’s assumptions.

1.1. The number of part-time jobs, which used to be quite small, is sharply increasing. In the 4<sup>th</sup> quarter of 2012, the employment of persons from the age of 15, in thousands, was (officially) as follows:

Total number of employees: 3 681.9; of whom 3 368.1 full-timers, i.e. total number of part-timers of both sexes: 313.8 or about 8.5 % of all employees.

Total number of male employees: 2 187.6; of whom 2 072.1 full-timers, i.e. total number of male part-timers: 115.6 or about 5.3 % of all male employees.

Total number of female employees: 1 494.3; of whom 1 297.1 full-timers, i.e. total number of female part-timers: 197.2 or about 13.2 % of all female employees.<sup>410</sup>

The Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR), responding to complaints by the Greek General Confederation of Labour (GSEE) on the incompatibility of austerity measures with ILO Conventions, notes the following: the share of part-time work increased from 5.6 % in 2008 to 6.8 % in 2011 (female rate: 10.2 %, male rate: 4.5 %). In 2011, 30.65 % of all new contracts were for part-time work.<sup>411</sup>

A sharply growing specific form of part-time work is rotation work (further defined below in 2.1.2.). Since the data rely on workers’ assumptions, it is not clear whether rotation work is included. At any rate, the data do not give a true picture of the labour market, due to ‘the high incidence of undeclared work, which was indeed alarming’, as an ILO High Level Mission that visited Greece in September 2011 stressed.<sup>412</sup> Among undeclared workers are building cleaners and domestic workers, the overwhelming majority of whom are foreign female part-timers; the latter are not covered by labour law, and therefore not monitored by the Labour Inspectorate (LI).

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[instrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html](http://www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html), accessed 7 April 2013.

<sup>407</sup> CEDAW Alternative Report submitted by the Alliance of German Women’s Organisations, November 2008, p. 10, available on <http://www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/frauenrechtskonvention-cedaw.html>, accessed 7 April 2013.

<sup>408</sup> See D. Schiek ‘Das Teilzeit- und Befristungsgesetz. Neue Paradigmen der Regulierung sogenannter atypischer Beschäftigung?’, *Kritische Justiz* 2002, pp. 18-44: a task for collective and company agreements.

<sup>409</sup> Hellenic Statistical Authority (ELSTAT), Statistical Presentation: [http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101\\_SJO01\\_MT\\_QQ\\_01\\_1998\\_04\\_2012\\_01\\_F\\_GR.pdf](http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101_SJO01_MT_QQ_01_1998_04_2012_01_F_GR.pdf), accessed 10 April 2013.

<sup>410</sup> ELSTAT Table 19: [http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101\\_SJO01\\_TB\\_QQ\\_04\\_2012\\_19\\_F\\_BI\\_0.xls](http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101_SJO01_TB_QQ_04_2012_19_F_BI_0.xls), accessed 14 April 2013.

<sup>411</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 111 (discrimination, employment and occupation): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3084473:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084473:NO), accessed 18 April 2013.

<sup>412</sup> Quoted in CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 81 (Labour Inspectorate): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3086753:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3086753:NO), accessed 18 April 2013.

There are no data on part-time work by profession, but only by sector of activity. Female part-time work is more common in the wholesale and retail trade, agriculture, education, activities for private households, accommodation and food service.<sup>413</sup>

1.2. As wages and pensions are increasingly and drastically cut, taxes and other charges are rising and unemployment is soaring (1.4. below),<sup>414</sup> many undertakings respond to the fall of demand by reducing working time. There are no statistical data on the percentage of involuntary part-time work. However, 200.5 part-timers (i.e. about 64 % of the total number of part-timers) stated that they took part-time work as they could not find a full-time job; this percentage was the same for men and women.<sup>415</sup> The CEACR and the LI note that in 2011, part-time work increased by 73.25 %; agreed rotation work increased by 193.06 %, while imposed rotation work increased by 631.89 % compared to 2010. Part-time and rotation work, as defined below in 2.1.2, are in particular imposed on women who are pregnant or returning from maternity leave.<sup>416</sup> This is in breach of the law, which prohibits any less favourable treatment of a woman related to pregnancy or maternity and entitles a woman returning from maternity leave to the same or an equivalent post, on no less favourable conditions, and to any improvement in working conditions that she would have obtained during her leave.<sup>417</sup> However, women are reluctant to complain or go to court, in particular due to the fear of being victimised or labelled trouble-makers, lack of evidence, very insufficient legal aid, sharply rising litigation costs (in breach of the right to access to court), and length of proceedings. The reluctance is growing along with the avalanche of austerity measures, by which safety nets are abolished, social benefits and services (including for children and other dependent family members) are reduced or suppressed, and while unemployment, which is much higher for women, is soaring. (1.3., 2.1.4, III.1. below).

People (e.g. domestic workers, building cleaners (1.1. above)) combine several part-time jobs whenever they can as wages are very low and constantly cut, but there are no relevant data. There are no data on full-timers wishing to reduce their working time.

1.3. There are studies on the gender pay gap until 2005, but the situation has drastically changed since then. As the CEACR and the ILO Committee on Freedom of Association (CFA)<sup>418</sup> found in response to GSEE complaints, the collective agreement (CA) system was dismantled through repeated and extensive statutory interventions in free and voluntary collective bargaining (see 2. below); the CA hierarchy was upset, so that enterprise-level CAs (where women's bargaining power is weaker) prevail over sectoral CAs; moreover, they are signed by 'associations of persons' lacking the guarantees enjoyed by trade unions. National general collective agreements (NGCAs), a safety net of last resort, were annihilated, as minimum wages throughout the country – their main subject – were first reduced by statute

<sup>413</sup> ELSTAT Table 20: [http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101\\_SJO01\\_TB\\_OQ\\_04\\_2012\\_20\\_F\\_BI\\_0.xls](http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101_SJO01_TB_OQ_04_2012_20_F_BI_0.xls), accessed 14 April 2013.

<sup>414</sup> See European Network of Legal Experts in the field of Gender Equality, Law Review 2/2012, S. Koukoulis-Spiiotopoulos 'Greece', pp. 79-84 (the situation has worsened since).

<sup>415</sup> ELSTAT Table 19: [http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101\\_SJO01\\_TB\\_OQ\\_04\\_2012\\_19\\_F\\_BI\\_0.xls](http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0101/Other/A0101_SJO01_TB_OQ_04_2012_19_F_BI_0.xls), accessed 14 April 2013.

<sup>416</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 100 (equal remuneration): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3084429:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084429:NO); Convention No. 111 (discrimination, employment and occupation): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3084473:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084473:NO); Greek Ombudsman *Gender and Employment Relationships, Special Report 2011*, and *Annual Report 2012*: [www.synigoros.gr](http://www.synigoros.gr); LI. *Annual Report 2011*: <http://www.ypakp.gr>, all accessed 14 April 2013.

<sup>417</sup> Articles 3(4) and 16 of Act 3896/2010 (OJ A 207, of 8 December 2010) transposing Directive 2006/54/EC.

<sup>418</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 98 (right to organise and collective bargaining): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13201:0::NO:P13201\\_COUNTRY\\_ID:102658](http://www.ilo.org/dyn/normlex/en/f?p=1000:13201:0::NO:P13201_COUNTRY_ID:102658); Convention No. 100 (equal remuneration): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3084429:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084429:NO); CFA 365<sup>th</sup> Report, Governing Body 316<sup>th</sup> Session, 1-16 November 2012, Case 2820 (Conventions No. 87 (Freedom of Association) and No. 98 (Right to Organise and Collective Bargaining): [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meeting\\_document/wcms\\_193260.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting_document/wcms_193260.pdf), all accessed 18 April 2013.

and then replaced by (lower) statutory wages. New NGCAs shall only concern non-wage matters and will not have a national scope; they shall only bind the signatory employers' and workers' federations and their members. All this is in compliance with Memoranda between the Commission, representing the creditors, and the Greek Republic, which set out strict conditions for disbursing loan instalments.<sup>419</sup> As a result, the number of enterprise-level agreements, mostly reducing wages to NGCA (now statutory) levels, is sharply rising (69 in the first ten months of 2011, 813 until November 2012).<sup>420</sup>

The gender pay gap as such is not addressed in collective bargaining.<sup>421</sup> According to CEACR data, it is wider in part-time than in full-time employment: in 2011, 47.7 % of male workers earned EUR 1 000 to 1 599 (against 38.7 % of female workers), while 48.3 % of female workers earned EUR 500 to 999 (against 38.5% of male workers), and 59.1 % of female part-timers workers earned up to EUR 499 (against 47.3 % of male part-timers).

The CEACR deplores the growing delays in the payment of wages and the accumulation of arrears, due to widespread insolvencies and lack of liquidity: 'The successive rounds of harsh austerity measures are decided under the overall guidance of the European Commission, the European Central Bank and the International Monetary Fund'. '[It] understands that most of [them] are meant to reduce an alarmingly high public deficit. [It] remains seriously concerned, however, at the cumulative effect [they] have on workers' income level and living standards and compliance with labour standards related to wage protection'. This situation, along with growing wage cuts which 'by their nature and scale' 'have dramatic effects on large parts of the workforce', violates Convention No. 95 (wage protection). According to the LI, non-payment of wages represented 68.8 % of all labour law infringements in 2011 – a marked increase compared to 2010 when 50.5 % of all violations related to such infringements – mostly in retail commerce, restaurants and catering, construction, hotels and the food industry.<sup>422</sup> Therefore, female part-timers are more heavily affected, as more women than men work in these sectors, except for the construction sector (1.1. above). This may be considered indirect discrimination against women in relation to pay.

Part-time work used to be viewed as related to women in connection to the family. However, according to the CEACR, as the crisis and the austerity measures have a 'disproportionate impact' on women, they are happy to have a job and willing to make compromises. From February 2008 to February 2013, the official unemployment rate rose from 8 % to 27 % (the highest in the EU) (men: from 5.2 % to 24.1 %, women: from 12 % to 31 %); the youth unemployment rate rose even more sharply: from 23 % to 64.2 % for the 15-24 age group and from 11.2 % to 36.2 % for the 25-34 age group.<sup>423</sup> Women's share among youth unemployment is also much larger.<sup>424</sup> In 2012, long-term unemployment (over 12 months) was 62.6 % of total unemployment, of which men represented 34.2 % and women 65.8 %.<sup>425</sup> The CEACR and the Ombudsman stress that in the private sector 'many enterprises replaced stable work with precarious work (including part-time and rotation work); the percentage of women who accepted such flexible work as newly recruited or already in employment increased, thereby making gender-based discrimination more visible'. 'Women

<sup>419</sup> See e.g. Act 3899/2010 (OJ A 212, of 17 December 2010); Article 37 of Act 4024/2011 (OJ A 226, of 27 October 2010; Article 1(6) of Act 4046/2012 (OJ 28, of 14 February 2012); Cabinet Act 6, of 28 February 2012 (OJ A 38, of 28 February 2012; Article One, paragraph IA, subparagraph IA.11, of Act 4093/2012 (OJ A 222, of 12 November 2012).

<sup>420</sup> A. Kapsalis *Collective bargaining and wage fixing for workers in the context of recession and crisis. Collective agreements in 2012*, Labour Institute of GSEE (INE/GSEE) 2013 (in press).

<sup>421</sup> A. Kapsalis *Addressing the gender pay gap: Government and social partner actions – Greece*:

<http://www.eurofound.europa.eu/eiro/studies/t0912018s/gr0912019q.htm>, accessed 15 April 2013.

<sup>422</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 95 (protection of wages): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3085303:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3085303:NO) (emphasis in the CEACR text); LI Annual Report 2011: <http://www.vpakp.gr>, both accessed 15 April 2013. The LI Report for 2012 is not yet available.

<sup>423</sup> Hellenic Statistical Authority (ELSTAT): <http://www.statistics.gr>, accessed 9 May 2013.

<sup>424</sup> Fourth trimester 2012: the general rate was 26 %; 15-24 age group: male 51.7 %, female: 65 % (Hellenic Statistical Authority (ELSTAT), Labour Force Survey: <http://www.statistics.gr>, accessed 18 April 2013.

<sup>425</sup> GSEE & ADEDY (Civil Servants Federation) Labour Institute (INE) *Enimerossi* No. 202, of February 2013, Table 7; No. 204, of April 2013, p. 36: <http://www.inegsee.gr>, both accessed 20 April 2013.

were exposed to indecent conditions of work, especially during pregnancy and after childbirth’ and ‘discrimination related to pregnancy and childcare leave was the most prominent form of discrimination’.

However, the Ombudsman sees only the tip of the iceberg. Moreover, women rarely use recourse to the LI, and even more rarely to the courts (1.2. above). Furthermore, judicial protection is hampered, in breach of Articles 6(1) ECHR and 47 of the EU Charter of Fundamental Rights, as litigation costs are sharply rising, proceedings are too long and legal aid is insufficient and subject to very strict conditions. The Greek National Commission for Human Rights (NCHR),<sup>426</sup> the CEACR and the Ombudsman<sup>427</sup> are deploring this situation.

## 2. Legislation, (national) collective agreements and case law

Employment and social security legislation has been strictly conditioned since 2010 by the Memoranda (1.3. above). Constantly and unpredictably issued and modified, long and tortuous statutes, on unrelated issues (‘omnibus laws’), often with retroactive effect and difficult to combine amongst themselves or with other legislation, create great legal uncertainty and a general sense of insecurity in all walks of life. Moreover, case law, also due to the length of proceedings (III.1. below), cannot catch up with legislation.

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time (including rotation) work is governed by labour law and the specific provisions of Article 38 of Act 1892/1990 as repeatedly amended.<sup>428</sup> Some measures aim to protect full-time workers from dismissal (2.1.2. below). There are discussions on part-time work being a symptom of gender stereotypes,<sup>429</sup> but without any connection to CEDAW Article 5a. The Greek Reports on the CEDAW do not address issues regarding part-time work.

#### 2.1.2. Equal treatment

Article 38 of Act 1892/1990, as amended, provides the following:

A ‘part-time worker’ is ‘a worker who has a (private law) contract of employment or employment relationship and whose working hours, as calculated on a daily, weekly, fortnight or monthly basis, are less than the normal working hours of a comparable full-timer’. ‘Rotation work’, a form of part-time work,<sup>430</sup> is ‘full-time work for fewer days a week or fewer weeks a month or fewer months a year or a combination of these’. Both forms enjoy the same protection. A ‘comparable full-time worker’ is ‘any full-time worker employed in the same undertaking on a contract or relationship of subordinate employment who performs the same or similar duties under the same conditions’. Part-timers must not be treated less favourably than comparable full-timers, except on objective grounds, such as difference in the work timetable.

Part-time or rotation work must be agreed upon hiring or during the employment by written contract, which must be reported to the LI within eight days of the day on which it was concluded. If there is no written contract or the contract has not been reported, there is a rebuttable presumption in favour of the worker that the employment is full-time.<sup>431</sup> For

<sup>426</sup> NCHR *Comments on the bill ‘fair trial and reasonable length thereof’* (Act 4055/2012, OJ A 51, of 12 March 2012); NCHR *Written Submission to the CEDAW Committee for the general Discussion on Women’s Access to Justice* (18 February 2013): <http://www.nchr.gr>, accessed 12 April 2013.

<sup>427</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 111 (discrimination, employment and occupation): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3084473:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084473:NO); Greek Ombudsman *Annual Report 2012*: [www.synigoros.gr](http://www.synigoros.gr), both accessed 15 April 2013.

<sup>428</sup> OJ A 101, of 31 July 1990.

<sup>429</sup> See e.g. A. Mouriki ‘Gender equality in employment policies’ in: M. Karamessini and I. Kouzis (ed.) *Employment Policy* pp. 241-263 Athens, Gutenberg 2005.

<sup>430</sup> Supreme Civil and Penal Court, Civil Section, 969/2011.

<sup>431</sup> Supreme Civil and Penal Court, Civil Section, 1264/2012.



seasonal employment in hotel and food services, the contract is for a daily or weekly period. There are no exclusions of any group of part-timers. The legislation applies to all undertakings, including SMEs. Part-time work on a private-law contract is also allowed in the public sector, except the State, local authorities and legal persons governed by public law.

Wages for part-time (including rotation) work are calculated on a pro rata temporis basis, in relation to the hourly rate of the ‘comparable full-time worker’. In the absence of such a worker, the comparison is made by reference to the CA which would cover the worker, had he/she been hired as a full-timer. Originally, part-timers who were paid the minimum legal wages and worked less than four hours per day were entitled to a 7.5 % increase, and to a 10 % increase (overtime supplement) when they worked more hours than agreed. Article 17 of Act 3899/2010 (OJ A 212, of 17 December 2010) abolished both the 7.5 % increase for those working less than four hours per day, and the 10 % overtime supplement. Regarding overtime in particular, Article 17(2) of Act 3899/2010 reads: ‘In case additional work is needed, the part-timer must perform it, if he/she can and his/her refusal would be contrary to good faith; he/she may refuse, in case the additional work is usual.’ The part-timer’s work cannot exceed eight hours per day, but there is no longer an entitlement to an overtime supplement, if he/she works more than agreed. Work on Sundays or other holidays and night work yield entitlement to the legal pay supplement.

Part-timers are entitled to take part in professional training provided by the undertaking under conditions that are analogous to those of full-timers and they must be granted the same social services as the other workers in the undertaking. Their seniority is calculated pro rata (part-time work amounting to a working day of a comparable full-timer is one working day). They are entitled to paid annual leave corresponding to the number of days on which they have worked. They enjoy the same guarantees against dismissal as full-timers and their dismissal due to non-acceptance of part-time work is null and void.

### 2.1.3. Organisation of working time

Article 38 of Act 1892/1990, as amended, provides the following:<sup>432</sup>

Part-time (including rotation) work is as a rule voluntary (2.1.2. above). However, in the event of decrease of activity, the employer may, instead of terminating the contracts, impose a system of rotation work for a period not exceeding nine months within the same calendar year, after having informed and consulted with the workers’ legal representatives or, in the absence of representatives, with all the workers. Rotation must be imposed equally in the undertaking, not selectively.<sup>433</sup> However, women seem to be singled out more often for such work (1.4. above). The employer’s decision must be reported to the LI within eight days of the day on which it was taken. Otherwise, there is a presumption of full-time work.

Case law requires that the ‘decrease of activity’ be serious and have permanent features; mere liquidity difficulties or bad market context do not suffice; the information and consultation must include exact financial data; the consultation period must be reasonable and any margin of alternative solutions be exhausted. If any of these conditions is not fully observed, the conversion of the contract is invalid and the original full-time contract applies.<sup>434</sup> It seems, however, that the conditions are often ignored, while complaints are scarce and LI control inadequate. As women are strongly affected by such situations, this is an example of how the ‘disproportionate impact of the crisis on women’ is exacerbated, due to ‘the inability of the LI to effectively address equality cases’.<sup>435</sup> Moreover, there is no minimum threshold of days, weeks or months (2.1.2. above) for imposed rotation work, meaning that it may be imposed e.g. for one day per week.

A full-timer in a undertaking with more than twenty workers may, after one year of work, request the conversion of his/her contract into a part-time contract with the right to return to

<sup>432</sup> All provisions mentioned under this heading are included in Article 38 of Act 1892/1990.

<sup>433</sup> See e.g. Athens First Instance Civil Court 11176/2012.

<sup>434</sup> Supreme Civil and Penal Court, Civil Section, 468/2012, Athens First Instance Civil Court 8606/2011.

<sup>435</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 111 (discrimination, employment and occupation): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3084473:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084473:NO), accessed 15 April 2013.

full-time. The employer's refusal may be justified by the undertaking's needs. If the employer does not reply in writing within a month, the request is deemed to have been accepted. Part-timers have priority among workers of the 'same category' for a full-time post. Seniority, calculated as above, is a feature of the 'same category'.

The employer's decisions and the validity of agreements for part-time work are subject to judicial review. All judgments referred to in this report deal with such issues.

In the private sector NGCAs granted natural, adoptive and single mothers, and subsidiarily fathers, a paid working time reduction 'for breastfeeding and childcare': one hour per day for two and a half years after maternity leave. A two-hour reduction per day for one year and one hour for the subsequent six months or a paid leave of analogous length may be agreed. The employer's agreement in the latter case may depend on business needs, but his/her refusal may be an abuse of rights, and hence null and void.<sup>436</sup>

There is a serious problem: NGCA clauses sanctioned by statute which copies their text acquire statutory force. Those not sanctioned remain in effect through subsequent NGCA clauses. The 2002 NGCA provided that the aforementioned working time reduction started upon childbirth and this clause was duly sanctioned by Article 7 of Act 3144/2003.<sup>437</sup> Then, the NGCA 2004 provided that the reduction starts upon expiry of the maternity leave (nine weeks after childbirth) and it also provided for the aforementioned agreement modifying the reduction, but none of these clauses was sanctioned by statute. A new NGCA was signed on 14 May 2013<sup>438</sup> by some employers' federations (the most important one, the Hellenic Federation of Enterprises (SEV) abstained). Due to the NGCA's limited scope (1.3. above), the effect of previous NGCA clauses not sanctioned by statute (including the said 2004 NGCA clauses) is problematic. The standard clause that previous NGCA clauses kept in effect is included in the new NGCA, but it is only binding on the signatories. Therefore, it can be concluded that the above, more favourable, but unsanctioned clauses of the 2004 NGCA are binding on the signatories of the new NGCA, but it is not yet clear whether they maintain their national scope.

Parents of handicapped children under sixteen may request an unpaid reduction of one hour per day. Workers who have agreed with their employer on a reduced working time due to family responsibilities are entitled to full-time work, at their request, if there is a vacancy, irrespective of whether the family circumstances which justified the reduced working time continue.<sup>439</sup> There is no case law on these provisions.

In the public sector, parents are granted, after maternity leave, a paid transferable reduced working day (by two hours, until the child reaches the age of two and by one hour until the child reaches the age of four) as an alternative to a transferable nine-month paid leave. The reduction and the leave last longer for a fourth child and for unmarried, widowed, divorced or handicapped parents.<sup>440</sup> Directive 2010/18/EC was transposed by Articles 48-54 of Act 4075/2012.<sup>441</sup> Article 50(1) of this Act grants parental leave in the private and the public sector until the child reaches the age of six. Therefore, in the public sector, the reduction must last until the child reaches this age.

#### 2.1.4. Assessment

All issues must be seen in the context of deepening recession, with wages, pensions and other benefits being drastically cut, taxes and other charges rising, unemployment soaring, the CA system being dismantled (1.3. above) and the effectiveness of control mechanisms decreasing. As LI personnel and material shortage is exacerbated through budget cuts, the LI cannot exercise their powers, in particular make surprise monitoring visits. They mostly rely on

<sup>436</sup> Supreme Civil and Penal Court, Civil Section, 10/2010.

<sup>437</sup> OJ A 111, of 8 May 2003.

<sup>438</sup> [http://www.gsee.gr/userfiles/file/2013\\_NEWS\\_KEIMENA/egsse\\_2013.pdf](http://www.gsee.gr/userfiles/file/2013_NEWS_KEIMENA/egsse_2013.pdf), accessed 16 May 2013.

<sup>439</sup> Articles 8 and 10 of Act 1483/1984, OJ A 153, of 8 October 1984.

<sup>440</sup> Article 53 of the Civil Servants' Code (CSC) (Act 3528/2007, OJ A 26, of 9 February 2007).

<sup>441</sup> OJ A 89, of 11 April 2012.

complaints, which are scarce however ( 1.4. and 2.1.3. above). This means that flexible, atypical and undeclared employment is steadily and uncontrollably growing.<sup>442</sup>

Indirect sex discrimination against part-timers may result from barriers to judicial protection (1.4. above). In addition, part-timers must be compared with full-timers performing not only the same or similar work (2.1.2. above), but also work of equal value. Clause 6(4) of Directive 97/81/EC, which stipulates that the Framework Agreement must be without prejudice to EU provisions on equal treatment for men and women, although not repeated in Article 38 of Act 1892/1990 (2.1.1. above), is implied by virtue of the Constitution and gender equality legislation (2.3.2. below).

Legislation on part-time work is not ‘gender sensitive’. The abolition of safety nets and the reduction or suppression of social benefits and services, including for children and other dependent family members, are favouring gender stereotypes, as women’s position in the labour market is constantly weakened, while their burdens are growing (1.2. and 1.3. above).

## **2.2. Collective agreements**

### *2.2.1. Policies*

The unions’ main concern is the sharp increase of part-time (including rotation) work and its imposition on women (see 1.1. and 1.3. above: GSEE complaints to the CEACR and CFA).

### *2.2.2. Equal treatment*

As long as they fixed minimum wages, NGCAs did not deal with part-time work. The minimum wages that they fixed applied to part-timers on a pro rata basis. As explained above (1.3), national minimum wages are not fixed by NGCAs anymore. They are fixed by statute. Statutory wages also apply to part-timers on a pro rata basis.

### *2.2.3. Organisation of working time*

NGCAs do not deal with the organisation of working time in relation to part-time work.

### *2.2.4. Assessment*

As the CA system has been dismantled (1.3. above) there can be no social partners’ practices.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

The Ombudsman may not take cases to court, but has intervened between employers and women who are pregnant or returning from maternity leave, on whom part-time (including rotation) work had been imposed (1.2. and 1.4. above). The courts have imposed equal treatment in relation to full-timers (2.1.2. above), but not in relation to gender. Indirect discrimination has only been found against the handicapped, on the basis of Act 3304/2005 (OJ A of 27 January 2005) transposing Directives 2000/43/EC and 2000/78/EC.<sup>443</sup> CEDAW Article 5a does not seem to be used in legal argumentation.

### *2.3.2. Assessment*

The constitutional norms imposing gender equality in all sectors, areas and situations and equal pay for work of equal value without distinction on any ground, including gender<sup>444</sup> also cover part-time work. Act 3896/2010 transposing Directive 2006/54/EC (OJ A 207, of 8 December 2010) covers workers or candidate workers in the private and the public sector ‘in any relationship or form of employment’, hence also part-timers. It correctly defines indirect discrimination, but this notion is not applied. However, its application would provide great

<sup>442</sup> CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 81 (Labour Inspectorate): [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3086753:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3086753:NO); LI Annual Report 2011: <http://www.ypakp.gr>, both accessed 15 April 2013.

<sup>443</sup> See e.g. Council of State (Supreme Administrative Court) 3729/2011 (lack of accessible toilets).

<sup>444</sup> Articles 4(2), 116(2) and 22(1)(b).



added value, in view of growing indirect sex discrimination related to part-time work (1.3., 1.4. and 2.1.4. above).

#### **2.4. Involvement of other parties**

The NCHR is constantly drawing attention to the barriers to judicial protection (1.4. above) and to the lack of awareness regarding the concept of indirect discrimination.<sup>445</sup>

### **3. Statutory social security and pension rights**

#### **3.1. Exclusions**

Part-timers are not explicitly excluded from any social security scheme. However, there is a factor of indirect discrimination: the unit on the basis of which the length of insurance is calculated is the working day.<sup>446</sup> This disadvantages those not working continuously, on a daily basis. Some examples: A is working five days per week and four hours per day, i.e. twenty hours per week; he/she is insured for twenty to twenty-two days per month. B is performing the same work two days per week, for ten hours per day, i.e. he/she is also working twenty hours per week; however, he/she is insured for only eight to nine days per month. While A is entitled to the same social security benefits as a full-timer, B cannot meet the threshold for sickness benefits (100 days in the last year before the sickness) or maternity benefits (200 days in the last two years before childbirth) (6.1.2. below). Moreover, B will need many more years than A in order to be entitled to a pension.

#### **3.2. Assessment**

Although the above problem has been detected in legal theory,<sup>447</sup> case law has not dealt with it.

### **4. Self-employment**

Equal treatment of self-employed part-timers does not seem to have been addressed.

### **5. Access to and supply of goods and services**

Problems in the access to and supply of goods and services do not seem to have been addressed.

### **6. Are there any gaps in national law?**

#### **6.1. Gaps in the area of (access to) employment**

##### **6.1.1. Recruitment process**

No problems in relation to part-timers' access to employment seem to have been addressed. There are no initiatives aiming at identifying indirect discrimination. There is a tendency to force female employees into part-time (including rotation) work (1.4. and 2.1.3. above).

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<sup>445</sup> See e.g. NCHR *Comments on the Bill 'Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – Harmonization of existing legislation with Directive 2006/54/EC'*: <http://www.nchr.gr>, accessed 18 April 2013.

<sup>446</sup> See e.g. Article 28 of Act 1846/1951 on the Social Insurance Institute (IKA) (OJ A 179, of 21 June 1951), the most important statutory social security scheme, as amended.

<sup>447</sup> A. Petroglou et. al. 'The new forms of employment and their impact on social security' *Social Security Law Review (EDKA)* 1997, pp. 257- 267 (in Greek).

### 6.1.2. *Employment conditions*

Payment of social security maternity benefits, which supplement pay during maternity leave, is subject to 200 working days in the last two years before childbirth. Payment of sickness benefits is subject to 100 working days in the last year before the sickness.<sup>448</sup> This disadvantages female part-timers in particular, which is in breach of Directive 92/85/EEC.

### 6.1.3. *Termination of the employment contract*

It is very likely that, in the context of the crisis and austerity measures, part-timers are forced out after application for an increase of working time, but there are no data.

## 6.2. *Gaps in other areas*

A serious gap is the lack of systematic and effective control (2.1.3. and 2.1.4. above).

## II. FIXED-TERM WORK

### 1. General information

There are no sex-segregated data, but it seems that many women are employed on fixed-term contracts, inter alia in seasonal and temporary work.<sup>449</sup> On the pay gap, see 1.3. above.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. *Policies and legislation at national level*

##### 2.1.1. *National policies*

National policies aim to combat practices of successive fictitious fixed-term contracts (2.1.2. below). However, in compliance with the Memoranda (1.3. and 2. above), a new policy was developed against fixed-term contracts of long duration which expired upon age limit or retirement (tenure) and thus guaranteed employment stability: they were converted into contracts of indefinite duration,<sup>450</sup> while dismissals were generally facilitated by a sharp increase in the minimum work period entitling to redundancy compensation along with drastic reductions in notice periods and redundancy compensation.

Act 4152/2013 (OJ 107, of 9 May 2013), which modified several statutes adopted a very short time before, introduced a project for the employment of unemployed persons by local authorities or other public services (e.g. hospitals and schools), to meet social needs, on fixed-term contracts. Article One, Paragraph ID, Subparagraph ID.1, of this Act fixes maximum (not minimum) wage rates, which are lower than the minimum national statutory rates (I.1.3. above) and even lower for workers under 25, i.e. EUR 19.6 per day and not over EUR 490.00 per month, for those over 25, and EUR 17.1 per day and not over EUR 427.00 per month for those under 25. The author notes that the lower wages for the young were found contrary to the European Social Charter.<sup>451</sup> As among the selection criteria is the length of unemployment (where women excel) and the work will include typical ‘female tasks’, such as care of children and the elderly, it is very probable that a great proportion, if not the majority of these

<sup>448</sup> Articles 35 and 39 of Act 1846/1951 (OJ A 179, of 21 June 1951); Article 11(5) of Act 1759/1988 (OJ A 50, of 18 March 1988); Article 27 of Act 1902/1990 (OJ A 138, of 17 October 1990); Article 11 of Decree 176/1997 transposing Directive 92/85/EEC (OJ A 150, of 15 July 1997).

<sup>449</sup> GSEE & ADEDY (Civil Servants Federation) Labour Institute (INE) *Enimerossi* No. 204, of April 2013: <http://www.inegsee.gr>, accessed 20 April 2013.

<sup>450</sup> Act 4046/2012 (OJ A 28, of 14 February 2012; Cabinet Act 6/28.02.2012, OJ A 38 of 28 February 2012).

<sup>451</sup> European Committee of Social Rights 23 May 2012, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* (Complaint No 66/2011): [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp), accessed 19 April 2013.

workers will be women. Therefore, this may well be a source of indirect gender discrimination.

### 2.1.2. *Equal treatment*

The traditional notion of fixed-term work in Greek law is similar to the notion in Directive 1999/70/EC. The decisive criterion is that the end of the employment contract or relationship is determined by a specific date or by objective factors related to its aim and purpose, such as the completion of a specific task or project<sup>452</sup> (e.g. a construction) or the occurrence of a specific event (e.g. return of a replaced worker from his/her leave).<sup>453</sup>

Fixed-term work is governed by labour law and Presidential Decrees (PD) 81/2003 (private sector) and 164/2004 (public sector)<sup>454</sup> transposing Directive 1999/70/EC. Also, Article 8(3) of Act 2112/1920<sup>455</sup> protects workers from successive fixed-term contracts, when these ‘are not justified by the nature of the work’, but ‘aim to circumvent the rules on termination of the contract’, i.e. when they serve standing needs of the employer. The latter is the decisive criterion for the contract to be deemed to be of indefinite duration.<sup>456</sup> This provision therefore is a measure to prevent abuse, according to Clause 5(1) of the Framework Agreement annexed to Directive 1999/70.

PDs 81/2003 and 164/2004 copy the Directive’s definition of a fixed-term worker. They contain the principle of non-discrimination in relation to comparable permanent workers, i.e. ‘workers with an employment contract or relationship of indefinite duration, in the same establishment or body, engaged in the same or similar work, due regard being given to qualifications or skills’. This definition (copied from the Directive) omits equal value. However, by providing (as the Directive does) that gender equality provisions are not affected, the PDs recall that the equal value criterion applies (2.1.4 and 2.3.2. above).

In the public sector, the Constitution (Article 103) exceptionally allows fixed-term contracts, the conditions for the conclusion of which, as well as for their duration, are fixed by law, and it prohibits their conversion into contracts of indefinite duration.

Both PDs allow exceptions from the equal treatment principle for ‘objective reasons’.<sup>457</sup> The nature of such reasons or the criteria of ‘objectiveness’ are not specified and no periodical revision of the exceptions nor prior consultation with social partners is required.<sup>458</sup> This amounts to excluding undefined categories of workers, wholly or partly, from the scope of the PDs, without transparency and guarantee. There is no case law on this matter. The PDs require that fixed-term workers be informed about vacant posts for work of indefinite duration and training opportunities, and that they be taken into account in calculating the number of workers conditioning the formation of workers’ organisations.

Fixed-term contracts end automatically on the fixed date or when the events agreed upon materialize, without notice and redundancy compensation. The contract may be terminated earlier for a ‘serious reason’ subject to judicial review.<sup>459</sup> A serious reason consists in one or more events that make the continuation of the contract unbearable, according to good faith and fair trade practices, irrespective of fault.<sup>460</sup> Examples of serious reasons: ‘essential’ breaches of the worker’s contractual duties (e.g. inadequate execution of the employer’s directions)<sup>461</sup> and the dissolution, liquidation or interruption of the company’s activity.<sup>462</sup> Mere financial reasons, such as decrease of gains or even damages sustained by the employer do not suffice and the proportionality test must be applied. However, the abolition of the

<sup>452</sup> Supreme Civil and Penal Court, Civil Section, 1221/1988.

<sup>453</sup> Supreme Civil and Penal Court, Civil Section, 1493/1986.

<sup>454</sup> OJ A 77, of 2 April 2003, and OJ A 134, of 19 July 2004, respectively.

<sup>455</sup> OJ A 67, of 18 May 1920.

<sup>456</sup> Supreme Civil and Penal Court, Civil Section, 7/2011 (Plen.); 15/2012.

<sup>457</sup> Article 4(1) and (2) of PD 164/2004 and Article 4(2) and (3) of PD 81/2003, respectively.

<sup>458</sup> See Clauses 1(2) and 4 of the Framework Agreement annexed to Directive 1999/70/EC.

<sup>459</sup> Article 672 Civil Code.

<sup>460</sup> Supreme Civil and Penal Court, Civil Section, 10/1995 (Plen.), 695/2010, 688/2007.

<sup>461</sup> Supreme Civil and Penal Court, Civil Section, 695/2010, 603/2006.

<sup>462</sup> Supreme Civil and Penal Court, Civil Section, 688/2007.

worker's post in such a context is a serious reason.<sup>463</sup> In the absence of a serious reason the termination is null and void<sup>464</sup> (III.1. below). The employer does not have to state the reason upon termination, but he/she must prove it in court, as a respondent. Mere generalisations do not suffice.<sup>465</sup>

Once the fixed-term contract has ended, maternity or parental leave does not continue, in breach of EU law and CJEU case law. The practice of non-renewal of a contract of a pregnant woman has been approved by case law.<sup>466</sup>

#### *2.1.3. Successive fixed-term contracts*

In the private sector, unlimited successive fixed-term contracts are allowed, if they are justified by an objective reason (e.g. the employer's company form, kind or activity or specific reasons or needs directly or indirectly resulting from the contract, as further specified in PD 81/2003). Seasonal workers are entitled to being re-hired, in particular in hotels, depending on their number of bookings. Once they apply for re-hiring, the contract is automatically renewed.<sup>467</sup> In the public sector, a maximum of only three successive fixed-term contracts is allowed, provided the interval is more than three months.<sup>468</sup> According to the Ombudsman, precarious work is more often imposed on women (1.4. above).

#### *2.1.4. Assessment*

Strengths of Greek legislation are the declaration of fictitious successive part-time contracts to constitute a contract of indefinite duration and the automatic renewal of seasonal contracts in hotels (2.1.2. and 2.1.3. above). A serious weakness is the lack of systematic and effective control (I.2.1.3 and 2.1.4. above). Moreover, the 'objective reasons' for exceptions to equal treatment may well be a source of indirect discrimination (2.1.2. above).

### **2.2. Collective agreements**

Social partners do not seem to have any policy regarding fixed-term work. National CAs have not addressed the issue and they do not seem to contain indirect sex discrimination.

### **2.3. Case law**

There does not seem to be any case law on equal treatment of men and women regarding fixed-term work, or regarding indirect sex discrimination, which would be of great added value (I.2.1.4. and 2.3.2. above). Case law mainly deals with fictitious successive contracts.

### **2.4. Involvement of other parties**

There does not seem to be any involvement of other parties with fixed-term work.

## **3. Statutory social security and pension rights**

No fixed-term workers are explicitly excluded from any social security scheme.

<sup>463</sup> Supreme Civil and Penal Court, Civil Section, 77/2010.

<sup>464</sup> Supreme Civil and Penal Court, Civil Section, 688/2007, 1400/2006.

<sup>465</sup> Supreme Civil and Penal Court, Civil Section, 1024/2006.

<sup>466</sup> Supreme Civil and Penal Court, Civil Section, 1341/2005, 317/2011.

<sup>467</sup> Supreme Civil and Penal Court, Civil Section, 14/2000 (Plen.), 671/2009.

<sup>468</sup> PD 164/2004.

### III. HORIZONTAL PROVISIONS

#### 1. Effectiveness

The ECtHR has repeatedly condemned Greece for (systemic) excessive length of proceedings and has even issued a ‘pilot judgment’.<sup>469</sup> The rising costs of proceedings and the insufficiency of legal aid are a barrier to justice (I.1.3. above). Non-awareness of the standing of organisations to take cases to court is deplored by NCHR<sup>470</sup> and some authors.<sup>471</sup> The only case the author knows of is a successful petition by the Greek League for Women’s Rights for the annulment of a decision of the Minister of Education which excluded periods of maternity and parental leave from the period required for state school teachers to apply for the post of school counsel.<sup>472</sup>

Remedies and sanctions are proportional and dissuasive. A discriminatory dismissal is declared null and void (by civil courts) or annulled (by administrative courts); the dismissal is deemed never to have occurred; the worker retains his/her post, reinstatement being unnecessary. A discriminatory refusal to hire or promote is declared null and void by the civil courts and the hiring or promotion is deemed to exist from the time it should have occurred. Administrative courts annul such a refusal and order the issuance of an administrative act of retroactive hiring or promotion. In all cases, full back pay plus legal interest is awarded, plus moral damages, when applicable. Also, in the private sector, fictitious successive fixed-term contracts are equated to a contract of indefinite duration. However, these effective remedies and sanctions are rarely applied, due to the growing reluctance of women to complain (I.1.2. above). The LI can bring criminal charges and impose fines, which however they seldom do in matters of gender equality (I.1.4. and 2.1.4. above).

#### 2. Vulnerability, multiple/intersectional discrimination

Migrant women suffer multiple discrimination due to the situations described above (1, first paragraph). They are particularly exploited as fixed-term and temporary workers. Their wages are very low and they are not insured. Disabled women and women from weaker economic backgrounds suffer from the dismantling of the welfare state and the constant cuts in social benefits and services. This also applies to women who have precarious or atypical employment contracts.

## HUNGARY – Beáta Nacsa

### I. PART-TIME WORK

#### 1. General information

In Hungary part-time employment is defined as an employment relationship in which working time does not reach the working time predefined for a full-time position<sup>473</sup> in the given job.<sup>474</sup>

<sup>469</sup> ECtHR *Athanasίου v Greece* (Application No. 50973/08) 21 December 2010 (final since 21 March 2011).

<sup>470</sup> See e.g. NCHR *Comments on the Bill ‘Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – Harmonization of existing legislation with Directive 2006/54/EC’*: <http://www.nchr.gr>, accessed 18 April 2013.

<sup>471</sup> S. Koukoulis-Spiliotopoulos, ‘Retirement and Harmonization of Family and Work (ECJ 26.3.2009 C-559/07)’ *Review of Social Security Law (EDKA)* 2009 pp. 753-785 (in Greek).

<sup>472</sup> Council of State 4875/2012. See S. Koukoulis-Spiliotopoulos ‘Greece’ in European Network of Legal Experts in the Field of Gender Equality, *Law Review* 2013-1, March 2013, European Commission.

<sup>473</sup> Usually the predefined working time for a job is 8 hours per day, but this can be shortened if the job is associated with health risks, e.g. due to being exposed to ionizing radiation. In this case the relationship is not considered to be part-time regardless of the fact that the daily working time is shorter than the generally applicable working time.

The proportion of part-time employment has traditionally been rather low in Hungary, 3-4 %, but it started to grow during the recent economic crisis. In 2012, the proportion of part-time work was 7 %, 2.5 % among men, 4.5 % among women.<sup>475</sup> In 2012 the proportion of women in part-time work was 64 %, while in full-time employment it was only 45 %.<sup>476</sup>

The number of part-time workers slowly increased to the detriment of full-time workers in the past four years, which is considered to be a sign of further deterioration of the Hungarian labour market.<sup>477</sup> Part-time employment in the first quarter of 2013 grew by 3 %, while the increase of full-time employment was only 0.5 %.<sup>478</sup> The rate of women's part-time employment increased more rapidly than that of men.

Year	Part-time employment			Full-time employment			Total employment
	Men	Women	Σ	Men	Women	Σ	
2008	70.100	109.100	179.200	2.040.700	1.659.500	3.700.200	3.879.400
2009	80.100	130.100	210.200	1.964.800	1.606.900	3.571.700	3.781.900
2010	78.800	141.200	220.000	1.943.800	1.617.400	3.561.200	3.781.200
2011	97.500	161.000	258.500	1.959.800	1.593.600	3.553.500	3.811.900
2012	97.400	173.400	270.800	1.985.000	1.622.100	3.607.100	3.877.900

**Numbers of employed persons (part-time and full-time) by sex in Hungary in 2008-2012<sup>479</sup>**

Approximately half of employment growth is due to the increasing number of employees in state-financed public work programmes<sup>480</sup> in which working conditions, including minimum wages, are far worse than in ordinary employment relationships.<sup>481</sup> Also, the increase of part-time employment is partly due to the illegal practice according to which employers request the conversion of full-time workers' employment contracts into part-time work, in order to save personal income tax and certain social security contributions. Officially these workers are considered to be part-time workers, although they informally work full time, and receive a certain portion of their wages 'under the table'.<sup>482</sup> In some sectors it is becoming a rather widespread practice, e.g. in retail.

Despite the slow increase, the level of part-time work is still low compared to Western-European Member States. There are several reasons for the low portion of part-time employment in Hungary. On the employees' side the most significant reasons are that part-time workers cannot earn (*pro rata temporis*) wages that would be sufficient to cover the cost of living due to wages being generally low,<sup>483</sup> and the low social status of part-time work. Employers are also reluctant to offer part-time jobs, because the amount of social security contributions to be paid for part-time workers is not proportionally lower than that for full-time workers. Also, some elements of wages (work clothing, public transportation) and other costs (costs of accounting, logistic, and organisation of work) are calculated per capita and not according to working time, which makes part-time employment more expensive than full-time

<sup>474</sup> The statistical and legal definitions of part-time work are identical. Legal definition: 92 (5) of Act No. I of 2012 on Labour Code (further on: LC). For statistical definition see [http://www.ksh.hu/apps/meta\\_objektum?p\\_lang=EN&p\\_menu\\_id=220&p\\_ot\\_id=200&p\\_obj\\_id=1321&p\\_session\\_id=82780076](http://www.ksh.hu/apps/meta_objektum?p_lang=EN&p_menu_id=220&p_ot_id=200&p_obj_id=1321&p_session_id=82780076), accessed 7 May 2013.

<sup>475</sup> [http://www.ksh.hu/docs/hun/xstadat/xstadat\\_eves/15\\_74\\_abra\\_12.pdf](http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/15_74_abra_12.pdf) (own calculation from statistical data), accessed 26 June 2013.

<sup>476</sup> [http://www.ksh.hu/docs/hun/xstadat/xstadat\\_eves/15\\_74\\_abra\\_12.pdf](http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/15_74_abra_12.pdf), accessed 26 June 2013.

<sup>477</sup> T. Egedy *A gazdasági válság hatásai városok és vidéken*, <http://www.ksh.hu/docs/hun/xftp/terstat/2012/04/egedy.pdf>, accessed 26 June 2013.

<sup>478</sup> <http://www.ksh.hu/docs/eng/xftp/gyor/fog/efog21303.pdf>, accessed 7 May 2013.

<sup>479</sup> [http://www.ksh.hu/docs/hun/xstadat/xstadat\\_eves/j\\_qf008.html](http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/j_qf008.html), accessed 7 May 2013.

<sup>480</sup> A KSH jelenti 2012. I.- IV. Gazdaság és társadalom. (The Central Statistical Office reports. 2012 2012. I.- IV. Economy and Society) <http://www.ksh.hu/docs/hun/xftp/gyor/jel/jel1212.pdf>, p. 58, accessed 7 May 2013.

<sup>481</sup> See the Ombudsman's report on *Dignity of work*, AJB Projektfüzetek A Munka Méltósága projekt 2013/4.

<sup>482</sup> See the above table.

<sup>483</sup> The amount of average gross earnings was EUR 751 (HUF 223 100) in the first quarter of 2013. <http://www.ksh.hu/docs/eng/xftp/gyor/let/elet21302.pdf>, accessed 7 May 2013. Exchange rate is as at 13 June 2013: <http://www.mnb.hu/arfolyamok>.



employment.<sup>484</sup> According to a case study, the cost of someone working 6 hours per day was 83.8 % of that of a full-time employee who works 8 hours daily.<sup>485</sup>

Approximately one quarter of part-time workers would like to work in full-time employment. For the other three quarters, it is an optimal form of employment, mostly because of their health conditions (20.5 %), school attendance (5 %), or not desiring to work longer hours (25.5 %).<sup>486</sup>

There are sectors where part-time work is more frequent: in the private sector in retail and tourism, where part-timers are usually hired to meet the temporary (weekly or seasonal) work demand of employers, frequently in the form of fixed-term contracts. In the public sector, part-timers are more frequent in healthcare and education. All these tendencies show a gender-related segmentation of part-time employment.

Younger generations are overrepresented in part-time work: in 2009 the ratio of part-time workers in the age group of 15-34 among non-students in services was 21.6 % for first employment,<sup>487</sup> and 34.6 % for second or further employment relationships.<sup>488</sup>

Due to the low level of wages, full-time employees rather frequently take an additional part-time job, either in a form of employment or in self-employment, which leads to an extreme level of overwork. This is quite widespread in sectors where women are overrepresented (education, healthcare, retail). It is also frequent for people, who otherwise have a proper social security status (students, pensioners), to take a part-time job, in many cases in the form of unregistered employment.

Gender (usually combined with another discriminatory factor, e.g. age) is one of the most common grounds of labour market discrimination, according to a statistical survey in 2012. Female gender and family circumstances constituted labour market discrimination in 27.4 % of cases, especially affecting the age group of 30-40. The situation is even worse for older women: 63 % of the unemployed women between 50 and 64 believed that they suffered some sort of discrimination in their application for a job, or losing their job, or arranging official matters. The comparable ratio among men was 47 %, which is still high, but shows the gender aspect in discrimination, in addition to age.<sup>489</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

In Hungarian employment policy part-time work is approached as a method to improve the employment rate. In the Hungarian Labour Plan (*Magyar Munka Terv*) issued by the Government in 2011 it was pointed out that the participation of mothers of small children in the labour market is much lower than that in other Member States, but this issue did not come up again with regard to part-time work. Instead, it was emphasised that part-time work among students and pensioners is very low although they are considered to be a major reservoir of part-time workers in Western-European Member States. It was also diagnosed that the usual working-time schedule of part-timers is inadequate: they usually work 4 or 6 hours per day, although one or two full working days would be more cost effective.<sup>490</sup> Later on it was

<sup>484</sup> A. Seres 'A részmunkaidős foglalkoztatás tendenciái és terjedésének tényezői az Európai Unióban és Magyarországon' (Tendencies of part-time employment and the factors of its distribution both in the European Union and Hungary) *Műhelytanulmányok Discussion Papers* Institute of Economics, Hungarian Academy of Sciences Budapest, 2010 Mt-Dp, 2010/10, <http://econ.core.hu/file/download/mtdp/MTDP1010.pdf>, accessed 3 July 2013.

<sup>485</sup> A. Seres (2010) p. 98.

<sup>486</sup> Seres (2010) pp. 89 and 93.

<sup>487</sup> [http://www.ksh.hu/docs/hun/xtabla/atmenet/tablam092\\_12.html](http://www.ksh.hu/docs/hun/xtabla/atmenet/tablam092_12.html), accessed 7 May 2013.

<sup>488</sup> [http://www.ksh.hu/docs/hun/xtabla/atmenet/tablam092\\_13.html](http://www.ksh.hu/docs/hun/xtabla/atmenet/tablam092_13.html), accessed 7 May 2013.

<sup>489</sup> *Munkaerő-piaci diszkrimináció. Statisztikai Tükör*, 2012/81. Central Statistical Office, 30 October 2012.

<sup>490</sup> [http://www.kormany.hu/download/7/03/40000/Nemzeti\\_munkaterv.doc](http://www.kormany.hu/download/7/03/40000/Nemzeti_munkaterv.doc), p. 13, accessed 28 May 2013.



mentioned that reconciliation of work and family should also be facilitated, but without elaborating on the issue.<sup>491</sup>

Part-time work was not mentioned in the latest CEDAW report.<sup>492</sup>

### 2.1.2. *Equal treatment*

Article 8 point r. of Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities prohibits direct discrimination based on part-time employment.

Labour law does not differentiate between full-time and part-time workers, employees enjoy the same (very weak) legal protection according to Act No. I. of 2012 in the new Labour Code. No groups of employees are excluded from the definition of worker, and that of part-time worker. There are no specific regulations in this regard for small and medium-sized enterprises either.

The national basic pay must be provided *pro rata temporis* to part-time workers. As the national minimum wage is rather low for full time employees with primary education EUR 340 (HUF 98 000), and for jobs requiring secondary education EUR 395 (HUF 114 000),<sup>493</sup> a *pro rata temporis* minimum wage of part-timers are far below the living expenses. Other regulations, e.g. regarding overtime supplements, workers' representatives and dismissals are not discriminatory either, although in practice part-timers' access to training and promotion is far worse than that of full-timers. This is related to the composition of the part-time workforce: usually unskilled or semi-skilled workers are employed in simple jobs, and consequently the employer does not need them to improve their skills. Furthermore, from an economic point of view, the returns on training expenses are quicker and higher if the employee works full time.<sup>494</sup>

### 2.1.3. *Organisation of working time*

The stereotype that part-time work is best for women with small children is usually in contrast with the real work demands of employers. In Hungary at least, employers tend to employ unskilled or semi-skilled workers as part-timers in simple jobs to meet daily fluctuations in their work demand especially in the evenings or early mornings, which is not usually suitable for women with small children.<sup>495</sup>

The new Labour Code introduced further flexibility in working-time arrangements, in order to promote the employers' needs in this regard. Employers are not legally obliged to take into account the employee's needs related to time schedules to the extent possible.

The rules relating to work schedules (working arrangements) are laid down by the employer.<sup>496</sup> In 'flexible working arrangements', the employer permits the employee to individually schedule at least half of his/her daily working time, but the purpose of such arrangements is to meet the needs of the unique characteristics of the job or the work to be done.<sup>497</sup>

The rule on the minimum of four hours of working time scheduled per day is not applicable to part-time work, so it is allowed to call in a part-timer to work for only one or two hours.<sup>498</sup>

Part-timers who are employed to work only on Saturdays and Sundays (which is very frequent in retail among women), may be scheduled for work on Sundays as regular working time.<sup>499</sup>

<sup>491</sup> [http://www.kormany.hu/download/7/03/40000/Nemzeti\\_munkaterv.doc](http://www.kormany.hu/download/7/03/40000/Nemzeti_munkaterv.doc) p. 53, accessed 28 May 2013.

<sup>492</sup> [http://noierdek.miria.hu/wp-content/uploads/2013/03/CEDAW.C.HUN\\_CO\\_7-8-1.doc](http://noierdek.miria.hu/wp-content/uploads/2013/03/CEDAW.C.HUN_CO_7-8-1.doc), p. 5, accessed 28 May 2013.

<sup>493</sup> Government Decree No. 390/2012. (XII. 20.) on the national minimum wage. Exchange rate is as at 30 May 2013.

<sup>494</sup> A. Seres (2010) p 87.

<sup>495</sup> See note 484.

<sup>496</sup> Article 96(1) LC.

<sup>497</sup> Article 96(2) LC.

<sup>498</sup> Article 99(1) LC.

<sup>499</sup> Article 101(1) point f. This Article lists several categories of workers whose work on Sundays is considered as regular working hours. According to point i., at employers engaged in commerce and tourism, any employee (not only those mentioned in point f.) could be ordered to work on Sundays as regular working time.

These workers are not entitled to any wage supplements.<sup>500</sup> There are certain other categories of workers whose work on Sundays is also carried out in regular hours, although they are entitled to a 50 % wage supplement,<sup>501</sup> which is still lower than the 100 % wage supplement which would be paid for irregular working time.<sup>502</sup>

For part-timers, overtime may be ordered proportionately: in full-time jobs two hundred and fifty hours of overtime work can be ordered in a given calendar year, while this threshold is proportionately lower for part-time work.<sup>503</sup>

The employee's individual needs related to time schedules are taken into account in only one regard: the employee may request the conversion of his/her contract from full-time into part-time work and vice versa. According to Article 61(1) point a. LC, employers are to inform workers concerning jobs for which such modification is possible. The employee may propose such a modification to his/her contract, to which request the employer is obliged to respond in writing within fifteen days. The response of the employer falls within their prerogatives, although the general legal regulations must be applied, including rules on equal treatment and prohibition of misuse of the law. If the employee considers that these rules have been violated, the decision of the employer might be challenged before an administrative or a labour court<sup>504</sup> or before the Equal Treatment Agency (ETA). There is only one case where the employer is obliged to convert the employment contract from full-time into part-time (equal to half of the normal working hours) in response to the employee's request: when a parent returns to work from unpaid leave before the child reaches the age of three and he/she requests the conversion of the employment contract into a part-time contract.<sup>505</sup>

According to the law, workers do not have a legally stipulated right to influence their working hours, for example in order to be able to meet family responsibilities, although employers in practice may accommodate such demands. Medium-sized Hungarian-owned companies seem to be the most responsive to workers' needs, due to the personal relationship among workers and managers, especially if specific working-time arrangements are requested due to health problems, without causing an inability to work.<sup>506</sup>

Part-time work and specific work schedules together may influence the level of wages: if part of the payment is made after the commercial turnover (e.g. in the form of commission); those part-timers who always work in the morning, when there are fewer buyers, will earn less than those who are able to work during the much busier evening hours.<sup>507</sup>

#### 2.1.4. Assessment

Regulations on organisation of working time focus on the interests of employers, and disregard those of employees. The philosophy behind the Hungarian regulations is that time-related needs of employees are addressed by the generous rights to unpaid leaves,<sup>508</sup> but when the employee returns to work, his/her working-time arrangements must be adjusted solely to the needs of the employer. This approach undermines the Government's intention to increase the level of employment, for example through part-time work, and restrain the spread of voluntary part-time work because it hinders reconciliation of work and family responsibilities.

Although the Hungarian Work Plan criticised the usual practice that part-timers must work a few hours every day (instead of the more economic one or two full working days per

<sup>500</sup> Workers covered by Article 101(1) point f. are not entitled to wage supplements. Article 140(1) LC.

<sup>501</sup> Workers covered by points d. (shift workers), e. (stand-by workers) and i. (workers in commerce and tourism) are entitled to 50 % wage supplements. Article 140 (1) LC.

<sup>502</sup> For irregular hours either a 100 % or a 50 % supplement plus extra rest period is provided. Article 143(3) LC.

<sup>503</sup> Article 109(1) and (2) point c.

<sup>504</sup> Article 285(3) LC.

<sup>505</sup> Article 61 (3) LC.

<sup>506</sup> [http://egyenlobanasmod.hu/tamop/data/2.4\\_Vedett\\_tulajdonsagu\\_mvall.pdf](http://egyenlobanasmod.hu/tamop/data/2.4_Vedett_tulajdonsagu_mvall.pdf), accessed 30 May 2013. Such arrangements are applied, mainly for full-time workers, to make it possible for them to visit their general practitioner to get prescriptions for usual medication, or for customary treatment (e.g. physiotherapy).

<sup>507</sup> [http://egyenlobanasmod.hu/tamop/data/2.4\\_Vedett\\_tulajdonsagu\\_mvall.pdf](http://egyenlobanasmod.hu/tamop/data/2.4_Vedett_tulajdonsagu_mvall.pdf), at p.58, accessed 30 May.

<sup>508</sup> Unpaid leave for taking care of a child until the age of three, or until the age of ten for a seriously ill child; or to take care of a family member. Articles 128-131 LC. Short-term leave (a few days) could also be accommodated according to Article 55(1) point j. LC.

week), it still stipulates that ‘Work shall be scheduled for five days a week, Monday through Friday (standard work pattern)’.<sup>509</sup> It is even more contradictory that the general rule stipulating a minimum number of four working hours per day is not applicable to part-timers and making it possible to call in a part-timer to work for only one or two hours per day.

As it is usually women who take part-time jobs on Saturdays and Sundays in the retail sector (usually as a second job), the regulation that their work is done in regular hours and that they are not entitled to wage supplements raises the suspicion that these regulations constitute indirect wage discrimination.

It is also unclear why the law stipulates that for parents of children under the age of three, the conversion from full-time into part-time work must result in a part-time job equal to half of the working time. It is unclear why the number of part-time hours is stipulated by law instead of by contract between the relevant parties, especially considering the fact that one of the major legislative aims of the new Labour Code was the amendment of labour law contract regulations. Deviation from this rule is possible, because both collective agreements and individual employment contracts may depart from this rule ‘to the benefit of worker’. It is still unclear, however, what ‘to the benefit of the worker’ means: longer or shorter than ‘half of the working time’.<sup>510</sup>

## 2.2. Collective agreements

In Hungary almost all collective agreements are concluded at company level, the number of sectoral collective agreements is very small (4 to 5, depending on the year), while there are no national-level collective agreements whatsoever.

Collective agreements, if at all, only regulate very specific aspects of part-time work. In the recent economic crisis, part-time work might be used to reduce the cost of employment, facilitating the avoidance of mass layoffs, and in this regard sometimes the framework for such modifications of employment contracts might be regulated by collective agreements.

Generally, regulations in collective agreements are not proactive, but are usually worded as implementing regulations related to the Labour Code, therefore not dealing with part-time work in order to meet the specific needs of certain groups of employees.

Five to ten years ago it was rather common for company collective agreements to exclude part-timers from the enjoyment of certain employment-related rights (participation in elections for works councils, and certain work-related allowances), but this practice became increasingly less frequent following the clarification of equal treatment requirements in this regard in legal literature and case law, in line with the reasoning in *Bötel* of CJEU.<sup>511</sup>

## 2.3. Case law

### 2.3.1. Cases/opinions of equality bodies

The Supreme Court issued guidelines on the equal treatment of part-timers in relation to the right to annual holidays. Resolution No. 19 of the Labour Collegium of the Supreme Court (MK 19) first of all pointed out that part-timers enjoy the same rights to annual holidays as full-timers: part-timers were entitled to stay away from work for the same period of time (calculated according to their age) regardless of their average daily working time, only their payment was proportionally lower than that of full-time employees. Resolution No. 18 of the Labour Collegium of the Supreme Court (MK 18) declared that employees were entitled to annual paid holidays in every legal relationship, in second jobs as well.

The number of gender-related cases submitted to the ETA is constantly and slowly decreasing. No case law has been published on the issue of part-time work yet.<sup>512</sup>

<sup>509</sup> Article 97(2) LC.

<sup>510</sup> Article 61(3) LC.

<sup>511</sup> Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin v Bötel* [1992] ECR I-3589.

<sup>512</sup> Possibly the combined result of a low number of gender-related cases generally, a low ratio of part-time work, and the dependency of publication resting on the content of a case; only interesting (and not all) cases are published.

### *2.3.2. Assessment*

The aforementioned Resolutions of the Supreme Court first of all stopped the illegal practice of employers allowing their part-time workers proportionally fewer days of paid holidays. These Resolutions had a spill-over effect, because they gave examples of reasoning on how to handle equal rights and proportional entitlements at the same time.

### *2.4. Involvement of other parties*

It is still a widely held view that women should be entitled to more flexible working-time arrangements because they are responsible for family matters. The idea that equal sharing of family responsibilities is key to combating gender discrimination is still not widely accepted. The recent conservative Government reinforces traditional gender roles, especially in their political communications, and to a lesser extent, in their political and legal actions.

## **3. Statutory social security and pension rights**

### *3.1. Exclusions*

All hours worked constitute the ‘period of service’ for the purposes of social security, for which contributions have been paid, provided that the financial basis of contributions (usually all parts of the salary) reaches the minimum wage level. If not, only the ratio of hours worked that equals the ratio of the salary earned and the minimum wage is considered to constitute ‘service’. Part-timers who work at least half of the statutory working time (four hours per day) are treated as if they work in a full-time job for the calculation of the period of service, provided that the salary for which contributions are paid reaches the minimum wage level. If not, the period of service is calculated proportionally.<sup>513</sup>

### *3.2. Assessment*

The extremely low wages that can be earned in part-time jobs determine the low amount of pension, as well, and therefore push part-timers into life-long poverty. On the other hand, if the part-timer belongs to a higher income group, the regulations on the period of service treat his/her hours more favourably than those of full-timers, provided that contributions have been paid for at least as much as the minimum wage.

## **4. Self-employment**

There are no data available on this issue. As part-time self-employment is frequently a second job due to low wages (compared to the cost of living) in many jobs where the majority of workers are women, self-exploitation, caused by unusually long total working hours and/or unusually intensive work, which might cause a strain on health, seems to be the major disadvantage suffered in this regard.

## **5. Access to goods and supply of goods and services**

There are no data available on this issue.

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<sup>513</sup> Article 39. Act No. LXXXI. of 1997 on State Pension, and Articles 56-57 of Government Decree No. 168/1997. (X. 6.) on its implementation.

## 6. Are there any gaps in national law?

### 6.1. Gaps in the area of (access to) employment

The ETA may impose rather weak sanctions (fines, publication of their decisions), and is not entitled to impose dissuasive sanctions such as reinstatement into the original job or payment of compensation.

#### 6.1.1. Recruitment process

Legally prohibited questions are frequently asked about family status, number of children and available help, but as many people are usually directly or indirectly affected by these circumstances, employers seem to be much more tolerant in this regard than they are towards Roma men, for example.<sup>514</sup>

#### 6.1.2. Employment conditions

Gender stereotypes allowing the belief that women need more flexible working-time arrangements to facilitate their work in the household are still deeply rooted in Hungary.<sup>515</sup> Employers are not obliged to accommodate employees' needs towards flexible working-time arrangements, as explained in 2.1. above.

#### 6.1.3. Termination of the employment contract

Part-timers enjoy the same (usually very weak) legal protection against unfair dismissal as full-timers. By way of exception, several groups of workers are entitled to reinstatement into their previous jobs in the event of unfair dismissal: first of all women whose right to protection against dismissal has been violated during pregnancy and/or maternity leave and other child-related leaves.

## II. FIXED-TERM WORK

### 1. General information

The ratio of fixed-term employment is not very high in Hungary (in 2012 9.5 %), although it is slowly and constantly growing. In the Hungarian statistical system, open-ended and fixed-term employment is distinguished among employees in dependent labour relationships:<sup>516</sup> the number of employed people was 3 424 700 in 2012, of which women represented 47.8 %. The position of women is slightly better than that of men with regard to fixed-term employment: the number of workers in open-ended work relationships is 3 101 500, of which women are 48.3 %, while the number of workers working under fixed-term contracts is 323 200, of which the ratio of women is 43.2 %.<sup>517</sup>

In the first quarter of 2013 the number of fixed-term employees was 287 400, which is 18 900 higher than in the first quarter in 2012 (in this regard the ratio of 2012/2013 data is 107 %, while the increase in open-ended contracts was only 100.4 %).<sup>518</sup>

Although the number of fixed-term contracts is still relatively low overall, there is a high and increasing rate of fixed-term contracts among new hires, particularly new hires from unemployment. More than 30 % of newly hired workers are given only fixed-term contracts,

<sup>514</sup> [http://egyenlobanasmod.hu/tamop/data/2.2\\_english\\_summary.pdf](http://egyenlobanasmod.hu/tamop/data/2.2_english_summary.pdf), accessed 30 May 2013.

<sup>515</sup> Women in part-time jobs spend more hours on work (paid and unpaid work at home together) than full-time male employees (65 compared to 54 hours weekly). Full-time women work altogether 65 hours per week, which clearly shows that work at home is usually done by women. Such division of work is widely accepted by women: [http://egyenlobanasmod.hu/tamop/data/2.4\\_Vedett\\_tulajdonsagu\\_mvall.pdf](http://egyenlobanasmod.hu/tamop/data/2.4_Vedett_tulajdonsagu_mvall.pdf), pp. 61-65.

<sup>516</sup> Dependent labour is a narrower category than being employed, which covers civil-law relationships as well.

<sup>517</sup> [http://www.ksh.hu/docs/hun/xstadat/xstadat\\_eves/15\\_74\\_abra\\_12.pdf](http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/15_74_abra_12.pdf), accessed 7 May 2013.

<sup>518</sup> <http://www.ksh.hu/docs/eng/xftp/gyor/fog/efog21303.pdf>, accessed 7 May 2013.

while the ratio for new hires from unemployment is even higher: more than 50 %.<sup>519</sup> Among the younger generations fixed-term contracts are more frequent than among older generations: among non-studying young women between 15 and 34, the ratio of fixed-term contracts was 8.7 % for first employment (men: 7 %, average: 7.8 %), and 20.7 % for second or further employment (men: 16.8 %, average: 18.4 %).

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

There is no specific employment policy in relation to fixed-term jobs. Employment promotion measures increase the ratio of fixed-term jobs, because employees in public work programmes and in other state-supported programmes are usually employed under fixed-term contracts.

The rules explained in 2.1. above in relation to Article 61 LC apply to fixed-term workers. Employers are obliged to inform fixed-term workers on positions regarding which there is a possibility to convert the contract into an open-ended one. If the employee initiates modification of his/her contract, the employer is obliged to respond to the worker's request in writing within fifteen days, but there is no legal obligation to grant the request.

#### 2.1.2. Equal treatment

Article 8 point r. of Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities prohibits direct discrimination on the ground of the 'fixed term of the employment relationship or other relationship aimed at work'.

#### 2.1.3. Successive fixed-term contracts

The duration of a fixed-term employment relationship must not exceed five years, including the duration of an extended relationship and that of another fixed-term employment relationship concluded within six months of the termination of the previous fixed-term employment relationship.<sup>520</sup> A fixed-term employment relationship may be extended, or another fixed-term employment relationship may be concluded within six months from the time of termination of the previous one based on the employer's legitimate interests. The agreement may not violate the employee's legitimate interests.<sup>521</sup>

Where an employment relationship is subject to official approval (e.g. for foreigners), it may only be concluded for the duration specified in the authorisation. If the authorisation is extended, the duration of the new fixed-term employment relationship may exceed five years together with the duration of the previous employment relationship.<sup>522</sup>

#### 2.1.4. Assessment

In practice it is quite frequent for fixed-term contracts to be used to avoid payment of dismissal benefits, this way violating employees' legitimate interests. The new Labour Code might reinforce this unlawful practice due to the fact that it has considerably reduced the sanctions to be applied in the event of unlawful termination of employment contract.

The new Labour Code, by now allowing the extension of the probationary period via collective agreements from three to six months in order to meet employers' seasonal workforce demand, has created the possibility to use such an extended probationary period instead of lawful fixed-term contracts. There seems to be an increasingly widespread practice of employers employing one worker after the other just for the probationary period. Being

<sup>519</sup> B. Nacsa 'Fixed-Term Contracts in Law on Paper and in Practice. Remarks to the Flexicurity Debate.' *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae Sectio Iuridica Tomus XLIX. Annus 2008* p. 352, [http://www.ajk.elte.hu/file/Annales\\_2008\\_15\\_Nacsa.pdf](http://www.ajk.elte.hu/file/Annales_2008_15_Nacsa.pdf), accessed 7 May 2013.

<sup>520</sup> Article 192(2) LC.

<sup>521</sup> Article 192(4) LC.

<sup>522</sup> Article 192(3) LC.

employed time after time only for the probationary period, and being fired without knowing why undermines workers' self-esteem and faith in employment relationships.

## 2.2. Collective agreements

A recent study on the practice of the new Labour Code has shown that in collective negotiations employers use the new option to request an extension of the probationary period, making it a total of six months. Trade unions seem to require special circumstances to underpin the need for extension of the probationary period (e.g. months-long on-the-job training).<sup>523</sup>

As fixed-term employees are more difficult to organise, trade unions try to limit the ratio of fixed-term contracts in collective agreements. In an automobile supplier factory's collective agreement, for example, the maximum for fixed-term workers was (a quite high) 50 %.<sup>524</sup>

An example of a good practice is a fruitful cooperation that has developed between two factories with seasonal production in different peak seasons in the same region and an employment agency. The workers are employed by the agency and hired out only to the companies in their different peak seasons. This arrangement provides the plants with a seasonal workforce, and the employees are employed by the agency on an open-ended basis.<sup>525</sup>

## 2.3. Case law

Case law developed by the ETA on the obligation to state the reasons for dismissal even during the probationary period, if the dismissal is challenged on the ground of discrimination, might play an important role in the prevention of abusive use of probationary periods (to replace a lawful fixed-term contract).<sup>526</sup>

## 3. Statutory social security and pension rights

Working on a fixed-term contract does not influence social security and pension rights.

# III. HORIZONTAL PROVISIONS

## 1. Effectiveness

Rules providing proper legal protection to part-time and fixed-term workers are mostly properly transposed into the Hungarian legal system, although effective enforcement is not ensured by the ETA because the authority is not entitled to impose effective sanctions.

## 2. Vulnerability, multiple/intersectional discrimination

Sex discrimination, if combined with other protected attributes, can lead to seriously harmful situations: older women especially, and to a lesser extent women at childbearing age, frequently become the victim of discrimination. Similarly, women belonging to the Roma minority are especially exposed to poverty due to the rarity of workplaces in the countryside, and workplace discrimination.

<sup>523</sup> M. Laki et al. '*Az új Munka Törvénykönyvének hatása a munkavállalók és a munkáltatók közötti kapcsolatokra Kutatási zárójelentés*' (The impacts of the New Hungarian Labour Code on the employee - employer relationship. Research Report) *Műhelytanulmányok Discussion Papers* Institute of Economics, Hungarian Academy of Sciences Budapest. MT-DP – 2013/2.

<sup>524</sup> See note 42. Case A, pp. 379-383.

<sup>525</sup> See note 42. Case B, pp. 379-383.

<sup>526</sup> [http://www.egyenlobanasmod.hu/data/Hirlevel\\_EBH\\_2012\\_aprilis.pdf](http://www.egyenlobanasmod.hu/data/Hirlevel_EBH_2012_aprilis.pdf), accessed 30 May 2013.



## I. PART-TIME WORK

### 1. General information

The majority of workers on the Icelandic labour market are employed on a full-time basis under an open-ended employment contract.<sup>527</sup> Other employment arrangements, such as part-time work and fixed-term work, are permissible and exist in various sectors of the labour market. The criterion for part-time work applies to those who work at least one hour per week but less than 35 hours. Part-time employment is defined by the Icelandic Confederation of Labour (ASI) as follows: An employee is considered to work part time if the amount of working hours, whether based on the working part of the day or in a different manner, is less /lower than the contractual obligation or legally determined working hours of an employee working full time. An employee working part time enjoys the same contractual and acquired rights, holidays, sick pay and days because of an accident, the same notice of termination of employment, acquired rights to promotion.<sup>528</sup>

In 2012 81.4 % of men were active on the labour market and 76.1 % of women.<sup>529</sup> The percentage of employees working part time in 2012 was 24 %. This is the average percentage in recent years but the percentage of those working part time was lower before the financial crisis hit with the collapse of the banking system in 2008.<sup>530</sup> Those working full time decreased by 13 400 in 2009 but those working part time increased by 2 500. This trend continued in 2010 when full-time positions decreased by 2 500 and part-time positions increased by 2 000. In 2011 there was a turnaround and those working full time increased by 2 500, those working part time decreased by the same amount.<sup>531</sup> The number of full-time positions in 2011 was 127 200 accounting for 76 % of the total workforce. This percentage was 77-79 % in the years preceding the financial crisis starting in 2008.

The State is the largest employer in Iceland.<sup>532</sup> According to the National Statistics roughly 179 000 persons are employed on the Icelandic labour market and state employees account for 12 %. State employees amount to around 22 000 but the actual positions are fewer as many are doing part-time work.<sup>533</sup>

The percentage of female employment (in Reykjavík, the capital, and surrounding areas) was 78.7 % in 2012; in the countryside it was 76.1 % and hence on average 77.7 %. Around 35 % of these women worked part time in 2012. This percentage had been somewhat higher in the preceding years, i.e. 37.7 % in 2010 and 36.8 % in 2003.

There is no reliable sex-segregated data on part-time work in Iceland. It is however evident that some job sectors are predominated by women, in particular jobs related to caring for the sick, elderly and children. The growing travel industry in Iceland is also characterised by part-time work and ‘low-paid women’s jobs’.<sup>534</sup> According to the VR (Commercial and Office Workers Union), composed of almost 30 000 members in more than 100 occupations, more women are working part time than men.

There are no national statistics on the percentage of involuntary part-time work. In the wake of the financial crisis in 2008 many companies pressed their employees at the initiative

<sup>527</sup> *Icelandic labour law: basic rights and obligations* Icelandic Confederation of Labour (ASI) October 2009 at p. 29.

<sup>528</sup> [http://www.asi.is/desktopdefault.aspx/tabid-121/182\\_read-803/](http://www.asi.is/desktopdefault.aspx/tabid-121/182_read-803/), accessed 24 March 2013.

<sup>529</sup> <http://www.hagstofa.is/Pages/95?NewsID=9337>, accessed on 24 March 2013.

<sup>530</sup> <http://www.hagstofa.is/Pages/95?NewsID=9337>, accessed on 24 March 2013.

<sup>531</sup> <http://www.sa.is/frettir/almennar/nr/5430/>, accessed 24 March 2013.

<sup>532</sup> <http://www.fjarmalaraduneyti.is/starfsmenn-rikisins/yfirlit/almenn/starfsm-stofnanir/>, accessed on 14 April 2013.

<sup>533</sup> Parliamentary discussions 12 October 2011 found on [http://www.althingi.is/altext/raeda/140/rad20111012\\_T152837.html](http://www.althingi.is/altext/raeda/140/rad20111012_T152837.html), accessed on 6 April 2013.

<sup>534</sup> Director of the Institute of Economic Studies, University of Iceland, lecture on 16 October 2008.

of the authorities, and the SA-Confederation of Icelandic employers, to reduce their working time instead of being dismissed.<sup>535</sup>

The 2013 gender equality programme of the Landspítali University Hospital<sup>536</sup> reveals that women are in the majority among those working part time (57 %) as opposed to 35 % men.<sup>537</sup> The information on part-time work is published under the heading ‘reconciliation of work and family life’ along with the fact that women are taking longer parental leave than men – using 88 % of the parental leave as opposed to only 12 % of men and that women are more often absent due to sickness. In the above the gap between women and men is growing.<sup>538</sup>

Part-time work for women was for a long time associated with family responsibilities.<sup>539</sup> Women, active on the labour market, are still the main care providers within the family.<sup>540</sup> Some corporations have provided their staff with the alternative of working part time with good results, like Icelandair where flight attendants can choose whether they work part time or full time. Apparently, the company is at present trying to persuade more flight attendants to work full time as the part-time option has appealed to so many.

Indirect sex discrimination is a concomitant of the financial crisis. Pay surveys during the crisis have revealed that the wages of women are decreasing, in particular in women-dominated job sectors.<sup>541</sup> During the first couple of years of the financial crisis state jobs reduced by 540 and of these 85 % had been occupied by women.<sup>542</sup> Women constitute 80 % of employees at the Landspítali University Hospital, one of the largest public employers in Iceland and this is where the gender-based pay gap has been growing.<sup>543</sup> The low pay of health-care assistants has been brought to public attention and the fact that they often only have access to part-time work.<sup>544</sup> Recently an enterprise agreement between nurses and the Landspítali University Hospital was approved and subsequently other job sectors where women are over-represented have demanded pay corrections; these women-dominated spheres include biomedical scientists, radiologists and unskilled workers engaged in kitchen duties and cleaning as well as the health-care assistants who on average receive EUR 1 742 (ISK 270 000) per month for full-time work. Health-care assistants lag behind due to the fact that nurses have not been keeping up with other professions in receiving pay rises. Health-care assistants have in general had access to 75 % of the total working time. Their spokesperson contends that their employer reasons that these are difficult jobs and are hence too demanding for full-time work. They are expected to live off wages for 40-50 % part-time work, ‘although they consider that the amount of the workload is more than the agreed working time’; they furthermore consider that their pay is ‘below the living wage’, says their spokesperson.<sup>545</sup>

The statistical series published in 2012 does not show the pay gap in relation to part-time and fixed-time work in particular, but when assessed according to the full-time equivalent the

<sup>535</sup> <http://www.pressan.is/Frettir/LesaFrett/skert-starfshlutfall-thydir-skertar-atvinnuleysisbaetur-gengur-a-botarettinn-med-skerdingu>, accessed 27 March 2013.

<sup>536</sup> <http://www.landspitali.is/tungumal/english/>, accessed 27 March 2013. In accordance with Article 18 of the Gender Equality Act No. 10/2008.

<sup>537</sup> [http://www.landspitali.is/library/Sameiginlegar-skrar/Gagnasafn/Um-Landspitala/Stefna-og-starfsaaetlanir/jafnrettisaetlanun\\_2013.pdf](http://www.landspitali.is/library/Sameiginlegar-skrar/Gagnasafn/Um-Landspitala/Stefna-og-starfsaaetlanir/jafnrettisaetlanun_2013.pdf), accessed 6 April 2013.

<sup>538</sup> [http://www.landspitali.is/library/Sameiginlegar-skrar/Gagnasafn/Um-Landspitala/Stefna-og-starfsaaetlanir/jafnrettisaetlanun\\_2013.pdf](http://www.landspitali.is/library/Sameiginlegar-skrar/Gagnasafn/Um-Landspitala/Stefna-og-starfsaaetlanir/jafnrettisaetlanun_2013.pdf), accessed 6 April 2013.

<sup>539</sup> Cf. [http://www.menntamalaraduneyti.is/media/MRN-pdf/Kynogjafnretti-5\\_mars2010.pdf](http://www.menntamalaraduneyti.is/media/MRN-pdf/Kynogjafnretti-5_mars2010.pdf), accessed 15 April 2013.

<sup>540</sup> Cf. [http://www.menntamalaraduneyti.is/media/MRN-pdf/Kynogjafnretti-5\\_mars2010.pdf](http://www.menntamalaraduneyti.is/media/MRN-pdf/Kynogjafnretti-5_mars2010.pdf), accessed 15 April 2013.

<sup>541</sup> [http://www.mbl.is/frettir/innlent/2011/12/07/laun\\_kvanna\\_laekka/](http://www.mbl.is/frettir/innlent/2011/12/07/laun_kvanna_laekka/), accessed 6 April 2013. See also: <http://www.mbl.is/media/41/4041.pdf>, accessed 7 June 2013.

<sup>542</sup> Parliamentary discussions 12 October 2011: <http://www.althingi.is/altext/raeda/140/rad20111012T152837.html>, accessed 6 April 2013.

<sup>543</sup> [http://www.landspitali.is/library/Sameiginlegar-skrar/Gagnasafn/Um-Landspitala/Stefna-og-starfsaaetlanir/jafnrettisaetlanun\\_2013.pdf](http://www.landspitali.is/library/Sameiginlegar-skrar/Gagnasafn/Um-Landspitala/Stefna-og-starfsaaetlanir/jafnrettisaetlanun_2013.pdf), accessed 6 April 2013. See also: <http://www.ruv.is/frett/osatt-vid-fylgi-flokksins>, accessed 16 April 2013.

<sup>544</sup> <http://www.ruv.is/frett/sjukralidar-lifa-ekki-af-laununum>, accessed 25 March 2013.

<sup>545</sup> <http://www.ruv.is/frett/sjukralidar-lifa-ekki-af-laununum>, accessed 25 March 2013.

average pay gap is 9.5 %.<sup>546</sup> An example of the pay gap in a women-dominated job sector concerns office workers and teachers, where women make up 87 % of the workforce but men were earning on average (statistics 2008) EUR 2 385 (ISK 369 410) while women were earning on average EUR 1 600 (ISK 247 848) per month.<sup>547</sup>

## 2. Legislation, (national collective agreements and case law)

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time workers, according to a general provision in collective agreements, are to be treated equally with full-time workers on a pro-rata basis.<sup>548</sup> Contractual and statutory rights such as those concerning sick leave, payments for holidays etc. are based on proportional service and a customary working day of the worker concerned.

Directive 97/81/EC (part-time work) is implemented by Act No. 10/2004 on employees in part-time work, as amended, and the Collective Agreement between the Confederation of Icelandic Employers (SA) and the Icelandic Confederation of Labour (ASI) on part-time work. The objective of the law is to eliminate any discrimination against part-time workers and at the same time to increase the options for working part time given the interest of both employers and employees. The law explicitly provides that employers must take into consideration the wishes of an employer to increase or reduce his/her working hours.<sup>549</sup> In respect of employment conditions, part-time workers cannot enjoy lesser terms and may not be treated in a less favourable manner than comparable full-time workers solely because they work part time, unless the different treatment is justified on objective grounds.<sup>550</sup> Having worked part time previously, or currently working part time, should not prevent a worker from being promoted, whether the new post is full time or part time. A worker's refusal to transfer from full-time to part-time work or vice versa will, according to Act No. 10/2004 Article 4(3), not in itself constitute a valid reason for dismissal.

The Act on payments to parents of chronically-ill or severely disabled children, No. 22/2006 covers the rights of parents on the labour market, subject to certain conditions (Article 8 of the law), and gives them a joint right, together with the other parent, to income-related payments if they have to withdraw from paid employment due to the serious and chronic illness of a child or a child's disability.<sup>551</sup> A wage earner is defined by the Act as any person who engages in paid employment in the service of others for at least 25 % of full-time employment each month.<sup>552</sup>

The main legislation on employment policy in Iceland is Act No. 55/2006 on labour market measures and Act No. 54/2006 on unemployment insurance. The maximum period for

<sup>546</sup> <http://www.hagstofa.is/?PageID=2594&src=/temp/Dialog/varval.asp?ma=VIN0200%26ti=Laun+eftir+laun%FEegah%F3pi+og+kyni+2008%2D2012+++++%26path=../Database/vinnumarkadur/laun/%26lang=3%26units=%DE%FAsundir%20kr%F3na>, accessed 15 April 2013. See also: <https://hagstofa.is/lisalib/getfile.aspx?ItemID=13798>, accessed 15 April 2013.

