

FAMILY-RELATED LEAVE: ENFORCEMENT ISSUES

Professor Annick Masselot



DESIGNED BY FRANKA VAN HOOF & RAPHAËLE XENIDIS

THE REPORT

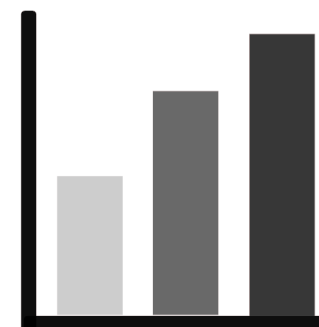
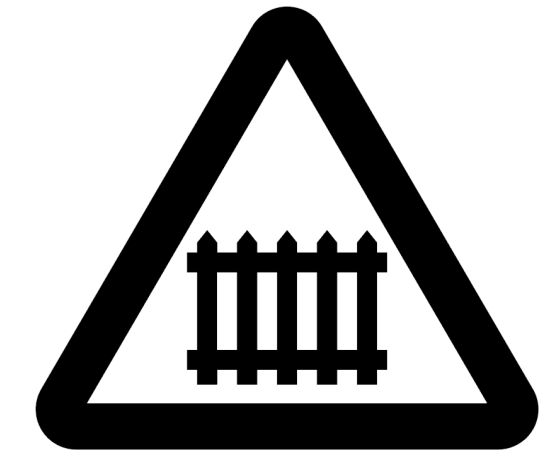
Authored by **Annick Masselot**, University of Canterbury, New Zealand
With the support of the European network of legal experts in gender equality and non-discrimination, **Susanne Burri**, **Franka van Hoof** and **Raphaële Xenidis** as well as the experts of the Network, particularly **Grace James**.



Focus on **enforcement issues** in relation to potential discrimination and dismissal in the context of the various types of family-related leave

Obstacles are identified to the enforcement in practice of the provisions of:

Maternity Leave Council Directive 92/85/EEC
Part-time Work Council Directive 97/81/EC
Gender Equality Directive (Recast) 2006/54/EC
Parental Leave Directive 2010/18/EU
Self-Employment Directive 2010/41/EU



Data was gathered from 31 country experts
(EU + EEA)

Based on responses to a questionnaire

MATERNITY LEAVE AND PREGNANCY-RELATED ISSUES

Protection against discrimination and dismissal

Part 1

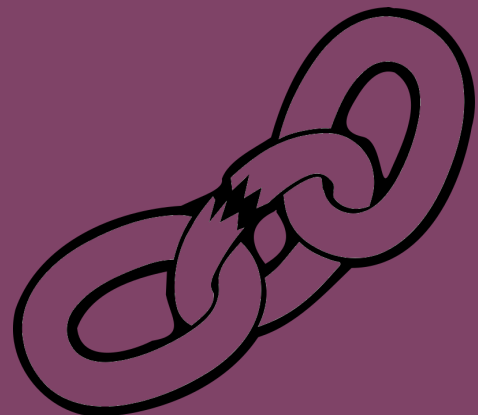
ENFORCEMENT ISSUES RELATED TO DISCRIMINATION BASED ON PREGNANCY AND MATERNITY LEAVE



The discrimination of workers on the ground of pregnancy or maternity leave is **formally prohibited** in **all** EU Member States and EEA countries

Despite **small number of legal cases** regarding pregnancy and maternity discrimination, **instances of discrimination are** reported to be **numerous** and include cases of

- dismissal
- downgrading to an inferior workplace
- wage cut-backs
- denial of the possibility of promotion to better workplaces



The **disconnect** between the law and the reality has many explanations

ENFORCEMENT ISSUES RELATED TO 'GAPS' IN THE LAW



Absence in some countries **of specific anti-discrimination provisions** on the ground of pregnancy and maternity, discrimination based on pregnancy/maternity falls under General anti-discrimination law (Bulgaria, Germany, Lithuania and Poland)

➤ May weaken broad awareness of workers' rights and thus their enforcement

Personal scope: Directive 92/85/EEC protects 'workers'

➤ Creates uncertainties with regard to the personal scope of the applicable prohibition, e.g. inclusion of members of corporate executive boards and some practicing lawyers?