<sup>547</sup> [http://www.menntamalaraduneyti.is/media/MRN-pdf/Kynogjafnretti-5\\_mars2010.pdf](http://www.menntamalaraduneyti.is/media/MRN-pdf/Kynogjafnretti-5_mars2010.pdf), accessed 15 April 2013.

<sup>548</sup> A collective agreement between the VR and the Confederation of Icelandic Employers (SA) valid to 1 February 2014 on <http://www.vr.is/english/collective-agreement-2011/>, accessed 7 June 2013. To give an example of a special agreement for people working in receptions between VR-Commercial and Officer Workers Union and SA-Confederation of Icelandic Employers, an employee hired on a part-time basis is paid per hour for work in excess of the agreed working hours daytime according to the daytime rate. It is not permitted to pay daytime wages for work outside the daytime work and for work on special holidays and public holidays according to such rate. See: [http://www.framsyn.is/wp-content/uploads/2011/02/kjarasamnliv\\_sa\\_feb\\_2013\\_gestamottokur.pdf](http://www.framsyn.is/wp-content/uploads/2011/02/kjarasamnliv_sa_feb_2013_gestamottokur.pdf), accessed 20 May 2013. Collective agreements provide for the payment by employers of a fixed Christmas bonus payable in December and a Holiday bonus payable from 1 May to 15 August. Those who work part time or for only a part of the year receive these premiums proportionally.

<sup>549</sup> Article 4 (b) of the Act on Part-time Workers No. 10/2004.

<sup>550</sup> Article 4 of the Act on Part-time Workers No. 10/2004.

<sup>551</sup> [http://eng.velferdarraduneyti.is/media/acrobatenskar\\_sidur/Act\\_on\\_payments\\_to\\_parents\\_of\\_chronically\\_ill\\_or\\_severely\\_disabled\\_children\\_No\\_22\\_2006\\_as\\_amended.pdf](http://eng.velferdarraduneyti.is/media/acrobatenskar_sidur/Act_on_payments_to_parents_of_chronically_ill_or_severely_disabled_children_No_22_2006_as_amended.pdf), accessed 13 April 2013.

<sup>552</sup> Cf. Article 3(d) of Act No. 22/2006.

receiving unemployment benefits is 3 years. When more people were required to work part time, in the wake of the financial crisis, an interim provision V of the Unemployment Insurance Act No. 54/2006 was introduced, which was in force until the end of 2012. Under this provision wages paid by the employer for work done in a reduced capacity did not reduce the amount of unemployment benefit.<sup>553</sup> Currently, the degree of insurance under the Unemployment Insurance Act covers the difference between the right one would have if one lost his/her whole position and the proportion thereof in which one is still employed, as from the time one lost it in part. The same applies if one loses one's job and takes another part-time job with another employer. This does not apply to those who voluntarily reduce their work to part time.<sup>554</sup> Around 10 % of those registered as unemployed are doing part-time work.<sup>555</sup>

### 2.1.2. *Equal treatment*

Article 65 of the Constitution of the Republic of Iceland No. 33/1944 provides that 'everyone shall be equal before the law and enjoy human rights irrespective of sex...'. In its paragraph 2 it explicitly states: 'men and women shall enjoy equal rights in all respects'.

The principle of equal treatment between women and men set forth in the Gender Equality Act No. 10/2008 (hereinafter GEA) means that there must be no discrimination whatsoever – direct or indirect – on grounds of gender. Concepts of discrimination are defined in Article 2 of the GEA. Affirmative action is defined as special temporary measures that are intended to improve the position of, or increase the opportunities for, women or men aimed at establishing gender equality in a specific field where either sex is at a disadvantage. In such cases it may prove necessary to give either sex temporary priority in order to achieve a balance.

The aims and definitions of the GEA are to establish and maintain equal status and equal opportunities for women and men, and thus to promote gender equality in all spheres of society. This aim is to be attained by various means laid out in Article 1 of the GEA, amongst others specifically improving the position of women and increasing their opportunities in society; working against wage discrimination and other forms of gender-based discrimination on the employment market; enabling both women and men to reconcile their work and family life and working against negative stereotypes regarding the roles of women and men.

The principle of equal pay for equal work or work of equal value between men and women is firmly embedded in the Gender Equality Act No. 10/2008. Article 19 of the GEA provides: 'Women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. By 'equal wages' is meant that wages shall be determined in the same way for women and men. The criteria on the basis of which wages are determined shall not involve gender discrimination'.

Employers are prohibited from advertising or publishing an advertisement for a vacant position indicating that a worker of one sex is preferred over the other. This does not apply, however, if the aim of the advertiser is to promote a more equal distribution of the sexes within an occupational sector, and that must then be indicated in the advertisement.

### 2.1.3. *Organisation of working time*

General principles of contract law apply to the formation of employment contracts on the private labour market. Contracts of employment that provide for poorer terms, such as minimum rates of pay, working time etc., than those provided for in the applicable collective agreement are, according to law, null and void.

If a worker is hired for longer than one month and on average for more than 8 hours per week, a written contract of employment must be entered into, or the terms of employment

<sup>553</sup> <http://www.vinnualastofnun.is/en/unemployment-benefit/entitlement-to-receive-unemployment-benefit/reduced-job-proportion--wage-earners/>, accessed 6 April 2013.

<sup>554</sup> [www.vinnualastofnun.is/en/unemployment-benefit/entitlement-to-receive-unemployment-benefit/job-proportion--wage-earners/](http://www.vinnualastofnun.is/en/unemployment-benefit/entitlement-to-receive-unemployment-benefit/job-proportion--wage-earners/), accessed 27 March 2013.

<sup>555</sup> <http://ruv.is/frett/tapa-a-thvi-ad-rada-sig-i-hlutastarf>, accessed 14 April 2013.

must be confirmed by the employer in writing, no longer than 2 months after the work has begun.<sup>556</sup>

Employers are obliged to take necessary measures to enable men and women to integrate the demands of their work and their duties towards their families. These measures aim at increasing flexibility in arranging work and working time so as to accommodate both the needs of the economy and the workers, including enabling them to re-enter employment after taking maternity/paternity leave or parental leave or periods of leave necessary to meet urgent family requirements.<sup>557</sup>

The Government Employees Act No. 70/1996 provides in Article 13 that employees have a right to flexible working hours. The head of an agency must agree to the wishes of employees in this respect as far as possible, provided it does not interfere with the service of the agency to the public. If a head of an agency rejects the request of an employee the decision may be referred to the Minister in charge. There are no statistics on how many government agencies have resorted to the measure of granting flexible hours to individual employees or the gender ratio in this respect.<sup>558</sup>

#### 2.1.4. Assessment

The long-standing high rate of women's part-time employment has been the concern of CEDAW.<sup>559</sup> Part-time work has been addressed by the CEDAW Committee.<sup>560</sup> In its concluding observations in 2008 the Committee remained concerned at the persistent and significant wage gap between women and men, which can mainly be explained as a result of indirect sex discrimination. The Committee reiterated its concern that more women than men work part time and that 'the survey on the importance of part-time employment and non-permanent jobs that are undertaken outside normal places of work has not been carried out'.<sup>561</sup>

The CEDAW Committee is also concerned that traditional practices and stereotypical attitudes about the roles and responsibilities of women and men within the family and in society persist, and considers that this could be the root cause of the disadvantaged position of women in the labour market. The Committee encourages Icelandic authorities to strengthen measures to change stereotypical attitudes about the responsibilities and roles of women in society, in order to promote the reconciliation of private and family life and work responsibilities between women and men, in accordance with articles 5 (a) and 11.1 (b) of the Convention. The Committee also recommended in 2008 that Icelandic authorities should undertake a survey on the root causes of unequal part-time employment and non-permanent jobs between women and men.<sup>562</sup> This survey has still not been carried out.

According to the Minister of Welfare there is very little information on the division of labour in the home or whether women are making more use of days off (sickness days) than men; i.e. collective agreements provide individuals with a certain amount of workdays out of 12 months due to illness or to attend to their sick children. There are no surveys on the use of flexible working hours.<sup>563</sup>

<sup>556</sup> These rules are based on Council Directive 91/533/EEC on an employer's obligation to inform workers of the conditions which are applicable to the contract or employment relationship. See: *Icelandic Labour Law: A summary of basic rights and obligations on the private labour market* ASI October 2009.

<sup>557</sup> Article 21 of the GEA No. 10/2008. See: *Icelandic Labour Law: A summary of basic rights and obligations on the private labour market* ASI October 2009.

<sup>558</sup> <http://www.althingi.is/altext/132/s/0254.html>, accessed 14 April 2013. See also: [http://www.bhm.is/media/fin/frettabref/pistill-formanns/09-0907\\_Pistill-formanns.pdf](http://www.bhm.is/media/fin/frettabref/pistill-formanns/09-0907_Pistill-formanns.pdf), accessed 14 April 2013.

<sup>559</sup> <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/89e6367c3ac1ba6fc12567b70027d9fb/740f1339911cb31f41256bae0048bdba?OpenDocument>, accessed 14 April 2013.

<sup>560</sup> <http://www.humanrights.is/frettir/nr/2251>, accessed 18 June 2013.

<sup>561</sup> <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.ICE.CO.6.pdf>, accessed 14 April 2013.

<sup>562</sup> <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.ICE.CO.6.pdf>, accessed 14 April 2013.

<sup>563</sup> <http://www.visir.is/samraeming-fjolskyldu--og-atvinnulifs-er-jafnrettismal/article/2013703169989>, accessed 13 April 2013.



The persistent pay gap is explained, on the one hand, by women working part time due to family responsibilities and, on the other, by the sex-segregated job market.<sup>564</sup> The Ministry of Welfare's Action plan for pay equality (2012) aims to abolish this sex segregation on the labour market with the joint effort of the state, municipalities and employers in designing a plan of long-term measures attempting to increase the number of men in women-dominated job sectors and women in men-dominated jobs sectors.

## **2.2. Collective agreements**

### *2.2.1. Policies*

Part-time work exists in various sectors of the labour market and employers may not discriminate between their employees as regards their terms of employment. Collective bargaining is governed by Act No. 80/1938 which empowers trade unions to negotiate agreements with employees concerning wages and other terms of employment of their members.

### *2.2.2. Equal treatment*

As explicitly stated in Article 18 of the GEA trade unions shall work to bring women and men on an equal footing on the labour market. Under a collective agreement negotiated between the Icelandic Confederation of Labour (ASI) and the SA-Confederation of Icelandic Employers, employers are prohibited from discriminating against part-time workers unless it is justifiable on objective grounds.<sup>565</sup> According to this agreement a worker is regarded as a part-time worker if he or she is paid wholly or partially by reference to the time that he or she works, and cannot be identified as a full-time worker when compared to other workers on the same type of contract. The agreement is based on the principle that a part-time worker has the right not to be treated less favourably than the employer treats a comparable full-time worker as regards the terms of the contract of employment.

Similarly, in the reorganisation of workloads part-time workers should not be treated less favourably than full-time workers, unless the treatment can be objectively justified. Previous or current part-time work should not prevent promotion, regardless of whether the new post is full-time or part-time.

In addition when choosing the criteria to select jobs for redundancy, the criteria must be objectively justified and part-time workers must not be treated less favourably than comparable full-time workers.

### *2.2.3. Organisation of working time*

Collective agreements are, according to Act No. 55/1980, automatically binding for all workers and employers operating within their occupational and geographical area. The goal of so-called workplace agreements is to evolve collective agreements so that they benefit both parties. This type of agreement can cover issues such as flexible daytime work or a four-day working week but any such agreement must comply on the whole with the applicable collective agreement. Workers who are in part-time work are paid proportionally (see for example the 2011 collective agreement of the VR general employees union for employees engaged in commerce).<sup>566</sup>

Contractual and statutory rights such as those concerning sick leave, payments for holidays etc. are based on proportional service and a customary working day of the worker concerned.

<sup>564</sup> Ministry of Welfare, *Action Plan for pay equality*, October 2012.

<sup>565</sup> This agreement transposes the Part-Time Workers Directive 98/23/EC into Icelandic law. Further implementation is provided for in Act 10/2004.

<sup>566</sup> <http://www.vr.is/english/collective-agreement-2011/>, accessed 14 April 2013.

#### 2.2.4. *Assessment*

The Confederation of Labour and the Confederation of Employers concluded their collective agreements in May 2011 which will be in force until the end of January 2014. The present government (which will not be in power after the elections on April 27, 2013) declared at the beginning of this year that they intended to re-evaluate the women-dominated job sector in the public sector before new collective agreements are concluded. According to the latest survey conducted by the Federation of State and Municipal Employees (BSRB) the gender-based pay gap is 13.1 % and has increased compared to a previous survey among the same employees.<sup>567</sup>

Civil servants have expressed their frustration at the lack of measures by the authorities and have called for steps to be taken instead of meetings. Employers and labour market associations have been developing a gender equality standard since 2008 and the aim is to make it effective before the end of this year. The main reason for the decrease in the gender-based pay gap in 2009 and 2010 appears to have resulted from the general decrease in men's salaries.

Representatives of trade unions and employees' associations appear to be frustrated by the lack of progress towards the objective of equal pay and call for progressive measures. There has been too much talk and too little action, they claim.<sup>568</sup>

### 2.3. *Case law*

No landmark cases of national courts/or equality bodies reflecting the interpretation of the principle of equal treatment in relation to part-time work.

### 2.4. *Involvement of other parties*

This reporter is not aware of any good practices which have been initiated by social partners or alternative private or public stakeholders to prevent indirect sex discrimination in relation to part-time work.

The CEDAW Committee emphasised in its periodic report on Iceland (2008) that traditional practices and stereotypical attitudes about the roles and responsibilities of women and men within the family and in society persist and considered that this could be the root cause of the disadvantaged position of women on the labour market.<sup>569</sup>

## 3. *Statutory social security and pension rights*

The current laws that apply in this area are the Social Security Act No. 100/2007 with later amendments; Act on Maternity/Paternity Leave No. 95/2000 with later amendments and the Public Health Service Act No. 40/2007.<sup>570</sup>

Any person who is resident in Iceland is regarded as insured under the Social Security Act No. 100/2007 with later amendments,<sup>571</sup> provided that other conditions of the Act are met

<sup>567</sup> <http://www.bsrb.is/um-bsrb/frettir/eldra/2013/1/>, accessed on 14 April 2013 and <http://www.bsrb.is/english-summary/>, accessed 18 November 2012.

<sup>568</sup> <http://www.visir.is/launamunur-kynjanna-eykst-a-ny/article/2012705039921>, accessed 17 December 2012 and <http://www.dv.is/frettir/2012/9/7/kynbundinn-launamunur-eykst-milli-ara/>, accessed 18 November 2012.

<sup>569</sup> CEDAW, Fifth and sixth periodic reports, Iceland, Part of A/63/38, p. 6, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.ICE.CO.6.pdf>, accessed 20 May 2013.

<sup>570</sup> Iceland has a three-pillar pension system: (1) a tax-financed social security pension scheme, which is residence based and regulated by the Act on Social Security No. 100/2007 with subsequent amendments. It pays a basic pension from the age of 67 to those who have been living in Iceland for at least 3 years between the ages 16 and 66 and have an annual income below a certain ceiling. (2) The Mandatory occupation pension fund is based on Act No. 129/1997 and provides for mandatory affiliation to the pension fund provided for in the applicable collective agreement for all workers between the age of 16 to 70. (3) The law and collective agreements provide for a framework of supplementary pension contributions. Final arrangements are made on an individual basis as part of the contract of employment.

<sup>571</sup> [http://eng.velferdarraduneyti.is/media/acrobat-enskar\\_sidur/Social\\_Security\\_Act\\_100\\_2007.pdf](http://eng.velferdarraduneyti.is/media/acrobat-enskar_sidur/Social_Security_Act_100_2007.pdf), accessed 20 May 2013.



(Article 29 of the Act). All wage earners who work in Iceland, provided their wages are paid in Iceland, and the self-employed are entitled to sickness benefits under this act. The qualifying condition is that the insured must be aged 18 or older, incapable of work as a result of sickness for at least 21 days, not receiving old-age benefits or disability benefits, and not receiving wages or employer-paid sickness benefits due to illness. A partial benefit is paid to those who receive 50 % of their income due to 'illness'. Cash benefits are not paid until wages have ceased.

The qualifying conditions for receiving maternity/paternity benefits is that both parents must have been working in Iceland for at least six consecutive months before the first day of parental leave. For maternity and paternity grants (i.e. for those who are not active on the labour market) the qualifying condition is that the beneficiaries must have resided in Iceland for at least 12 months before the expected date of childbirth. Medical benefits are paid subject to the condition that the insured must have resided in Iceland for at least six months.

The Maternity/Paternity Leave Fund's monthly payment to an employee during maternity/paternity leave amount to 80 % of her/his average total wages (never exceeding EUR 2 200 (ISK 350 000)), this being based on a continuous twelve-month period ending six months prior to the birth of the child or, in the case of an initial adoption or permanent foster care, prior to the date of arrival of the child in the home. 'Wages' here include all forms of wages and other remuneration according to the Insurance Levy Act, and also payments from the Maternity/Paternity Leave Fund, payments from the Unemployment Insurance Fund, per diem payments for illness and accident injury, payments from Trade Unions' Sickness Funds, payments from an insurance company due to a temporary loss of employment or wage-related payments under Section III of the Act on Payments to the Parents of Chronically Ill or Severely Disabled Children.

The monthly payment during maternity/paternity leave to a parent in a 25-49 % part-time job must never be less than EUR 595 (ISK 94 938) and the monthly payment to a parent holding a 50-100 % job must never be less than EUR 824 (ISK 131 578).

### **3.1. Exclusions**

The pension age is 67 and the qualifying condition is to have resided in Iceland for at least 40 years (three years for a reduced pension) from the age of 16 to 66, and to have an annual income below EUR 25 844.66 (ISK 4.148.420). A pension supplement is granted if the insured's annual income does not exceed a certain amount. Social allowances (means-tested) are paid for living expenses such as housing and medicine costs if the insured's annual income does not exceed a certain amount.

### **3.2. Assessment**

Women working part time have not been able to add much to the modest income provided by social security through the mandatory occupational fund. There are no advantages granted to persons (women) who have brought up children, specifically concerning periods of interruption of employment.

## **4. Self-employment**

Part-time self-employed workers in Iceland are not covered by any national collective agreements. They have the same maternity and parental leave rights under Act No. 95/2000. Access to financial services is based on one's credit rating with the bank but not one's employment status.<sup>572</sup>

<sup>572</sup> This may be problematic for part-time workers, given their reduced income.

## 5. Access to goods and the supply of goods and services

See the answer to no. 4 above as the same principles apply here. The Ministry of Welfare had intended to propose a new Act implementing Directive 2004/113/EC but there was not enough time to approve the draft before the end of the Parliamentary session before the elections on 27 April.

## 6. Are there any gaps in national law?

The EFTA Surveillance Agency has issued a formal notice to the Icelandic authorities due to their failure to implement Directive 2010/41/EU.<sup>573</sup> The Ministry of Welfare intended to propose a new Act implementing Directive 2004/113/EC but there was not enough time to approve the draft before the end of the Parliamentary session before the elections on 27 April. CEDAW's concern in its periodic report on Iceland in 2008 is that current legislation on the distribution of assets upon divorce might not adequately address gender-based economic disparities between spouses resulting from the existing segregation of the labour market and women's greater share in unpaid work and potentially interrupted career patterns due to family responsibility.<sup>574</sup>

## II. FIXED-TERM WORK

### 1. General information

Directive 1999/70/EC (fixed-term work) has been transposed by Act No. 139/2003 on employees in fixed-term work, as amended, and Act No. 70/1996 on Government Employees, as amended.

The aim is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and by establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. The GEA imposes an obligation on employers and trade unions to work deliberately to bring women and men on an equal footing within their enterprise or institution and to take steps to avoid jobs being classified as specifically women's or men's jobs.<sup>575</sup>

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National Policies

The use of successive fixed-term contracts is to be limited. Act no. 139/2003 prohibits the extension or renewal of fixed-term agreements when they last continuously for a period longer than two years, unless otherwise provided for in the law. A new employment contract is deemed to replace a previous one if it is extended or if a new fixed-term contract is established between the same parties within three weeks from the completion of the previous agreement.

##### 2.1.2. Equal treatment

Act No. 139/2003 (Fixed Term Employment) aims to improve the quality of fixed-term work twofold: by ensuring the application of the principle of non-discrimination, and by establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

<sup>573</sup> See: <http://www.eftasurv.int/media/document-registry/No-31.pdf>, accessed 13 April 2013.

<sup>574</sup> <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.ICE.CO.6.pdf>, accessed 14 April 2013, p. 7.

<sup>575</sup> Article 18 of the GEA No. 10/2008.

### *2.1.3. Successive fixed-term contracts*

Government employees, other than civil servants, must be hired on an indefinite basis with a mutual period of notice of three months upon the completion of the trial period.<sup>576</sup> An employee may be hired on a fixed-term basis. Such a contract may not be extended continuously beyond two years. Fixed-term contracts have become more common among nurses as part of the budget cuts in the health sector.<sup>577</sup>

### *2.2. Collective agreements*

Fixed-term contracts would fall under the category of workplace agreements, supplementing collective agreements, and the agreement in question must comply, on the whole, with the applicable collective agreement.

### *2.3. Case law*

No relevant case law. In case no. 5356/2008 the Parliamentary Ombudsman dealt with the situation where school authorities did not hire a woman teacher who had been working on a fixed-term contract for more than 2 years but instead hired a man on a fixed-term contract to avoid having to hire the woman on an indefinite basis. The Ombudsman held that if the woman in this case had been the most qualified person for the job, objective reasons demanded that she had to be hired on an indefinite basis, even though the teaching post was considered to be of a temporary nature.

### *2.4. Involvement of other parties*

Apart from the spokespersons of women in the healthcare sector there appears to be little, if any, direct activities in this field.

## **3. Statutory Social Security and Pension Rights**

Fixed-term workers are required to be members of a pension fund, cf. the Pension Act No. 129/1997. No workers are excluded from the social security pension scheme if they are residents in Iceland. The scope of maternity/paternity leave and parental leave applies to all workers, also those who are not active on the labour market.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

A part-time worker can invoke the Gender Equality Act (GEA) in relation to gender-based discrimination on the employment market, which the Act is to work against. The Minister of Welfare is in charge of applying the Act. Within the administration each ministry is to have a gender equality representative with an expert knowledge of gender equality issues. Corporations and institutions with more than 25 employees must also, on average over the years, set themselves a gender equality programme or mainstream gender equality perspectives into their personnel policy. This will specifically include, i.e., a statement of aims, with a plan on how they are to be achieved in order to guarantee to employees the rights set forth in the GEA.

National law provides for free legal aid for individuals seeking their rights, provided that their income is below a certain amount according to their tax report or not exceeding EUR

<sup>576</sup> Article 41 of Government Employees Act No. 70/1996. See also: [http://www.ruv.is/frett/faekkar-um-allt-ad-25-storf?keepThis=true&TB\\_iframe=true&height=650&width=850&caption=](http://www.ruv.is/frett/faekkar-um-allt-ad-25-storf?keepThis=true&TB_iframe=true&height=650&width=850&caption=), accessed 7 June 2013.

<sup>577</sup> Cecilia Björgvinsdóttir, *Tímarit hjúkrunarfræðinga* – 4. Tbl. 86. Árg. 2010, p. 14.

12 521 (ISK 2 million) per year. If an applicant for free legal aid is married the income of the spouse or partner is also taken into account when applying for legal aid and the total ceiling is EUR 18 782 (ISK 3 million).<sup>578</sup>

There are no studies addressing the particular difficulties involved in obtaining access to legal redress for rights regarding part-time workers' positions. There is no case law regarding class actions initiated by associations or other legal entities which have a legitimate interest in this area.

Individuals, enterprises, institutions and non-governmental organisations, either in their own name or on behalf of their members, who consider that they are the victims of violations of the GEA may submit their case to the Gender Equality Complaints Committee. The Centre for Gender Equality may request that the Gender Equality Complaints Committee examines a case if it has reason to suspect that an institution, enterprise or non-governmental organisation has violated the GEA. The relevant institution, enterprise or non-governmental organisation is obliged to provide the Centre for Gender Equality with the information and materials it considers necessary to reveal the facts of the case. If the parties concerned do not comply with this request by the Centre for Gender Equality within a reasonable time limit, the Centre may decide that they are to pay per diem fines until the information and materials have been provided. If the Centre for Gender Equality considers that the information and materials in question further substantiate the suspicion that a violation of this Act has taken place, it must request the Gender Equality Complaints Committee to examine the matter, and consequently inform the institution, enterprise or non-governmental organisation concerned in writing of its decision to do so.

The Centre for Gender Equality must, at the request of the claimant, take steps to ensure that the rulings of the Gender Equality Complaints Committee are enforced as appropriate. When a party against whom a ruling of the Gender Equality Complaints Committee is directed fails to comply with it, the Centre for Gender Equality may instruct the party concerned to make satisfactory remedial measures in accordance with the ruling within a reasonable time limit. If the party against whom the ruling is directed fails to comply with the instructions of the Centre for Gender Equality, the Centre may decide that the party is to pay per diem fines until it complies with the instructions.

## **2. Vulnerability, multiple/intersectional discrimination**

Women with lesser education, no education and no special skills are vulnerable. This vulnerability is multiple if they belong to ethnic minorities, do not speak Icelandic properly and are from lower economic backgrounds. The chicken or the egg causality dilemma applies here.

To sum up; part-time workers are in principle protected against discrimination from the state and in their relations with other individual or private entities. This, however, does not compensate for their lesser income or grant them the opportunity to increase their work unless it is in the interest of the employer.

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<sup>578</sup> Act on Civil Procedure No. 91/1991, chapter XX; Regulation No. 45/2008 on the conditions for receiving free legal aid and the procedure of the free legal aid committee. <http://www.innanrikisraduneyti.is/raduneyti/starfssvid/gjafsokn/>, accessed 24 May 2013.

## IRELAND – Frances Meenan

## I. PART-TIME WORK

## 1. General information

The Central Statistics Office defines part-time workers as persons who work up to three days per week.<sup>579</sup> The most recent details of employment were published in the *Quarterly National Household Survey – Quarter 4 2012*, which states that there are 2.144 million people in the labour force in Ireland with over 1.8 million persons in employment and of those 1.4 million are in full-time employment and 450 000 in part-time employment.<sup>580</sup> There are over 1.1 million men in the labour force; of those 988 000 are in employment and of those 846 000 are in full-time employment and 142 000 in part-time employment (and of those 77 000 who are in part-time employment are not underemployed, i.e. they are not seeking full-time work or more hours). There are 960 000 women in the labour force with 861 000 in employment and of those 553 000 are in full-time employment and 308 000 in part-time employment (of those 227 000 are not underemployed). In 2011 women worked an average of 30.6 hours and men 39.4 hours. Only 14.7 % of married women worked more than 40 hours per week. Most workers in the health and education sectors are women.<sup>581</sup> As of Quarter 4 2012, 37 000 men worked in education and 48 000 in the health and social services sector whilst 109 000 women worked in education and 198 000 in health.<sup>582</sup> What is interesting about these figures is that there is clearly a much higher number of women who are working part time and wish to remain part time, i.e. two thirds of them approximately, whereas half the men who work part time are seeking more work. As of Quarter 4 2012, 64 000 men were self-employed with employees and 169 000 without employees; 20 000 women were self-employed with staff and 39 000 without staff.

The report *Women and Men in Ireland 2011* stated that in 2009 men had an average income of EUR 34 317 while the average for women was EUR 25 103 or 75 % of men's income.<sup>583</sup> When these figures are adjusted to take account of the average hours per week spent in paid employment, women's average hourly income was about 94 % of that of men in 2009. The difference between men's and women's incomes for persons aged 15 to 64 years increased with age. The average income of women aged 15 to 24 was 95 % of that of men in the same age group in 2009 while for the 55 to 64 age group women's average earnings were 61.4 % of that of men. The report states that the average gender pay gap in Ireland was 15.75 % in 2009.<sup>584</sup> The report *Measuring Ireland's Progress 2008*, published in August 2009,<sup>585</sup> set the gender pay gap at 17 % so we can see that there has been some improvement. The pay gap as published in the *National Employment Survey 2007* (published in July 2009) shows that in October 2007, average hourly pay for men was EUR 21.17 compared to EUR 18.91 for women.<sup>586</sup> This amounted to an average hourly wage equal to 89.3 % of men's hourly pay. In all sectors men earned more than women. The survey showed significant differences between the average hourly rate of pay between full-time and part-time

<sup>579</sup> [http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2013/lreg\\_mar2013.pdf](http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2013/lreg_mar2013.pdf) accessed 16 April 2013.

<sup>580</sup> [http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2012/qnhs\\_q42012.pdf](http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2012/qnhs_q42012.pdf). Published on 27 February 2013, accessed 20 April 2013. Statistics relate to the Republic of Ireland (26 counties).

<sup>581</sup> Central Statistics Office *Women and Men in Ireland 2011*. <http://www.cso.ie/en/media/csoie/releasespublications/documents/otherreleases/2011/Women%20and%20Men%20in%20Ireland%202011.pdf> accessed 16 April 2013.

<sup>582</sup> The author could not find a breakdown in respect of full-time and part-time based on gender and sector.

<sup>583</sup> <http://www.cso.ie/en/media/csoie/releasespublications/documents/otherreleases/2011/Women%20and%20Men%20in%20Ireland%202011.pdf> accessed 20 April 2013.

<sup>584</sup> It is defined as the relative difference, in percentage terms, between the average gross hourly earnings of women and men.

<sup>585</sup> Available on [www.cso.ie](http://www.cso.ie), accessed 5 June 2013.

<sup>586</sup> <http://www.cso.ie/en/newsandevents/pressreleases/2009pressreleases/nationalemploymentsurvey2007/>, accessed 26 June 2013.

employees, with an hourly wage of EUR 21.17 comparing to EUR 15.40 respectively. The largest gap between full-time and part-time hourly rates was in the business services sector with an average hourly wage of EUR 21.37 compared to EUR 13.11. While full-time male employees had higher hourly earnings than full-time female employees in all sectors, the survey did note that part-time female employees were found to earn more than their male counterparts in some sectors, including manufacturing and construction.<sup>587</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

Employees may work on a part-time basis, that is, *pro rata* to full-time employees in the employment concerned.<sup>588</sup> Such employees may have protection to include the benefit of *pro rata* rights of full-time employees under the Protection of Employment (Part-Time Work) Act 2001, which implemented Council Directive 97/81/EC. Statutory hourly thresholds no longer exist so all employees fall within the scope of employment legislation, e.g. the Unfair Dismissals Acts 1977-2011, the Employment Equality Acts 1998-2011, and the Organisation of Working Time Act 1997. In addition, Section 8 of the 2001 Act provides that the Carers' Leave Act 2001, the Minimum Notice and Terms of Employment Acts 1973-2001, the Protection of Employees (Employers' Insolvency) Acts 1984-2012, the Redundancy Payments Acts 1967-2007, the Terms of Employment (Information) Act 1994, the Unfair Dismissals Acts 1977-2007, and the Worker Participation (State Enterprises) Acts 1977-1993 apply to part-time employees; this of course is in addition to the Employment Equality Acts 1998-2011. Furthermore, part-time employees are entitled to the protection of the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005, and the Parental Leave Acts 1998 and 2006. It should be noted however that the term part-time worker has many definitions and connotations.<sup>589</sup> The Protection of Employees (Temporary Agency Work) Act 2012 gave effect to Directive 2008/104/EC, which applies to agency workers temporarily assigned by an employment agency to work for and under the direction and supervision of a hirer. Agency working can be full-time, fixed-term or part-time, for example. An agency worker is entitled to the same basic working and employment conditions in the employment in which they are hired. However, if the agency worker has a contract of employment with the agency and is paid between assignments, equal treatment as regards pay does not apply. Prior to this legislation, agency workers had the benefit of entitlements under other employment protection legislation.

As regards pay, in addition to the Protection of Employees (Part-Time Work) Act 2001, part-time workers have the benefit of protection under the National Minimum Wage Act 2000, and protection under various employment regulation orders in respect of certain sectors, e.g. catering, hairdressing, or if they work under a registered agreement.

#### 2.1.1. National policies

There are no particular national policies in respect of part-time work, as it is a contractual relationship between employer and employee. The public service as an employer makes provision for job sharing, and other flexible working arrangements.

There are no particular discussions in respect of part-time employment save that in respect of childcare the earnings of a part-time worker may not be sufficient to pay for

<sup>587</sup> See also: Equality Authority and the Economic and Social Research Institute, *The Gender Wage Gap in Ireland: Evidence from the National Employment Survey 2003*, published September 2009 and available on [www.equality.ie](http://www.equality.ie), accessed 5 June 2013.

<sup>588</sup> See generally F. Meenan Chapter 2 'The Employment Relationship' in *Employment Law*, Round Hall Thomson Reuters (forthcoming September/ October 2013).

<sup>589</sup> For example, a person could be an employee who works from home and called a 'home-worker', a 'zero-hour' worker who has protection under the Organisation of Working Time Act 1997, agency-supplied workers may be part-time and they have certain protections under the Protection of Employees (Temporary Agency Work) Act 2012.



childcare, which is a private and expensive arrangement in Ireland. The most recent report available to CEDAW provides that there has been an introduction of an equal opportunity policy and guidelines for the civil service and this includes developments inter alia in relation to flexible working and work-life balance arrangements, the encouragement of government departments to make these arrangements available to staff in senior management grades, and the implementation of a childcare initiative in the civil service for the provision of crèches for the children of civil servants.<sup>590</sup>

### 2.1.2. *Equal treatment*

As stated above, all employment legislation protection is available to part-time employees. The definition of a part-time worker for the purposes of the Protection of Employees (Part-Time Work) Act 2001 is ‘an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her’.<sup>591</sup> This legislation applies to all types of employment. A part-time employee must not be treated in a less favourable manner than a comparable full-time employee,<sup>592</sup> and the comparable full-time employee may be of the same sex or of a different sex.<sup>593</sup> The part-time employee and the full-time employee must be doing ‘comparable work’ which is similar to the definition of ‘like work’ in Section 7 of the Employment Equality Act 1998. There is also certain protection for ‘zero-hour’ workers<sup>594</sup> under the Organisation of Working Time Act 1997. These are arrangements where an employee is requested to be available for work, without the guarantee of work, or where an employee is informed that there will be work available on a specified day. If the employer fails to require an employee to work at least 25 % of the time that the employee is required by his or contract of employment to be available to work for the employer, then the employee will be entitled to a payment for 25 % of the contract hours or 15 hours, whichever is less. This provision must not be confused with a requirement that an employee be ‘on call’.<sup>595</sup> This provision does not apply to employment of a casual nature.

The Code of Practice on Access to Part-Time Working provides that as far as possible employers should give consideration to requests by employees to transfer from full-time to part-time work or transfer from part-time to full-time work or to increase their working time should the opportunity arise.<sup>596</sup> The Code states however that the employer can take into account its business requirements in such consideration.

### 2.1.3. *Organisation of working time*

There has been a development of more flexibility with the protection of such employees, for example job sharing or other arrangements where employees work during school term only. Such arrangements are generally provided for in the public service. As stated above there is a Code of Practice in respect of part-time working. If an employee request part-time work, the employer must justify any refusal.

Upon returning from maternity leave, there is no automatic right to work reduced hours for a certain time to facilitate work and family obligations unless of course, the employee applies for leave under the Parental Leave Acts; in such case, leave may be taken in one fixed period or there may be an arrangement where the employee works part time taking into account the entitlement to parental leave. The employee could cite the Code of Practice in respect of part-time work and if an employer refuses an employee part-time work, the employer must have an objective justification for such refusal. In such circumstances, the

<sup>590</sup> Ireland Combined Fourth and Fifth Reports under the UN Convention on the Elimination of All Forms of Discrimination Against Women 2003. <http://www.justice.ie/en/JELR/Pages/CEDAW>, accessed 18 April 2013.

<sup>591</sup> Section 7(1) of the Protection of Employees (Part-Time Work) Act 2001. ‘Normal hours of work’ means in relation to an employee ‘the average number of hours worked by an employee each day during the reference period’ and a ‘reference period’ is a period of not less than 7 days’ nor more than 12 months’ duration.

<sup>592</sup> Section 9(1) of the Protection of Employees (Part-Time Work) Act 2001.

<sup>593</sup> Section 9(5) of the Protection of Employees (Part-Time Work) Act 2001.

<sup>594</sup> Section 18 of the Organisation of Working Time Act 1997.

<sup>595</sup> Section 18(5) of the Organisation of Working Time Act 1997.

<sup>596</sup> Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) Declaration Order 2006 (S.I. No. 8 of 2006).



claim would more likely be brought under the Employment Equality Acts 1998-2011 as it would be on the ground of gender or civil status.

#### *2.1.4. Assessment*

The key benefit of the Protection of Employees (Part-Time Work) Act 2001 is that part-time employees regardless of sex or gender are entitled to *pro rata* rights in respect of their terms and conditions of employment. The difficulty with the employment equality legislation (on the gender ground) in respect of an equal pay claim on the gender ground is that a claimant must have a comparator of the opposite sex, which means there are still difficulties with gender-segregated employment. Difficulties can arise however where a part-time and a full-time employee are employed on different terms and conditions of employment, e.g. in the case of a part-time teacher who is employed directly by the school and a full-time teacher who is employed by the Department of Education and Science (see below).

### **2.2. Collective agreements**

In Ireland, the employment relationship is founded on the contract of employment and in general unless a collective agreement is formally incorporated into a contract of employment, the parties are not bound by the collective agreement. Until recently, there have been social partnership agreements where the State set out its policies, for example in the social partnership agreement *Sustaining Progress (Social Partnership 2003-2005)* it was agreed that the social parties would develop a *Code of Practice on Access to Part-Time Working*. The Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) (Declaration) Order 2006<sup>597</sup> came into effect on 12 January 2006. The background to the Code states that it accords with the principle of minimising the potential for indirect discrimination in relation to part-time working, introduces positive measures to eliminate obstacles and barriers, and encourages greater participation in employment on a number of grounds, as provided for in the Employment Equality Acts 1998-2011. The Code is applicable to all employers and employees. As far as possible, employers should give consideration to requests by employees to transfer from full-time work to part-time work, requests from employees to transfer from part-time to full-time work, and requests to increase their working time should the opportunity arise. The facility to change hours of work is a matter agreed between employer and employee rather than a statutory entitlement. Best practice indicates that employers should treat such requests seriously. An employer may refuse a request for part-time working if it is satisfied that such arrangements would have an adverse effect on the operation of the business. The Code states that best practice recommends that employers assess the possibilities of either introducing or increasing the scope of existing part-time working arrangements. The Code is admissible in evidence before any court or tribunal.

#### *2.2.1. Policies*

The principle of *pro rata* terms and conditions of employment are protected in legislation, as is the full protection of part-time employees in all protective legislation.

#### *2.2.2. Equal treatment*

The key legislation is the Protection of Employees (Part-Time Work) Act 2001 and the Employment Equality Acts 1998-2011. Collective agreements are generally not binding unless incorporated into the individual contract of employment.

#### *2.2.3. Organisation of working time*

Apart from legislation, the Code of Practice on Part-Time Working is the key agreed document between the social partners.

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<sup>597</sup> S.I. No. 8 of 2006. <http://www.irishstatutebook.ie/2006/en/si/0008.html>, accessed 26 May 2013.

#### 2.2.4. Assessment

As stated, legislation overrides all collective agreements save for where there are additional contractual benefits between the parties.

### 2.3. Case law

#### 2.3.1. Cases/opinions of equality bodies

Claims brought by part-time employees have been of various forms. Prior to the passage of the 2001 Act, part-time female employees who considered that they were being discriminated against had to rely on employment equality legislation.<sup>598</sup> The requirement to work full time was considered in *Inoue v NBK Designs Limited*,<sup>599</sup> in a claim under the Employment Equality Act 1998. The claimant, a lone parent with a school-going child, was working part-time in a job-sharing arrangement. As business expanded the employer wanted the two part-time positions to be amalgamated into one post; the claimant was offered the post which she refused and was dismissed. The Labour Court had to decide as to whether the requirement to work full time is one which can be complied with by a significantly higher proportion of men than women and/or those of a different marital or family status to that of the claimant. The Court was satisfied that the requirement to work full time was not necessary and accordingly found that the claimant had been discriminated against on gender, family status and marital status grounds.

The issue of job sharing has been problematic. ‘Job sharing’ may be defined as one full-time permanent post with benefits being shared by more – usually two – employees. There are many combinations and permutations of job sharing and it may provide considerable flexibility for employees who wish to work part time, although they are working within the confines of a full-time post.<sup>600</sup> Access to job sharing can be more problematic in senior positions where an employer may justify that the position is not suitable for job sharing.<sup>601</sup> More recently the Equality Tribunal considered that the requirement to take up promotional positions on a full-time basis was discriminatory on grounds of gender and family status but such policy could still be objectively justified.<sup>602</sup>

There is a difficulty in relation to certain part-time teachers. In Ireland, all secondary school teachers are paid by the Department of Education and Science regardless of whether they work in a fee-paying or a non-fee paying school provided they are part of an allocated quota. Some schools (more usually private fee-paying schools), may employ additional teachers directly. Such difference was considered by the High Court in *Catholic University School v Dooley*.<sup>603</sup> The claimant, a part-time teacher, was paid directly by the school and it was accepted by the claimant and the school that he was paid less than his chosen comparator who was a full-time permanent teacher employed by the school but paid by the Department of Education. The employer submitted that the comparator chosen by the claimant was not a proper comparator within the meaning of the Protection of Employees (Fixed-Term Work) Act 2003, Directive 99/70/EC and also the Part-Time Workers Directive 97/81/EC. The employer submitted that there was objective justification for the treatment. There were substantial differences between the two types of teachers. The teacher paid by the Department had rights to incremental salary scales, the negotiation of terms and conditions of employment, being subject to redeployment, qualifications, probationary periods, receipt of

<sup>598</sup> E.g. pro rata pay (*St. Patrick's College v 19 Female Employees* EP4/1984; DEP10/1984); selection of part-time employees for redundancy ahead of full-time employees (*Two Employees v Michael O'Neill and Sons Limited* DEE1/1988); and note also *Hill and Stapleton v Revenue Commissioners* [1998] I.R.L.R. 466.

<sup>599</sup> [2003] ELR 98.

<sup>600</sup> Job sharers may not be treated less favourably than full-time employees (*Hill and Stapleton v The Revenue Commissioners* [1998] I.R.L.R. 466. From 1 December 1997, service in a job-sharing capacity in the public service was credited as full-time service for the purposes of promotion and competition in the civil service.

<sup>601</sup> *The Minister for Justice, Equality and Law Reform v Hand* DEE5/1998 (a senior civil servant position was found not suitable for job sharing).

<sup>602</sup> E.g. in *O'Brien v Cork University Hospital* DEC-E 2008-023 where the position was that of a clinical nurse manager.

<sup>603</sup> [2010] IEHC 496, Dunne J., 20 July 2010.

responsibility allowances, career breaks, job sharing and the obligation to be in the Department of Education and Science Pension Scheme. None of these benefits applied to the claimant. The High Court decided that the school was entitled to treat two teachers whom it directly employed less favourably in terms of pay and conditions than teachers paid by the Department of Education. Ms Justice Dunne stated that the Department determined the terms and conditions of teachers directly paid by it, while the school's board of management determined the terms and conditions of privately paid teachers. However, this arrangement is not necessarily a gender issue as, if such claim were brought under the Employment Equality Acts 1998-2011 on the gender ground, there would also be the viable defence that both parties were employed under different terms and conditions.

Flexible working arrangements are not an entitlement and are subject to the needs of the employer's business. However, given that the vast majority of employees using flexible work arrangements are women, the employer must operate fair procedures otherwise there could be a *prima facie* claim of indirect discrimination on the gender ground.<sup>604</sup> Returning to the employee's contractual position following maternity leave may be problematic. For example, in *Quinn v Connaught Electronics*,<sup>605</sup> the claimant had been working on a part-time basis but on her return from maternity leave the employer required that she work full-time because the requirements of the business had changed. She was offered a full-time position; the Employment Appeals Tribunal upheld the employer's decision and held that the position offered was not substantially less favourable. An employee has no specific entitlement to part-time work on return from maternity leave if she is a full-time employee. However, a refusal to grant shorter hours must be objectively justified.<sup>606</sup>

Other issues under the Protection of Employees (Part-Time Work) Act 2001 in respect of remuneration have included discrimination in respect of the payment of a travel allowance,<sup>607</sup> payment to teachers for supervision and substitution,<sup>608</sup> non-provision of overtime,<sup>609</sup> and the entitlement to rest breaks on a *pro rata* basis compared to full-time employees along with the entitlement to shift premium payments on a *pro rata* basis compared to comparable full-time employees.<sup>610</sup>

### 2.3.2. Assessment

Case law in respect of discrimination and part-time employees has been essentially related to *pro rata* entitlements under the Protection of Employees (Part-Time Work) Act 2001 which allows for claims on a gender-neutral basis. Interestingly, claims in respect of equal treatment are brought under employment equality legislation on the gender ground and involve access to part-time employment. Such claims may be *prima facie* indirect discrimination and the employer has to justify any decision made in respect of a refusal to accede to flexible working arrangements.

In Ireland, an employee wishing to pursue an employment claim can elect to proceed under a number of different statutes. Choice is the problem. For example, if an employee on return from maternity leave is not allowed her contractual position, then she may have a claim for constructive dismissal under the Unfair Dismissals Acts. Alternatively, she could consider bringing a claim under the Employment Equality Acts on grounds of dismissal on the gender ground.

<sup>604</sup> *Morgan v Bank of Ireland* DEC – E2008-29.

<sup>605</sup> P4/2002.

<sup>606</sup> *Burke v NUI Galway* [2001] ELR 181; *Tesco Ireland v Swift* EDA 0514.

<sup>607</sup> *Ennis v Department of Justice, Equality and Law Reform* PTD1/2004.

<sup>608</sup> *Department of Education and Science v Gallagher* PTW/03/13.

<sup>609</sup> *Curry v Boxmore Plastics Limited* PTD5/2003.

<sup>610</sup> *Abbott Ireland v SIPTU* PDD3/2004.

## 2.4. *Involvement of other parties*

As stated above, the social partners have agreed the implementation of the application of all protective legislation to part-time employees. However, the State as an employer has been in the forefront in providing flexible working arrangements for its staff.

## 3. Statutory social security and pension rights

### 3.1. *Exclusions*

Access to occupational pension schemes for part-time employees are problematic. Both Directives provide that no less favourable treatment in respect of conditions of employment may be provided. The CJEU in the *IMPACT* case<sup>611</sup> considered that ‘employment conditions’ which refer to the work relationship between employer and employee covers pensions but excludes social security schemes. Section 9(5) of the Protection of Employees (Part-Time Work) Act 2001 provides that pension schemes or arrangements do not apply to a part-time employee whose normal hours of work are less than 20 % of the normal hours of work of a comparable full-time employee.<sup>612</sup> The reason for this provision is more than likely cost based. It may be suggested that the reason for this 20 % provision is the cost of administration of pension schemes. Indeed this provision may be increasingly academic given that pension schemes are being wound up due to pension scheme liabilities. There is a similar provision in Section 6(5) of the Protection of Employees (Fixed-Term Work) Act 2003. There is no similar requirement under the Pensions Acts 1990-2011. A part-time worker may bring a claim under the Pensions Acts, where there is no such restriction yet. They would have to find a comparator of the opposite sex, which is not required under part-time or fixed-term protection legislation. Employees may bring claims in respect of pension entitlements under the Protection of Employees (Part-Time Work) Act 2001 or the Protection of Employees (Fixed-Term Work) Act 2003 or on the basis of indirect discrimination under the Pensions Acts 1990-2011.

Part-time employees are entitled to maternity benefits and other social welfare entitlements, but their contributions to Pay-Related Social Insurance are relative to their earnings. If a person is unemployed, they may be entitled to Jobseekers’ Benefit which is payable for a certain period of time, but more importantly it provides for other allowances to cover payment for child dependents, mortgage interest or rent supplement and a medical card (free medical care). If such a person is offered employment on a part-time basis, their Benefit will be reduced. Frequently, a person may not benefit from taking up part-time employment although all efforts are being taken to assist people in taking up employment because of the very high unemployment rate in Ireland – currently 14.1 %.

### 3.2. *Assessment*

Part-time employees are entitled to social welfare benefits based on their contributions. Many employments do not provide for pension schemes and are therefore obliged to provide access to a Personal Retirement Savings Account where there are various income tax advantages. Where there is a pension scheme in the employment concerned, it will not apply to the part-time employee whose normal hours of work constitute less than 20 % of the normal hours of work of the comparable full-time employee. However, such part-time employee could decide to bring a claim on grounds of indirect discrimination in respect of such a provision under the Pensions Acts.

<sup>611</sup> Case C-286/06 *IMPACT v Minister for Agriculture and Food* [2008] ECR I-02483 at Paragraph 132.

<sup>612</sup> Section 9(4) of the Protection of Employees (Part-Time Work) Act 2001.

#### **4. Self-employment**

By definition, a self-employed person may work full time or part time or on the basis of whatever other flexible arrangements they may apply to themselves. However, by the nature of self-employment, it is precarious and it is commonplace that an individual self-employed person may not have beneficial access to bank loans and other financial services.

#### **5. Access to good and supply of services**

Access to goods and services are based on a person's financial status. Obviously if a person is applying for a mortgage, both their financial and employment situation would have to be taken into account.

#### **6. Are there any gaps in national law?**

##### ***6.1 Gaps in the area of (access to) employment***

It is not considered that there are gaps in respect of access to employment, other than as stated above that an employer may not wish to employ part-time staff for business reasons or the extra cost of administration. However, such decision has to be justified.

##### ***6.1.2. Employment conditions***

In respect of employment conditions, the employee may not have access to a pension scheme if s/he works for less than 20 % of the hours of the comparable full-time employee.

##### ***6.1.3. Termination of the employment contract***

As set out above, if a full-time employee seeks part-time work and because of that request is dismissed, this may constitute discriminatory dismissal within the meaning of the Employment Equality Acts. Such issues more frequently happen when full-time employees return from maternity or adoptive leave and seek part-time work. If refused, they have the option of remaining in full-time employment or resigning and claiming constructive dismissal.

##### ***6.2 Gaps in other areas***

There are no gaps in other areas.

## **II. FIXED-TERM WORK**

### **1. General information**

There do not appear to be any specific statistics available for those working on fixed-term or specified-purpose contracts. This is understandable as such persons would fall into the categories of full-time or part-time employees, as statistics do not show an employee's legal status.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

First, a fixed-term contract<sup>613</sup> has been defined as ‘A contract of employment for a limited period of time or for the performance of a specific task which ends without the need for an act of termination on the part of either employee or employer’.<sup>614</sup> The Unfair Dismissals Act 1977 does not apply to the non-renewal of a fixed-term or specified-purpose contract provided that the contract is in writing, signed by both parties and states that the Act will not apply to the termination of the contract.<sup>615</sup> The main area of concern is the non-renewal of second or subsequent fixed-term contracts, i.e. rolling contracts.<sup>616</sup> The Employment Appeals Tribunal has stated that employers may not choose the device of a fixed-term contract to avoid unfair dismissals legislation.<sup>617</sup> The Unfair Dismissals Acts does not apply to the dismissal of an employee who is replacing another employee who is on maternity leave or any other form of protective leave, natal care absence, attending antenatal classes or for breastfeeding.

The Protection of Employees (Fixed-Term Work) Act 2003 implemented Directive 1999/70/EC. A fixed-term employee must not be treated in a less favourable manner than a comparable permanent employee in respect of the terms and conditions of employment. However, a fixed-term employee may be treated in a less favourable manner than a permanent employee if it can be justified on objective grounds.<sup>618</sup> The one exception is in respect of pensions where there are the same provisions as under the Protection of Employees (Part-Time Work) Act 2001.

#### 2.1.1. National policies

There has been increasing legislative protection for employees who work under fixed-term contracts as set out above in relation to ‘rolling contracts’.

#### 2.1.2. Equal treatment

As stated above there are two key pieces of legislation: the Unfair Dismissals Acts 1977-2007<sup>619</sup> and the Protection of Employees (Fixed-Term Work) Act 2003. With regards to the former, there is a requirement to have worked one year’s service in order to fall within the scope of the Acts (with the exception of dismissal *inter alia* on grounds of pregnancy, denial of rights under the maternity, adoptive leave and parental leave legislation). The latter Act applies to all employees including state employees. A fixed-term employee shall not be treated in a less favourable manner than a comparable permanent employee in respect of their terms and conditions of employment.<sup>620</sup> However, a fixed-term employee may be treated in a less favourable manner if it can be justified on objective grounds and in this case the fixed-term employee and the comparable permanent employee must both be employed in ‘like

<sup>613</sup> See generally F. Meenan ‘Temporary, Fixed-Term and Part-Time Employment’ Chapter 6, in *Employment Law*, Round Hall Thomson Reuters (forthcoming September/ October 2013).

<sup>614</sup> B. Hepple and P. O’Higgins *Employment Law* Sweet & Maxwell London 1981 4<sup>th</sup> Ed., para 524.

<sup>615</sup> Section 2(2)(b).

<sup>616</sup> The expert believes that it is reasonable to employ a person on a fixed-term contract with the same terms and conditions as a permanent employee as it is a contractual arrangement between employer and employee. In the event that such an employee is promised a further contract and the employer subsequently refuses to re-employ the employee on a further contract, the employee may have a cause of action against the employer.

<sup>617</sup> E.g. *FitzGerald v St. Patrick’s College* UD244/1978. There are also further protections if there is a series of fixed-term contracts as provided under the Unfair Dismissals Acts 1977 to 2012.

<sup>618</sup> Section 6(1) and (2) of the Protection of Employees (Fixed-Term Work) Act 2003.

<sup>619</sup> E.g. *O’Mahony v College of the Most Holy Trinity* [1998] ELR 159.

<sup>620</sup> Section 6(1) of the Protection of Employees (Fixed-Term Work) Act 2003. ‘Conditions of employment’ have a broad definition including remuneration and all matters relating thereto including pensions. Remuneration is deemed to include *ex-gratia* payments, eg. *Sunday World Newspapers v Kinsella* [2008] ELR 53. It should be noted, however, as under the Protection of Employee (Part-Term Work) Act 2001, if a fixed-term employee carries out work amounting to less than 20 % of the hours of a comparable permanent employee, then there will not be an entitlement to pension schemes or arrangements.

work'. If the relevant fixed-term employee is the sole employee then there may be a comparable permanent employee where there is reference to that type of employee in a collective agreement. Where there is no reference to such an employee in a collective agreement, a comparable employee may be found if employed in the same industry or sector of employment as the relevant fixed-term employee. The 'comparable work'<sup>621</sup> provisions are similar to the definitions provided by the Employment Equality Act 1998,<sup>622</sup> yet here there must be a comparator in the same employment, rather than the same industry or sector of employment. Fixed-term employees in certain circumstances may be deemed to have a contract of 'indefinite duration'.<sup>623</sup> This is defined as such where an employee is employed by their employer on two or more continuous fixed-term contracts, and the aggregate duration of such contracts does not exceed four years. This does not apply where there exist objective grounds justifying the renewal. There is no maximum time period for a fixed-term contract as this is a matter of a contractual bargain between the parties.

### 2.1.3. Successive fixed-term contracts

Employers may offer employees employment based on a fixed-term contract or a contract for a specified purpose (eg. a research project). When successive or 'rolling' contracts occur, employees may seek protection under legislation. Save for certain exceptions, the legislation is applicable to all employment, public and private. There is no particular evidence of any gender based issues in relation to employment on fixed-term contracts.

### 2.1.4. Assessment

When consulting the case law, there does not appear to be any particular gender issue in relation to fixed-term contracts. It becomes clear, however, that the uses of 'rolling' or successive fixed-term contracts in the public sector generally predominate in sectors such as health,<sup>624</sup> education<sup>625</sup> and the civil service.<sup>626</sup> The Unfair Dismissals Acts have generally provided protection for employees who have been dismissed following a series of fixed-term contracts as such contracts are not regarded as genuine fixed-term contracts, rather as a device to avoid the application of the unfair dismissals legislation.<sup>627</sup> The Protection of Employees (Fixed-Term Work) Act 2003 may deem a person to have a contract of 'indefinite duration' but this provision does not provide the employee with permanent employment; the contract can come to an end by reason of redundancy.<sup>628</sup> The dismissed employee will have all entitlement to the unfair dismissals legislation should they so wish. A person working under a fixed-term contract should have the same working conditions as a comparable permanent person. Again the comparison may be broader than under the employment equality legislation as one does not require a comparator of the opposite sex. Therefore, arguably this legislation provides 'easier' access to equal treatment than the employment equality legislation (except in the case of access to pensions, as set out above). If there was an employment situation in which women were being employed on fixed-term contracts and men were not, then there may be a cause of action under the Employment Equality Acts for indirect discrimination on the gender ground. However, there does not appear to be any evidence of such contractual arrangements.

<sup>621</sup> Section 5(2) of the Protection of Employees (Fixed-Term Work) Act 2003.

<sup>622</sup> Section 7 of the Employment Equality Act 1998.

<sup>623</sup> Section 9 of the Protection of Employees (Fixed-Term Work) Act 2003.

<sup>624</sup> This is apparently more evident in respect of non-consultant hospital doctors, eg. *HSE v Khan* [2006] ELR 313.

<sup>625</sup> This is apparent in both second level and third level, eg. *Catholic University School v Dooley* [2010] IEHC 496, Dunne J., 20 July 2010.

<sup>626</sup> Case C-286/06 *IMPACT v Minister for Agriculture and Food* [2008] ECR I-02483; *Minister for Finance v McArdle* [2007] ELR 165.

<sup>627</sup> *FitzGerald v St. Patrick's College* UD244/1978.

<sup>628</sup> *Holland v Athlone Institute of Technology* [2012] ELR 1, to be read in conjunction with *McGrath v Athlone Institute of Technology* [2011] IEHC 254.



## 2.2. Collective agreements

Protection is provided by legislation but only if the relevant collective agreement is incorporated in the individual contract of employment.

## 2.3. Case law

If an employee's fixed-term contract is terminated by reason of pregnancy or if a fixed-term contract is not renewed by reason of pregnancy, then the employee would appear to have a good cause of action based on discrimination. In *NUI Galway v McBrierty*, the claimant argued that her fixed-term contract was not renewed when she told her employer of her pregnancy.<sup>629</sup> The Labour Court found no discrimination based on the gender ground as the claimant had already had three successive fixed-term contracts when the employer became aware of her pregnancy and she was treated the same as all other similar employees. However, in *McGloin v Legal Aid Board* the court found that the claimant, who had worked under a number of fixed-term contracts, had been discriminated against as her fixed-term contract was not renewed as she had been off sick with a pregnancy-related illness.<sup>630</sup>

## 2.4. Involvement of other parties

Protection is provided by legislation.

## 3. Statutory social security and pension rights

The same comments apply as those in respect of part-time employees.

# III. HORIZONTAL PROVISIONS

## 1. Effectiveness

If a claim is to be made under either the Protection of Employees (Part-Time Work) Act 2001, the Protection of Employees (Fixed-Term Work) Act 2003 or the Unfair Dismissals Acts 1977-2007, access to adjudication is without difficulty. If a person wishes to bring a claim under the Employment Equality Acts to the Equality Tribunal, there are delays of up to three years before a claim is heard. However, there is access to the Circuit Court for a gender claim (only) and such access can be speedy and efficient. There is no legal aid in respect of such claims. There is no provision for class actions. In respect of claims under the Employment Equality Acts, there has been a recent amendment in respect of access to compensation which would assist a lower-paid worker, e.g. a part-time employee.<sup>631</sup> Redress under the Employment Equality Acts can embrace a broad variety of orders in respect of the employment concerned, e.g. introduction of employment policies etc. and in addition, there is provision for compensation of a maximum of two years' remuneration and unlimited compensation at the Circuit Court. There are a number of anomalies if a person wishes to bring a claim under the Protection of Employees (Fixed-Term Work) Act 2003, because not only may a person working under a fixed-term contract be entitled to a contract of indefinite duration, but they may also bring a separate common-law action for compensation.

<sup>629</sup> EDA091.

<sup>630</sup> DEC – E2009 – 042.

<sup>631</sup> An employee may receive two years' remuneration or EUR 40 000 or EUR 13 000 (where the claimant is not an employee, e.g. in relation to access to employment).

## 2. Vulnerability, multiple/intersectional discrimination

There have been a number of studies looking at other grounds of discrimination, but there is no particular evidence in relation to persons working as part-time employees or under fixed-term contracts.<sup>632</sup>

### ITALY – Simonetta Renga

## I. PART-TIME WORK

### 1. General information

As regards statistical data, part-time workers are those who work on a reduced schedule compared to full-time workers performing the same job.<sup>633</sup> The definition, in accordance with the definition adopted by the ILO and Eurostat, does not depend on the kind of contract (fixed-term or not) or on a fixed number of hours. Rather it depends on a comparison with the number of hours normally performed by other full-time workers who are employed in a similar job, including the self-employed.<sup>634</sup>

The last complete and available data on part-time work date back to 2011 when the percentage of part-time workers was 15.5 %, the percentage of female employment was 40.7 % and the percentage of female part-time workers was 29.3 % as compared to 5.9 % for males.<sup>635</sup>

The majority of women working part time are employed in the services sector, mainly commerce and care, while the percentage in industry is lower, about 19 %, and has been progressively decreasing in the last few years. Two thirds of the increase in female participation in the labour market over the last twenty years is due to part-time workers although many women declare that they would change to full-time work.<sup>636</sup> This increase mainly concerns non-qualified jobs, especially workers, while professionals and employees in high positions rarely work part time.

Data on involuntary part-time work records a percentage of 63 % for men and more than 50 % for women.<sup>637</sup> Only 4.4 % of male part-time workers and 1.5 % of the female equivalent combine a few part-time jobs.

Women mainly choose to work part time for family reasons (about 43 % against 4 % of men) and this form of occupation is certainly viewed as specifically related to women in relation to family responsibilities.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

Part-time work is an employment contract where the working hours are reduced compared to the schedule of full-time workers employed in the same job. Part-time work can be horizontal when the working time reduction concerns a single day, vertical when the person works full

<sup>632</sup> D. Watson et al. *Disability in the Irish Labour Market: Evidence from the QNHS Equality Module 2010* Equality Authority 2013, G. Kingston et al. *Ethnicity and Nationality in the Irish Labour Market: Evidence from the QNHS Equality Module 2010* Equality Authority 2013, and F. McGinnity et al. *Analysing the Experience of Discrimination in Ireland* Equality Authority 2012.

<sup>633</sup> This is the definition provided by the National Institute for Statistics (ISTAT).

<sup>634</sup> [http://www3.istat.it/dati/catalogo/20110802\\_01/arg\\_11\\_40\\_i\\_tempi\\_del\\_lavoro.pdf](http://www3.istat.it/dati/catalogo/20110802_01/arg_11_40_i_tempi_del_lavoro.pdf), p. 55, accessed 12 April 2013.

<sup>635</sup> [http://noi-italia.istat.it/index.php?id=7&user\\_100ind\\_pi1%5Bid\\_pagina%5D=97&cHash=b9ed5190ce34dd3a9574e47852d5a33c](http://noi-italia.istat.it/index.php?id=7&user_100ind_pi1%5Bid_pagina%5D=97&cHash=b9ed5190ce34dd3a9574e47852d5a33c), accessed 12 April 2013.

<sup>636</sup> <http://www.istat.it/it/files/2012/05/Rapporto-annuale-2012.pdf>, accessed 12 April 2013.

<sup>637</sup> *Rapporto CNEL 2012 sul Mercato del Lavoro* [http://www.cnel.it/53?shadow\\_documento=22786](http://www.cnel.it/53?shadow_documento=22786), accessed 12 April 2013.

time but only for some periods within the week, the month or the year, or it can also be mixed when it combines both forms of reduction.

Under Decree No. 61/2000,<sup>638</sup> the contract must be in a written form and must contain the exact schedule of the working time. The worker can be asked to perform additional hours if he gives his consent or the collective agreement lays this down. In case of horizontal part-time work, the worker's possible refusal can never justify dismissal.<sup>639</sup>

Flexibility clauses which allow the employer to request an increase or a change in the working time schedule must be approved in writing by the employee, who is not obliged to accept them, although obviously his/her consent can be very readily given, most of all when this occurs at the beginning of the working relationship.

Changes to the working time under a flexibility clause entitles the worker to an increase in remuneration and to a right of notice of at least five days from the employer. Collective agreements provide some limitations on the employer's right to change the working time, also as regards an increase in working time, and the conditions for the worker to request the elimination of or a modification to the flexibility clause.

The provisions on part-time work also apply to the public sector with some slight differences. Under Article 1, Paragraph 58 of Act No. 662/1996, as modified by Article 73 of Decree No. 112/2008 and Article 16 of Act No. 183/2010, the Public Administration can reject the worker's request to change to part-time work when there is a clash of interests caused by other possible working activity and in case it hampers the functioning of the enterprise. Under a previous ruling, instead, the worker, also in the latter case, had a right to change to part-time work and his request could only be postponed for a maximum of six months. Moreover, under Article 6, Paragraph 4 of Decree No. 79/1997 the worker also has the right to return to full-time work after two years.

### *2.1.1. National policies*

Part-time work is mainly addressed as a reconciliation measure in certain policies. For instance, Article 9 of Act No. 53/2000 provides for the allocation of a part of the Fund for Family Policies to public or private businesses and also to associated businesses that enforce collective agreements concerning targeted positive actions adopting a flexible working schedule through different measures, including part-time work.

Under Article 12*bis* of Decree No. 61/2000 a priority in access to part-time work is recognised when an employee's relative is suffering from cancer or other serious illness, when he or she assists a live-in relative who is not self-sufficient or when an employee takes care of a live-in child who is younger than 13 or who is disabled. In the case of a certified and serious illness suffered by an employee's spouse or a relative the employee can agree to modify working conditions, e.g. to work part time.

The worker who has changed to part-time work has priority in returning to full-time work if personnel have to be appointed for the same job.<sup>640</sup>

An Action Plan signed by the Minister of Labour and the Minister for Equal Opportunities in 2011 was also aimed at spurring all social parties to enhance the measures mentioned above.<sup>641</sup> The Observatory of the National Equality Adviser had been charged with monitoring the respective good practices. Nevertheless, at present no assessment of the implementation of this Plan has been published which confirms the criticism expressed by a major union concerning its real efficacy.<sup>642</sup>

<sup>638</sup> Decree No. 61 of 25 February 2000, implementing Council Directive 97/81/CE concerning the Framework Agreement on Part-time Work concluded by UNICE, CEEP and the ETUC, published in Official Journal No. 66 of 20 March 2000, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2000-03-20&atto.codiceRedazionale=000G0103&currentPage=1>, accessed 12 April 2013.

<sup>639</sup> Article 3 Paragraph 3 of Decree No. 61/2000.

<sup>640</sup> Article 12*ter* of Decree No. 61/2000.

<sup>641</sup> Mid-term Programme for increasing women's participation in the Labour Market, December 2009, [http://www.lavoro.gov.it/Lavoro/PrimoPiano/20091201\\_Piano\\_Azione\\_Italia2020.htm](http://www.lavoro.gov.it/Lavoro/PrimoPiano/20091201_Piano_Azione_Italia2020.htm), accessed 12 April 2013.

<sup>642</sup> <http://www.cgil.it/Archivio/PariOpportunita/Valutazioni%20Piano%20ITALIA%202020.pdf>, accessed 12 April 2013.

In more general terms, in the private sector an employer who wishes to hire part-time employees must inform full-time employees of this fact and take into consideration their possible request to change to part-time work.<sup>643</sup> The individual contract of employment can provide that the worker who has changed to part-time work has priority in returning to full-time work if new employees have to be appointed to the same job in the same area. The change from full time to part time or *vice versa* can never justify the worker's dismissal.<sup>644</sup>

### 2.1.2. *Equal treatment*

Article 4 Paragraph 1 of Decree No. 61/2000 on part-time employment expressly provides that part-time workers shall never be subjected to more disadvantageous treatment, simply because they work reduced working hours, in comparison with full-time workers who perform the same or an equivalent job. This means that they are entitled to the same working conditions which are enforceable for full-time workers and, in particular as regards remuneration, in proportion to the working hours provided by their contract. Collective agreements, as regards vertical part-time work, can adapt the length of the trial period and of the period for preserving a job (protection against unfair dismissal) in case of illness.

Moreover, all kinds of part-time workers are fully covered by the protection provided by the Code for Equal Opportunities (Article 27 of Decree No. 198/2006) against gender discrimination as well as the provisions on part-time work, both in the public and in the private sector, irrespective of the size of the business, the length of service or the percentage of the working time reduction.

The VI Report on the implementation of CEDAW does not include any reference to specific measures aimed at combating stereotypes as regards part-time work, and neither have any debates on this issue been recorded.

### 2.1.3. *Organisation of working time*

As regards national legal measures to facilitate the development of part-time work see above at paragraph 2.1.

Workers/employees have no general right to change to part-time work. The main statute governing working time is aimed at employees' health and safety rather than reconciliation. Under Article 12*bis* Paragraph 1 of Decree No. 61/2000 an employee has a right to work part time when he or she suffers from a serious illness.

In the public sector, in general, the change from full-time to part-time work is no longer a worker's right as such (see above 2.1).

After returning from maternity leave a working mother does not have a right to work reduced hours but she can benefit by two hours a day in time off for breastfeeding until the child is one year old. Moreover, after the recent changes to the Code on the Protection of Motherhood and Fatherhood (Decree No. 151/2001), parental leave can be used on an hourly basis. This can also lead to a daily or weekly/monthly reduction of working time, although the worker is not fully covered as regards remuneration. Parental leave actually provides an entitlement to an allowance of 30 % of the remuneration for six months until the child is three years old.

In general terms, a case can only be brought to court when the worker has a statutory right to change to part-time work or, in the public sector, when the employer has not (properly) justified a refusal.

### 2.1.4. *Assessment*

As regards working part time as a measure aimed at the reconciliation of private life and working time, one of the weakness of the legislation lies mainly in the provision on extra time and flexible clauses as the worker cannot fully rely on predetermined spare time. The 5-day period of notice and the right to compensation when flexibility clauses are used by the

<sup>643</sup> Article 5 Paragraph 3 of Decree No. 61/2000 provides that the information can be delivered by displaying it in a public area of the business.

<sup>644</sup> Article 5 Paragraph 1 of Decree No. 61/2000.

employer under Decree No. 61/2000 can be derogated from by the parties. Moreover, all limits regarding the quantity and the criteria for changes in scheduling or the criteria on requesting a suspension of possible flexibility clauses are provided by collective agreements, but this kind of protection suffers from the problems of the personal scope and the strength of collective agreements in different sectors. As the financial crisis is very serious it is also difficult for workers to refuse to abide by these clauses, although formally they are entitled to do so, considering the express prohibition on any dismissal concerning this point.

Another ‘gap’ in the law is certainly the few cases where workers have a real ‘right to work part time’. In certain sectors and most of all for certain positions a change to part-time work is seldom accepted by the employer. Statistics on resignations by working mothers, which must be validated at the Labour Inspectorate within 12 months of the child’s birth, showed that a high percentage of women had stopped working because they could not combine working time and taking care of the child due to the lack of crèches and/or relatives who could help.<sup>645</sup>

## 2.2. *Collective agreements*

### 2.2.1. *Policies*

There have been no special debates on part-time employment. In very general terms, the unions’ attitude towards this contract can be discerned by looking at national collective agreements. In fact, working part time, which was and still is mainly meant as an instrument of conciliation between working and private life (in some sectors it is also mentioned as regards the promotion of Corporate Social Responsibility), is also considered as a way to provide an incentive for matching the demand for and the supply of labour,<sup>646</sup> an opportunity for the business to adapt to organisational needs, or to face periods of economic crisis (helping processes for the requalification of workers in case of redundancies) or to ensure appropriate periods of leave for training purposes.<sup>647</sup> These different approaches probably also demonstrate the progressive overcoming of an initial suspicion towards this type of agreement.

### 2.2.2. *Equal treatment*

Collective agreements usually reproduce the same provisions as laid down in Decree No. 61/2000 and add some further practical details for their application, in particular to ensure the principle of proportionality regarding, for instance, hourly pay or the length of the trial period. The collective agreement in the Insurance sector is particularly interesting as it expressly provides that part-time workers are entitled to the same career opportunities as comparable workers, so the same criteria for calculating the length of service must be applied.

### 2.2.3. *Organisation of working time*

Considering that this form of agreement is particularly ‘at risk’ as regards the principle of equal treatment as laid down in Article 3 of the Constitution and the principle of the sufficiency of remuneration as laid down in Article 36 of the Constitution, collective agreements often provide some limits on the use of flexibility clauses, including the possibility for workers to suspend them for justified reasons (such as, for instance, personal health reasons, different occupations with incompatible working times or other reasons of

<sup>645</sup> Annual Report for 2012 by the Minister of Labour, General Directorate of Labour Inspections, on the resignation of working mothers, in [http://www.lavoro.gov.it/NR/rdonlyres/38743A13-A79E-4693-AC00-F21A11FE9588/0/Relazione\\_convalida\\_dimissioni\\_2012.pdf](http://www.lavoro.gov.it/NR/rdonlyres/38743A13-A79E-4693-AC00-F21A11FE9588/0/Relazione_convalida_dimissioni_2012.pdf), accessed 12 April 2013.

<sup>646</sup> Collective agreement in the Services sector, in <http://www.ilccnl.it/CCNL/Terziario%20e%20Servizi/Terziario%20-%20Confesercenti/CCNL%20Commercio%20-%20Confesercenti.htm#aTestoCCNL>, accessed 12 April 2013.

<sup>647</sup> <http://www.ilccnl.it/CCNL/Chimica/Chimica%20e%20Affini%20-%20Industria/CCNL%20Chimica%20-%20Industria.htm#aAccordoIpotesi>, and <http://www.ilccnl.it/CCNL/Terziario%20e%20Servizi/Terziario%20-%20Confesercenti/CCNL%20Commercio%20-%20Confesercenti.htm#aTestoCCNL>, accessed 12 April 2013.

equal social value to be laid down in a collective agreement at the level of the business<sup>648</sup>), they determine the percentage of the increase in compensation (from 1.5 % to 10 % in hourly pay or forfeiting a minimum of EUR 120 per year) in case of a change or an increase in working time, and a longer period (7 or sometimes even 10 days) of notice for the use of these clauses. Moreover, collective agreements normally provide quantity limits for overtime and sometimes the need to justify any overtime; the collective agreements in the Insurance and Commerce sectors also provide for a minimum working time (daily, weekly or monthly) which must be guaranteed to the worker/employee.

Data on part-time work are often provided within the unions' right of information both at national and business level.

The collective agreement for the Mechanical Industry provides that, taking into account the worker's specific competence, the business will allow 3 % of full-time workers to change to part-time work, also on a temporary basis (from a minimum of 6 months to a maximum of 24 months) for specific needs, such as caring for a seriously ill live-in relative, for a child up to 13 years old, or in order to obtain compulsory or higher education. In different cases the employer will consider workers' requests to change to part-time work and this can apply for up to 4 % of the full-time personnel. Moreover, the worker in question will not be asked to adhere to flexible clauses. The collective agreement in the Services sector provides the same right to temporary part-time work, if it is compatible with the worker's job, but only for the parents of children up to three years old. The majority of collective agreements do not promote part-time work in this way.

#### 2.2.4. *Assessment*

In general all collective agreements include provisions on part-time work. Most of them were actually entered into before the last legislative amendments which were introduced in June 2012 by Act No. 92, but some agreements already 'anticipated' the softening of 'flexibility clauses' in the interest of employers, which is the aim of the last legislative amendment. As regards any weak points in collective agreements we can mention the lack of, except in rare exceptions, the promotion of part-time work as a temporary measure to meet the contingent and individual needs of the worker, as well as the total lack of any reference to the possibility to change to part-time work in all kinds of jobs, also highly qualified positions.

### 2.3. *Case law*

#### 2.3.1. *Cases/opinions of equality bodies*

On 29 August 2011 the Court of Cassation stated in n. 17726 that under Article 4 of Decree No. 61/2000 on the prohibition on discrimination the comparator is a full-time worker who performs a job at the same level according to collective agreements. So no other criteria, such as the constant shifting of work activity which is only performed by full-time workers, can be used to differentiate the remuneration of part-time workers (that is, to pay a higher remuneration to full-time workers). On 30 December 2009 the Court of Cassation ruled in n. 27762 that the court is entitled to reduce the period during which the worker has the right to retain his job in the case of illness although this rule is not provided in any collective agreement, as this allows the principle of proportionality to be applied in relation to the effective working time.

On 3 August 2005 the Court of Cassation stated in n. 16284 that the 'benefit (remuneration)' which is linked to the high-level position of the worker must be fully (and not in proportion to the working schedule) recognised for both full-time and part-time workers. This benefit is actually given to remunerate the special responsibility linked to the position which does not depend on working time and is legitimate as Decree No. 61/2000 expressly

<sup>648</sup> Collective agreement in the Mechanical Industry, on <http://www.ilcni.it/CCNL/Meccanici/Metalmeccanica%20-%20Industria/CCNL%20Metalmeccanica%20-%20Industria.htm#aTestoCCNL> and <http://www.ilcni.it/CCNL/Meccanici/Metalmeccanica%20-%20Industria/CCNL%20Metalmeccanica%20-%20Industria.htm#aAccordoIpotesi>, accessed 12 April 2013. In the Commerce and Insurance sectors similar limits are provided by collective agreements.

provides that individual and collective agreements can entitle part-time workers to a remuneration which is more than proportional to the remuneration of comparable full-time workers.

### 2.3.2. *Assessment*

Published case law on the ban on discrimination against part-time workers is quite scanty but it does show a certain sensitivity on the part of judges towards the ‘reasons’ why workers want to work part time although no cases have been published which faced this problem from the point of view of gender discrimination.

### 2.4. *Involvement of other parties*

Nothing of relevance under this heading.

## 3. **Statutory social security and pension rights**

### 3.1. *Exclusions*

The statutory system is compulsory and it is not subject to any limitations.

The requirements for access to pensions in the *contribution-based system* are the following: a) a pensionable age of 62 for women (in the private sector) and 66 for men (and for women in the public sector) coupled with both a minimum period of contributions of 20 years and a total of contributions paid so that the total of the pension corresponding thereto is at least equal to about EUR 660 a month (that is to say 1.5 times the Social allowance); b) or, alternatively, the worker must be at least 70 years of age in order to receive a pension without the above-mentioned requirements.

The amount of the total individual contributions is very sensitive to earnings levels and their variations and to the continuity and regularity of the claimants’ employment. As regards part timers, in particular the earnings level may endanger the right to a pension at 62-66 years of age because of the fulfilment of the total amount of pension requirement: in order for the pension to be at least equal to 1.5 times the state social allowance, a considerable amount of contributions must have been paid on and the amount of contributions depends on the pay level, which for part timers is always lower than for full timers.

It must also be underlined that in our system there is a general rule which concerns all the benefits subject to the fulfilment of contribution conditions, such as pensions. According to this rule, the number of weekly contributions to be credited annually is equal to the number of paid working weeks; the worker, however, is only credited with the weekly contribution in full if his/her pay is at least equal to 40 % of the monthly minimum pension. If this ceiling (about EUR 180 a week) is not reached, the weekly contribution is proportionally reduced: a proportional reduction of the weekly contribution results, in turn, in a reduction of the contribution record and thus a period of time longer than normal will be necessary to fulfil the contribution conditions.

The involuntary unemployment requirement has often had a negative impact on women working part time. Indeed, the Court of Cassation has denied unemployment benefits to vertical part-time workers, in relation to periods during which the work is suspended, based on the assumption that the inactivity during those periods is voluntary, as it is part of the working-time agreement which exists between the employer and the vertical part timer.<sup>649</sup> This case law has also been supported by a decision of the Constitutional Court, which expressly denied any infringement of the anti-discriminatory legislation.<sup>650</sup> On the other hand, temporary workers, who are in the same substantial situation as vertical part timers as regards periods of inactivity, are entitled to unemployment benefits. Given that those who are actively looking for work during periods of inactivity can be considered as being involuntarily

<sup>649</sup> Corte di Cassazione SU 6/2/2003, no. 1732 and Corte di Cassazione 26.3.2007, no. 7298.

<sup>650</sup> Corte Costituzionale 24.3.2006, no. 121.



unemployed, it is clearly discriminatory to preclude benefits for vertical part timers who are available for work during their periods of inactivity. As many part timers are women, it is also clear that in this respect women are once again among the victims of indirect discrimination.

Again, the involuntary unemployment requirement does not take into consideration the possible obstacles which single parents have to face in entering the labour market, as is shown by the following case. In March 2008, a young woman applied for a two-month fixed-term contract at a school where she had previously worked under a part-time contract from 7.00 a.m. to 1.00 p.m. When she discovered that the job was from 1.00 to 8 p.m., she no longer had any interest therein as she had two children aged 6 and 4-years old to take care of as a divorced mother. As a result, the Job Centre withdrew her unemployment benefit and she lost her season ticket for public transport and the exemption from health expenses, which are only available to an ‘unemployed person’.<sup>651</sup>

The family income benefit also demonstrates a discriminatory feature against part timers. Indeed, workers are entitled to full weekly family benefits when they work at least 24 hours a week. Part-time employees working less than 24 hours a week are entitled to family benefits in proportion to the number of days spent at work, independent of the number of hours worked per day: thus, if a part timer works 1 hour a day for 5 days a week, she/he will receive 5 daily family benefits, while if she/he works for 21 hours a week during 3 days, she/he will only receive 3 daily benefits; vertical part timers do not get any benefit in relation to spells of inactivity.

### 3.2. Assessment

Our legislation is, on the whole, fairly in line with the EU law on gender equality. However, a social security system essentially based upon the employment status of the claimants, as all public social insurance systems are, strongly penalises those persons who are in situations of need and do not have a good employment record; in particular, as caring for the family is mainly entrusted to women, this can result in their exclusion from the labour market and consequently from contributory benefits, which in Italy means having to rely either on the social allowance or on civil invalidity benefits, the amount of which is quite low. In other words, in systems based on social insurance, claimants’ earnings variations as well as the continuity and regularity of their employment appear to be of crucial importance. Therefore, what is at stake are pensions and unemployment benefits and all other contributory benefits of atypical workers, intermittent, temporary, occasional and part-time workers as well as those of workers with earnings and careers which are inferior compared average standards, and these kinds of jobs are mainly taken up by women. These sorts of problems emerge in the form of indirect discrimination.

In this context, it is extremely important to keep atypical workers, that is to say intermittent, temporary, occasional and part-time workers, within the social insurance system. Their confinement to the area of social assistance, that in our country is absolutely inadequate, must be avoided. This is also because during their spells of employment they do pay insurance contributions, which should not be wasted. Therefore, an important step in this direction could be an improvement to the set of instruments geared towards recovering wasted contributions in the statutory social security system, such as the crediting of notional contributions, the totalising of contributions, redemption and voluntary contributions. In particular, it is necessary to widen the scope of *notional contributions* to all periods of involuntary unemployment or under-employment and of professional training as well as – in the long term – to all the periods of family, care and voluntary work. It would also be desirable for the social security system to contribute towards the expenses of *redemption* and of *voluntary contributions*.

As regards family income benefit, this should be paid in proportion to the number of hours worked rather than the days spent at work; this would eliminate discrimination against vertical part timers working less than 24 hours a week.

<sup>651</sup> As posted on: <http://prono.provincia.genova.it/settore.asp?CodiceSettore=LAV>, accessed 29 May 2013.

At a social policy level, it has become evident that unemployment benefits are crucial in the fight against progressive impoverishment linked to atypical working patterns: this area of social protection should therefore be globally rethought taking into consideration the evolution of the labour market during the last few decades. In particular, all cases where the discontinuity of employment and underemployment make it impossible for workers to reach income levels which are sufficient to attain social integration should be included in the social protection against unemployment, as long as the worker is involuntarily inoperative and is actively looking for work: that would correct the current discriminatory situation, such as when vertical part timers lose their unemployment benefit because they are regarded as being voluntarily unemployed, despite the fact that they had taken up what was available on the labour market at that moment and are actively looking for a job in order to attain a decent income.

#### **4. Self-employment**

No relevant information.

#### **5. Access to goods and supply of goods and services**

No relevant information.

#### **6. Are there any gaps in national law?**

No relevant information.

## **II. FIXED-TERM WORK**

### **1. General information**

The percentage of people employed on a fixed-term contract increased by about 5.5 % in 2011 (including apprentices and seasonal workers), but this increase stopped last year with the worsening of the economic crisis. This kind of contract covers about 13 % of the working population and it is not voluntary in 93.5 % of cases. Among fixed-term workers about 14 % are women and 11 % men (respectively of all women and men employed).<sup>652</sup> Statistics also reveal that a fixed-term contract is seen as being less and less a stepping-stone towards a permanent job: this happens in only 23 % of cases while the ‘exit’ percentage is 16 % to 19 % and the permanency percentage in this kind of contract tends to be on the increase.<sup>653</sup>

The prevalence of this type of contract in employment, as we mentioned above, is higher among women than among men, but we have no evidence of the reasons for this.<sup>654</sup>

A fixed-term contract has always been considered as an exception to the ordinary employment contract. This principle is also expressly laid down in Decree No. 368/2001 which reformed this kind of contract, thereby transposing EC Directive 99/70. Anyway, such precarious working relationships are mainly meant as a form of flexibility in entering the labour market which can be particularly functional for the specific and contingent

<sup>652</sup> NoiItalia 100 statistiche per capire il paese in cui viviamo, published by Istat 2012, on [http://www3.istat.it/dati/catalogo/20120215\\_00/Noi\\_Italia\\_2012.pdf](http://www3.istat.it/dati/catalogo/20120215_00/Noi_Italia_2012.pdf), accessed 12 April 2013.

<sup>653</sup> Rapporto CNEL 2012 sul Mercato del Lavoro on [http://www.cnel.it/53?shadow\\_documento=22786](http://www.cnel.it/53?shadow_documento=22786), accessed 12 April 2013.

<sup>654</sup> [http://www.portalecnel.it/Portale/IndLavrapportiFinali.nsf/vwTuttiPerCodiceUnivoco/11-0/\\$FILE/11.%20REGOLAZIONE.%20WELFARE%20E%20POLITICHE%20ATTIVE%20DEL%20LAVORO.pdf](http://www.portalecnel.it/Portale/IndLavrapportiFinali.nsf/vwTuttiPerCodiceUnivoco/11-0/$FILE/11.%20REGOLAZIONE.%20WELFARE%20E%20POLITICHE%20ATTIVE%20DEL%20LAVORO.pdf), p. 263, accessed 12 April 2013.

organisational needs of the business. Some 44 % of businesses also consider this form of contract to be a sort of ‘long trial period’.<sup>655</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

Decree No. 368/2001,<sup>656</sup> which has undergone several amendments during the last few years as a result of alternating tension between increasing flexibility and restricting it, is enforceable as far as all employers are concerned, irrespective of the size of the business. There are some exceptions with regard to the agriculture sector, imports and exports in the market gardening sector, and fixed-term contracts of no longer than three days for special services in tourism sector. It asserts that the non-fixed-term contract is the prevalent kind of contract with regard to the employment relationship and provides that the clause regarding the term of the contract must be in writing in order to be valid. Fixed-term contracts are to be justified by organisational, technical, production or substitutional reasons, but only concerning the ordinary activity of the business. The recent reform also allows for a first contract to be a fixed-term contract, with a maximum length of 12 months, without any justification. No extension is admitted in this case. Other exceptions (i.e., different from ‘the first’ fixed-term contract) to the compulsory justification clause can be provided by collective agreements in some cases as is laid down under Article 5 Paragraph 3 of Decree No. 368/2001 (such as, for instance, in a start-up business) within the percentage of 6 % of the personnel working in the unit.

Collective agreements can provide quantity limits on the use of these contracts, except in cases of new activities, radio or TV programmes or fixed-term contracts which are justified by substitutional or seasonal reasons or are used for workers older than 55 years of age.

Fixed-term workers are not taken into consideration in calculating the threshold above which workers' representative bodies can be constituted in the business unless their contract is longer than nine months. An amendment on this point is provided by the bill for Community Law 2013 which is currently being discussed in Parliament so as to avoid an infringement procedure.<sup>657</sup>

In the public sector fixed-term contracts are governed by Article 36 of Decree No. 165/2001, which also refers to Decree No. 368/2001. The provisions are almost the same with a few differences. As regards the justification the ruling is stricter as the Public Administration can only make use of such contracts for exceptional and temporary reasons. As regards the consequences of an infringement, according to the prevailing interpretation, converting the contract is not possible due to the special nature of this working relationship (which makes any appointment subject to a public competition) and the general principles on compensation for damage which must be applied, together with the personal responsibility of managers which is expressly provided by Article 36 of Decree No. 165/2001.

Two remarkable exceptions apply with regard to fixed-term contracts for both medical/auxiliary staff and teaching/auxiliary staff which are expressly excluded by the scope of the Decree, with the aim being to ensure these essential services (see below on successive contracts).

<sup>655</sup> [http://www.portalecnel.it/Portale/IndLavrapportiFinali.nsf/vwTuttiPerCodiceUnivoco/11-0/\\$FILE/11.%20REGOLAZIONE.%20WELFARE%20E%20POLITICHE%20ATTIVE%20DEL%20LAVORO.pdf](http://www.portalecnel.it/Portale/IndLavrapportiFinali.nsf/vwTuttiPerCodiceUnivoco/11-0/$FILE/11.%20REGOLAZIONE.%20WELFARE%20E%20POLITICHE%20ATTIVE%20DEL%20LAVORO.pdf), p. 20, accessed 12 April 2013.

<sup>656</sup> Decree No. 368 of 6 September 2001, in Official Journal No. 235 of 9 October 2001, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2001-10-09&atto.codiceRedazionale=001G0424&currentPage=1>, accessed 12 April 2013.

<sup>657</sup> <http://www.ilsole24ore.com/art/notizie/2013-04-22/arrivo-parlamento-italia-punta-102151.shtml?uuid=AbLzaQpH>; the text of the bill is published on <http://www.senato.it/service/PDF/PDFServer/BGT/00700298.pdf>, accessed 5 June 2013.

### 2.1.1. National policies

National policies tend to promote the stability of the working relationship. Following Decree No. 368/2001, a worker employed under a fixed-term contract for a period (also not a continuing period) longer than 6 months has priority when ordinary personnel are hired for the same job. This right expires 12 months after the end of the contract. Also seasonal workers have priority in the case of seasonal hiring for the same job by the same employer. With this aim Article 9 Paragraph 1 of the Decree provides an individual right to information, which has to be governed by a collective agreement, so it is not unconditional as stated by Directive CE 99/70 and there are no specific criteria or time requirements provided by the law as to how this information is to be conveyed.

The recent change provided by Act No. 92/2012, which allowed employers to hire first-time workers on fixed-term contracts for up to 12 months without needing a reason to justify such an appointment, has been presented as an important instrument of active labour market policy. This increase in flexibility has been accompanied by an increase in contributions of 1.4 % for fixed-term contracts (except for seasonal and substitute contracts) which can be partially refunded in the case of a change to the ordinary work within 6 months as well as by stricter control of successive contracts.

Special contribution reductions are provided for fixed-term contracts for redundant workers (Article 8 Paragraph 2 of Act No. 223/1991) and for substituting workers on maternity leave when the businesses employ less than 20 workers (Article 4 of Act No. 151/2001).

### 2.1.2. Equal treatment

Article 6 of Decree No. 368/2001 expressly provides that fixed-term workers are entitled to the same working conditions as apply to other workers who perform the same job according to criteria stated by the collective agreement, in proportion to the length of the working relationship and unless this is not compatible with its temporary nature.

Also proper training in health and safety issues must be provided for these workers. Collective agreements can provide for measures aimed at maintaining training to promote workers' qualifications, career and professional mobility and they can also govern the details concerning collective rights to information as regards fixed-term contracts.

The period of work for the same employer, performing the same or an equivalent job, under one or more fixed-term contracts, cannot be longer than 36 months in total, including possible periods of temporary work. As a once-only exception, this limit can be surpassed if this is laid down in a collective agreement and it has been validated by the Labour Department.

### 2.1.3. Successive fixed-term contracts

Under Decree No. 368/2001 a new fixed-term contract for the same job can be proposed to the worker only after 60 days from the end of a previous contract which was no longer than 6 months, or after 90 days if the previous contract was longer than 6 months. Collective agreements can determine that these periods of compulsory interruption are cut respectively to 20 and 30 days. An extension is allowed only once, for the same job, period and reason. Successive or extended fixed-term contracts are allowed within the general time limit of 36 months mentioned above. In case of an infringement the second contract is considered to be an ordinary employment contract.

This specific provision on successive contracts is not enforceable as far as fixed-term contracts for the Public Administration in the school and health sectors are concerned, as provided by Article 10 Paragraph 4*bis* and 4*ter* of Decree No. 368/2001. This exclusion, which seems to involve a lack of protection against abuses of such contracts, is currently being considered by the Constitutional Court<sup>658</sup> as well as by the CJEU for the school

<sup>658</sup> A question of constitutional consistency has been raised by the Tribunal of Trento on 27 September 2011, as reported by the comment by Maria Luisa Offer, in *Lavoro nella Pubblica Amministrazione*, 2011, 2, p. 291 *et seq.*,

sector<sup>659</sup> (a sector which, in addition, has an over-abundance of female employees) (Decree 16 April 1994, No. 297), where fixed-term contracts can also be used to compensate for a general lack of staff that is not for exceptional and temporary reasons.<sup>660</sup>

#### 2.1.4. *Assessment*

Time limits and the principle of equal treatment provide fixed-term workers with protection which is deemed, on the whole, to be consistent with the objectives of Directive 99/70/EC. Nevertheless, both exceptions which can be provided by collective agreements and the new possibility to make use of such a contract without a specific organisational justification run the risk of increasing permanency in precarious jobs. This is particularly true for non-qualified jobs, where the employer, who is not interested in retaining trained workers, can easily find new temporary workers.

Moreover, as regards promoting the stability and competence of fixed-term workers the instrumental rights to information and professional training are too weak as they depend on the existence/enforceability of collective agreements. With regard to, specifically, the principle of equal treatment, Article 6 of the Decree, otherwise than the Directive, does not expressly mention that criteria for determining the length of service for ordinary workers must be applied to fixed-term workers as well, unless different treatment is objectively justified. Although this can be deemed to be implicit in Article 6 of the Decree, an express statement to that effect would ensure a more effective application of this principle (see below the case law on this issue).

Some serious doubts concerning the consistency of the provisions on fixed-term contracts with EU law arise from the last amendments to Decree No. 368/2001 mentioned above as regards successive fixed-term contracts in the school sector, which employs a very high percentage of women. Nonetheless, this issue is dealt with from the point of view of the protection of fixed-term workers, without any reference being made to possible indirect gender discrimination issues, as often happens in Italy, probably meaning a certain underuse of the gender equality/anti-discrimination law.

## 2.2. *Collective agreements*

National collective agreements usually govern fixed-term contracts which are considered to be an instrument to promote employment and gradual stability by laying down a maximum percentage of the workers from the total number of personnel which can be hired under this contract as well as the specific organisational reasons which can justify this. They also normally provide that the unions at national and local level must be informed about the percentage of workers employed on a fixed-term basis, the kind of job this contract is used for, and the reasons for making such appointments, but usually data are not gender-disaggregated.

Most collective agreements provide fixed-term workers with both a priority when hiring for the same job (sometimes together with determining the overall length of service) and the right to be informed of such vacancies.

As regards the principle of equal treatment they mainly entitle bargaining at the business level to lay down criteria for performance bonuses for fixed-term workers, but sometimes they also provide that when there is a lack of collective bargaining the bonus must be

<sup>659</sup> A preliminary ruling from the Tribunal of Naples of 13 January 2013 (not yet published), and an infringement procedure opened by the EU Commission (No. 2124/2010) concern possible gaps in the implementation of Council Directive 97/81/EC on measures to combat the abuse of fixed-term contracts in the school sector, <http://eurinfra.politichecomunitarie.it/ElencoAreaLibera.aspx>, [http://www.lavoroprevidenza.com/leggi\\_articolo.asp?id=2309](http://www.lavoroprevidenza.com/leggi_articolo.asp?id=2309), [http://books.google.it/books?id=Ar\\_wMCEqZ9IC&pg=PA25&lpg=PA25&dq=procedure+d'infrazione+successione+contratti+a+termine&source=bl&ots=Y\\_xK6f0t7B&sig=nvSJDolHoz33Hrm7rOfdNWKXaMM&hl=en&sa=X&ei=IV6aUZPrJYTcPY69gKgM&ved=0CEkQ6AEwBDgU#v=onepage&q=procedure%20d'infrazione%20successione%20contratti%20a%20termine&f=false](http://books.google.it/books?id=Ar_wMCEqZ9IC&pg=PA25&lpg=PA25&dq=procedure+d'infrazione+successione+contratti+a+termine&source=bl&ots=Y_xK6f0t7B&sig=nvSJDolHoz33Hrm7rOfdNWKXaMM&hl=en&sa=X&ei=IV6aUZPrJYTcPY69gKgM&ved=0CEkQ6AEwBDgU#v=onepage&q=procedure%20d'infrazione%20successione%20contratti%20a%20termine&f=false)

<sup>660</sup> See also: Decree 16 April 1994, No. 297, general ruling on the school system which also includes provisions on working relationships in this sector.

proportionate to the length of the contract (also meaning more contracts for the same employer).

Fixed-term workers must also receive proper training, including in safety and some collective agreements provide for a minimum number of hours of training.

### **2.3. Case law**

The scanty case law on the principle of equal treatment provides a broad interpretation of the enforcement of collective agreement clauses on working conditions for fixed-term workers, also following EU law. In particular, the same length of service as other comparable workers (summing up different contracts for the same job and employer) as well as the same time off for study reasons, as a fundamental right of the person under the Constitution and the CEDU, have been recognised for fixed-term workers.<sup>661</sup>

The provisions on successive fixed-term contracts gave rise to very rich case law in the past, which is not worth summarising as it mainly refers to previous provisions. The most interesting issue at present concerns compensation for damage (see below).

### **2.4. Involvement of other parties**

No relevant information.

## **3. Statutory social security and pension rights**

As we have already said, in relation to the calculation of contributory pensions, claimants' earnings variations as well as the continuity and regularity of their employment appear to be of crucial importance: the amount of the individual contribution total is indeed very sensitive to these factors. The same holds true for the fulfilment of the total amount of pension requirement (the pension has to be at least equal to 1.5 times the state social allowance). Here again, therefore, the pension rights of atypical workers, intermittent, fixed-term, occasional and part-time workers, as well as those workers with earnings and careers which are inferior to average standards will be at stake.

Fixed-term seasonal and precarious workers are also excluded from the mobility allowance for the unemployed (which is going to be abrogated as from 2017). Seasonal and precarious workers have reduced contribution conditions for having access to unemployment benefit, but, on the other hand, they receive reduced unemployment benefits with a duration limited by the contribution paid during the previous year. The exclusion of fixed-term workers from sickness benefit for any sickness which emerges during 60 days after the termination of the employment contract is also a discriminatory feature: according to the general rule, benefits are due also for sickness which emerges during 60 days after the termination of the employment relationship; fixed-term workers are excluded from this guarantee and this difference in treatment is unjustified. Moreover, sickness benefits are paid to fixed-term workers for a period that cannot be longer than the number of days worked in the previous twelve months.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

Decree No. 183/2010 introduced some important changes in procedural civil law which can have an impact on the effectiveness of the protection granted, mainly as regards fixed-term contracts.

<sup>661</sup> Court of Cassation No. 3871 of 17 February 2011, published on <http://enti.uilpa.it/index.php/component/attachments/download/183>, accessed 12 April 2013.



Article 32 Paragraph 5 provided a maximum amount of compensation for damage in case of an infringement of time limits (corresponding to an amount of 2.5 to 6 months of remuneration), which has already been deemed to be constitutionally consistent by the national Court as it is not the only remedy but is to be added to the conversion of an illegitimate fixed-term contract into an ordinary employment contract.<sup>662</sup> Also Act No. 92/2012, amending Decree No. 368/2001, specified that the allowance provided by Article 32 fully restores the damage for the period which runs from the end of the working relationship until the judgment. Nevertheless, some recent case law still recognises a right to further compensation, ruling that the fixed amount cannot be considered to be an effective and dissuasive sanction following the principles stated by the CJEU.

The Decree also provided that the right to contest the legitimacy of a fixed-term contract (excluding inconsistencies in successive contracts and extensions thereto) expires after 120 days from its end and the case must be taken to court in the next 180 days. This procedural ruling has been compared to the one on dismissal in that it satisfies employers' need for certainty in the management of personnel but this still weakens the position of precarious workers who will normally avoid taking a case to court hoping for a further renewal of the contract.

## 2. Vulnerability, multiple/intersectional discrimination

No relevant information.

### LATVIA – Kristīne Dupate

## I. PART-TIME WORK

### 1. General information

It is not an easy task to provide employment statistics for Latvia because research from 2011 has demonstrated that entrepreneurs and workers themselves estimate that undeclared work forms 37 % of the Latvian labour market.<sup>663</sup> It also includes the phenomenon of partially undeclared work where an employee is formally employed at the statutory minimum salary but in reality he/she receives a much higher salary in an 'envelope'. In addition, more male than female workers are believed to be 'involved' in the so-called 'grey economy' for well-known reasons: female employees prefer stability with lower pay while male employees are under pressure of stereotypes and therefore choose the most gainful work.<sup>664</sup>

The Central Statistical Bureau of Latvia for the purposes of data provided below does not use any specific definition of 'part-time worker'.<sup>665</sup> The Bureau has acquired the respective data in a poll of employed persons. This means that the data depicts the personal opinion of the workers on whether they work full time or part time. However, the author considers that such data is reliable, because full-time employment is an absolute norm in Latvia, and therefore workers are most likely well-informed that full-time employment means employment of 40 hours per week.

<sup>662</sup> Constitutional Court No. 303 of 11 November 2011, published on <http://www.giurcost.org/decisioni/index.html>, accessed 12 April 2013.

<sup>663</sup> *Darba tiesību problēmjauditājumu izpēte nedeklarētās nodarbinātības gadījumos un darba tiesību aizstāvības rīcībstratēģiju modelēšana* (Research on topical issues in cases of undeclared employment and modelling of strategy of protection of rights), sociological research, 2011, funded by ESF, Confederation of Free Trade Unions of Latvia, Baltic Institute of Social Sciences, available in Latvian on [http://www.lbas.lv/upload//\\_nedekl\\_darbs\\_biss\\_lbas\\_2011\\_gala.pdf](http://www.lbas.lv/upload//_nedekl_darbs_biss_lbas_2011_gala.pdf), accessed 12 April 2013.

<sup>664</sup> Central Statistical Bureau of Latvia, database on [http://data.csb.gov.lv/Selection.aspx?px\\_tableid=Sociala%Ikgad%C4%93jie+statistikas+dati%Nodarbin%C4%81t%C4%ABba%NB0080.px&px\\_language=lv&px\\_type=PX&px\\_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0](http://data.csb.gov.lv/Selection.aspx?px_tableid=Sociala%Ikgad%C4%93jie+statistikas+dati%Nodarbin%C4%81t%C4%ABba%NB0080.px&px_language=lv&px_type=PX&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0), accessed on 8 October 2013.

<sup>665</sup> Telephone interview with a head of unit of employment data of the Central Statistical Bureau of Latvia, 11 April 2013.



According to official statistics on 2012, 9.4 % of all employed persons were part-time workers (or 83 200 persons).<sup>666</sup> Male part-time workers represented 7.1 % (or 30 800 persons) of employed persons, while female workers represented 11.6 % (or 52 400 persons). The total of employed persons was 885 600, 801 800 of whom had full-time employment (398 400 female and 403 400 male). Statistics show that 39.8 % of female part-time workers (or 20 900 persons) and 43.1 % of male part-time workers (or 13 300 persons) stated as the reason for part-time employment that they had been unable to find full-time work. Only 12 % of male part-time workers (or 3 800) and 15.2 % of female part-time workers (or 8 000 persons) indicated a wish to work part time. However, 11 % of male part-time workers (or 3 400 persons) and 11.9 % of female part-time workers (or 6 200 persons) responded that they were employed on a part-time basis on account of personal or family considerations. Statistical data therefore does not demonstrate part-time employment as a major problem for gender equality, because the number of persons employed on a part-time basis and the disproportion of sexes are not very high. Rather, this data is proof of the double burden which must be carried by female Latvian workers. This may be explained by the fact that salaries in Latvia are low and female workers with family obligations are simply compelled to work full time in both situations – when they live alone (with children) and are breadwinners, or when they live with a partner earning an average salary. The fact is that one person is able to provide for normal family needs if he/she earns at least 4 average salaries, so only in such cases can the other partner either work part time or choose not to work at all.<sup>667</sup> At the same time, full-time employment remains a norm in Latvia, most likely from the period of Soviet occupation when everybody was obliged to work and to work full time. To the author's knowledge it is difficult to find part-time employment, because in general employers are sceptical to that form of employment. It is unfortunate that the Statistical Bureau of Latvia cannot provide data on full-time workers who would like to work part time.

The normal working time in Latvia is 40 hours per week. Statistics show that on average in the fourth quarter of 2012 male workers were employed 38.9 hours per week, while female workers had employment for 37.6 hours (self-employed: male – 36.6 hours, and female – 35.6).<sup>668</sup> These average statistics demonstrate that the gap of working time between the sexes is not very high. This may be explained by the fact that the number of part-time workers in general is rather small, as well as that the disproportion between male and female part-time workers is not very high.

Statistics show some more interesting facts, in particular that during the fourth quarter of 2012 only 4 % of male workers (or 17 600 persons) worked additional work (in addition to basic work) while 6.1 % of female workers worked additional work (or 28 000 persons).<sup>669</sup> The author believes several elements may explain this fact. Firstly, around 40 % of children in Latvia live with their mother only. At the same time there are serious problems with receiving alimony payments from fathers, which means that single mothers (together with their children) are subject to high poverty risks. Taking into account that salaries on average are rather low, most probably single mothers are simply compelled to work additional hours in order to earn a sufficient income. Secondly, one must again take into account that statistical

<sup>666</sup> Central Statistical Bureau of Latvia, database on <http://data.csb.gov.lv/Dialog/varval.asp?ma=NB0110&=NBG11%2ENORM%C2LU+UN+NEPILNU+DARBA+LAIKU+NODARBIN%C2TIE+IEDZ%CEVOT%C2JI+P%C7C+DZIMUMA&path=../DATABASE/ledzsoc/Ikgad%E7jie%20statistikas%20dati/Nodarbin%E2t%Eeba/&lang=16>, accessed 10 April 2013.

<sup>667</sup> Pētījums: *Turīgā ģimenē uz vienu ģimenes locekli mēnesī ir vismaz 450 latu* (The research: Wealthy family must have at least 450 lats (EUR 640) income per person monthly); portal nra.lv, 11 June 2013, accessed 7 October 2013.

<sup>668</sup> Central Statistical Bureau of Latvia, database on <http://data.csb.gov.lv/Dialog/varval.asp?ma=c&ti=%2E+PAMATDARB%C2+NOSTR%C2D%C2T%C2S+STUNDAS+%28VID%C7JI+NED%C7%CF%C2%29+P%C7C+DZIMUMA+UN+NODARBIN%C2T%CEBAS+STATUSA+PA+CETURK%D0%D2IEM&path=../DATABASE/ledzsoc/%CEstermi%F2a%20statistikas%20dati/Nodarbin%E2t%Eeba%20un%20bezdarbs/&lang=16>, accessed 10 April 2013.

<sup>669</sup> Refers to employment with a second employer, not over-time. Central Statistical Bureau of Latvia, database on <http://data.csb.gov.lv/Dialog/varval.asp?ma=NB0150c&ti=NB15%2E+BLAKUS+DARB%C2+%C2TIE+P%C7C+DZIMUMA+PA+CETURK%D0%D2IEM&path=../DATABASE/ledzsoc/%CEstermi%F2a%20statistikas%20dati/Nodarbin%E2t%Eeba%20un%20bezdarbs/&lang=16>, accessed 10 April 2013.

data in Latvia regarding employment is not very reliable because of the high percentage of undeclared work. On account of this, it is also probable that more male persons work additional hours and statistics simply reflect reality – women more often tend to perform declared work even if it paid less. No information on the combination of two or more minor jobs or of part-time work with self-employment is available.

No data is available regarding which professions and which sectors of employment have larger numbers of part-time workers.

In 2011 the general pay gap was 17.4 % and in 2012 it was 17.7 %, <sup>670</sup> while the pay gap between part-time male and female workers was only 5 % in 2011 and 3 % in 2012. The pay gap between full-time male employees and part-time male and female employees in 2012 was 37.6 % and 39.5 % accordingly. This means that the overall pay gap between part-time male and female workers compared to full-time male employees is only 2 %. It follows that according to statistics there are more problems with the gender pay gap among full-time workers than part-time workers, because the gender pay gap among part-time workers is minor.

Part-time work is considered as an exception. This is proven by the fact that in Latvia in 2012 only 9.4 % of all employed persons were part-time workers. Moreover, part-time employment is rather seen as the inability to find full-time work because of the lack of demand for the relevant profession/skills in the labour market. Such assumption may be based on the fact that the rate of part-time employment was considerably affected by the financial crisis that started at the end of 2008. In 2007 only 6.4 % of employees were employed on a part-time basis, in 2008 this was 6.3 %, in 2009 it was 8.8 %, in 2010 it was 9.7 % and in 2011 it was 9.2 %. <sup>671</sup> The recovery of the economy that started in 2010 has resulted in a decrease in the rate of part-time employment. The increase of part-time employment during the economic crisis may also be explained by the social solidarity measures taken by private employers, since a considerable part of them decided not to dismiss workers but rather to reduce their employment time. In the public sector measures were also taken to change employment agreements from full-time into part-time employment, firstly, because of the lack of financial resources to pay for full-time employment, and secondly to avoid a high unemployment rate.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

#### *2.1.1. National policies*

There are no national policy measures to be described with regard to part-time employment. Part-time work has never been seen as a problem from the perspective of gender equality, and CEDAW reports are therefore silent on this issue.

#### *2.1.2. Equal treatment*

The normative Act regulating individual employment is Labour Law. <sup>672</sup> The Labour Law is applicable to all employees working in the public and the private sector, except special groups of officials employed under special public service laws. The Labour Law does not differentiate labour rights depending on the size of the enterprise.

Article 134(3) of the Labour Law explicitly provides that an employee who is employed on a part-time basis must enjoy the same working conditions as an employee who is employed on a full-time basis. Therefore the Labour Law does not provide for any norm

<sup>670</sup> According to data provided by the Ministry of Welfare specially prepared by the Central Statistical Bureau of Latvia, provided in an e-mail of 10 April 2013 from a senior official of the Ministry of Welfare.

<sup>671</sup> Central Statistical Bureau of Latvia, database on <http://data.csb.gov.lv/Dialog/varval.asp?ma=&ti=%2ENORM%C2LU+UN+NEPILNU+DARBA+LAIKU+NODARBIN%C2TIE+IEDZ%CEVOT%C2JI+P%C7C+DZIMUMA&path=../DATABASE/iedzoc/Ikgad%E7jie%20statistikas%20dati/Nodarbin%E2t%E2ba/&lang=16>, accessed 11 April 2013.

<sup>672</sup> *Darba likums*, Official Gazette No. 105, 6 July 2001.

which would allow the exclusion of part-time workers from any mandatory minimum statutory rights provided by the Labour Law. In other words, all Labour-Law provisions are equally applicable to part-time and full-time employees.

There is no legal definition of ‘part-time worker’. However, a definition follows from Article 134(1), which provides that an employer and an employee may agree on part-time employment, which is shorter than the normal daily or weekly working time. According to Article 131(1) the normal daily working time is 8 hours and the normal weekly working time is 40 hours. From the formulation of the definition of part-time employment (in particular, Article 134(1) of the Labour Law) it follows that part-time employment under Latvian Labour Law is seen as an exception rather than the norm. Such fact is proven by the statistical data provided above.

### *2.1.3. Organisation of working time*

Article 134 of the Labour Law includes stipulations with regard to the right to full-time and part-time work. First, Article 134(1) allows part-time employment. Second, Article 134(5) obliges an employer to transfer an employee from full-time work to part-time work if she/he so requests and if this is possible in a particular business. Third, according to Article 134(4) the refusal to transfer from full-time to part-time work, or the other way around, is no valid basis for dismissal, unless the request for transfer is sufficiently justified by urgent economic, organisational, technological or similar needs of the business. Fourth, under Article 134(6) an employer must provide information to the workers’ representatives on the possibility of part-time employment in a business if they request such information. Fifth, Article 134(7), like Article 136 on overtime work as applicable to full-time workers, provides that employment of a part-time worker for overtime hours requires written consent. Six, Article 134(2) obliges the employer to provide part-time employment to a pregnant worker, to a worker during the maternity period, which is 1 year after giving birth or the entire period of breastfeeding, and to a worker who has a disabled child under the age of 14. This means that Latvian law envisages mandatory obligations to facilitate part-time employment only with regard to pregnancy and maternity or disability of a child. No such mandatory obligation is provided with regard to further childcare or with regard to care for elderly relatives.

It follows from the above that part-time employment in general is subject to mutual agreement between employer and employee. This especially applies regarding particular aspects of part-time employment, i.e. organisation of the number of working hours, schedule etc.

An employee has the right to claim the breach of any norm provided by the Labour Law before the national courts. If an employer breached any provision of Article 134, an employee would therefore have the right to contest it before a national court.

### *2.1.4. Assessment*

Overall, national legislation may be considered as satisfactory. However, it is doubtful whether the rights provided by Article 134 of the Labour Law are effectively applied in practice. On account of the relatively high unemployment rate it should not be ruled out that employees do not enforce their rights because of a fear of dismissal. It is generally known that enforcement measures are not effective in practice – workers’ representation is rare and weak and litigation before court is time-consuming and costly. Unfortunately there is no data on how many full-time employees would wish to work part time. Such data would allow assessment of whether this is a problem in practice.

Further, formal legal provisions do not explicitly stipulate an obligation to transfer an employee to full-time work after the end of the pregnancy and maternity period. Legal regulations also fail to take into account the need to care for elderly relatives.

It may be presumed that employers are not interested in part-time employment because it may cause higher administration costs, e.g. insolvency risk contributions for each individual employee irrespective of working time, organisation of work with a larger number of employees, and production of reports to administrative institutions on a larger number of employees (the State Revenue Office, State Social Security Agency, Statistical Bureau etc.).

Finally, there is a traditional view that if a person cannot work full time he/she does not comply with the norm and consequently automatically belongs to the 'risk group' – persons with family obligations (risk of sick leave on account of sickness of a child/children) or persons with special needs (again risk of frequent sick leave).

## **2.2. Collective agreements**

### *2.2.1. Policies*

Social partners, in particular the Confederation of Free Trade Unions of Latvia, in their informative materials have invited employers' and workers' representatives several times to introduce flexible organisation of working time in order to provide better opportunities to various groups of society. However, collective agreements in general are not common in Latvia, and moreover there is no data on whether any of them provide for special measures with regard to part-time employment.

### *2.2.2. Equal treatment*

There are no generally applicable collective agreements, except one general agreement concerning employees working in the railway transport services. This means that there are no widely applicable collective agreements regulating issues of part-time workers, if any at all.

### *2.2.3. Organisation of working time*

There is nothing to report on this issue.

### *2.2.4. Assessment*

There is nothing to report on this issue.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

No relevant case law or opinion of the Ombudsman has been found.

### *2.3.2. Assessment*

There is nothing to report on this issue.

## **2.4. Involvement of other parties**

The issue of part-time employment has never been discussed in public debate. There is no information that any other party than the legislator or the Government has ever dealt with issues regarding part-time employment.

## **3. Statutory social security and pension rights**

### **3.1. Exclusions**

Statutory social insurance is equally applicable to all employees irrespective of working time.<sup>673</sup>

The only disadvantage which may concern part-time workers in statutory social insurance is the amount of the allowances or the old-age pension, because such amount is directly

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<sup>673</sup> Law on Statutory Social Insurance (*Likums 'Par valsts sociālo apdrošināšanu'*), Official Gazette No. 274/276, 21 October 1997. The exception applies to the employees of micro-enterprises because their statutory insurance contributions do not depend on their salary but on the company's turnover, which sometimes does not even provide for a minimum statutory social insurance allowance. However it is equally applicable to full-time and part-time employees of such businesses. There is no data on how many employees are employed in micro-tax businesses. The Law on Micro-Enterprise Tax (*Mikrouzņēmumu nodokļa likums*), Official Gazette No. 131, 19 August 2010.

dependent on the amount of the contributions. If salary is low, then allowances and old-age pension would also be low. However, there are no differences between full-time and part-time workers regarding the amount of the contributions (in proportion), or in the calculation of the allowances or old-age pension.<sup>674</sup>

Persons who receive unemployment benefits are not allowed to work at all.<sup>675</sup> In case of any type of employment the right to unemployment benefits is lost immediately. The same applies to sickness benefits. This is a problem especially for persons employed in several jobs on a part-time basis and jobs of a different nature (for example, sickness not always precludes distance working (from home)).

The provisions of statutory social insurance are also 'family-unfriendly'. In particular, it concerns the right to childcare allowance. For the mother/father to be entitled to such allowance, any type of employment, including minor, is prohibited.<sup>676</sup> On the one hand the Labour Law allows requesting part-time employment during the maternity period, but at the same time there are no compensatory mechanisms to make up for the partial loss of pay, i.e. through the statutory social insurance system. In Latvia this is a topical issue, because as mentioned above, salaries are low and the majority of employees may 'survive' only when receiving a salary corresponding to full-time employment. In addition, unlike maternity, paternity and sickness leave where the State provides social insurance in the full amount against other social risks, during childcare leave, irrespective of the amount of childcare allowance, which is 70 % of previous earnings, the State offers insurance against old age, disability and unemployment risk only from EUR 71 (LVL 50), i.e. if the monthly income is only EUR 71.<sup>677</sup> Such a situation, where even part-time employment is precluded during childcare leave, has a negative impact on the amount of old-age pensions, which is of course a gender discrimination issue.

### 3.2. Assessment

It follows from the information above that the Latvian statutory social insurance system is not flexible regarding persons with family responsibilities, because it does not allow a flexible combination of professional and family life, especially during the childcare period. It also fails to provide equal protection to persons working several part-time jobs, especially with regard to sickness and unemployment protection. Consequently it does not provide equal opportunities in the labour market and related social security rights (especially old-age protection).

## 4. Self-employment

According to statistics, self-employed men represent 7.1 % of economically active persons in Latvia and self-employed women are 6.2 %.<sup>678</sup>

There is no concept such as dependent self-employment under Latvian law and therefore there is no such thing as 'part-time self-employed', because independent self-employed persons according to Latvian law are not restricted with regard to working time. This is also the reason why neither the Latvian Central Statistical Bureau nor any other institution has any

<sup>674</sup> Law 'On maternity and sickness insurance' (*Likums 'Par maternitātes un slimības apdrošināšanu'*), Official Gazette No. 182, 23 November 1995; Law 'On unemployment insurance' (*Likums 'Par apdrošināšanu bezdarba gadījumam'*), Official Gazette No. 416/419, 15 December 1999; Law 'On State Pensions' (*Likums 'Par valsts pensijām'*), Official Gazette No. 182, 23 November 1995.

<sup>675</sup> Law 'On unemployment insurance', Official Gazette No. 416/419, 15 December 1999.

<sup>676</sup> Law 'On maternity and sickness insurance', Official Gazette No. 182, 23 November 1995.

<sup>677</sup> *Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem* (The Cabinet of Ministers Regulation No.230 'On mandatory contributions from state budget and special statutory social insurance budget'), OG No. 91, 13 June 2001.

<sup>678</sup> Central Statistical Bureau of Latvia, database on <http://data.csb.gov.lv/Dialog/varval.asp?ma=c&ti=%2E+NODARBIN%C2TIE+IEDZ%CEVOT%C2JI+P%C7C+DZIMUMA+UN+NODARBIN%C2T%CEBAS+S+TATUSA+PA+CETURK%D0%D2IEM&path=../DATABASE/ledzsoc/%CEstermi%F2a%20statistikas%20dati/Nodarbin%E2t%Eeba%20un%20bezdarbs/&lang=16>, accessed 10 April 2013.

data on self-employed persons who work less than 40 hours a week, i.e. who work part time. Statistics provide the average working time of self-employed persons, which is 36.6 hours per week for self-employed men and 35 hours per week for women. Overall, self-employed persons have very low social protection. The author considers that overall, the situation of self-employed persons is very different regarding the precariousness of work.<sup>679</sup> Under Latvian law, self-employed persons are persons working in prestigious and profitable professions such as attorneys, medical doctors in private practices<sup>680</sup> etc. At the same time, the rest of self-employed persons are small entrepreneurs in a small (Latvian) market which does not always guarantee a stable flow of customers and the related stable income.

## 5. Access to goods and supply of goods and services

Access to goods and services in Latvia depends on the level of income. In the sector of financial services (loans) the crucial aspect is the ability to prove predictability of income. Taking into account the fact that income in general in Latvia is low and part-time workers on average earn less than full-time employees, their access to goods and services is logically more restricted, especially regarding financial services. In 2012 full-time working men earned a gross average of EUR 765 (LVL 538) and women EUR 630 (LVL 443), while part-time working men earned an average of EUR 478 (LVL 336) and women EUR 463 (LVL 326).<sup>681</sup> The net pay is approximately 67 % of the gross pay. There are no considerable tax deductions for those with a low income, which means that taxes of approximately 33 % (income tax and social security contributions) apply equally to all, irrespective of the amount of earnings. Private insurance provided by the employer is exceptionally rare and not widely developed in Latvia.

## 6. Are there any gaps in national law?

### 6.1. Gaps in the area of (access to) employment

#### 6.1.1. Recruitment process

Latvian law does not recognise situations where a person is not recruited to a post only because he/she can only work part time but it is a full-time post as unequal treatment or discrimination. The problem is the lack of part-time employment opportunities. In lower posts, actually, the opposite situation is true: the pay is so low that persons usually work longer than full-time hours. This is possible because the Labour Law does not preclude working for more than one employer for longer than 40 hours per week.<sup>682</sup> Very problematic is the healthcare sector, where the pay is very low (for nurses and hospital attendants) and there is a shortage of workforce. To tackle this issue, the Law on Medical Treatment under an exception provided by Directive 2003/88<sup>683</sup> allows employing medical workers in the healthcare sector on a 1.5-time basis or 60 hours per week instead of the normal 40 hours.<sup>684</sup>

<sup>679</sup> As compared to those with an employment contract.

<sup>680</sup> Law 'On Statutory Social Insurance', Official Gazette No. 274/276, 21 October 1997.

<sup>681</sup> According to data provided by the Ministry of Welfare specially prepared by the Central Statistical Bureau of Latvia, provided in an e-mail of 10 April 2013 from a senior official of the Ministry of Welfare.

<sup>682</sup> Commission Staff Working Paper, *Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time* ('The Working Time Directive') Accompanying document to the report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('The Working Time Directive') (COM(2010) 802 final), SEC/2010/1611 final, <http://eur-lex.europa.eu/LexUriServ.do?&SEC=2010::FIN:EN:PDF>, accessed 14 April 2013. Directive 2003/88 does not regulate such aspects of working time.

<sup>683</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299 of 18 November 2003, P. 0009 – 0019.

<sup>684</sup> *Ārstniecības likums*, Official Gazette No. 167/168, 1 July 1997.



Consequently the largest problem is that part-time work is simply not available and national law does not provide any protection against the situation where a person in a recruitment procedure is at a disadvantage only because she/he can only work part time.

#### *6.1.2. Employment conditions*

The only gaps which can be identified in national legal regulations is that the Labour Law provides for the right to require part-time employment during pregnancy and maternity, but does not stipulate any obligation to later transfer the worker back to full-time work. Speaking about the implementation of Article 5 of Directive 92/85, this is more explicit. Article 99 of the Labour Law requires the adjustment of working conditions during pregnancy and maternity to ensure safe and healthy working conditions which makes it logical, when the risk ceases to exist, for the employer to have the obligation to provide the previous employment conditions.

The main gap, however, is that provisions of the Labour Law do not tie in with statutory social security provisions. In particular, even though the Labour Law allows for a certain degree of flexibility in working time, the social security system covers social risks (sickness, unemployment, childcare) only for those who do not work at all. The combination of receiving social security allowances and having part-time employment is impossible.

#### *6.1.3. Termination of the employment contract*

There is no data available on part-time (or full-time) workers being compelled to leave their job because they want to be employed part time. However, it is most likely that this occurs, because in Latvia in general society (and employers) considers that part-time work does not comply with the 'norm'.

### **6.2. Gaps in other areas**

Please see the information provided above.

## **II. FIXED-TERM WORK**

### **1. General information**

Information of the Central Statistical Bureau shows that in 2012 a total of 4.7 % of all employed persons were employed on fixed-term contracts. 6.2 % of fixed-term employees (or 23 300 persons) were men and 3.3 % were women (or 13 700 persons).<sup>685</sup> This means that at least official data demonstrates that more men than women had a fixed-term contract in Latvia. There is no data available regarding the sectors in which fixed-term work is common, but it may be presumed that the male dominance in this group is on account of employment in the construction sector, where fixed-term contracts are most probably widely used.

There is no information available on the pay gap regarding fixed-term employees.

### **2. Legislation, (national) collective agreements and case law**

#### **2.1. Policies and legislation at national level**

##### *2.1.1. National policies*

There are no special policy measures with regard to fixed-term work, except to avoid misuse of the right to conclude successive fixed-term term agreements. For this purpose there is a strict legal regulation that allows employment on a fixed-term basis only in exceptional situations.

<sup>685</sup> Central Statistical Bureau of Latvia, database on <http://data.csb.gov.lv/Dialog/varval.asp?ma=NB0180&ti=%2E+DARBA+%D2%C7M%C7JI+SADAL%CEJUM%C2+P%C7C+DARBA+L%CEGUMA+VEIDA+UN+DZIMUMA&path=../DATABASE/iedzoc/lkgad%E7jie%20statistikas%20dati/Nodarbin%E2t%E2%EFba/&lang=16>, accessed 10 April 2013.



### *2.1.2. Equal treatment*

Article 44(6) of the Labour Law stipulates an obligation to provide the same working conditions to fixed-term workers and permanent employees. Article 44(1) defines the exceptional situations in which fixed-term contracts are allowed. Fixed-term contracts may be used only in seasonal work, in work that inherently has a temporary character, for replacement of a worker, for the performance of incidental work that is not usually carried out in a business, in the event of a short-term increase of production etc. In addition to particular seasonal work and work having an inherently temporary character, other aspects are to be defined by the Regulation of the Cabinet of Ministers (Article 44(2)). According to Article 44(5) if an employment agreement does not stipulate the period or type (definite or indefinite) of employment it must be considered as a permanent contract. The same applies to an employment contract for work that does not allow fixed-term employment. Article 44(7) obliges an employer to provide information to a fixed-term employee on available vacant permanent positions in a business.

Under Article 45(4) if a fixed-term contract comes to an end but none of the parties requests its termination and they continue performance of their obligations, the fixed-term contract must be considered as a permanent agreement.

Although there is no respective data, practice shows that termination of the employment relationship on account of pregnancy and maternity is a widespread phenomenon and it concerns female workers employed on any type of contract (full-time, part-time, permanent and fixed-term, and also in their probation period).<sup>686</sup>

### *2.1.3. Successive fixed-term contracts*

According to Article 45 a fixed-term agreement must not be longer than 3 years (including extensions). In addition, if an employer concludes another fixed-term agreement with the same employee within 30 days after termination (expiration) of the previous fixed-term agreement, the second agreement must be considered as an extension of the first agreement. Article 45(2) stipulates that fixed-term contracts for seasonal work must not be longer than 10 months within the period of one year. For replacement of an absent worker the term of a fixed-term contract may be prolonged beyond 3 years, but if the absent worker does not resume work the employment contract of the replacing worker must automatically be considered as a permanent contract. Such obligation applies equally to all employees irrespective of the sector of employment (public/private) and the size of the business.

### *2.1.4. Assessment*

Legislation in general is protective. However, there is a problem with effective enforcement due to protective measures being ineffective in practice.

## **2.2. Collective agreements**

There are no generally applicable collective agreements, except one general agreement concerning employees working in the railway transport services. This means that there are no widely applicable collective agreements regulating issues of fixed-term workers, if any at all.

## **2.3. Case law**

No relevant case law or opinion of the Ombudsman has been found.

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<sup>686</sup> Opinion of lawyers of the Confederation of Free Trade Unions (telephone interview on 12 April 2013); and statement of Ombudsman, *Darba devēji diskrimināciju iemācījušies maskēt* (Employers have learned how to mask discrimination) 10 July 2012, available in Latvian on <http://www.tiesibsargs.lv/lv/darba-deveji-diskriminaciju-iemacijusies-masket>, accessed 15 April 2013.

## 2.4. Involvement of other parties

There has been no particular involvement of non-governmental bodies or public debate relating to gender equality in fixed-term employment.

## 3. Statutory social security and pension rights

As stated above all employees are subject to mandatory statutory social insurance. All employees have equal conditions and rights under statutory social insurance.<sup>687</sup>

The only problem that may affect fixed-term workers are qualification periods. For example, only persons who have an employment period of at least 20 years have the right to an old-age pension.<sup>688</sup> There might also be problems with the entitlement to unemployment allowance. This is available only to those unemployed persons who have been employed for at least 9 months within the period of 12 months preceding unemployment.<sup>689</sup> Fixed-term employees may be in a less advantageous situation with regard to the amount of maternity, paternity and childcare allowance.<sup>690</sup> This is because such allowances are calculated on the basis of contributions over the 12-month period until 2 months before the insurance case occurs. If an employee did not have insurance (employment) during such period, it is presumed that his/her monthly income amounted to the statutory minimum salary (approximately EUR 205 net).

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

There are no special protection mechanisms established exclusively for part-time or fixed-term workers. They enjoy the same mechanisms for the protection of their rights as other employees.

However, these measures are not effective, because quality litigation requires professional legal assistance, which is costly and difficult to afford for the majority of natural persons.

If a case concerns discrimination, however, legal aid and representation before a court may be provided by the Ombudsman office.<sup>691</sup>

Under Latvian law, legal entities have no independent legal standing in proceedings for the protection of interests.<sup>692</sup> Trade unions (workers' representatives) may act as representatives in labour disputes, while NGOs may only act as representatives in litigation concerning discrimination.

<sup>687</sup> Law 'On Statutory Social Insurance', Official Gazette No. 274/276, 21 October 1997.

<sup>688</sup> The Law on State Pensions (*Par valsts pensijām*), Official Gazette No. 182, 23 November 1995. It is calculated on the basis of the period of mandatory statutory social insurance contributions.

<sup>689</sup> Law 'On unemployment insurance', Official Gazette No.416/419, 15 December 1999.

<sup>690</sup> Law 'On maternity and sickness insurance', Official Gazette No. 182, 23 November 1995.

<sup>691</sup> Ombudsman Law (*Tiesībsargs likums*), Official Gazette No. 65, 25 April 2006.

<sup>692</sup> This follows from the decision of the Senate of the Supreme Court in Case SKC-412/2010, stating that a trade union may only represent a claimant in an individual labour dispute, and the decision of the Supreme Court of Latvia in Case No.SK-134/2007 (14 March 2007, Jurista Vārds, No. 20, 15 May 2007), where it held that non-compliance and infringement of the rights provided by Directive 2001/23 (77/187) cannot be contested before the court as a collective claim because under Civil Procedure Law such a claim cannot be recognized as object of the claim. The breach of the rights provided by the Directive can be claimed by individual employees only on condition of having a 'normal' claim object, e.g. recognition of unfair dismissal and reinstatement. Consequently the Senate has interpreted Latvian law as not allowing claims by workers' representatives even when collective rights have been breached. The Law on Foundations and Associations (*Biedrību un nodibinājumu likums*, Official Gazette No. 161, 14 November 2003) explicitly provides that NGOs dealing with human rights issues may act as representative of a victim.

## 2. Vulnerability, multiple/intersectional discrimination

No particular studies are available with regard to Latvia.

### LIECHTENSTEIN – *Nicole Mathé*

## I. PART-TIME WORK

### 1. General information

Statistics on this topic are very rare in Liechtenstein. In 2013, the Office of Statistics published tables regarding the average income of men and women from the year 2010.<sup>693</sup> Differentiation is made by age but not by part-time or full-time work. The average gender pay gap, ignoring aspects such as part-time work, age and sector, is at about 18 %. In the 20-29 age bracket, the gender pay gap is only about 4 %. In the 30-39 age bracket the gender pay gap is already 11 % whereas it is 23 % for the 40-49 age bracket and 24 % for the bracket covering 50-59. One can see that from the age of 40 women's income drastically decreases. Statistics do not reveal the reasons behind this, even if there are various. Older women earn less, probably mainly due to their lower level of education or professional experience, less demanding job, and corresponding classification into lower wage categories.

The Office of Equal Opportunity provided financial and non-tangible support for the first 'Equal Pay Day' organised for the first time in March 2009 by the Business and Professional Women's Club (BPW).<sup>694</sup> An information stand in the centre of Vaduz drew attention to the fact that in 2009 women had to work 49 days longer, i.e. until 10 March of the subsequent year, to earn as much as men. In the year 2013 it was 7 March as the gender pay gap is still at about 18 %.

While the total number of workers has approximately quadrupled in 70 years, the number of working women has increased by a factor of seven. In the 1930s, the share of women in the workforce was only about 25 %, in 2000, women already constituted 44 % of the workforce in Liechtenstein. This development was largely independent of the legal equality of women and men and began long before the introduction of women's franchise in parallel with the economic development and the growing number of jobs.<sup>695</sup>

Due to the rapidly increasing number of jobs, the employment of women is economically necessary, well-advanced, socially accepted, and a matter of course. Much less obvious for women is equal access to positions in the top levels of hierarchy, however.

In 2012, the Office of Statistics published the Employment and Workplace Statistics concerning the year 2011, the most recent statistics available.<sup>696</sup> In 2011 the percentage of women in the labour market was 40.3 whereas that of men was 59.7. Among the part-time workers the rate of women was 75.6 %. On 31 December 2011 24.8 % of all workers worked part time. Of all working women, 46.5 % worked part time on the reporting date, unlike men, of whom only 10.1 % worked part time. Looking at part-time employees by sector, most part-time work was in the third sector (services): 83.8 % of all part-time employees. According to these statistics work is considered as part-time work when it constitutes 2 to 89 % of the hours of a full-time job.

<sup>693</sup> Office of Statistics, Liechtenstein in Zahlen, p. 29, [http://www.llv.li/pdf-llv-as-liechtenstein\\_in\\_zahlen\\_2013](http://www.llv.li/pdf-llv-as-liechtenstein_in_zahlen_2013), accessed 16 April 2013.

<sup>694</sup> <http://www.bpw-rheintal.ch/index.php?section=news&cmd=details&newsid=37>, accessed 16 April 2013.

<sup>695</sup> Fourth periodic report for Liechtenstein to CEDAW Committee, 2009, [http://www.llv.li/pdf-llv-scg-4\\_laenderbericht.pdf](http://www.llv.li/pdf-llv-scg-4_laenderbericht.pdf), accessed 19 April 2013.

<sup>696</sup> [http://www.llv.li/pdf-llv-as-beschaeftigungsstatistik\\_2011\\_def](http://www.llv.li/pdf-llv-as-beschaeftigungsstatistik_2011_def), accessed 16 April 2013.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

In the Concluding Observations of the Committee on the Elimination of Discrimination against Women concerning Liechtenstein the Committee on 8 February 2011 presented recommendations with regard to employment. Liechtenstein is to counteract any adverse consequences of part-time work for women, especially with regard to their career development options as well as pension and other social benefits. It should also increase the number and capacity of public day-care nurseries and public day schools. Furthermore the State is to ensure that flexible work arrangements and part-time work are available for men, in addition to women, in the public and private sectors, and that efforts are made to encourage men to make use of such arrangements. Last but not least the Committee recommends Liechtenstein to promote responsible fatherhood, including by providing incentives such as paid parental leave for fathers to encourage them to participate more actively in child-raising and to equally share other domestic duties.<sup>697</sup>

#### 2.1.2. Equal treatment

The Gender Equality Act (*GLG*) stipulates the prohibition of gender discrimination, which applies to all labour contracts.<sup>698</sup> The principle of equality between women and men is also laid down in the Civil Code where Paragraph 1173a Article 8a refers to the *GLG*.<sup>699</sup> In its Paragraph 1173a Article 8b the Civil Code includes a rule with regard to equal treatment of part-time and full-time work as well as fixed-term and open-ended work contracts. Discrimination of part-time workers in relation to comparable full-time workers is forbidden unless objective reasons justify different treatment. The same is applicable to persons working in comparable fixed-term and open-ended contracts. Where appropriate the *pro rata temporis* principle is essential. According to Paragraph 1173a Article 46 dismissals by employers because an employee is not willing to change from a part-time post to a full-time post are discriminatory.

#### 2.1.3. Organisation of working time

Pursuant to Paragraph 1173a Article 36a Civil Code the employer has to promote and supply information regarding part-time and fixed-term working contracts. The employer must consider requests from full-time workers who want to change to a part-time position, as far as possible. Moreover the employer is to inform employees timely about available jobs in order to facilitate the change from part-time to full-time or the other way round. The employer also has to inform the trade union about the availability of such part-time work. In addition the employer is obliged to facilitate the access of part-time workers, as far as possible, to managerial positions and for vocational training as well as promote professional advancement and mobility. The employer has to inform fixed-term workers about permanent posts that will become vacant. Beyond this, the employer has to facilitate the access to vocational training for them as far as possible. The employer also informs the trade union about vacant fixed-term posts in the company.

#### 2.1.4. Assessment

As described above, national legislation has rather good provisions concerning the obligation of information of the employer regarding vacant part-time and fixed-term jobs as well as the obligation to facilitate the access. As there is no case law and there are no opinions by the

<sup>697</sup> [http://www.llv.li/pdf-llv-scg-cedaw\\_concluding\\_observations\\_deutsch-2.pdf](http://www.llv.li/pdf-llv-scg-cedaw_concluding_observations_deutsch-2.pdf), accessed 19 April 2013.

<sup>698</sup> State Gazette No. 2011/212, legislation published on the Internet: [www.gesetze.li](http://www.gesetze.li), accessed 19 April 2013.

<sup>699</sup> Civil Code (ABGB), State Gazette No. 2006/153, legislation published on the Internet: [www.gesetze.li](http://www.gesetze.li), accessed 19 April 2013.

Gender Equality Office it is hard to qualify the intensity of application of these norms in practice.

Liechtenstein has made a short analysis of the situation of the country concerning reconciliation of family and work that was part of a Swiss Handbook in the year 2007.<sup>700</sup> The Handbook gives practical examples and supports small and medium enterprises in implementing measures to achieve family-friendly management of the enterprise. The central message is that enterprises supporting employees who have family duties also support the enterprise itself. The four family-friendly Liechtensteiner companies presented in the Handbook introduced measures such as company kindergartens, flexible working-time models, part-time work in managerial functions, flexible working hours, re-entry opportunities, family-oriented leaves, sabbaticals, equal opportunities human resources development, ideas management (to follow up and implement ideas of employees), mobility optimisation by company mobility cars, promotion of carpooling, employees' club (to promote networking among employees in order to facilitate increased knowledge of family-specific needs and circumstances), adapted working organisation, job sharing and teleworking.

## 2.2. Collective agreements

### 2.2.1. Policies

In principle collective agreements are available online on the Internet.<sup>701</sup> As it is not possible in the framework of this report to analyse these agreements in depth some general information is given below as an overview. Collective bargaining (especially the so-called Gesamtarbeitsvertrag, GAV, Paragraph 1173a Article 101 *et seq.* Civil Code) is an instrument used in Liechtenstein's private law whose function is rather similar to the law itself. This particular collective bargaining agreement GAV puts into force clauses between the parties that override individual labour contracts and partly the legal regulations and can also apply to third parties. The GAV is mutually agreed and signed by the representative of the employees (trade union, LANV) and by the representative of the employers (GWK<sup>702</sup>). The contracting parties aim to achieve several goals by signing the GAV such as preserving the labour peace, settling disputes by mutual consent, enhancing the social, economic and environmentally-friendly development of each branch of trade as well as keeping Liechtenstein's market place competitive in a social market economy by encouraging innovations and modern labour organisation. This also includes equal opportunities between men and women with regard to equal pay. A third of all GAVs therefore explicitly contains a clause concerning equal opportunities between men and women. It has to be mentioned that these GAVs (such as for the metal industry, non-metal industry and building trades) that cover equal opportunities between men and women apply to the majority of employees. In general collective agreements also apply to part-time and fixed-term contracts per analogiam.

### 2.2.2. Equal treatment

Please see above section on policies. Moreover, the LANV has published a general commitment statement on its website concerning gender equality.<sup>703</sup>

### 2.2.3. Organisation of working time

Please see above section on policies.

<sup>700</sup> [http://www.llv.li/pdf-llv-scg-handbuch\\_fl\\_web-5.pdf](http://www.llv.li/pdf-llv-scg-handbuch_fl_web-5.pdf), accessed 22 April 2013.

<sup>701</sup> Trade union (representative of employees) LANV (*Liechtensteiner ArbeitnehmerInnenverband*), <http://www.lanv.li/Dienstleistung/Gesamtarbeitsvertrag/GAVimGewerbe/Autogewerbe/tabid/165/Default.aspx>, accessed 19 April 2013.

<sup>702</sup> <http://www.wirtschaftskammer.li>, Economic Chamber of Trade (*Wirtschaftskammer Liechtenstein*), accessed 23 April 2013.

<sup>703</sup> <http://www.lanv.li/Dienstleistung/Gleichstellung/tabid/101/Default.aspx>, accessed 19 April 2013.

#### *2.2.4. Assessment*

In principle collective agreements are applicable to part-time and fixed-term contracts. The extent to which this actually takes place in practice has not been evaluated in detail yet.

### **2.3. Case law**

#### *2.3.1. Cases/opinions of equality bodies*

There is still a complete lack of court cases and opinions in Liechtenstein.

#### *2.3.2. Assessment*

Unfortunately it is not possible to present any interpretations or draw any conclusions based on case law.

### **2.4. Involvement of other parties**

Please see above section 2.1. ‘Assessment’ concerning the Handbook, regarding reconciliation of work and family.

## **3. Statutory social security and pension rights**

### **3.1. Exclusions**

Part-time workers are not excluded from statutory social security schemes. They participate in these systems like full-time workers. Thresholds exist only for occupational pension schemes, depending on a certain minimum of annual income (EUR 16 000).<sup>704</sup>

### **3.2. Assessment**

In general legislation prohibits any discrimination of part-time workers. As there is no case law one has to be careful in applying all norms in a non-discriminatory way. Consequently it cannot be ruled out that in practice discrimination still exists, especially based on gender-stereotypical participation of men and women in professional and private life.

## **4. Self-employment**

Potential disadvantages faced by self-employed persons working part time may possibly exist. However, if they have different access to financial services this is not included in any statistics, as this is negotiated on an individual basis. Self-employed persons are obliged to insure themselves in statutory social security schemes. Because of the lack of case law no more insight can be given for the moment.

## **5. Access to and supply of goods and services**

The author has no knowledge of any further specific information.

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### *6.1.1. Recruitment process*

Referring to 2.1 of this report, national law seems to be rather complete and aware of the fact that part-time and full-time posts have to be made visible. Therefore the law has regulated the

<sup>704</sup> Act on Occupational Pensions, see Articles 3, 4 and 4a, State Gazette No. 1988/12 updated 2007/219.

topic as described above. Current and future vacant posts have to be communicated officially by the employer.

#### *6.1.2. Employment conditions*

The author has no knowledge of any further specific information.

#### *6.1.3. Termination of the employment contract*

The author has no knowledge of any further specific information.

### **6.2. Gaps in other areas**

The author has no knowledge of any further specific information.

## **II. FIXED-TERM WORK**

Referring to the answers under I. the same information applies here, as the law regulates part-time and fixed-term contracts in close connection. For this reason, the author has already referred to fixed-term contracts where relevant above.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

It is very hard to evaluate the effectiveness of norms if there is no case law on the topic. However, the Gender Equality Office has been promoting gender equality in Liechtenstein for a long time. In various gender-awareness activities its aim was and still is to reach the involved stakeholders, above all the employers in order to make them aware of the fact that gender discrimination has to be eliminated. It can be observed that over the last ten years some significant changes have been made to the law, which will hopefully also be effective in the daily life of employers and employees. The author presumes, however, that there are still great efforts to be made, to ensure that part-time and fixed-term labour contracts are free from any gender discrimination. To reach this aim it will still be necessary to combat effectively the underlying stereotypical behaviours of men and women in society. These behaviours appear in every role we play in society e.g. as employers and employees, fathers and mothers, clients, politicians, trainers, owners, scientists/academics etc. and must be challenged constantly in order to be adapted to our society's modern needs.

### **2. Vulnerability, multiple/intersectional discrimination**

The author has no knowledge of any studies addressing these points for Liechtenstein.

## **LITHUANIA – Tomas Davulis**

## **I. PART-TIME WORK**

### **1. General information**

A part-time job is defined as a job for part of the working time set by legislation or collective agreement.<sup>705</sup> At a national level, according to the data for the year 2011, 8.7 % of employees

<sup>705</sup> Statistics Lithuania, *Labour Force Survey: descriptions and definitions*, available on: <http://web.stat.gov.lt/en/pages/view/?id=1402&PHPSESSID=9a922e6d6bc6107560f5ecc7fd488a17>, accessed 8 May 2013.



were working part time. In Lithuania female employment constituted 58.7 %, and 9.3 % of them were working part time. There are no official data but it can be assumed that part-time work mostly exists in the sectors of education (teachers, babysitters, lecturers), healthcare (medical professions), and retail (cashiers, sales assistants). There are no national statistics on the percentage of involuntary part-time work. Although no special surveys have been carried out in Lithuania regarding workers having multiple part-time jobs, the author can say that second or third jobs are primarily seen as supplementary sources of income in relation to a main job. In most cases, employees have one job as their main job, plus an extra job.

According to the 5th European Working Conditions Survey, 19 % of employees in Lithuania prefer to work less than they currently do. However, there are no statistics on the impact of part-time work on the gender pay gap.

The legislation of Lithuania allows various forms of part-time work. The Labour Code provides for the right of the parties to agree on (in certain cases the employer's duty to allow it, after the employee's request) full-time work or part-time work.<sup>706</sup> In 2010 approximately 109 000 people, or 8 % of all employees, were working on a part-time basis in Lithuania. This number is so small, on the one hand, due to employers' lack of interest in employing people for part-time work and, on the other hand, due to wages being low, which constitutes a disincentive for employees to opt for part-time work.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

#### ***2.1.1. National policies***

The legislation of Lithuania allows various forms of part-time work. The Labour Code provides for the right of the parties to agree on (in certain cases the employer's duty to allow it) a partial working day or a partial working week. Available forms of part-time work have also been addressed in the case law of the Constitutional Court of Lithuania.

According to Section 146(1) p. 1 of the Labour Code, part-time daily working time or part-time weekly working time is to be determined by agreement between the employee and the employer. For a shortened working day or working week, employees will receive payment in proportion to the working time (*pro rata temporis* principle; Section 146(3) of the Labour Code). Such an agreement can be formalised by signing a contract of employment or by later amendments thereto, but the clause regarding part-time work should in all cases be stipulated in the written employment contract. The compulsory written form for the employment contract was adopted by the Government and contains a special section where the parties must include such a clause, if so agreed.<sup>707</sup> It is important to note that an employer is not allowed to take a unilateral decision to shorten the working day or working week, while an employee is granted such a right in certain cases. Irrespective of the employer's preferences, a working day or working week should be shortened at the employee's request due to the employee's health condition if there is a relevant medical opinion; at the request of a pregnant woman, a woman who has recently given birth, a woman who is breastfeeding, an employee raising a child under the age of three, as well as an employee who is a single parent of a child until the age of fourteen or who has a child with limited functional capacity until the age of eighteen; at the request of an employee under the age of eighteen, a disabled employee or an employee nursing a sick family member. The aforementioned persons should submit relevant opinions or certificates issued by competent authorities to confirm their status. The law ensures that part-time work does not result in any limitations when establishing the duration of annual leave, calculating the length of service, promotion, or improving qualifications, and does not limit any other rights of the employee. This means that the part-time aspect must in no way be

<sup>706</sup> State Gazette, 2002, No. 64-2569.

<sup>707</sup> No. 6 of the compulsory Template Form of the Employment Contract, approved by Governmental Decree No. 115 of 28 January 2003.

reflected in the calculation of seniority, length of service or qualification for holidays. The *pro rata temporis* principle can be applied for remuneration purposes only.

The provisions of the Labour Code that grant the right to request part-time work should be distinguished from so-called ‘shorter working time’, which is basically considered as full-time work, but with fewer hours than the statutorily established norm of 40 hours. This means that the Labour Code can establish a duty for the employer to determine shorter working time. Section 145 of the Labour Code provides that a shorter working time must be determined for:

1. persons under 18 - in accordance with the provisions of the Law on Safety and Health at Work;
2. persons who work in a working environment with certain concentrations of hazardous factors. In this case, working time must be determined taking into account the working environment, but not exceeding 36 hours per week; and
3. employees working at night.

The key feature that distinguishes shorter working time from part-time work is that in case of ‘shorter working time’ the persons involved are usually paid the same salary as for full-time work. ‘Part-time work’ for workers to whom according to this law only the shorter working time is applicable means work with fewer hours than the maximum duration of the shorter working time, applicable only to these specific groups of workers. It is important that agreements on part-time work can also be initiated by workers who work shorter working time. This means that these workers, just like all other workers, according to Section 146 of the Labour Code have the right to request the employer for a working time shorter than the statutory ‘shorter working time’.

The fourth periodic report of Lithuania on the implementation in the Republic of Lithuania of the CEDAW of 10 October 2007 did not address part-time work.

#### *2.1.2. Equal treatment*

Pursuant to Section 146(3) of the Labour Code, part-time work must not result in any limitations when establishing the duration of annual leave, calculating the length of service, promotion, or improving qualifications, and must not limit any other rights of the employee compared to employees who work in the same or an equivalent job and part-time work conditions, taking into account seniority, qualifications and other considerations. The law allows differentiation between full-time workers and part-time workers for remuneration reasons only, and only in line with the *pro rata temporis* principle. However, there is no case law on the interpretation or application of this provision in practice.

The law also allows the part-time worker to split up the working day, which means that a part-timer’s lunch break can be longer than 2 hours. However, the uninterrupted period of 11 hours between shifts must be respected.

#### *2.1.3. Organisation of working time*

There are no other legislative provisions aimed at facilitating part-time work on a voluntary basis and contributing to the flexible organisation of working time.

As mentioned above, Section 146(1) p. 1 of the Labour Code provides for the right of the parties to agree on (in certain cases - the employer’s duty to determine) a shorter working day or a shorter working week. Part-time daily working time or part-time weekly working time is to be determined by agreement between the employee and employer. The same is true for converting part-time work into full-time work. However, the employer’s refusal cannot be challenged in legal proceedings: if part-time work is determined by mutual agreement between the parties, the transformation of the contract into a full-time contract needs the agreement of both parties. This voluntary agreement cannot be replaced by a court decision.

If, however, there is a request from the special group of employees (see above) to determine part-time work (health reasons or family reasons as described above) the employer is bound by this request to change the contract. A refusal of such request may be appealed before the Labour Dispute Commission and the court. The law, however, remains silent on

whether it is possible for an employee to convert the part-time job back into a full-time job, when the reasons for part-time employment no longer apply. However, recent court practice has given an employee the right to claim back their full-time position in the sense that the employer must seriously consider this request and provide reasons for their refusal.<sup>708</sup>

As far as reduction of working hours for family responsibilities is concerned, Section 146 of the Labour Code stipulates that the part-time daily working time or part-time weekly working time is to be determined at the request of a pregnant woman, a woman who has recently given birth (mother who submits to the employer a certificate issued by a healthcare institution confirming that she has given birth, and who is raising a child under the age of one), a breastfeeding woman (mother who submits to the employer a certificate issued by a healthcare institution confirming that she is raising and breastfeeding her child); an employee raising a child under the age of three, as well as an employee who is a single parent of a child under the age of fourteen or a disabled child under the age of eighteen; and at the request of an employee nursing a sick family member according to a statement of a healthcare institution.

#### *2.1.4. Assessment*

The current legislation on this issue does not differ from the labour legislation from the Soviet period. There are, however, no cases regarding the application of the principle of non-discrimination or gender-specific application of the legal provisions. Despite the fact that the law grants more advanced rights to certain groups of employees to engage in part-time employment, it clearly ignores the need for flexible transition of part-time employment into full-time employment, as well as flexible transition from full-time employment to part-time employment for employees who do not belong to these groups.

### **2.2. Collective agreements**

#### *2.2.1. Policies*

Trade unions in Lithuania in most cases oppose any incentives to liberalise working time, because, under conditions of extremely low incidence of collective bargaining and coverage by collective agreements, more liberal regulation of working time creates opportunities for employers' abuse in terms of creating less favourable working conditions for employees.

The gender dimension of part-time work has not been discussed by the social partners at national or sectoral level.

#### *2.2.2. Equal treatment*

There are no national collective agreements that contain specific provisions on part-time work.

#### *2.2.3. Organisation of working time*

There are no national collective agreements that contain specific provisions on part-time work.

<sup>708</sup> Kaunas Regional Court, Ruling no. 2A-1316-485/2011 of 15 September 2011. A dispute arose between a female trolleybus driver and her company. Initially the full-time working hours of the driver were reduced by 50 % based on a certificate issued by the health institution, stating that the level of the driver's capacity for work had decreased to 50 %. A few months later, a new health assessment indicated that her capacity for work was 80 %. The company's refusal to amend the contract of employment and to return the driver to full-time work was considered unlawful both by the District Court and the Regional Court. The courts expressly stated that Article 146 of the Labour Code must be interpreted as 'taking into consideration the aims and meaning of Directive 97/81/EC'. The limits of the newly restricted employer's discretion are still unclear since the case was related to the shift to part-time work on an absolute ground (i.e. health institution certificate – Section 146(1) p. 2 of the Labour Code) but not a change of contract by individual agreement (Section 146(1) p. 1 of the Labour Code).

#### *2.2.4. Assessment*

Nation-wide or even sectoral collective agreements do not address this issue. Some particularities on the organisation of working time may be found in enterprise-level agreements. However, they usually fail to address the phenomenon of part-time work.

### **2.3. Case law**

#### *2.3.1. Cases/opinions of equality bodies*

There is no case law on the interpretation of the principle of equal treatment in relation to part-time work.

#### *2.3.2. Assessment*

There is no additional information here.

### **2.4. Involvement of other parties**

The Equal Opportunities Ombudsman and various NGOs (the Centre for Equality Advancement, the Women's Employment Information Centre, etc.) play an important role in the field of rights of female workers in general, by organising seminars for social partners on flexible working arrangements, equality and non-discrimination issues. NGOs work on projects on gender and mass media, gender and development, gender and education, and equal opportunities for women and men in the EU accession process, but they approach part-time work from the family-friendly and flexible working arrangements perspective. The principle of non-discrimination has not been addressed at this level so far.

## **3. Statutory social security and pension rights**

### **3.1. Exclusions**

Part-time workers are insured under the state social security scheme in the same way as full-time workers, meaning that no part-time workers are explicitly excluded from statutory social security schemes and/or statutory old-age pension schemes. There are no minimum requirements, thresholds or provisions that disadvantage part-time workers as regards working time for acquiring statutory social security or pension rights in Lithuania, and there are no specific problems for part-time workers in relation to unemployment benefits or statutory leave entitlements. The cash benefits from the state social security scheme will be provided taking into account the level of paid contributions depending on the income of part-time workers, which will generally be lower than that of full-time workers.

### **3.2. Assessment**

In Lithuania, there is no exclusion of part-time workers from the state social security scheme.

## **4. Self-employment**

The author has no information on potential disadvantages faced by self-employed persons working part time, e.g. in the access to financial services (bank loans). The number of working hours of self-employed persons is in no way monitored or registered in Lithuania. This information is simply unavailable.

There are no national legislative provisions and/or national collective agreements that address issues of equal treatment pertaining to part-time self-employed persons. There is no relevant case law.

## 5. Access to and supply of goods and services

The author has no information on any disadvantages faced by part-time workers in the area of access to and supply of goods and services, e.g. in the access to financial services (e.g. mortgages, bank loans). The number of working hours of part-time workers is registered by the employer and cannot be provided to third parties.

## 6. Are there any gaps in national law?

No gaps can be identified, other than the inflexible stipulations regarding part-time work adjustment as described above.

### 6.1. Gaps in the area of (access to) employment

#### 6.1.1. Recruitment process

There is no evidence of a lack of effective protection against discrimination of part-time workers in relation to access to employment. In sectors such as healthcare, cleaning and education, part-time work is more widespread but this is not due to a lack of full-time positions. Education institutions, such as schools and universities, sometimes create part-time positions because it is impossible to offer full-time employment due to an insufficient workload. However, there is no evidence that in these particular situations, employers are trying to cover up unpaid overtime of part-timers.

In the public service, however, new positions are always full-time.

#### 6.1.2. Employment conditions

Part-time work is treated in the same way as full-time work and the author does not know of any possible differences. In practice, however, employers' decisions on promotion, vocational training, and business trips may be taken with consideration of full-time or part-time employment. These cases are very difficult to detect and have not been reported or investigated in legal proceedings so far.

The adjustment of working conditions and/or working hours of pregnant workers to avoid exposure to occupational risks is the same for part-time workers and full-time workers.<sup>709</sup>

#### 6.1.3. Termination of the employment contract

Part-time work or the request to work part time is in no way a ground for dismissal or for the selection of employees to be dismissed. The same applies to the switch to full-time work.

### 6.2. Gaps in other areas

There are no gaps in other areas.

## II. FIXED-TERM WORK

### 1. General information

The percentage of employees on temporary contracts is 2.4 % of the total workforce: men represent 3.3 %, and women 1.7 %.<sup>710</sup>

There are three types of fixed-term contracts: ordinary fixed-term contracts with a maximum duration of 5 years, seasonal contracts and short-term contracts.

<sup>709</sup> This is the implementation of Directive 92/85/EC (Pregnant Workers Directive) OJ L 348, of 28 November 1992.

<sup>710</sup> Eurofound *Fifth European Working Conditions Survey*, Publications Office of the European Union, Luxembourg, 2010, p. 17.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

According to Section 109 of the Labour Code, a fixed-term employment contract may be concluded for a certain period of time or for the period of the performance of certain work, but not exceeding five years. It is prohibited to conclude a fixed-term employment contract if the relevant work is of a permanent nature, unless this is provided for by laws or collective agreements or if an employee is hired for up to one year in a position which can be filled in an open competition.

The law allows fixed-term employment if ‘this is provided for by laws or collective agreements’, not requiring objective reasons for fixed-term employment or its extension. In this case the maximum period of 5 years for fixed-term employment does not apply, and employees may be employed for decades in the same position with constantly renewed employment contracts, which is something that happens very often in the area of higher education. Therefore, the general indulgence to conclude such lawful fixed-term contracts of employment (‘if provided in law or collective agreement’) can be considered as not in line with Fixed-Term Work Directive 1999/70/EC.

The employer must individually inform employees working under a fixed-term employment contract about vacancies and ensure that they have the same opportunity to secure permanent employment as other employees.<sup>711</sup> In respect of employment conditions or in-service training and promotion opportunities, employees working under fixed-term employment contracts must not be treated in a less favourable manner than employees working under employment contracts of indefinite duration. If the term of an employment contract has expired, whereas employment relationships are actually continued and neither of the parties has, prior to the expiry of the term, requested to terminate the contract, it is considered as having been extended for an indefinite period of time.<sup>712</sup> If an employment contract, upon the expiry of its term, is not extended or is terminated, but within one month from the day of its termination another fixed-term employment contract is concluded with the dismissed employee for the same work, then, at the request of the employee, such contract will be recognised as having been concluded for an indefinite period of time.<sup>713</sup>

It should be noted that the Parliament of the Republic of Lithuania in 2012 extended the validity of temporary provisions of the Labour Code which allow the conclusion of fixed-term employment contracts for ‘newly created jobs’. Sections 109(1) and 109(2) of the Labour Code allowed the conclusion of fixed-term contracts for objective reasons and in specific cases foreseen by laws and collective bargaining agreements. In addition, the ‘anti-crisis’ legislation package of 22 June 2010 introduced a temporary possibility to conclude fixed-term employment contracts for ‘newly created jobs’. Despite the fact that this has not significantly changed the labour market, the deadline of the validity of this measure was extended from 31 July 2012 to 31 July 2015. Like the fixed-term contracts concluded on the basis of special provisions in laws (e.g. for teachers of universities and institutions of higher education) or collective bargaining agreements, the contracts for newly created jobs fall outside the scope of Section 111(3) of the Labour Code, which aims to transpose the prohibition of the anti-abuse clause in the Fixed-Term Work Directive (1999/70/EC). However, on this topic, Lithuanian law includes strict conditions for concluding such contracts (for a maximum of 2 years; not with former employees; not for former assignments; for a maximum of 50 % of all posts) which can be considered as measures to prevent abuse. In addition, such contracts will be applicable temporarily, meaning that all contracts concluded after 31 July 2015 will be considered as permanent employment contracts.

<sup>711</sup> Section 109(4) of the Labour Code.

<sup>712</sup> Section 109(4) of the Labour Code.

<sup>713</sup> Section 111(3) of the Labour Code.

### *2.1.2. Equal treatment*

The legislation on fixed-term employment is applicable to all employees (except employees employed by temporary employment agencies) and all employers. However, the public service is considered as a special branch of law and some different rules may be found applying to judges or in the Law on Public Service or in various Statutes for Police, the State Prosecutor's Office, the Special Investigation Office, the prisons etc.

Section 109(5) of the Labour Code states that employees working under fixed-term employment contracts must not be treated in a less favourable manner than employees working under employment contracts of indefinite duration in respect of employment conditions or in-service training and promotion opportunities. In practice, however, employers' decisions on promotion, vocational training, and business trips may be taken with consideration of fixed-term employment. Since employers have no obligation to follow the rules of selection or report the grounds for individual decisions, such decisions are very difficult to detect and have not been reported or investigated in legal proceedings so far.

According to Section 109(1) of the Labour Code, fixed-term employment contracts may be concluded for a certain period of time or for the period of the performance of certain work, but not exceeding five years. In the event of a fixed-term contract with a pregnant woman she is also protected against dismissal, but this protection only applies throughout the pregnancy and for one month after delivery.<sup>714</sup>

### *2.1.3. Successive fixed-term contracts*

Successive contracts are allowed, if they meet the aforementioned criteria, i.e. if work is not of a permanent nature or if there is an exception provided by laws or collective agreements. The general limit of 5 years must be taken into account. In addition, Section 111(3) of the Labour Code stipulates that if an employment contract, upon the expiry of its term, is not extended or is terminated, but within one month from the day of its termination another fixed-term employment contract is concluded with the dismissed employee for the same work, then, at the request of the employee, such contract will be recognised as having been concluded for an indefinite period of time.

No specific conditions apply depending on the size or type of employer. However, in the public service different rules may be established in the Law on Public Service or in various Statutes for Police, the State Prosecutor's Office, the Special Investigation Office, the prisons etc.

There is no information on specific problems of women relating to fixed-term contracts, e.g. that young women are offered a fixed-term contract more often than young men.

### *2.1.4. Assessment*

In general, the law restricts the possibilities to conclude or to extend fixed-term employment, but the Labour Dispute Commissions and the courts have a wide margin of discretion when establishing the permanent character of a job. In the public sector, the State has created more favourable conditions for itself, because fixed-term contracts may be allowed if provided for in special laws. No case law is known that relates to the implementation of the principle of non-discrimination of fixed-term employees.

## **2.2. Collective agreements**

Collective bargaining is hugely underdeveloped due to poorly developed social partnering (low level of unionisation, and absence of strong trade unions at enterprise level). It is difficult to envisage any changes in this area in Lithuania in the near future. Accordingly, ensuring higher flexibility of labour relations through collective agreements will hardly be possible, despite the fact that the law allows fixed-term employment for permanent jobs, if provided for by the collective bargaining agreement. Very few employers have used this provision.

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<sup>714</sup> Section 132(1) of the Labour Code.



### **2.3. Case law**

There has been a number of cases related to the application of the guarantee of non-dismissal of pregnant women (Section 132(1) of the Labour Code). It was unclear whether this provision also applied to fixed-term employment until the Supreme Court finally established that this was the case.

For example, the Supreme Court of Lithuania interpreted this provision as including a prohibition to dismiss a woman for the period described, if she has been working under a fixed-term contract and becomes pregnant during this fixed-term employment. In the opinion of the Court, the law does not require that employers should be informed of every detail of such employee's life as soon as it becomes clear.<sup>715</sup> Such employee has the right to request parental leave at the end of her maternity leave. In this case, the fixed-term contract may be extended for the period of the parental leave. This has been confirmed by the Lithuanian Supreme Court, which stated that provisions of the Labour Code of the Republic of Lithuania guarantee the right to choose between the opportunity to use the whole leave at once or only part of it. It should be noted that the parental leave until the child turns three is paid not by the employer, but from the Social Insurance Fund, thus fulfilling the principle of strong support for the family established in Article 38 of the Constitution of the Republic of Lithuania.<sup>716</sup>

### **2.4. Involvement of other parties**

Neither the Equal Opportunities Ombudsman nor the various NGOs (the Centre for Equality Advancement, the Women's Employment Information Centre, etc.) are involved in any actions or discussions on the impact of fixed-term employment on sex discrimination.

## **3. Statutory social security and pension rights**

Fixed-term employees are treated in the same way as permanent employees as far as coverage or access to state social security benefits is concerned. No problems can be identified here, because the State tends to cover all required contributions to the state social insurance fund.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

There are no different provisions or different applications of the law to enforce the rights of part-time or fixed-term workers compared to full-time or permanent workers. They are treated in the same way as far as access to justice is concerned.

For instance, their employment rights will be protected by State Labour Inspectors and/or they will have full access to the Labour Disputes Commissions and the courts. Only if the fact of discrimination on the grounds of sex (as well as on the grounds of religion, belief, ethnic origin, social status etc.) is acknowledged, will involvement of the Equal Opportunities Office be possible. The right to file a complaint with the Equal Opportunities Ombudsman about violation of equal rights is provided to all natural and legal persons (Section 18(1) of the Equal Opportunities Act for Women and Men). Complaints must be presented in writing. If a complaint has been received by word of mouth or by telephone or if the Equal Opportunities Ombudsman has found indications of violation of equal rights in the press, other mass media or other sources of information, the Equal Opportunities Ombudsman may initiate an investigation on his own initiative. Anonymous complaints are not investigated, unless the Equal Opportunities Ombudsman decides otherwise. The time limit for filing complaints is 3 months after the commission of the acts regarding which the complaint is being submitted.

<sup>715</sup> Decision of the Supreme Court of Lithuania No. 3K-3-92/2005 of 9 February 2005.

<sup>716</sup> Decision of the Supreme Court of Lithuania No. 3K-3-423/2005 of 26 September 2005.

Complaints filed after the expiry of this time limit will not be investigated unless the Equal Opportunities Ombudsman decides otherwise. The complaint must be investigated and the complainant must be given a reply within 1 month from the day of receipt of the complaint. If necessary, the Equal Opportunities Ombudsman may extend the time limit of investigation by up to 2 months. The complainant must be duly notified. Pursuant to Section 24 of the Act, upon the completion of the investigation, the Equal Opportunities Ombudsman may decide:

1. to refer the material to investigative bodies if indications of an offence have been established;
2. to address an appropriate person or institution with a recommendation to discontinue the actions violating equal opportunities or to repeal a legal act relating to it;
3. to hear cases of administrative offences and impose administrative sanctions;
4. to dismiss the complaint if the violations mentioned in it have not been confirmed; and
5. to issue a warning about the committed violation.

The Equal Opportunities Ombudsman cannot award damages – this competence is reserved to the courts.

## 2. Vulnerability, multiple/intersectional discrimination

There is no information on this issue in Lithuania.

### LUXEMBOURG – Anik Raskin

## I. PART-TIME WORK

### 1. General information

In Luxembourg, full-time work is defined as a monthly average of 173 working hours. Part-time work is all work which comprises less than 173 hours. According to the statistical data from the General Inspection of social security (*Inspection Générale de la Sécurité Sociale*),<sup>717</sup> in 2011 nearly one out of three female workers were part-time workers. More detailed data are available for previous years. In 2009, 33.4 % of female workers and 3.5 % of male workers were part-time workers.<sup>718</sup> Most of them worked between 10 and 20 hours a week. In 2011, the female employment rate was 61.7 % and the male employment rate was 77.8 %. The last published detailed study relies on a set of data from 2006. This study contains data about the professions of female part-time workers, which were: 22.5 % directors and high position management, 35 % technical work and middle position work, 36.8 % administrative staff and 48.6 % manual workers.<sup>719</sup>

In 2006, a study showed that 73 % of part-time workers made a free choice to work part-time.<sup>720</sup> There is no statistical material about if and how many part-time workers combine several part-time jobs, or if people combine part-time work with self-employment. There is no statistical material about how many full-time workers would like to reduce their working time. Moreover, there are no statistics or findings on the impact of part-time work on the gender pay gap. However, part-time work is more present in low-paid work.

The female employment rate is constantly increasing. As indicated above, part-time work is women's work. The main reason to work part time is based on family care, which means the care for children or other dependent persons. The idea that men have to work and women

<sup>717</sup> Ministère de la Sécurité sociale, *Rapport Général sur la Sécurité Sociale au Grand-Duché de Luxembourg 2011*, Luxembourg November 2012.

<sup>718</sup> <http://www.statistiques.public.lu/catalogue-publications/regards/2012/PDF-05-2012.pdf>, accessed 6 April 2013.

<sup>719</sup> S. Alegrezza et al. *Egalité hommes-femmes, Mythe ou réalité*. Service Central de la Statistique et des Etudes Economiques, 2007.

<sup>720</sup> CEPS-Instead, *Chronique de l'enquête PSELL-3/2006*, No. 50 – Octobre 2008.

may work is still strongly present in Luxembourg. Women's salaries are still often perceived as support for the family budget as men's salaries are the normal income.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

#### *2.1.1. National policies*

Part-time work is not facilitated for specific groups of workers. There is, however, a specific leave on family grounds in the event of illness or an accident suffered by a child.<sup>721</sup>

There is no specific reference to part-time work in the latest report to the CEDAW Committee. However, the Ministry of Equal treatment regularly addresses the subject of conciliation between private life and work. The role of fathers and the need to share family responsibilities is one of the main subjects addressed.

#### *2.1.2. Equal treatment*

There are laws stipulating the principal framework of working time.<sup>722</sup> The possibilities to adjust working time are that employees are allowed to establish a working time organization plan regarding a reference period of 4 weeks. In this period, the total working time should correspond to a maximum of 40 hours a week (or the conventional fixed weekly working time). Employees' representatives have to be consulted before the plan can be implemented. There is no difference according to the size of enterprises. Civil servants who are responsible for a child under 15 can apply for temporary half-time leave on family grounds, and they can also apply for a working time reduction of 25, 50 or 75 %.<sup>723</sup> There are no equivalent provisions for the private sector. The aforementioned half-time leave is considered as full-time activity with regard to career advancement, index majorities, promotion and admission to promotion examinations. There are no equivalent provisions for the private sector. Civil servants can also be authorised by the chief of administration to carry out part of their tasks online from home.

#### *2.1.3. Organisation of working time*

There is no general right to work part time or a right to work full time. Working time is a result of negotiations with the employer. However, as mentioned, civil servants who are responsible for a child under 15 do have a specific right to part-time work.

There is no right to reduced working hours for a certain period after returning from maternity leave and no right to reduced working hours based on a need to care for elderly relatives.

#### *2.1.4. Assessment*

Part-time work is increasing and is a form which mainly concerns women. The subject is mainly addressed by civil society because of the consequences in terms of reduced salary and reduced pension rights for part-time workers. Policies and legislation should address part-time work more specifically. Currently, there are only general prohibitions to grant equal treatment to all workers, regardless of whether they are full-time or part-time workers.

## ***2.2. Collective agreements***

### *2.2.1. Policies*

Negotiations on collective agreements are required to include the subject of equal treatment between women and men. In general, part-time work appears to be perceived as a good tool which allows women, i.e. mothers, to stay in the working process.

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<sup>721</sup> Labour Code, Article L.234-50.

<sup>722</sup> Labour Code Article L.211-4.

<sup>723</sup> *Loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat*, Article 31-1.

### *2.2.2. Equal treatment*

According to a study published in May 2012,<sup>724</sup> the few collective agreements that mention part-time work simply repeat legal protections such as the principle of equal treatment regarding career progress or access to training courses.

### *2.2.3. Organisation of working time*

Organisation of working time is one of the mandatory subjects which social partners have to negotiate. According to the aforementioned study, part-time work is mentioned in half of the collective agreements studied. Part-time work is not generally a regular part of the negotiations.

### *2.2.4. Assessment*

Legislation does not include an obligation to reach certain results in matters of gender equality. Social partners therefore often just respond to the formal obligation to include the subject by using a standard formulation which states that the subject has been considered. In order to ensure effectiveness, the legislator could stipulate the obligation to establish equality plans that should include provisions on part-time work.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

No relevant case law or opinions have been published.

### *2.3.2. Assessment*

Part-time work does not seem to be a regular subject in negotiations regarding collective agreements. As this type of work is increasing this will probably change in the future. The fact that there is no obligation to draw up gender equality plans in collective agreements allows social partners to concentrate on other subjects.

## **2.4. Involvement of other parties**

The Ministry in charge of Equal Opportunities is running a programme offering financial support to enterprises that implement positive actions in the field of gender equality. These actions are diverse and can include organisation of working time.<sup>725</sup>

## **3. Statutory social security and pension rights**

### **3.1. Exclusions**

In order to benefit from pension rights, the minimum number of monthly hours is 64.<sup>726</sup>

### **3.2. Assessment**

There is nothing to report here.

<sup>724</sup> C. Blond-Hanten *Le temps de travail, l'emploi, la formation et l'égalité des genres dans les conventions collectives de travail* en 2005 et 2006, Maas Roland, Etienne Fanny, CEPS-Instead, May 2012.

<sup>725</sup> No examples are available.

<sup>726</sup> Social Security Code Article 175.

#### **4. Self-employment**

There are no formal disadvantages faced by self-employed persons working part time. There is a lack of data and studies on the subject however, which makes it impossible to give a precise assessment.

#### **5. Access to and supply of goods and services**

There are no elements which could cause specific disadvantages for part-time workers in the access to and supply of goods and services. Of course, the fact that some of these workers have a low salary causes problems for some when trying to obtain access to various services, such as mortgages.

There are no legal provisions or stipulations in any of the analysed collective agreements addressing discrimination of part-time workers in the access to and the supply of goods and services.

There is no court case law or opinions of the national equality body on the subject.

#### **6. Are there any gaps in national law?**

##### ***6.1. Gaps in the area of (access to) employment***

###### *6.1.1. Recruitment process*

Currently, higher positions in the public sector are not available for part-time workers.<sup>727</sup> However, a reform is about to change this and all jobs will be open for part-time workers.<sup>728</sup>

###### *6.1.2. Employment conditions*

There are no legal gaps to be described here.

Article 5 of the Pregnant Workers Directive has been implemented correctly. In some sectors, women even enjoy stronger protection than required because they are excused from work from the beginning of their pregnancy by reason of contact with ill persons or children.

###### *6.1.3. Termination of the employment contract*

There is no evidence of part-time workers being forced out of employment because they want to work part time, but in practice a worker who knows that his/her wish to work part time will not be granted will probably change work. There also is no evidence of the opposite.

##### ***6.2. Gaps in other areas***

There is nothing to report here.

## **II. FIXED-TERM WORK**

### **1. General information**

There are no sex-disaggregated data available on fixed-term work. The use of fixed-term contracts has seemed to be increasing in recent years, but there are no precise data available. Fixed-term contracts are viewed as insecure contracts as they do not allow workers, if they stay in this kind of working conditions, access to various services such as bank loans.

There are no statistics on the impact of fixed-term work with regard to the gender pay gap.

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<sup>727</sup> *Loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat*, article 31-1.

<sup>728</sup> At the time of writing no documents concerning this reform are available to the public.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

There are no specific policies regarding fixed-term work.

#### 2.1.2. Equal treatment

Article L.122-10 of the Labour Code stipulates that regarding equal treatment all provisions concerning permanent employment also apply to fixed-term work. Regarding periods of annual leave both permanent and fixed-term employment are subject to *pro rata* rules. No enterprise is excluded from the scope of application. There are no specifications about working conditions other than the general ones. There is no evidence that fixed-term contracts are not being renewed for reasons connected to pregnancy, maternity or parental leave. There is no maximum time limit for how long a person may be hired on fixed-term contracts. However, as fixed-term contracts are only allowed by way of exception to meet temporary needs of enterprises, the usual term is short.<sup>729</sup>

#### 2.1.3. Successive fixed-term contracts

Fixed-term contracts are allowed to meet temporary needs of enterprises.<sup>730</sup> There is, in principle, no difference between the private and the public sector nor between enterprises of different sizes. The contract may be renewed twice.

However, certain types of work, which are explicitly stipulated by law, may be performed under fixed-term contracts even if the need is not temporary: scientific and academic researchers, artists and apprentices/trainees may have fixed-term contracts.<sup>731</sup>

There is no evidence that young women are offered a fixed-term contract more often than young men.

#### 2.1.4. Assessment

There is no national debate on fixed-term work in the light of gender equality. As there are very few data available, it is difficult to identify any gaps. Research on the subject could be interesting.

### 2.2. Collective agreements

Fixed-term work is not part of negotiations regarding collective agreements.

### 2.3. Case law

There is no case law to report on these issues.

### 2.4. Involvement of other parties

Trade unions are the only actors to play an active role in the field of rights of fixed-term workers. Their role is to inform and advise their members on their rights.

<sup>729</sup> At the time of writing there are no court or tribunal cases to be reported regarding fixed-term contracts not being renewed, or claimed to be circumventing the rules on ordinary employment contracts, in relation to gender discrimination.

<sup>730</sup> Labour Code Article L.122-1.

<sup>731</sup> Labour Code Article L.122-1.

### 3. Statutory social security and pension rights

There are no exclusions from statutory social security schemes. Regarding old-age pension rights, the minimum number of working hours per month must be 64.<sup>732</sup> Retired workers receive their pension in proportion to the period worked.

As the right to parental leave is conditioned on working for a continuous period of 12 months before the leave, fixed-term workers may not have access to this leave because of failing to meet this condition.<sup>733</sup>

Luxembourg legislation does comply with EU legislation on this point.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

There are no indications of specific difficulties in enforcing rights in relation to part-time or fixed-term workers. Neither is there any financial support or specific advice for individuals seeking to enforce their rights. However, individuals can address trade unions or the national equality body (*Centre pour l'Égalité de Traitement*), which has no authority to impose its decisions however.<sup>734</sup> There are no studies which address the difficulties involved in obtaining access to legal redress for rights regarding part-time workers' positions.

The Recast Directive has not been implemented yet. Generally, very few (class) actions are initiated in Luxembourg.

Regarding compensation, there are no specific stipulations for part-time work or fixed-term work.

### 2. Vulnerability, multiple/intersectional discrimination

There is no research available regarding particular disadvantages for any specific groups with regard to being a part-time worker or fixed-term worker.

## FYR of MACEDONIA – Mirjana Najcevska

## I. PART-TIME WORK

### 1. General information

Part-time employees in the FYR of Macedonia (FYR of Macedonia) are defined as persons employed based on an employment contract (private employers) or administrative decision (state organs as employers) for an indefinite or definite period of time who work fewer hours than full-time employees with the same employer. Their remuneration, as well as healthcare and social insurances and pension contributions are paid by the employer proportionally, i.e. according to the number of working hours, unless in medical cases when the State pays these contributions in full, i.e. as if the worker worked full time.<sup>735</sup> In the official statistical data related to women, part-time work is defined as work which includes less than 36 working hours per week.<sup>736</sup>

<sup>732</sup> Social Security Code Article 175.

<sup>733</sup> Labour Code Article L.234-43.

<sup>734</sup> Access to trade unions is not always restricted to members; some trade unions also offer advice to non-members (in the hope of gaining additional members).

<sup>735</sup> [http://www.stat.gov.mk/OblastOpsto\\_en.aspx?id=14](http://www.stat.gov.mk/OblastOpsto_en.aspx?id=14), accessed 19 June 2013.

<sup>736</sup> <http://www.stat.gov.mk/Publikacii/Gender2010.pdf>, accessed 19 June 2013.



According to the official statistics, the percentage of employees working part time on the national level is 6.31 % of all employed people.<sup>737</sup>

The percentage of female employment on the national level is 39.7 %, while 7.65 % of employed women work part time. 44.7 % of all employees working part time are females. However, if we look at age structure, it becomes evident that female part-time employees between 35 and 44 years are the most widely present in the total number of part-time workers (51.3 %).<sup>738</sup>

Part-time work is more common in the sectors of agriculture, manufacturing, construction and education.

Women often are in part-time positions because there is a lack of full-time work or some other kind of job (66.3 %). Only 4 % of women working in part-time positions do so because of taking care of children or disabled persons. Yet, women are 71 % of those who have accepted part-time work because of taking care of children or disabled persons.<sup>739</sup>

There is no evidence that people combine several (minor) part-time jobs.

34 % of people working part time are self-employed.<sup>740</sup>

There are no statistics on the percentage of full-time workers who would like to reduce their working time.

According to a study on the pay gap,<sup>741</sup> the proportion of women in part-time jobs has increased in recent years. However, this increase is not drastic, as employers are obliged to give the legal reference wage when calculating taxes. According to this study, employers have a widespread practice of reporting the salary as equal to the reference salary, but then require the employee to return part of the salary ‘under the table’. Part-time employment is becoming attractive for women because of the increasing legal pensionable age. Still, according to this study ‘part-time jobs are often considered as less paid, with less chance for advancement, promotion’.

There have been specific developments in the participation of women and men with different levels education as part of the total number of part-time workers. In 2010, of all employed women without any or with uncompleted primary education 71 % were part-time workers, while 64 % of all employed women with lower secondary education were also part-time workers, thus representing a proportion that was higher than that of men, in the total number of part-time workers. In 2011 the situation had changed significantly: the first percentage dropped to 60.2 % (women without any education or uncompleted primary education), while the second percentage dropped to 41.1 % (women with lower secondary education).<sup>742</sup>

Although in general it may be stated that legal provisions are in compliance with the EU *acquis* on gender equality, according to one report on FYR of Macedonia ‘[t]emporary, part-time and fixed-term workers are likely to exhibit limited access to training. Given that young and female workers are overrepresented in such flexible work contracts, this might reveal their further disadvantage because lack of training will reduce their promotion prospects relative to other, full-time employees.’<sup>743</sup>

<sup>737</sup> <http://www.stat.gov.mk/Publikacii/2.4.12.11.pdf>, accessed 19 June 2013.

<sup>738</sup> <http://www.stat.gov.mk/Publikacii/2.4.12.11.pdf>, accessed 19 June 2013.

<sup>739</sup> <http://www.stat.gov.mk/Publikacii/2.4.12.11.pdf>, accessed 19 June 2013.

<sup>740</sup> <http://www.stat.gov.mk/Publikacii/2.4.12.11.pdf>, accessed 19 June 2013.

<sup>741</sup> M. Kazandziska *Gender pay gap in the Former Yugoslav Republic of Macedonia*, International Labour Organisation 2012.

<sup>742</sup> <http://www.stat.gov.mk/Publikacii/Gender2012.pdf>, p.79, accessed 13 June 2013.

<sup>743</sup> N. Mojsoska-Blazeski *Decent work country report*, International Labour Office.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time work is rarely mentioned in the reports and studies related to gender issues.<sup>744</sup>

In the Strategy for Gender Equality 2013-2020, adopted in Parliament in February 2013,<sup>745</sup> the part-time job is promoted as a way to strengthen the economic status of women. It is seen as a measure to promote the balance between public and private life.<sup>746</sup> In the ACTION PLAN (2013) for the implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability for 2012-2015, part-time work is not mentioned at all.

#### 2.1.2. Equal treatment

According to the Law on Labour Relations,<sup>747</sup> Article 48(3), part-time workers' rights are fully equal to those of full-time workers, and they enjoy these rights proportionally to their working hours. The situations of part-time workers are specifically stipulated in this Law, which includes a general clause (Article 48); the possibility of doing so with more employers at the same time (Article 49); working part time additionally to working full time, yet limited to ten hours per week (Article 50); part-time work in special cases (Article 122); handicapped persons and medical rehabilitation) and special working conditions (Article 122-a); particularly difficult jobs and jobs with health risks); part-time work to take care of a child with developmental problems and special educational needs (Article 169). The only sex-coloured provision is in Article 171, allowing mothers of a child under the age of one and breastfeeding mothers one extra hour per day to take care of their child.

The Labour Law does not stipulate any exclusions, but the Law on Safety and Health at Work<sup>748</sup> in Article 3(3) used to exclude 'house assistants' (in practise mainly women). This was contested before the Constitutional Court, which decided to declare this provision void.<sup>749</sup>

These provisions of the Labour Law also apply to civil servants due to the relay provision in Article 4 of the Law on Civil Servants,<sup>750</sup> since any issue that is not regulated by this law is to be addressed applying the general regulations on labour relations (i.e. the Labour Law).

Article 122(2) of the Labour Law specifically declares that full-time and part-time workers are equal. Since there is no mention of excluding part-time workers concerning any of the working conditions (training facilities, promotion, workers' representatives, dismissal) except remuneration, which is calculated *pro rata*, this should mean that part-time workers are entitled to all of these rights. The only exception is the overtime supplement, since they are protected against being ordered to work overtime (Article 48(5)), unless the employment contract states otherwise. Apparently, the idea of the legislator is to avoid substituting full-time hours with part-time hours plus overtime hours, thus allowing overtime only in cases of *force majeure*, natural disasters etc. In such cases the part-time worker should be paid equally to full-time employees working overtime.

#### 2.1.3. Organisation of working time

FYR of Macedonia legislation includes no mention of part-time work on a voluntary basis or of its use in order to achieve flexibility of the organisation of working time. On the one hand,

<sup>744</sup> See: [http://www.un.org/ga/search/view\\_doc.asp?symbol=CEDAW/C/MKD/4-5](http://www.un.org/ga/search/view_doc.asp?symbol=CEDAW/C/MKD/4-5), and [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ESEM\\_for\\_PSWG\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ESEM_for_PSWG_en.pdf), both accessed 13 June 2013.

<sup>745</sup> Parliamentary Decision No. 07-991/1, 20 February 2013.

<sup>746</sup> The Gender Strategy (*Родова стратегија*).

<sup>747</sup> Law on Labour Relations (*Законот за работните односи*), Official Gazette of the Former Yugoslav Republic of Macedonia no. 62/2005, last changes 10/2013.

<sup>748</sup> Law on Safety and Health at Work (*Законот за безбедност и здравје при работа*), Official Gazette no. 92/2007.

<sup>749</sup> Decision of the Constitutional Court No. 160/2010 of 29 June 2011.

<sup>750</sup> Law on State Servants (*Законот за државните службеници*), Official Gazette no. 59/2000, last change 15/2013.

the Labour Law, as mentioned earlier, considers these two categories as equal (Article 122(2)), on the other hand, in all other provisions it relates part-time work to certain situations – be it special cases or special working conditions.

Concerning the return from maternity leave, Article 171 of the Labour Law allows mothers of a child under the age of one and breastfeeding mothers one extra hour per day to take care of their child. Literally speaking, this does not constitute part-time work *in strictu sensu*, but a type of full-time work relationship with a decreased number of working hours (35 instead of 40 hours per week). The condition of proportionality is not included, meaning that they are entitled to full pay, as well as full contributions for the purposes of social security and pensions. The same is true for part-time work due to special working conditions (despite the title of this Article 122-a of the Labour Law) and the similar Article 93 of the Law on the Army.<sup>751</sup> This Article, in its first paragraph, refers to the general number of working hours (40), while, in its second paragraph, it refers to a smaller number of working hours, where the minimum is 30 hours per week. Again, the condition of proportionality is not included, meaning that these workers are equally paid etc.

#### 2.1.4. Assessment

The absence of a clause of a general nature allowing both employer and employee to mutually agree on a part-time work relationship actually prevents part-time work from being perceived as viable, everyday option. In a traditional society such as FYR of Macedonia this mainly concerns women since they are still the real carers in the household. Yet, this is strange because it would open up a clear path for the Government to reduce the unemployment rate. This is because according to the Law on Employment and Insurance against Unemployment<sup>752</sup>, a part-time job is considered (Article 57) as 'appropriate employment'.

Therefore, it cannot be viewed as indirect sex discrimination, but rather as a missed opportunity for proactive measures, i.e. enhancing employment opportunities of, among others, women who would like to work part time.

## 2.2. Collective agreements

### 2.2.1. Policies

The issue of part-time work is not part of the development of policies of social partners. Trade unions deal with the issue as part of discussions related to gender equality<sup>753</sup>, but there is no visible influence on the development of their policies.

Part-time work is mentioned as a tool for more flexibility of the labour force in the National Strategy for reduction of poverty.<sup>754</sup>

### 2.2.2. Equal treatment

Generally, collective agreements do not deal with the issue of part-time work or simply copy some of the articles of the Labour Law.

The General Collective Agreement on the Private Sector in the area of Economy<sup>755</sup> does not include a single provision about part-time or fixed-term workers. Yet, the Collective Agreement on the Textile Industry of the FYR of Macedonia<sup>756</sup> might be seen as a real exception to this approach. It includes several provisions related to the issue, even attempting to specify the provisions of the Labour Law for the textile industry. For instance, the full-time schedule is limited to 40 hours per week, yet there is a possibility, when hazardous work is

<sup>751</sup> Law on Service in the Army of the Former Yugoslav Republic of Macedonia

(*Закон за служба во Армијата на Република Македонија*), Official Gazette 36/2010.

<sup>752</sup> Law on Employment and Insurance against Unemployment (*Закон за вработување и осигурување во случај на невработеност*), Official Gazette no. 37/1997, last change 153/2012.

<sup>753</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=845%3A2012-12-10-12-34-10&catid=49%3Ahealth&Itemid=146&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=845%3A2012-12-10-12-34-10&catid=49%3Ahealth&Itemid=146&lang=mk), accessed 19 June 2013.

<sup>754</sup> [http://www.mtsp.gov.mk/wbstorage/files/strategija\\_socijalna.pdf](http://www.mtsp.gov.mk/wbstorage/files/strategija_socijalna.pdf), accessed 19 June 2013.

<sup>755</sup> Official Gazette no. 60/2010.

<sup>756</sup> Official Gazette no. 137/2007.

involved, for the full-time schedule to include fewer hours, but not less than 36 hours per week (Articles 49-50). Furthermore, Articles 53-59 deal with the different situations of part-time work in exactly the same way as the Labour Law.

It may therefore be concluded that according to this Collective Agreement, part-time work is less than 36 working hours per week, while there is no minimum number of hours.

### *2.2.3. Organisation of working time*

There are no provisions in the main national collective agreements (if any) on the organisation of working time that should facilitate the development of part-time work on a voluntary basis.

### *2.2.4. Assessment*

Collective agreement negotiations may quite possibly be more specifically focused on elementary levels of minimum wage, preventing uncontrolled dismissals, and ensuring daily, weekly and annual periods of rest, while the issues of a flexible work approach, especially in the area of part-time jobs, let alone agreeing on these matters on an equal footing, are left to be addressed in the future.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

Court cases show no variation. The courts rule in favour of the part-time worker, while the substance of the cases is mainly the type of payment. In Ro. no. 21/12, the Basic Court of Radovish issued a verdict on 6 November 2012, finding that the employer had tried to avoid their duty to pay the claimant dismissal compensation as well as the annual holiday bonus, allegedly because she was a part-time worker. The Court took the opportunity to stress that the claimant was equal to other, full-time workers when she was dismissed (together with a group of other workers) due to business reasons.

ROZh-352/09, which was decided by the Appellate Court of Shtip on 8 July 2009, is somewhat similar. The employer tried to avoid paying not only pension contributions and supplements for food, but also the proper amount of salary, again allegedly because the claimants were part-time workers. The Court instructed the Basic Court to reopen the case keeping in mind that part-time workers were entitled to all these benefits.

However, the Basic Court of Berovo, in its verdict in MALV.P. no. 26/13 on 22 March 2013 ruled against a part-time worker. She had been granted a part-time job in order to take care of her handicapped sisters. Once the Social Centre started compensating her for the salary to the full amount, she regained her full-time job, allegedly forgetting to inform the Centre of this change, thus receiving both full remuneration and the supplement to compensate for the difference between part-time and full-time pay paid by the Social Centre. It was concluded that this represented fake part-time working; the Court did not, however, address the issue of whether the employer was part of the scenario to fraudulently receive Labour Law benefits or not.

### *2.3.2. Assessment*

Taking into consideration the provisions of the Labour Law, and its rather strict basic regime for part-time jobs, there are no apparent shortcomings in the application of the principle of equal treatment nor are there any differences with the views of the Court of Justice. However, these cases have no real connection with the concept of indirect sex discrimination, and there should therefore be proper reservations on whether case law at this stage is a relevant indicator.

## **2.4. Involvement of other parties**

Trade unions do not take a clear position on the issue of part-time work. In the seminar ‘Youth on the labour market’ organised by the Association of Trade Unions in 2011, part-

time work was promoted as a new positive global trend.<sup>757</sup> In contrast, the same Association reacted negatively to the proposed changes of the Labour Law in 2009/2010, inter alia with regard to the part-time work clarifications. They announced that ‘all proposed changes are unfavourable for workers’.<sup>758</sup>

There are several NGOs working on the issues related to part-time work: ‘Lenka – movement for social justice’,<sup>759</sup> the ‘Progress institute’,<sup>760</sup> and ‘Reactor’.<sup>761</sup> However, the influence of public stakeholders in the field of rights of part-time workers is very limited.

The main conclusion from the activities and studies of the aforementioned organisations is that there is a current process of reducing the rights of workers and that the part-time job is used as a tool in this process. They are generally positive regarding part-time work; however, they are afraid of its possible abuse which could involve less social rights, less rights for protection and less time for rest/holidays.<sup>762</sup>

According to some studies,<sup>763</sup> the innovative trade union proposals inspired by measures taken during the crisis in European countries (such as part-time work, forced holidays, etc.) have not been accepted by the Government.<sup>764</sup> These studies also address other negative practices (e.g. when employers report employment as a part-time job, although it is a full-time job).<sup>765</sup>

Some political parties also mention part-time work as a tool for gender equality (such as DOM).<sup>766</sup>

So far, part-time work and the rights of part-time workers have not been of interest for the Ombudsperson or the Commission on Protection from Discrimination.

### 3. Statutory social security and pension rights

#### 3.1. Exclusions

There are no categories of part-time workers explicitly excluded from statutory social security schemes and/or statutory old-age pension schemes.

According to the Law on Pension and Disability Insurance,<sup>767</sup> salaries earned when working fewer than full-time hours are calculated based on the average monthly amount corresponding to the salary for full-time work (the final amount is reached after the specific calculation, in which the actual working hours are compared with the full-time working hours). There are no minimum requirements that disadvantage part-time workers as regards working time to acquire statutory social security or pension rights.

There is one legally dubious situation. On the one hand, part-time workers lose all unemployment benefits and are removed from the list of unemployed persons when they

<sup>757</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=667%3A2011-09-15-13-49-01&catid=49%3Ahealth&Itemid=146&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=667%3A2011-09-15-13-49-01&catid=49%3Ahealth&Itemid=146&lang=mk), accessed 19 June 2013.

<sup>758</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=363%3Ademokratsko-kusenjena-rabotnickite-prava&catid=49%3Ahealth&Itemid=146&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=363%3Ademokratsko-kusenjena-rabotnickite-prava&catid=49%3Ahealth&Itemid=146&lang=mk), accessed 19 June 2013.

<sup>759</sup> <http://lenka.mk/>, accessed 19 June 2013.

<sup>760</sup> [http://www.progres.org.mk/index.php?option=com\\_frontpage&Itemid=1](http://www.progres.org.mk/index.php?option=com_frontpage&Itemid=1), accessed 19 June 2013.

<sup>761</sup> <http://www.reactor.org.mk/default.aspx?lang=en-US>, accessed 19 June 2013.

<sup>762</sup> Demographic policies and gender equality in the Former Yugoslav Republic of Macedonia, <http://www.reactor.org.mk/CMS/Files/Publications/Documents/Rodova%20ednakvost%20i%20demografski%20politiki.pdf>, [http://www.solidar.org/IMG/pdf/38\\_macedonia\\_decentwork\\_macedonian.pdf](http://www.solidar.org/IMG/pdf/38_macedonia_decentwork_macedonian.pdf), [http://eprints.ugd.edu.mk/3279/1/10.%20OPINIO%20IURIS%20ZVOSN%20\(11.VII.2012\).pdf](http://eprints.ugd.edu.mk/3279/1/10.%20OPINIO%20IURIS%20ZVOSN%20(11.VII.2012).pdf), accessed 19 June 2013.

<sup>763</sup> Centre for Economic Development, *The Economic Crisis Impact on Industrial Relations National Systems: Policy Responses as key recovery tools*, 2012, funded by the European Union.

<sup>764</sup> <http://www.time.mk/cluster/d48dc73afe/pari-pomalku-rabotni-casa-i-suvencii-za-plati.html>, accessed 19 June 2013.

<sup>765</sup> Some of the media have also reported on the issue: <http://www.time.mk/cluster/e404ac1cf3/rabotele-polno-a-im-plakale-skrateno-rabotno-vreme.html>, accessed 19 June 2013.

<sup>766</sup> <http://www.dom.org.mk/2012-11-12-20-13-17/aktivnosti-forum-na-zeni/521-iii-izborni-sobranie-forum-na-zeni-dom>, accessed 19 June 2013.

<sup>767</sup> Article 23, Official Gazette of the Former Yugoslav Republic of Macedonia No. 98/2012.

accept a part-time job, as if it were a full-time job.<sup>768</sup> On the other hand, in the context of financial support for unemployment (Article 77), a part-time worker who is employed for half of the full-time working hours, still receives half of the support and has the right to be coached by the Agency towards full-time work.

There are no specific requirements in order to be entitled to statutory leaves (e.g. parental leave) that might exclude or disadvantage part-time workers.

### **3.2 Assessment**

Women could be discouraged from accepting part-time jobs if this means that they lose their unemployment benefits and are removed from the list of unemployed persons. Obviously, the provisions of Article 77 of the same law are much less known to them. Also, this prevents the practice of having several part-time jobs which will enable full pension benefits. On the other hand, if a part-time job promotes the balance between family responsibilities and career, this approach could be useful at least for some of the women.

## **4. Self-employment**

There are no differences in treatment of self-employed persons related to part-time work.

## **5. Access to and supply of goods and services**

There are no differences in the area of access to and supply of goods and services related to part-time work.

Apart from the general ban of discrimination stipulated in the Labour Law and in the Law on Prevention and Protection from Discrimination,<sup>769</sup> there are no specific provisions addressing possible discrimination of part-time workers in the access to and supply of goods and services.

However, fixed-term work is usually an obstacle in obtaining bank loans. For fixed-term workers, banks usually require 12 or 24 months' employment with the same employer prior to the loan application.<sup>770</sup>

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### **6.1.1. Recruitment process**

Absence of a unified legal approach regarding the issue of what is part-time work and what is, for instance, shorter full-time work, together with the strict regime on part-time work based on necessity (necessary part-time work), has created some specific conditions. This means that the recruitment process generally includes a public announcement of a vacancy for a full-time job, and only afterwards a situation of working part time might be created due to personal reasons of the worker. The other way around is an exception. The most well-known part-time jobs are those in educational institutions, where teachers are supposed to have a certain number of lessons (as working hours). Often, they cannot complete the necessary number in one school, e.g. an elementary school. Therefore, they do so by working in two or even sometimes in three different schools. However, this is not considered as voluntary part-time work, but as a result of the work process.

<sup>768</sup> Article 59, Law on Employment and Insurance against Unemployment, Official Gazette of the Former Yugoslav Republic of Macedonia No.37/97.

<sup>769</sup> The Law on prevention and protection against Discrimination was adopted in April 2010, and published in the Official Gazette of the Former Yugoslav Republic of Macedonia No. 50/2010.

<sup>770</sup> <http://www.staterbanka.com.mk/display.php?page=potrosuvacki>;  
[http://www.investicii.com.mk/index.php?option=com\\_content&task=view&id=324&Itemid=44](http://www.investicii.com.mk/index.php?option=com_content&task=view&id=324&Itemid=44); and  
<http://www.unibank.com.mk/categories/view/321>, all accessed 19 June 2013.



In the private sector (see also 2.3.) there is one absurd situation: there is no obligatory requirement to test the candidate (knowledge and/or skills) before hiring them. For instance, the employer is already acquainted with a worker and wants to hire him/her, or the employer has a cooperation with an employment agency to find the best candidates. In contrast, the only situation when employment agencies are involved is when hiring a fixed-term worker. Then, only after the recruitment process, is it mandatory for the procedure to hire the selected worker to go through such an agency.

### 6.1.2. Termination of the employment contract

There are no court cases addressing either workers being forced out of employment because they want to work part time or being forced out because of an application for an increase of their work amount. The legal system is such that both parties consider part-time work as a necessity strictly regulated by the Labour Law, and such types of obligation. The only problems encountered relate to full payment, of course, based on the principle of proportionality.

## II. FIXED-TERM WORK

### 1. General information

According to a study from 2008, '[F]ixed-term employment acts as a precautionary measure for employers in unfavourable economic condition, while it implies a certain degree of insecurity for employees. Relatively high share of employees with temporary contracts was a characteristic of FYR of Macedonia. This rate was in a range between 10 % and 13 % after 1996 and increased to 17.7 % in 2003.'<sup>771</sup>

In 2011, 12.7 % of all employed women and 11.9 % of all employed men worked as fixed-term workers. Fixed-term work is largely found in public administration. For example, among teachers in elementary schools, 22.7 % have a fixed-term contract.<sup>772</sup> 23.3 % of all female teachers have a fixed-term contract.

Fixed-term work is perceived by the Government as part of job flexibility as well as of harmonisation with European legislation.<sup>773</sup> Fixed-term work is seen as a positive step, in comparison with the grey economy and employment without any registration. This is the context for the increased number of fixed-term employment contracts (from 54.3 % in 2006 to 62.2 % in 2010; compared to the decreased percentage of permanent employment contracts: from 45.7 % in 2006 to 37.8 % in 2010).<sup>774</sup> The conclusion in the Strategy is that 'The Law on Agencies for Temporary Employment'<sup>775</sup> allows employers to adjust the number of workers according to their needs by signing flexible employment contracts'.

The Country Assessment Report also reports an increasing percentage of fixed-term employment contracts (from 8.5 % of all employed people in 2006 to 12 % in 2010).<sup>776</sup> In the period from 2005 to 2010, fixed-term employment among women increased by 46 %.<sup>777</sup>

<sup>771</sup> N. Mojsoska-Blazeski *Decent work country report*, International Labour Office Regional Office for Europe and Central Asia, 2008.

<sup>772</sup> [http://www.stat.gov.mk/Publikacii/2\\_4\\_12\\_04.pdf](http://www.stat.gov.mk/Publikacii/2_4_12_04.pdf), accessed 19 June 2013.

<sup>773</sup> National strategy for employment (2012-2015), <http://www.konkurentnost.mk/StrateskiDokumenti/Nacionalna%20strategija%20za%20vrabotuvanje.pdf>, accessed 19 June 2013.

<sup>774</sup> <http://www.konkurentnost.mk/StrateskiDokumenti/Nacionalna%20strategija%20za%20vrabotuvanje.pdf>, p. 23, accessed 19 June 2013.

<sup>775</sup> National strategy for employment (2012-2015), <http://www.konkurentnost.mk/StrateskiDokumenti/Nacionalna%20strategija%20za%20vrabotuvanje.pdf>, accessed 19 June 2013.

<sup>776</sup> [http://www.ilo.org/wcmsp5/groups/public/@europe/@ro-geneva/@sro-budapest/documents/publication/wcms\\_167032.pdf](http://www.ilo.org/wcmsp5/groups/public/@europe/@ro-geneva/@sro-budapest/documents/publication/wcms_167032.pdf) at p.30, accessed 19 June 2013.

<sup>777</sup> [http://www.ilo.org/wcmsp5/groups/public/@europe/@ro-geneva/@sro-budapest/documents/publication/wcms\\_167032.pdf](http://www.ilo.org/wcmsp5/groups/public/@europe/@ro-geneva/@sro-budapest/documents/publication/wcms_167032.pdf), p.31, accessed 19 June 2013.



There are no statistics on the impact of fixed-term work with regard to the gender pay gap on a national level. However, there is a general impression that fixed-term employment is less secure and the risks of lower payment are higher.<sup>778</sup> Also, there have been several reactions of trade unions demanding that the category of fixed-term employment be abolished, with the explanation that fixed-term employees are easily subjected to manipulation of a political nature, especially before elections.<sup>779</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

The Government is promoting fixed-term work by granting employers related advantages (the procedure for registration and deregistration of fixed-term workers has been simplified).<sup>780</sup> In general, there is no clearly defined, consistent policy against fixed-term contracts or in favour of permanent contracts.

#### 2.1.2. Equal treatment

The Labour Law, as is true for part-time workers, is the main legal source here. Equality with permanent workers is guaranteed by the same non-discrimination clauses. More precisely, Article 8(3) stipulates that both categories must be treated equally unless there are justified reasons. Furthermore, provisions, in Article 14, establishing the employment contract as a constitutional element of the work relationship are the same for the two categories. The employer is obliged, in Article 25(9), to offer both categories, as much as possible, the same conditions for improving their working skills, career development and professional mobility. In the category of fixed-term worker, the legislator includes seasonal workers (Article 47), as well as fixed-term managers (Article 54).

#### 2.1.3. Successive fixed-term contracts

Two questionable provisions of the Labour Law are in Article 46 and Article 95(10). The first deals with the length of the fixed-term contract and its transformation into a permanent contract. Generally, the length covers a period of five years, with or without interruptions. Yet, certain cases (retirement or other types of vacancy related to a specific position), the requirement is to have worked in the relevant position for two years.

The second one deals with the situation of so-called collective dismissal due to operational reasons. In such cases, the trade union must be consulted and allowed to participate in the whole process. However, this does not apply to fixed-term workers, or to workers of the public administration.

#### 2.1.4. Assessment

The legislator obviously intended to offer employers good possibilities in this area. According to the previously mentioned Law on Employment and Insurance against Unemployment, Article 1, any fixed-term contract longer than three months makes the worker an employee, which means that a worker might work for four months per year, for example, while being unemployed for the rest of the year. In a situation where salaries in general are rather low, particularly compared to the salaries in other EU Member States, it is hard to believe that this is based on the worker's will.

On the other hand, the transformation from a fixed-term contract to a permanent contract is not governed by certain specific criteria. This means that employers may use this mechanism to recruit workers without the necessary qualifications and engage them as fixed-

<sup>778</sup> <http://www.vest.com.mk/?ItemID=D65D41ED7FBAEB438AF4BE459F4E0945> and <http://www.vecer.com.mk/default.asp?ItemID=444C2EF49E771B4A9769847B5BD8BC5D>, both accessed 19 June 2013.

<sup>779</sup> <http://www.netpress.com.mk/mk/vest.asp?id=26089&kategorija=1>, accessed 19 June 2013.

<sup>780</sup> <http://vlada.mk/node/4354>, accessed 19 June 2013.

term workers. After a certain period of time (two or five years), they can give them a permanent contract. This is a way to avoid the recruitment competition and/or criteria required for permanent workers. With respect to competition, it is, to say the least, questionable whether these candidates would have been selected. With respect to criteria, for instance, quite often these fixed-term workers do not fulfil the criterion of knowledge of a foreign language, or have a more modest academic score than required etc.

## **2.2. Collective agreements**

FYR of Macedonian collective agreements do not deal with the issue of fixed-term employment contracts at all. Apparently, they are considered the same as any other permanent and full-time employment contract.

## **2.3. Case law**

FYR of Macedonian case law has been in favour of fixed-term workers, trying to protect them as much as possible.

The Kavadarci Basic Court found that an employer had not paid a fixed-term worker the wage component that covered the worker's experience or the years spent working, or the Christmas bonus and New Year's bonus, and ordered that the payments be made promptly.<sup>781</sup> However, the Court made a distinction. With respect to the bonuses, it found that this constituted discrimination on the ground of fixed-term work. With respect to the first issue it did not consider this discrimination. Most probably the Court realised that although the claimant had worked for this employer for only one year, she had more than 23 years of work experience. Therefore, the employer had a valid dilemma whether to pay her for all those years of work experience or only for the time spent working in this company.

The Veles Basic Court ordered an employer to transform a fixed-term work relationship into a permanent one.<sup>782</sup> The Court based its decision on the fact that the claimant had worked for more than three years as a fixed-term worker, while in the meantime the relevant position had fallen vacant due to retirement. Therefore, the employer should have transformed her status into that of a permanent worker following the automatic consequence stipulated by the Labour Law.

The Supreme Court rejected a correction made by an employer, and confirmed the verdicts of the Basic Court of Delchevo and of the Appellate Court of Shtip.<sup>783</sup> The workers concerned had worked in the company on only one three-month contract, following which their fixed-term status had been transformed into that of a permanent worker. Most probably, the newly appointed director of the employer discovered that the procedure had been lacking – no public announcement of the vacancies had been made – and dismissed the workers. All three courts found that the procedure had indeed included a substantial mistake, but that the workers were not responsible for this mistake and therefore should not suffer the consequences.

## **2.4. Involvement of other parties**

Fixed-term work has not been the subject of specific studies. Trade unions try to prevent abuse of fixed-term employment by educating their members on the legal obligations of employers and protective mechanisms present in the law.<sup>784</sup>

In 2008, the Association of Trade Unions submitted a proposal according to which fixed-term employment should not last more than two years, with the possibility to transform the contract after expiry of these years.<sup>785</sup>

<sup>781</sup> RO.No. 58/09 of 27 March 2009.

<sup>782</sup> RO.No. 665/11 of 17 August 2011.

<sup>783</sup> Rev2.no. 1147/2010 on 4 April 2012.

<sup>784</sup> [http://www.ssnm.org.mk/index.php?option=com\\_content&view=article&id=48%3Ada-se-namalat-nesigurni-vrabotuvanja&lang=mk](http://www.ssnm.org.mk/index.php?option=com_content&view=article&id=48%3Ada-se-namalat-nesigurni-vrabotuvanja&lang=mk), accessed 19 June 2013.

NGO ‘Lenka’ has reacted to the continuing reduction of employees’ rights. They referred, inter alia, to fixed-term employment contracts, which were extended from one year in 1990, to three years in 2003 and to five years in 2008, describing this as a very serious deterioration of working conditions.<sup>786</sup>

In 2008 a specific agreement was made between the Ministry of Education, the Ministry of Labour and Social Policy and the Trade Union for Education, according to which more than 5000 teachers had their contract transformed from fixed-term employment into permanent employment. Among the teachers there were some who had been working as fixed-term employees for as long as 25 years.<sup>787</sup>

### 3. Statutory social security and pension rights

There are no categories of fixed-term workers explicitly excluded from statutory social security schemes and/or statutory old-age pension schemes.

According to Article 66 of the Law on Employment and Insurance against Unemployment, the right to compensation in the event of unemployment is granted to fixed-term workers who have worked more than 40 hours per week. There is no mention of mixed cases (both part-time and fixed-term workers).

According to the Law on Health Insurance,<sup>788</sup> a minimum of six months’ health insurance is required for an employee to be entitled to health benefits.<sup>789</sup>

In cases related to fixed-term work and pregnancy, usually courts rule in favour of the pregnant worker. However, a case before the Tetovo Basic Court<sup>790</sup> was decided in favour of the employer, who fired the employee before the fixed-term job ended, right after her return from maternity leave. For the Court the decisive fact was that she renewed the fixed-term contract during her pregnancy.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

There are no studies which address the difficulties involved in obtaining access to legal redress for rights regarding part-time workers’ positions.

### 2. Vulnerability, multiple/intersectional discrimination

A distinction should be made between part-time and fixed-term contracts based on the Labour Law, on the one hand, and so-called ‘civil-law contracts’ based on the Contract Law (Article 38), on the other hand.<sup>791</sup> According to the study ‘Decent work country report’<sup>792</sup> the latter workers are excluded from any social security and do not enjoy any employment rights. In fact, it concerns employment engagement, and yet it is only covered by a regular contract, as would apply to the purchase of services. There are cases of people working under these conditions for many years, sometimes for even more than five years. This contract grants no maternal or parental rights.

<sup>785</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=267%3A%2008-10-18-22-10-22&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=267%3A%2008-10-18-22-10-22&lang=en), accessed 19 June 2013.

<sup>786</sup> <http://lenka.mk/tag/rabotnicki-prava/#.UWxRd7Xn3Z4>, accessed 19 June 2013.

<sup>787</sup> <http://www.sonk.org.mk/news/22032011mk.html> and <http://www.time.mk/cluster/9b4a62e695/od-rabota-na-opredeleno-5-189-prosvetni-rabotnici-sega-se-vraboteni.html>, both accessed 19 June 2013.

<sup>788</sup> [http://www.fzo.org.mk/WBStorage/Files/4\\_ZAKON\\_ZA\\_ZDRAVSTVENOTO\\_OSIGURUVANE\\_Precisten\\_tekst\\_65\\_od\\_20120.pdf](http://www.fzo.org.mk/WBStorage/Files/4_ZAKON_ZA_ZDRAVSTVENOTO_OSIGURUVANE_Precisten_tekst_65_od_20120.pdf), accessed 19 June 2013.

<sup>789</sup> Article 15.

<sup>790</sup> 22 September 2009, Judgment WR.No.258/09.

<sup>791</sup> Law on Obligations, Official Gazette No. 18/2001.

<sup>792</sup> N. Mojsoska-Blazevski, *Decent Work Country Report*, International Labour Office 2008.

In general, there are no significant differences between the positions of female part-time and female fixed-term employees based on their ethnicity. However, there are some areas with visible differences, for example the number of teachers with fixed-term contracts: 21 % from the FYR of Macedonia, 29 % of Albanian and 39 % of Turkish teachers have fixed-term contracts. Unfortunately, there are no cross-referenced data on gender and ethnicity.<sup>793</sup>

A pilot programme on part-time and fixed-term employment to promote social inclusion of people from lower economic backgrounds is supported by the Ministry of Labour and Social Policy.<sup>794</sup>

According to the Government, ‘the informal sector in the FYR of Macedonia covers seasonal work, temporary work or part-time workers who often have low skills and small salaries’.<sup>795</sup>

This answer is not based on legal facts, although experts might be aware of a number of studies which address these points.

## **MALTA – Peter G. Xuereb**

### **I. PART-TIME WORK**

#### **1. General information**<sup>796</sup>

The employment trend is for increases in both full-time and part-time employment, with women still entering part-time employment in the main. In September 2012, of 152 483 full-time employees, 52 706 were women. Full-time work is sought by both sexes but tails off for women when they start to have children. Thereafter they tend to return to part-time work. This pattern is more or less embedded. The number of women who are not in the workforce or who work part-time is very high. In October 2012 total part-time employment amounted to 55 325 persons - an increase of 5.5 % or 2 868 persons when compared to the corresponding month in 2011. Of 40 % of women in work in 2011, 11 % were in part-time employment.<sup>797</sup> The most significant increase in part-time employment was registered in accommodation and food service activities, at 7.9 %. The number of part-timers who also held a full-time job increased by 3.8 % when compared to 2011 levels, reaching 23 518 persons. The largest increase was recorded among women at 8.3 %. The number of persons who had a part-time job as their main employment, went up by 6.8 %, with the highest increase being recorded among women (+6.2 %).<sup>798</sup> The trend therefore appears to be for more women to enter the labour force, but as part-timers rather than full-timers, while an increasing number of women hold both a full-time and a part-time job simultaneously. There are no statistics regarding involuntary part-timers, regarding full-timers who wish to reduce their hours, or regarding the impact of part-time work on the gender pay gap. Nor is there hard evidence that discrimination varies by type of employer, size of employer or sector, although incidence of part-time employment does vary by sector.

‘Part-time employee’ is defined in Article 2 of the Employment and Industrial Relations Act 2002 (EIRA) as ‘an employee whose normal hours of work, calculated on a weekly basis

<sup>793</sup> <http://www.stat.gov.mk/Publikacii/2.4.12.04.pdf>, accessed 19 June 2013.

<sup>794</sup> <http://www.zvrm.gov.mk/WBStorage/Files/OPzanaVlada2012.pdf>, accessed 19 June 2013.

<sup>795</sup> <http://cfcd.finance.gov.mk/macedonian/IPA/OPHRD>, accessed 19 June 2013.

<sup>796</sup> For a full breakdown by sex and sector, see Table 4 annexed to NSO News release 12 February 2013, available on [http://www.nso.gov.mk/statdoc/document\\_file.aspx?id=3528](http://www.nso.gov.mk/statdoc/document_file.aspx?id=3528), accessed 4 April 2013. The statistics are based on the records of the Employment and Training Corporation (ETC).

<sup>797</sup> Eurostat LFS 2011, on [https://docs.google.com/viewer?a=v&q=cache:0kOkIO0qVasJ:ec.europa.eu/pdf/themes/23\\_labour\\_market\\_participation\\_of\\_women.pdf+&hl=en&gl=mt&pid=bl&srcid=ADGEESHlPjdGhXzPgHVQb0W\\_aATmDKBExn34rSx2B6Sd1ysWCTJb41fveqbHEhdfbChPcQcAu3LBBKEx3w\\_1vskp8N9IJSIzvMP3V-vuJvOAHZe3ITr2P6CJU9pEZ1kakzwUqsi7SQzq&sig=AHIEtbTpuL4zuUO\\_11\\_hxfjfb3vg](https://docs.google.com/viewer?a=v&q=cache:0kOkIO0qVasJ:ec.europa.eu/pdf/themes/23_labour_market_participation_of_women.pdf+&hl=en&gl=mt&pid=bl&srcid=ADGEESHlPjdGhXzPgHVQb0W_aATmDKBExn34rSx2B6Sd1ysWCTJb41fveqbHEhdfbChPcQcAu3LBBKEx3w_1vskp8N9IJSIzvMP3V-vuJvOAHZe3ITr2P6CJU9pEZ1kakzwUqsi7SQzq&sig=AHIEtbTpuL4zuUO_11_hxfjfb3vg), accessed 10 April 2013.

<sup>798</sup> *Number of Gainfully Occupied Up 1.4% - NSO*, Malta Independent, 5 March 2013, <http://www.independent.com.mt/articles/2013-03-05/news/number-of-gainfully-occupied-up-14-nso-1054048263/>, accessed 4 April 2013.

or on an average over a period of employment of up to one year, are less than the normal hours of work of a comparable whole-time employee and who is not a whole-time employee with reduced hours'.<sup>799</sup> This appears to be the definition now employed by the National Statistics Office (NSO).

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Government policy over the last several years has been to increase female employment. The general question is whether sufficient full-time and permanent jobs can be created, and then more importantly, whether women are accessing these jobs. According to the NSO, in September 2012, female full-time employment increased by 3.2 %, reaching 52 760 women, out of 152 483 persons in full-time employment, when compared to the corresponding month in 2011. The highest increase in female employment was recorded within the human health and social work activities (NACE 86-88; +4.9 %).<sup>800</sup> Equally, increases in part-time female employment have been recorded. Measures to facilitate part-time work include childcare provision and tax incentives for mothers to return to work (whether full time or part time).<sup>801</sup> There are discussions around part-time work as stereotypical. The outgoing Government was aware of CEDAW Article 5a but sometimes explained this lack of women in the workforce, even in part-time employment, by reference to choice on the part of women.<sup>802</sup> The Malta Confederation of Women's Organisations does not agree with this position and argues for greater efforts in battling stereotypes.<sup>803</sup> In several sectors, female part-time employees far outnumber men.

#### 2.1.2. Equal treatment

The relevant legislation is primarily the Employment and Industrial Relations Act of 2002, (Chapter 452 of the Laws of Malta, 'EIRA'), and the relevant regulations made thereunder. These are the Part-Time Employees Regulations (hereafter the 'PTE Regulations').<sup>804</sup> These regulations allow more favourable provisions to be made in collective agreements or the individual contract of employment (Regulation 14). It is the EIRA that defines the part-time employee as 'an employee whose normal hours of work, calculated on a weekly basis or on an average over a period of employment of up to one year, are less than the normal hours of work of a comparable whole-time employee and who is not a whole-time employee with reduced hours'.<sup>805</sup> Regulation 4 of the PTE Regulations prohibits employers (with no distinction as to corporate size or nature of employer) from treating a part-time employee less

<sup>799</sup> Chapter 452 of the Laws of Malta.

<sup>800</sup> [http://www.nso.gov.mt/statdoc/document\\_file.aspx?id=3528](http://www.nso.gov.mt/statdoc/document_file.aspx?id=3528), accessed 4 April 2013.

<sup>801</sup> Article 12(1)(b) of the Income Tax Act, Chapter 123 of the Laws of Malta.

<sup>802</sup> The UN Committee's position in 2010 was: '...The Committee is concerned that women continue to be stereotyped as mothers and caregivers, while men are stereotyped as breadwinners. Such stereotypes undermine women's social status, as reflected in women's disadvantaged position in a number of areas, including in the labour market and in access to political life and decision-making positions, and affect women's choices in their studies and professions. The Committee notes that such stereotypes constitute a significant impediment to the practical realisation of the principle of equality of women and men, as called for in article 2(a) of the Convention. 19. The Committee calls upon the State party to put in place a comprehensive policy, targeted at men and women, and boys and girls, to overcome traditional stereotypes regarding the roles of women and men in society and in the family, in accordance with articles 2 (f) and 5 (a) of the Convention...' See: <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/e787646c1909b766c12577d5003a2950?OpenDocument>, accessed 10 April 2013.

<sup>803</sup> <http://www.mcwo.net/2010/10/united-nations-review-on-malta%E2%80%99s-progress-made-in-respect-to-cedaw/>, accessed 10 April 2013. See also on this point F. Camilleri-Cassar, *Gender Equality in Maltese Social Policy?* Agenda 2005, p.104.

<sup>804</sup> Legal Notice 427 of 2002, as amended. SL 452.79. (Where 'SL' stands for 'subsidiary legislation').

<sup>805</sup> Before this new definition appeared in the law, part-time work was defined as involving less than twenty hours of work per week. This led to widespread employment of persons for nineteen hours per week, with the result that in such cases the protection of employment law did not apply.



favourably than a comparable full-time employee. In general it is the pro rata rule that applies, whether to pay or to leave, but then the same treatment applies to vocational training and information about full-time or part-time opportunities as the case may be. Pro rata entitlements include statutory bonus and weekly allowance, all public holidays, vacation leave, sick leave, birth leave, bereavement leave, marriage leave, injury leave and any other leave in terms of law. All employment of eight hours or more in a calendar week with the same employer comes with social security obligations (to pay contributions) and rights to benefits.<sup>806</sup> The rule applied to working conditions is the pro rata rule.<sup>807</sup>

### 2.1.3. Organisation of working time

The Constitution recognises the right to work, whether in full-time or part-time employment or self-employment with no distinction. The favourable organisation of working time is provided for by the PTE Regulations, and the Organisation of Working Time Regulations.<sup>808</sup> For example, the latter provide that pro rata leave must be calculated in hours. Under the EIRA itself employees must be made aware of alternative opportunities to work part time or full time with their employer<sup>809</sup>. Article 26(2) EIRA qualifies as discriminatory treatment ‘all actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.’ There is no right to work reduced hours unless provided by a collective agreement, but a recent mother may avail herself of her unpaid parental leave entitlement to work fewer hours by arrangement with her employer.<sup>810</sup> Equal pay for part-time employees is secured by Regulation 4(2) of the PTE Regulations.

### 2.1.4. Assessment

The author believes that legislation is comprehensive and has successfully sought to implement the relevant provisions of the various EU directives in order to exclude any sex discrimination in relation to part-time employment. However, the eight hours per week threshold for the payment of contributions may be problematic.

## 2.2. Collective agreements

Except in the public sector, cf. the public service collective agreement,<sup>811</sup> there is no national collective bargaining in Malta. Bargaining in the private sector takes place at enterprise level.

## 2.3. Case law

There have not been any leading cases as such but there have been several cases where part-time employees have pursued their rights with success. The usual forum is the Industrial Tribunal.<sup>812</sup>

<sup>806</sup> Paragraph 4 of Part II of the First Schedule of the Social Security Act, Chapter 318 of the Laws of Malta.

<sup>807</sup> It is impossible to detail these here, but the law is clear in PTE Regulations 4, 6, 8 and 11.

<sup>808</sup> Legal Notice 247 of 2003, as amended, SL 452.87.

<sup>809</sup> Article 25(2)(b), EIRA.

<sup>810</sup> See <http://www.vacancycentre.com/The-Resource-Library/Career-Advice-to-Job-Seekers/Work-Life-Balance/Maternity-Leave>, accessed 10 April 2013.

<sup>811</sup> <http://www.mumt.org/pdf/2012/10/Public%20Service%20Collective%20Agreement%202011%20-%202016.pdf>, accessed 9 April 2013.

<sup>812</sup> For example *Joan Monatanaro v Bay Street etc*, Decision No. 1874, where the Tribunal denounced the practice of issuing two contracts - one full-time and one part-time - for the same (female) employee in order to pay for overtime at the part-time rate rather than at the higher overtime rate. On [https://docs.google.com/viewer?a=v&q=cache:H0AMU6tuuZ4J:industrialrelations.gov.mt/download.aspx?id%3D503&decizjoni+impiegata+part+time&hl=en&gl=mt&pid=bl&srcid=ADGEESg53zwaepMYwG0U1Ac2aGHx8KNe8Hx7IlgtW3xCYxwXv7n6s\\_X529nq8RuY68ItB22vX-wSDPmZssZBtFkPBLYL7TG\\_KG1Fq8h3YbghueQjhBsQMwC8rvpT9w2q5EZajSVV8O7aM&sig=AHIEtbQwGdmORspThqNVuGbZGdJL1Q2qKQ](https://docs.google.com/viewer?a=v&q=cache:H0AMU6tuuZ4J:industrialrelations.gov.mt/download.aspx?id%3D503&decizjoni+impiegata+part+time&hl=en&gl=mt&pid=bl&srcid=ADGEESg53zwaepMYwG0U1Ac2aGHx8KNe8Hx7IlgtW3xCYxwXv7n6s_X529nq8RuY68ItB22vX-wSDPmZssZBtFkPBLYL7TG_KG1Fq8h3YbghueQjhBsQMwC8rvpT9w2q5EZajSVV8O7aM&sig=AHIEtbQwGdmORspThqNVuGbZGdJL1Q2qKQ), accessed 10 April 2013. In *Maria Mifsud v Vincent Baldacchino*, Case No. 1832, the Tribunal held that the legal right to reinstatement after redundancy if a vacancy in the same post arose within one year also applied where a previously held full-time post became available on a part-time basis. On

### *2.3.1. Cases/opinions of equality bodies*

Cases or opinions of equality bodies are not published.

### *2.3.2. Assessment*

There are no cases where CEDAW Article 5a has been used in the argumentation. Nor are there any good practices of particular note that could be of interest to other Member States.

## **2.4. Involvement of other parties**

An important role is played by the National Commission for the Promotion of Equality (the NCPE) which is the primary Maltese Equality Body, especially in terms of awareness-raising. A potentially large role could be played by the Malta Council for Economic, Social Development, comprised of the social partners and the Government. The MCESD does not engage in collective bargaining. From the women's rights perspective, in addition to the NCPE, one should mention leading women's organisations (NGOs) such as the National Council of Women Malta<sup>813</sup>. The trade unions are well geared to the protection of part-time workers and in favour of pushing for full-time jobs. It is in the informal economy that there may well be exploitation of part-time workers, but no full study of this has been carried out so far.<sup>814</sup>

## **3. Statutory social security and pension rights**

### **3.1 Exclusions**

There are no exclusions applicable only to part-time employees in the Social Security Act, Chapter 386 Laws of Malta. However, the threshold of eight hours per week before contributions become payable may be considered problematic.

### **3.2. Assessment**

There is no distinction made between full-time and part-time employees who pay social security contributions.

## **4. Self-employment**

One or two cases have been brought against an 'employer' accused by an 'employee' of having redrawn an employment contract as a contract of consultancy (self-employment, or a contract for services) in order to facilitate dismissal. The main case on this is still pending. There is no specific legislation, collective agreements or published cases of the equality body.

## **5. Access to and supply of goods and services.**

The PTE Regulations apply only in the employment context. The Access to Goods and Services and their Supply (Equal Treatment) Regulations do not specifically address the issue of full-time/part-time employment, but of course prohibit discrimination in such access on the grounds of sex.<sup>815</sup>

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<https://docs.google.com/?a=v&q=cache:OqJHI0DGK6kJ:industrialrelations.gov.mt/download.aspx?id=%3D875+decizjoni+impjegata+part+time+diskriminazzjoni&hl=en&gl=mt&pid=bl&srcid=ADGEEsiVbageQF93hSUhHfGj1N3-ZLDqntEBiChANuaTltwCVnTc5lhKQblDo4qpzuwcRzQyzIH3DDsm4YgwJrCbFAiRSBGzTIHvp1a9yj55obEil9i9DIb2Ehh3S8AtcvXC4U&sig=AHIEtbRxIXCWAR4d28gg2A8V0HRf7aov5A>, accessed 10 April 2013.

<sup>813</sup> [www.newmalta.com](http://www.newmalta.com), accessed 4 April 2013.

<sup>814</sup> J. Debono *Precariousness or changing lifestyles?* Malta Today, 23 August 2009, available on <http://www.maltatoday.com.mt/2009/08/23/t10.html>, accessed 8 April 2013.

<sup>815</sup> Legal Notice 181 of 2008 as amended.



## 6. Are there any gaps in national law?

The author does not consider there to be any gaps in national law.

### 6.1. Gaps in the area of (access to) employment

#### 6.1.1. Recruitment process

Employers may in general favour employing persons on a part-time and flexible basis, in line with the trend elsewhere in Europe. This actually in one sense benefits some categories of employee, such as the female carer or mothers with young children who may actually be looking for such employment. However, not only may this be working against other women who are available for full-time work, but a pattern may also have been set where men may be preferred by the employer for full-time jobs and women for part-time jobs in some sectors. The courts will move quickly to protect the right to equality under the law, but it is up to the equality body (the National Commission for the Promotion of Equality) to press for identification of problem areas and cases and for enforcement of the law.

#### 6.1.2. Employment conditions

There is anecdotal evidence of sharp practice on the part of some employers in the informal economy, especially in certain sectors. It appears that the weakness in the system lies here, and with enforcement. Both Maltese nationals and foreign nationals, especially those who may have overstayed their stipulated entry period, have become particularly vulnerable and may be employed on conditions falling below the legal minimum requirements.

#### 6.1.3. Termination of the employment contract

There is no evidence on a significant scale of part-time workers being forced out of employment either because they want to work part time or due to an application for more working hours. Such action on the part of an employer is prohibited by the PTE Regulations and would amount to unfair dismissal under Regulations 10 and 11 of those Regulations. The courts will move quickly to protect rights under the law.<sup>816</sup>

### 6.2. Gaps in other areas

Statistics over the years have shown the obvious: that reduced hours and part-time work, allocation of work and job classification, mainly affecting women, lead to a real gender pay gap unfavourable to women. Formal equal opportunities and gender anti-discrimination legislation have not succeeded in redressing the forces that lead to less work, lower benefits and pay, and fewer opportunities at the higher levels of work and decision-making.<sup>817</sup>

## II. FIXED-TERM WORK

### 1. General information

National Statistics Office (NSO) Labour Force quarterly statistics contain no recent breakdown by sex of fixed-term status.

<sup>816</sup> See Industrial Tribunal Case 1832, *Maria Mifsud v Vincent Baldacchino*, cited in Section 2.3. above.

<sup>817</sup> For a sociological analysis that is still valid see F. Camilleri-Cassar *Gender Equality in Maltese Social Policy?* Agenda 2005 Chapter 4.

## **2. Legislation, (national) collective agreements and case law**

### **2.1. Policies and legislation at national level**

The relevant law is the EIRA and regulations made thereunder. Article 34(1) provides that ‘Saving as otherwise prescribed by this Act, the conditions of employment in a fixed term contract shall not be less favourable than those which would have been applicable had the same contract of employment at the same place of work been for an indefinite time, unless different treatment is justified on objective grounds: Provided that this article shall not apply to contracts of employees on initial vocational training and, or, on apprenticeship schemes’. The relevant Regulations are the Contracts of Service for a Fixed Term Regulations of 2007 as amended (hereafter the CFT Regulations).<sup>818</sup>

#### *2.1.1. National policies*

Government policy is of course to create the conditions that produce permanent full-time jobs and useful permanent part-time job opportunities. Employers tend to want flexibility. The unions – for those sectors that are in fact unionised - would prefer permanent full-time jobs but have been conceding on a flexicurity basis, although the debate on flexicurity continues. The issue of fixed-term contracts is also sometimes mentioned in this context.

#### *2.1.2. Equal treatment*

Regulation 4 of the CFT Regulations prohibits discrimination against fixed-term employees, except on objective grounds set out therein, namely ‘the difference arises in view of the recognition of length of service, experience, qualifications or conditions of pay and work attached to the service immediately preceding the contract of service for a fixed term, and such other differences as are justified on objective grounds, or the task is specific or has a top management nature and includes objective considerations which justify such differentiation’.

#### *2.1.3. Successive fixed-term contracts*

Employers used to employ the same employee on successive fixed-term contracts, but this is no longer allowed, except in exceptional cases as permitted by law: (a) appointments on the board of a statutory or public authority, (b) assignments for the performance of a task of a specific nature or a specific task to be performed in a specific period of time given by the employer to an employee who is already on a permanent contract, (c) persons in training or acquiring work experience, (d) a contract for service in the public service or the public sector not made in accordance with the applicable laws of Malta and in particular, the Constitution.<sup>819</sup>

#### *2.1.4. Assessment*

The law is clear in its prohibition of discrimination against fixed-term employees.

## **2.2. Collective agreements**

There are no national collective agreements in Malta that refer to fixed-term employment contracts, except for the public service collective agreement.<sup>820</sup>

## **2.3. Case law**

The Industrial Tribunal has regularly applied the appropriate principles of equal treatment and non-discrimination, and relevant legislation, to fixed-term contracts. For example, in the case of *Neil John Pavia v Mediterranean Aviation Co. Ltd.* the Industrial Tribunal applied the

<sup>818</sup> Legal Notice 51 of 2007, as amended by Legal Notices 427 of 2007, 239 of 2008 and 376 of 2009.

<sup>819</sup> As set out in Regulation 7, CFT Regulations, especially by reference to Regulation 3(2).

<sup>820</sup> Available on <http://www.mum.gov.mt/publications/2012/10/Public%20Service%20Collective%20Agreement%202011%20-%20202016.pdf>, accessed 9 April 2013. The relevant clause can be found on <http://pahro.gov.mt/chapter-1-4>, accessed 28 May 2013.

principle of equal pay to a fixed-term contract.<sup>821</sup> The cases do not appear to present any difficulties with the concept of equal treatment/indirect sex discrimination. There have not been any cases that were inconsistent with the case law of the Court of Justice.

## 2.4. *Involvement of other parties*

The National Council of Women has been at the forefront in the promotion of equal treatment, even as trends change to include greater use of part-time and fixed-term contracts. The concern is mainly for young persons, and mainly for young women. The NCW proposed in 2008 the following policy guidelines, which remain valid: ‘Within the MCESD,<sup>822</sup> the flexicurity debate should give more attention to gender differences. Despite the fact that more flexibility through part-time work is welcomed by the majority of women and men to ensure a better work-life balance, women are often at a disadvantage in the labour market in terms of flexibility and security. Gender impact assessments should be carried out to ensure that collective agreements in the context of new forms of work agreements do not impact negatively on female workers and employees, which should also be backed by a legal framework’.<sup>823</sup>

## 3. Statutory social security and pension rights

There are no exclusions or other disadvantages that are caused by the mere fact that employment is for a fixed term.

# III. HORIZONTAL PROVISIONS

## 1. Effectiveness

Several difficulties have been recorded in the NCPE study *Unlocking the Female Potential*.<sup>824</sup> These include lack of awareness of rights and general vulnerabilities, so that underreporting of discrimination is a general problem. Length of procedures or the cost of proceedings may be a deterrent in particular cases but it is not perceived to be the case, in the author’s view, that these are insurmountable obstacles in most cases. The NCPE will offer advice and support in the enforcement of rights. Legal aid may be available in appropriate cases.<sup>825</sup> There has not been any specific study on access to remedies for part-time workers. There have been no class actions in this matter. Recent legislation has introduced the collective (‘class’) action into Maltese law, but its scope is limited to certain specific spheres that fall mainly in the economic domain (competition, consumer law).<sup>826</sup> As far as compensation is concerned, this remedy is set out in the law, and sex and other forms of discrimination have in recent times resulted in significant payment of damages orders from the courts and the Industrial Tribunal (it is the statutory fines that are deemed too low by several commentators<sup>827</sup>). The NCPE can also receive ‘complaints’, and the service is low-cost, but the NCPE can only investigate and

<sup>821</sup> No. 2627/LC Decision No. 2003. The case concerned a first officer who was paid less than first officers flying another type of aircraft operated by the same employer: [https://docs.google.com/viewer?a=v&q=cache:us8Nk5aqRwJ:industrialrelations.gov.mt/download.aspx%3Fid%3D618+&hl=en&gl=mt&pid=bl&srcid=ADGEEsGfXJwfMr12wde\\_Z6fR](https://docs.google.com/viewer?a=v&q=cache:us8Nk5aqRwJ:industrialrelations.gov.mt/download.aspx%3Fid%3D618+&hl=en&gl=mt&pid=bl&srcid=ADGEEsGfXJwfMr12wde_Z6fR), accessed 8 April 2013, or on <http://industrialrelations.gov.mt/download.aspx?id=618>, accessed 8 April 2013.

<sup>822</sup> The tripartite Malta Council for Economic and Social Development.

<sup>823</sup> See [http://www.ncwmalta.com/the\\_flexicurity\\_debate](http://www.ncwmalta.com/the_flexicurity_debate), accessed 9 April 2013.

<sup>824</sup> Project ESF 3.47 *Unlocking the Female Potential*, Research Report, NCPE, 2011 on [https://secure3.gov.mt/socialpolicy/SocProt/equal\\_opp/equality/resources/research\\_outcomes.aspx](https://secure3.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/research_outcomes.aspx), accessed 4 April 2013.

<sup>825</sup> Legal Aid assistance is available under the Code of Organisation and Civil Procedure to any employee who satisfies the conditions for the grant of assistance. See <https://gov.mt/en/Services-And-Information/Business-Areas/Justice/Pages/Things-to-Know-About-Justice-in-Malta.aspx>, accessed 18 July 2013.

<sup>826</sup> Collective Proceedings Act 2012, Chapter 520 Laws of Malta.

<sup>827</sup> Such as laid down in Article 45 of the Employment and Industrial Relations Act.

seek to act as a mediator; it has no adjudicatory power and therefore has no power itself to issue executive or judicial orders such as an order for the payment of compensation.

## 2. Vulnerability, multiple/intersectional discrimination

While the law provides for formal equality of treatment in line with EU law, the reality as exposed in an NCPE study, *Unlocking the Female Potential*, is that there are vulnerable workers who are simply not given their rights by their ‘employers’. These vulnerable groups include many women, mainly for reasons to do with the nature of the sector in which they work and often coupled with the fact that the sector in which they work itself is vulnerable in uncertain and difficult economic and trading conditions.<sup>828</sup> These causes combine with what is still far from becoming a dual earner model.<sup>829</sup> Yet the NCPE was at pains to emphasise in the study quoted above that ‘notwithstanding the unfavourable market conditions and challenges faced by employers operating in [the] three industries surveyed in the study there is a unanimous standpoint among all employers’ associations and trade unions alike that vulnerable employment should be curbed unreservedly’.<sup>830</sup> However, this does not mean that the unions are as keen as the employers to introduce measures of flexible working, within the law. It is clear that women are at a particular disadvantage resulting from being part-time or fixed-term employees in certain sectors, mainly due to low pay and lack of job security, and because they tend to be employed in those sectors.<sup>831</sup> It is equally clear that as far as part-time employment (or even economic inactivity) is concerned this is still most frequently a ‘choice’ made by women by force of circumstances, and one that follows from a series of decisions made along the way including in the course of training and education,<sup>832</sup> and is all dictated by a sense of responsibility as a current or future primary carer for home and family. Adequate childcare remains the one major potential solution.

### THE NETHERLANDS – Rikki Holtmaat

## I. PART-TIME WORK

### 1. General information

Part-time work is defined by Statistics Netherlands (*Centraal Bureau Statistiek*, CBS) as working less than 35 hours a week in the main job.<sup>833</sup> The percentage of employees working

<sup>828</sup> Project ESF 3.47 *Unlocking the Female Potential*, Research Report, NCPE, 2011 on [https://secure3.gov.mt/socialpolicy/SocProt/equal\\_opp/equality/resources/research\\_outcomes.aspx](https://secure3.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/research_outcomes.aspx), accessed 4 April 2013.

<sup>829</sup> See generally F. Camilleri-Cassar *Gender equality in Maltese Social Policy?* Agenda 2005.

<sup>830</sup> The three industries surveyed: tourism, cleaning and the language industries. On the Horeca sector see *Malta: The representativeness of trade unions and employer associations in the Horeca sector* on <http://www.eurofound.europa.eu/eiro/studies/tn1109028s/mt1109029q.htm> and *Malta: The representativeness of trade unions and employer associations in the cleaning activities sector* on <http://www.eurofound.europa.eu/eiro/studies/tn1108048s/mt1108049q.htm>, both accessed 10 April 2013.

<sup>831</sup> See for example, in the tourism, cleaning and the language industries. On the Horeca sector see *Malta: The representativeness of trade unions and employer associations in the Horeca sector* on <http://www.eurofound.europa.eu/eiro/studies/tn1109028s/mt1109029q.htm> and *Malta: The representativeness of trade unions and employer associations in the cleaning activities sector* on <http://www.eurofound.europa.eu/eiro/studies/tn1108048s/mt1108049q.htm>, both accessed 10 April 2013. See also *Employment and Industrial Relations in the Hotels and Restaurants* on <http://www.eurofound.europa.eu/eiro/studies/tn1109011s/mt1109019q.htm>, accessed 10 April 2013.

<sup>832</sup> See for background, Chapter 4 in F. Camilleri-Cassar *Gender Equality in Maltese Social Policy?* Agenda 2005.

<sup>833</sup> See <http://www.cbs.nl/nl-NL/menu/methoden/toelichtingen/alfabet/d/deeltijdwerk.htm>, accessed 18 April 2013. NB: Only workers working more than 12 hours a week are included in the CBS’ Statistics, and this is not a legal definition.

part time is 17 % for male employees and 73 % for female employees.<sup>834</sup> The percentage of female employment is 64 %.<sup>835</sup> Part-time work is more common in some professions than in others, with a considerable higher percentage of employees working part time in healthcare, welfare services and homecare. Over 60 % of the employees are satisfied with their working hours, 25 % would like to reduce their working time, whereas 8 % would prefer to work more hours per week.<sup>836</sup> The percentage of full-time workers preferring to reduce their working time is almost 10 %.<sup>837</sup> There are no statistics about how many people combine several part-time jobs or a part-time job with self-employment.

There are statistics on the impact of part-time work on the gender pay gap. Single female employees earn only 84 % of the salary of male employees. Married or cohabitating female employees with children earn 45 % of the salary of male employees with the same home situation. This is mainly caused by the fact that most of the women with children work part time while men with children work tend to work full time.<sup>838</sup> The Dutch Government has acknowledged that there is a connection between the facts that so many women are part-time employees and that they on average have lower-skilled jobs and the continued existence of unequal pay (gender pay gap).<sup>839 840</sup>

The number of women working part time has been rising in the past decades. The main reason for choosing a part-time job is the care of family and household.<sup>841</sup> Part-time work is generally viewed as positive. More than 90 % of the Dutch employees consider part-time workers just as professional as full-time workers. Still, some prejudices do exist, such as that 'real men' work full time (20 % of the Dutch employees confirm this statement).<sup>842</sup> Also, more female than male part-time employees with children say that they are responsible for the care of family and household.<sup>843</sup> There is no evidence suggesting that forms of discrimination on the ground of part-time work vary according to the type of employer, size of enterprise or sector.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Although in general the Dutch government has a positive view on part-time work, it is sometimes considered as a problem as well.<sup>844</sup> As the Dutch population ages, the Government has adopted policies to strengthen the financial sustainability of the pension system. By encouraging part-time workers to accept a full-time job, contributions to the social security and pension system can be more evenly divided. On the other hand, part-time work is still not

<sup>834</sup> A. Merens et al. *Emancipatiemonitor* Den Haag: CBS 2012, p. 59. It is important to note that the part-time jobs women have now on average include more hours than before, a development that can easily be discerned by comparing the 2001 and 2011 numbers.

<sup>835</sup> A. Merens et al. *Emancipatiemonitor* Den Haag: CBS 2012, p. 53.

<sup>836</sup> C. Hupkens 'Meeste werknemers tevreden met aantal werkuren', *CBS Sociaal economische trends* 2012.

<sup>837</sup> L. Kusters 'Deeltijders minder tevreden over arbeidsduur dan voltijders', *Webmagazine CBS* 8 July 2009.

<sup>838</sup> M. Van den Brakel & L. Moonen 'Groot inkomensverschil tussen werkende moeders en vaders', *Webmagazine CBS* 6 March 2013.

<sup>839</sup> See e.g. the Taskforce Part-Time Plus. Mentioned in the 8<sup>th</sup> report on Equal Pay, submitted to Parliament on 13 December 2007, TK 2007-2008, 27 099, no. 19, Section 2.1. See also: Taskforce Part-Time Plus (March 2010) *De discussie voorbij*. Eindrapport Taskforce Deeltijd Plus. The Hague: Ministry of Social Affairs.

<sup>840</sup> This difference may partly be caused by the fact that women, when negotiating the terms of their labour contract, are not so keen on getting a high salary as men. See I. Sjerps 'The Netherlands' in: The Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women *Legal aspects of the gender pay gap* Brussels, European Commission 2007, pp. 68-70.

<sup>841</sup> H. Lautenbach & G. Mars 'Meer vrouwen aan het werk: vooral in deeltijd', *Webmagazine CBS*, 7 March 2012.

<sup>842</sup> T. van der Horst & M. de Jongh, Rapport TNS NIPO: (Voor)oordelen over parttimers, February 2008.

<sup>843</sup> T. van der Horst & M. de Jongh, Rapport TNS NIPO: (Voor)oordelen over parttimers, February 2008.

<sup>844</sup> See for example the Social and Cultural Planning Bureau (SCP): 'Deeltijdwerk (g)een probleem', October 2009, to be downloaded from <https://www.scp.nl/dsresource?objectid=22994&type=pdf>, accessed 1 April 2013).

addressed negatively either, as in the past it was the key instrument to persuade more (married) women to enter the labour market.

The Government facilitates working part time and using care leave by means of legislative measures (see 2.1.3. below). In the Netherlands, all workers have the right to change their full-time job into a part-time job or vice versa.<sup>845</sup> In addition, in the event of family responsibilities and care responsibilities, each worker has a legal right to request leave. The relevant Collective Agreement (*CAO* in Dutch) may contain additional rules, but any regulation in this regard must respect the basic rights to leave as guaranteed in the Law on Employment and Care.<sup>846</sup> Although various CAOs contain provisions that offer older employees opportunities to work fewer hours and/or carry out less heavy work, part-time work is not specifically facilitated for older employees in law.

Most certainly a discussion about part-time work as a symptom of gender stereotypes is lingering on in the Netherlands. Women's working predominantly part time is a consequence of still very influential normative patterns in which mothers are expected to be the principal caregiver, while fathers do the breadwinning. There still is a large wage gap between men and women in the Netherlands and the difference is partly explained by the fact that men usually work full time, whereas women predominantly work part time. This fuels the debate about part-time work as a symptom of gender stereotypes and as a trap for women or as a brake on their possibilities to have a fully economically-independent existence.<sup>847</sup>

The provisions of the CEDAW Convention are not directly applicable in general. As a consequence, the judiciary is left with the task of determining whether a particular provision may be applicable. As yet, no cases about the direct applicability of Article 5a CEDAW has been dealt with by the courts. The CEDAW Committee's Concluding Observations about the latest Dutch report (2010) briefly mentions part-time work in its discussion of employment, expressing concern that 'the Government of the Netherlands overestimates the degree to which part-time employment is the result of women's choice'. The Committee subsequently calls on the Government to implement measures that give women access to full-time employment.<sup>848</sup>

### 2.1.2. *Equal treatment*

There is no legal definition of part-time workers. The main existing national legal measures meant to combat discrimination and to implement the principle of equal treatment in relation to part-time work are to be found in the General Equal Treatment Act (GETA), prohibiting inter alia (indirect) discrimination on the ground of sex and applicable to all categories of employees. There are no exclusions of specific groups of part-time workers insofar as the equal treatment norm is concerned. Article 5 GETA covers all possible contractual relationships where 'work' (in the widest possible sense) is involved. On the ground of Article 5 GETA, differences between working conditions, including the number of hours worked, must not lead to (indirect) discrimination on the ground of sex. In addition, Article 3 of the Equal Treatment Act for Men and Women in Employment (ETA) prohibits discrimination on the ground of sex during the recruitment process and contains specific provisions about equal pay. The aforementioned legislation is applicable to all enterprises. Different working conditions, such as basic pay, need to be applied *pro rata temporis* to part-time workers in order to meet the principle of equal treatment. According to the Working Time Discrimination Act (1996), unequal treatment on the ground of working time is prohibited. This is also included in Article 7:648 Civil Code, which is not applicable to

<sup>845</sup> Article 2:8 and 2:9 Adjustment of Working Time Act (AWTA; Wet aanpassing arbeidsduur, 2000). A Bill has been proposed to extend the scope of this law to flexible labour, such as working from home: see TK 2010-2011, 32 889.

<sup>846</sup> This right can be found in the Law on Employment and Care (Wet arbeid en zorg).

<sup>847</sup> This debate was more or less started by Heleen Mees, an economist and writer, with a column in one of the country's major newspapers, declaring part-time work to be 'an easy choice' and a brake on emancipation. See [http://vorige.nrc.nl/opinie/article1649205.ece/Vrouwen\\_zouden\\_nu\\_eindelijk\\_eens\\_echt\\_aan\\_het\\_werk\\_moeten\\_gaan](http://vorige.nrc.nl/opinie/article1649205.ece/Vrouwen_zouden_nu_eindelijk_eens_echt_aan_het_werk_moeten_gaan), accessed 19 April 2013.

<sup>848</sup> See points 36 and 37. The full report is available from <http://www2.ohchr.org/english/bodies/cedaw/docs/co/C-NLD-CO-5.pdf>, accessed 16 April 2013.



persons with a public-law employment relationship. For this category of employees, the same prohibition is included in Article 125g of the Civil Service Act. Furthermore, Article 3 of the Adjustment of Working Time Act (AWTA - 2000) guarantees that employees must never be dismissed due to a request for adjustment of their working time.

### 2.1.3. Organisation of working time

National legislation provides a right to adjust working time both in the private and the public sector, but as far as the private sector is concerned this right is restricted to enterprises of at least 10 employees.<sup>849</sup> An employee's request for reduction or extension of working time may only be denied by the employer in case of compelling reasons, such as 'severe' financial, organisational, safety, staff composition or schedule problems.<sup>850</sup> The rights of reduction and extension of working time are only granted to workers who have been working for their employer for at least one year, and it is possible to lodge an appeal against the employer's decision.<sup>851</sup> An employer is legally obliged to take the employee's wishes and personal circumstances into account when establishing the working time schedules.<sup>852</sup> Requests for flexible working time must be dealt with in accordance with the employee's personal needs, health and welfare, and in accordance with the principle of reasonableness. The issue of temporary working time reduction (e.g. for the purpose of reconciliation of work and care) is predominantly addressed in the Work and Care Act (2001), in which a range of care-leave arrangements is provided.

### 2.1.4. Assessment

One weakness of national legislation could be that equal treatment provisions are currently in four different laws, which hinders comprehensibility and transparency. The Dutch Government is in the process of integrating these laws, however.<sup>853</sup> In addition, there are specific laws prohibiting unequal treatment on the ground of working time or type of labour contract, which makes the situation even more complicated. There is no indication that national legislation is (indirectly) discriminatory on the ground of sex. There has been some discussion about the gender bias of legal systems and constructs, as a whole, although this (academic and theoretical) discussion was more lively and intense some years ago.

## 2.2. Collective agreements

### 2.2.1. Policies

Historically, employers have facilitated part-time working inter alia in order to facilitate for women who want to combine paid labour and care obligations, but some reluctance does exist as well. This is due to the fact that part-time workers tend to cost more.<sup>854</sup> On the other hand, in times of economic downturn, reducing working time can be a way to reduce wage costs, as it was used in the 1980s.<sup>855</sup> Trade unions on the other hand tend to be quite open to part-time work, as it creates opportunities for employees to organise their lives in their own way.

<sup>849</sup> Article 2 and Article 2:12 AWTA. Employers with fewer than 10 employees are nevertheless obliged to make (their own) arrangements with regard to the subject.

<sup>850</sup> Article 2:8 and 2:9 AWTA.

<sup>851</sup> See W.L. Roozendaal *Werk en privé. De strijd om tijd in het arbeidsovereenkomstenrecht* 2011, pp. 184-188.

<sup>852</sup> Article 4:1 Arbeidstijdenwet (Working Hours Act).

<sup>853</sup> In July 2012 the Minister of the Interior and Kingdom Relations sent a letter to Parliament (TK 2011-2012, 28 481 no. 18, 11 July 2012) in which she explains that the interim Government has decided that the to be newly established Government would need to decide what it wanted to do with respect to the integration of equal treatment legislation. So far, the new Coalition Government has not announced any plans.

<sup>854</sup> For more information about how employers perceive part-time jobs, see J. Schippers & C. Hillebrink *De kosten en baten van gezinsvriendelijk beleid. Een onderzoek onder organisaties* Tilburg: Organisatie voor Strategisch Arbeidsmarktonderzoek 2009.

<sup>855</sup> In 1982, in the famous '*Akkoord van Wassenaar*', trade unions agreed to reduced wages, whereupon employers agreed to reduced working time.



### 2.2.2. *Equal treatment*

There are about 1000 collective agreements in the Netherlands, many of which are approved by the Ministry as being applicable for a whole sector of industry (national CAOs). It is therefore difficult to provide a brief overview of their contents in this regard. Still, it should be emphasised that in the Netherlands, all workers have a legal right to change their full-time job into a part-time job, and this concerns a right that cannot be deviated from in a collective agreement.<sup>856</sup> In addition, a recent government research analysing 100 of the major CAOs for large branches of industry or sectors of society showed that in none of these CAOs part-timers were wholly excluded. However, in 15 % of them part-timers were partly excluded and in 56 % some provisions of the CAO had a different scope of application for part-timers.<sup>857</sup>

### 2.2.3. *Organisation of working time*

Collective agreements do contain arrangements about the adjustment of working time, but they are not considerably different from the legal arrangements in the AWTa. Collective agreements do not contain clauses that are specifically designed to facilitate the development of part-time work on a voluntary basis, but some agreements do contain regulations on working from home.<sup>858</sup> These regulations offer more flexibility to employees.

### 2.2.4. *Assessment*

One thing that could be considered as a weakness is that collective agreements are negotiated by trade unions that used to focus primarily on the interests of (male) full-time workers. Although collective agreements do not appear specifically ‘gender-sensitive’ or discriminatory on the ground of sex, the underrepresentation of female part-time workers in the trade unions may have influenced working conditions, and the negotiations on the subject.

## 2.3. *Case law*

### 2.3.1. *Cases/opinions of equality bodies*

Discrimination on the ground of part-time work could amount to indirect sex discrimination, as the great majority of part-time workers are still female. An important example in which the Supreme Court considered this to be the case, is a case in which a difference between the application of pension schemes, established in a collective agreement, to part-time workers and full-time workers in the enterprise amounted to indirect sex discrimination.<sup>859</sup> The author would like to highlight a few developments in landmark case law on indirect sex discrimination in relation to part-time work. In many cases the conflict is caused by an employee’s request to reduce working time from a full-time job to a part-time job.<sup>860</sup> As stated above, workers in the Netherlands have the legal right to influence working time and working hours in accordance with their needs, for example in relation to family responsibilities. An employer can only deny such a request for compelling reasons, and case law tends to set strict requirements.<sup>861</sup> Most recently, in a judgment of May 2013 the Supreme Court considerably strengthened the rights of on-call workers. This was facilitated by interpreting in a favourable and extensive way an existing provision in the Civil Code

<sup>856</sup> This right is enshrined in Article 2 AWTa.

<sup>857</sup> TK 2012-2013, Kamerstuk 29544 nr. 436. The full report may be found on <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/02/27/cao-onderzoek-volgtijd-deeltijd-en-contracten-voor-bepaalde-en-onbepaalde-tijd.html>, accessed 11 April 2013.

<sup>858</sup> More about regulations on working from home in CAOs can be found in *Faciliteiten Arbeid en Zorg 2009, een onderzoek naar arbeid-en-zorg-faciliteiten in CAO's*, Ministry of Social Affairs and Employment, February 2010, [http://docs.minszw.nl/pdf/129/2010/129\\_2010\\_3\\_14144.pdf](http://docs.minszw.nl/pdf/129/2010/129_2010_3_14144.pdf), accessed 4 April 2013.

<sup>859</sup> See HR 5 January 2007, LNJ AY8771, JAR 2007/50.

<sup>860</sup> E.g. ETC 2007-175. ETC stands for Equal Treatment Commission, now the Netherlands Institute for Human Rights (NIHR).

<sup>861</sup> The Haarlem Cantonal Court, 16 September 2008, (JIN 2008 afl. 17), considered it almost impossible to find compelling reasons that would be sufficient to deny a reduction from a 5- to 4-day working week, as part-time work is extremely common in Dutch society. See also W.L. Roozendaal *Werk en privé. De strijd om tijd in het arbeidsovereenkomstenrecht*, 2011, p. 187.

concerning the minimum number of hours for which a worker is to be paid for each shift. However, although most (part-time) on-call workers are women, the Supreme Court was not acting explicitly in the light of the prohibition of indirect sex-discrimination.<sup>862</sup>

Another main source of conflicts are bonuses and other forms of flexible remuneration, such as year-end bonuses. Problems can arise if employers set certain minimum standards that are detrimental to part-time workers.<sup>863</sup> In addition, problems can occur in situations in which an employee is not entitled to a bonus over a period that she was on pregnancy and maternity leave or has taken up parental leave on a part-time basis.<sup>864</sup> Such practices may count as unjustifiable unequal treatment in employment conditions, unless the employer has a valid reason for the specific remuneration structure.

### 2.3.2. *Assessment*

The case law on part-time work is in accordance with the case law of the Court of Justice, where Dutch case law focuses specifically on the relevant provisions of the AWTa. A continuous barrier remains the difficulty to prove indirect discrimination on the ground of sex, and it is for this reason that the author believes the existence of this Act to be of added value. Another method to protect the rights of part-time or flexible workers (for example, workers who work on the basis of an on-call contract) is to interpret generously the existing labour laws included in the Civil Code. This was demonstrated by the recent Supreme Court case as referred to in Section 2.3.1. (above).

## 2.4. *Involvement of other parties*

There are many stakeholders that play a particularly important role in the field of labour conditions in general and in the field of rights of part-time workers in particular. The Netherlands are characterised by the polder model, a system of tripartite cooperation between employers' organisations, trade unions, and the national Government. Trade unions have been accused of focusing predominantly on the rights of older, male, fulltime workers, but as more and more employees tend to work part time, trade unions have modernised, which has resulted in more attention for the interests of part-time workers.<sup>865</sup> The Dutch equality body, the NIHR, has played a large role too, as its Opinions – although not binding – are very authoritative.

One notable ministerial initiative is the taskforce 'Deeltijd Plus' (Part-Time Plus), which wrote a report on the question how to encourage women to work more.<sup>866</sup> An independent organisation that has carried out some work that could be relevant in the area of indirect discrimination on the ground of part-time work is E-quality, an independent think-tank for emancipation.<sup>867</sup> E-quality carries out research about gender-related topics, such as the financial position of women.

<sup>862</sup> Hoge Raad der Nederlanden 3 May 2013, ECLI:NL:PHR:2013:BZ2907.

<sup>863</sup> ETC 2009-106 is an example of a part-time worker who was not awarded a year-end bonus. ETC 2008-142 is another case in which a bonus system is deemed detrimental towards part-timers.

<sup>864</sup> See for example ETC 2001-38, Utrecht District Court, 8 October 2008 (LJN number: BG4779).

<sup>865</sup> See for example '*Arbeidsparticipatie en de combinatie arbeid en zorg*', (Employment rates and the combination of work and care), a paper published by the largest Dutch trade union FNV in May 2009, containing proposals to ease the combination of (part-time) work and care. The document can be found on [http://www.fnv.nl/site/media/pdf/79997/Nota\\_Arbeidsparticipatie\\_en\\_Zorg\\_mei2009.pdf](http://www.fnv.nl/site/media/pdf/79997/Nota_Arbeidsparticipatie_en_Zorg_mei2009.pdf), accessed 2 April 2013.

<sup>866</sup> See Taskforce Part-Time Plus (March 2010) *De discussie voorbij. Eindrapport Taskforce Deeltijd Plus*. The Hague: Ministry of Social Affairs. See also: Taskforce Part-Time Plus. Mentioned in the 8<sup>th</sup> report on Equal Pay, submitted to Parliament on 13 December 2007, TK 2007-2008, 27 099, no. 19, Section 2.1.

<sup>867</sup> More information can be found on <http://www.e-quality.nl/>, accessed 4 April 2013.

### 3. Statutory social security and pension rights

#### 3.1 Exclusions

The right to statutory old-age pension benefits is not affected by working part time or full time, nor by the type of labour contract (fixed-term – permanent contract). Most occupational pension schemes are earnings related and are nowadays based on average pay. Since 1994, part-time workers are no longer at a disadvantage.<sup>868</sup> The deductible income is lowered according to the part-time percentage. Therefore, compared with full-time workers who earn the same salary, the pension accrual of the part-timer is considerably higher. Corresponding to the Court of Justice's case law, part-time workers accrue (per hour worked) the same pension as full-time workers. This equal treatment is usually restricted to contracted hours and does not include overtime for part-time workers. For some employment relationships the possibility of being covered by the social security schemes is restricted to those who work at least two days a week.<sup>869</sup> Also, among others, domestic staff that works on less than four days a week for the same private employer are excluded from the scope of social security schemes.<sup>870</sup> These workers have a right to be paid during 6 weeks of illness while other employees have this right for 104 weeks.<sup>871</sup> Although in both situations the exclusion is phrased in sex-neutral language, in effect they may constitute a difference on the ground of sex because more women than men work in small part-time jobs. Also, more women than men work in another household. Both exceptions have been justified in the past for administrative reasons: the burden to fulfil all administrative requirements for people with such small jobs was considered too high on the employer. According to the Central Court of Appeal, the interpretation of 'domestic staff' includes not only persons cleaning the house or child-minding and likewise, but also 'professional caregivers' such as trained nurses giving medical care at home in the service of an individual employer.<sup>872</sup>

Part-time workers face no specific problems in relation to unemployment benefits. Unemployed persons who accept a part-time job get less benefit, as the amount of benefit will be reduced when the relevant persons has earnings from a part-time job.<sup>873</sup> The personal scope of social security legislation is extended to the *gelijkgestelden*, i.e. workers who do not qualify as worker in the sense of Article 7:610 CC, but who work under similar conditions (quasi/para-subordinate workers).<sup>874</sup> The extension is applicable to employment relationships characterised by a certain dependency of the worker.<sup>875</sup> Examples are various types of flex-workers or home-workers. For some of the *gelijkgestelden* a threshold applies: their employment relationship must have covered at least 30 days, and the income must amount to at least 40 % of the minimum income as regulated by law.

#### 3.2 Assessment

On the face of it, the Dutch (exclusions to) statutory social security and pension rights seem to be in line with the provisions on (gender) equality in the EU *acquis communautaire*. However, it can be argued that especially the exclusion of domestic staff that works on less than four days a week for the same private employer amounts to indirect discrimination on the ground of sex. It remains to be seen whether the administrative burden for the individual

<sup>868</sup> Before that time it was usual for part-time workers to be excluded from the pension scheme.

<sup>869</sup> See Articles 1 and 5 of '*Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd (Rareitenbesluit)*', Stb. 2008, 574.

<sup>870</sup> Article 6 Sickness Act. See also: L. Bijleveld & E. Cremers *Een baan als alle andere?: De rechtspositie van deeltijd huishoudelijk personeel* Leiden, Vereniging voor Vrouw en Recht Clara Wichmann 2010.

<sup>871</sup> Artikel 7:629 lid en 2 BW.

<sup>872</sup> CRvB 29 April 1996, RSV 1996/247.

<sup>873</sup> Article 34 Unemployment Act.

<sup>874</sup> S. Klosse & F.M. Noordam, *Socialezekerheidsrecht*, Kluwer 10<sup>th</sup> ed., 2010, Paragraph 2.2.4. In the WACA, there is a reference to the personal scope of the Sickness Act (*Ziektewet*) (Article 3:6 WACA).

<sup>875</sup> See Article 4 Sickness Act and Article 8 '*Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd (Rareitenbesluit)*', Stb. 2008, 574.

employer (in a private household, i.e. not a company or institution) can count as an objective justification for this exclusion.<sup>876</sup>

#### 4. Self-employment

It is essential to note that a new category of workers is gaining importance in the Netherlands: so-called ‘ZZP-ers’ (self-employed freelancers). They have experienced severe consequences of the economic downturn over the past few years, as they cannot rely on social security schemes. This topic does not seem to be gender-related however, and the author is not aware of any potential disadvantages faced by self-employed persons working part time. Article 6 GETA prohibits discrimination in relation to the conditions of and access to liberal professions. There are no national legislative provisions and national collective agreements addressing issues of equal treatment pertaining to part-time self-employed persons. There is no relevant case law, nor are there opinions of the NIHR on these issues.

#### 5. Access to and supply of goods and services

The author is not aware of any disadvantages faced by part-time workers in the area of access to and supply of goods and services. There are no specific national provisions on discrimination of part-time workers in the access to and supply of goods and services. Article 7 of the GETA concerning the right to equal treatment in the area of goods and services is applicable to all workers. There is no case law, nor are there opinions of equality bodies on these issues.

#### 6. Are there any gaps in national law?

##### 6.1. Gaps in the area of (access to) employment

###### 6.1.1. Recruitment process

Part-time workers are equally protected against discrimination in relation to access to employment as full-time workers. The author is not aware of any lack of full-time positions in certain professions/sectors. Part-time working women are overrepresented in certain sectors (e.g. home-care, retail and teaching), but it is unclear whether this is a demand or a supply issue.

###### 6.1.2. Employment conditions

Part-time workers are equally protected against discrimination in relation to employment conditions. The author is not familiar with any problems regarding women who work part time and the implementation of Article 5 of the Pregnant Workers Directive (92/85). With regard to the gender pay gap, there still is a wage difference of 8 % that cannot be explained by factors such as education, working time and experience.<sup>877</sup> It may partly be due to the fact that women more often choose part-time work, which may in turn offer less career-advancement opportunities.

###### 6.1.3. Termination of the employment contract

There is no evidence part-time workers being forced out of employment because they want to work part time. As stated above, an employee’s request for reduction of working time may only be denied by the employer in case of compelling reasons, and courts rarely find this to apply.<sup>878</sup>

<sup>876</sup> This is argued by L. Bijleveld & E. Cremers *Een baan als alle andere?: De rechtspositie van deeltijd huishoudelijk personeel* Leiden, Vereniging voor Vrouw en Recht Clara Wichmann 2010.

<sup>877</sup> See <http://www.cbs.nl/nl-NL/menu/themas/dossiers/vrouwen-en-mannen/publicaties/artikelen/archief/2012/2012-072-pb.htm>, accessed 16 April 2013.

<sup>878</sup> See W. L. Roozendaal *Werk en privé. De strijd om tijd in het arbeidsovereenkomstenrecht* 2011, p. 187.

## 6.2. Gaps in other areas

The author cannot identify any gaps in other areas.

## II. FIXED-TERM WORK

### 1. General information

The number of employees with fixed-term contracts increased from 13 % in 2001 to 18 % in 2011.<sup>879</sup> Generally, fixed-term work is viewed negatively, as it causes considerable uncertainty for employees. In addition, a fixed-term contract renders it next to impossible to get a mortgage, effectively leaving people no choice but to rent.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

The newly installed Government stipulated that flexible labour is crucial for a well-functioning labour market, but that fixed-term work must not become a cheap alternative for permanent work. Measures will be taken to balance flexible and permanent work.<sup>880</sup> So far, these measures have not yet been finalised. However, a recent agreement (11 April 2013) between the social partners and the Government includes the intention to reduce fixed-term contracts, although the agreement lacks concrete measures.<sup>881</sup>

##### 2.1.2. Equal treatment

On the ground of Article 5 GETA, differences between working conditions must not lead to (indirect) discrimination on the ground of sex. This includes the type of labour contract. In addition, unequal treatment on the ground of fixed-term work is prohibited.<sup>882</sup> This norm is also included in Article 7:649 Civil Code, which is not applicable to persons with a public-law employment relationship. For this category of employees, the same prohibition is included in Article 125g of the Civil Service Act. This legislation is applicable to all enterprises, but these Articles are not applicable to workers who have a contract with an employment agency. There are no thresholds in relation to specific rights. Different working conditions, such as basic pay, annual bonuses and overtime supplements, need to be applied *pro rata* to fixed-term workers in order to meet the principle of equal treatment.

##### 2.1.3. Successive fixed-term contracts

Article 7:668a of the Civil Code provides that an employer may offer a worker a maximum of three fixed-term contracts in succession, and that the total duration of fixed-term contracts is limited to three years. The fourth employment contract will automatically become a permanent contract. These conditions do not differ depending on the size or type of employer. Pregnant women and women who have recently given birth experience serious problems in relation to fixed-term-contracts. In a study carried out by the Dutch equality body NIHR,

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<sup>879</sup> W. Smits 'Nearly one in five employees are flexworkers' *Webmagazine CBS*, 29 May 2012. <http://www.cbs.nl/en-GB/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2012/2012-3628-wm.htm>, accessed 19 April 2012.

<sup>880</sup> See Chapter XI (p. 33) of the 2012 Coalition Agreement, which may be found on <http://www.kabinetformatie2012.nl/actueel/documenten/regeerakkoord.html>, accessed 3 April 2013.

<sup>881</sup> See <http://www.rijksoverheid.nl/nieuws/2013/04/11/kabinet-en-sociale-partners-eens-over-sociale-agenda-voor-arbeidsmarkt-van-de-21e-eeuw.html>, accessed 11 April 2013 for the main features of the new 'social agenda'.

<sup>882</sup> In the Working Time Discrimination Act.

44 % of women with fixed-term contracts declared that their contract had not been renewed (partly) because of their pregnancy.<sup>883</sup>

#### 2.1.4. Assessment

Although the increased number of fixed-term workers may be considered as a risk with respect to job security, it does not seem to include a gender dimension in the sense that more women than men are offered only fixed-term contracts. A major problem is that women with a fixed-term contract who get pregnant very often experience discrimination. Although these women are formally protected against this discrimination by the GETA, in practice this does not alter the discriminatory policies of employers. Still, national policy and legislation need to be adapted to the increase of temporary work, one of the main challenges being to encourage employers to offer more permanent contracts.

### 2.2. Collective agreements

Traditionally, employers' organisations take a positive stance towards fixed-term work, as it offers more flexibility to adjust their workforce to economic circumstances. In contrast, trade unions are inclined to be less enthusiastic, as fixed-term work is perceived as a threat toward permanent work (and workers' rights in general). As mentioned before, there are certain legal limits to the number and duration of fixed-term contracts. However, it is possible to deviate from these rules in collective agreements (CAO) on the basis of Article 7:668a Section 4 of the Civil Code. Certain sectors have opted to deviate from the legal rules, as the limitations can cause serious difficulties.<sup>884 885</sup> According to a recent study on 100 major CAOs, approximately 49 % of the CAOs only apply to permanent workers; in 41 % of them fixed-term workers are partly excluded. In 16 % of them there are provisions whose application differs between permanent and fixed-term contacts. The exclusion of fixed-term workers has decreased, compared to 2005.<sup>886</sup>

A strong point of the Dutch social system is, first of all, that it offers different economic sectors the possibility to establish a set of rules that suits the particular needs of that sector. In addition, a CAO is normally created in a spirit of consensus and needs consent from both parties involved (and to make a CAO binding, the Minister of Social Affairs also needs to approve it). This system may be useful in balancing fixed-term and permanent work as well, but only when both parties and the Government have enough interests in common. If the economic crisis deepens, this may become the case, as only close co-operation will solve some structural problems in the labour market. The author is not aware of any forms of indirect sex discrimination in officially approved collective agreements; this would require an in-depth study of all their neutral provisions and an assessment of the related impact on women's positions, including the question whether for this difference in treatment there may be an objective justification.

### 2.3. Case law

Case law offers a valuable addition to the protection already incorporated in Dutch legislation. Classic cases such as *Campina* (1991, relating to fixed-term contracts) and *Agfa/Schoolderman* (1994, relating to a flexible zero-hour contract) have put an end to the

<sup>883</sup> NIHR, *Dossier Zwanger en Werk 2012*, <http://www.mensenrechten.nl/dossier/zwanger-en-werk>, accessed 10 April 2013.

<sup>884</sup> An example could be higher education. The legal rules make it very difficult, for example, to change working time or the content of the work, as this would count as a new contract.

<sup>885</sup> More about regulations in CAOs can be found in *Faciliteiten Arbeid en Zorg 2009, een onderzoek naar arbeid-en-zorg-faciliteiten in CAO's* Ministry of Social Affairs and Employment, February 2010, [http://docs.minszw.nl/pdf/129/2010/129\\_2010\\_3\\_14144.pdf](http://docs.minszw.nl/pdf/129/2010/129_2010_3_14144.pdf), accessed 4 April 2013.

<sup>886</sup> The full report may be found on <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/02/27/cao-onderzoek-voltijd-deeltijd-en-contracten-voor-bepaalde-en-onbepaalde-tijd.html>, accessed 11 April 2013.



impairment of workers' rights.<sup>887</sup> In a recent case, the Supreme Court has ruled that workers with an on-call contract are entitled to be paid for a minimum period of three hours for each time they are called to come to work, encouraging employers to prevent multiple short shifts per day.<sup>888</sup>

Again, the author would like to highlight only those developments in case law that are most crucial with regard to indirect or direct sex discrimination in relation to fixed-term work. The largest problem the author has distinguished is that employers do not renew a fixed-term contract (partly) because of pregnancy.<sup>889</sup> A major step taken in case law to combat this phenomenon, following established case law from the EU Court,<sup>890</sup> is that the decision not to extend a fixed-term contract is equated with a decision not to hire a person.<sup>891</sup> Although in theory this ensures greater protection of fixed-term workers, it appears from the very large number of cases that the (former) ETC and the court have to deal with, that employers still continue this practice on a large scale.

#### **2.4. Involvement of other parties**

Again, many actors play an important role, such as employers' organisations and trade unions, but there is not one particular organisation that specifically focuses on the rights of fixed-term workers in the Netherlands. When it comes to the rights of fixed-term workers, many cases with a gender dimension are brought to the attention of the NIHR. Often, it concerns an employer who refuses to extend a contract because of pregnancy or taking up maternal leave.<sup>892</sup> The author is not aware of any particularly good practices which could be relevant in the area of indirect sex discrimination on the ground of fixed-term work.

### **3. Statutory social security and pension rights**

There are no categories of fixed-term workers who are explicitly excluded from statutory social security schemes or old-age statutory pension schemes. Under Article 7:649 of the Civil Code, distinctions on the basis of fixed-term or permanent contracts with regard to occupational benefits are prohibited. There are no minimum requirements, thresholds or provisions to be met that disadvantage fixed-term workers in order to acquire statutory social security or pension rights. There are no specific requirements to be met in order to be entitled to statutory leaves which might disadvantage fixed-term workers, and there is no specific case law on such issues. As stated before, this is in line with the EU *acquis* on gender equality.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

Enforcement of rights in the field of private employment takes place at the cantonal court. Cantonal courts are known for their understandability and accessibility, as these courts try to use plain language and manners are not extremely formal. The length of the procedure is relatively short, and court fees tend to be moderate (there have been, however, plans to increase the fees). For people without sufficient means, a lower court fee applies. Civil servants can use rather informal administrative appeal-committee procedures and can

<sup>887</sup> In HR 22 November 1991, NJ 1992, 707 (*Campina*), the Supreme Court ruled that the alternation of fixed-term contracts and freelance contracts still amounted to successive fixed-term contracts. In HR 8 April 1994, JAR 1994/94 (*Agfa/Schoolderman*), the Supreme Court ruled that full-time work under a zero-hours contract gave right to full-time workers' rights.

<sup>888</sup> HR 3 May 2013, LJN: BZ2907.

<sup>889</sup> See for example ETC 2007-111 and ETC 2008-119.

<sup>890</sup> HvJ EG 4 oktober 2001, C-438/99 (Jimenez Melgar), Jur. 2001, p. I-6915, JAR 2001, 219.

<sup>891</sup> See for example ETC 2007-48. This decision ensures greater protection of fixed-term workers.

<sup>892</sup> See for example Opinion 2013-29, which may be found on <http://www.mensenrechten.nl/publicaties/oordelen/2013-29>, accessed 4 April 2013.



subsequently bring their case before an administrative district court. In the Netherlands, a system of subsidised legal aid exists. Under the Law on Legal Aid, individuals can obtain this aid when they meet a number of requirements, including a maximum (household) income. In addition, free legal aid and advice is offered by a number of institutions, such as the *Rechtswinkel* (law clinics).<sup>893</sup>

The Dutch law system is performing very well, according to the Global Law Index.<sup>894</sup> Dutch courts are found to be accessible and free of improper influence.<sup>895</sup> The author is not aware of an increase in national case law regarding class actions initiated by associations, organisations or other legal entities which have a legitimate interest in this area since the implementation of the Recast Directive. In the Netherlands, it is possible to bring cases concerning direct and indirect sex discrimination and discrimination on the basis of part-time or fixed-term work to the attention of the Netherlands Institute of Human Rights (NIHR, formerly the ETC). The NIHR can only declare that a certain situation is in breach of equal treatment legislation. It cannot impose fines or grant damages. Still, a case can always be brought to a (civil or administrative) court in order to obtain a binding judgment and compensation. When it comes to the rights of part-time or fixed-term workers, many cases with a gender dimension are brought to the attention of the NIHR. Often, it concerns an employer who refuses to extend a contract because of pregnancy or taking up maternal leave.<sup>896</sup>

## 2. Vulnerability, multiple/intersectional discrimination

There is no evidence that women of ethnic minorities are at a disadvantage with regard to being part-time employed or only being offered fixed-term contracts. Highly educated women more often work full time than other women. In 2011 45 % of women in the possession of a university degree worked full time while 33 % of women in the possession of a university of applied sciences degree had a full-time job. Only 20 % of women with a lower level of education worked full time.<sup>897</sup> There is no evidence that women with disabilities are at a disadvantage with regard to being part-time employed or on fixed-term contracts.

### NORWAY – Helga Aune

## I. PART-TIME WORK

### 1. General information

The definition used in national statistics on part-time work is any job which is less than the normal hours for full-time work in the same or equivalent job/profession. Part-time work constitutes about 25 % of the entire workforce. With a total workforce of 2 604 000 persons, 691 000 persons work part time.<sup>898</sup> The employment rate of men is 73.6 % and 68.1 % for women. Female part-time employees (495 000 persons) represent 71.6 % of all part-time employees. Male part-time employees (196 000 persons) represent 28.4 % of all part-time employees. Of all employed women, 40.1 % work part time, while only 14.3 % of all

<sup>893</sup> See for more information <http://www.rechtswinkel.info/>, accessed 3 April 2013.

<sup>894</sup> Published each year by non-governmental organisation The World Justice Project (WJP). The 2012-2013 Report can be found on [http://worldjusticeproject.org/sites/default/files/wjproli2012-web.pdf?bcsi\\_scan\\_A7028DB668A=JPNuI285GCfep/z7gvqvku1t4+EwAAAZSr1CA=&bcsi\\_scan\\_filename=wjproli2012-web.pdf](http://worldjusticeproject.org/sites/default/files/wjproli2012-web.pdf?bcsi_scan_A7028DB668A=JPNuI285GCfep/z7gvqvku1t4+EwAAAZSr1CA=&bcsi_scan_filename=wjproli2012-web.pdf), accessed 4 April 2013.

<sup>895</sup> See pp. 27-28 of the aforementioned report.

<sup>896</sup> See for example Opinion 2013-29, which may be found on <http://www.mensenrechten.nl/publicaties/oordelen/2013-29>, last accessed 4 April 2013.

<sup>897</sup> A. Merens e.a. *Emancipatiemonitor 2012* Den Haag: CBS 2012, p. 59.

<sup>898</sup> Statistics Norway, second quarter 2012: <http://www.ssb.no/en/forside.jsessionid=457A900042E2996338207ACF9C39C78D.kpld-as-prod03>, accessed 19 May 2013. See also H. Aune *Deltidsarbeid. Vern mot diskriminering på strukturelt og individuelt grunnlag*, Cappelen Damm Akademisk forlag, 2013 at Chapter 2.

employed men work part time. Of the part-time workers 21.1 % are students, 12.3 % are older employees ‘down-sizing’ before full retirement. 47.6 % of part-time workers work 1-19 hours weekly, while 52.6 % work 20-36 hours weekly. Statistics show that the lower someone’s education, the more common is part-time work. Of people having completed secondary school 41 % work part time, while of employees with a university education only 21 % work part time. The number of part-time employed women has been stable since the 1980s, slightly decreasing from 44 % to 40.1 %.

In 2012, 9.8 % of the part-time workers responded that they were under-employed – of whom 70 % were women and 30 % men. The definition of under-employed is that the person has actively applied for additional work without success and is able to start new employment within a month. However, the number of people who will define themselves as under-employed is higher, since the requirement of starting the job within a month excludes at least 58 000 persons from the list. There is a great number of people who do not actively apply to jobs; in small communities a clear picture of job openings is usually available so if there are no visible vacancies, no applications will be sent.

A 2007 report focused on employees who combine two part-time positions in the municipal services. 32 000 employees had more than two contracts with the same employer and 80 % of these were women (mainly the health sector).<sup>899</sup> The practical reality is that many employees in the health sector will have a small part-time position and then work extra each month. This will not constitute two different work contracts in practice, but merely be extra hours. Here many talk about a norm of part-time work rather than full-time work being the norm. There are no statistics describing the extent to which persons combine a part-time job with self-employment. Due to the fact that part-time work is easily accessible there are no statistics on the percentage of workers who would like to reduce their working time.

Part-time work developed in Norway as a result of women’s gradual entry into the labour market in the 1970s. Women worked part time as an effect of the traditional gender patterns where the man was the breadwinner and women were viewed as the primary carers. With almost full kindergarten coverage one would expect the amount of part-time work to decrease, but this did not happen.<sup>900</sup> The number of employed women working part time has remained stable at around 40 % since the mid-1980s. This is explained by researchers as resulting from a combination of many factors. One is that the traditional gender roles are far stronger than what people like to believe. One research report says that the notion of what is a good mother, related to Christianity, is so strong that no one dare work full time (in some regions of the country).<sup>901</sup> Women who work part time when they have children hardly ever return to full-time work when the children are grown up.

The CEDAW Committee has in several recommendations to Norway stressed the need to combat the gender stereotypes and to not interpret the high number of part-time employed women as meaning that this is something all women want.<sup>902</sup> The Committee argues that part-time work is a result of the gender stereotypes and is a result of how the education system and the organisation of the employment market and individual workplaces interact. The Committee is deeply concerned about the long-term consequences of part-time work resulting in women ending up poor in old age. The gender aspect tends to slip into the background

<sup>899</sup> K. Nergaard, Fafo ‘Arbeidstakere med to ansettelsesforhold hos same arbeidsgiver – kommunal sektor’, Updated September 2007, paper not yet published.

<sup>900</sup> Kindergarten coverage 2012: nine out of ten children attend kindergarten and 97 % of all 5-year-olds have attended kindergarten before starting school. For more specific data see Chapter 3.1 in the Government’s report on kindergartens to the Parliament: <http://www.regjeringen.no/nb/dep/kd/dok/regpubl/stmeld/2012-2013/meld-st-24-20122013/4.html?id=720207>, accessed 25 June 2013.

<sup>901</sup> M. Magnussen *The good-mother norm: Arbeid ute og hjemme: Sørlandske mødres valg og vurderinger*, FoU-rapport no. 5, 2005, Trond Stalsberg Mydland, Gro Kvåle, on [http://www.agderforskning.no/reports/fou05\\_05\\_arbeid\\_ute\\_og\\_hjemme.pdf](http://www.agderforskning.no/reports/fou05_05_arbeid_ute_og_hjemme.pdf), accessed 21 June 2013.

<sup>902</sup> The CEDAW Committee’s replies. See the comments to the 5<sup>th</sup> and 6<sup>th</sup> periodic reports: CEDAW/C/2003/I/CRP.3/Add.2/Rev.1; the comments to the 3<sup>rd</sup> and 4<sup>th</sup> periodic reports: Norway.03/02/95.A/50/38, Paragraphs 452-495; Comments to Report 7: CEDAW/C/NIR/Q/7, Comments to Report 8: CEDAW/C/NIR/CO/8.

when the Gender Equality Act<sup>903</sup> (GEA) and the Working Environment Act<sup>904</sup> (WEA) are not interpreted in conjunction with each other. Many part-time work issues are addressed in the WEA, but the evaluation is strictly non-gender there and the gender perspective is lost. The protection against indirect discrimination looks good on paper, but in practice proves unable to address the underlying causes of inequality in real life.<sup>905</sup>

Discrimination on the grounds of part-time work does not *prima facie* vary according to the type of employer (state/private), size of employer or sector. However, as the Equal Pay Commission pointed out in 2008, employees (i.e. women) working in the health sector have been underpaid for decades. Given that the public sector in practice has a monopoly of these services (with some exceptions), the State has been a tough negotiator when making the collective pay agreements. The Equal Pay Commission recommended that the State should award this sector a total pay rise of over EUR 125 million (NOK 1 billion) to undo the pay discrimination.<sup>906</sup> Of course, this recommendation was not implemented by the Government.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time work is facilitated in the WEA, providing a right to work part time for employees with certain needs. See for example workers with family responsibilities, in Section 10-2(4) and Section 12-6, and care responsibilities for chronically ill or disabled persons, in Section 4-6. There is also a right to partial leave for further education, see Section 12-11. Part-time work, as well as involuntary part-time work, is common in typical female-dominated professions such as healthcare, education, retail and cleaning. Legislation has been developed in the last decade to provide these workers with a preferential right to an increased position, rather than the enterprise employing additional employees, see WEA Section 14-3.

Part-time work is increasingly addressed as a result of stereotypical gender roles. This concern is repeated by the various committees appointed by the Government in the last few years.<sup>907</sup> All of these committees identify part-time work as a direct result of a lack of gender equality. All committees call for a comprehensive approach, where the shaping of gender roles in families (e.g. increased paternity leave), is viewed in light of education and work as components in the greater picture of society. The Government presented its Gender Equality Report to Parliament on 21 June 2013 and addressed the issue comprehensively.<sup>908</sup> The gender-segregated employment market should not be viewed in isolation but as an end result of norms (or absence of norms on gender equality) in the sector of education as well as in the private sphere in addition to norms in the employment market. The Government suggests opening four regional offices, to be in charge of systematic gender equality work. The employment market is to be addressed by a tripartite council with representatives from the largest unions on the employers' and the employees' sides, as well as representatives from the

<sup>903</sup> Workings of 17 June 2005 No. 62 relating to working environment, working hours and employment etc. (*Arbeidsmiljøloven av 17. Juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv*).

<sup>904</sup> Equality Act (*Likestillingsloven*) 9 June 1978 no. 45, a proposal for a new Gender Equality Act was passed in Parliament on 10 June 2013. It is not known yet at what time this new law will become effective. The new Act is not meant to introduce any major new provisions but rather to ensure that all anti-discrimination legislation has the same basic outline and to increase user-friendliness.

<sup>905</sup> H. Aune *Deltidsarbeid: Vern mot diskriminering på strukturelt og individuelt grunnlag* ('Part-time work: Protection against discrimination at the structural and individual level') Cappelen Damm Publishing House, Norway, 2013.

<sup>906</sup> NOU 2008:6 *Kjønn og Lønn: Fakta, analyser og virkemidler for likelønn*. See especially Chapters 4, 5, 6 and 13 on <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2008/nou-2008-6.html?id=501088>, accessed 19 May 2013. Exchange rate, EUR 1 equals NOK 7.95, see [www.dnb.valutakalkulator.no](http://www.dnb.valutakalkulator.no), accessed 16 July 2013.

<sup>907</sup> See for instance the Equal Pay Commission (NOU 2008:6), Structure for Equality (NOU 2011:18) and Gender Equality and Politics (NOU 2012:15).

<sup>908</sup> See Meld Storting 44 (2012-2013) *Likestilling kommer ikke av seg selv* (Gender Equality does not just happen on its own) on <http://www.regjeringen.no/nb/dep/bld/dok/regpubl/stmeld/2012-2013/meld-st-44-20122013.html?id=731019>, accessed 21 June 2013.

Government/ministries. The council is to work systematically in order to enhance gender equality. Part-time work is one of the target areas.

### *2.1.2. Equal treatment*

There are two sets of legislation on equal treatment possibly affecting part-time workers: the prohibition against indirect sex discrimination in the GEA and the prohibition against discrimination of part-time workers in the WEA. GEA Section 3 is applicable in instances where part-time workers are predominantly women. However, as the WEA system provides specific legislation on part-time work these cases are for practical matters no longer addressed under the GEA but under the WEA.

WEA Section 13-1 and Section 13-3 implement the principle of equal treatment in relation to part-time work. Section 13-1(1) stipulates the prohibition against direct and indirect discrimination and Section 13-1(2) includes all discrimination grounds covered by the WEA, while Section 13-1(3) states that this prohibition also specifically applies to employees working part time or on a fixed-term contract. Section 13-3(2) specifically defines when differential treatment does not constitute indirect discrimination of part-time workers or fixed-term workers: when differential treatment is necessary and has a legitimate cause/objective reason and this treatment is not disproportionately invasive for the person or persons treated differently.

This legislation is applicable to all businesses regardless of size and of whether they are private or public. There are no thresholds in the law in relation to specific rights. The prohibition against discrimination applies to all working conditions (e.g. basic pay, overtime supplements, training facilities, promotion, workers representatives, and dismissal) in full or according to the principle of pro rata.

### *2.1.3. Organisation of working time*

The main legal national measures to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time are found in the WEA, see 2.1.1. above. WEA Section 14-3 provides a preferential right to an increased position for part-time workers, rather than the employer hiring a new employee. This right is subject to two conditions: the employee has to be qualified for the position and the expansion of working time is not of major inconvenience to the enterprise

A new Section 14-3 with amendments, enacted on 4 June 2013 (in force from 1 January 2014), provides in addition to the aforementioned rule, for a right to a position equalling the average working hours during the last 12 months (a measure to combat involuntary part-time work, which consequently indicates that a change would only entail more, not less than the number of hours contractually agreed).<sup>909</sup> The amendments to the WEA, an effort to combat involuntary part-time work are:

- New Section 14-1: the employer is obliged to discuss the use of part-time work at the enterprise with the employees' representatives at least once a year;
- New Section 14-3, third paragraph: when an employee has made use of her preferential right to request expanding her position to a full-time position or to a position with more hours (according to Section 14-3, first and second paragraphs), the employer has the obligation to discuss/consult the matter with the employee before making the final decision.
- New Section 14-4 a: introduces a completely new right, 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 that the need for the extra work is no longer present.

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<sup>909</sup> See preparatory work (Prop. 83 L (2012-2013) at the Government's proposals: <http://www.regjeringen.no//dep//regpubl/prop/2012-2013/prop-83-l-20122013.html?id=717709>, accessed 26 June 2013. Act of 14 June 2013 nr. 32 and Royal Decree: res. 14 June 2013 nr. 617, sets the amendments in force starting from 1 January 2014.

- New Section 14-4 b: regulates the effects of violations of part-time workers' rights to a position according to Section 14-4 a. The court may, upon such demand by the employee, award the relevant person such a position (equal to the average of the last 12 months of work). In addition the employee may be awarded damages.

The amendments seem to constitute adequate steps towards addressing the structural part of the unequal treatment of men and women in the employment market. By structural, the author means the way that the employment market so strongly depends on part-time jobs (organised so that employers can save money) for which the price is paid by women who cannot find full-time positions. The new provisions in the WEA underline the importance for people to get full-time jobs, and (female) employees are at least provided with the right to a contract reflecting their actual working 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.

An employer's decision regarding a request according to the provisions presented above may be appealed before the WEA Dispute Tribunal (*Tvisteløsningsnemnda*) and is also a pre-requirement before the case can be brought to court, according to WEA Section 17-1. This Tribunal will strictly evaluate the conditions for the preferential right: that any refusal of the request for expansion of working time must be based on necessity, and that it must not be too inconvenient for the employer to grant the extra hours to the employee balanced against the employee's interest in more working time. The Tribunal does not address the gender equality perspective in accordance with the GEA.

Upon returning from maternity leave (Article 15 of Directive 2006/54/EC), the WEA provides for a right to work reduced hours for a certain time to facilitate the reconciliation of work and family obligations under WEA Section 10-2(4) and Section 12-6. The WEA does not provide for a right to reduced working hours based on a need to care for elderly relatives specifically, but leave may be granted through Section 10-2(4). Some unions have discussed a possible need to provide for such a possibility, in view of the wave of the growing elderly population.

#### 2.1.4. Assessment

The strengths of national legislation are that it does address the need for the possibility to work part time in certain periods of life. WEA Section 14-3 provides strong legislation ensuring the right to work and promoting awareness at enterprise level. The protection against discrimination is also clearly stipulated in the law. The weaknesses are that due to the division of the legislation regarding part-time work into two separate strands of legislation (employment law and anti-discrimination law) the gender perspective is lost out of sight. This represents an under-use of gender equality legislation, because sex discrimination in employment law is disappearing from the courts. The Acts on Additional Occupational Pension as well as the Collective Agreement regarding additional occupational pension all include a threshold for participation, stipulating that the employee must work more than 14 hours weekly. This legislation must now be changed, after a landmark case from the Labour Court on 24 June 2013, see Section 2.3.1 below.<sup>910</sup>

Legislation is 'gender sensitive' only to the extent that Gender Equality Act Section 1 states that the aim of the Act is to ensure gender equality. To reach this aim without addressing gender stereotypes will not be possible. CEDAW was implemented into Norwegian law through its enactment in the Human Rights Act of 21 May 1999, Section 2. Norway is therefore under a double obligation to ensure fulfilment of the requirements regarding gender stereotypes as stated in CEDAW Article 5a. The author believes that there is a need to expand the Ombud's funds and capacity to carry out controls. In addition the Ombud needs to be granted the authority to impose fines on enterprises when they disrespect their duty to work for gender equality according to Section 1a in the GEA.

<sup>910</sup> Labour Court judgment of 21 June 2013, Case no. 20/2013 *Landsorganisasjonen i Norge med Fagforbundet mot Kommunesektorens organisasjon (KS)*. The case may still be appealed to the Supreme Court and is therefore not yet final.



## 2.2. Collective agreements

### 2.2.1. Policies

With regard to part-time work, the social partners are clear in the wording of their collective agreements, stating that equal treatment must be respected, concerning both the gender and the part-time work aspects. Part-time work is viewed as more problematic for the unions representing the sectors with the larger numbers of part-time workers.

### 2.2.2. Equal treatment

The main national collective agreements regulate part-time work by simply including the principle of equal treatment and stating the parties' obligation to work for gender equality.<sup>911</sup> These clauses do not go beyond the requirements as already stated in the WEA.

### 2.2.3. Organisation of working time

The clauses on working time affecting possible part-time workers' ability to actually start working part time do not go beyond the requirements as already stated in the WEA.

### 2.2.4. Assessment

An example of a 'good practice' is that the unions challenge all thresholds that do not guarantee equal treatment of part-time workers and full-time workers.

## 2.3. Case law

### 2.3.1. Cases/opinions of equality bodies

An analysis of court cases and decisions from Tribunals regarding part-time work from the last 30 years allows the following basic reflections:

- From a historical perspective, the older cases (from mid 1960-s until the mid-1990s) reveal that part-time workers were viewed as support service for full-time workers. Some shifts were even called the "housekeepers' shift" by the social partners and even by the Labour Court. This clearly reflects the opinion regarding part-time workers – they were considered as support services offered by employees whose main activity was that of housekeeper, i.e. stay-at-home moms/housewives (ARD-1970-96, ARD-1988-176 and ARD-1999-207).
- In most of the cases of the Labour Court, the question of how a collective agreement was to be interpreted as regards part-time workers was not something the parties considered when negotiating the agreement. The question came up in hindsight.
- The GEA and protection against indirect sex discrimination has seldom been used by the Labour Court in their judgment. The employees' union still argues their case both on the protection against indirect sex discrimination (GEA) and according to traditional contract interpretation (i.e. what the parties have good reason to believe is the correct interpretation based on the evidence of the case) (ARD-2008-6, ARD-1997-253, ARD 2003-116). The Court has in the majority of the cases issued a decision based on the facts and reasonable interpretation of the agreement, reaching the same result as proper use of indirect sex discrimination legislation would have provided.
- The most recent cases from the Labour Court rely on the court cases of the CJEU. Here the Labour Court seems to prefer the rules on protection against discrimination on the ground of part-time work to those providing protection against sex discrimination (ARD-2012-23 and Labour Court judgment of 21 June 2013).
- As the rules on protection against discrimination of part-time (as well as fixed-term) workers were introduced in the WEA in 2006 and these cases have been channelled to the Tribunal of the WEA, the gender perspective has been lost. The evaluation criteria

<sup>911</sup> See for example the basic agreement between LO and NHO, Part C Supplementary Agreement no. 2 on gender equality, <http://www.lo.no/hovedavtalen1/?tabid=131> in English [http://www.lo.no/Documents/english/Basic\\_Agreement\\_2010\\_2013.pdf](http://www.lo.no/Documents/english/Basic_Agreement_2010_2013.pdf), both accessed 25 June 2013.

according to this legislation are whether or not the wish of the employee is too inconvenient for the needs of the enterprise. There is no connection to the evaluation of whether the action is in breach of the gender equality principle following the obligations in the GEA/EEA (EU directives).

- Before 2006, more complaints regarding indirect sex discrimination of part-time workers were submitted to the Ombud and Equality Tribunal.<sup>912</sup>

All in all, in the last 30 years very few cases regarding part-time workers (as well as in relation to the GEA) have been decided by the courts. The Labour Court only decided in 13 cases in a period of 40 years. The Supreme Court has only decided in one case regarding the issue of part-time workers and the GEA in particular. The Appeal Courts have only applied the rules on indirect discrimination in a total of 10 cases, not a single one of which regarding part-time workers. The courts of first instance saw a total of 12 cases on indirect discrimination, and only one regarding part-time workers.

The small number of cases should be a question of concern. One may question whether the effectiveness of enforcement of the principle of equal treatment complies with the EU acquis as long as the tribunals do not have the authority to grant compensation.

#### *The Labour Court*

The Labour Court judgment in Case no. 20/2013<sup>913</sup> concerns issues similar to those in CJEU cases *Bilka*, *Vroege* and *Dietz*.<sup>914</sup> This Norwegian case concerned a threshold in a collective agreement requiring 14 hours of weekly work in order to participate in the additional pension system. It was deemed illegal and discriminatory, and in violation of the protection against discrimination against part-time workers in WEA Chapter 13 (based on the Part-Time Directive). However, the employees' union's claim for participation for those who had been discriminated against since the implementation of the Directive was not accepted by the Court. The Court returned the challenge to the social partners, declaring that although the limit of 14 hours was illegal, it did not mean that 'a limit' (wherever that limit may be) may be illegal, and that this was for the parties to decide. The employees' unions stated that they believe the limit should be zero and now negotiations will need to decide on how the correction is to be carried out. This applies to those who have already retired, to those who have partly retired, and those currently working. The author believes that this Labour Court judgment must have consequences for similar thresholds of 14 hours of weekly work for participation in occupational additional pension schemes.<sup>915</sup>

#### *The WEA Tribunal/Dispute Tribunal (Tvisteløsningnemnda)*

Cases following claims according to WEA Section 14-3 predominantly concern healthcare workers who want to work more hours but who find themselves 'trapped' in the part-time work pattern at their workplace.<sup>916</sup>

#### *2.3.2. Assessment*

The protection against discrimination of part-time workers (Part-Time Work Directive) seems to be quite efficient. However, the protection against indirect sex discrimination in relation to part-time work is strong on paper and weak in practice. This is a serious point, as gender equality legislation is the only legislation addressing the structural level that recreates and

<sup>912</sup> See LKN-1992-2, LKN-1989-7 and LKN-1987-4.

<sup>913</sup> The case of 21 June 2013 may still be appealed to the Supreme Court and is therefore not yet final. The parties in the case are: Landsorganisasjonen i Norge med Fagforbundet mot Kommunesektorens organisasjon (KS).

<sup>914</sup> Cases 170/84 *Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR-00607, C-57/93 *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV & Stichting Pensioenfond* [1994] ECR-I04541, and C-435/93 *Francina Johanna Maria Dietz v Stichting Thuiszorg Rotterdam* [1996] ECR I-05223, respectively.

<sup>915</sup> Law on the State Pension Fund (*Lov om Statens Pensjonskasse*) 28 July 1949 no. 26 Paragraph 5, Pensions Act (*Foretakspensjonsloven*) 24 March 2000 no. 16 Paragraphs 3-5 and Defined Contribution Pension Act (*Innskuddspensjonsloven*) 24 November 2000 no. 81 Paragraphs 4-2.

<sup>916</sup> The cases of the Dispute Tribunal are available on: <http://www.arbeidstilsynet.no/fakta.html?tid=78505>, accessed 26 June 2013.



strengthens the gender-stereotypical patterns in society. The author considers the following as possible solutions: 1) to establish a connection between the WEA and the GEA to ensure the gender perspective in employment law, which works in a gender-segregated reality, and 2) to strengthen the legislation on the activity and reporting duty regarding gender equality at enterprise level, including the added level of a tripartite council of gender equality in the employment market.

#### ***2.4. Involvement of other parties***

There is nothing further to report on this issue.

### **3. Statutory social security and pension rights**

#### ***3.1. Exclusions***

No categories of part-time workers are explicitly excluded from statutory social security schemes and/or old-age statutory pension schemes. For the additional occupational pension systems, see Section 2.3.1. above. There are no specific problems regarding unemployment benefits. There are no specific requirements in order to be entitled to statutory leaves (e.g. parental leave) which might disadvantage part-time workers. Benefits are paid proportionately to the previous income.

#### ***3.2. Assessment***

National legislation is in line with the EU acquis on gender equality. The thresholds in the Acts governing the additional occupational pension systems will have to be removed following the Labour Court judgment of June 2013.

### **4. Self-employment**

As financial services (bank loans) are always conditional on the borrower's financial ability to repay his/her loans, the amount of the loan granted will be determined by the income level. There are no national legislative provisions and/or national collective agreements that address equal treatment of part-time self-employed persons, nor is there any case law.

### **5. Access to and supply of goods and services**

There are no disadvantages faced by part-time workers in the area of access to and supply of goods and services, e.g. in the access to financial services (mortgages, bank loans), longer waiting periods for insurances or premiums higher than justified by the application of the principle *pro rata temporis*. The only threshold is the one requiring 14 working hours per week in order to earn additional pension, as reported above. There are no national legislative provisions or national collective agreements addressing discrimination of part-time workers in the access to and supply of goods and services. There is no case law and/or opinions of equality bodies on such issues with regard to part-time work.

### **6. Are there any gaps in national law?**

#### ***6.1. Gaps in the area of (access to) employment***

##### ***6.1.1. Recruitment process***

In the formal text of the law, the effective protection against discrimination of part-time workers in relation to access to employment is satisfactory. As described in Section 2.1.1. above, however, there is a profound problem at the systemic level where part-time employment positions are actively overused in certain sectors (e.g. the healthcare sector) in order to stick

to budgets. Employing a sufficient number of part-time employees makes it possible to avoid paying overtime in the sense that the workload is distributed among so many workers that none of them reach a full-time position, and consequently no overtime will ever need to be paid. This cost-efficient approach is also seen in part-time workers being called in to work extra hours and then being sent home, following which a new shift of part-time workers is called in to work another extra shift later in the day. In order to prevent discrimination of part-time workers, the author believes that only by making owners of enterprises accountable for gender equality as such, through reporting and activity duties, will the practice of employing too many part-timers in this sector change in the long term.

There is a lack of full-time positions in certain professions/sectors: such as in healthcare, cleaning, retail and education. In practice, this forces (female) employees into part-time work as they are overrepresented in these sectors. The Government has earmarked EUR 3.1 million (NOK 25 million) for various projects at enterprise level to address unwanted part-time work. The aim is to find alternative ways to organise the work, thus creating more full-time positions.<sup>917</sup> A further initiative included in the WEA as from 4 June 2013 is the establishment of a tripartite co-operation group between the social partners and the Government (ministries) whose mandate is to solve the lack of gender equality at workplaces, including involuntary part-time work, which is explicitly mentioned. There are no problems concerning the lack of quality in part-time work available, e.g. in higher functions.

### *6.1.2. Employment conditions*

For the most part, employers seem to understand that equal treatment between part-time workers and full-time workers is the main rule. The recent judgment of the Labour Court is an example which should further strengthen this understanding. Other examples are how seniority is calculated in pay rises, bonus payments, etc. The court cases from the CJEU play an important part in providing the legal arguments needed in this development.

Analysing the court cases and tribunal cases on part-time work, it seems that the employees' unions tend to argue their cases along both paths of law: gender equality and the protection against indirect discrimination, as well as the gender-neutral protection against discrimination of part-time workers. The courts seem to choose the gender-neutral option. From what the author hears from lawyers, they believe this is partly due to the vagueness in the rules on indirect sex discrimination. There especially is uncertainty on how the rule on the pool of comparison is to be interpreted in practice, where the question is 'whom or which group to compare with'. Clarification of this issue at EU level would be most welcome.

### *6.1.3. Termination of the employment contract*

There is no evidence of part-time workers being forced out of employment because they want to work part time. Neither is there evidence of them being forced out after having applied for an increase of their work amount. This being said, cases from the Tribunal indicate that many employees will not be too demanding, out of fear of losing out on opportunities for additional work in the future.

## **6.2. Gaps in other areas**

There is nothing to report on this issue.

<sup>917</sup> See <http://www.regjeringen.no/nb/dep/ad/pressemeldinger/2012/flere-prosjekter-mot-ufrivillig-deltid.html?id=696578>, accessed 26 June 2013.

## II. FIXED-TERM WORK

### 1. General information

Of the total workforce, 19.3 % are on fixed-term contracts.<sup>918</sup> Of all employed women 11.1 % are on fixed-term contracts, and 8.2 % of all employed men. There are no statistics on the impact of fixed-term work with regard to the gender pay gap.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

WEA Section 14-9 on fixed-term work states that these contracts are the exception; the general rule is that employment contracts are to be permanent. WEA Chapter 13 (implementing Directive 99/70/EC) includes the prohibition against discrimination of employees because they are on temporary contracts. Fixed-term contracts are only allowed under certain circumstances. WEA Section 14-9(1) litra a) to e) list the circumstances where temporary contracts are legal: a) when the nature of the work calls for it and this work is extraordinary compared to the work ordinarily carried out at the enterprise, b) when a person is substituting for a specific person (who is on leave), c) for educational positions/trainees as part of school programmes, d) for work organised under the social insurance system, and e) for athletes, coaches, referees and other leadership positions in organised sports.

The employer is obliged to discuss the use of temporary contracts at the enterprise with the employees' representatives at least once a year, see Section 15-9. National employees' unions may enter into collective agreements regarding the use of temporary contracts for a defined group of employees (artists, researchers or work in relation to sports), see Section 14-9(3).

An employee who has been employed for more than a year is entitled to notification in writing regarding his/her final working day, with a minimum of one month before the actual termination date. If this time limit is not respected, the contract will continue until one month after the notification letter is handed over, see Section 14-9(4). Temporary employment contracts automatically expire at the end of the agreed contract term or when the agreed work is completed, unless otherwise agreed in writing or stated in collective agreements, see Section 14-9(5). An employee who has been successively employed on various temporary contracts for more than four years must then be employed on a permanent basis, see Section 14-9 (a) and (b).

##### 2.1.2. Equal treatment

Two sets of legislation on equal treatment possibly affect fixed-term workers. There is the prohibition against indirect discrimination in the GEA and the prohibition against discrimination in the WEA. The regulations as described in I.2.1.2., GEA Section 3 and WEA Chapter 13, have the same wording on both part-time work and fixed-term work.

Apart from women not getting their contracts renewed because of pregnancy, the author is not aware of any specific problems of women relating to fixed-term contracts.

##### 2.1.3. Successive fixed-term contracts

WEA Section 14-9 exhaustively lists when it is legally allowed to offer fixed-term contracts and the related conditions, as described in 2.1.1. above. Legislation applies regardless of the size or type of employer (state/private). The Equality and Discrimination Ombud annually

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<sup>918</sup> See Statistics Norway, <https://www.ssb.no/statistikkbanken/SelectVarVal/saveselections.asp>, accessed 26 June 2013.

reports a large number of cases regarding fixed-term contracts not being renewed for reasons connected to pregnancy, maternity, or parental leave.<sup>919</sup>

#### *2.1.4. Assessment*

There is no indirect sex discrimination in national legislation. An example of a ‘good practice’ is the legislation making the social partners co-responsible with the employers for monitoring and discussions regarding the use of fixed-term contracts.

### **2.2. Collective agreements**

The legislation on fixed-term work is functioning well. The need for additional provisions in collective agreements is reduced to a minimum. This is also due to the Norwegian tradition, where the social partners are represented in the committees preparing the proposals for new legislation.

### **2.3. Case law**

Case law is in accordance with the case law of the CJEU.<sup>920</sup> The author sees no shortcomings in the application of the principle of equal treatment/the concept of indirect sex discrimination in relation to fixed-term work. It is hard to see any added value of the concept of indirect sex discrimination given the scope of national legislation, for two reasons. First, fixed-term work also applies to men (more than is true for part-time work). Second, legislation is effective. It is quite detailed and specific as regards the conditions for when fixed-term work is allowed, and the consequences for disrespecting the rules are strict, automatically making the fixed-term contract a permanent contract. However, this ‘masks’ the workplaces that may still have a problem, for example in workplaces where the gender perspective is not brought up for discussion because the rules of gender neutral fixed-term work are those which are sought after first.

### **2.4. Involvement of other parties**

The social partners play an important role in the work to ensure that temporary work remains the exception that it is meant to be according to the law. Specific and targeted analyses of the concrete needs at individual enterprises are necessary in order to evaluate the true need for temporary contracts. In addition, the cases brought before the courts are important to promote awareness regarding applicable legislation.

## **3. Statutory social security and pension rights**

There are no categories of fixed-term workers that are explicitly excluded from statutory social security schemes and/or statutory old-age pension schemes. There are no minimum requirements or thresholds to be met that disadvantage fixed-term workers. There is no case law to report. The statutory security and pension rights as regards temporary workers are in line with the EU acquis on gender equality.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

For the most part, the main difficulties linked to enforcing rights in relation to the position of part-time or fixed-term workers are not connected to the length of the procedure or the cost of

<sup>919</sup> See annual reports SALDO: <http://www.ldo.no/no/ombudet/publikasjoner/saldo/>, accessed 16 July 2013.

<sup>920</sup> See for instance Supreme Court, Rt. 2006-1158 – Ambulance personnel.

the proceedings. The true problem is that there is no clear statement or agreement with authorities and enterprise owners that the legal obligation to ensure gender equality and to avoid systems that will in practice be indirectly discriminatory against one of the sexes is not negotiable. Today, the reality is that all politicians also seem to think that the main obligation is to stick to budgets and that this justifies that entire sectors are organised mainly using part-time positions. The people who pay the price are those in female-dominated professions. The fundamental question has never been presented to a court: whether or not a system that systematically leaves female employees in certain professions to work part time violates the principle of equal treatment. This no doubt affects both the level of involuntary part-time work and so-called ‘voluntary’ part-time work. When the normal work culture is that of part-time work, few individuals will oppose this. Many healthcare workers have complained in newspaper articles (and this is supported by the disability and sick leave rates for these professions) that the hospital sector is systematically understaffed and that it is too hard to work in a full-time position. This reality forces employees to voluntarily choose to work part time. In this way, the systematic under-budgeting and the heavy work pressure are turned into a private problem of the individual employee.

Free legal aid may be offered to low-income employees.<sup>921</sup> The related income level has been criticised as being too low, so that few employees will qualify. Unions offer free legal aid to their members. In addition there is the Ombud/Tribunal system that provides free legal advice, but they cannot award any compensation.

There are no studies addressing the difficulties involved in obtaining access to legal redress for rights of part-time workers. As regards the preferential right to an increased position rather than the employer hiring a new employee, these claims must be handled by a tribunal before the case is taken to court. This tribunal is free of charge, but not many employees will take their case to court after having had their claim rejected. The main issue is that a court case is costly unless they have a union to support them in the process. In addition, there is the human factor. Individuals working part time who wish to work more hours are completely dependent on good will in order to receive extra jobs in the future. Last but not least, in professions where the entire organisation of work is fundamentally based on a pool of part-time workers (who do get to work more if they wish), it is nearly impossible for the individual employee to claim that the system itself is systematically discriminatory, limiting the individual’s ability to ensure a normal income to provide for oneself.<sup>922</sup>

Since the implementation of the Recast Directive, there has been no increase in national case law regarding class actions initiated by associations, organisations or other legal entities which have a legitimate interest in this area.

Effective compensation or reparation in a way which is dissuasive and proportionate to the damage suffered is ensured in the regular courts. The main concern is that very few cases reach the courts. Norway has an extensive low-cost complaints system (Ombud and Tribunals). To strengthen the effectiveness of gender equality legislation, there have been several suggestions to grant the Tribunal the right to award damages/compensation. This is consistently refused by the Government, and was most recently rejected in the Gender Equality Report to Parliament of 21 June 2013.

## 2. Vulnerability, multiple/intersectional discrimination

There are no specific reports on intersectional discrimination. Various social science reports describe the use of part-time work in combination with temporary work as well as the employment situation for immigrants.<sup>923</sup> The national statistics reporting on specific groups

<sup>921</sup> Law on Free Legal Aid (*Lov om fri rettskjelp*) LOV-1980-06-13-35.

<sup>922</sup> This reality where the structures at female-dominated work places are in fact indirectly discriminatory to female employees, is documented in H. Aune *Deltidsarbeid. Vern mot diskriminering på strukturelt og individuet grunnlag* Cappelen Damm Akademisk forlag 2013.

<sup>923</sup> The topic is briefly addressed in the Gender Equality Commission’s reports *NOU 2011:18 Struktur for likestilling* and *NOU 2012: Politikk for likestilling*.

leave no doubt that some groups of women are at a particular disadvantage with regard to being part-time employed and/or on fixed-term contracts. For instance:

- women from ethnic minorities; the employment rate for these women greatly varies depending on which country they have emigrated from;
- women from lower economic backgrounds; the lower the education, the higher the percentage of part-time work; and
- women with disabilities; 37.5 % work full time and 62.5 % work part time. Interestingly, these figures are in almost direct contrast with those for men with disabilities: 68.63 % work full time and 31.37 % work part time. This might be explained by the gender-stereotypical notions of what is normal for women and men.

### POLAND – Eleonora Zielińska

Indirect discrimination against employees working part time or on fixed-term contracts in Poland, has to be considered in the broader context of developments in the labour market. The quest by employers for increasing competitiveness in this market has led to actions aimed at dramatically reducing labour costs. These include not only non-standard forms of employment contracts, but also the increasingly popular trend of using civil code contracts and the practice of making group lay-offs and replacing employees with outsourcing services. For employees such changes mean less employment security, worse working conditions, and a lack of many employee benefits provided for in the labour code (hereafter LC),<sup>924</sup> including the right to enjoy union protection.<sup>925</sup> As a result, two different labour markets emerge. One is 'internal', occupied by full-time employees, enjoying stable employment and pursuing careers involving promotions and rising incomes. The other one is 'external', formed by temporary workers, living in constant uncertainty, threatened by unemployment and having poor prospects of promotion.<sup>926</sup> This phenomenon has to be regarded as universal in Poland. Nevertheless, it disproportionately affects the female-dominated so-called peripheral areas of the market, such as public services (education, health, social welfare), as well as the lower levels of the administration and commercial sectors. The Government has not taken any steps to prevent this phenomenon. Such omission can be regarded as indirect discrimination against women.

## I. PART-TIME WORK

### 1. General information

In statistical terms part-time employees are persons who, in accordance with labour contracts, regularly work on a part-time basis.<sup>927</sup> Poland is characterised by the polarisation of women's labour in the sense that relatively few women are employed on a part-time basis, whereas proportionately many women are unemployed or combine full-time employment with family

<sup>924</sup> Dziennik Ustaw R.P. 1998 Nr 113, item 717 (Journal of Laws of Republic of Poland (hereafter: Dz.U.).

<sup>925</sup> J. Kubisa, 'Kobiety w długotrwałym kryzysie. Sytuacja zawodów sfeminizowanych okiem działaczek związkowych' (Women in long-term crisis. The situation of female-dominated occupations in the eyes of union activists) in A. Czerwińska, et al. (eds.), *Kobiety na zielonej wyspie. Kryzys z perspektywy gender* (Women on the Green Island. Crisis from gender perspective). Fundacja Feminoteka, H Boell Stiftung, Warszawa 2010. [http://www.feminoteka.pl/downloads/Kryzys\\_a%20kwestiegender\\_www.pdf](http://www.feminoteka.pl/downloads/Kryzys_a%20kwestiegender_www.pdf), accessed 1 April 2013.

<sup>926</sup> K. Szafraniec, *Młodzi 2011* (Young people 2011). Warszawa 2011. Kancelaria Rady Ministrów.

<sup>927</sup> *Rocznik Statystyczny 2012*, (Statistical Yearbook of the Republic of Poland). GUS (Central Statistical Office), Warszawa 2012, p. 218-219 (hereinafter cited as Statistical Yearbook 2012). Data compiled on the basis of the Labour Force Survey (LFS), a sample survey conducted on a quarterly basis. The survey covers persons aged 15 and more, being members of households selected on a random basis. Own Calculations pps. 225 and 235 [http://www.stat.gov.pl/cps/rde/xbr/gus/PW\\_kwart\\_inf\\_aktynw\\_ekonom\\_ludnosci\\_4kw\\_2012.pdf](http://www.stat.gov.pl/cps/rde/xbr/gus/PW_kwart_inf_aktynw_ekonom_ludnosci_4kw_2012.pdf), accessed 1 April 2013.

obligations.<sup>928</sup> According to Central Statistical Office data for the year 2011, the employment rate for women in the production age was 56.3 %, compared with 63.9 % for men.<sup>929</sup> The percentage of employees working part time amounted to 7.6 % of all persons employed. This index was higher for women (9.8 %) than for men (5.5 %).<sup>930</sup> In practice, part-time employment posts are offered most frequently in customer services (e.g. cash desks, sales, e, telemarketing, call-centres, office administration or security). There are hardly any part-time employment offers directed at specialists or people with experience. The proportion of people employed part time is generally higher in female-dominated professions, however in this case it strongly depends on the nature of the work. So, in 2011 in the area of education, where women comprise 77 % of employees, the percentage of female part-time employment was 12 %. Yet in health care and social services, where 82 % of employees are female, this part-time percentage was lower by a half, amounting to only 6.2 %.<sup>931</sup>

According to data from 2012, the number of persons employed part time, who are able and would like to work longer (the so-called ‘community of non-full time employees’), amounted to 343 000, that is approximately 26 % of all part-time employees.<sup>932</sup> According to qualitative indicators for women, those rates seem to be much higher. As many as 41.5 % of women in the age group 25 to 49, employed part time, would like to work longer hours (if it would increase their salary), and 26.1 % of women decided to work part time due to problems with finding full-time employment. Only one in five women (21.4 %) declared as the reason for such employment the wish to take care of children or other close family members.<sup>933</sup> In 2012 6.9 % of all part-time employed persons worked in more than one place, the majority of whom were men (62.8 %).<sup>934</sup> There is no statistical data indicating the percentage of full-time employees who would like to reduce their working hours, nor the number of persons combining part-time positions with self-employment, nor is there any data indicating the impact of part-time work on the gender pay gap.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

The basic strategic document defining the objectives and priorities of Polish economic development is the National Development Strategy 2020. This Strategy sets out the increase in the total employment rate to 71 % by the year 2020 (it was 61.6 % in 2010). With regard to this aim, amongst the main objectives of intervention, it assigns priority to measures stimulating economic activity by creating solutions which enable the reconciliation of work and family life, such as increasing the availability of various forms of institutional care for children, the elderly and other dependent persons. The new document also clearly underscores the need for large-scale promotion and implementation of flexible and alternative forms of employment and the organisation of working hours and conditions, as well as ensuring the safety of employees within the model of so-called flexicurity. Although the Strategy has not

<sup>928</sup> A. Baranowska Rataj and M. Rynko, *Dostosowanie sposobu organizacji czasu pracy do obowiązków rodzinnych w Polsce (...)* (Adaptation of working time organisation to family obligations in Poland ...), *Zeszyty Naukowe* (Working Paper) Instytutu Statystyki i Demografii Szkoły Głównej Handlowej, 2013, No. 29, p. 7.

<sup>929</sup> Production age is 18-64 years (men) and 18-59 years (women).

<sup>930</sup> Statistical Yearbook 2012 p. 235.

<sup>931</sup> Statistical Yearbook 2012 p. 235.

<sup>932</sup> *GUS Kwartalna informacja o aktywności ekonomicznej ludności* (Quarterly information on economic activity of the population) IV kwartał (IV quarter) 2012, [http://www.stat.gov.pl/cps/rde/xbcr/gus/PW\\_kwart\\_inf\\_aktynw\\_ekonom\\_ludnosci\\_4kw\\_2012.pdf](http://www.stat.gov.pl/cps/rde/xbcr/gus/PW_kwart_inf_aktynw_ekonom_ludnosci_4kw_2012.pdf), accessed 1 April 2013.

<sup>933</sup> A. Baranowska Rataj and M. Rynko, *Dostosowanie sposobu organizacji czasu pracy do obowiązków rodzinnych w Polsce (...)* (Adaptation of working time organisation to family obligations in Poland ...), *Zeszyty Naukowe* (Working Paper) Instytutu Statystyki i Demografii Szkoły Głównej Handlowej, 2013 p. 9.

<sup>934</sup> *GUS Kwartalna informacja o aktywności ekonomicznej ludności* (Quarterly information on economic activity of the population) IV kwartał (IV quarter) 2012, [http://www.stat.gov.pl/cps/rde/xbcr/gus/PW\\_kwart\\_inf\\_aktynw\\_ekonom\\_ludnosci\\_4kw\\_2012.pdf](http://www.stat.gov.pl/cps/rde/xbcr/gus/PW_kwart_inf_aktynw_ekonom_ludnosci_4kw_2012.pdf), accessed 1 April 2013.



explicitly mentioned part-time work, the notion of ‘flexible and alternative forms of employment’ is broad enough to encompass it. The Strategy also provides for the elimination of barriers to establishing and conducting economic activity.<sup>935</sup>

### 2.1.2. *Equal treatment*

The Polish Labour Code does not contain a legal definition of part-time workers.<sup>936</sup> It neither excludes nor favours any specific group of part-time employees,<sup>937</sup> with the exception of persons entitled to parental leave (see below). The legislation regarding part-time employment is applicable to all undertakings. The prohibition against sex discrimination in employment (both direct and indirect) provided for in Article 11.3) LC, is considered to be one of the general principles of labour law. According to Article 18.3a Paragraph 1 LC, it is applicable in relation to: establishing and terminating an employment relationship; employment conditions; promotion conditions; as well as access to vocational training. In addition Article 29.2 LC specifies that concluding an employment contract with an employee providing for part-time employment must not establish their work and remuneration conditions in a manner that is less favourable in relation to employees performing the same or similar work full time, though taking into account the principle of proportionality of the remuneration for work and of other work-related benefits, in relation to the length of working time of the employee. The prohibition against discrimination is separately regulated with respect to teleworkers (Article 67.15 LC). It encompasses, amongst other matters, the prohibition of gender-based discrimination in respect of establishing telework, as well as the refusal to establish this type of work. Complementary to the above provisions is Article 94 (2b) LC, obliging the employer to act against sex discrimination in employment on the grounds of employment for a fixed or indefinite term and full or part time. It should also be mentioned that Article 94.2 LC requires employers to inform employees, in the way usually used in the enterprise, about the possibility of full-time or part-time employment and, in relation to employees working on fixed-term contracts, about vacant job positions. The commentaries to this provision giving as examples of ‘the way usually used’ indicate: the presentation of written information on a vacancy through a general announcement to all employees on the special announcement wall or in the enterprise’s internal press or through e-mails or orally in the meeting with employees.<sup>938</sup> The issue of discrimination in access to employment, with regard to any employee (including part-time employees) is governed by the provisions of the Antidiscrimination Act of 2010.<sup>939</sup>

### 2.1.3. *Organisation of working time*

Article 29.2 Paragraph 2 LC does not provide a right for the employee to decide about working part or full time. It obliges the employer, however, where possible, to accept a request in relation to changing the length of working time.<sup>940</sup> It is, however, emphasised that

<sup>935</sup> Resolution of the Council of Ministers no 157 from 25 September 2012 on adoption of the National Development Strategy 2020. Active society, competitive economy, efficient state. Warszawa 2012. Monitor Polski of 22 November 2012, item 882. [http://www.mrr.gov.pl/rozwoj\\_regionalny/Polityka\\_rozwoju/SRK\\_2020/Documents/SRK\\_2020\\_112012\\_1.pdf](http://www.mrr.gov.pl/rozwoj_regionalny/Polityka_rozwoju/SRK_2020/Documents/SRK_2020_112012_1.pdf) accessed 1 April 2013.

<sup>936</sup> Instead it uses the term ‘part-time employment’ and ‘part-time employee’. The literature states that the terms should have such meaning as given to them in the agreement included in the Directive 97/81/EC. Compare: J. Skoczyński in M. Gersdorf et al. (eds.) *Kodeks pracy. Komentarz*. (Labour Code. Commentary) LexisNexis, 6th edition, p. 413.

<sup>937</sup> Part-time employees are entitled to all employee benefits, however things like remuneration (incl. awards and bonuses), as well as supplements (e.g. length of service) and holiday entitlements, shall be set forth in proportion to the working time of the particular employee (Article. 154 Paragraph 2 LC). Similarly, in the case of debt collection from wages, the amount of free deductions are reduced in proportion to the length of working time (Article 87.1 Paragraph 2 LC).

<sup>938</sup> M. Nałęcz in W. Muszalski (ed.) *Kodeks pracy. Komentarz* (Labour Code. Commentary) 8th edition Wydawnictwo C.H. Beck, Warszawa 2011, p. 362.

<sup>939</sup> The Law of 3 December 2010 on the implementation of several EU equality directives, Dz.U. 2010 No. 254, item 1700, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20102541700> accessed 3 April 2013.

<sup>940</sup> The literature emphasises that the term ‘where possible’ does not mean a purely discretionary nature of the duties of the employer, because there is always the option of bringing a negative decision of the employer to

the principle of freedom of movement between the two forms of employment, in practice, seems to be illusory because of the difficulties in its enforcement.<sup>941</sup>

The situation of employees returning from maternity leave, who are entitled to parental (child care) leave, is differently regulated. They may file a request with the employer to reduce the working time (to not less than half of the full time), instead of taking such leave. The employer is obliged to accept the employee's request (Article 186.7 LC) and may not terminate that employment contract for a further period of 12 months (Article 186.8 Paragraph 1 LC).<sup>942</sup> An employee taking advantage of the reduction in working time, may take on paid work with the current or another employer, and may pursue other activities, including studying or training, as long as it does not interfere with the personal care of the child (Article 186.2 LC). It is worth noting that the LC also provides, for all employees, the possibility of flexible organisation of working time, which is mainly geared to adjusting working time to the type, organisation, place or hours of work, although it can also be used in the interests of the employee, for example in such areas as raising children.<sup>943</sup> The limited number of extended working hours indicates that this system would always be part-time work. Since 2006 an employee has been able to agree with the employer to perform telework (Article 67.5 LC). In all these cases of flexible organisation of working time (other than related to parental leave), however, the employer is not bound by the request of the employee.

#### 2.1.4. Assessment

Equality legislation related to part-time work is well developed in Poland. However, doubts arise with regard to regulations concerning overtime supplements for part-time employees. According to Article 151 Paragraph 5 LC, a part-time employment contract should include an indication as to the number of working hours which, if exceeded, entitles the employee to an overtime supplement. If such number of hours is not determined in the contract, the part-time employee is not entitled to any overtime supplement for additional working time.<sup>944</sup> In such case she or he is only entitled to regular remuneration for additional working hours and may not refuse to perform additional work.<sup>945</sup>

The provision relating to the possibility of reducing the working time for employees eligible for parental leave and to the prohibition on terminating such a contract deserves positive recognition. However, this group of employees is not subject to any protection against group dismissals according to the Collective Redundancies Act 2003,<sup>946</sup> despite the fact that the Act lists 10 categories of persons to whom the employer should propose other pay and working conditions, rather than dismissal.<sup>947</sup> Concerns are also reported about the use of flexible forms of working time in practice. Research shows that more than 42 % of women declare that it is impossible to change the starting and finishing hours of their work. Only

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judicial review, where the burden of proof of the lack of such possibility rests with the employer.

W. Muszalski in W. Muszalski. (ed.) *Kodeks pracy. Komentarz* (Labour Code. Commentary), 8th edition, Wydawnictwo C.H. Beck, Warszawa 2011, p. 109.

<sup>941</sup> J. Wrątny, 'Elastyczne formy zatrudnienia w perspektywie polskiego prawa pracy' (Flexible forms of employment from the perspective of Polish Labour law) in C. Sadowska-Snarska (ed.) *Elastyczne formy pracy. Szanse i zagrożenie* (Flexible forms of employment. Opportunities and challenges), Wydawnictwo Wyższej Szkoły Ekonomicznej w Białymstoku, Białystok 2008 p. 27.

<sup>942</sup> Unless the employer is declared bankrupt or enters into liquidation or there are grounds to justify the termination of the employment contract without notice through the fault of an employee (Article 186.8 Paragraph 2 LC in connection with Article 186.1 LC).

<sup>943</sup> This means that at the written request of an employee, a shortened working week system may be applied (fewer than 5 days per week), while at the same time extending the daily working time, but no more than up to 12 hours (Article 143 LC), or adopting a weekends and holidays working system (Article 144 LC).

<sup>944</sup> Supreme Court ruling (further: SC) from 9 July 2008, Ref. I PK 315/07, OSNP 2009/23-24/310.

<sup>945</sup> The restrictions with regard to overtime working hours such as consent-related restrictions to work overtime relating to pregnant woman or employees taking care of a child up to 4 years old do not apply (Article 178 Paragraphs 1 and 2 LC). Compare: M. Nałęcz in W. Muszalski (ed.) *Kodeks pracy. Komentarz* (Labour Code. Commentary), p. 686.

<sup>946</sup> Act of 13 March 2003 on special conditions for the termination of employment for reasons not attributable to employees. Dz.U. 2002 Nr 90 item. 844.

<sup>947</sup> These categories include, among others: women being pregnant or on maternity leave, as well as e.g. persons called to active military service or military training.

12.8 % of employees have any influence on their working time.<sup>948</sup> This is confirmed by research carried out by the Ministry of Labour and Social Policy, showing that Poland has suffered very badly from the effects of the implementation of flexicurity.<sup>949</sup> Therefore, there is the belief that the flexibility of employment is a privilege of the employer rather than serving for the benefit of the employees themselves.

## **2.2. Collective agreements**

No regulations in collective agreements aimed at preventing indirect discrimination against women in relation to part-time employment have been identified.

### *2.2.1. Policies*

There were no specific policies observed which aimed at preventing discrimination against persons employed part time.

### *2.2.2. Equal treatment*

If any provisions concerning equal treatment do appear in collective agreements, they usually reiterate the provisions of the Labour Code.

### *2.2.3. Organisation of working time*

Unions managed to negotiate the addition of some favourable provisions to the different anti-crisis packages e.g. benefiting parents, taking care of a child under 14 or another family member in need of personal care. In such cases the employee may request the employer to allow him to work according to an individual time schedule. The employer should take the application into account if the organisation of work within the company allows it. A refusal must be justified in writing.

### *2.2.4. Assessment*

There is no information that social partners pay particular attention to the problem of sex discrimination in relation to part-time employment.

## **2.3. Case law**

No judicial decisions have been identified which have a decisive effect on the discrimination against women working part time.

### *2.3.1. Cases/opinions of equality bodies*

The Polish Human Rights Defender as well as the Government Plenipotentiary for Equal Treatment, has not dealt with the problem of indirect discrimination against women in relation to part-time work.

### *2.3.2. Assessment*

The problem of indirect discrimination against women in relation to part-time work has been noticed in Poland but it does not, however, feature in the mainstream of public debate.

<sup>948</sup> 'Por A. Kurowska Raport Forum Obywatelskiego Rozwoju, przygotowany w ramach prac w Instytucie Polityki Społecznej Uniwersytetu Warszawskiego' (Raport of the Forum for Society Development drafted in the Institute for Social Policy of the Warsaw University). <http://bezrobocie.org.pl/wiadomosc/628153.html>, accessed 3 April 2013.

<sup>949</sup> Ministry of Labour and Social Policy, 'Flexicurity w Polsce. Diagnoza i rekomendacje. Report z badań Ministerstwo Pracy i Polityki Społecznej' (Flexicurity in Poland. Assessment and recommendations). Warszawa 2009.

### 3. Statutory social security and pension rights

#### 3.1. Exclusions

In the general statutory system of social security or pension rights, there are no thresholds or provisions which would disadvantage part-time employees. In the light of the law of 17 December 1998 on pensions from the Social Insurance Fund,<sup>950</sup> the period of employment under a part-time employment contract is calculated as a period of insurance or contributory period. The extent of employment is irrelevant for determining eligibility for retirement (one year of half-time work counts just as much as one year of full-time work). The only thing that is important for determining the size of the pension is the amount of pension contributions, which in turn depend on the remuneration.

Special pension rights of persons employed in conditions detrimental to health, which negatively affect part-time workers, are differently regulated. The legislature accepted that working in such special conditions only guarantees the right to early retirement when it is performed for at least for 15 years, 8 hours a day.<sup>951</sup> Shorter contact with harmful working conditions, which takes place in case of part-time work, does not justify earlier benefits from the public service transition state pension).

#### 3.2. Assessment

The total lack of any possibility of benefiting from the transition state pension in the case of part-time employees working in conditions detrimental to health should be assessed negatively. In particular, despite the statutory exclusion from transition state pension benefits, those employees still must pay premiums for the Transition State Pension Fund (FEP). The explanation for this from the Ministry of Labour is unconvincing, justifying it with the argument that contributions to the Transition State Pension Fund are taxes, rather than insurance premiums. In the view of insurance law experts such an opinion contradicts legal regulations basing this kind of pension on the principles typical for insurance (what indicates: the obligation to pay contribution to FEB being Fund of Central Insurance Office (ZUS), only by persons being entitled to as well as the manner in which the conditions for entitlement to the pensions are established).<sup>952</sup>

### 4. Self-employment

There are no national legal provisions and/or nation-wide collective agreements, as well as no opinions of the equality body, which address issues of equal treatment pertaining to self-employed persons who work part time.

### 5. Access to goods and supply of goods and services

Under the law, part-time workers have the same access to banking services as other workers. However, since access to bank loans depends mainly on an individual's creditworthiness, workers with a contract of indefinite duration enjoy the fullest degree of trust, whilst what is important is not so much the extent of employment (full or part time), but rather the size of income. Bearing in mind that part-time workers in Poland tend to earn less, one can assume that, in practice, they may face disadvantages with regard to loan accessibility or

<sup>950</sup> Dz.U z 2004 r., Nr 39 item. 353.

<sup>951</sup> Compare: Ordinance of Council of Ministers of 7 February 1983 r. on the matter of retirement age of employees working in the conditions especially detrimental for health, employees working in special conditions and performing work of special character, Dz. U. No 8, item. 43 with further amendments.

<sup>952</sup> See the opinion of Professor I. Jędrasik Jankowska cited in: <http://prawo.rp.pl/artykul/55644,755539-Ustawa-o-emeryturach-pomostowych-do-korekty.html>, accessed 20 April 2013.

conditions.<sup>953</sup> More frequently, however, unequal treatment occurs in the case of workers employed on a fixed-term contract. Sometimes banks require that a fixed-term contract must continue for at least a half or even another whole year. The most difficult situation arises in the case of self-employed persons engaged in private business activity. In such cases one out of three banks wants to see how the potential loan candidate has managed his or her enterprise for at least one year (even longer in the case of some banks). The problem of discrimination against people with atypical forms of employment has been noticed by the President of Poland. He addressed an inquiry to the National Financial Supervision Commission about the availability of loans to individuals employed under temporary contracts of all kinds – that is, fixed-term employment contracts, specific task contracts or job order contracts, as well as self-employment.<sup>954</sup>

## 6. Are there any gaps in national law?

### 6.1. Gaps in the area of employment

#### 6.1.1. Recruitment process

The fact that the Labour Code does not introduce any measures to assist part-time employees to access employment in managerial positions may be perceived as a gap. It also does not specify any legal consequences for the failure by an employer to meet her/his obligations deriving from Article 94.2 LC. As a consequence, an employee who, because of missing information, was not able to file a request for modification of her/his employment contract (from part time to full time), does not have a legal claim for the conclusion of a modification agreement, if the employer has hired somebody from outside for the vacancy.

#### 6.1.2. Employment conditions

The lack of a clear obligation on an employer to take into account employees' requests to change working hours from part time to full time. The Labour Code also does not provide any facilities for access to training by part-time workers. In addition, the way of resolving the matter of overtime hours in the case of workers employed part-time is highly controversial. The lack of a clear regulation in this respect is often taken advantage of by employers, who extend working hours beyond those stipulated in the contract. Out of fear of losing their jobs, employees feel forced to accept such a situation. High-profile cases of failure by supermarket operators to pay bonuses for overtime work provide evidence that discrimination affects women to a greater extent.<sup>955</sup>

#### 6.1.3. Termination of the employment contract

The lack of protection from collective redundancies for employees entitled to parental leave who perform part-time work may be considered as a gap in the legislation.

### 6.2. Gaps in other areas

There is a gap with regard to the regulation of unemployment benefits. In light of Article 71 (1)2(a), of the Act of 20 April 2004 on employment promotion and labour market institutions,<sup>956</sup> one of conditions for assigning unemployment benefits is that the candidate has been employed, within the 18 months preceding the day of registration, for at least 365

<sup>953</sup> Some banks refuse the loan if the earnings are not high enough. Others calculate smaller instalments, instead setting a long financing period. As a result the payments are higher, because a larger percentage is being charged.

<sup>954</sup> [http://wyborcza.biz/biznes/1.101562.12748704.Prezydent\\_apeluje\\_do\\_KNF\\_o\\_kredyty\\_dla\\_ludzi\\_na\\_czasowkach.html#ixzz2QGMLafTz](http://wyborcza.biz/biznes/1.101562.12748704.Prezydent_apeluje_do_KNF_o_kredyty_dla_ludzi_na_czasowkach.html#ixzz2QGMLafTz), accessed 6 April 2013.

<sup>955</sup> *Sytuacja pracowniczek w super i hipermarketach. Raport z monitoring* (Situation of female employees working in super- and hyper-markets). Report from monitoring NGO Karat [http://www.karat.org/wp-content/uploads/2008/01/kobiety\\_o\\_swojej\\_pracy\\_w\\_supermarketach.pdf](http://www.karat.org/wp-content/uploads/2008/01/kobiety_o_swojej_pracy_w_supermarketach.pdf), accessed 5 April 2013.

<sup>956</sup> Unified Text Dz. U. 2008 r. Nr 69 item 415.

days and receives a remuneration of at least the minimum wage (from which there is an obligation to pay contributions to the Labour Fund). Initially, a literal interpretation was given to this provision, allowing the assigning of such benefits only to persons who have previously been employed full time, and denying them to unemployed former part-time employees.<sup>957</sup> Such an interpretation, however, was rejected by the administrative courts which found that it led to unequal treatment between full-time and part-time workers, which would constitute a violation of the constitutional equality clause. Eventually, the courts decided that, in the case of unemployed former part-time employees, the amount of remuneration would be comparable to the minimum wage in proportion to the number of hours worked by that employee during a particular month.<sup>958</sup> As a result, the mere fact of part-time employment no longer constitutes an obstacle in obtaining unemployment benefits. The provision, however, remains unchanged.

## II. FIXED-TERM WORK

### 1. General information

According to Eurostat data, with 27 % of all employees working under fixed-term contracts, Poland leads the EU in this respect.<sup>959</sup> There are a slightly greater number of men than women employed under such contracts.<sup>960</sup> There are no statistics to show the impact of fixed-term work on the gender pay gap. With regard to seasonal workers, the literature emphasises that, in order to minimise the risk of discrimination in pay, different remuneration systems for temporary and permanent employees should not be permitted.<sup>961</sup>

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

It is unanimously declared by the literature and has been confirmed by case law that Polish labour law accepts employment under a contract of indefinite duration as the norm, and fixed-term contracts constitute exceptions from this norm. Hence, if the duration of the agreement was not defined in the contract, it has to be assumed that it has been concluded for an indefinite period.<sup>962</sup> In light of Article 25.1 LC, the general fixed-term contract constitutes one of three types of fixed-term agreements, the other two being replacement contracts and occasional or seasonal work contracts. The LC generally does not provide for any limitation as to the duration of such contracts, with the exception of contracts for a trial period which may not exceed 3 months (Article 25 (2) LC) and seasonal work contracts which may not exceed 10 months. So, fixed-term contracts may last for a few days or months, or for many years. Nevertheless, courts have determined the practice of setting terms of such contracts for two, five or nine years to be a circumvention of labour law, if their duration was not justified

<sup>957</sup> *'Umowa na 3/4 etatu szkodzi, gdy straci się pracę'* (Contract for 3/4th of a full time may cause more harm, if one loses his job), <http://lodz.naszemiasto.pl/artykul/1117487,umowa-na-3-4-etatu-szkodzi-gdy-straci-sie-prace.id.t.html>, accessed 10 April 2013.

<sup>958</sup> So e.g. rulings of administrative courts in the cases: II S.A./Op280/2009, II S.A./Wa 573/2009, II S.A./Bd 537/2009.

<sup>959</sup> <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00073>, accessed 15 April 2013.

<sup>960</sup> [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-32-11-798/EN/KS-32-11-798-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-32-11-798/EN/KS-32-11-798-EN.PDF), accessed 28 March 2013.

<sup>961</sup> K. Walczak, *'Zakaz dyskryminacji w stosunku do osób wykonujących pracę na podstawie atypowych form zatrudnienia'* (The prohibition of discrimination in relation to persons working on the basis of atypical forms of employment) *Monitor Prawa Pracy* 2012 Nr 3, s. 120.

<sup>962</sup> W. Muszalski (ed.) *Kodeks pracy. Komentarz* (Labour Code. Commentary) 8th edition Wydawnictwo C.H. Beck, Warszawa 2011. Ruling of the SC of 17 May 1995, ref. I PRN 11.95, OSNAPiUS 1995, Nr 20 item 250.



by the task for which the employee has been hired. Eventually, such contracts are converted to indefinite-term contracts.<sup>963</sup>

### 2.1.2. *Equal treatment*

The prohibition on discrimination on the grounds of sex in part-time employment, provided for in Article 11.3 and Article 18.3a LC, also applies to fixed-term employment. The equality provisions of the Antidiscrimination Act of 2010 apply to all other forms of atypical (non-employee type) employment, like mentioned already civil-code contracts and self-employment. This legislation is applicable to all undertakings. As a rule, persons employed on a fixed-term contract are entitled to similar rights as persons employed under a contract of indefinite duration. However, in the case of pregnancy or motherhood those rights suffer limitations. For example, the special protection of employment during pregnancy and while on maternity leave, does not apply to a female employee on a trial period not exceeding one month (Article 177 Paragraph 2 LC). According to Paragraph 3 of this provision, an employment contract concluded for a definite period of time is extended until the date of birth,<sup>964</sup> only if the contract was set to terminate after the third month of pregnancy. This extension does not apply to women employed as replacements (Article 177 Paragraph 3.1 LC).<sup>965</sup>

It is worth noting that, in exceptional situations, if a contract is concluded for a period longer than six months, the LC allows early termination by each of the contracting parties (with two weeks' notice). In light of Article 33 LC, this possibility only applies if it is explicitly provided for in the contract.

### 2.1.3. *Successive fixed-term contracts*

Since Poland's accession to the EU, all employers, regardless of their size and type, are subject to the provisions of Article 25.1 LC, stipulating that a subsequent employment contract for a definite period of time has the same legal effect as the conclusion of an employment contract for an indefinite period of time. This provision only applies if the parties had previously concluded two employment contracts in succession for a definite period of time, meaning that the interval between the termination of the preceding contract and the establishment of the subsequent employment contract cannot exceed one month. This provision does not apply to contracts concluded for replacements or for the purpose of completing occasional or seasonal work, or tasks performed periodically (Article 25.1(3), nor does it apply to contracts for a trial period or for the time of completion of a specified task. Article 25.1 also prohibits the practice of extending the duration of employment contracts by way of special annexes, in order to circumvent this provision.<sup>966</sup> A Supreme Court ruling extended the application of this provision to the situation where the parties *de facto* concluded an employment contract, but decided to give the agreement a different name (e.g. 'order contract').<sup>967</sup> It should be noted that the application of this provision has been suspended for

<sup>963</sup> Ruling of the SC of 25 October 2007 r., Ref. II PK 49/07 OSNP 2008, Nr 21-22, item 317; Ruling of the SC of 7 September 2005 r., Ref. II PK 294/04, OSNP 2006/13-14/207).

<sup>964</sup> As a result of this extension, fixed-term labour contracts expire at the moment of childbirth, meaning that a woman is entitled to maternity allowance, but after the expiry of the contract can no longer take maternity leave or parental leave.

<sup>965</sup> Meaning that those women have no right to maternity leave even when the contract expires one day before giving birth. K. Rączka (w:) M. Grsdorf, K. Rączka, J. Skoczyński, *Kodeks pracy. Komentarz* (Labour Law. Commentary), p. 606.

<sup>966</sup> W. Muszalski (ed.) *Kodeks pracy. Komentarz* (Labour Code. Commentary) 8 th edition Wydawnictwo C.H. Beck, Warszawa 2011, p. 96.

<sup>967</sup> Ruling of the SC of 4 December 1997, I PKN 394 /97, OSNAPiUS 1998, Nr 20, item 597.



certain enterprises.<sup>968</sup> The draft of the new Anti-crisis Act is currently under preparation and has been subject to discussion by the Trilateral Commission.<sup>969</sup>

#### 2.1.4. Assessment

The provisions regarding fixed-term contracts have weaknesses in terms of inadequate protection for pregnant women. If, for example, a fixed-term contract were to come to an end in the case of a woman who is in the early pregnancy (less than 12 weeks), it would terminate on the date specified therein, i.e. approximately six months before delivery. In such a case the woman would neither acquire the right to maternity leave, nor to parental leave, hence at the time of delivery she would have been unemployed for longer than six months. She also would not acquire the right to maternity benefits, because social care provisions do not provide for such a possibility after the health insurance has terminated. The exclusion of the possibility of extending the duration of a fixed-term contract (until the moment of birth) in the case of a female employee with whom a contract for replacement has been concluded, should also be looked at critically. Usually replacement is associated with the maternity leave of another employee who is employed for an indefinite term; hence the leave may endure for months or even years. In such a case depriving the replacing employee of the right to extend the contract until the birth automatically results in depriving her of the right to maternity benefits, and this can be seen as discrimination against this group of employees.

An amendment is necessary with regard to Article 50 LC regulating the consequences of illegal dissolution of fixed-term labour contracts, in particular regarding Paragraph 5 of this provision which does not mention employee fathers taking a part of the ‘maternity leave’ instead of women. This causes doubt as to whether such employees would acquire, in the case of wrongful termination of employment, a claim for reinstatement to work to which pregnant women or women on maternity leave are entitled in such a situation, or whether such employee fathers would only be entitled to claim for compensation in the form of damages just like all other workers.

As a rule an employment contract for a fixed period should be incapable of being terminated during the fixed term, unless the parties decide otherwise in the contract (according to Article 33 LC). The ruling of the Supreme Court, therefore, which inclined to allow the possibility of termination of such a contract by both the employer and the employee, despite the lack of such contractual provision, should be regarded as a negative development.<sup>970</sup>

## 2.2. Collective agreements

No provisions of collective agreements dedicated to eliminating sex discrimination in respect of fixed-term employment could be identified.

<sup>968</sup> Until 1 January 2012, according to the Act of 1 July 2009 on mitigating the effects of the economic crisis for employees and employers Dz.U. Nr 125, item 1035. This Act allowed, on the one hand, the conclusion an almost unlimited number of subsequent fixed-term contracts, without the possibility of automatic transformation of the third such contract in a row into an contract for an indefinite period of time. On the other hand, however, it limited the maximum period of such employment to 24 months.

<sup>969</sup> <http://www.mpips.gov.pl/aktualnosci-wszystkie/art.5527.6071.posiedzenie-trojstronnej-komisji-poswiecone-ustawie-antykrzysowej.html>, accessed 29 March 2013.

<sup>970</sup> The summary of the case law and opinions of legal experts on this issue contains the Resolution of the Supreme Court of 17 November 2011 (Ref. II PZP 6/11) [http://www.sn.pl/sprawy/siteassets/lists/zagadnienia\\_prawne/editform/iii-pzp-0006\\_11.pdf](http://www.sn.pl/sprawy/siteassets/lists/zagadnienia_prawne/editform/iii-pzp-0006_11.pdf), accessed 27 May 2013. The controversy was connected with the problem whether such illegal termination is valid and the employee is entitled only to compensation (equal to a maximum of three months’ salary) (predominant opinion in case law of Supreme Court and legal literature) or whether it is invalid and should result in reinstatement of the employee to work and compensation for the time s/he was not allowed to work. Finally in the resolution mentioned above, the Supreme Court accepted the ‘compromise’ option that in such a case the provision of Article 59 together with Article 56 LC should be applied, which means that in such situations the employee is entitled exclusively to compensation if the term of the contract has already elapsed or return to work would be not recommended because of the short remaining time period.

### 2.3. Case law

In the judgment of 2009 the Supreme Court in considering an annulment of the verdict of court of appeal, revealed discrimination based on sex against a disabled employee employed on a fixed-term contract as a replacement.<sup>971</sup> The employer dismissed her after he found out that she had become pregnant, justifying his decision with the argument that he needed replacement employees to be flexible and disponible in order to properly perform their tasks. The courts of both instance found the dismissal to be wrongful, rightly arguing that replacement employees who are pregnant also have the right to protection of the employment relationship provided for pregnant women in the LC, and granted her compensation. The lower courts, however, did not consider the dismissal to be discrimination based on sex, thereby denying her additional compensation in this regard. The Supreme Court did not agree with the decision that there had been no sex discrimination and sent the case back to the court of first instance.<sup>972</sup>

Another ruling, issued on 18 April 2012 tackled the issue of wage discrimination in the case of a woman employed for a trial period.<sup>973</sup> In that case, the issue of remuneration was regulated by a collective agreement, which entitled the employer to reduce the basic salary (by one or two scale points). In the opinion of the court the provisions of the collective agreement as such were not discriminatory in character in respect to wages, especially given the fact that no grounds for reductions had been provided for in this agreement which would guide the employer when applying the provision (hence none could be assessed as discriminatory). The court found, however, that discriminatory practice (direct or indirect) in respect to wages might be observed in the phase of the application of the collective agreement by the employer. Because of this the Supreme Court, decided to send the case back for reconsideration, ordering the court of second instance to undertake an examination to see if the employer took advantage of his contractual right to reduce the basic salary only (or mostly) with regard to trial period employees. If this were found to be the case, it could constitute wage discrimination against this group of employees.

### 2.4. Involvement of other parties

Both trade unions and NGOs, whose statutory purpose is to prevent discrimination in employment, repeatedly opted against the use by employers of fixed-term employment in cases when a regular employment contract for indefinite period should be concluded. Their actions among others contributed to the introduction of the provision described above, restricting the use of successive fixed-term contracts.

## 3. Statutory social security and pension rights

At present, no provisions of statutory social security and pension law could be identified which would discriminate against women in respect to fixed-term employment.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

No specific problems regarding the enforcement of rights in relation to the position of part-time or fixed-term employees could be identified. The law does not provide for specific forms of assistance to persons seeking to enforce their rights to equal treatment, including those in

<sup>971</sup> Ref. II PK 142/09.

<sup>972</sup> [http://sejmometr.pl/sn\\_orzeczenia/5905](http://sejmometr.pl/sn_orzeczenia/5905), accessed 27 May 2013. The Supreme Court did not refer to any EU case law.

<sup>973</sup> Ref. II PK 197/11.

relation to part-time and fixed-term employment. The Law on class actions basically limits the application of its provisions in the field of labour law to cases of employers' tortious liability, that is to intentionally performed actions which cause damage to the employee, with the exception of claims for protection of personal goods.<sup>974</sup> In light of the Law, class actions can only be initiated by individuals, not by associations, organisations or other legal entities having a legitimate interest in this area. A monitoring of such actions carried out, after the first year of application of the Law, by the Helsinki Foundation showed that there were no claims concerning the violation of the principle of equal treatment.<sup>975</sup> Another case study has shown that, during the last three years, in none of the pending class action cases has there been a substantive court hearing.<sup>976</sup> The Supreme Court has repeatedly pointed out that in cases of sex discrimination the compensation or reparation should be effective in a way which is dissuasive and proportionate to the damage suffered.<sup>977</sup> In Poland there is no system of low-cost complaint systems.

## 2. Vulnerability, multiple/intersectional discrimination

There are no studies which would indicate that women employed part time or on fixed-term contracts suffer multiple discrimination. In studies on discrimination against foreigners in Poland no examples of discrimination in connection with part-time or fixed-term contracts are given.<sup>978</sup> In other studies on foreigners, a situation test was applied examining the problem of discrimination in accepting job applications. These studies, however, did not include the gender variable, nor did they distinguish part-time employment.<sup>979</sup>

### PORTUGAL – Maria do Rosário Palma Ramalho

## I. PART-TIME WORK

### 1. General information

Part-time work is not common in Portugal, because both men and women tend to work on a full-time basis, even when they have small children or other family dependents.

The situation of part-time work in Portugal is the following:<sup>980</sup>

- The percentage of employees working part time in 2011 was 13.3 % (source Eurostat), which corresponds to 2 562 people (source INE);

<sup>974</sup> Act of 17 December 2009 r. Dz. U. 2010 Nr 7, item 44.

<sup>975</sup> <http://programy.hfhr.pl/monitoringprocesulegislacyjny/files/2013/01/Marek-Nieduzak-Postepowanie-grupowe-po-pierwszym-roku-funkcjonowania-RAPORT1.pdf>, accessed 15 April 2013.

<sup>976</sup> This leads to the conclusion that the whole idea of class actions suits in Poland was a failure. <http://programy.hfhr.pl/monitoringprocesulegislacyjny/rzeczpospolita-kleska-pozwow-grupowych-czas-na-wnioski/>, accessed 15 April 2013.

<sup>977</sup> *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych* (Anti-discrimination law in the practice of Polish courts). *Raport z monitoringu*, M. Wiczorek i K. Bogatko (ed.), Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warszawa 2013.

<sup>978</sup> W. Klaus, K. Wencel. *Sytuacja cudzoziemców w Polsce. Diagnoza sytuacji. Stowarzyszenie Interwencji Kryzysowej* (Situation of foreigners in Poland. A diagnosis of the situation). Society for Crisis Intervention, 'Ekspertryzy' 7/2008, <http://interwencjaprawna.pl/docs/ARE-708-dyskryminacja%20cudzoziemcow.pdf> accessed 15 April 2013.

<sup>979</sup> Por. K. Wysińska, 'Nguyen, Serhij, czy Piotr? Pilotażowe badanie audytowe dyskryminacji cudzoziemców w rekrutacji' (Nguyen, Serhij, or Peter? an audit based pilot study on discrimination against foreigners in recruitment) W. Klaus (ed.), *Cudzoziemcy czy intruzi* (Foreigners or intruders), W. Klaus ed. Institute for Public Affairs, Society for Legal Intervention, Warszawa 2010, <http://isp.org.pl/uploads/pdf/1454281981.pdf>, accessed 15 April 2013.

<sup>980</sup> Data available on Eurostat (<http://epp.eurostat.ec.europa.eu>), accessed on 10 April 2013, and at the national level, data available from the Instituto Nacional de Estatística (INE) ([www.ine.pt](http://www.ine.pt)), accessed on 10 April 2013. Due to the difficulties in accessing and dealing with the data collected at the national level (INE), the period of reference is not always the same. We also emphasise that some data are outdated, since the unemployment rate has greatly increased in the last year, and this recent evolution is not yet reflected in the available data.

- The general percentage of female employment is 61.1 %, while the male percentage is 70.1 % (source INE, related to 2010); according to Eurostat, in 2011 these percentages decreased to 68.1 % (for men) and to 60.4 % (for women); in both years the percentages are calculated on the basis of full-time jobs; and
- The number of women and men working part time in 2012 was the following: for men 1 022, while over 1.8 million work full time; for women, 1 537 people, while approximately 1.8 million work full time (source INE).

In our research, we were not able to confirm the definition of part-time work used in national statistics and had no access to information about the areas where part-time work is more common, aside from the general information that it is more common in the area of services and is seldom used in industry. Also, we found no statistics either in relation to the percentage of involuntary part-time work, or on the percentage of full-time workers who would like to reduce their working time. Finally, there are no available statistics in Portugal that specifically connect part-time work to the gender pay gap.

On the contrary, statistics concerning ‘secondary activity’ show that people combine jobs: a secondary activity was performed by 46 347 people in 2012 (source INE), from which 24 436 were men and 2 191 were women; corresponding to an average of 5 % of the total number employed people (source Eurostat). However, we have no further details on this secondary activity, namely in order to see if it corresponds to a second job or to self-employment.

As stated above and the statistics show, part-time work is relatively scarce in Portugal, especially when compared to the situation in other countries. On the contrary, a professional occupation on a full-time basis for both sexes has strong roots in our country. Sociological and economic reasons are usually indicated to explain this situation.

As for men, work on a full-time basis is in accordance with their traditional role as breadwinners. As for women, despite the fact that they have the main role in care within the family, the need to replace men as the main breadwinners during long absences due to wartime service (this was up to the 1960s when Portugal was at war in ancient colonies), or in immigration (also a very spread-out phenomenon between the 1950s and 1970s) often led them to enter professional life on a full-time basis. And, later on, the development of a good network of care facilities for young children (both at the private and public level) supported their choice for full-time jobs.

At another level, the low development of part-time work in Portugal is attached to the traditional organisation of Portuguese firms (that tends to be rigid) and to the preference of employers for full-time positions. Finally, the low level of salaries in Portugal also contributes to the option of the family for two full-time jobs instead of only one full-time and one part-time job.

Under these circumstances, the most common situation in a family today is that both the mother and the father work on a full-time basis, either for financial reasons or because they choose to do so. More rarely and depending on the family income, only one of the couple works (and when this happens, it is usually the man) while the other takes care of the children or other dependents.

When it is used, part-time work is viewed as specifically being related to women in relation to family responsibilities because the law specifically grants the right to access this form of work on the grounds of maternity and paternity. And although this right is granted to both parents, in practice mothers tend to take advantage of it more frequently, thus contributing to the common association of this form of work with women, even though the statistics do not show such a huge difference between both sexes in this area as in other countries.

There is no evidence that discrimination on the grounds of part-time work vary according to the type of employer (State/private) and regarding the size of the employer or the sector.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National Policies

As for national policies, part-time work is not really an issue in Portugal, due to the fact that it is scarcely used. Nevertheless, when addressed, part-time work is viewed as a tool to promote the reconciliation of family and professional life, and in that sense, is related more to maternity and paternity rights than to other purposes, like a tool for creating new jobs, for example.

#### 2.1.2. Equal treatment

As to the legislation, part-time work is governed by the Labour Code (LC, approved by Law No. 7/2009, of 11 February 2009) in two situations:

- *Common part-time work agreement*: in this situation part-time work relies on an agreement concluded between the employer and employee, either from the beginning of the labour contract or in the course of the labour contract by transforming a full-time position into a part-time position. This situation is governed by Articles 150 and ff. of the LC, that are largely based on Dir. 97/81/EC, of 15 December 1997 and can be instated indefinitely or for as long as the parties wish to do so.
- *Part-time work arrangements to exercise maternity and paternity rights or care responsibilities*: in this situation, governed by Article 55 of the LC, workers in full-time positions who wish to exercise maternity and paternity rights in relation to young children, and workers with care responsibilities towards children under 12 years old, or, regardless of their age, towards chronically ill or disabled children have the right to change from full-time work to part-time work on those grounds. This arrangement can be in place for a period that goes up to a maximum period of 2, 3 or 4 years, depending upon the situation (Article 55 Nos. 4 and 6).

Also, parental leave (granted after maternity leave) can be taken on the basis of a part-time arrangement for a period of 12 months, as an alternative to the full suspension of the labour contract for 3 months (Article 51 No. 1 b) of the LC).

The difference between these two cases and the previous situation is that the part-time arrangement does not depend upon the agreement of the employer, since he cannot oppose the right of the worker to have access to part-time work, unless under very strict conditions.

In this sense, part-time work is promoted as an instrument to facilitate the reconciliation of family and professional life in the Portuguese legislation, but only in relation to maternity and paternity rights. On the contrary, in relation to other situations (like the need to take care of other dependents or in the case of older workers) there are no specific rules, aside from a recommendation of the LC directed towards collective agreements, which are intended to promote the fixation, at that level, of preference criteria in the access to part-time work that favour people with care responsibilities, a reduced labour capacity, disabled or chronically-ill workers and student workers.<sup>981</sup>

We are not aware of any discussions surrounding part-time work as a symptom of gender stereotypes, maybe due to the fact that part-time work is not common in Portugal.

The legal provisions regarding part-time work rely mostly on Articles 150 and ff. of the LC. These articles are also applicable to part-time work on the grounds of maternity and paternity aside the specific provisions of Article 55 and 51 No. 1b) of the LC.

As to the definition of part-time, it depends upon the following situations:

- In general, part-time work is defined as the weekly working-time arrangement corresponding to less hours than the full-time occupation of a worker in the same position (in this sense, if a full-time position corresponds to 40 hours work per week, an

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<sup>981</sup> Article 152 No. 1 of the Labour Code.

obligation to perform only 39 hours is qualified as part-time work) – Article 150 No. 1 of the LC.

- On the contrary, part-time work on the grounds of maternity and paternity rights corresponds to half of the weekly working time on a full-time basis in the same position – Article 55 No. 3 of the LC. Other kinds of arrangements must rely on an agreement between the employer and the employee.

The right to have access to part-time work on the grounds of maternity and paternity is granted regardless of the size of the business.

Nevertheless, the employer can oppose this right under strict conditions (also applicable regardless of the size of the company and, except in the case of parental leave, the employer cannot refuse under any circumstances), by proving that the presence of the worker on a full-time basis is absolutely essential to the business and that the worker is irreplaceable (Article 57 No. 2). In this case, the employer is bound to communicate the refusal to the Equality Agency (*CITE – Comissão para a Igualdade no Trabalho e no Emprego*) for an opinion, and if the opinion of the Agency is negative, the right of the worker must be contested in court (Article 57 No. 4 to 7 of the LC). In practice, refusing the worker's request to work part time is difficult.

The right to equal treatment between full-time employees and part-time employees is established in Article 154 of the LC and includes the areas of pay, overtime supplements,<sup>982</sup> training facilities, promotion, workers' representatives and dismissal. In the area of pay and other supplements, the proportionality principle is applicable (Article 154 of the LC).

Aside from part-time work other flexible time arrangements are possible under national law in situations related to maternity and paternity:

- The right to reduce working time for the purpose of feeding a baby until the child reaches the age of one, or, regardless of age, when breastfeeding (Article 47 of the LC);
- The right to reduce working time by 5 hours per week, granted to the working parent of a disabled or chronically ill child under 1 year old (Article 54); and
- The right to adjust flexible time-limits in a more flexible way, granted to the parent of a child under 12 years old, or, regardless of age, to the parent of a disabled chronically ill child (Article 56 of the LC); unlike in the previous situation, the employer can object to this right under the same terms as he can object to the transition from full-time work to part-time work (Article 57 of the LC).

### 2.1.3. Organisation of working time

At another level, it is worth mentioning that the modern tendencies to adopt very flexible time arrangements, according to employers' and businesses' needs may be a practical obstacle to part-time and other family-friendly working-time arrangements.

Under the Portuguese LC several schemes destined to increase flexibility in working time are possible, like flexible time arrangements instated by collective agreements or agreed between the employer and individual workers,<sup>983</sup> but, under some circumstances, these schemes can be extended to workers who are not members of the trade union that signed the collective agreement, and to workers who have not signed the individual agreement.<sup>984</sup> Under these collectively decided working-time arrangements, that can last for a long time, the working time may vary over many weeks, the worker being asked to work for many hours during one week and very few hours in the weeks to come, according to the employer's needs.

In this context, despite being a powerful instrument in making the labour force more flexible and in increasing productivity, these schemes can make the reconciliation of professional life and family life very difficult in practice. Also, even though individual part-time arrangements already in place are preferable to these collective arrangements, in practice

<sup>982</sup> Every hour of work above the normal working time of a part-time worker is qualified, under Portuguese legislation, as overtime, and is paid with the corresponding supplement.

<sup>983</sup> '*Adaptabilidade por convenção colectiva*' and '*adaptabilidade individual*', and '*banco de horas por convenção colectiva*' and '*banco de horas individual*' (Articles 204, 205, 208 and 208-A of the LC).

<sup>984</sup> '*Adaptabilidade grupal*' and '*banco de horas grupal*' (Articles 206 and 208-B of the LC).

the existence of these collective arrangements will not give much room for individual and necessarily different arrangements in the same environment, whatever their grounds may be.

#### 2.1.4. *Assessment*

As a global assessment, four remarks are in order.

First, it must be recognised that the Portuguese legal system is quite protective in relation to part-time work and to other working-time arrangements on the grounds of maternity and paternity, given the fact that several statutory rights are granted to employees to make it possible to exercise these rights. And in this respect the law can be considered to be gender-sensitive in addressing gender stereotypes as an underlying matter because all the arrangements are granted to both working parents, who can choose who and how to take advantage of them. Also, as stated above, the legal protection is strong in the sense that it is difficult for the employer to refuse the exercise of those rights, and if this happens, he can be challenged in court.

Secondly, it should be pointed out that the law does not demonstrate a similar concern regarding either other care-related situations (for instance, the need to take care of elderly dependents) or in relation to specific categories of workers (e.g., older, disabled or chronically ill workers) where part-time work would also be beneficial. In fact, in these cases, part-time work only relies on an agreement between both parties.

Thirdly, it should be noted that despite the rights granted in this area, the low dissemination of part-time work in Portugal gives reason for some doubts regarding the practical implementation of these rights.

Finally, to a certain extent in this area the Portuguese legal system (like other systems and also like EC law) shows a structural contradiction, because, on the one hand, it puts in place rights and measures related to working time that are intended to promote the reconciliation of family and working life, while, on the other, it allows and encourages working-time arrangements that are opposed to that reconciliation.

## 2.2. *Collective agreements*

### 2.2.1. *Policies*

Before our analysis of this topic, it has to be said that it is impossible to obtain a full picture of collective agreements because there are hundreds of agreements at various levels. Under these circumstances, our remarks must be considered as a personal opinion, based on a picking-up analysis of some nationwide instruments concerning different professional areas.<sup>985</sup>

Collective agreements could have addressed the issue of part-time work, since the statutory regulation of part-time work is relatively recent in Portugal<sup>986</sup> and before that, the law only established that part-time work was allowed and could be addressed by collective agreements.<sup>987</sup> However, there is no tradition in that sense: even today collective agreements seldom refer to part-time work in general, or mention it only in a general clause to allow it, under the same conditions as the law or by indicating specific admission conditions,<sup>988</sup> or in

<sup>985</sup> For the purpose of this report, we have checked nationwide collective agreements in the following areas: construction, industry (in the automobile, shoe and leather products and the chemical sectors), transport, the financial sector, commerce and services, education, public administration, and in the area of medical services and university professors.

<sup>986</sup> Law No. 103/99 of 26 July 1999. The content of this Law was subsequently integrated in the first Labour Code (approved in 2003) and later on in the present LC.

<sup>987</sup> Article 43 of Decree-Law No. 409/71, of 27 September, which was in force until the approval of the first LC, in 2003.

<sup>988</sup> In this sense, for instance the collective agreement in the area of financial services (*‘ACT do sector bancário’*, published in the official bulletin BTE, No. 4, of 29/01/2005) qualifies as part-time work the work that corresponds to 90 % or less of full-time work in the same post (Clause 46 No. 3).



clauses related to specific issues, namely to remuneration or to limitations on overtime, to emphasise the proportionality principle.<sup>989</sup>

In any case we found no evidence that the social partners or collective agreements are opposed to part-time work.

In relation to part-time and other working-time arrangements intended to facilitate the reconciliation of working and family life, collective agreements tend to recognise the rights already granted by the law (as stated above) and not to go beyond this, but the majority of agreements do not deal with the subject or simply refer to the legal provision.<sup>990</sup>

On the contrary, flexible working-time arrangements related to the business's needs are very frequently included in collective agreements. As we said above, these arrangements are counter-productive for the reconciliation of family and working life.

### 2.2.2. *Equal treatment*

As a global assessment, we can say that the main weaknesses of national collective agreements with respect to part-time work as a tool to promote the reconciliation of family and working life relies on the lack of awareness of collective agreements towards this role of part-time work.

This lack of awareness explains the tendency to reproduce the legal provisions in this area, rather than to go beyond them, or simply the tendency to ignore the subject. Anyway, in the few cases where we found some references to the topic in collective agreements, we found no evidence of forms of indirect sex discrimination in those provisions.

## 2.3. *Case law*

Given the scarce use of part-time work in Portugal, there is no significant case law on the subject, let alone in relation to the principle of equality.

As to equality bodies, as stated above the Commission for Equality at Work (CITE) has to issue an opinion whenever the worker asks to be transferred from a full-time position to a part-time position on the grounds of maternity and paternity but the employer refuses the request on the basis of entrepreneurial reasons.

These opinions of the CITE are binding in the sense that if the CITE does not agree with the employer's justification, the question has to be taken before the court. Since the burden of proof lies on the employer in these situations, the cases where the opinion of the CITE has gone against the employer are related to situations where the employer was not able to prove the absolute need for the worker to remain working on a full-time basis. The shift of the burden of proof in these situations proves to be very important for the eventual decision.

<sup>989</sup> In this sense, several collective agreements reaffirm the proportionality principle towards part-time work, in relation to remuneration – for instance, the collective agreement in the area of air transportation (*'AE da TAP'*, published in the official bulletin BTE, No. 19, of 22/05/2007, Clause 66 No. 3), the collective agreement in the area of construction (*'CCT da área da construção civil e obras públicas'*, published in the official bulletin BTE, No. 12, of 29/3/2009, Clause 41 No. 5), the collective agreement in the area of financial services (*'ACT do sector bancário'*, Clauses 101, 104, 105 No. 6), or in relation to limitations on overtime – the collective agreement in the area of construction (*'CCT da área da construção civil e obras públicas'*, Clause 12 No. 4), the collective agreement in the area of commerce and services (*'CCT da área da distribuição, comércio, escritório e serviços'*, published in the official bulletin BTE, No. 22, of 15/06/2008, Clause 12 No. 3), the collective agreement for the automobile industry (*'CCT do sector automóvel'*, published in the official bulletin BTE, No. 37, of 8/10/2010, Clause 57 No. 1 c)).

<sup>990</sup> In this area, some exceptions are worth mentioning. The collective agreement in the area of financial services (*'ACT do sector bancário'*) recognises the right to have access to part-time work for workers with care responsibilities towards children under 12 years of age and, apart from these situations, in other cases, depending upon the employer's agreement (Clause 41); the collective agreement in the area of the shoe and leather industry (*'CCT da área da indústria do calçado e artigos de pele'*, published in the official bulletin BTE of 16 April 2010) grants the right to work part time for minors who still attend school (Clause 24 No.2), and the Collective agreement for a medical career in public hospitals and medical services, concluded on 27 November 2012 (Clause 41 No. 3), establishes as preference criteria to have access to work-time arrangements in the medical profession to doctors with care responsibilities, disability or chronic disease). All these collective agreements were found at [www.bte.pt](http://www.bte.pt), accessed 8 April 2013.

The opinions issued by the CITE are published on its website<sup>991</sup> and demonstrate a very active intervention on the part of the Agency in this regard.

### **3. Statutory social security and pension rights**

#### **3.1. Exclusions**

The author has no specific information on this issue. Please see below in 3.2.

#### **3.2. Assessment**

In the Portuguese social security system, there are no categories of part-time workers explicitly excluded from statutory social security schemes and/or old-age statutory pension schemes, and there are no formal minimum requirements, thresholds or provisions that disadvantage part-time workers as regards working time for acquiring statutory social security or pension rights, or unemployment benefits, aside from those arising from the fact that the minimum contributory period to have access to a pension or other social security benefits is taken into consideration in proportion to the working time.

As for the unemployed, the unemployment protection law determines the suspension of unemployment allowances granted by the social security system if the worker resumes a labour contract, regardless of the working-time arrangement in question.<sup>992</sup>

Finally, in relation to other statutory forms of leave, namely those related to maternity and paternity, there are no specific requirements that exclude or disadvantage part-time workers.

### **4. Self-employment**

Self-employed persons, even if working on a full-time basis, are disadvantaged in having access to financial services (namely bank loans) due to the more uncertain income usually associated with independent work that is reflected in a lower warranty for the loans. Under these circumstances, part-time self-employed workers are even more disadvantaged.

Equal treatment in self-employment is addressed at the national level by Law No. 3/2011, of 15 February 2011, that transposed Directives 2000/43, 2000/78 and 2000/6/54, into national law, in relation to independent work. This legislation applies to self-employment in general and makes no distinction between full-time and part-time independent workers.

We have no knowledge of any relevant case law and/or opinions of equality bodies on such issues.

### **5. Access to goods and the supply of goods and services**

We are not aware of any particular disadvantage faced by part-time workers in the area of access to and the supply of goods and services. In the access to financial services (e.g. mortgages, bank loans), there is a possible accrued reserve of the financial institutions to grant credit on the grounds of the lesser income of the part-time worker, that also means a weaker warranty for the loans.

Equal treatment in relation to access to and the supply of goods and services is addressed at the national level by Law No. 14/2008, of 12 March 2008, that transposed Directive 2004/113/EC into national law. This legislation makes no distinction between full-time and part-time independent workers.

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<sup>991</sup> [www.cite.gov.pt](http://www.cite.gov.pt) (Pareceres), accessed 7 June 2013. In 2013, several opinions have been issued and published on the website.

<sup>992</sup> Decree-Law No. 220/2006, of 3 November 2006, with the amendments introduced by Law No. 64/2012, of 15 March 2012, Article 52.

We have no knowledge of any relevant case law and/or opinions of equality bodies on such issues.

## **6. Are there any gaps in national law?**

### ***6.1. Gaps in the area of (access to) employment***

In our view, the main gap in the national system as regards part-time work in relation to gender does not rely on the law, but on the stereotypes concerning the optimal organisation of companies (that largely rely on the idea of extensive working-time arrangements for more productivity and consider part-time workers as a secondary and less enrolled labour force). These stereotypes, alongside the stereotype on care responsibilities as a typical woman's task is mainly responsible for the low practical implementation of part-time work in Portugal and for its immediate association with women and care.

#### ***6.1.1. Recruitment process***

This general background explains indirect discrimination practices in recruitment, such as questions related to the family situation or the number of dependents of the applicants, or the request for the immediate and full commitment of the candidate to indeterminate or very long working-time limits. Despite being directed to all candidates, these questions may affect women and men differently, and women or men with children and care responsibilities more than other groups.

#### ***6.1.2. Employment conditions***

The same situation can occur during the contract and in relation to working conditions. In fact, despite the fact that pregnant women and parents are formally protected in the exercise of maternity and paternity rights this may not be enough to avoid indirect discrimination – for instance, when the employer insists that the position of the worker can only be occupied full time.

However, because they rely on social stereotypes, these practices are difficult to deal with under the law.

#### ***6.1.3. Termination of the employment contract***

As regards the termination of an employment contract there is no evidence of part-time workers being forced out of employment because they want to work part time or of being forced out after an application to increase the amount of work.

### ***6.2. Gaps in other areas***

We have no further information on this topic.

## **II. FIXED-TERM WORK**

### **1. General information**

Fixed-time work in Portugal is much more common than part-time work. In fact, available statistics place Portugal as the third country in Europe with the highest rate of fixed-term labour contracts (above 20 % of the total employment rate).<sup>993</sup>

<sup>993</sup> According to Eurostat information related to 2010, Portugal came just after Spain and Poland, where one in four workers was hired on a fixed-term basis [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index./Employment\\_statistics/pt#Contratos\\_a\\_tempo\\_parcial\\_e\\_a\\_termo](http://epp.eurostat.ec.europa.eu/statistics_explained/index./Employment_statistics/pt#Contratos_a_tempo_parcial_e_a_termo), accessed 7 June 2013. More recent data indicate a decrease in this type of contract in Portugal to 17 % in 2012 (source: national statistics – INE, [www.ine.pt](http://www.ine.pt), accessed 7 June 2013).

However, there is no evidence of any link between the high rate of fixed-term labour contracts and gender. In fact, these contracts are as common for women as for men and the reason for such a high rate is the rigidity of the constitutional and legal provisions regarding dismissal: to avoid the severe constraints in individual dismissals (that make it very difficult to dismiss a worker for reasons not related to reprehensible conduct), employers prefer fixed-term contracts, where the termination of the contract is automatic when the term comes to an end. In this sense, despite the exceptional nature of fixed-term labour contracts in the law, these contracts are viewed as an instrument to avoid future difficulties in the termination of the employment relationship.

We found no statistics on the impact of fixed-time work with regard to the gender pay gap.

## **2. Legislation, (national) collective agreements and case law**

### ***2.1. Policies and legislation at national level***

#### ***2.1.1. National policies***

National policies regarding fixed-term work are traditionally strict, in the sense that this contract is only meant to be used exceptionally.

These strict policies are reflected in the legal regulation of this contract in Article 139 to 149 of the LC, which is also very strict. In this sense, the LC indicates the possible grounds for this contract in a strict sense, establishes formal requirements for these contracts (they must be established in writing), imposes strict limits on the number of renewals allowed (not more than 3 is the general rule) and on their total duration, including renewals (not more than 3 years is the general rule) and determines the automatic transformation of these contracts into open-ended labour contracts if any of these requirements are not respected.

However, the high rate of these contracts show that the strict policies and legal provisions regarding this form of contract are not very effective in practice, because employers prefer to take the risk of the fixed-term contract being transformed into an open-ended labour contract (if the fixed-term contract is faulty in some way) instead of open-ended labour contracts which carry the risk of not being able to terminate the employment relationship in the future.

#### ***2.1.2. Equal treatment***

The principle of equal treatment between workers with open-ended contracts and those with fixed-term contracts is clearly established in Article 146 of the LC.

This principle is applicable regardless of the size of the business, in relation to working conditions (e.g. basic pay, overtime supplements, training facilities, promotion, workers' representatives, dismissal) and to other developments relating to the contract. Treating fixed-term workers differently is only allowed for 'objective reasons'.

Where the renewal of fixed-term contracts is concerned, we found no statistics concerning the reasons for the termination of contracts, but it is a known fact that pregnancy and maternity leave are a common reason not to renew such contracts. Bearing that in mind, the LC grants some protection to women who are pregnant or on maternity leave, in relation to the termination of their fixed-term contracts, making it compulsory for the employer to communicate to the CITE the reason why the contract is not being renewed (Article 144 No. 3 of the LC). This communication is meant to facilitate the action of the Labour Inspection Service, and eventually the worker can be reinstated by a court order, on the grounds of unlawful dismissal, based on gender discrimination, if it becomes evident that the contract was not renewed on account of the pregnancy or maternity leave.

#### ***2.1.3. Successive fixed-term contracts***

The national legislation is quite strict regarding the possible grounds of fixed-term labour contracts. According to Article 140 of the LC, these contracts can only be concluded for transitional entrepreneurial reasons and only while these reasons remain. Entrepreneurial reasons can be related to the need to replace absent workers or to the need to reinforce the

workforce with new or more demanding projects, as well as launching a new company or a new establishment. Apart from these situations, fixed-term labour contracts are also allowed under specific employment policies, in order to favour a first employment or the occupation of long-term unemployed people.

The grounds of fixed-term labour contracts do not vary according to the size of the enterprise, but are slightly different for the private sector and for the State, where the ‘entrepreneurial grounds’ are adapted to the public services.

We are not aware of any specific problems faced by women related to fixed-term contracts, aside from the specific and very important difference concerning the refusal to renew a contract on the grounds of pregnancy and maternity. The fact remains that this contract is commonly used to employ both women and men, young or old.

#### *2.1.4. Assessment*

As a final assessment of this topic, we can say that there are no specific weaknesses in the national legislation concerning fixed-term labour contracts in relation to gender equality.

The employers’ obligation to communicate to the equality agency whenever the fixed-term contract of a pregnant worker or of a worker on maternity leave is not being renewed, and the follow-up procedure that we have described above, is an example of good practice.

### **2.2. Collective agreements**

Collective agreements address fixed-term work especially in relation to the grounds of those contracts but not very comprehensively, because the legal provisions in this area are imperative.

We are not aware of either any forms of indirect sex discrimination in national collective agreements or of examples of ‘good practices’ regarding fixed-term labour contracts in relation to gender equality at this level. Some agreements do contain provisions recommending employers to regularly transform fixed-term contracts into open-ended contracts, but these provisions are not ‘gender-sensitive’ because fixed-term contracts are indeed a gender-neutral issue.

### **2.3. Case law**

Case law in relation to fixed-term labour contracts is very abundant and discusses issues such as the grounds for these contracts, the lack of legal formalities and their consequences, the duration and renewal of those contracts, the notion of successive fixed-term contracts, the termination of those contracts and the severance payments attached thereto, among other issues.

In relation to equal treatment, we found no decisions specifically applying the notions of direct and indirect discrimination in this area. As to successive fixed-term contracts, the courts discuss a range of legal prohibitions (laid down in Article 143 of the LC), and draw upon the notion of the ‘same job’ for the purposes of applying that prohibition. Anyway, we have not noticed any shortcomings in the application of the principle of equal treatment and in the concept of indirect sex discrimination in this field.

### **2.4. Involvement of other parties**

Apart from the case law, we can underline the active role of the Equality Agency in Employment (CITE) also in this area. The Agency receives communications from employers concerning the non-renewal of fixed-term contracts, as well as complaints from workers in relation to that issue, and can follow-up those complaints and redirect them to the Labour Services Inspectorate, if a discriminatory practice is spotted.

As for the social partners, trade unions tend to be against a more flexible legal system as regards fixed-term labour contracts, while the employers’ associations are in favour of a more liberal system in relation to the grounds, time-limits and renovation limits of these contracts.

Until now the Government has been sensible in limiting itself to a restrictive regulation of these contracts, but it has been subject to some criticism. In any case, gender discrimination has not been linked to this discussion.

### **3. Statutory social security and pension rights**

All fixed-time workers are entitled to statutory social security schemes and/or old-age statutory pension schemes, provided they have worked long enough during their careers to reach the minimum guarantee period, like any other worker.<sup>994</sup>

We have no additional information in relation to this topic.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

We are not aware of any specific difficulties linked to enforcing rights regarding the position of part-time or fixed-term workers, the length and the costs of the proceedings being the same as for other workers.

Under national law, hands-on support and advice to these workers can be given by the Equality Agency for Employment (CITE), and by the Labour Services Inspectorate. As to financial support, if the case comes to court and the worker is in need of financial assistance, due to his/her very low income, the court will designate a lawyer to plead the case at the expense of the State.<sup>995</sup>

We are not aware of any studies which address the difficulties involved in obtaining access to legal redress for rights regarding part-time workers' positions, and we are also not aware of any increase in the national case law regarding class actions initiated by associations in this area after the Recast Directive.

In terms of compensation, effective compensation or reparation is granted by the national system for damages caused by discriminatory practices (Article 28 of the LC). This compensation also applies to violations of the gender equality rights (including maternity and paternity rights) of part-time workers or fixed-term workers. The compensation must be awarded by the court.

### **2. Vulnerability, multiple/intersectional discrimination**

We are not aware of any studies which address the issues indicated at this point in the questionnaire in relation to part-time work and/or fixed-term contracts.

## **ROMANIA – Iustina Ionescu**

## **I. PART-TIME WORK**

### **1. General information**

In national statistic, part-time work means work performed in a partial work programme. Generally, for employees (on a contract) this is a work programme that is significantly smaller than the normal work programme of 8 hours per day or 40 hours per week.<sup>996</sup> Data

<sup>994</sup> The time-limit conditions are the same for fixed-term and permanent workers.

<sup>995</sup> The right of access to justice free of charge is granted by the Portuguese Constitution (Article 20) and is governed by Law No. 34/2002, of 29 July 2002, and Decree-Law No. 224-A/96, of 26 November 1996.

<sup>996</sup> The definition is available on <http://statistici.insse.ro/shop/index.jsp?page=tempo3&lang=ro&ind=AMG115F>, accessed 15 April 2013.

have been collected about work more generally, not only employed work. However, in this country report the author will refer only to employed work.

On 27 March 2013, the Ministry of Labour, Family, Social Protection and the Elderly – Department for Equal Opportunities for Women and Men (*Ministerul Muncii, Familiei, Protecției Sociale și Persoanelor Vârstnice, Direcția pentru Egalitate de Șanse pentru Femei și Bărbați (DESF)*) reported that at the national level 14.55 % of employees were working part time.<sup>997</sup> For the year 2011, the National Institute of Statistics (*Institutul Național de Statistică (INS)*) reported 5.2 % part-time employees.<sup>998</sup> The author has no official explanation why these two figures are so different. DESF's figures are based on data provided by the national registry of employees. INS data are the result of an annual sample survey carried out by INS. Part-time work is still a rare form of employment relationship in Romania and there are no available sociological studies on the issue of part-time work.

The author has no data available for 2013 on the percentage of female employment, only that of the total number of part-time employees, 192 845 (49 %) were women and 201 063 (51 %) were men.<sup>999</sup> In 2011, of the total number of part-time employees 120 389 (51.4 %) were women and 113 567 (49.6 %) were men. Also in 2011, 47.2 % of employees were women and 5.7 % of them were part-time employees.<sup>1000</sup>

There are no data available on professions, only on fields of activity. For the year 2013, the DESF reported that part-time work is more common in the following fields of activity: retail (175 067 part-time employees), education (75 524 part-time employees), transport (43 851 part-time employees), restaurants and catering (43 851 part-time employees), healthcare (33 576 part-time employees), and construction (34 312 part-time employees).<sup>1001</sup>

The DESF did not provide information on the numbers of women in these fields.<sup>1002</sup> However, data published by the INS for the year 2011 show that more women who are part-time employees work in exactly those areas where part-time work is more common, except for transport and construction: retail (35 556 women and 21 423 men), hotels and restaurants (11 057 women and 6 853 men), education (14 851 women and 8 441 men) and health and social assistance (6 918 women and 2 575 men), while men more often work in the following areas: construction (20 099 men and 6 099 women), transport (9 023 men and 3 167 women), and administrative and support services (9 887 men and 5 696 women).<sup>1003</sup>

Apart from these data, there are no national statistics available on the percentage of involuntary part-time work, whether employees combine several (minor) part-time jobs, combine a part-time job with self-employment, want to reduce their working time or what is the impact of part-time work on the gender pay gap. Moreover, the author could not find studies on part-time work, and the DESF reported not knowing of any such study.<sup>1004</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time employment is regulated by the Labour Code.<sup>1005</sup> Part-time employees have the same rights as full-time employees, except that salary-related rights are awarded proportional to the time actually worked and that part-time employees are forbidden to work any

<sup>997</sup> DESF, Response No.13B of 29 March 2013, on file with the author.

<sup>998</sup> INS, *Costul fortei de munca in 2011* (The Cost of the Workforce in 2011), 2012, pp.67-69.

<sup>999</sup> DESF, Response No.13B of 29 March 2013, on file with the author.

<sup>1000</sup> INS, *Costul fortei de munca in 2011* (The Cost of the Workforce in 2011), 2012, pp.67-69, 72-73.

<sup>1001</sup> DESF, Response No.13B of 29 March 2013, on file with the author.

<sup>1002</sup> DESF, Response No.13B of 29 March 2013, on file with the author.

<sup>1003</sup> INS, *Costul fortei de munca in 2011* (The Cost of the Workforce in 2011), 2012, pp.67-69.

<sup>1004</sup> DESF, Response No.13B of 29 March 2013, on file with the author.

<sup>1005</sup> Law No.53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Articles 103-107, 112, 126.



overtime.<sup>1006</sup> On certain conditions, employees working night shifts may reduce their full-time working week,<sup>1007</sup> mothers who are breastfeeding may reduce their full-time programme by two hours every day until the child is 1 year old,<sup>1008</sup> and employees who are under 18 may only work a reduced number of 6 hours per day.<sup>1009</sup> In addition, employees carrying out certain jobs may have their work programme reduced, following the conditions of the collective agreement.<sup>1010</sup>

The issue of part-time work is not a priority of national policies. According to the DESFB, the National Strategy in the field of equal opportunities between women and men 2010-2012 does not include part-time work among its priority objectives.<sup>1011</sup> Romania did not address the topic of part-time work in its reports to the CEDAW Committee, as shown in the official documents available.<sup>1012</sup> Since 2011, Romania has not had a national collective agreement in force, only collective agreements in certain fields of activity, which simply refer to the Labour Code where the topic of part-time work is concerned.

### 2.1.2. *Equal treatment*

The provisions forbidding sex discrimination in employment are general and they also apply to part-time workers.<sup>1013</sup> All employers, irrespective of size, should comply with the provisions regarding part-time workers and non-discrimination.

Except for rights related to the payment of salary and other equivalent payments which are awarded proportionally to the working time, all other employees' rights should be granted equally to part-time employees and full-time employees.<sup>1014</sup> There is no information available regarding the application of such rights in practice.

The main legal exclusion that part-time workers face is that they are not allowed to work overtime, except for force majeure cases.<sup>1015</sup> Article 105.(1).(c) of the Labour Code was to prevent that employers abuse part-time work contracts in cases when they could actually hire full-time workers. As a general rule at the national level, because the numbers of women and men doing part-time work are very close, one could argue that this legal measure affects women and men equally. However, one may detect a possible risk of indirect discrimination at individual workplaces because statistics show that women who are part-time employees more frequently work in exactly those areas where part-time work is more common, except for transport and construction (see above).

### 2.1.3. *Organisation of working time*

According to Article 17 of the Labour Code, working time is an essential element of the employment contract that cannot be amended unilaterally, only by shared agreement of the

<sup>1006</sup> Law No.53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Articles 105-106.

<sup>1007</sup> Law No.53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 126.

<sup>1008</sup> Emergency Ordinance No.93/2003 regarding protecting maternity at the workplace (*Ordonanța de Urgență nr.93/2003 privind protecția maternității la locul de muncă*), published in Official Journal No.750 of 27 October 2003, as amended by Law No.25/2004, published in Official Journal No.214 of 11 March 2004, point 5, Article 17.(2).

<sup>1009</sup> Law No.53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 112 (2).

<sup>1010</sup> Collective Agreement No.59.495 of 19 December 2012 in the field of high education and research (*Contractul colectiv de muncă unic nr.59.495 din 19 decembrie 2012 la Nivel de Sector de Activitate Invatamant Superior si Cercetare*), Article 18.

<sup>1011</sup> DESFB, Response No.13B of 29 March 2013, on file with the author.

<sup>1012</sup> More information available on <http://tb.ohchr.org/default.aspx?country=ro>, accessed 15 April 2013.

<sup>1013</sup> Government Ordinance No.137/2000 on preventing and sanctioning all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) and Law 202/2002 on equal opportunities between women and men (*Legea nr.202/2002 privind egalitatea de șanse între femei și bărbați*).

<sup>1014</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 106.

<sup>1015</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 105.(1).(c).

employer and the employee. Article 107 of the Labour Code provides the obligation of the employer to take into account the employee's request to change working time from part-time to full-time and vice versa or to extend working time. But this only applies if positions are available with the employer and there is no express sanction in the event of a violation, which renders the provision highly ineffective in practice.<sup>1016</sup> In theory, a decision of an employer not to grant such right although the internal context allowed for a change of working time could be challenged in court, but all evidence related to the internal context is in the hands of the employer.<sup>1017</sup>

In general, workers do not have any influence on their working hours, for example in order to be able to meet family responsibilities. According to the Labour Code, only women who are breastfeeding may choose to work reduced hours, from the normal working time of 8 hours to 6 hours per day, until the child is 1 year old.<sup>1018</sup> The exact hours at which these breastfeeding breaks are taken in the working day are to be negotiated between the employer and the employee. Except for collective agreements applied to a limited number of employees, in certain fields of activity,<sup>1019</sup> in general, the Labour Code does not recognise this right to women who are not breastfeeding or women whose children are older than 1, to fathers who return from parental leave or to employees who want to reduce their working hours based on a need to care for elderly relatives.

#### 2.1.4. Assessment

A positive aspect of national legislation regarding part-time work is that according to the Labour Code part-time employees have the same rights as full-time employees in all respects, except salary and equivalent benefits, which are provided proportionally to the working time.

A weakness of national legislation is that the employee does not have any influence on his/her working time, not even to temporarily reduce working time or reorganise working hours in order to cope with family responsibilities. This constitutes indirect discrimination against women who traditionally are the caregivers of their families. The employer's obligations to take into account the request of the employee to change working time from part-time to full-time and vice versa<sup>1020</sup> or to extend the working time when there are positions available and to inform the employees about the positions available<sup>1021</sup> is ineffective because there are no express sanctions included in Article 260 of the Labour Code.

Another weakness is the legal prohibition of part-time workers to work overtime, which might cause employees to dislike part-time work.

## 2.2. Collective agreements

### 2.2.1. Policies

Part-time work is not an issue of debate for social partners in Romania.

### 2.2.2. Equal treatment

Romania has no national collective agreement in force. Collective agreements have been adopted in certain fields of activity. Generally, these collective agreements simply refer to the

<sup>1016</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 260.

<sup>1017</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 268.

<sup>1018</sup> Government Emergency Ordinance 96/2003 regarding protecting maternity at the workplace (*OUG nr.96/2003 privind protectia maternitatii la locul de munca*), published in Official Journal No.750 of 27 October 2003, Article 17.

<sup>1019</sup> Collective Agreement No.59.495 of 19 December 2012 in the field of high education and research (*Contractul colectiv de muncă unic nr.50.495 din 19 decembrie 2012 la Nivel de Sector de Activitate Invatamant Superior si Cercetare*), Articles 22-23.

<sup>1020</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 107.(1).

<sup>1021</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 107.(2), (3).

Labour Code where the topic of part-time employment is concerned.<sup>1022</sup> In the field of public healthcare, where all hiring has been banned for budgetary reasons for a long time, part-time work appears to be a privilege of the people who already have another employment contract with the healthcare unit. This means that the employee then combines two employment contracts, for two jobs (of which at least one job is part-time).<sup>1023</sup>

### 2.2.3. Organisation of working time

As mentioned above, the Labour Code, which applies to all employment relationships in the country, is very limited as to the employee's right to influence the organisation of working time. In absence of a national collective agreement, some groups of employees are in a better situation than others because in their fields of activity there are collective agreements in force. For example, in the healthcare units that are under the control of the Ministry of Health, the employer and the employee can agree on a flexible work programme consisting of two parts – fixed working hours for all employees and variable working hours negotiated individually with each employee.<sup>1024</sup> In the sector of education and research, all employees who return from a childcare leave earlier than planned may benefit from a reduction in working time of 2 hours per day, and all employees who are raising children under the age of 6 may work part time (50 %) at the doctor's recommendation.<sup>1025</sup>

### 2.2.4. Assessment

The collective agreements in certain fields of activity, such as healthcare and public education, have provisions that are more favourable to employees who return from childcare leave or who are caregivers for sick children under the age of 6. These employees benefit from a reduction in working time of 2 hours per day, or may choose to work part time (50 %) at the doctor's recommendation, respectively.

## 2.3. Case law

The National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării (CNCD)*) informed the author that there have not been any cases of discrimination in relation to part-time work.<sup>1026</sup> Moreover, no public information on court case law is available on the issue of discrimination. Items that are mentioned as categories for research in existing public databases do not contain information with regard to discrimination.

## 2.4. Involvement of other parties

There is nothing to report on this issue.

<sup>1022</sup> For example Collective Agreement No.59.495 of 19 December 2012 in the field of high education and research (*Contractul colectiv de muncă unic nr.50.495 din 19 decembrie 2012 la Nivel de Sector de Activitate Invatamant Superior si Cercetare*), Article 54.(3), Collective Agreement No.59.382 of 3 December 2012 at the level of Ministry of Health units (*Contractul colectiv de muncă nr.59.382 din 3 decembrie 2012 la nivel de grup de unitati al Ministerului Sanatatii si unitatilor din subordine pe anul 2012*), Article 23, and Collective Agreement No.59.276 of 2 November 2012, at the level of lower education (*Contractul colectiv de muncă unic nr.59.276 din 2 noiembrie 2012 la Nivel de Sector de Activitate Invatamant Preuniversitar*), Article 62.(3).

<sup>1023</sup> For example Collective Agreement No.59.382 of 3 December 2012 at the level of Ministry of Health units (*Contractul colectiv de muncă nr.59.382 din 3 decembrie 2012 la nivel de grup de unitati al Ministerului Sanatatii si unitatilor din subordine pe anul 2012*), Articles 23, 97, 112.

<sup>1024</sup> Collective Agreement No.59.382 of 3 December 2012 at the level of Ministry of Health units (*Contractul colectiv de muncă nr.59.382 din 3 decembrie 2012 la nivel de grup de unitati al Ministerului Sanatatii si unitatilor din subordine pe anul 2012*), Article 110.

<sup>1025</sup> Collective Agreement No.59.495 of 19 December 2012 in the field of higher education and research (*Contractul colectiv de muncă unic nr.50.495 din 19 decembrie 2012 la Nivel de Sector de Activitate Invatamant Superior si Cercetare*); Collective Agreement No.59.276 of 2 November 2012 in the field of lower education (*Contractul colectiv de muncă unic nr.59.276 din 2 noiembrie 2012 la Nivel de Sector de Activitate Invatamant Preuniversitar*), Articles 24 and 25.

<sup>1026</sup> CNCD, Response No.1876/12.04.2013, on file with the author.

### 3. Statutory social security and pension rights

There are no limits as to the minimum number of working hours per week in order to qualify for statutory social security and pension rights. However, there are two opposite approaches with regard to the calculation of the minimum period of time during which a person has contributed to the social security insurance fund, which is a condition for social security and pension rights.

The first approach is in the field of pension rights. The period of time during which a person has contributed to the social security insurance fund is calculated based on the time that the person has actually contributed, not the time he/she has worked.<sup>1027</sup> Pension rights are established for all members proportionally to their income, not the hours worked – the monthly income is balanced to the average national salary l.

As to the rights related to leave, including annual leave, maternity risk leave, maternity leave and parental leave, the law does not distinguish between the types of contract – full-time or part-time.

The second approach relates to unemployment benefits. There, the minimum period of time during which the person has contributed to the social security insurance fund is calculated proportionally to the period of time he/she has worked; several part-time contracts may be combined.<sup>1028</sup>

### 4. Self-employment

There is nothing to report on this issue.

### 5. Access to and supply of goods and services

There is nothing to report on this issue.

### 6. Are there any gaps in national law?

#### 6.1. Gaps in the area of (access to) employment

##### 6.1.1. Recruitment process

There is a lack of full-time positions in those sectors that are highly feminised, like public healthcare services and education, due to budgetary constraints. For example, in the field of healthcare, the response to such measures has been to give priority to people who already have an employment contract with the healthcare unit to also obtain a part-time job.<sup>1029</sup> This disproportionately affects women, who are overrepresented in this sector – they either do not have access to full-time jobs or are forced to accept part-time jobs. No measures have been taken to address this issue.

##### 6.1.2. Employment conditions

The provisions giving breastfeeding mothers of children under the age of 1 the right to either reduce their normal working time by two hours per day or take two breastfeeding breaks per

<sup>1027</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 106; Law 263/2010 regarding the unified public pensions system (*Legea nr.263/2010 privind sistemul unitar de pensii publice*), Article 3.(1).(p).

<sup>1028</sup> Law 76/2002 regarding the social security system for unemployment and the stimulation of the workforce (*Legea nr.76/2002 privind sistemul asigurarilor pentru somaj si stimularea ocuparii fortei de munca*), of 16 January 2002, published in Official Journal No.103/6 February 2002, Article 34.(1.2).

<sup>1029</sup> For example Collective Agreement No. 59.382 of 3 December 2012 at the level of Ministry of Health units (*Contractul colectiv de muncă nr. 59.382 din 3 decembrie 2012 la nivel de grup de unitati al Ministerului Sanatatii si unitatilor din subordine pe anul 2012*), Articles 23, 97 and 112.

day do not apply to part-time employees.<sup>1030</sup> When these part-time employees combine two part-time jobs on the same working day, this may raise issues related to the fairness of such legal provisions.

### *6.1.3. Termination of the employment contract*

There is nothing to report on this issue.

## **6.2. Gaps in other areas**

There is nothing to report on this issue.

## **II. FIXED-TERM WORK**

### **1. General information**

The authorities in the field of employment have centralised data about all employment contracts in the country, because there is an obligation to register them with these authorities. However, when asked about data regarding fixed-term work, the INS and the DESFB did not provide the author with any data on this topic.<sup>1031</sup>

### **2. Legislation, (national) collective agreements and case law**

#### ***2.1. Policies and legislation at national level***

##### *2.1.1. National policies*

Under the Romanian Labour Code, the permanent employment contract is the rule and the fixed-term employment contract is the exception. The 2011 amendment of the Labour Code aimed to ensure greater flexibility of the labour market. With this aim, the Government extended the list of situations allowing a fixed-term employment contract and the maximum time of fixed-term contracts from 18 months to 36 months, with the possibility of further extension up to 60 months. Such amendments were criticised as being to the disadvantage of employees, who no longer have any security in their work. For example, a fixed-term employment contract may be now concluded for the implementation of projects, programmes or jobs that are limited in time. Such a provision is obviously too comprehensive to constitute an exception and may give rise to abuse in situations where employers could have concluded a permanent contract. The other cases prescribed by law appear to respond to the social need to encourage active ageing – a fixed-term employment contract may be concluded when hiring a pensioner or an older person who has only 5 more years to reach the pensionable age.

The issue of fixed-term work is not a priority of national policies. According to the DESFB the National Strategy in the field of equal opportunities between women and men 2010-2012 does not include fixed-term work among its priority objectives.<sup>1032</sup> Romania did not address the topic of fixed-term work in its reports to the CEDAW Committee, as shown in the official documents available.<sup>1033</sup> Since 2011, Romania has not had a national collective agreement in force, only collective agreements in certain fields of activity which simply refer to the Labour Code where the topic of fixed-term work is concerned.

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<sup>1030</sup> Emergency Ordinance No.93 of 14 October 2013 regarding the protection of maternity at the workplace (*Ordonanța de Urgență nr.93/2013 privind protecția maternității la locul de muncă*), published in Official Journal No.750 of 27 October 2013, Article 17.

<sup>1031</sup> See requests for public information sent to the INS and the DESFB on 15 March 2013, on file with the author.

<sup>1032</sup> DESFB, Response No.13B of 29 March 2013, on file with the author.

<sup>1033</sup> More information available on <http://tb.ohchr.org/default.aspx?country=ro>, accessed 15 April 2013.

### 2.1.2. *Equal treatment*

The provisions forbidding sex discrimination in employment are general and they also apply to fixed-term workers.<sup>1034</sup> Article 87 of the Labour Code states that fixed-term employees should not be treated less favourably than comparable employees who work on a permanent employment contract. The law allows an exception when the different treatment is ‘justified by objective reasons’.<sup>1035</sup> All employers, irrespective of size, should comply with the provisions regarding fixed-term workers and non-discrimination.

The exception ‘justified by objective reasons’ introduced by the law is very vague and there are no detailed regulations in place to ensure that employers do not abuse it in practice. First, the required comparator – an employee with a permanent employment contract in the same position as the fixed-term worker – may not exist in the company, and there are no standards in place with regard to levels of wages for certain positions or professions. This creates difficulties in establishing the basic pay for the fixed-term worker. Second, an employer may interpret the phrase ‘objective reasons’ as including too many situations justifying treating a fixed-term employee less favourably than a permanent employee, even including the temporary status of the fixed-term employee in the company. While legal provisions on overtime supplements, workers’ representatives and individual dismissal clearly protect all employees, irrespective of the precariousness of their employment contract, Article 87 may be interpreted as allowing discrimination against fixed-term employees in the field of training opportunities, promotion and collective dismissal because this is ‘justified by objective reasons’.<sup>1036</sup>

If an employee becomes pregnant close to the end of a fixed-term contract, it is likely that she will not be offered a renewal of her employment contract. The reason for the employer not to do so is that the new contract could be legally suspended for a long time in the event of medical leave, maternity leave or even childcare leave, and the employer will have to save the position for when the fixed-term employee comes back, in order to complete the rest of the time prescribed in the contract. As long as an employment contract is still in force, because it has not expired or has been suspended, the relevant employee benefits from all legal safeguards associated with pregnancy and maternity, irrespective of whether she has a permanent employment contract or a fixed-term employment contract.

### 2.1.3. *Successive fixed-term contracts*

According to Article 87 of the Labour Code a fixed-term employment contract may be offered only in the following cases: to replace an employee if the employment contract is suspended for other reasons than strike, for an increase and/or temporary modification of the employer’s structure of activity, for seasonal activities, to temporarily favour certain categories of unemployed persons, according to the law, to hire persons that have up to 5 years to reach their pensionable pension, to hire pensioners, to hire persons that have been elected for a temporary mandate in non-governmental organisations or trade unions, when a special law provides for a fixed-term contract, and for carrying out projects, programmes and jobs that are limited in time.

A fixed-term employment contract may be concluded for up to 36 months or even longer when it serves to substitute a permanent employment contract that has been suspended for longer than 36 months.<sup>1037</sup> Renewals must be limited to two and must not exceed 12 months

<sup>1034</sup> Government Ordinance No.137/2000 on preventing and sanctioning all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) and Law No.202/2002 on equal opportunities between women and men (*Legea nr.202/2002 privind egalitatea de șanse între femei și bărbați*).

<sup>1035</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 87.(1).

<sup>1036</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 87.(1).

<sup>1037</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 84.

each. In total a person may have fixed-term employment contracts with an employer for up to 60 months.<sup>1038</sup> All employers, irrespective of size, should comply with these legal provisions.

According to the two main institutions in the field of equality in Romania, there are no studies available on the issue of fixed-term contracts and gender discrimination.<sup>1039</sup>

#### 2.1.4. Assessment

According to the Labour Code, employers may only hire fixed-term employees as substitutes for periods of time that employees are on maternity leave, parental leave or childcare leave. On the one hand, this legal obligation combines the interests of employers to continue their activities with those of employees, predominantly women, to take time for family responsibilities. On the other hand, in practice, there have been cases where employers preferred to continue the collaboration with the fixed-term employee instead of the employee that had been away on leave for a long time. However, there are legal safeguards against dismissal and non-discrimination which apply to this situation as well.<sup>1040</sup>

The author is not aware of any form of indirect sex discrimination against fixed-term workers in national legislation.

### 2.2. Collective agreements

Romania has no national collective agreement in force. Collective agreements have been adopted in certain fields of activity. Generally, these collective agreements simply refer to the Labour Code where the topic of fixed-term employment contracts is concerned.<sup>1041</sup> In the field of education, there are categories of positions that are open only for one school year: substitute teachers.<sup>1042</sup> These fixed-term employment contracts are either concluded for a short period of time until a qualified teacher is available for the position, or they vary depending on the level of education of the substitute teacher: 1 September-31 August for higher education graduates that are not specialised in the particular subject they teach, and September-June, plus annual leave for lower education graduates that are not specialised in the particular subject they teach.<sup>1043</sup> DESFB did not provide the author with gender-segregated data on fixed-term work regarding sectors of activity,<sup>1044</sup> but education is one of the most female-dominated sectors in Romania.

### 2.3. Case law

See I.2.3. above.

<sup>1038</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 82.

<sup>1039</sup> CNCD, Response No.1876/12.04.2013 and DESFB, Response No.13B of 29 March 2013, on file with the author.

<sup>1040</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 65.(2).

<sup>1041</sup> For example Collective Agreement No.59.495 of 19 December 2012 in the field of high education and research (*Contractul colectiv de muncă unic nr.50.495 din 19 decembrie 2012 la Nivel de Sector de Activitate Invatamant Superior si Cercetare*), Article 54.(2), Collective Agreement No.59.382 of 3 December 2012 at the level of Ministry of Health units (*Contractul colectiv de muncă nr.59.382 din 3 decembrie 2012 la nivel de grup de unitati al Ministerului Sanatatii si unitatilor din subordine pe anul 2012*), Article 33.(1), and Collective Agreement No.59.276 of 2 November 2012, at the level of lower education (*Contractul colectiv de muncă unic nr.59.276 din 2 noiembrie 2012 la Nivel de Sector de Activitate Invatamant Preuniversitar*), Article 62.

<sup>1042</sup> For example Collective Agreement No.59.276 of 2 November 2012 at the level of lower education (*Contractul colectiv de muncă unic nr.59.276 din 2 noiembrie 2012 la Nivel de Sector de Activitate Invatamant Preuniversitar*), Article 62.(4) and (5).

<sup>1043</sup> For example Collective Agreement No.59.276 of 2 November 2012 at the level of lower education (*Contractul colectiv de muncă unic nr.59.276 din 2 noiembrie 2012 la Nivel de Sector de Activitate Invatamant Preuniversitar*), Article 62.(4) and (5).

<sup>1044</sup> DESFB, Response No.13B of 29 March 2013, on file with the author.



## 2.4. Involvement of other parties

One important trade union was particularly vocal against the amendments of the Labour Code introduced in May 2011 regarding the extension of the period of time for which fixed-term work relationships were allowed, from 18 months to 36 months and more. Nevertheless, the gender aspects were not raised in this discussion.<sup>1045</sup> In October 2012, another major trade union proposed a legal amendment to further extend the maximum term for a fixed-term employment contract from 3 to 5 years.<sup>1046</sup>

## 3. Statutory social security and pension rights

As long as the minimum period of contribution requirement is fulfilled, there are no differences based on the type of contract, whether it is a permanent contract or a fixed-term contract.

# III. HORIZONTAL PROVISIONS

## 1. Effectiveness

Access to justice within a reasonable timeframe is an issue in the enforcement of labour rights in Romania. This is true more generally, not only with regard to part-time and fixed-term work. Although the law states that these cases should be solved urgently by the courts,<sup>1047</sup> in practice many delays occur because the tribunals, which are higher courts of law (second level), are competent to adjudicate all labour-rights conflicts and these are usually the busiest courts in Romania. Consequently, although employees are exempted from paying judicial fees, the time and stress spent on court hearings and the lack of free legal advice deter employees from enforcing their rights.

As mentioned above, there is no case law available on the issue of part-time work or fixed-term work and the author is not aware of any national case law regarding class actions in this area. Moreover, the author would like to underline that on 13 December 2012 a legal amendment entered into force that does not comply with Article 9.(2) of Directive 2010/41/UE. The Emergency Ordinance to amend the Gender Equality Law limits the right to represent or assist a person having suffered discrimination on the ground of sex to administrative procedures only.<sup>1048</sup> It is not clear why this limitation was introduced, especially since the previous version was much broader and covered all other groups having suffered discrimination, who could be supported by NGOs in both administrative and court procedures.<sup>1049</sup> While it is important to be supported in administrative procedures as well, persons having suffered discrimination would benefit from the support of specialised NGOs especially in court proceedings that are more formal and involve more resources.

In general, courts grant low amounts of compensation for moral damages incurred due to human rights violations and gender discrimination is not an exception. As to the administrative procedure before the CNCD, the national equality body in Romania, this is not an effective procedure, although an amendment was introduced recently with the aim to

<sup>1045</sup> Confederația Națională Sindicală 'Cartel ALFA', Press release, available on <http://www.cartel-alfa.ro/default.asp?nod=68&info=47913>, accessed 15 April 2013.

<sup>1046</sup> Blocul Național Sindical, website campaign available on <http://www.sustinecodulmuncii.ro/nedreptati-corectate/>, accessed 15 April 2013.

<sup>1047</sup> Law 53/2003 on the Labour Code (*Legea nr.53/2003 privind Codul muncii*), republished in Official Journal No.345 of 18 May 2011, Article 271.

<sup>1048</sup> Emergency Ordinance No.83/2012 to amend the Gender Equality Law, of 4 December 2012 (*Ordonanța de Urgență 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*), point 23.

<sup>1049</sup> Government Ordinance No.137/2000 on preventing and sanctioning all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished on 8 February 2007, Article 28.

address this lack of compliance with EU directives.<sup>1050</sup> Until the amendment, which entered into force on 2 April 2013, the CNCD refused to impose an administrative fine six months after the time of the facts, invoking a general law in the field of administrative offences. The amendment stipulates that the six months will be calculated from the time that a complaint is filed with the CNCD. This amendment is still not satisfactory because it links the statute of limitations for imposing an administrative fine to the length of proceedings before the CNCD. In cases where the investigation by the CNCD extends beyond the six-month limit, the administrative fine cannot be imposed, so the sanctioning mechanism is still ineffective. A similar situation was considered by the Court of Justice of the European Union to be in breach of Article 17 of Directive 2000/78/EC in *ACCEPT v Consiliul Național pentru Combaterea Discriminării*.<sup>1051</sup> Emergency Government Ordinance No. 19/2013 is currently being debated in Parliament. The Senate has proposed another change to this particular provision so that the six months will be calculated from the time that the CNCD has issued a decision. At the time of this report, the proposal was scheduled for a vote in a plenary session of the Chamber of Representatives.

## 2. Vulnerability, multiple/intersectional discrimination

There is nothing to report on this issue.

### SLOVAKIA – Zuzana Magurová

## I. PART-TIME WORK

### 1. General information

A number of statistics and analyses show that the Slovak Republic has for a long time maintained its position as one of the European countries with the lowest percentage of employees working part time. This is caused by the fact that the income generated from a part-time job does not cover the living costs of employees, and most families need to secure two full incomes to meet their needs. Part-time work is therefore mostly used by employees as a supplementary form of earnings on top of full-time employment or pension benefits or by parents who can spend only some time at work because they take care of their children. The factor of part-time work has no crucial impact on the gender pay gap, as very few employees take advantage of part-time work. Nevertheless, it is usually women who tend to work part time. In 2006, 4.6 % of women worked part time compared to 1.3 % of men.<sup>1052</sup>

Part-time work can be regarded as a common type of employment relationship which does not cause any problems in everyday life. For this reason the issue of part-time work is not often the subject of expert discussions, independent research (although it is partially addressed in research covering the labour market and flexible forms of work), collective bargaining or court rulings.

The basic source of gender statistics is the Statistical Office of the Slovak Republic,<sup>1053</sup> which since 2010 has a special section on its website dedicated to gender equality and every year issues the publication *Gender Equality*.<sup>1054</sup> This publication provides comprehensive

<sup>1050</sup> Emergency Ordinance No.19/2013 to amend Government Ordinance 137/2000, of 2 April 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*), point 6.

<sup>1051</sup> Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* [2013] WLR (D) Paragraphs 60-73.

<sup>1052</sup> J. Filadelfiová 'The Gender Gap. What statistical and research data (do not) tell us about women's and men's earnings' *Gender Issues* 1/2007, p. 87.

<sup>1053</sup> The Statistical Office is specialised in the provision of data only, because it receives no funds and does not have the experts required to perform in-depth scientific analyses.

<sup>1054</sup> <http://portal.statistics.sk/showdoc.do?docid=59033>, accessed 22 October 2013.

statistical information describing the status of women and men in society. Data are presented by gender in areas of demography, labour market, social statistics and health, education, science and technology, crime, violence and justice, public life and decision-making. In the section on the labour market, the statistics only provide data on employment (economic activity, employment and wages, unemployment), without indicating information about part-time work.

Information concerning the labour market (including employment of women), is mostly derived from the Labour Force Sample Survey (LFS).<sup>1055</sup> The LFS has been conducted by the Statistical Office since the beginning of 1993, and from 2003 the survey has been completely harmonised under the regulations and guidelines of the EU. The aim of the survey is to obtain regular information about the situation, structure and development of the labour market in Slovakia based on adequate methodological ways of measuring employment, unemployment and economic inactivity.<sup>1056</sup>

The tables on employment refer to the main (or only) job of those persons who are classified (according to the methodology) as employed. The data are broken down by status in employment (employed and self-employed), economic activity (NACE Rev.2), classification of occupations (ISCO-08), permanency of the job, and the full-time and part-time distinction. Information on employment and unemployment is classified by gender in all tables.

Analyses of these gender statistics are particularly performed by the Institute for Labour and Family Research,<sup>1057</sup> and by the Department of Gender Equality and Equal Opportunities of Ministry of Labour, Social Affairs and Family, which has issued an annual Summary Report on Gender Equality in Slovakia since 2010.<sup>1058</sup> These documents inter alia contain data on full-time work, part-time work and underemployment of women. However, they do not contain data on areas (professions) for which part-time work is typical.

The development of the scope of part-time work in Slovakia in the period 2004-2011 shows that there was no clear upward or downward trend in the scope of this form of employment until the second quarter of 2008. The share of part-time workers fluctuated around 2.5 % – 3 %. After the second quarter of 2008, however, the scope of part-time work suddenly increased by 46 %. In the following period this growth slowed down, but it continued until the end of 2011 and reached the level of 4.3 % of the total number of workers. This growth was probably caused by anti-crisis measures, including the reduction of working times by enterprises in that period. The use of part-time work in its atypical form, i.e. less than 10 working hours per week, remains limited and reached 0.9 % in late 2011.<sup>1059</sup>

After the second quarter of 2008 the number of involuntary part-time workers increased due to the impossibility to find a full-time job, and in particular due to employers' preference for part-time employment because of the lack of work. This indicates that the growth of part-time employment described above was particularly caused by the consequences of the financial and economic crisis. The third most common reason was voluntary part-time work. Employees regard this form of work as convenient, and its representation throughout the period under review did not notably change.<sup>1060</sup>

<sup>1055</sup> [http://portal.statistics.sk/files/vzps123\\_publ.pdf](http://portal.statistics.sk/files/vzps123_publ.pdf), accessed 22 October 2013.

<sup>1056</sup> The survey is designed to provide reliable results on a quarterly basis. The methodology of the LFS indicators fully corresponds with the ILO recommendations and with the 'Resolution concerning statistics of the economically active population, employment, unemployment and underemployment' adopted by the 13th International Conference of Labour Statisticians, October 1982, as well as the EUROSTAT definitions.

<sup>1057</sup> In December 2012 it issued the report by P. Bellan and A. Olšovská entitled *Flexible forms of work within EU – possibilities and risks of their application in SR*, containing data on part-time work and fixed-term work, available in Slovak at [http://www.sspr.gov.sk/IVPR/images/IVPR/vyskum/2012/Bellan/2157\\_olsovska\\_bellan.pdf](http://www.sspr.gov.sk/IVPR/images/IVPR/vyskum/2012/Bellan/2157_olsovska_bellan.pdf), accessed 25 July 2013.

<sup>1058</sup> <http://www.gender.gov.sk/>, accessed 15 April 2013 (available only in Slovak).

<sup>1059</sup> P. Bellan & A. Olšovská, *Flexible forms of work within EU – possibilities and risks of their application in SR*, at p. 50.

<sup>1060</sup> P. Bellan & A. Olšovská, *Flexible forms of work within EU – possibilities and risks of their application in SR*, at p. 51.

## 2. Legislation, (national) collective agreements and case law

The Labour Code (*Zákoník práce*)<sup>1061</sup> regulates the employment relationship with reduced working time and part-time work,<sup>1062</sup> including job sharing<sup>1063</sup> and special allowances such as home (at home or in another agreed location) work and telework (at home or in another agreed location with the use of information technologies) in the working time scheduled by the worker.<sup>1064</sup> Part-time work differs from both standard full-time and fixed-term work in the volume of weekly working hours.

In addition to employment, the Labour Code (Articles 223-228a) also allows contracts on work performed outside the employment relationship (contractual work) as non-standard forms of employment; these are a specific type of agreement recognised by Slovak labour law. They include ‘work performance agreements’ (work is defined by result and its scope does not exceed 350 hours in one calendar year), ‘agreements on work activities’ (occasional activity is defined by type of work and its scope does not exceed 10 hours per week) and ‘agreement on temporary work of students’. Contractual work can be regarded as a flexible element of labour law, enabling employees to carry out a gainful activity alongside their job, business, care of underage children, study, retirement, and so on. It is used only as a supplementary form of earning income for individuals and employees, and for employers it represents an exceptional method of employment in cases where it is not effective for them to use work carried out in an employment relationship.

The previous regulations governing contractual work (invalid since early 2013) were criticised as non-compliant with EU law,<sup>1065</sup> so they were changed through the amendment of the Labour Code. This amendment (which entered into force on 1 January 2013) increased the legal protection of employees in the areas of working time, remuneration and obstacles at work. Previously it was possible for the remuneration of employees to be lower than the minimum wage and there were no rules regarding the maximum working time of employees working under agreements. However, the amendment has not removed all deficiencies, so cancellation of this type of agreements or adoption of further changes to these regulations has to be considered, particularly in light of Directive 97/81/EC.

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

The Government has produced several reports and strategies in which it addresses the issue of reconciliation of work, private and family life. The measures in these reports and strategies are outlined roughly and are not always supported by appropriate analyses that would support the implementation of these measures. Furthermore, all documents lack the gender element. The issue of part-time work is not dealt with by political or strategic documents and it is not facilitated for specific groups of workers. There are currently no discussions concerning part-time work as a symptom of gender stereotypes.

In June 2006 the Government adopted the Draft Measures for the Reconciliation of Family and Professional Life for the Year 2006.<sup>1066</sup> This document particularly concerns those

<sup>1061</sup> Act No. 311/2001 Coll. Labour Code, as amended.

<sup>1062</sup> According to Article 49 of the Labour Code an employer may agree with an employee on a weekly working time schedule which is reduced compared to the previously determined weekly working time. The reduced working time need not be distributed over all working days.

<sup>1063</sup> According to Article 49a of the Labour Code, job sharing refers to a job in which employees in an employment relationship with reduced working time distribute amongst themselves the actual working hours and the tasks pertaining to the job.

<sup>1064</sup> Article 52 of the Labour Code.

<sup>1065</sup> In particular regarding the Framework Agreement to Directive No. 97/81/EEC concerning part-time work, Directive No. 2003/88/EEC concerning certain aspects of the organisation of working time and the ILO Convention 158 on termination of employment.

<sup>1066</sup> *Návrh opatření na zosúladenie rodinného a pracovného života na rok 2006 s výhľadom do roku 2010* (Material developed by the Ministry of Labour, and approved by the Slovak Government on 21 June 2006 by Resolution No. 560/2006).

employees who have young children and close dependent family members and are looking for jobs or whose working conditions are made difficult by the fulfilment of their family obligations. In the period 2009-2011, the National Labour Inspectorate issued a report entitled *Measures for the Reconciliation of Family and Professional Life for the Year 2006 with Outlook until 2010*.

### 2.1.2. Equal treatment

The general regulations regarding the prohibition of discrimination, contained in the Anti-Discrimination Act (*Antidiskriminačný zákon*),<sup>1067</sup> also apply to part-time work. The principle of non-discrimination for the protection of part-time workers is also expressed in the Labour Code.<sup>1068</sup> In order to comply with the prohibition of discrimination against part-time workers the definition of the term ‘comparable employee’ is enshrined in the law. It is understood as a full-time worker with the same type of employment contract or employment relationship, who has been engaged for the same or similar work by the same employer, whereby other factors, including qualification, competence, expertise and duration of employment relationship are also taken into account.

Part-time workers have exactly the same rights and the same scope of protection as full-time workers. The legislation on part-time work is applicable to all groups of workers and to all businesses.

### 2.1.3. Organisation of working time

The Labour Code contains several provisions that may contribute to the development of part-time work on a voluntary basis and to the flexible organisation of working time. Many of these provisions are related to time management and/or division of working time. According to Article 49 of the Labour Code an employer may agree with an employee on a reduced weekly working time schedule rather than the previously determined weekly working time schedule. However, legislation does not contain a general right to part-time work. The relevant agreement on part-time work is, in principle, laid down in writing.

If a pregnant woman, or a woman or a man permanently taking care of a child younger than 15 applies for part-time work or other suitable adjustment of working time, the employer is obliged to grant such request, unless serious operational reasons prevent it (Article 164(2) of the Labour Code). If such a request is refused by the employer, it can be enforced in court. Another suitable adjustment of working time may be the allowance for flexible working time.

### 2.1.4. Assessment

Although the Labour Code has improved the regulations for part-time work, only a small percentage of employees use the relevant rights.<sup>1069</sup> The disadvantage of part-time work is a much lower wage corresponding to the shorter working hours. Home workers and teleworkers enjoy the same social security as other employees, although they are not entitled to bonuses for working in difficult and unhealthy working conditions.

According to the findings of the National Labour Inspectorate<sup>1070</sup> (concerning part-time work during labour inspections) the purpose for which part-time employment had been agreed was not clear from the relevant employment contracts. Reasons for part-time work may include, among other reasons, the employee’s own initiative or the need to perform work for shorter working hours. However, complaints have been submitted by employees, suggesting

<sup>1067</sup> Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination and Amendment of Certain Acts (Antidiscrimination Act), as amended.

<sup>1068</sup> According to Article 49(5) of the Labour Code an employee in an employment relationship with reduced working time must not be advantaged nor constrained in comparison to a comparable employee. According to Article 52(4), working conditions for employees who work from home or telework must not disadvantage such employees in comparison with comparable employees who work in the employer’s workplace.

<sup>1069</sup> The previous part of Article 49 of the Labour Code, ‘The part-time employment agreed for less than 20 hours per week may be terminated by notice for any reason or without indication of reason, with a notice period of 15 days’, was removed.

<sup>1070</sup> Report on the results of labour inspection: *Measures for the Reconciliation of Family and Professional Life for the Year 2006 with Outlook until 2010*.

more speculative reasons, for example the employer's intention to pay lower mandatory contributions, having work carried out as a full-time job without having to pay full wages. Employers more often used contractual work rather than concluding a part-time employment contract. In the overwhelming majority of cases, contractual work substituted work carried out under part-time employment contracts. If the concept of contractual work were abolished, the number of part-time employment contracts would significantly increase.<sup>1071</sup>

The assessment of compliance with labour regulations in agreements for contractual work revealed that the trick described above was common use. By using contractual work, employers avoid having to maintain regular employment relationships, in order to decrease salary costs by the amount of the mandatory contributions they avoid having to pay.<sup>1072</sup> This form of employment relationship is detrimental to the employee, who carries out work within the scope of a regular employment relationship, but receives no benefits other than non-taxed funds (old-age pension, health insurance, leave, compensation of income in case of temporary disability, protection against termination of work, etc.). Employers frequently abuse this legal option, and according to the Labour Inspectorate this violation accounted for 25.1 % of the total number of detected violations concerning reconciliation of family and professional life in 2011. These violations involved employers concluding contracts for work to perform repeated activities, thus abusing the agreement for work by preferring it over a regular employment relationship.

## **2.2. Collective agreements**

### *2.2.1. Policies*

According to the available information (collective agreements are not published), specific provisions regarding part-time work are not provided in general collective agreements<sup>1073</sup> at sector or company level.

### *2.2.2. Equal treatment*

The provisions of collective agreements are formulated in a gender-neutral fashion. The issue of equal treatment and reconciliation of working and parental obligations of women and men is usually contained in collective agreements concluded at company level, particularly in large companies. As collective agreements at company level are not usually available to the public, they have not yet been subject to analysis.

### *2.2.3. Organisation of working time*

Some collective agreements contain provisions related to flexible organisation of working time, but they are very general and mostly relate to weekly or daily flexible working time.

### *2.2.4. Assessment*

As previously mentioned, no analysis of collective agreements is available. There is no systematic monitoring of these agreements, so there is a consequent lack of information concerning their concrete provisions.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

No judgments concerning the violation of the principle of equal treatment of part-time work are available.

The reports containing information on the observance of human rights in the Slovak Republic,<sup>1074</sup> including the observance of the principle of equal treatment, only briefly refer to

<sup>1071</sup> There has been debate on cancelling the concept of contractual work or adopting further changes to its regulation.

<sup>1072</sup> The obligation to pay mandatory contributions was introduced by an amendment of the Labour Code valid from 1 January 2013.

<sup>1073</sup> Act No. 2/1991 Coll. on Collective Bargaining (*O kolektívnom vyjednávaní*).

the lower rate of employment of women and inequality in remuneration. These reports are annually prepared by the Slovak Republic, but they do not deal with the issue of part-time work.

### 2.3.2. *Assessment*

Although legislation is quite sufficient, no analysis is available.

## 2.4. *Involvement of other parties*

The Government has shifted a substantial part of its responsibility for the issue of part-time work, onto the social partners. Non-governmental organisations therefore play an important role, in particular in the area of quality gender research. For example, the Institute for Public Affairs, Aspect, Esfem and Citizen has produced important analytical publications concerning gender (in)equality and the labour market.<sup>1075</sup>

The main problem in the collection and evaluation of gender-differentiated statistics in Slovakia is the limited number of experts who are able to perform gender-sensitive or gender-specific research, from its operationalization through to its evaluation and gender analysis. Although gender statistics are cross-sectoral, a small number of researchers deal with them specifically.

Virtually for each thematic area of gender issues, as defined in the ‘Roadmap for equality between women and men’, the Beijing Platform for Action or CEDAW, data are insufficient and classification by gender lacks certain characteristics. For example, data on marital status or parenthood are unavailable in many databases, which are needed in order to assess levels of discrimination. The area of access to finance and property is not covered from the gender perspective at all. Also, there is no time management survey to provide data on the division of the time available for rest, paid work and household duties and their comparison for individual categories of population, including women and men. The situation in Slovakia has its gender specifics, which would require long-term monitoring on the basis of ‘national specific’ indicators, such as the low percentage of part-time jobs and their relation to the family situation of women and men.

## 3. Statutory social security and pension rights

### 3.1. *Exclusions*

Part-time workers are not excluded from statutory social security schemes and/or old-age statutory pension schemes. This means there are no minimum hour requirements to be met in order to be included in the system.

### 3.2. *Assessment*

Regarding pensions, following the reform mothers with lower incomes are disadvantaged because they save less or pay less money to the social insurance company.<sup>1076</sup> The reform has

<sup>1074</sup> <http://www.snsip.sk>, accessed 15 April 2013 (available only in Slovak).

<sup>1075</sup> *She and He in Slovakia: Gender and Age in the Period of Transition*, <http://www.ivo.sk/5625/en/books/she-and-he-in-slovakia-gender-and-age-in-the-period-of-transition> (available in English), accessed 17 July 2013. *Equal Pay for Equal Work? Aspects of the Gender Pay Gap* [www.pinkablueworld.sk](http://www.pinkablueworld.sk), (available in English), accessed 17 July 2013. *Dáta o rovnosti v slovenskej realite* (Data on equality in Slovak reality) <http://diskriminacia.sk/zbornik-data-o-rovnosti-a-pravne-aspekty-rovnakeho-zaobchadzania-v-slovenskej-realite/>, (available in Slovak), accessed 17 July 2013.

<sup>1076</sup> The system of social security and the pension system in Slovakia underwent major reforms in 2003 and 2004 in the adoption of the Act on Social Insurance, the Act on Old-Age Pension Saving and the Act on Additional Pension Saving. In 2005 the statutory old-age pension scheme was organised into two tiers, one being a defined benefit pay-as-you-go system, the other a funded defined contribution scheme. The funded tier is managed by private pension funds. The new system is universal for all productive citizens with the exception of the armed forces (policemen, soldiers). An important part of the reform was a rise of the statutory retirement



determined that the amount of pension is derived from the ‘merits’, and a person who pays less will receive less. The number of children brought up by the parents does not influence the amount of the pension. Pension savers who are part-time workers are exposed to a stronger probability that they will not be able to pay contributions to his/her pension account for a period that is long enough for the pension savings to be advantageous for him/her.

#### 4. Self-employment

The self-employed worker is an individual who does business as an entrepreneur according to the Commercial Code (*Obchodný zákonník*)<sup>1077</sup> or who pursues trade activities according to the Small Business Act (*Živnostenský zákon*)<sup>1078</sup> and who may not acquire or have the legal status of employee during the performance of any of these activities.

Self-employment cannot be regarded as a form of employment from the formal (legal) perspective, but due to its characteristics it is sometimes very similar to flexible forms of dependent work, and is therefore included in statistical data. The term of self-employment in LFS terminology covers a wide range of self-employed persons such as entrepreneurs, traders, freelancers, self-employed farmers, etc. The share of self-employed persons as part of the total number of workers in Slovakia slightly exceeds the average value in EU countries. Self-employed persons without employees accounted for 12.3 % of all workers on the Slovak labour market in 2011, while self-employed persons with employees represented 3.5 % of all workers. From the first quarter of 2010 an individually monitored category of traders without employees was included in LFS data. The share of traders in the category of self-employed persons without employees saw continuous growth until the end of 2011.<sup>1079</sup>

Trade work sometimes masks an employment relationship and can in fact have the character of dependent activity, usually referred to as ‘forced trade’. Forced trade is the most advantageous form of ‘employment’ for an ‘employer’, because traders do not have the status of regular employees. They are not protected by the Labour Code against dismissal and the ‘employer’ may terminate the cooperation with them at any time without them being entitled severance pay or notice period.<sup>1080</sup> The ‘employer’ does not even have to state the reason for the termination. The trader is not entitled to any type of leave and his working time and minimum wage are not regulated by the Labour Code.

LFS data show that self-employed persons are predominantly male, particularly in the category of traders without employees. In comparison with employees, traders without employees mostly work in the construction sector as skilled workers and artisans.

#### 5. Access to and supply of goods and services

There is no information available on possible discrimination of part-time workers in the access to and supply of goods and services. However, it is possible that due to their low income, part-time workers may fail to meet the required minimum income for a loan.

#### 6. Are there any gaps in national law?

##### 6.1. Gaps in the area of (access to) employment

###### 6.1.1. Recruitment process

The legislation on protection against discrimination of part-time workers in relation to access to employment is sufficient.

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age, from 60 for men and 53-57 for women (depending on the number of children) to 62 for both genders (for men reached in 2007 and for women to be reached in 2015).

<sup>1077</sup> Act No. 513/1991 Coll. Commercial Code, as amended.

<sup>1078</sup> Act No. 455/1991 Coll. on Licensed Trades (Small Business Act) as amended.

<sup>1079</sup> P. Bellan & A. Olšovská *Flexible forms of work within EU – possibilities and risks of their application in SR*, p. 55.

<sup>1080</sup> Their trade activities are regulated by the Act on Licensed Trades (Small Business Act).

*6.1.2. Employment conditions*

Legislation is sufficient.

*6.1.3. Termination of the employment contract*

There is no information available on this topic.

*6.2. Gaps in other areas*

There is no information available on this topic.

## II. FIXED-TERM WORK

### 1. General information

LFS data on fixed-term employment cover two specific flexible forms of employment in Slovakia: fixed-term employment (Article 48 of the Labour Code) and work performed under agreements outside an employment relationship (referred as contractual work, Articles 223 to 228 of the Labour Code).

In 2011, 6.6 % of all employed persons in Slovakia were fixed-term workers (i.e. including both fixed-term employment and work performed under agreement according to the Labour Code). LFS data indicate some of the reasons for entering into fixed-term work. Persons who ‘voluntarily’ work on a fixed-term contract (because this form of employment is convenient for them) can be distinguished from those working on a fixed-term contract on an ‘involuntary’ basis (because they cannot find another form of employment). These reasons first presented themselves in LFS in early 2006, when ‘involuntary’ fixed-term workers accounted for approximately 65 % of all fixed-term workers. By 2009 this percentage had increased to 80 %, remaining at this level until the end of the period under review in 2011. The remaining percentage represented persons ‘voluntarily’ working on a fixed-term contract and persons who attended practical or specialised training in this form of employment (although their number did not reach the limit of 5 % in the period under review).<sup>1081</sup>

### 2. Legislation, (national) collective agreements and case law

Fixed-term work, unlike ‘standard’ full-time employment of indefinite duration, represents a form of employment relationship that is characterised by specifically determined duration(s) of work (Article 48/1 of the Labour Code). In general, fixed-term employment can be defined as an employment relationship the length of which is limited by a specific date, performance of a specified activity, or return of an employee, meaning that duration and termination of the employment relationship are determined by pre-agreed circumstances. The most common forms are fixed-term employment agreed for the period of substitution of an employee (often during maternity leave), seasonal work, or work with an increased labour requirement not exceeding 8 months per calendar year (Article 48/4 of the Labour Code). It is a standard flexible tool, but its disadvantages include instability, uncertainty (because the employee only has work for a limited period), and impossibility to obtain benefits which are conditional upon the duration of the employment relationship at the employer (e.g. access to training).

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

There is no information available on this topic.

<sup>1081</sup> P. Bellan & A. Olšovská *Flexible forms of work within EU – possibilities and risks of their application in SR*, p. 42.

### *2.1.2. Equal treatment*

The principle of equal treatment is regulated by the Labour Code (Article 48/7), which provides that a fixed-term worker cannot be advantaged or disadvantaged, particularly in relation to working conditions such as safety and protection of health at work, compared to a worker employed for an indefinite period of time. The employer is to inform these workers about the possibility to obtain a permanent job if such a vacancy arises (Article 48/8 of the Labour Code). The Labour Code stipulates that information must be provided in a 'suitable manner'. In practice, such information is provided on a general basis.

In employment relationships established by agreement (referred as contractual work, Articles 223 to 228 of the Labour Code) the employees enjoy limited protection and entitlements as compared to regular employees due to the fact that not all provisions of the Labour Code concerning the employment relationship apply to them. In the author's opinion this is contrary to the principle of equal treatment.

Only general provisions of the Labour Code on safety and protection of health at work, and prohibitions of performance of certain work by women, are applicable to contractual work. However, provisions on the employment relationship (start and termination, notice periods), working time (continuous rest, overtime work, night work, leave), pay (including equal pay), obstacles at work and corporate social policy (meals for employees) are among those not applicable to contractual work. An employee working under such an agreement is not entitled to paid leave or meal tickets, for example. Also, such relationships can be more easily terminated by the employer.

### *2.1.3. Successive fixed-term contracts*

Fixed-term employment can be agreed, extended or renewed for a period not exceeding two years. During this period, the fixed-term employment can be extended or renewed twice at most (Article 48/2 of the Labour Code). Until the end of 2012, fixed-term employment could be agreed, extended or renewed for a period not exceeding three years and with a maximum of three times.

Renewed fixed-term employment is regarded as an employment relationship when it is established not later than six months after the termination of the previous fixed-term employment relationship between the same parties (Article 48/3 of the Labour Code).

Another extension or renewal of fixed-term employment within or beyond two years is possible only in the circumstances specified in Article 48/4 of the Labour Code: in case of substitution of an employee during maternity or parental leave; to cover another employee's leave immediately following maternity or parental leave; to cover the temporary disability of an employee or absence of an employee who has been released to perform a public or trade-union function for a long period; for performance of works that require a substantial increase in the number of employees for a period not exceeding eight months per calendar year; for seasonal work; and for performance of works agreed in the relevant collective agreement.

Another extension or renewal of a fixed-term employment relationship within or beyond two years is possible for some categories of employees specified by the Labour Code, for example university teachers or creative scientific/academic research and development workers. This only applies when justified by an objective reason which results from the nature of the activity of such a worker and is provided for by a special regulation (Article 48/6 of the Labour Code). This regulation can be inconvenient, particularly for women who are contemplating parenthood.

The reason for extension or renewal of the employment relationship must be indicated in the employment contract (Article 48/5 of the Labour Code).

An important provision is that no probationary period can be agreed for renewed fixed-term employment contracts (Article 45/4 of the Labour Code).

The conditions for offering fixed-term contracts do not depend on the size or type of employer.

#### 2.1.4. Assessment

According to the findings of the National Labour Inspectorate, results of inspections have not indicated major problems with fixed-term employment.<sup>1082</sup>

#### 2.2. Collective agreements

According to the available information, collective agreements generally do not contain specific provisions regarding fixed-term work.

#### 2.3. Case law

There is no information available on this topic.

#### 2.4. Involvement of other parties

There is no information available on this topic.

### 3. Statutory social security and pension rights

The popularity of agreements on work performed outside an employment relationship (referred to as contractual work) is based on their exemption from social security payments. Alternatively, the relevant workers do not qualify for pension entitlements or other types of social insurance (unless paid for voluntarily). For these reasons, this type of agreement was concluded relatively often, but this exemption has been invalid since 1 January 2013. Only practice will show how this change will influence the use of these agreements.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

There is no information available on this topic.

### 2. Vulnerability, multiple/intersectional discrimination

There is no information available on this topic.

## SLOVENIA – Tanja Koderman Sever

## I. PART-TIME WORK

### 1. General information

Women in Slovenia represent almost half of all employed persons and mostly work full time, the same as men. The percentage of female employment in Slovenia is 47 %. Only 12 % of women work part time. However, the definition of part-time work used in national statistics is very wide. According to the statistical report of the Statistical Office of the Republic of Slovenia (hereafter the Statistical Office) workers who work 35 hours or less per week are considered as part-time workers. In this definition, all types of part-time work are included. According to statistics, one third of workers performing part-time work are students, 23 % of workers work part time due to illness, disability or partial retirement, and 22 % work part time because they cannot find a full-time job. According to these statistics, the total percentage of part-time workers is 9 %.<sup>1083</sup>

Part-time work is not very common in Slovenia. This is mainly due to economic necessity and ideological influences from the past, the current economic situation, the good

<sup>1082</sup> Reports on results of labour inspection *Measures for the Reconciliation of Family and Professional Life for the Year 2006 with Outlook until 2010*.

<sup>1083</sup> [http://www.stat.si/novica\\_prikazi.aspx?id=4375](http://www.stat.si/novica_prikazi.aspx?id=4375), accessed 28 June 2013.

childcare network, good organisation of school schedules and cohabitation of multiple generations of families. There is no special distinction in part-time employment between professions. In addition, there are no national statistics on the percentage of involuntary part-time work or evidence that people combine minor part-time jobs or part-time jobs with self-employment.

## **2. Legislation, (national) collective agreements and case law**

The Employment Relationships Act<sup>1084</sup> (hereinafter the ERA-1) regulates two forms of part-time work. The first one is part-time employment agreed at the discretion of the contracting parties<sup>1085</sup> and the second one is part-time employment in special cases due to disability, partial retirement, parenting and health reasons pursuant to the regulations on pension and invalidity insurance, the regulations on health insurance or the regulations on parental leave.<sup>1086</sup>

There is no distinction between state-owned and private businesses or regarding the size of employer.

There is no relevant case law and there are no opinions of the equality body on this matter.

### **2.1. Policies and legislation at national level**

#### *2.1.1. National policies*

Since the majority of women works full time, there are no special policies on part-time work, nor is there any debate regarding part-time work as a symptom of gender stereotypes.

#### *2.1.2. Equal treatment*

According to the ERA-1 a part-time worker is a worker whose working time is shorter than the full working time in force with the employer.

Workers who work part time according to the employment contract concluded at the discretion of the contracting parties have the same contractual and other rights and obligations arising from the employment relationship as workers who work full time, and may exercise these rights and obligations proportionally to the time for which the employment relationship has been concluded. They are entitled to annual leave for the duration pursuant to the law, and have a right to paid annual leave in proportion to the working hours for which they concluded an employment contract. Special groups of workers, meaning workers with family responsibilities, disabled workers, people with health problems and partially retired workers, who work part time, are entitled to remuneration according to their actual work obligations, and have the same rights and obligations arising from the employment relationship as full-time workers.

In Slovenia, there are no legal measures meant to combat discrimination or to implement the principle of equal treatment specifically in relation to part-time work. There is only legislation designed to combat discrimination and to implement the principle of equal treatment in employment in general. Common bases and premises for ensuring equal treatment of all persons as regards access to employment, vocational training and promotion and working conditions are determined by the Act Implementing the Principle of Equal Treatment<sup>1087</sup> (hereinafter the AIPET), and concrete provisions are included in the ERA-1 and in the Public Servants Act (hereinafter the PSA).

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<sup>1084</sup> The new Employment Relationship Act (ERA-1), Official Gazette of the Republic of Slovenia, No. 21/2013, of 13 March 2013.

<sup>1085</sup> Article 65 of the ERA-1.

<sup>1086</sup> Article 67 of the ERA-1.

<sup>1087</sup> Act Implementing the Principle of Equal Treatment, Official Gazette of the Republic of Slovenia, No. 61/2007.

### *2.1.3. Organisation of working time*

According to the ERA-1 a worker may conclude an employment contract to work either full time or part time. There is no statutory right to adjust working time, however.

Regarding special groups of workers, the Parental Protection and Family Benefits Act (hereinafter the PPFBA)<sup>1088</sup> e.g. gives employees with a child under the age of three or with a severe handicap the right to work part time.<sup>1089</sup>

### *2.1.4. Assessment*

Regulation of part-time work in Slovene legislation is satisfactory. There are no weaknesses in legislation. Although labour legislation provides a right to work full time, it provides possibilities to work part time as well. There are no forms of indirect sex discrimination and there are no examples of good practices worth following by other countries in national legislation.

## **2.2. Collective agreements**

### *2.2.1. Policies*

The social partners have no specific policies in relation to part-time work. Furthermore, social partners have never even discussed part-time work issues.

### *2.2.2. Equal treatment*

The main collective agreements mostly regulate rights of part-time workers regarding annual leave and reimbursement for meals during work.

### *2.2.3. Organisation of working time*

There are no provisions in the main national collective agreements on the organisation of working time that would facilitate the development of part-time work on a voluntary basis.

### *2.2.4. Assessment*

National collective agreements mostly copy some provisions of the ERA-1 regarding rights of part-time workers. Since the issue of part-time work is not of great importance, the regulation of part-time work in collective agreements is not extensive. There are no forms of indirect sex discrimination and there are no examples of good practices worth following by other countries in national collective agreements.

## **2.3. Case law**

### *2.3.1. Cases/opinions of equality bodies*

There is an interesting case of unlawful dismissal of a part-time worker, decided by the High Labour and Social Court in February 2012.<sup>1090</sup> The Court found that an employee, working full time in the banking sector, concluded a new employment contract with his employer to work 20 hours per week due to parenthood, in accordance with the PPFBA. In the contract, they agreed on flexible working time. According to the rules on working time in force at the employer, flexible time gave the employee the right to determine his own arrival at and departure from work. The purpose of this provision was reconciliation of family and professional life. Despite the fact that the employee decided to work part time due to family responsibilities, he was ordered to work in the afternoon, when he had no childcare possibilities. Since he refused to work in the afternoon, the employer dismissed him. The Court found the dismissal unlawful based on the concluded employment agreement and the general rules in force at the employer.

<sup>1088</sup> Parental Care and Family Benefits Act, Official Gazette of the Republic of Slovenia, No. 110/2006.

<sup>1089</sup> Article 48 of the PPFBA..

<sup>1090</sup> Case No. Pdp 20/2012.

### 2.3.2. *Assessment*

There are no shortcomings in the application of the principle of equal treatment. There is not much case law on this subject. Nevertheless, any existing case law is in accordance with the case law of the Court of Justice of the European Union.

### 2.4. *Involvement of other parties*

Since only a small percentage of people works part time, part-time work is not an important issue in Slovenia. There is no involvement of private or public stakeholders other than the legislator that play an important role in the field of rights of part-time workers, nor are there any reluctant or obstructive bodies or restrictive views in this regard. Furthermore, there are no examples of good practices worth following by other countries in national legislation.

## 3. **Statutory social security and pension rights**

### 3.1. *Exclusions*

All part-time workers are included in the statutory social security schemes (the health insurance scheme,<sup>1091</sup> the pension and invalidity insurance scheme,<sup>1092</sup> the unemployment insurance scheme<sup>1093</sup> and the social assistance scheme<sup>1094</sup>). These insurance schemes are regulated by different laws (the Health Protection and Insurance Act,<sup>1095</sup> the Pension and Invalidity Insurance Act,<sup>1096</sup> the Labour Market Regulation Act<sup>1097</sup> and the Social Security Act<sup>1098</sup>). There are no minimum requirements, thresholds or provisions that disadvantage part-time workers as regards working time for acquiring statutory social security or pension rights. Regarding pension rights, in the insurance period required for the acquisition and assertion of rights under compulsory insurance, the period of time in which an insured person was part-time employed is taken into account. The total number of hours of part-time employment in a particular year are taken into consideration and calculated in proportion to full-time hours. These provisions also apply if full-time working hours are obtained by working under two or more employment contracts. Furthermore, part-time workers do not face any specific problems in relation to unemployment benefits. They receive benefits that are calculated on the basis of their salary. Regarding entitlements to statutory leaves, such as parental leave, there are no specific requirements that might exclude or disadvantage part-time workers.

There is no relevant case law on this issue.

### 3.2. *Assessment*

Regulation of part-time work regarding statutory social security and pension rights is satisfactory and in accordance with the EU acquis. There are no weaknesses in legislation or good practices worth following by other countries. There is no relevant case law on this issue.

## 4. **Self-employment**

According to the general provisions of the AIPET,<sup>1099</sup> equal treatment must be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance, in relation to self-employment. There is no

<sup>1091</sup> Article 15 of the Health Protection and Insurance Act.

<sup>1092</sup> Article 14 of the Pension and Invalidity Insurance Act.

<sup>1093</sup> Article 54 of the Labour Market Regulation Act.

<sup>1094</sup> Article 14 of the Social Security Act.

<sup>1095</sup> Health Protection and Insurance Act, Official Gazette of the Republic of Slovenia, No. 100/2005-UPB2.

<sup>1096</sup> Pension and Invalidity Insurance Act, Official Gazette of the Republic of Slovenia, Nos. [96/2012](#), [39/2013](#).

<sup>1097</sup> Labour Market Regulation Act, Official Gazette of the Republic of Slovenia, No. 80/2010.

<sup>1098</sup> Social Security Act, Official Gazette of the Republic of Slovenia, No. 3/2007.

<sup>1099</sup> Article 2 of the AIPET.



case law and nor are there cases of the equality body regarding disadvantages faced by self-employed persons working part time. Nevertheless, they probably face some problems in obtaining bank loans due to potentially lower incomes.

## **5. Access to and supply of goods and services**

According to the AIPET,<sup>1100</sup> equal treatment must be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance, in relation to access to and supply of goods and services, which are available to the public. In this regard there are no special national legislative provisions or national collective agreements addressing discrimination of part-time workers in the access to and supply of goods and services. In addition, there is no case law and nor are there cases of the equality body regarding disadvantages faced by part-time workers in the area of access to and supply of goods and services. Nevertheless, they probably face some problems in obtaining bank loans and mortgages due to potentially lower incomes.

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### *6.1.1. Recruitment process*

There are no gaps in national legislation in relation to access to employment.

#### *6.1.2. Employment conditions*

There are no gaps in national legislation with respect to specific employment conditions of part-time workers.

#### *6.1.3. Termination of the employment contract*

Since Slovene employers prefer employment of full-time workers, there has been a case of unlawful dismissal of a part-time worker who was first employed on a full-time basis and then applied for part-time work due to parenthood, as described above.<sup>1101</sup>

### **6.2. Gaps in other areas**

There are no other gaps.

## **II. FIXED-TERM WORK**

### **1. General information**

There has been a significant increase in the number of fixed-term workers in Slovenia in the last 15 years. In 1995, in the early years of transition, Slovenia had 8.4 % fixed-term workers, but by 2010 their share had increased to 17.3 % according to the figures of the Statistical Office. Slovenia is therefore ranked among the countries with a high proportion of fixed-term employment. According to this report, the concept of ‘fixed-term worker’ includes workers who have a contract of employment for a fixed period, those working through the student service, and those who perform contract work. 75 % of fixed-term workers are young workers under the age of 35.

There are no available statistics or findings on the impact of fixed-term work with regard to the gender pay gap.

<sup>1100</sup> Article 2 of the AIPET.

<sup>1101</sup> Judgment of the High Labour and Social Court, No. Pdp 20/2012, of 24 February 2012.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

On 5 April 2013 the amended labour legislation came into force. By reducing the cost of employment for an indefinite period of time by decreasing the difference in rights arising from an employment relationship for a fixed and indefinite period of time on the one hand, and reducing the financial disincentive for the use of fixed-term contracts on the other, the new ERA-1 pursues two of the essential objectives of the reform: reducing fragmentation and segmentation of the labour market and increasing labour -market flexibility. According to the ERA-1, simplified procedures for conclusion or termination of an employment contract will contribute to reducing the barriers to permanent employment. Furthermore, the cost of employment for an indefinite period of time has been reduced by introducing shorter notice periods and reduced amounts of severance pay in the event of termination of employment due to operational reasons or due to incapacity. In addition, severance pay will be introduced in the event of termination of fixed-term employment.

#### 2.1.2. Equal treatment

Apart from a general prohibition of discrimination in employment in the ERA-1<sup>1102</sup> and the AIPET<sup>1103</sup> there are no existing legal measures meant to combat discrimination and to implement the principle of equal treatment in relation to fixed-term work. The aforementioned legislation is applicable to all businesses and to all workers. There are cases of the Advocate of Equality showing that fixed-term contracts were not renewed for reasons connected to pregnancy, maternity, or parental leave. Since women have difficulties proving it, they rarely decide to take their case to court.<sup>1104</sup>

#### 2.1.3. Successive fixed-term contracts

A fixed-term employment contract can be concluded:<sup>1105</sup> for work which by nature is of limited duration; when replacing a temporarily absent worker; in the event of a temporarily increased volume of work; for employment of a foreigner or person without citizenship who has been granted a work permit for a definite period, except for a personal work permit; for managerial staff and executive workers who manage a business field or organisational unit at the employer and are authorised to conclude legal transactions or to make independent personnel and organisational decisions; for seasonal work; with a worker who concludes a fixed-term employment contract for reasons of preparation for work, vocational training or advanced study for work and/or education; for employment for a definite period of time due to work during the accommodation period for purposes of the final decision and certificate to be issued by the body competent in the procedure of recognition of qualifications pursuant to a special law; for performance of public works and/or inclusion in the measures of active employment policy pursuant to law; for preparation or realisation of work organised as a project; for work required during the period of introduction of new programs, new technology and other technical and technological improvements of the working process or for training workers; for elected and appointed officials and/or other workers related to the term of office of a body or official in local communities, political parties, trade unions, chambers, associations and their federations; and for the time of work transfer and other cases laid down by law and/or sector collective agreement. These conditions do not differ depending on the type of employer, but may differ depending on the size of employer. According to the ERA-1,

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<sup>1102</sup> Article 6 of the ERA-1.

<sup>1103</sup> Article 2 of the AIPET.

<sup>1104</sup> There is no access to this case law.

<sup>1105</sup> Article 54/1 of the ERA-1.

the sectoral collective agreement may stipulate that a smaller employer can conclude fixed-term employment contracts regardless of the aforementioned restrictions.<sup>1106</sup>

According to the ERA-1 the employer must not conclude one or more successive fixed-term employment contracts with the same worker and for the same job, the uninterrupted period of which would last longer than two years, except in cases laid down by law.

If a fixed-term employment contract is concluded in violation of the law or collective agreement, or if the worker continues to work even after the period for which he concluded the employment contract expires, it is assumed that the worker concluded an employment contract for an indefinite period of time.

Despite the aforementioned provisions, when the old labour legislation was in force, fixed-term contracts were abused due to easier termination of that type of employment contract and in order to avoid some rights given only to permanent employees. In fact, the majority of young workers, with a large percentage of women, were offered only fixed-term contracts. Unfortunately, there are no data or studies available in evidence of such findings. The new legislation, in force from April 2013, introduced some changes regarding rights and benefits of fixed-term workers in order to prevent the aforementioned abuse.

#### *2.1.4. Assessment*

With the newly adopted legislation Slovenia has regulated the situation of employees in regular employment for an indefinite period of time in relation to that of those in fixed-term employment, in order to reduce labour-market segmentation. Reducing the cost of employment for an indefinite period of time by decreasing the difference in rights arising from employment relationships for a fixed and for an indefinite period of time, and the financial disincentive for the use of fixed-term contracts are considered as strengths in national legislation. Weaknesses are no longer present in legislation itself, but in the inspection supervision of its implementation.

There are no forms of indirect sex discrimination and there are no examples of good practices worth following by other countries in national legislation.

## **2.2. Collective agreements**

There is no special collective agreement on fixed-term work. There are plenty of sectoral collective agreements that mostly copy provisions of the ERA-1 regarding fixed-term work. When concluding the ERA-1, employers' associations strived for greater labour-market flexibility and reduction of the cost of employees. On the other hand, trade unions strived to reduce labour-market segmentation and to increase the legal certainty for employees.

There are no forms of indirect sex discrimination and there are no examples of good practices worth following by other countries in national legislation

## **2.3. Case law**

There are no cases of national courts dealing with the interpretation of equal treatment in relation to fixed-term work. There are some cases worth mentioning, although not considered as landmark cases, of the High Labour and Social Court in relation to successive fixed-term contracts. One of them is a case where the Court granted a female worker who concluded a number of successive contracts of employment for a fixed term for the same job, whose continuous total duration was longer than two years, the right to transformation of the fixed-term employment into employment for an indefinite period of time.<sup>1107</sup> Furthermore, the Court in another case decided that the legitimate reason to conclude a fixed-term employment contract, in this case a temporary need for a particular worker, must still exist at its expiry.<sup>1108</sup>

<sup>1106</sup> Article 54/2 of the ERA-1. According to Article 5 of the ERA-1 a small employer is an employer who employs ten or fewer workers.

<sup>1107</sup> Judgment of the High Labour and Social Court, No. Pdp 781/2010 of 7 January 2011.

<sup>1108</sup> Judgment of the High Labour and Social Court, No. 1108/2006 of 7 June 2007.

The uncertain future of the employer's economic operation, which is bound by orders of its business partners, does not constitute a legitimate reason to conclude a fixed-term employment contract. By contrast, the Court held in two other cases<sup>1109</sup> that a series of successive fixed-term contracts, concluded due to the temporarily increased volume of work, does not mean that the fixed-term contracts were not concluded in accordance with labour legislation.

In recent years, the Advocate for Equality has dealt with some cases where women were employed on a fixed-term basis, whose contracts were not renewed after they became pregnant. Since they were employed because of a temporarily increased volume of work, the explanation for non-renewal of their contract was that the volume of work was no longer increased.<sup>1110</sup>

#### **2.4. Involvement of other parties**

Trade union federations and confederations play an important role in Slovenia in the process of negotiations with employers' associations and the Government about legislation in the area of employment, gender equality, social security etc. Recently, they played a positive role in the negotiations on the Draft ERA-1.

There are no particularly good practices initiated by the social partners or alternative private or public stakeholders that could be relevant in the area of indirect sex discrimination on the ground of fixed-term work.

### **3. Statutory social security and pension rights**

All fixed-term workers are included in the statutory social security schemes. They receive benefits according to their salary. There are no minimum requirements, thresholds or provisions that disadvantage fixed-term workers as regards working time for acquiring statutory social security or pension rights. In addition, there are no specific requirements to be met in order to be entitled to statutory leaves, which might exclude or disadvantage fixed-term workers.

There is no relevant case law on this issue.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

All workers, not only fixed-term or part-time workers, face difficulties when enforcing their rights due to a judicial backlog. Free legal aid is granted to individuals seeking to enforce their rights, who regardless of their financial situation and the financial situation of their families, without prejudice to their social status and social status of their families, could not afford the litigation and legal aid costs. Applications for legal aid must be filed at the competent district court. In this regard, the good organisation of trade unions is helpful, appointing representatives at a certain employer and providing a system of free legal aid (including representation before the courts) for their members.

There are no studies addressing the difficulties in obtaining access to legal redress regarding rights of part-time workers. Furthermore, there has been no increase in national case law regarding class actions initiated by associations, organisations or other legal entities that have a legitimate interest in this area. Remedies and sanctions in Slovenia are effective, proportionate and dissuasive and adequately compensate victims of violations of rights, regardless of the type of employment. Slovenia does not have a low-cost complaints system.

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<sup>1109</sup> Judgments of the High Labour and Social Court, Nos Pdp 757/2009 of 20 January 2010 and Pdp 758/2009 of 14 January 2010.

<sup>1110</sup> Since the abolishment of the Office for Equal Opportunities no further data are available.

All workers, regardless of the type of employment, may request judicial protection, with time limits, before the competent labour court if employers fail to fulfil their obligations arising from the employment relationship or if any of the workers' rights arising from their employment relationship are violated.

## 2. Vulnerability, multiple/intersectional discrimination

According to statistics, young women entering the labour market are at a particular disadvantage with regard to being employed on a fixed-term basis. This is because their fixed-term contracts are often not extended due to pregnancy, sickness or parental leave.

### SPAIN – María Amparo Ballester Pastor

## I. PART-TIME WORK

### 1. General information

The national statistics that have been used in this section are from the Active Population Survey (APS) (*Encuesta de Población Activa*).<sup>1111</sup> The APS relies on the individual statements of people and not on official data, so it also includes non-declared work.<sup>1112</sup> It could be expected that a certain part of part-time work in Spain might be non-declared work (although there are no data available regarding this).

The percentage of employees working part time at the end of 2012 was 15.3 %.<sup>1113</sup> The percentage of part-time working women in relation to the total of working women was 25.5 %. The percentage of part-time working men in relation to the total of working men was 6.8 %.

The professional activities in which part-time work was more common at the end of 2012 were the ones that did not require qualifications (33.5 %); those related to the tourism industry and to the care of dependent people (21.5 %); and administrative activities (14 %). The professional activities in which part-time work was less common were the managerial ones (4.4 %), the jobs requiring qualifications in industry and construction (5.1 %) and the qualified jobs related to machinery and installations (5.7 %).<sup>1114</sup>

The percentage of part-time working women that would like to work full time at the end of 2012 was 58 % (involuntary part-time work). The percentage of part-time working men that would like to work full time was 64.7 %. The percentage of women who chose to work part time at the end of 2012 because of family responsibilities was 14.18 %. The percentage of men who chose to work part time because of family responsibilities was 1.36 %.<sup>1115</sup>

In general, in Spain part-time work is not seen as specifically related to women with regard to family responsibilities because, according to the statistics referred to, part-time work is mostly involuntary, so it is the last choice for women as much as for men. However, the higher percentage of part-time working women in general indicates that they have more difficulties in accessing more valuable full-time jobs than men. When it is voluntarily chosen, part-time work is mostly done by women to take care of family members (14.18 %). Men hardly ever use part-time work for family reasons (1.36 %).

<sup>1111</sup> APS, <http://www.ine.es/daco/daco42/daco4211/epa0412.pdf>, accessed 23 March 2013.

<sup>1112</sup> The percentage of non-declared work or 'shadow economy' in Spain is considered to be approximately 22.5 % according to R. Murphy *Closing the European Tax Gap* (A report for the group of the progressive alliance of Socialists and Democrats in the European Parliament), [http://www.socialistsanddemocrats.eu/gpes/media3/documents/3842\\_EN\\_richard\\_murphy\\_eu\\_tax\\_gap\\_en\\_120229.pdf](http://www.socialistsanddemocrats.eu/gpes/media3/documents/3842_EN_richard_murphy_eu_tax_gap_en_120229.pdf), accessed 31 March 2013.

<sup>1113</sup> APS, <http://www.ine.es/jaxiBD/tabla.do>, accessed 23 March 2013. Eurostat data show that, in 2011, in Spain the percentage of part-time workers in relation to the total amount of workers was 13.8 %. <http://epp.eurostat.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00159&tableSelection=1&plugin=0>, accessed 26 March 2013.

<sup>1114</sup> APS, <http://www.ine.es/jaxiBD/tabla.do?per=03&type=db&divi=EPA&idtab=126>, accessed 23 March 2013.

<sup>1115</sup> APS, <http://www.ine.es/jaxiBD/tabla.do?per=03&type=db&divi=EPA&idtab=127>, accessed 23 March 2013.

## 2. Legislation, collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

According to Article 12 of the Workers' Statute (WS), a part-time worker is considered to be a worker who works a certain number of hours a day, a week, a month or a year which is smaller than that of a comparable full-time worker.<sup>1116</sup> A comparable full-time worker is a worker of the same company and work location, with the same type of employment contract and who performs identical or similar work. If this type of comparable full-time worker does not exist, a full-time worker would be considered to be a worker who works fewer hours than the maximum established in the applicable collective agreement or, by default, the maximum legally established.

Spanish regulations establish a system of overtime for part-timers called supplementary hours (*horas complementarias*), which gives the employer the right to require a part-time worker to perform an amount of extra hours up to a certain limit. There is a maximum number of supplementary hours that, failing a collective agreement, is fixed by law. In certain circumstances the obligation can be eliminated at the employee's request. The legal reform of the labour market that took place through Law 3/2012<sup>1117</sup> maintains the supplementary hours for part-time workers but adds, in favour of the employer, the possibility of requiring the part-time workers to work the same amount of overtime that a full-time employee would have to work. This increase of employer's prerogatives has been introduced to encourage the use of part-time work, which in Spain is used less frequently than in other countries.

Part-time work is facilitated for workers with family responsibilities in two ways:<sup>1118</sup> First, full-time workers have the right to become part-time workers when they have children younger than 8, when they have handicapped relatives for whom they are responsible, or when they have family dependents who, for health or age reasons, need to be taken care of (Article 37.5 WS). The time reduction cannot be less than one eighth or more than half of the previous working time, and will last as long as the circumstance that produced the right to time reduction. In this case the employee receives the salary that corresponds to the new reduced working time. If the employer were to dismiss the worker in this time-reduction situation, he/she would be obliged to reemploy the employee, since the dismissal would be null and void. Second, full-time workers have the right to reduce their working time when they have a newborn child that requires hospitalisation (Article 37.4*bis* WS), in which case the time reduction can be up to two hours a day; or when they have a child younger than 18 who has a serious illness such as cancer, terminal illness or any other sickness that is certified as serious by the public health services (Article 37.5 WS). In this event, the time reduction has to be, at least, half of the previous working time, and the social security system pays the difference between the new and the old salary, to guarantee that the worker receives the same amount of remuneration as before the time reduction motivated by the child's serious illness.

Currently, there is no relevant discussion in Spain about part-time work as a symptom of gender stereotypes.

#### 2.1.2. Equal treatment

There are no specific measures meant to combat discrimination and to implement the principle of equal treatment in relation to part-time work in Spain. There is a general recognition of equal treatment in Article 12 WS. The legal definition of part-time work does not have any direct or indirect effects in relation to gender discrimination. There are no exclusions of specific groups of part-time workers, the relevant legislation is applicable to all

<sup>1116</sup> [http://noticias.juridicas.com/base\\_datos/Laboral/rdleg1-1995.t1.html#a12](http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.t1.html#a12), accessed 23 March 2013.

<sup>1117</sup> Law 3/2012, of 6 June 2013, on urgent measures to reform the labour market. [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2012-9110](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9110), accessed 23 March 2013.

<sup>1118</sup> Both of them are regulated by Article 37 WS. [http://noticias.juridicas.com/base\\_datos/Laboral/rdleg1-1995.t1.html#a37](http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.t1.html#a37), accessed 23 March 2013.

businesses, there are no differences in relation to specific rights, and it is not allowed to establish different conditions for part-time workers.<sup>1119</sup>

### 2.1.3. Organisation of working time

Currently in Spain there are no measures to facilitate the development of part-time work on a voluntary basis or to contribute to the flexible organisation of working time. Rather the opposite is true: in 2012 (by Law 3/2012) the organisational employer's power in relation to working time of part-time workers was increased.

Part-time workers that have worked for the company for at least three years have a preferential right to occupy an available full-time job. Workers that were initially contracted full time and that afterwards had voluntarily become part-time workers have a preferential right to an available full-time job as well. The remaining part-time workers do not have a preferential right to become full-time workers but their applications have to be taken into consideration by the employer, who is obliged to argue his/her decision. Employers have the obligation to inform part-time workers about any full-time position that becomes available.<sup>1120</sup>

Any employer's decision in relation to the described rights can be submitted for scrutiny by a Court.

Workers have certain influence on their working hours because the time reduction for family responsibilities takes place whenever they decide (Article 37.6 WS). However, Law 3/2012 has reduced employees' prerogatives in this respect in two ways: First, the reduction of working time that can be requested based on parental reasons has to be on a daily basis.<sup>1121</sup> This means that the worker will not have the right to accumulate the daily reduction of time over a week, and use it on only one day of that week, as was possible before. Second, for the first time, the possibility has been introduced for collective agreements to establish the criteria for the concrete determination of working-time reduction. The new legislation means that the negotiators can decide on the timeframe in which the reduction of working time has to take effect.

Upon returning from maternity leave there is a right to work reduced hours to facilitate work and family responsibilities and to take care of elderly relatives, in the sense established in Article 37.5 WS, which applies at any time during the contractual relationship, including upon return from maternity leave.

### 2.1.4. Assessment

The strengths of the Spanish regulations are the following (they could be considered 'good practices'): (i) Part-time workers that have worked for the company for at least three years have a preferential right to occupy an available full-time job; (ii) Full-time workers have the right to become part-time workers when they have certain family responsibilities (Article 37.5 WS), in which case if they are unfairly dismissed the dismissal would be null and void; and (iii) Full-time workers have the right to reduce their working time when they have a child younger than 18 who has a serious illness in which case the full-time remuneration would be guaranteed by the social security system.

The main weakness of Spanish regulations is that part-time workers are subjected to a system of work organisation in which they are at the disposal of the employer. This is true not only because they can be required to work supplementary hours, as well as ordinary overtime (introduced by Law 3/2012) but also because their working time can be altered at any time (as in full-time contracts) through a mechanism called *distribución irregular de la jornada* (irregular distribution of the work day), an employer's prerogative that was strengthened in the 2012 legal reform. This regulation could constitute indirect sex discrimination since full-

<sup>1119</sup> This prohibition is expressly referred to in Article 12 WS.

<sup>1120</sup> All information in this Paragraph pertains to preferential rights derived from Article 12 WS.

<sup>1121</sup> See generally: M.A. Ballester-Pastor 'Legal Effects of the Economic Crisis on Gender Equality in Spain: Effects on the Right to Reconcile Work and Family after the 2012 Labour Law Reform' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* No. 2/2012, November 2012, European Commission, at pp. 20-30, available on [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2012-2\\_web\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-2_web_final_en.pdf), accessed 11 July 2013.



time workers are not subjected to a similar intensive availability requirement (full-time workers do not have supplementary hours). Another important weakness is the fact that collective agreements can specify the time at which the working-time reduction for family responsibilities can take place.

Spanish legislation is not ‘gender sensitive’ in addressing gender stereotypes as an underlying matter.

## 2.2. Collective agreements

### 2.2.1. Policies

It is unusual for collective agreements in Spain to address the topic of part-time work. Only a limited number of company-level agreements refer to the reduction of working time for family reasons, increasing the benefits set out in legislation.<sup>1122</sup> However, the number of these provisions is very limited. With regard to part-time work legislation, workers’ representatives in Spain fear that a policy that favours part-time work could lead to the substitution of full-time jobs by part-time jobs.

### 2.2.2. Equal treatment

Collective agreements do not regulate part-time work with regard to gender discrimination.

### 2.2.3. Organisation of working time

Collective agreements do not refer to the organisation of working time which should facilitate the development of part-time work on a voluntary basis.

### 2.2.4. Assessment

The main weakness of the national collective agreements with regard to part-time work is that this subject is not addressed.

## 2.3. Case law

### 2.3.1. Cases/opinions of equality bodies

In Spain the only case related to indirect discrimination of part-time workers was related to statutory old-age pension schemes. In *Elbal Moreno*,<sup>1123</sup> the part-time worker concerned would have needed more than 100 years to acquire access to the old-age pension established in Article 160 of the Spanish General Law on Social Security (*Ley General de Seguridad Social*).<sup>1124</sup> Under these regulations, the Spanish Social Security System required part-time workers to contribute to the old-age pension system when some of them were never going to acquire access to any old-age pension. More recently, the Spanish Constitutional Tribunal reached the same conclusion, taking as reference the arguments of the CJEU presented in *Elbal Moreno*.<sup>1125</sup> The Spanish Constitutional Court fully acknowledged the conception of indirect discrimination applied in this case. However, the Spanish courts faced a problem: The specific provision that had required five hours of work to be completed in order for it to be considered one part-time working day was abolished, with no alternative applicable rule discernible. Royal Legislative Decree 11/2013 of 2 August 2013 established the minimum time of work required for access to pensions will be reduced proportionately depending on the duration of the day worked by the part-time worker. From now on, the minimum working time required in order for part-time workers to obtain access to retirement pensions, will depend on a new concept called ‘partiality coefficient’ (*coeficiente de parcialidad*). This

<sup>1122</sup> F. Baró *Genere i conciliació de la vida laboral als convenis col·lectius de Catalunya* (2013 General Report on gender issues in Catalan collective agreements), Barcelona, 2013.

<sup>1123</sup> Case C-385/11 *Elbal Moreno* [2012] (not yet published).

<sup>1124</sup> The content of this Article is reproduced in the text of the *Elbal Moreno* Case, which can be found on <http://curia.europa.eu/juris/document/document.jsf?text=&docid=130250&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=873038>, accessed 23 March 2013.

<sup>1125</sup> Constitutional Tribunal Judgment 61/2013 of 14 March 2013.

measures the proportion of working time of a part-time worker in relation to a comparable full-time worker. The minimum working time required for pensions will be reduced according to this coefficient.

In other previous cases, the Spanish Constitutional Tribunal had recognised the fundamental nature of the right to reconciliation of work and family life.<sup>1126</sup> This recognition is particularly important because it means that every time that a worker asserts his/her right to reconciliation in legal proceedings (e.g. when asking for a time ‘adjustment’ which is not a time ‘reduction’ in the sense that has been explained above), the court should respond by taking into consideration the various conflicting rights (basically, the employee’s right to reconciliation and the employer’s right to organise the labour force in the company).

There are no cases in Spain where CEDAW Article 5a has been used in the legal argumentation.

### 2.3.2. *Assessment*

The attitude of Spanish courts and judges with regard to indirect sex discrimination related to part-time workers seems adequate. It is quite significant that they are dedicating the time and effort to submit preliminary questions to the CJEU, such as the one that gave rise to *Elbal Moreno*.

## 2.4. *Involvement of other parties*

Such involvement does not exist or is not sufficiently relevant.

## 3. Statutory social security and pension rights

### 3.1. *Exclusions*

There are no minimum requirements, thresholds or provisions that disadvantage part-time workers as regards working time for acquiring statutory social security or pension rights, apart from those that gave rise to *Elbal Moreno*.

Currently, there are no specific problems that part-time workers face with regard to unemployment benefits because, since the entry into force of the Organic Law of Effective Equality between women and men,<sup>1127</sup> the salary that is taken as reference to determine unemployment benefits in the event of working-time reduction because of family reasons is the full-time salary that was paid before the working-time reduction.<sup>1128</sup> There are no specific requirements in order to be entitled to statutory leaves that might disadvantage part-time workers.

### 3.2. *Assessment*

After the correction of *Elbal Moreno*, Spanish social security legislation does not seem to produce indirect sex discrimination with regard to part-time workers. However, this judgment of the CJEU has opened up a debate about the subject in Spain.

## 4. Self-employment

Self-employed persons working part time could face difficulties accessing financial services, given that the expected income that could be used as a guaranteed income is lower, but there is no actual information in this respect.

<sup>1126</sup> Constitutional Tribunal Judgments 3/2007 of 15 January 2007, and 26/2011 of 14 March 2011. Both of them linked the right to reconcile work and family life with the right not to be discriminated against (Article 14 of the Spanish Constitution) and with the right to preserve family life (Article 39 of the Spanish Constitution).

<sup>1127</sup> Law 3/2007.

<sup>1128</sup> Article 37.5 WS.

## 5. Access to and supply of goods and services

There is no information available on this issue.

## 6. Are there any gaps in national law?

### 6.1. Gaps in the area of (access to) employment

#### 6.1.1. Recruitment process

Women are overrepresented in the professional sectors that have the larger numbers of part-time jobs (the tourism industry, care of dependents and administrative activities) but the author does not know of any initiatives to change the organisation of employment at these workplaces.

In managerial positions there are not many part-time jobs, but all workers in Spain have the right to working-time reduction for family reasons (Article 37.5 WS) including those in managerial jobs, so the organisation of employment would have to be adjusted to part-time work if a working-time reduction for this reason were requested.

#### 6.1.2. Employment conditions

There is no information available on this issue.

#### 6.1.3. Termination of the employment contract

The unjustified dismissal of a worker who has requested a working-time reduction for family reasons (Article 37.5 WS) would be null and void. There is no information available about part-time workers being forced out of employment because they want to work part time, and neither does the author have any information about workers being forced out after application for an increase in working time.

## 6.2. Gaps in other areas

There is no information available on this issue.

## II. FIXED-TERM WORK

Note: The dimension of temporary contracts in Spain cannot be adequately interpreted if only fixed-term contracts are taken into account. Therefore, the more comprehensive terms ‘contracts of limited duration’ or ‘temporary contracts’ will be used below.

### 1. General information

According to the National Institute of Statistics (*Instituto Nacional de Estadística*),<sup>1129</sup> in 2011 the total percentage of people working on temporary contracts was 25.3 %. The percentage of female workers with temporary contracts in relation to the total number of female workers was 26.6 %. The percentage of male workers with temporary contracts in relation to the total number of male workers was 24.2 %. The percentage of female workers with temporary contracts in relation to the total number of temporary workers was 49.4 %.

The large number of temporary contracts is usually considered to be a really serious problem in Spain. In fact, most of the labour-law reforms of the last two decades have had as their objective to lower the percentage of temporary contracts. The participation of men and women in the total number of temporary contracts is similar, however, which explains why in Spain temporary contracts are not considered a gender issue.

<sup>1129</sup> [http://www.ine.es/ss/Satellite?L=0&c=INESeccion\\_C&cid=1259925461713&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param3=1259924822888](http://www.ine.es/ss/Satellite?L=0&c=INESeccion_C&cid=1259925461713&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param3=1259924822888), accessed 26 March 2013.

In 2010, temporary workers received an average salary that was 32 % lower than the salary of non-temporary workers.<sup>1130</sup>

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

The legal regulations regarding temporary contracts in Spain can mostly be found in Article 15 WS.<sup>1131</sup> According to this Article the possibility of contracting a worker for a limited period of time is permitted in Spain in three cases: (i) when the activity is concrete and autonomous by nature but the specific time of its completion is undetermined (*contrato de obra*); (ii) when the circumstances of the market or the accumulation of tasks in a company requires a temporary contract, in which case the day of termination of the contract has to be expressly included (*contrato de eventuales*); and (iii) when a position has to be covered temporarily because the original worker is absent for legal reasons (suspension of contract) or because it is part of the procedure to definitively occupy a certain position (in both cases this contract is called *contrato de interinidad*). There are two other types of temporary contract in Spain whose purpose is not to satisfy a need for temporary labour, but simply to promote employment. The first one is the contract for the promotion of employment of workers with disabilities.<sup>1132</sup> The second one is the contract for the promotion of young workers' first employment.<sup>1133</sup>

#### 2.1.2. Equal treatment

Article 15 WS expressly provides that temporary workers deserve the same treatment as workers on a permanent contract. Spanish Courts of Justice have applied this provision quite often, for instance in order to recognise the same seniority rights for temporary workers as those that are established in collective agreements for workers on a permanent contract.<sup>1134</sup>

No data are available about specific problems of women relating to temporary contracts. No data are available about fixed-term contracts not being renewed for reasons connected to pregnancy, maternity or parental leave. Theoretically, if a court considered that maternity was the reason for non-renewal (in a *prima facie* case of discrimination) the termination of the temporary contract would be declared to be null and void for gender-discriminatory reasons (in which case the employer would be obliged to reinstate the worker).<sup>1135</sup>

#### 2.1.3. Successive fixed-term contracts

There is a maximum time limit for how long a person may be hired on contracts of limited duration. This is regulated in Article 15.5 WS and according to this Article a temporary contract would become a permanent contract if the relevant worker has been contracted by the company on several temporary contracts for more than 24 months in a period of 30 months.<sup>1136</sup> This is an automatic consequence, and it does not require any evidence that the temporary contract did not have temporary reasons.

<sup>1130</sup> According to the Wage Structure Survey (*Encuesta de Estructura Salarial*) <http://www.ine.es/prensa/np720.pdf>, accessed 26 March 2013. No other more recent data are available, since the Survey is done every four years.

<sup>1131</sup> [http://noticias.juridicas.com/base\\_datos/Laboral/rdleg1-1995.t1.html#a15](http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.t1.html#a15), accessed 31 March 2013.

<sup>1132</sup> Additional Provision 1 of Law 43/2006, 29 December 2006, [http://noticias.juridicas.com/base\\_datos/Laboral/143-2006.html#da1](http://noticias.juridicas.com/base_datos/Laboral/143-2006.html#da1), accessed 31 March 2013.

<sup>1133</sup> Article 12 of Royal Decree 4/2013, 22 February 2013, [http://noticias.juridicas.com/base\\_datos/Laboral/rd14-2013.html#a12](http://noticias.juridicas.com/base_datos/Laboral/rd14-2013.html#a12), accessed 31 March 2013.

<sup>1134</sup> Supreme Court Judgment of 27 October 1998, *Recurso* 1902/1998 and Supreme Court Judgment of 14 February 2013, *Recurso* 4231/2011.

<sup>1135</sup> Tribunal Constitutional Judgment 173/1994 of 7 June 1994. <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/2690>, accessed 31 March 2013

<sup>1136</sup> See [http://noticias.juridicas.com/base\\_datos/Laboral/rdleg1-1995.t1.html#a15](http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.t1.html#a15), accessed 31 March 2013.

In addition to this regulation, if any of the temporary contracts in a series of contracts have been concluded without a genuinely temporary reason,<sup>1137</sup> the contract will become permanent. This means that any following temporary contract would not have a temporary reason either. In these circumstances, if a future temporary contract were terminated, it would be declared an unfair dismissal.<sup>1138</sup>

#### 2.1.4. Assessment

The main strength of Spanish legislation on temporary contracts (which could be an example of ‘good practice’) is the protection that Article 15.5 WS provides to counteract successive temporary contracts (see above). Its main weaknesses are the following: First, the legal criteria to allow temporary contracts are configured in a very ambiguous way, which favours abuse; second, Spanish legislation does not include any deterrents in order to stop this abuse, since the penalty for a wrongful temporary contract is payment by the employer of a compensation whose concrete amount is related to the worker’s seniority in the company. Temporary workers usually do not have a very long period of seniority, so this system of compensation fails to promote the correct use of temporary contracts. The recent labour-law reform (Law 3/2012) has lowered the amount to be paid in the event of unfair dismissal, so it has also lowered the compensation for wrongful temporary contracts.<sup>1139</sup> In addition, many temporary workers do not dare sue their employers because they do not want to lose their chances to be called in on other temporary contracts in the future.

Spanish legislation regarding temporary contracts does not contain any indirect sex discrimination, given that the percentage of women with temporary contracts is not relevantly higher than that of men.

#### 2.2. Collective agreements

Collective agreements in Spain can specify the criteria to allow temporary contracts but they cannot create new criteria for contracts of limited duration that are different from the legal ones.<sup>1140</sup> The collective agreement for the construction sector has used this prerogative and has regulated a specific form of contract for a specific job (*contrato de obra*) called ‘fixed contract for a specific job’ (*contrato fijo de obra*).<sup>1141</sup> This contract allows the worker to be assigned several jobs in the company during a period of three years. It even allows the worker to continue providing services beyond the period of three years if the last of these jobs has not yet been completed.<sup>1142</sup>

Some collective agreements have attempted to promote permanent contracts and discourage temporary ones. They could be considered ‘good practices’ or strong points in these collective agreements. The instruments that are commonly used for this purpose are a ban on temporary contracts for certain activities<sup>1143</sup> or the automatic transformation of a temporary contract into an indefinite one when the worker remains in the company for a certain period of time.<sup>1144</sup>

<sup>1137</sup> For example, a general need for an ordinary permanent worker, rather than a temporary need for work.

<sup>1138</sup> Supreme Court Judgment of 3 April 2007, *Recurso* 290/2006.

<sup>1139</sup> Law 3/2012 of 6 July 2012, [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2012-9110](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9110), accessed 1 April 2013.

<sup>1140</sup> Supreme Court Judgment of 7 March 2003, *Recurso* 36/2002.

<sup>1141</sup> A commentary regarding this *contrato fijo de obra* can be found on <http://blog.efl.es/actualidad-juridica/regulacion-del-contrato-fijo-de-obra-en-el-nuevo-convenio-del-sector-de-la-construccion>, accessed 1 April 2013.

<sup>1142</sup> The law allows maintaining the contract for more than 3 years in order to finish the specific work.

<sup>1143</sup> Spanish Courts have considered this collective agreements’ regulation as legal. Supreme Court Judgment of 4 October 2007, *Recurso* 1505/2006.

<sup>1144</sup> Spanish Courts have considered this collective agreements’ regulation as legal. Supreme Court Judgment of 11 November 1998, *Recurso* 1601/1998.

### 2.3. Case law

Most of the judgments of the Spanish courts on temporary contracts deal with the existence or absence of criteria for temporary hiring. With respect to successive temporary contracts, Spanish courts have established that, if any of the temporary contracts in a series has been concluded without a temporary reason, the worker must be considered as working on a permanent contract. This could be considered an example of ‘good practice’. There are no contradictions between Spanish judgments and the case law of the CJEU.

### 2.4. Involvement of other parties

Trade unions play a positive role in the field of temporary contracts in Spain since they try to reduce the number of temporary contracts through collective agreements.

## 3. Statutory social security and pension rights

Spanish social security legislation does not have any specific provisions that could have a negative effect on temporary workers. However, recent legal reforms have increased the difficulties that people with irregular professional careers may have in accessing a retirement pension in the future, given that more working time will be required.<sup>1145</sup> The labour participation rate of Spanish women is lower than that of men,<sup>1146</sup> which may in part be the consequence of women leaving the labour market to take care of dependents. Since women’s careers are more irregular than those of men it may be expected that women would be the main group affected by the legal reform of the social security system. Some ‘trade-offs’ have been agreed, e.g. giving mothers 112 days of work for the purposes of a future pension.<sup>1147</sup> However, it is doubtful whether this measure will effectively serve to counteract the new legislation’s indirectly discriminatory effects on women.

## III. HORIZONTAL PROVISIONS

### 1. Effectiveness

There may currently be more difficulties for people with lower income to enforce their rights, since new legislation has been passed that increases the cost of judicial proceedings in Spain.<sup>1148</sup> This directly affects part-time workers and temporary workers, since their salaries are lower (see above for temporary workers). Spanish legislation provides financial support to individuals seeking to enforce their rights if their annual income is between EUR 14 910 and EUR 22 365 (for 2013, depending on the composition of the family).<sup>1149</sup> However, this measure might not be sufficient to guarantee that every Spanish citizen has effective access to justice.<sup>1150</sup>

Compensation for illegal temporary contracts might not constitute a sufficient deterrent, as described above (assessment in Section 2.1., part II.).

<sup>1145</sup> Article 4 of Law 27/2011, on update, adaptation and modernisation of the social security system. [http://noticias.juridicas.com/base\\_datos/Admin/127-2011.html#a4](http://noticias.juridicas.com/base_datos/Admin/127-2011.html#a4), accessed 6 April 2013.

<sup>1146</sup> According to APS, <http://www.ine.es/daco/daco42/daco4211/epa0412.pdf>, accessed 6 April 2013.

<sup>1147</sup> This only applies to statutory pensions. Additional Provision 44 of General Law of Social Security, [http://noticias.juridicas.com/base\\_datos/Admin/rdleg1-1994.t3.html#da44](http://noticias.juridicas.com/base_datos/Admin/rdleg1-1994.t3.html#da44), accessed 6 April 2013.

<sup>1148</sup> Law 12/2012 of 20 November 2012 on Court fees, [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2012-14301](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-14301), accessed 6 April 2013.

<sup>1149</sup> Article 3 of Law 1/1996 of 10 January 1996 on Free Legal Assistance, [http://noticias.juridicas.com/base\\_datos/Admin/11-1996.html#a3](http://noticias.juridicas.com/base_datos/Admin/11-1996.html#a3), accessed 6 April 2013.

<sup>1150</sup> The new law on judicial fees has been widely criticised in Spain. <http://www.rtve.es/noticias/20130401/mas-171000-personas-piden-gallardon-derogue-ley-tasas-judiciales/627901.shtml>, accessed 6 April 2013.



## 2. Vulnerability, multiple/intersectional discrimination

In Spain domestic work is mostly done by immigrant women. These workers are particularly vulnerable because many of them are non-declared workers and are therefore left unprotected by labour law and social security.<sup>1151</sup>

### SWEDEN – Ann Numhauser-Henning

## I. PART-TIME WORK

### 1. General information

Generally speaking, part-time work started to increase in Sweden in the early 1970s, as a result of women increasingly taking part in the open labour market. It was – and still is – therefore related to the labour market integration of women and more specifically to the reconciliation of (women's) paid work and family responsibilities. The rate of part-time employment among women peaked in the early 1990s.

In 2011 82 % of the women aged 20-64 participated in the labour market, compared to 89 % of the men. 77 % of these women were employed whereas 6 % were unemployed. The equivalent figures for men were 83 % in employment and 7 % unemployed.

53 % of the women aged 20-64 worked full time (i.e. 35 hours or more per week) whereas 25 % worked part time (21 % 'long part-time' amounting to 20-34 hours per week, and, 4 % 'short part-time' amounting to 1-19 hours per week). Among men, 74 % worked full time whereas 8 % worked part time (6 % long part-time and 2 % short part-time).

Among the women aged 20-64 in gainful employment 68 % worked full time, while 32 % worked part time. The corresponding figures for men were 90 % and 10 % respectively.

For women, the reasons for working part time, on a decreasing scale, are (1) not being able to find a suitable full-time job, (2) the care of children, and (3) not wanting to work full-time, no reasons given. Other, less significant, reasons are illness, studies, having several jobs and the care for elderly family members.

With regard to the pay gap, women's wages in 2011 amounted to 93 % of that of men 'weighted' for full-time/part-time, sector and occupational group. 'Un-weighted', women's wages amounted to only 86 % of that of men. The largest un-weighted pay differentials are found in the county-council sector, where women's wages amount to only 74 % of that of men. In the private sector the equivalent figure is 87 %.<sup>1152</sup>

The percentage of employees (both sexes) working part time in 2011 was 23 %.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

Part-time work, generally speaking, is not an issue in Sweden. It is common knowledge – see above – that more women than men work part time and this is mainly discussed in relation to the parental benefits scheme. Discussions aim to make these rights excessively individual to balance out the 'unequal' use of it – some 75 % of the benefits are used by mothers. (Women's part-time work developed prior to the introduction of the parental benefits scheme, however.)

<sup>1151</sup> An analysis of the situation of migrant women in domestic service in Spain is provided by M. Diaz, 'Mercado de trabajo, género e inmigración' in: *Mujeres migrantes, viajeras incansables*, Bilbao, 2006, <http://es.scribd.com/doc/9370132/12/Sobre-Harresiak-Apurtuz#page=59>, pp. 55-74, accessed 6 April 2013.

<sup>1152</sup> Source: Statistics Sweden *Women and Men in Sweden 2012*. This applies to all figures in this section.



The (1995:584) Parental Leave Act provides possibilities to work part time (up to 75 %) for any parent of a child until the age of 8 years. This right is ‘supported’ by the Parental Benefits Scheme regulated in the Social Insurance Code (2010:110) offering extremely flexible social benefits, also on a part-time basis.

The Part-Time Work Directive was implemented by Article 25a of the (1982:80) Employment Protection Act providing a right to increased working hours for those in part-time employment when compatible with employer interests. The right to non-discrimination is implemented by the (2002:293) Act prohibiting discrimination of those in part-time and fixed-term employment.

### *2.1.2. Equal treatment*

The non-discrimination ban in the Part-Time Work Directive was implemented by the special Act (2002:293) prohibiting discrimination of those in part-time and fixed-term employment. To the extent that differential treatment of part-timers amounts to indirect sex discrimination it is also covered by the Discrimination Act (DA) (2008:567) and its ban on discrimination in working life, inter alia on the ground of sex (Chapter 2 Section 1 of the DA).

The 2002 Act applies to all part-time (and fixed-term) workers without exceptions. It also applies to all employers regardless of size, etc.

Article 2 of the 2002 Act contains the definition of part-time worker: a worker whose normal working time during a week or another period shorter than one year is shorter than that of a comparable worker who, according to agreement or law, works full time.

Article 3 contains the ban on direct discrimination: An employer must not disfavour a part-time worker applying less favourable wage- or employment conditions than those applied to a comparable full-time worker, if the employer cannot show that this is not related to the part-time status of the worker. The ban does not, however, apply if the conditions are justified by objective reasons.

Article 4 contains a ban on indirect discrimination phrased in accordance with EU directives.

### *2.1.3. Organisation of working time*

There are not really any provisions or measures in Sweden to facilitate the development of part-time work apart from those related to childcare – there was never any need for this given the fact that as early as in the 1970s Swedish part-time rates were among the highest from an international perspective. Working time is regulated by the Working-Time Act (1982:673), extensively providing for collective agreements regarding the organisation of working time allowing for adjustment to business needs. Flexible organisation of working time is known to widely exist on a voluntary basis on the Swedish labour market.

There is no such thing as an actual ‘right’ to work part time or a right to work full time. Article 25a of the Employment Protection Act (1982:80), however, provides for a priority right to increased working time (from a small part-time to a larger part-time job or to a full-time position) for any part-time worker. The worker has to apply for increased working time and be sufficiently qualified for the work in question. The right is not unconditional, however. It only applies to the extent that the employer’s labour needs are satisfied by employing the worker in question for more hours. The priority right to extended working hours only applies to the workplace in question – not to all the activities of the employer. Should there be various workers requiring extended working hours, the last-in-first-out principle will apply in reverse.

Labour Court Case 2009 No. 9 concerned a part-time worker in a retail store (shoes) requesting extended part-time work (from 24 to 30 hours a week). She was sufficiently qualified and the petition was made when a colleague, working 30 hours a week, left an opening. Nevertheless, she was denied increased working hours. A ‘re-organisation’ at the workplace eliminated the position of 30 hours a week, leaving a total of three workers at 24 hours a week and somewhat shortened hours for the workplace in total. Employer interests requiring shortened hours and the workers being placed ‘on equal footing’ – each working 24 hours a week – were balanced against the interests of the individual worker, who won the

case. This interpretation of Article 25a of the Employment Protection Act was confirmed by Labour Court Case 2012 No. 41, also concerning the retail business.

The decision not to grant extended working hours may be contested in the same way as other employment rights issues – ultimately before the Labour Court (compare below).

There is also a general right for parents of children until the age of 8 to work shorter hours, regulated in Article 7 of the Parental Leave Act (1995:584). This right naturally applies also to employees returning from maternity leave. In addition to this general right to shortened hours until the child turns 8, the Act – in combination with the public parental benefits scheme regulated in the Social Security Code (2010:110) – offers a very flexible system of part-time or full-time leave during a maximum of 480 (full) days for each child.

Apart from the special social benefits – with a maximum of 100 days of benefits – provided to relatives taking care of a severely ill person regulated in Chapter 47 of the Social Security Code, there is no general right to reduced working hours based on a need to care for elderly relatives.

#### *2.1.4. Assessment*

The strength of Swedish legislation is no doubt the right to shorter working hours when the relevant worker has children. At the same time this may provide ‘a trap’ for women traditionally taking on the larger part of family responsibilities. One may – as is done in Sweden – question the basic design of the public parental benefits scheme, as it is based not on individual rights but on a family basis, the latter being rather uncharacteristic of Swedish welfare rights, generally speaking. Reforms have successively been carried out, introducing first one then two non-transferable ‘daddy months’ and then a special ‘gender equality bonus’ (see further the Gender Equality Bonus Act (2008:313)<sup>1153</sup>), but the general basic design remains the same.

As case law is concerned, the cases concerning the right of part-time employees to extended working hours provided in Article 25a of the Employment Protection Act can, as applied, be criticised regarding the employer’s right to organise his/her business in a certain way implying certain part-time structures – i.e. certain part-time positions – without really scrutinising the need for this. This is, however, not surprising given the general respect for employer prerogatives in Swedish labour law.

## **2.2. Collective agreements**

### *2.2.1. Policies*

As mentioned above, in practice the Swedish labour market, and therefore also the social partners, opened up to part-time work as early as in the 1970s when great numbers of women entered the labour market. The Swedish labour market is highly sex-segregated, women dominating in public, and specifically municipal, employment and part-time work was therefore introduced early there. To the author’s knowledge there are no special collective agreement regimes on this issue, however. The number of working hours for the individual is based on the individual employment contract and generally speaking there are no restrictions on such individual agreements regarding part-time work in collective agreements. As reflected in Labour Court Case 2007 No. 52 – dealing with certain civil aviation workers – a collective agreement may well confirm this right to an individual agreement on part-time solutions, giving some additional indications aiming to facilitate part-time work in relation to steady wages and occupational insurance schemes, however.

There are numerous collective agreements in Sweden – also at national level – and within the format of this report it is impossible to go into any detail.

### *2.2.2. Equal treatment*

Generally speaking, the author has no knowledge of any special regulations for part-timers as compared to full-time workers in Swedish collective agreements – compare, however, Section

<sup>1153</sup> See also the National Insurance Board’s Guidelines 2011:2 version 2.

2.2.1. above. Special rules on working time and remuneration are frequent, however. For instance, in the municipal sector agreement (*Allmänna bestämmelser*) extra hours up to full time are remunerated at 120 % of ordinary wages, whereas ‘overtime proper’ (exceeding ordinary full-time hours) is paid at a rate of 180-240 %. Before the Part-Time Work Directive there were some special rules concerning the right to occupational pension schemes for ‘short’ part-timers within the municipal sector – these have now been eliminated to meet the equal treatment requirements.

#### 2.2.3. *Organisation of working time*

There are numerous collective agreements in Sweden, also at national level, and within the format of this report it is impossible to go into any detail – compare, however, Sections 2.2.1. and 2.2.2. above. To the author’s knowledge, however, such schemes are not frequent.

#### 2.2.4. *Assessment*

There is nothing to report here.

### 2.3. *Case law*

#### 2.3.1. *Cases*

Only two cases have been presented to the Swedish Labour Court concerning equal treatment of the part-time and/or fixed-term employed. The author would not refer to them as ‘landmark’ cases but one of them, concerning part-time employment, will nevertheless be presented here (and the other in the fixed-term work section below).

Labour Court Case 2008 No. 32 concerned three part-time employees (one also employed for a fixed term) working on the design of advertisements. Pay discrimination on the grounds of part-time (and fixed-term) work was asserted since these employees were paid lower wages than several other employees (two women and one man) working on a full-time basis and performing the same type of work. (All three alleged victims were women but the case was not argued in terms of indirect sex discrimination.) Discrimination was not found to be at hand in any of the three cases, however (neither on the grounds of part-time work nor on the grounds of fixed-term work), given that the comparators were not regarded to be in a ‘comparable situation’. The comparators were all found to be more qualified given their longer work experience and/or higher personal qualifications justifying their higher wages although they, basically, performed equal work.

The possibilities for workers to influence working time and working hours in accordance with their needs in relation to family responsibilities were extensively described in Section 2.1.3. above on the organisation of working time.

To the author’s knowledge, there has been no use of CEDAW Article 5a in the legal argumentation of Swedish courts (or the Equality Ombudsman).

#### 2.3.2. *Assessment*

The only case decided by the Labour Court concerning discrimination of part-timers seems to be in accordance with the case law of the Court of Justice of the EU.

### 2.4. *Involvement of other parties*

There is nothing to report here.

## 3. *Statutory social security and pension rights*

### 3.1. *Exclusions*

Swedish statutory pensions are based on the average earnings throughout working life – only the income is relevant, not whether it is earned in part-time, full-time, temporary or permanent positions. Income-related pension is earned only on the basis of a yearly income

amounting to at least 42.3 % of the so-called ‘price amount’ (*prisbasbelopp*), about EUR 5 058 (SEK 43 000) a year. This threshold would leave extremely ‘short’ part-timers and/or very short-term fixed-term employees without any pension points for the year in question. (There is, however, a right to a so-called guaranteed pension whenever resident in Sweden, regardless of income.)

There is also a threshold income (before taxes) for the right to social sickness benefits according to the Social Security Code – 24 % of the price amount (compare above). This is quite a low threshold and therefore does not really exclude part-time workers or fixed-term workers, generally speaking.

The right to unemployment benefits is regulated in the Act on Unemployment Benefits (1997:238). A general requirement for income-related unemployment benefits is that you are available for the labour market for employment during – as a minimum – 3 hours a day and 17 hours a week. Also a qualification criterion applies: you must have had paid work for at least 80 hours a month for six months during the last year, or, for 480 hours within 6 months working a minimum of 50 hours a week each of these months during the last year. This excludes people working ‘short’ part time from the unemployment benefits scheme. Situations may also occur where, for example, unemployed people lose their benefits when they accept a part-time job. The rules are very complex and interact with the parental benefits scheme, and it is impossible to describe all details here.

### **3.2. Assessment**

The restrictive scope of the unemployment benefits scheme as regards ‘short’ part-time work may possibly be criticised from an EU law perspective.

## **4. Self-employment**

The author has no information on this issue.

## **5. Access to and supply of goods and services**

The author has no information regarding any such practices – part-time work has long been viewed as something highly normal in Sweden. (Financial services – such as loans – are known to frequently be restricted to those in permanent positions, however.)

## **6. Are there any gaps in national law?**

### **6.1. Gaps in the area of (access to) employment**

#### *6.1.1. Recruitment process*

There is nothing to report here.

#### *6.1.2. Employment conditions*

There is nothing to report here.

#### *6.1.3. Termination of the employment contract*

There is nothing to report here.

### **6.2. Gaps in other areas**

There is nothing to report here.

## II. FIXED-TERM WORK

### 1. General information

16 % of all employed persons aged 15-74 had temporary employment in 2011 – the percentage among men was 14.5 % whereas the percentage for women was 18.3 %. The percentage for the very young was extremely high: 74.5 % among men aged 16-19 and 79 % among women in the same age bracket.<sup>1154</sup> Generally speaking, the rate of fixed-term employment in Sweden has increased from approximately 10 % in the mid-1980s to a current 16 %, with a peak in 1997 of 18 % when the legal regime regarding the access to fixed-term employment was weakened. The legal scope for fixed-term employment has been rather at the centre of employment protection discussions ever since the introduction of the first Employment Protection Act, as long ago as 1974. The ‘trend’ in legislation is an increasingly broadened scope, to the dislike of trade unions in general. It was the Swedish Confederation for Professional Employees (TCO) who, following legal amendments in 2007, notified the European Commission that Sweden – according to the organisation – was lacking in the implementation of the Fixed-Term Work Directive (compare below).

There are – to the author’s knowledge – no statistics or findings on the impact of fixed-term work with regard to the gender pay gap at national level.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

The access to fixed-term employment was first legislated when general employment protection was introduced in the early 1970s. Regulations have been changed many times since then, generally speaking weakening the restrictions. The Government is now hesitant to further restrict the regulations despite a reasoned opinion from the Commission accusing Sweden of having implemented the Fixed-Term Work Directive incorrectly where successive contracts are concerned.<sup>1155</sup>

##### 2.1.2. Equal treatment

The non-discrimination ban in the Fixed-Term Work Directive has been implemented through the special Act (2002:293) prohibiting discrimination of those in part-time and fixed-term employment. To the extent that differential treatment of fixed-term workers should ever amount to indirect sex discrimination it is also covered by the Discrimination Act (DA) (2008:567) and its ban on discrimination in working life, including that on the ground of sex (Chapter 2 Article 1 of the DA).

The 2002 Act applies to all fixed-term (and part-time) workers without exception. It also applies to all employers regardless of size, etc.

Article 3 contains the ban on direct discrimination: An employer must not disfavour a fixed-term worker applying less favourable wage- or employment conditions than those applied to a comparable permanent worker, if the employer cannot show that this is not related to the fixed-term status of the worker. The ban does not, however, apply if the conditions are justified by objective reasons.

Article 4 contains a ban on indirect discrimination phrased in accordance with EU directives.

It is impossible to present any figures regarding the extent to which fixed-term contracts are not being renewed for reasons connected to pregnancy, maternity, or parental leave, but

<sup>1154</sup> Source: *Statistics Yearbook 2013*, SCB.

<sup>1155</sup> Reasoned opinion by the European Commission, Brussels 22 February 2013 (Infringement number 2007/4835).

legal cases regarding the ‘disfavouring’ of employees in relation to parental leave etc. are generally speaking not infrequent.

The rules on the permissibility of fixed-term contracts are to be found in the (1982:80) Employment Protection Act. The rules are quite complex and there is not one specific maximum time limit for how long a person may be hired on fixed-term contracts, but a list of situations legislated in different ways (see further Section 2.1.3. below).

### *2.1.3. Successive fixed-term contracts*

When and how to use fixed-term employment (*tidsbegränsad anställning*) is regulated in Articles 5 and 6 of the Employment Protection Act (1982:80). Generally speaking Article 5 allows fixed-term employment in four situations: (1) ‘general fixed-term employment’, (2) replacement, (3) seasonal employment, and (4) for employees aged 67 and over. Moreover, fixed-term contracts may also be (differently) regulated by collective agreements. The rules apply to all employers whether public or private, small or big.

The rules for these four situations are the following:

(1) General fixed-term employment during more than 24 months within a period of five years automatically turns into permanent employment. (2) The same is true for replacement employment as deputy. (3) Seasonal employment is regarded as requiring objective reasons for each employment and there is no upper limit. (4) There is an unlimited right to use fixed-term employment in relation to persons aged 67 and over. Additionally, Article 6 of the Employment Protection Act contains a rule allowing 6 months of probationary employment.

The different types of fixed-term employment may be combined into ‘chains’ of fixed-term employment contracts with no upper limit. In a reasoned opinion<sup>1156</sup> the Commission has criticised Sweden for incorrect implementation of the Fixed-Term Work Directive, since the regulation – according to the Commission – does not effectively restrict the use of successive fixed-term contracts.

### *2.1.4. Assessment*

As shown by the reasoned opinion presented by the European Commission criticising Sweden, the implementation of the Fixed-Term Work Directive as regards the guarantee against abusive successive fixed-term contracts may well be – and has been – questioned.<sup>1157</sup>

## **2.2. Collective agreements**

In the early 1970s the original regulations regarding fixed-term employment were considerably stricter than today’s regulations – they did not allow probationary employment, nor ‘general fixed-term contracts’ that were not objectively justified. As a consequence, these rights were regulated in collective agreements. Many of these agreements, with special rules on probationary employment for example, still prevail despite later amendments to the Employment Protection Act. Nowadays, such collective agreements frequently, but not always, are more restrictive than legislation.

## **2.3. Case law**

There have only been two judgments by the Labour Court concerning the principle of equal treatment in relation to fixed-term work. Labour Court Case 2008 No. 32 concerned three part-time employees (one also employed for a fixed term) working on the design of advertisements. Pay discrimination on the grounds of part-time and fixed-term work was asserted since these employees were paid lower wages than several other employees (two women and one man) working on a full-time and permanent basis and performing the same

<sup>1156</sup> Compare to reasoned opinion by the European Commission, Brussels 22 February 2013 (Infringement number 2007/4835).

<sup>1157</sup> Reasoned opinion by the European Commission, Brussels 22 February 2013 (Infringement number 2007/4835).

type of work. (All three alleged victims were women but the case was not argued in terms of indirect sex discrimination.) Discrimination was not found to be at hand in any of the three cases however, neither on the grounds of part-time work nor on the grounds of fixed-term work, given that the comparators were not regarded to be in a ‘comparable situation’. The comparators were all found to be more qualified given their longer work experience and/or higher personal qualifications justifying their higher wages although they, basically, performed equal work.

In Labour Court Case 2008 No. 97 the alleged discrimination also failed due to the fact that the comparators were not considered to be in a comparable situation. This case concerned two opera singers employed to perform two different plays in a row on the basis of one fixed-term contract. Paid holidays were agreed to take place in the (winter) period between the two plays and the comparators were permanent employees at the theatre in question who had their main holidays in the summer. The Labour Court found the scheduling of the paid holidays to be to the detriment of the claimants, depriving them of paid summer holidays. (The alternative had been to pay them special ‘holiday remuneration’ following the expiry of the fixed-term contracts.) However, the situation of the permanent employees – who did have summer holidays – was not found to be comparable to that of the claimants due to the differences in their duty to perform work. They were at the continuous disposal of their employer for various tasks – also in between plays – whereas the duty to work in the case of the claimants was restricted to the specific plays they were contracted to perform. –Therefore no *prima facie* evidence of discrimination had been presented.

The outcome of Case 2008 No. 97 is somewhat similar to CJEU Case *Wippel*<sup>1158</sup> and the author sees no reason why it should be considered not to be in line with the *acquis communautaire*.

#### **2.4. Involvement of other parties**

Generally speaking, the social partners have been reluctant to accept fixed-term contracts and legal developments widening the scope of such contracts. TCO reported Sweden to the Commission for lacking implementation of the Fixed-Term Work Directive. Recently, another trade union in the higher education sector, SUHF, submitted a similar report concerning the special (extensive) regulations on fixed-term contracts in the Higher Education Sector.

### **3. Statutory social security and pension rights**

Generally speaking, no differences are made between the temporarily and the permanently employed in relation to statutory social security. However, some minimum requirements/thresholds concerning working hours/pay may be detrimental to those with very short contracts – compare Section 3.1. above.

## **III. HORIZONTAL PROVISIONS**

### **1. Effectiveness**

Claims related to part-time and/or fixed-term work need to comply with the same rules as other labour-law claims. The Swedish labour market is still highly organised (approximately 75 %) and the trade union has a priority right to represent their members in any labour-law dispute should they choose to do so. If you are not a member of a trade union you can take your case to court yourself, starting at a local-level District Court. The Equality Ombudsman can only take on a case if the Discrimination Act (2008:567) is referred to, and not according

<sup>1158</sup> Case C-313/02 *Wippel* [2004] ECR I-9483.



to the Act on the prohibition against discrimination of the part-time and fixed-term employed (2002:293) as such.

## 2. Vulnerability, multiple/intersectional discrimination

The author has no information regarding the frequency of multiple/intersectional discrimination related to being part-time employed and/or employed on fixed-term contracts.

### TURKEY – Nurhan Süral

## I. PART-TIME WORK

### 1. General information

Flexibility has always been a much-discussed issue in Turkey. Turkey's Labour Act 2003<sup>1159</sup> tried to incorporate economic considerations, especially by introducing flexible modalities of employment and flexitime. The Labour Act was expected to support and enhance employment creation and develop 'just-in-time management.' Liberalisation, on-going privatisations, opening up to international trade and capital flows, globalisation, and attempts at compatibility with EU employment policies necessitated and prompted modernisation and flexibilisation of the labour market. But rapid adaptation was not easy because of difficulties in trying to reach consensus.

There is a large and persistent gap between the labour participation of men and that of women. The target set in the Ninth Development Plan (2007-2013)<sup>1160</sup> is to attain a 29.6 % labour participation rate for women by the end of 2013, against an OECD average of 62 % in 2010. Labour market rigidities channel an even higher share of female than male workers into informal employment, undermining their productivity, income and work incentives.<sup>1161</sup>

49.8 % of Turkey's population (75 627 384) is female (37 956 168 persons) and 50.2 % is male (37 671 216 persons). In 2012, the labour participation rate among women is 29.5 %, among men this rate is 71 %. The proportion of employed women in the population is 26.3 % and the proportion of employed men is 65 %. The proportion of regular or casual workers among working women is 54.3 % and the proportion of self-employed women is 10.8 %. The proportion of regular or casual workers among working men is 66.5 % and the proportion of self-employed men is 22.3 %. The unemployment rate for women is 10.8 %, for men it is 8.5 %. When the youth unemployment rate among the 15-24 age group is considered, the rate for women is 19.9 % and for men it is 16.3 %. In households with children younger than 5, the care of children is in the hands of the mothers for 89.6 % and for 1.5 % of the fathers. 2.4 % of the children goes to day nurseries.<sup>1162</sup>

The OECD cites the incidence of part-time workers as a percentage of total employment as 11.7 % in 2011 (from 6.1 % in 2004, 5.6 % in 2005, 7.6 % in 2006, 8.1 % in 2007, 8.5 % in 2008, 11.1 % in 2009 and 11 % in 2010).<sup>1163</sup> Of female workers, 23 % (19 % in 2000) are part-timers and of male workers, 7 % (6 % in 2000) are part-timers.<sup>1164</sup> Compared to men, a

<sup>1159</sup> *İş Kanunu*, Official Gazette 10 June 2003, no. 25134.

<sup>1160</sup> *Dokuzuncu Kalkınma Planı (2007-2013)*, Official Gazette 01.07.2006, no. 26215 bis.

<sup>1161</sup> OECD Economic Surveys Turkey, July 2012, Paris 2012, p. 34.

<sup>1162</sup> Turkish Statistical Institute (TUIK) news release, 8 March 2012, no. 13458, [tuik.gov.tr](http://tuik.gov.tr), accessed 8 March 2013.

<sup>1163</sup> OECD (2013) 'Country statistical profile: Turkey' *Country statistical profiles: Key tables from OECD. Last updated: 28 February 2013*; doi: [10.1787/csp-tur-table-2013-1-en](https://doi.org/10.1787/csp-tur-table-2013-1-en), accessed 4 April 2013; OECD (2013), 'Part-time employment', in OECD Factbook 2013: Economic, Environmental and Social Statistics, OECD Publishing, p. 135, <http://dx.doi.org/10.1787/factbook-2013-53-en>, accessed 4 April 2013.

<sup>1164</sup> Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM 2012, OECD Week 2012, Meeting of the OECD Council at Ministerial Level, Paris 23-24 May 2012, p. 82. OECD defines part-timers as 'persons who usually work less than 30 hours per week in their main job', <http://oecd.org> accessed 25 March 2013.

larger proportion of Turkish women prefers to work part time, or in other flexible forms of employment.

In Turkey, there are incentives for informal employment. Employment flexibility is greater in the informal sector. As both temporary employment and agency work are banned by prevailing regulations, such flexibility is only possible in informal and semi-formal activities. According to the OECD, only cost-reducing and flexibility-enhancing regulatory reforms can increase formalisation. Otherwise, government efforts to reduce informality and facilitate formalisation, including the comprehensive *Strategy of Fight against Informal Economy* cannot yield much progress.<sup>1165</sup> This negative situation for women became particularly visible in the crisis and post-crisis period: 1 million of the 1.6 million new jobs created for women between end-2008 and end-2011 were in the informal sector.<sup>1166</sup> To encourage hiring in the formal sector, flexible labour contracts are needed.<sup>1167</sup>

Information on percentage distribution of part-timers by major occupational group and educational qualification in 2010 revealed that part-timers were mostly concentrated in professionals, and service and sales workers with 31.3% and 27.3%. The highest educational level for both male and female part-timers was higher education.<sup>1168</sup> Gender pay gap tables in the earnings survey by TUIK, the Turkish Statistical Institute, were prepared only taking into consideration full-time workers, which accounted for 98.7% of the data set.<sup>1169</sup>

The Turkey 2012 Progress Report states that ‘There is a remarkable difference between the figures for men and women with regard to employment as an unpaid family worker, which is mostly prevalent in the agriculture sector. The female employment target in the draft national employment strategy (35 %) is less than ambitious. Measures on improving the work-life balance are not fully in place, and the existing ones mainly focus on women rather than a gender mainstreaming approach’.<sup>1170</sup>

Turkey submitted its 6th Periodical Country Report to the Committee on the Elimination of Discrimination Against Women (CEDAW) Committee in 2010 and defended it before the CEDAW Committee members in 2010. The report was evaluated by the CEDAW Committee which issued its Concluding Observations, and written information was subsequently requested from Turkey on two topics: impact of the headscarf ban in the fields of education, employment, health and political and public life; and violence against women.<sup>1171</sup> Flexible types of work have not been mentioned in country reports or CEDAW’s concluding observations.

## 2. Legislation, (national) collective agreements and case law

### 2.1. Policies and legislation at national level

#### 2.1.1. National policies

A part-timer is a worker whose normal number of working hours, calculated on a weekly basis, is substantially lower than the normal number of working hours of a comparable full-timer (Labour Act, Article 13). In the explanatory memorandum to Article 13 and the Working Time By-Law, ‘substantially less’ is interpreted as ‘less than 2/3 of the contracted weekly hours of work’. Therefore, a part-time job of more than a certain number of hours per

<sup>1165</sup> OECD Economic Surveys Turkey, p. 29.

<sup>1166</sup> OECD Economic Surveys Turkey, p. 90.

<sup>1167</sup> OECD Economic Surveys Turkey, p. 8.

<sup>1168</sup> TUIK, Structure of Earnings Survey, 2010, March 2012, p. 1.

<sup>1169</sup> TUIK, Structure of Earnings Survey, 2010, March 2012, p. 1.

<sup>1170</sup> Turkey 2012 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013 {COM(2012) 600 final} Brussels, 10.10.2012 SWD(2012) 336 final, p. 67.

<sup>1171</sup> Committee on the Elimination of Discrimination against Women Fifty-fourth session 11 February – 1 March 2013, Concluding observations of the Committee on the Elimination of Discrimination against Women: Turkey. Addendum Information provided by the Government of Turkey on the follow-up to the concluding observations of the Committee (CEDAW/C/TUR/CO/6), <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.TUR.CO.6.Add.1.pdf>, accessed 20 March 2013.

week is considered a full-time job.<sup>1172</sup> For example, if the statutory number of weekly working hours (forty-five) is at the same time the contracted weekly hours of work, work of more than thirty hours a week will be deemed full-time work.

### *2.1.2 Equal treatment*

The Labour Act stipulates that a part-timer must not be subjected to differential treatment in comparison to a comparable full-timer solely because his/her contract is part-time, unless there is a justifiable cause for differential treatment (Article 13/2). The divisible benefits to be granted to a part-time worker in relation to wages and other benefits must be paid in proportion to the length of his working time, proportionate to a comparable full-timer. A comparable worker is one who is employed full time in the same or a similar job in the establishment. If there is not such a worker in the establishment, a worker with a full-time contract performing the same or similar job in an appropriate establishment which falls in the same branch of activity is considered to be a comparable worker (Article 13/3). Consequently, a part-timer has access to all fringe benefits (e.g. bonuses, premiums, child allowances, heating allowances, holiday pay) granted to full-time workers but only in terms of divisible amounts in proportion to the length of his work. These provisions are in conformity with the framework agreement put into effect by Council Directive 97/81.

### *2.1.3. Organisation of working time*

Upon returning from maternity leave workers do not have an automatic right to work reduced hours for a certain period of time to facilitate work and family obligations. Similarly, there is not an automatic right to reduced working hours based on a need to take care of elderly relatives. However, this may be discussed with the employer and by mutual agreement and availability of atypical work, a new working-time arrangement may be made.

Employers have to give consideration to requests by workers to transfer from full-time to part-time work and vice versa if there is such availability in the establishment (Labour Act, Article 13/4). The Labour Act is silent on in-service training or on-the-job training. If such training is provided by management, however, on the basis of Article 5 no discrimination is allowed.

### *2.1.4. Assessment*

The Labour Act exceeds relevant EU directives in providing protective measures. The balance between ‘flexibility’ and ‘security’ is distorted in favour of ‘security’. For example, an employer who hires a worker to work 30-45hrs/week must give this worker the same treatment as a full-timer as regards monetary issues. Better regulation and encouragement of atypical employment will reduce the share of the informal sector.

A part-time worker who finds it difficult to pay his/her own premiums for the remaining periods or who thinks that he/she cannot be entitled to retirement may opt for informal employment asking the employer to add social security premiums (contributions) to his/her wages.

## **2.2. Collective agreements**

### *2.2.1. Policies*

Trade unions have opposed all atypical forms of work, whereas employers’ associations favoured them. The trade unions, in general, have a ‘status-quo’ bias against reforms. They severely criticise the existing system, but where a reform is to be introduced, they become staunch defenders of it. As ‘insider’ groups they define the political agenda, blocking reforms and thus making it harder for ‘outsiders’ (the unemployed or informally employed) to enter the labour market through flexibility arrangements. Polarisation and credibility gaps between the fragmented labour confederations add to this. Competing labour confederations watch

<sup>1172</sup> *İş Kanununa İlişkin Çalışma Süreleri Yönetmeliği*, Official Gazette 06.04.2004, no. 25425.

each other and are ready to label those with a compromising attitude an employer dominated ‘puppet union.’

The trade unions have contented themselves with defending the existing levels of protection and institutional arrangements that stand in the way of decentralisation and destandardisation of employment relations, without offering alternatives generating new employment. The renunciation of standard working times and atypical employment were regarded as heralding the end of trade unionism. These rules were severely criticised by trade unions and the then main opposition party, on the basis of their lack of job stability and being a threat to open-ended labour contracts. Issues of flexibility were completely twisted; flexible work and especially temporary work were equated with ‘slavery’ as a result of which the degree of flexibility, although a lot less than what was provided in the EU *acquis*, in the proposed act could not be maintained but was reduced as a concession. For example, temporary agency work is illegal in Turkey; temporary work agencies cannot be established and fixed-term work is almost impossible in practice. There is, on the other hand, a strong incentive for employers to make use of changing patterns conceived to be in their favour. It is the Government and employers who have been taking the initiative in pushing the trend toward deregulation and flexibility. The Government wants to make progress towards ‘flexicurity’ adapted to the Turkish context through laws and employment packages. Government circles regard flexibility as a key factor to increase competitiveness and (female) employment as well as to encourage job creation in the formal sector. Two policies believed to increase female employment are that of making part-time and fixed-term work more attractive, and that of promoting female entrepreneurship.

#### *2.2.2. Equal treatment*

Collective agreements are silent on the issue.

#### *2.2.3. Organisation of working time*

Collective agreements do not have specific provisions on the organisation of working time.

#### *2.2.4. Assessment*

Labour legislation has always been the main instrument to establish labour standards. It may be stated that the most tangible expression of how powers are divided is legislation and governmental regulations. The workers’ and employers’ occupational organisations, instead of becoming more organised in bargaining patterns, prefer to make their demands to the Government in the form of laws or amendments to laws. Legislation covers a broad spectrum of issues, many of which in other countries are treated as topics of social dialogue and left to social partners. Trade unionism is essentially ‘business’ unionism, covering negotiation and administration of monetary terms. Trade unions negotiate on pay issues, not on other issues.

### **2.3. Case law**

There is no case law apart from decisions rendered regarding contract terminations and such decisions are the same as for terminations of other types of labour contracts.

#### *2.3.1. Cases/opinions of equality bodies*

There are no equality bodies in Turkey.

#### *2.3.2. Assessment*

Rigidities have to be removed for flexible contracts to actually work in practice.

### **2.4. Involvement of other parties**

Private employment offices support enhancement of atypical works in line with the EU *acquis*. If legal bans/rigidities are removed, employers will hire workers through these offices instead of the informal market.

### **3. Statutory social security and pension rights**

#### **3.1. Exclusions**

Part-timers, whether they work for a single employer or for a number of different employers, are covered by the compulsory social insurance schemes without exception. Under Article 80/h of the Social Insurances and General Health Insurance Law,<sup>1173</sup> employers have to submit the Social Security Organisation a written labour contract for part-time work. The hours worked by the part-timer are aggregated and divided by 7.5 to find the number of days worked in a month. Statutory weekly hours of work is 45 and this means 7.5 daily working hours in establishments functioning on a 6-day working week. Each calendar month is regarded as comprising thirty days. If part-timer (A) works for 2 hours per day, this means 30 days x 2 hours = 60 hours; 60 divided by 7.5 = 8 days/month. The employer will pay premiums (contributions) for 8 days. Where the number of days specified is less than 30 per month, it is up to the part-timer to pay premiums for the remaining hours, meaning that (A) will be compulsorily insured for 8 days and voluntarily insured for 22 days.

#### **3.2. Assessment**

There are incentives for part-time workers to remain in informal employment.<sup>1174</sup> Part-time workers who find it difficult to pay their own premiums for the remaining hours or who think that they cannot be entitled to retirement may opt for informal employment, asking their employer to add social security premiums (contributions) to their wages.

Currently, the Ministries of Labour and Social Security and Family and Social Affairs are working on an employment package for women, prioritising part-time work, easing its accessibility for the enhancement of women's participation in the labour market. Conditions for entitlement to social security and pension rights will be eased.

### **4. Self-employment**

There are no studies/surveys/statistics as regards full-time and part-time self-employed persons.

### **5. Access to and supply of goods and services**

There are no disadvantages faced by part-time workers in the area of access to and supply of goods and services.

### **6. Are there any gaps in national law?**

#### **6.1. Gaps in the area of (access to) employment**

##### **6.1.1. Recruitment process**

The recruitment process is the same for typical and atypical workers.

##### **6.1.2. Employment conditions**

The legal obligation for employers to inform their workers of full-time vacancies exists only regarding part-time workers. There are no provisions in the Labour Act requiring employers to inform fixed-term workers of full-time vacancies in the establishment.

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<sup>1173</sup> *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Law no. 5510, Official Gazette 10.06.2006, no. 26200.

<sup>1174</sup> These workers are workers, but they are not officially registered by their employer as the workers of a particular workplace. Once this becomes known they will be registered starting from the time of recruitment and the employer will be required to pay a fine.

### 6.1.3. Termination of the employment contract

There are no gaps regarding rules on contract termination.

### 6.2. Gaps in other areas

There are no other gaps.

## II. FIXED-TERM WORK

### 1. General information

In Turkey, fixed-term contracts are authorised only under very special circumstances: An objective reason for first conclusion of such contracts, and exclusion of unqualified workers, as specified in II.2.1 and II.2.3. below. As a result, fixed-term contracts play a very marginal role in the Turkish labour market. Against this background, a ‘semi-formal’ sector has emerged: formal firms register and legally employ a core workforce, but in addition use informal workers to cope with fluctuations in business conditions. Semi-formality appears widespread in volatile manufacturing sectors (such as textiles and clothing) and in service sectors such as transport, hotels and restaurants.<sup>1175</sup>

Turkey’s labour regulations are highly rigid by international comparison. This rigidity is caused by employment protection laws, in particular limitations on temporary and fixed-term employment contracts and the protection of regular employment through high severance payments. Investment Climate Surveys show that despite these restrictions, temporary and fixed-term contracts are common in the informal sector. Hiring informal workers is the simplest way for firms to achieve the necessary flexibility.<sup>1176</sup>

According to the Ministry of Labour, constraints on temporary hiring force many formal firms to use overtime rather than to create new jobs. A new law authorising temporary work agencies and temporary contracts was adopted by Parliament in 2009, but, after strong trade union opposition, the President vetoed the law. A new draft law was submitted for discussion to the social partners in November 2011. This draft law is an important initiative, but it appears more restrictive than in other OECD countries.<sup>1177</sup> The Government is determined to flexibilise the labour market. Turkey’s most recent employment policy initiatives have taken this direction.<sup>1178</sup>

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

A fixed-term labour contract is one that is concluded between the employer and the worker in written form, for work of a specified term or which is based on the emergence of objective conditions such as the completion of a certain project or the occurrence of a certain event (Labour Act, Article 11). A written contract is required for all fixed-term contracts in Article 11 but according to Article 8 of the Labour Act only those with a period of at least one year have to be concluded in written form. There is a contradiction between Articles 11 and 8 as regards the requirement for a written contract.

The wording of Article 11 is a word by word translation of the definition given in the EU Directive but in practice it is interpreted as if an objective justification is required in order to

<sup>1175</sup> OECD Economic Surveys Turkey, p. 89.

<sup>1176</sup> World Bank, *Turkey Country Economic Memorandum: Informality: Causes, Consequences, Policies*, Report No. 48523-TR, 2 March 2010, p. iv.

<sup>1177</sup> OECD Economic Surveys Turkey, p. 89.

<sup>1178</sup> There is no fixed timeframe for implementation of these initiatives, but it is likely to be in 2013.

be able to conclude a first fixed-term contract. This restricts the conclusion of fixed-term contracts.

### 2.1.2. *Equal treatment*

Article 12 of the Labour Act is parallel to and consistent with Article 5 of the Directive concerning the principle of equal treatment. A fixed-term worker must not be subjected to differential treatment compared to a comparable worker employed under an open-ended (permanent) labour contract. Divisible amounts for a given time period relating to wages and other monetary benefits to be given to a fixed-term worker have to be paid in proportion to the length of time during which the worker has worked. In cases where seniority (length of service) in the same establishment or the same enterprise is treated as the criterion for an employment benefit, the seniority criterion foreseen for a comparable worker working under an open-ended contract will apply to a worker with a fixed-term contract, unless there is a reason justifying the application of a different seniority criterion for a fixed-term worker. A comparable worker is a worker who is employed under an open-ended contract in the same or a similar job in the establishment. If there is no such worker in the establishment, then a worker with an open-ended contract performing the same or a similar job in a comparable establishment falling into the same branch of activity will be considered as a comparable worker.

### 2.1.3. *Successive fixed-term contracts*

A labour contract for a definite period must not be concluded more than once, except when there is a substantial cause (the terms ‘objective justification’ for the first contract and ‘substantial cause’ for subsequent contracts are regarded as equivalent by the judiciary) which may necessitate repeated (chain) contracts. Otherwise, the labour contract is deemed to have been concluded for an indefinite period of time from the very beginning (Article 11/2 Labour Act). Article 11/3 confirms this: Chain contracts based on substantial cause will maintain their status as contracts concluded for a fixed term.

When a fixed-term labour contract terminates upon expiration of a specified period, there will be no severance pay for the worker. However, upon termination of an open-ended labour contract by the employer, the worker is entitled to severance pay, except when having been dismissed for a so-called ‘zero-tolerance offence’.<sup>1179</sup> Therefore, upon termination of a fixed-term contract due to expiration of its specified period, workers almost automatically apply to the court claiming ‘absence of objective justification’ for its first and/or subsequent conclusion.<sup>1180</sup> This not only causes a heavy workload for the judiciary but also unwillingness by employers to conclude fixed-term labour contracts. This is one of the reasons for opting for informality/semi-formality mentioned under II.1.

### 2.1.4. *Assessment*

The Labour Act has gone beyond Directive 1999/70 in protecting the fixed-term worker by requiring an objective justification for the first conclusion of a fixed-term contract. Rigidities in the Labour Law cause many enterprises to seek ways to avoid them, including employing informal workers.

<sup>1179</sup> Immediate dismissal may occur for specified serious offences known as gross misconduct (zero tolerance offences). Examples are résumé fraud (‘CV fraud’, meaning having given misleading information about oneself), sexual harassment of other workers, verbal or physical abuse directed at the employer or the members of his family, illegal drug usage, wilful neglect of duty that is not trivial, and has not been condoned by the employer, abuse of trust such as theft, embezzlement, disclosure of trade secrets, or use of employer's equipment (e.g. vehicles and computers) to engage in non-work-related activity). Some workers dismissed for gross misconduct may face additional consequences like criminal prosecution (e.g. bank teller stealing money from the cash drawer) or a civil lawsuit.

<sup>1180</sup> Upon termination of a fixed-term contract due to expiration of the specified period, there will be no severance pay for the worker. However, if the worker applies to the court claiming there was no objective reason for conclusion and/or renewal of the fixed-term contract and provides sufficient proof, then this contract is transformed into an indefinite period contract by the court and the worker is then entitled to claim severance pay. For this reason, ‘objective justification’ in the conclusion and/or renewal of contracts is very important.



## **2.2. Collective agreements**

As a result of business unionism, collective agreements almost purely focus on wages, as specified in I.2.2. above.

## **2.3. Case law**

‘Protectionism’ is prevalent in the drafting and interpretation of laws, resulting in a provision of security far beyond EU directives. The Court of Cassation follows a rigid interpretation of legal rules and introduces additional constraints. The Court not only requires an objective reason for the first conclusion of a fixed-term contract, but it moreover states that they can be concluded with ‘qualified’ workers.<sup>1181</sup> The law does not make a distinction between qualified and unqualified workers but the Court of Cassation thinks that this is necessary for the protection of ordinary workers who have lesser individual bargaining powers. It is not easy to draw a definitive line between qualified and unqualified workers but it can be stated that according to the Court of Cassation, workers operating machinery or using equipment and tools after no or short period of in-service training have to be employed under open-ended labour contracts. For example, a private hospital can conclude fixed-term contracts with doctors but not with the personnel performing cleaning services.

## **2.4. Involvement of other parties**

The information presented in I.2.4. above also applies here.

## **3. Statutory social security and pension rights**

A fixed-term worker may be a full-timer or part-timer. If he/she is a part-timer, the information in I.3.1. also applies here. If he/she is a full-timer, then as regards social security and pension rights, he/she must be treated in the same way as a permanent full-timer in proportion to the period worked. Also here, however, if the full-time/part-time fixed-term worker is employed for short period(s), he/she may opt for informal employment. Part-time/fixed-term workers who find it difficult to pay their own premiums for the remaining hours or who think that they cannot be entitled to retirement may opt for informal employment asking their employer to add the social security premiums (contributions) to their wages.

# **III. HORIZONTAL PROVISIONS**

## **1. Effectiveness**

There are no difficulties linked to enforcement of rights regarding the position of part-time or fixed-term workers.

## **2. Vulnerability, multiple/intersectional discrimination**

There is no evidence that some women are at a particular disadvantage with regard to being part-time employed and/or on fixed-term contracts.

<sup>1181</sup> A court will invalidate a fixed-term contract with unqualified workers, transforming them into open-ended contracts. For such decisions of the Court of Cassation see: *Yargıtayın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2009* (An Evaluation of the 2009 Decisions of the Court of Cassation on Labour Law and Social Security Law), Ankara 2011, pp. 57-75.

## UNITED KINGDOM – Aileen McColgan

## I. PART-TIME WORK

## 1. General information

National (Labour Force Survey) statistics do not define part-time work but depend on self-classification of respondents.

In the period of November 2012-January 2013, part-time employees comprised 26.5 % of employees nationally and part-time workers (employed and self-employed) comprised 27 % of all workers nationally.<sup>1182</sup>

Women accounted for 46.5 % of all workers and 49.2 % of all employees at national level and women and men working part time accounted for 41.7 % and 11.8 % respectively of all male and female employees.

The latest available statistics for part-time working by occupation relate to April 2011.<sup>1183</sup> They show that, among ‘Managers, Directors and Senior Officials’, 8.8 % of employees worked part time, among ‘Professional Occupations’ the figure was 17.7 %, among ‘Associate Professional and Technical’ occupations it was 15.4 %, among ‘Administrative and Secretarial’ occupations it was 34.6 %; among ‘Skilled Trades’ it was 8.4 %, among ‘Caring, Leisure and Other Service’ occupations it was 43.3 %, among ‘Process, Plant and Machine Operatives’ it was 53.2 % and among ‘Elementary Occupations’ it was 9.7 %. These broad occupational categories are further sub-categorised and part-time working varies from negligible levels in (for example) ‘Financial Institution Managers and Directors’, ‘Managers and Directors in Transport and Logistics’, ‘IT Specialist Managers’, ‘Metal Forming, Welding and Related Trades’, ‘Metal Machining, Fitting and Instrument Making Trades’, ‘Vehicle Trades’, ‘Electrical and Electronic Trades’ and ‘Construction and Building Trades’ to 40 % of ‘Other Administrative Occupations’, 46 % of ‘Secretarial and Related’ occupations, 52 % of ‘Teaching Assistants’, 66 % of ‘Window Cleaners’, 67 % of ‘Waiters and Waitresses’, 72 % of ‘Sales and Retail Assistants’ and 81 % of ‘Retail Cashiers and Check-out Operators’.

In the period of November 2012-January 2013 44 % of male part-time workers and 74.5 % of female part-time workers reported that they did not want a full-time job.<sup>1184</sup> 31.9 % of male part-time workers and 12.9 % of female part-time workers could not find full-time work.<sup>1185</sup> Statistics are not gathered nationally, as far as known, on the percentage of full-time workers who would like to reduce their working time and the author is unaware of any statistical evidence on people combining multiple part-time jobs, although this happens. The author does not know of any statistics collected on people combining a part-time job with self-employment. This does not mean that such does not occur.

According to the 2012 Labour Force Survey,<sup>1186</sup> the median gross hourly earnings (excluding overtime) for women working full time in 2012 was EUR 14.15 (GBP 12) per hour, the equivalent figure for men being EUR 15.65 (GBP 13.27) per hour, for women working part time EUR 9.57 (GBP 8.12) per hour and for men working part time EUR 9.10 (GBP 7.72) per hour. Given that women working part time accounted (see above) for 41.7 % of all female employees, but men working part time for only 11.8 % of all male employees, the impact of female part-time working on the gender pay gap is obvious. Indeed even if the gender pay gaps between male and female part-time employees, and between male and female

<sup>1182</sup> Labour Force Survey, Table 3 available through the index at <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/july-2013/index-of-data-tables.html>, accessed 29 July 2013..

<sup>1183</sup> <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-215723>, accessed 8 April 2013.

<sup>1184</sup> LFS, Table 3. The very high cost of childcare in the UK may of course influence this decision: see Resolution Foundation *The Price of Motherhood* [http://www.resolutionfoundation.org/media/media/downloads/The\\_price\\_of\\_motherhood\\_women\\_and\\_part-time\\_work.pdf](http://www.resolutionfoundation.org/media/media/downloads/The_price_of_motherhood_women_and_part-time_work.pdf), pp. 3-4, accessed 12 June 2013.

<sup>1185</sup> LFS, Table 3. 3.

<sup>1186</sup> <http://www.ons.gov.uk/ons/rel/lmac/hours-worked-in-the-labour-market/2011/rpt-hours-worked-in-the-labour-market.html>, accessed 9 April 2013.

full-time employees, were eliminated,<sup>1187</sup> the overall hourly gender pay gap would be reduced by only 5.5 points, from 17.5 % to 12 %.

Part-time work is predominantly done by women, male part-time employment tending to occur at the start and end of working lives (when men are students, and are reducing their hours towards retirement) whereas many women who work part time do so initially, at least, in order to reconcile work with caring responsibilities. Recent OECD statistics show a very strong pattern in the UK of families in which one parent works part time and the other full time.<sup>1188</sup> In the UK, there is typically a very significant difference between the hours worked by full-time and part-time workers: in 2012, full-time workers averaged about 37.5 hours per week and part-time workers about 15.8 hours per week.<sup>1189</sup> A high proportion of mothers who work part time report that they have had to accept lower skilled work in order to do so.<sup>1190</sup> This partly explains the gender pay gap which is particularly significant for female part-time workers. (In 2011, the Annual Survey of Hours and Earnings suggested that the gender pay gap for full-time workers' median hourly wages had reduced from 10.1 % in 2010 to 9.1 % in 2011<sup>1191</sup> but the overall median hourly gap for all workers remained almost static (moving from 19.8 % to 19.5 %) because women's part-time earnings did not significantly increase.<sup>1192</sup>

The author is not aware of any evidence that 'forms of *discrimination* on the grounds of part-time work vary according to the type of employer (state/private); the size of the employer or the sector' (emphasis added). However, the gender pay gap is significantly smaller in the public than in the private sector. The gender pay gap for part-time women in the public sector was 36.3 % in 2011 compared to 42.8 % in the private sector.<sup>1193</sup> Gender pay gaps also differ markedly across sectors.

## 2. Legislation, (national) collective agreements and case law

The Part-Time Workers Regulations prohibit unjustified discrimination between part-time and (narrowly defined) comparable full-time workers.<sup>1194</sup> They are further considered below. There are a number of national-level collective agreements which include the 'Joint Agreement on Guidelines for the Employment of Part-Time Employees in Further Education Colleges', concluded between the employers and a range of trade unions, and the National Joint Council for Local Government Services, National Agreement on Pay and Conditions of Service. The former, which sets out detailed provisions for the employment of part-timers, sets as its first 'objective' that 'Part-time employees have the right not to be treated less favourably than comparable full-time employees as regards the terms of their contract of employment or any act, or deliberate failure to act, of the employer'. The latter provides (Part 2 Paragraph 8) that: 'Part time employees shall have applied to them the pay and conditions of service pro-rata to comparable full time employees in the same authority, except for: (a) training and development – where part time employees should have access equal to that of full time employees and when on training courses outside their contracted daily hours shall be paid on the same basis as full time employees. (b) the car allowance scheme – which applies to part time employees in full on the same basis as full time employees'. Collective agreements in the UK are not legally binding although various of their terms may become incorporated into the contracts of employment of workers to whom they apply and be given legal effect through that mechanism.

<sup>1187</sup> By increasing female full-time rates to male full-time rates and male part-time rates to female part-time rates.

<sup>1188</sup> Chart LMF2.2.A, <http://www.oecd.org/els/family/LMF2.2%20Working%20hours%20distribution%20among%20couples%20-%20updated%20200112.pdf>, accessed 29 July 2013. There were high levels of this pattern of working also in Austria, Sweden, Germany, Switzerland and, in particular, the Netherlands.

<sup>1189</sup> 2012 Labour Force Survey, <http://www.ons.gov.uk>, accessed 12 June 2013.

<sup>1190</sup> Resolution Foundation, [http://www.resolutionfoundation.org/media/media/downloads/The\\_price\\_of\\_motherhood\\_women\\_and\\_part-time\\_work.pdf](http://www.resolutionfoundation.org/media/media/downloads/The_price_of_motherhood_women_and_part-time_work.pdf), pp.5-6, accessed 12 June 2013.

<sup>1191</sup> Excluding overtime.

<sup>1192</sup> ONS, ASHE 2011 <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-235202>, accessed 9 April 2013.

<sup>1193</sup> *Women's pay and employment update*, [www.tuc.org.uk/tucfiles/251.pdf](http://www.tuc.org.uk/tucfiles/251.pdf), accessed 9 April 2013.

<sup>1194</sup> Northern Ireland has materially identical Regulations.

## 2.1. Policies and legislation at national level

### 2.1.1. National policies

There is nothing which in the author's view qualifies as a 'national policy' on part-time work. The question whether an individual may work part time is a matter for that individual and his or her employer, although a refusal to permit part-time working may amount to indirect sex discrimination. There is no right to work part time in order to accommodate family responsibilities, care responsibilities for chronically ill or disabled persons or any other reason, although employees with at least 26 weeks' continuous service with an employer have a right to *request* flexible working arrangements (which might include reduced hours).<sup>1195</sup> This right amounts to little more than having the right not to be subjected to detriment for having made the request, and to have the employer follow a prescribed procedure in responding to the request. It does not include any right to have the request granted, even if such would not inconvenience the employer.<sup>1196</sup>

National discussion tends to be more concerned with removing obstacles to part-time working in higher-level jobs than with challenging the gender divisions in full-time and part-time working (see, for example, the terms of reference of the recent inquiry by the Business, Innovation and Skills Committee into Women in the Workplace<sup>1197</sup>). The UK's most recent report to the CEDAW Committee does not address part-time work<sup>1198</sup> other than by stating (Paragraph 167) that 'The Government is committed to helping mothers and fathers balance work and family life and a series of family friendly employment policies is available', referring to the right to request flexible working arrangements and to maternity, paternity and parental leave rights.

### 2.1.2. Equal treatment

The Part-Time Workers Regulations define a part-time worker as one who is 'paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker'.

Such workers may not, without justification, be treated less favourably than 'comparable' full-time workers, on the ground of their being part-time workers, as regards terms and conditions of employment, including pay, bonuses and shift allowances; contractual sick pay; holidays; career breaks; parental leave; maternity pay and maternity leave; fringe benefits, such as staff discounts, subsidised mortgages, etc.; or access to pension schemes; and nor can they be subject to any detriment, on the ground of their being part-time workers, compared to 'comparable' full-time workers.

A 'comparable' full-time worker is one who is 'employed by the same employer under the same type of contract' as the part-time worker, and at the same time, and is 'engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience'. Part-time workers may, alternatively, compare their treatment to that which they themselves received as full-time workers. The Part-Time Workers Regulations are applicable to all part-time workers regardless of where and by whom they are employed, but in fact benefit very few part-time workers because most such workers do not have suitable comparators.<sup>1199</sup>

<sup>1195</sup> The Employment Rights Act 1996, Sections 80F-I as amended, and the Working (Procedural Requirements) Regulations 2002 and Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002.

<sup>1196</sup> A refusal to grant such a request might, however, amount to unlawful indirect sex discrimination

<sup>1197</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/news/women-in-the-workplace/>, accessed 9 April 2013.

<sup>1198</sup> <https://www.gov.uk/government/publications/uks-7th-periodic-convention-on-the-elimination-of-all-forms-of-discrimination-against-women-report>, accessed 9 April 2013.

<sup>1199</sup> The RIA estimated that only 1/6 of part-time workers would have a full-time comparator: <http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/employment/workandfamilies/part-time/ria/page19200.html> accessed 9 April 2013. See further: A. McColgan, 'Missing the Point?: The Part-Time Workers Regulations 2000' *Industrial Law Journal* 2000 pp. 260-267.

Where there is a suitable comparator, the Regulations provide for the application, where appropriate, of the pro rata principle (Regulation 5(4)). They also provide (Regulation 5(5)) that ‘A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime’.

### *2.1.3. Organisation of working time*

See above for discussion of the right to request flexible working arrangements. There is no right to work part time or to adjust hours of work, including after maternity leave. The right to request flexible working arrangements does include a right of access to the Employment Tribunal but the only complaints which may be made concern the subjection of the employee to detriment for having made a request, or a failure on the part of the employer to comply with the proper procedures, rather than a challenge to the substantive response to the request.

### *2.1.4. Assessment*

The absence of a right to reduce or vary working hours is problematic in view of the fact that many women have to accept jobs for which they are over-qualified in order to accommodate work and family life (this particularly because of the exorbitantly high cost of childcare in the UK). The very narrow comparator requirement imposed by the Part-Time Workers Regulations is also problematic, as is the ‘opt out’ provision in the Working Time Regulations. One of the significant problems faced by women in the UK is that the normal hours for full-time work are long in comparison to those elsewhere.

It is impossible to answer the question of whether there are ‘any forms of indirect sex discrimination in national legislation’. The legislation considered above does not attempt to address gender stereotypes and in the author’s view there are no real examples of ‘good practice’ in this area in the UK.

## **2.2. Collective agreements**

### *2.2.1. Policies*

Trade unions were historically relatively hostile to part-time work but this is no longer the case and unions for the most part strive to secure fair treatment for part-time workers.

### *2.2.2. Equal treatment*

There are no ‘main national collective agreements’ in the UK. As mentioned above, such agreements are not legally binding in any event. Two examples of national agreements have been described above which make it clear that part-time workers should not be discriminated against. This would be the norm in such agreements, as in more localised agreements.

### *2.2.3. Organisation of working time*

The author has no information on any such agreements.

### *2.2.4. Assessment*

As above, the UK is unusual in that collective agreements are not binding and there is not a resource of such agreements which is readily accessible. No doubt there are national collective agreements which contain indirectly discriminatory provisions but no examples can be provided.

## 2.3. Case law

### 2.3.1. Cases/opinions of equality bodies

In *R v Secretary of State for Employment ex p EOC*,<sup>1200</sup> for example, the House of Lords allowed a challenge to the then requirement that part-timers had to work for five years to qualify for protection from unfair dismissal, whereas full-time employees only had to work for two, and to qualify for statutory employment rights a part-timer had to work for five years, whereas a full-timer had to work for only two years. It was common ground that a far higher proportion of women than men worked part time. In *Allonby v Accrington and Rossendale College*<sup>1201</sup> the requirement to work full-time in order to avoid redundancy was indirectly discriminatory and unlawful, as was the rejection of an application to job share in *British Telecommunications Plc v Roberts and Langstaffe*.<sup>1202</sup> In *Shackletons Garden Centre Ltd v Lowe* [2010] EqLR 138 the EAT accepted that the requirement for staff to take part in a weekend working roster disadvantaged women. Similarly in *London Underground Ltd v Edwards (No 2)*<sup>1203</sup> the imposition of a requirement to undertake flexible shifts involved unlawful indirect sex discrimination where 95 % (20 out of 21) female train drivers could comply with it, but 100 % of the 2023 male drivers.

In *British Airways plc v Starmar*,<sup>1204</sup> the EAT upheld a decision that the claimant, a female pilot who had been refused permission to work 50 % of her previous hours (the company insisted on her doing at least 75 %) had been subject to an unjustifiable ‘provision, criterion or practice’ which was not, on the facts, justified. In *Hacking & Paterson v Wilson*,<sup>1205</sup> by contrast, the EAT ruled that refusing to allow a woman to return part time after maternity leave did not amount to the application to her of a ‘provision, criterion or practice’.<sup>1206</sup>

### 2.3.2. Assessment

The application of the prohibition on sex discrimination in the context of part-time work has been broadly satisfactory in recent years, although decisions such as that of the EAT in *Hacking & Paterson v Wilson* are unfortunate and, in the author’s view, not compliant with the case law of the CJEU. Nor can this case law directly assist men who wish to (or do) work part time. The added value of the concept of indirect sex discrimination lies in the fact that the comparator requirement of the Part-Time Workers Regulations is such that the Regulations are of very limited value to the majority of part-time women, and also that the Regulations do not provide any right to work part time.

## 2.4. Involvement of other parties

The author is not aware of the involvement of other private or public stakeholders that are playing a particularly positive and/or important role in the field of rights of part-time workers in the UK, except that trade unions generally and the TUC in particular are active in lobbying for better treatment of part-time workers.

## 3. Statutory social security and pension rights

### 3.1 Exclusions

Access to statutory social security and pension schemes is dependent on the payment of National Insurance contributions which are paid by those earning in excess of the lower

<sup>1200</sup> [1994] ICR 317.

<sup>1201</sup> [2001] ICR 1189.

<sup>1202</sup> [1996] ICR 625.

<sup>1203</sup> [1999] ICR 494.

<sup>1204</sup> [2005] IRLR 862.

<sup>1205</sup> [2011] EqLR 19.

<sup>1206</sup> The author has no knowledge of CEDAW Article 5a having been used in legal argumentation.

earnings limit (currently EUR 125 (GBP 107) per week). Part-time workers are disproportionately excluded from membership because of their low earnings but not directly or explicitly because of their part-time status. Acceptance of a part-time job will mean that an unemployed worker ceases to be eligible for job seekers' allowance but there are a number of in-work benefits which are intended to (although do not always) ensure that those in work are better off than those who do not work. Entitlement to statutory leave does not depend on working hours so should not exclude or disadvantage part-time workers.

#### **4. Self-employment**

The author is not aware of any potential disadvantages faced by self-employed persons working part time, in relation to, for example, access to financial services. The lower a person's income the more difficult such access is likely to be, however. The author is not aware of any national legislative provisions and/or national collective agreements which address issues of equal treatment pertaining to part-time self-employed persons, or of any case law in this area.

#### **5. Access to goods and supply of goods and services**

The author is not aware of any disadvantages faced by part-time workers in the area of access to and supply of goods and services except that which is connected to lower earnings. No national legislative provisions or, as far as the author is aware, national collective agreements address discrimination against part-time workers in the access to and supply of goods and services, although a collective agreement which itself discriminated against part-time workers (by, for example, imposing different thresholds on them with respect to qualification for benefits) would itself be open to legal challenge.

#### **6. Are there any gaps in national law?**

##### ***6.1. Gaps in the area of (access to) employment***

As above, there is no right as such to undertake work on a part-time basis although a refusal to consider part-time or other flexible working arrangements may amount to indirect sex discrimination. Women are not forced into part-time work by an absence of full-time work in female professions in the author's view. The difficulty is more that, other than in traditionally female sectors and occupations, opportunities for part-time working have traditionally been restricted to lower-level jobs. Many women want to work part time to enable them to parent children while others are obliged to do so by the unavailability of affordable childcare.

It is well established that blocking access of part-time workers to occupational pension schemes is likely to amount to unlawful indirect sex discrimination. Because part-time workers are often segregated into relatively poor jobs they are often disadvantaged when it comes to training and promotion etc. The Part-Time Workers Regulations do not address this because of the requirement for (narrowly defined) actual comparators who do not typically exist in the workplaces where many part-time workers are to be found.

The author is not aware of particular problems with women who work part time and the implementation of Article 5 of the Pregnant Workers Directive (92/85).

The author is not aware of evidence of part-time workers being forced out of employment because they want to work part time, as distinct from workers being herded into lower-quality jobs because they want to work part time.



## II. FIXED-TERM WORK

### 1. General information

In the period of November 2012-January 2013, 6.1 % of male employees and 6.9 % of female employees were in temporary positions. Fixed-term work is generally regarded less positively than part-time work, because of its inherently insecure nature, although it is understood that some workers choose this type of work. In contrast with the position of part-timers (see above), in the period of November 2012-January 2013 only 17 % of men and 23 % of women working on fixed-term contracts reported that they did not want a permanent job, with 45 % of men and 36 % of women having been unable to find permanent employment. The author is not aware of national statistics on fixed-term work and the gender pay gap.

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

There are not, as far as the author is aware, any national policies on fixed-term work.

##### 2.1.2. Equal treatment

The Fixed-Term Employees Regulations<sup>1207</sup> require (broadly) that employees on fixed-term contracts:

- should not be treated less favourably than comparable permanent employees as regards the terms of their contracts; or by being subjected to any other detriment by any act, or deliberate failure to act, by their employer;
- should not be given contracts which waive their redundancy rights; and
- should be made aware of permanent vacancies within the organisation.

The Regulations only apply to ‘employees’, not ‘workers’ in the general sense, and specifically exclude employment agency workers; apprentices, even if they have contracts of employment; people on certain government-supported training schemes; people on higher education courses doing work placements of one year or less and serving members of the armed forces.

The legislation is applicable to all businesses. It expressly prohibits unequal treatment (absent justification) ‘on the ground that the employee is a fixed-term employee’ as regards ‘any period of service qualification relating to any particular condition of service’, ‘the opportunity to receive training’ and ‘the opportunity to secure any permanent position in the establishment’. It provides for the application of the pro rata principle ‘unless it is inappropriate’. The maximum period for which employees can be continuously employed on successive fixed-term contracts is four years unless the use of such contracts is objectively justified. In the absence of justification the latest FTC (fixed-term contract) becomes a contract of indefinite duration. There is no statistical evidence on the non-renewal of fixed-term contracts for reasons connected to pregnancy, maternity, or parental leave although the suspicion is that this does happen.

There are conditions on which it is legal to offer fixed-term contracts under national legislation, save for the normal prohibitions on discrimination. As above, after four years of continuous employment on a succession of FTCs, employment will become permanent unless the use of the FTCs is objectively justified. These conditions do not vary between employers (although the answer to the question of whether the use of FTCs in a particular case is objectively justified may vary).

The fact that employers can avoid successive FTCs from becoming permanent by engineering breaks in the employee’s continuity of employment is an obvious weakness, as is

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<sup>1207</sup> Northern Ireland has materially identical Regulations.

the fact that the Fixed-Term Employees Regulations apply only (as their name suggests) to employees rather than workers. The author cannot answer the question of whether there are there any forms of indirect sex discrimination in national legislation, although it does not appear that the Fixed-Term Workers Regulations themselves discriminate on grounds of sex. The author cannot offer any examples from the UK of good practice in this context.

## ***2.2. Collective agreements***

The ‘Joint Agreement on Guidelines for the Employment of Fixed-Term Employees in Further Education Colleges’ between the Association of Colleges and a number of Trade Unions lists as its first objective that ‘Fixed-term employees have the right not to be treated less favourably than comparable permanent employees as regards the terms of their contract of employment or any act, or deliberate failure to act, of the employer’ and contains a number of provisions to that end. The National Joint Council for Local Government Services has issued Guidance on School Support Staff which includes provision for the equal treatment of FTC workers and guidance as to when FTCs might properly be used.<sup>1208</sup> Trade unions are less sanguine about the use of FTCs than they are about part-time work, since FTCs can be abused by employers and are less likely to be the product of employee choice than is part-time working. The author is not aware of indirect sex discrimination in national collective agreements in relation to FTC work

## ***2.3. Case law***

In *Whiffen v Milham Ford Girls' School*<sup>1209</sup> the Court of Appeal accepted that protecting permanent staff from redundancy at the expense of temporary employees, when 100 % of men in the school but only 77 % of women were employed on permanent contracts, amounted to unlawful indirect sex discrimination. The case is unusual because there was a strong correlation between fixed-term working and sex in the particular workplace, although there is not in the British economy. A Tribunal had found that the policy was justifiable because it was ‘of its nature gender-neutral’, but the Court of Appeal ruled that this was necessarily so in cases of indirect discrimination, and that the employer had failed to show that it was necessary in this case to select only temporary staff for redundancy.

Generally the concept of indirect sex discrimination is of little value in this context as there is not a correlation at national level between gender and FTC working.

## ***2.4. Involvement of other parties***

The author is not aware of the involvement of any private or public stakeholders, in addition to that of the legislator or government, which play a particularly positive and/or important role in the field of rights of fixed-term workers in the UK.

## **3. Statutory social security and pension rights**

Fixed-term workers are not explicitly excluded from statutory social security schemes and/or old-age statutory pension schemes but they may lack the pattern of National Insurance contributions required for various levels of entitlement because of interrupted working patterns and may lack the continuous employment (generally 26 weeks) required to produce entitlement to statutory leaves. The relative balance between male and female workers on FTCs in the UK means that the implications of FTC working as regards sex equality are limited, given in particular that the expiry of an FTC without renewal is regarded as a dismissal in national law and the prohibition on pregnancy discrimination applies in this context, including in particular the enhanced rights that pregnant workers enjoy as regards

<sup>1208</sup> <http://www.lge.gov.uk/lge/aio/778006>, accessed 25 June 2013.

<sup>1209</sup> [2001] ICR 1023.

redeployment. This is not to deny the particular insecurities faced by women on FTCs who need to take maternity leave, or that there may be a disproportionate concentration of women on FTCs in particular sectors (there is some evidence that this is the case in education).<sup>1210</sup>

### III. HORIZONTAL PROVISIONS

#### 1. Effectiveness

Generally speaking Employment Tribunal cases are difficult to bring because of short time limits, complex law, the cost of instructing lawyers (and the fact that cases are difficult to win without the involvement of lawyers), the risk of costs being awarded if the claim fails (such costs may be awarded where claims are ‘misconceived’) and, as of summer 2013, the imposition of fees of up to EUR 1 400 (GBP 1 200) to bring such claims.

National law does not provide hands-on support, financial support or advice for individuals seeking to enforce their rights. There are, to the author’s knowledge, no specific studies of difficulties experienced by part-time workers as regards the enforcement of rights. National law does not allow class actions as such and the author is not aware of any increase in litigation by associations, organisations or other legal entities since the implementation of the Recast Directive.

Compensation in discrimination cases is uncapped and covers pecuniary losses and injury to feelings. It does not include punitive damages except in unusual cases involving public authorities but remedies are probably effective, dissuasive and proportionate to the damage suffered. This may not be the case as regards the Part-Time Workers and Fixed-Term Employee Regulations, under which no awards may be made in respect of injury to feelings. There is no low-cost complaint system in the UK.

#### 2. Vulnerability, multiple/intersectional discrimination

White British women appear to be disproportionately likely to work part time in comparison with Black Caribbean, Indian, Black African, Pakistani and Bangladeshi women.<sup>1211</sup> A TUC report found in 2005 that EM women were more likely than their white counterparts to be employed in temporary jobs: 5.7 % of white women were in non-permanent work in comparison with 8.3 % of Asian or Asian-British, 9.4 % each Mixed and Black or Black-British, 10.9 % ‘Other ethnic group’ and 13.4 % Chinese.<sup>1212</sup>

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<sup>1210</sup> See for example the National Union of Teachers’ factsheet at <http://www.teachers.org.uk/node/12834>, accessed 29 July 2013.

<sup>1211</sup> EHRC *Moving on Up? Ethnic Minority Women and Work* [www.northantsobservatory.org.uk/docs/docpaygaps070410142800.pdf](http://www.northantsobservatory.org.uk/docs/docpaygaps070410142800.pdf), p.14, accessed 9 April 2013.

<sup>1212</sup> TUC *Black Women and Employment* <http://www.tuc.org.uk/extras/bwae.pdf>, accessed 9 April 2013.

# Annex 1

## Questionnaire

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**Questionnaire for the report *Indirect Sex Discrimination in Relation to Part-time and Fixed-term Work.***  
***The application of EU and national law in practice in 33 European countries***  
***(working title)***

**European Network of Legal Experts in the Field of Gender Equality**

**Susanne Burri (main author) and Helga Aune**

### 1. Introduction

Disadvantages related to part-time work and fixed-term work often amount to forms of indirect sex discrimination, due to the fact that more women than men work with such employment contracts. Women are particularly over-represented in part-time jobs: while 19.2 % of the EU-27 workforce worked part-time in 2010, one third (31.9 %) of women in the EU-27 worked on a part-time basis compared to less than one out of ten men (8.7 %). Part-time work is thus closely related to gender equality issues, for example in relation to the building up of pensions. The incidence of part-time work in the EU-27 is the highest in the Netherlands, the UK, Denmark, Sweden, Germany, and Austria. The predominance of women in part-time work is often explained by gender stereotypes related to family responsibilities, but is also related to the gender segregation in employment, in particular in the educational and health sectors.

In 2010, 13.9 % of the EU-27 workforce were contracted with limited duration.<sup>1</sup> Such contracts are more common in Poland, Spain, Portugal, where roughly one out of four workers has a contract of limited duration.<sup>2</sup> Slightly more women than men work with a contract of limited duration.<sup>3</sup>

The legal protection against indirect sex discrimination, in particular in relation to part-time work, has been strongly developed over the last decades. The Court of Justice of the EU (CJEU) has played a key role in enhancing the protection of women in relation to part-time work and in developing the concept of indirect (sex) discrimination. The first case on this issue was *Jenkins* (96/80), published in 1980, followed by the landmark case on indirect (sex) discrimination *Bilka* (170/84), published in 1986. The test in order to decide whether unequal treatment which disadvantages a group of persons might be objectively justified applies not only in relation to part-time work, but also in relation to fixed-term work. The legal approach to such forms of discrimination in EU law is quite similar. This is the main reason why both forms of contract – part-time and fixed-term – form the topic of this report. In addition to the application of the concept of indirect sex discrimination, two directives (97/81/EC and 1999/70/EC) aim at enhancing the protection of part-time and fixed-term workers. In 1997, directive 97/81/EC on part-time work was adopted. Many preliminary questions have been answered by the CJEU since *Jenkins* in relation to the rights of part-time workers, in particular in relation to pay, working conditions, promotion and (occupational) social security and pensions (see e.g. the recent case C-385/11, *Ebal Moreno*). In addition, the interpretation

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<sup>1</sup> Note that the group with a contract of limited duration as defined by Eurostat is broader than the group working with a fixed-term contract.

<sup>2</sup> Eurostat, *Europe in figures-Eurostat Yearbook 2012*, p. 229, available at: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Europe\\_in\\_figures\\_-\\_Eurostat\\_yearbook](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Europe_in_figures_-_Eurostat_yearbook), accessed 4 March 2012.

<sup>3</sup> Eurostat, *Labour market statistics, Employment*, p. 30, available at: [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-32-11-798-EN/KS-32-11-798-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-32-11-798-EN/KS-32-11-798-EN.PDF), accessed 22 February 2013.

of the CJEU of Directive 1990/70/EC on fixed-term contracts is also relevant in so far as similar concepts are included in the part-time work directive, such as the principle of equal treatment or the objective reasons test.

The aim of this thematic report is to investigate the main problems faced by part-time and fixed-term workers in the 33 countries participating in the Gender Network and analyse and assess existing gender equality legislation and case law in this field, both at EU and national level. The purpose of this report is to provide information on and an analysis of the practical impact of the relevant gender equality directives as well as possible weaknesses/lacunae in the existing *acquis* and its implementation and application in relation to these two groups of workers. The main added value of this report will be to determine to what extent gender equality directives and their implementation can and do contribute to further the protection of these categories of workers. As such, the report is not to be about transposition/implementation/application of Directives 97/81/EC and 1999/70/EC, but on the gender equality directives. However some aspects of the other two directives may be relevant, an example being the definition of these two categories of workers, but only to a limited extent. The relevant EU gender equality legislation is Article 157 TFEU, the Recast Directive 2006/54/EC, Directive 79/7/EEC on statutory social security and the Goods and Service Directive 2004/113/EC. The scope of the report will therefore cover rights of part-time and fixed-term workers in the field of labour law, pregnancy and maternity, occupational and statutory social security law and pensions as far as possible. Possibilities to adapt working time and working hours to the needs of workers will also be addressed. The report will cover pay and (access to) employment, self-employment, occupational and statutory pension schemes, and (access to) the supply of goods and services. Not only relevant national legislation will be described, but also the case law of national courts and the opinions of equality bodies.

This report aims at identifying gaps in existing legislation both at EU and national level in order to remedy the problems faced by part-time workers and fixed-term workers, to provide information on relevant case law and to identify good practices. Questions addressed also include the extent to which forms of systemic discrimination of part-time and fixed-term workers are examined. In how far do policies, national legislation, national collective agreements, case law and labour market policies contribute to weakening gender segregation of the part-time and fixed-term labour market and gender stereotypes in relation to part-time and fixed-term work?

## **2. The legislative context in European Union law**

The issue of discrimination in relation to part-time work and fixed-term work is addressed by Treaty provisions, secondary legislation (directives), case law of the Court of Justice, soft law and policies.

A summary of the Treaty provisions, secondary legislation (directives), and relevant soft law and policies is provided hereunder for your information and convenience.

Treaty Provisions and the Charter of Fundamental Rights which has the same status as Treaty provisions since the 1<sup>st</sup> of December 2009

In Article 157 of the Treaty on the Functioning of the European Union (TFEU) the principle of equal pay for equal work or work of equal value between men and women is firmly embedded. Article 19 TFEU (an enabling clause) and Directive 2004/113/EC extend the principle of anti-discrimination outside the strict confines of the workplace (to the exclusion of the content of the media, advertisements and education).

Furthermore, the EU Charter of Fundamental Rights<sup>4</sup> firmly establishes the importance of the concept of equality in Article 20 and non-discrimination in Article 21 and more

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<sup>4</sup> OJ C 82 of 30 March 2010.

specifically gender equality in Article 23. In addition, the issue of reconciliation of professional and family life is addressed in Article 33. The provisions of the Charter shall not be interpreted as restricting or adversely affecting human rights and fundamental freedoms (Article 53).

### Secondary Legislation

#### *The Recast Directive 2006/54/EC*

The Recast Directive<sup>5</sup> incorporated and updated the following now repealed directives: the Equal Pay Directive 75/117/EEC, the Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC, the Occupational Social Security Directive 86/378/EEC as amended by Directive 96/97/EC and the Burden of Proof Directive 97/80/EC.

It provides for the principle of equal treatment between women and men which means that there should be no discrimination whatsoever – direct or indirect – on grounds of sex. Concepts of discrimination are defined in the directive (see Article 2).

#### *The Statutory Social Security Directive 79/7/EEC*

The Statutory Social Security Directive 79/7/EEC<sup>6</sup> applies to statutory social security schemes and statutory pensions as set out in Article 1. Article 4 prohibits both direct and indirect sex discrimination, in particular with reference to family or marital status with respect to the scope of the schemes and the conditions for accessing them; the obligation to contribute and the calculation of contributions; as well as the calculation of benefits and the conditions governing the duration and retention of an entitlement to benefit. It specifies that measures for the protection of women on the ground of maternity shall not be affected by the principle of equal treatment. However, Member States may exclude the following from the scope of the directive: the determination of the pensionable age; advantages granted to retired persons who have brought up children, specifically concerning periods of interruption of employment; old-age or invalidity benefit entitlement connected with the derived entitlements of a spouse; and long-term benefits accorded to a spouse connected with the invalidity, old age, accidents at work or the occupational disease of their spouse.

#### *The Part-time Work Directive 97/81/EC*

The Part-time work Directive<sup>7</sup> implements the Framework Agreement of the European social partners (annexed to the Directive). The purpose of the Directive is to remove discrimination against part-time workers and to improve for the quality of part-time work (see clause 1 (a)). In addition the Framework Agreement purports to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers (see clause 1 (b)).

#### *The Directive on Fixed-term Work 1999/70/EC*

The Fixed-term Work Directive is in many regards similar to the Part-time Work Directive and also implements a Framework Agreement of the European social partners.<sup>8</sup> This agreement has two main goals: First to improve the quality of fixed-term work (see clause 1(a)); and second to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

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

<sup>6</sup> Council Directive 79/7/EEC, OJ L 6, of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

<sup>7</sup> Council Directive 97/81/EEC, OJ L 14, of 15 December 1997 concerning the Framework Agreement on part-time work concluded by the UNICE; CEEP and the ETUC.

<sup>8</sup> Council Directive 1999/70/EC, OJ L 175, of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP., 10.7.1999, p. 43–48.

*The Goods and Services Directive 2004/113/EC*

This directive applies to (the access to) goods and services, except for the content of media and advertising and education (see Article 3(3)). It also contains definitions of discrimination (Article 2).<sup>9</sup>

Soft law provisions

The Council Resolution of 29 June 2000 provides that the balanced participation of women and men in both the labour market and in family life is an essential aspect of the development of society.

Commitment to this has been reiterated on several other occasions. Most notably the Presidency Conclusions of 23/24 March 2006 which acknowledged the need to promote a better work-life balance and to combat gender stereotypes in the employment market.<sup>10</sup> This commitment was also more recently emphasised by the Council in the European Pact for Gender Equality.<sup>11</sup>

## QUESTIONNAIRE FOR THE EXPERTS

### I. PART-TIME WORK

There is hardly any topic more interlinked than the legal norms of gender equality and the prohibition of sex discrimination in the one hand and the social structures in work and family life in the other. In considering the gender segregated labour market and the imbalanced share of family responsibilities between women and men, the approaches to the meaning of gender equality in relation to part-time work are rather diverse. There are different traditions in the various countries on how part-time work is viewed upon in general and more in particular by the social partners. Part-time work may be seen as an end product mirroring traditional gender roles, with emphasis on the disadvantages of part-time work in pay, promotion, pension rights etc. Or it might be seen as an instrument to increase the labour participation – and thus to a certain extent at least economic independence – of women. We kindly ask you to provide answers to the questions below as they apply to your national context.

#### 1. General information

Please provide in a few lines sex-segregated data on part-time work in your country.

What is the definition used in national statistics of part-time work?

At a national level: what is the percentage of employees working part-time?

At a national level: what is the percentage of female employment and what percentage of these do work part-time?

At a national level: is part-time work more common in some professions than others? Please provide examples.

At a national level: Are there national statistics on the percentage of involuntary part-time work (people in part-time positions who would like to work more)?

Is there evidence that people combine a few (minor) part-time jobs?

Is there evidence that people combine a part-time job with self-employment?

At national level: Are there statistics on the percentage of full-time workers who would like to reduce their working time?

At national level: Are there any statistics of findings on the impact of part-time work on the gender pay gap?

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<sup>9</sup> Council Directive 2004/113/EC, OJ L 373, of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services., 21.12.2004, p. 37-43.

<sup>10</sup> Presidency Conclusions of 23/24 March 2006, 777751/1/06 REV 1.

<sup>11</sup> Council Conclusions on the European Pact for Gender Equality (2011-2020) (2011/C 155/02).



Please give some general information on developments related to part-time work and how part-time is generally viewed in your country. For example, is part-time work viewed as specifically related to women in relation to family responsibilities? Is there evidence that forms of discrimination on the grounds of part-time work vary according to the type of employer (State/private); the size of the employer or the sector?

## **2. Legislation, (national) collective agreements and case law**

National rights in relation to part-time work has been described in the past by the Gender Network;<sup>12</sup> therefore, we would be grateful if you could provide below a recent summary of existing national legislation, (national) collective agreements, case law and opinions of the equality body in order to give an impression of the legal situation in your country.

### **2.1. Policies and legislation at national level**

#### 2.1.1. National policies

Provide some general information on national policies on part-time work. How is part-time work addressed in policy documents?

Is part-time work facilitated for specific groups of workers, for example workers with family responsibilities, care responsibilities for chronically ill or disabled persons or older employees?

Please report if there are any discussions around part-time work as a symptom of gender stereotypes and what the legal obligation of CEDAW article 5a is in this regard. If you have knowledge about your states reports to the CEDAW Committee, please state the degree to which part-time work has been addressed?

#### 2.1.2. Equal treatment

Describe the main existing legal national measures meant to combat discrimination and to implement the principle of equal treatment in relation to part-time work in your country.

Pay attention so far as possible to the following issues:

- The legal definition of part-time workers,
- Exclusions of specific groups of part-time workers,
- Is the legislation applicable to all undertakings or are small and medium-sized enterprises (SME's) excluded from the scope of application?
- The thresholds in relation to specific rights, and
- How different working conditions (eg. basic pay, overtime supplements, training facilities, promotion, workers representatives, dismissal) have to be applied to part-time workers in order to meet the principle of equal treatment.

#### 2.1.3. Organisation of working time

Describe the main existing legal national measures in place to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time.

Does national legislation provide a general right to work part-time or a right to work full time? Or a right to adjust working time, for example a statutory right to adjust working time, i.e. to reduce working time or to increase working time (from a small part-time to a bigger part-time job or to a full position)? If so, is this right subject to certain conditions; are some groups of workers excluded? What is the scope of application?

May a decision on such a right be appealed to a Tribunal or to the courts?

Do workers hold influence over their working hours, for example in order to be able to meet family responsibilities?

<sup>12</sup> See in particular the report *Legal Approaches to some aspects of the reconciliation of work, private and family life in 30 European Countries, August 2008*, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9), accessed 22 February 2013.

Upon returning from maternity leave (see in particular Article 15 of Directive 2006/54/EC): is there a right to work reduced hours for a certain time to facilitate the work and family obligations? Is there a right to reduced working hours based on a need to care for old relatives?

#### 2.1.4. Assessment

What do you consider the strengths and weaknesses of the national legislation?

Are there any forms of indirect sex discrimination in national legislation?

To what extent is this legislation ‘gender-sensitive’ in addressing gender stereotypes as an underlying matter?

Is there any example of a ‘good practice’ you would consider worth followed by other countries?

### **2.2. Collective agreements**

#### 2.2.1. Policies

Describe in a few lines the policies of the social partners in relation to part-time work. Have social partners, historically, in your national state opened up for part-time work or do they oppose part-time work?

#### 2.2.2. Equal treatment

Provide a brief overview of how the main national collective agreements (if any) regulate part-time work.

#### 2.2.3. Organisation of working time

Provide a brief description of the main national collective agreements (if any) on the organisation of working time which should facilitate the development of part-time work on a voluntary basis and the role of social partners in this regard.

#### 2.2.4. Assessment

What do you consider the strengths and weaknesses of the national collective agreements in this respect?

Are you aware of any forms of indirect sex discrimination in national collective agreements?

To what extent is this legislation ‘gender-sensitive’ in addressing gender stereotypes as an underlying matter?

Is there any example of a ‘good practice’ you would consider worth to be followed by other countries?

### **2.3. Case law**

#### 2.3.1. Cases/opinions of equality bodies

Briefly describe landmark cases (if any) of national courts and/or equality bodies which you consider to generally reflecting the interpretation of the principle of equal treatment in relation to part-time work. Pay in particular attention to:

- The application of the principle of equal treatment,
- The interpretation of the concept of indirect sex discrimination in relation to part-time work, and
- The possibilities for workers to influence working time and working hours in accordance with their needs, for example in relation to family responsibilities.

Please inform us of cases where CEDAW Article 5a has been used in the legal argumentation.

#### 2.3.2. Assessment

In relation to the case law you have just described, do you perceive there to be any shortcomings in the application of the principle of equal treatment/the concept of indirect sex discrimination?

With regards to part-time work, is this case law in accordance with the case law of the Court of Justice? If not, what are the contradictions?

What is in your view the added value of the concept of indirect sex discrimination given the scope of national legislation?

Is there any example of a ‘good practice’ you would consider worth to be followed by other countries?

#### **2.4. Involvement of other parties**

Briefly describe the involvement of any private or public stakeholders, beside that of the legislator/government that is/are playing a particularly positive and/or important role in the field of rights of part-time workers in your country.

Please consider in particular the role of the social partners, national equality bodies, Non-Governmental Organisations (NGO’s)/civil society.

Do you know of any particularly good practices which have been initiated by the social partners or alternative private or public stakeholders which could be relevant in the area of indirect discrimination on the ground of part-time work?

On the contrary, is it possible to identify reluctant or obstructive bodies or restrictive views (for example due to political and or religious or cultural reasons, re CEDAW Article 5a)? Please give short examples where possible.

### **3. Statutory Social Security and Pension rights**

#### **3.1. Exclusions**

Are some categories of part-time workers explicitly excluded from statutory social security schemes and/or old age statutory pension schemes?

Are there any minimum requirements, thresholds or provisions that disadvantage part-time workers as regards working time for acquiring statutory social security or pension rights?

Are there specific problems part-time workers face in relation to unemployment benefits, for example unemployed people who lose benefits when they accept a part-time job?

Are there specific requirements in order to be entitled to statutory leaves (e.g. parental leave) which might exclude or disadvantage part-time workers?

Please describe briefly specific case law (if any) on these issues.

#### **3.2. Assessment**

How do you assess the information provided in Section 3.1. in light of the EU *acquis* on gender equality?

### **4. Self-employment**

Are you aware of any potential disadvantages faced by self-employed persons working part-time, for example the access to financial services (bank loans)?

Do any national legislative provisions and/or national collective agreements address issues of equal treatment pertaining to part-time self-employed persons?

Can any case law and/or opinions of equality bodies be found on such issues?

Please assess the information provided.

## 5. Access to goods and supply of goods and services

Are you aware of any disadvantage faced by part-time workers in the area of access to and supply of goods and services, for example in the access to financial services (e.g. mortgages, bank loans), longer waiting periods for insurances or higher premiums than justified by the application of the principle *pro rata temporis*?

Do any national legislative provisions or national collective agreements address discrimination of part-time workers in the access to and supply of goods and services?

Can any case law and/or opinions of equality bodies be found on such issues?

Please assess the information provided.

## 6. Are there any gaps in national law?

Gaps can be identified through various sources: judicial cases or other reported alternative dispute resolution; reports and opinion from the national equality body; and academic scientific studies. Please note that the issues described below are meant only as examples for consideration in your answers. You might not have answers to each and every one of these questions hereunder; indeed there might not be many gaps in your national law. Please do not feel obliged to answer all questions posed; only those that are relevant to your country. If, however, you have extensive examples in this area, we would be grateful if you could choose the most significant examples to report; briefly describe the situations of discrimination and include the relevant references.

### 6.1. Gaps in the area of (access to) employment

#### 6.1.1. Recruitment process

Does your national law lack effective protection against discrimination of part-time workers in relation to access to employment? In particular can you identify where procedures/mechanisms/safeguards are lacking with regards to employment recruitment in order to prevent discrimination of part-time workers?

Is there a dearth of full-time positions in certain professions/sectors: such as the health-, cleaning and education sectors? In reality, does this force (female) employees into part-time work as they are overrepresented in these sectors? If this is the case; are there any initiatives at the local or national level to change the organisation of employment at the work places? Such initiatives may be in the form of evaluation groups, co-operation between the social partners or addressed by law-committees or politicians.

Are there any problems concerning the lack of quality in part-time work available, for example in higher functions? If so, are there any initiatives at local or national level to enhance possibilities to adjust working time?

Are there any good practices worth reporting?

#### 6.1.2. Employment conditions

Are there any gaps you have not mentioned yet in national law with respect to specific employment conditions of part-time workers which might amount to indirect sex discrimination at the workplace (e.g. promotion, training facilities, and/or access to occupational pensions)?

Are there problems with women who work part-time and the implementation of Article 5 of the Pregnant Workers Directive (92/85), for example the requirement that the employer is to temporarily adjust the working conditions and/or working hours of pregnant workers to avoid exposure to occupational risks?

#### 6.1.3. Termination of the employment contract

Is there evidence of part-time workers being forced out of employment because they want to work part-time?

Or the opposite, forced out after application for an increase of the work amount?

## 6.2. Gaps in other areas

Are there any other gaps that you could identify in other areas (statutory social security, pensions, self-employment, goods and services that you have not yet mentioned above)?

## II. FIXED-TERM WORK

### 1. General information

In a few lines, please provide sex-segregated data (if available) on fixed-time work in your country and provide some general information on related developments work and how fixed-term work is generally viewed in your country.

At national level: Are there any statistics of findings on the impact of fixed-time work with regards to the gender pay gap?

### 2. Legislation, (national) collective agreements and case law

#### 2.1. Policies and legislation at national level

##### 2.1.1. National policies

Provide some general information on national policies regarding fixed-term work.

##### 2.1.2. Equal treatment

Describe the main existing legal national measures meant to combat discrimination and to implement the principle of equal treatment in relation to fixed-term work in your country.

Pay attention so far as possible to the following issues:

- Is the legislation applicable to all undertakings or are small and medium-sized enterprises (SMEs) excluded from the scope of application?
- The thresholds in relation to specific rights, and
- The way in which different working conditions (e.g. basic pay, overtime supplements, training facilities, promotion, workers representatives, dismissal) are applied to fixed-term workers in order to meet the principle of equal treatment.

Is there evidence that fixed-term contracts are not being renewed for reasons connected to pregnancy, maternity, or parental leave? Is there a maximum time limit for how long a person may be hired on fixed-term contracts?

##### 2.1.3. Successive fixed-term contracts

On what conditions and when is it legal to offer fixed-term contracts under national legislation?

Do these conditions differ depending on the size or type of employer (State/private)?

Are you aware of any specific problems of women relating to fixed-term contracts, for example that young women are offered more often a fixed-term contract than young men?

Are there any data or studies available which show such findings?

##### 2.1.4. Assessment

Which do you consider the strengths and weaknesses of the national legislation?

Are there any forms of indirect sex discrimination in national legislation?

Is there any example of a 'good practice' you would consider worth followed by other countries?

## **2.2. Collective agreements**

Describe in a few lines the policies of the social partners in relation to fixed-time work. Provide a brief overview of the main national collective agreements on fixed-time work (if any) or how the issue is addressed.

What do you consider weak and strong points of the national collective agreements in this respect?

Are there any forms of indirect sex discrimination in national collective agreements you are aware of?

Is there any example of a ‘good practice’ you would consider worth to be followed in other countries?

## **2.3. Case law**

Describe shortly landmark cases (if any) of national courts and/or equality bodies which you consider to generally reflect the interpretation of the principle of equal treatment in relation to fixed-time work. Pay in particular attention to:

- The application of the principle of equal treatment, and
- The interpretation of the concept of indirect sex discrimination in relation to fixed-term work.

Describe in a few lines landmark cases (if any) in relation to successive fixed-term contracts.

In the case law you have described, do you perceive there to be any shortcomings in the application of the principle of equal treatment/the concept of indirect sex discrimination?

With regards to fixed-term work, is this case law in your opinion in accordance with the case law of the Court of Justice? If not, which contradictions do you perceive?

Given the scope of national legislation, what do you perceive to be the added value of the concept of indirect sex discrimination given the scope of national legislation?

Is there any example of a ‘good practice’ you would consider worth to be followed by other countries?

## **2.4. Involvement of other parties**

Briefly describe the involvement of any private or public stakeholders, beside that of the legislator/government that is/are playing a particularly positive and/or important role in the field of rights of fixed-term workers in your country.

In particular, please consider the role of the social partners, national equality bodies, and NGO’s/civil society.

Do you know of any particularly good practices which have been initiated by the social partners or alternative private or public stakeholders which could be relevant in the area of indirect sex discrimination on the ground of fixed-term work?

## **3. Statutory Social Security and Pension rights**

Are some categories of fixed-time workers explicitly excluded from statutory social security schemes and/or old age statutory pension schemes?

Are there any minimum requirements, thresholds or provisions to be met that disadvantage fixed-time workers with regards to working time in order to acquire statutory social security or pension rights?

Are there specific requirements to be met in order to be entitled to statutory leaves (e.g. parental leave) which might exclude or disadvantage fixed-time workers?

Please describe in a few lines specific case law (if any) on these issues.

How do you assess the information provided in this Section in light of the EU *acquis* on gender equality?

### III. HORIZONTAL PROVISIONS

#### 1. Effectiveness

Are you aware of any difficulties linked to enforcing rights regarding in relation to the position of part-time or fixed-term workers (e.g. the length of the procedure, the cost of the proceedings)?

Does national law provide hands-on support, financial support and/or advice for individuals seeking to enforce their rights?

Are you aware of any studies which address the difficulties involved in obtaining access to legal redress for rights regarding part-time workers positions? (Please provide a brief summary of the findings and references).

Since the implementation of the Recast Directive, are you aware of an increase in the national case law regarding class actions initiated by associations, organisations or other legal entities which have a legitimate interest in this area?

In terms of compensation, the various directives require Member States to introduce, in their national legal systems, effective compensation or reparation in a way which is dissuasive and proportionate to the damage suffered. Are you aware of any remedies or compensation which does not dissuade transgressors or does not adequately compensate the victim of violations of rights of part-time workers or fixed term workers?

Some countries have extensive low-cost complaint systems (Anti-discrimination Ombud and Board of Appeal/Tribunals), but these systems are not entitled the right to award damages or compensation. How does this system work in your national state, and does it affect the rights of part-time or fixed-term workers?

#### 2. Vulnerability, multiple/intersectional discrimination

This question is not based on legal facts; however, experts might be aware of a number of studies which address these points:

Is there any evidence that some women are at a particular disadvantage with regard to being part-time employed and/or on fixed term contracts? For instance:

- Women from ethnic minorities,
- Women from lower economic backgrounds,
- Women with disabilities, and
- Women who have precarious or atypical employment contracts.

#### 3. Relevant national literature

Please identify the main national academic literature in relation to discrimination on the grounds of part-time or fixed-term work and indirect sex discrimination. (Please limit your reference to a maximum of 5 references).





## Annex II

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