ENFORCEMENT ISSUES RELATED TO THE APPLICATION OF ANTI-DISCRIMINATION PROVISIONS BY NATIONAL COURTS

- 1 The application of the concept of indirect discrimination
- 2 The reversal of the burden of proof
- 3 Remedies and sanctions



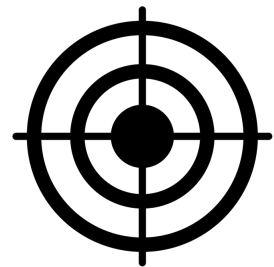
OTHER ISSUES OF ENFORCEMENT



Underlying **stereotypes** as cause of discrimination, not actual pregnancy



Lack of access to **information** and/or lack of **awareness**



Victimisation and the fear of **victimisation**



Complexity of regulations concerning maintenance of payment



Lack of provisions regarding the right to **breastfeeding**

ENFORCEMENT ISSUES REGARDING THE LEGAL IMPLEMENTATION OF THE PROTECTION AGAINST DISMISSAL



In compliance with Art. 10(1) and (2) of Directive 92/85/EEC the dismissal of workers on the ground of pregnancy or maternity is **prohibited in all countries** covered in the report

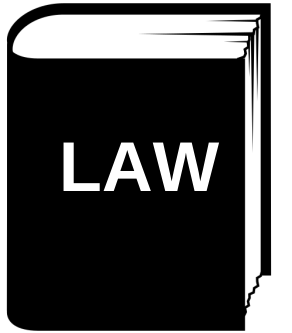


The **majority** of case law related to discrimination based on pregnancy and maternity concerns the **termination of the employment relationship.**

Issues of discrimination or unfavourable treatment are often raised in the argument against the termination of employment, rather than as a stand-alone issue



ENFORCEMENT ISSUES RELATED TO GAPS IN THE LAW



Justification for Dismissal

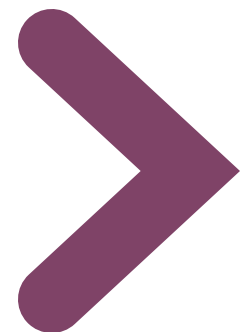
Art. 10 of Pregnant Workers Directive: " Member States shall take the necessary measures to prohibit the dismissal of workers [...] except for reasons unconnected to the pregnancy or the maternity as specified by national law"



Provision is **often abused** by employers, justifications for dismissal include inter alia economic grounds and redundancy

Uncertainty regarding length of protection

Art. 10 of Pregnant Workers Directive : "Member States shall take the necessary measures to prohibit the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of the maternity leave [...]"



There are **many different interpretations** to what the beginning of a pregnancy and the end of maternity actually constitutes

ENFORCEMENT ISSUES RELATED TO APPLICATION OF PROTECTION OF DISMISSAL BY NATIONAL COURTS

1

Courts do not always recognize dismissal on ground of pregnancy/maternity as direct sex discrimination. They often find that 'sex' is not applicable because there is no evidence that the employee has been treated in a particular way because she is a woman

2

Application of the concept of indirect discrimination

3

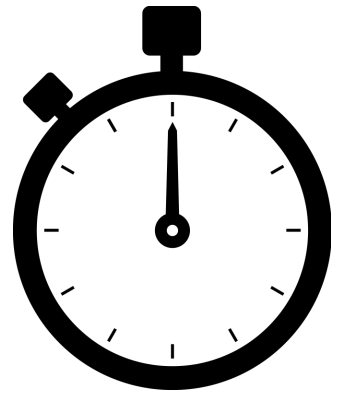
Application of the burden of proof

4

Remedies and Sanctions

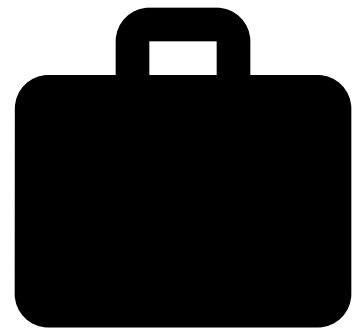


ENFORCEMENT ISSUES RELATED TO THE CONTRACT



- Fixed-term contract of employment
- Probation period

Precarious jobs



Self-employed

OTHER ENFORCEMENT ISSUES



The issue of 'blank resignation' and supervision procedures

Remedies and sanctions



Difficulty to prove link between pregnancy and dismissal

PARENTAL AND ADOPTION LEAVE PATERNITY LEAVE CARERS' LEAVE

Protection against discrimination and dismissal

Part 2

EU ACQUIS

Parental leave Directive 2010/18/EU



Parental leave



Paternity leave



Carers' leave



Flexible working
arrangements

THE WORK-LIFE BALANCE DIRECTIVE PROPOSAL

COM/2017/0253 final



Parental leave



Paternity leave



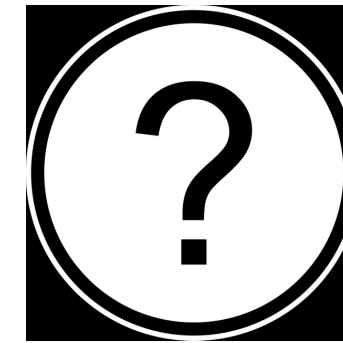
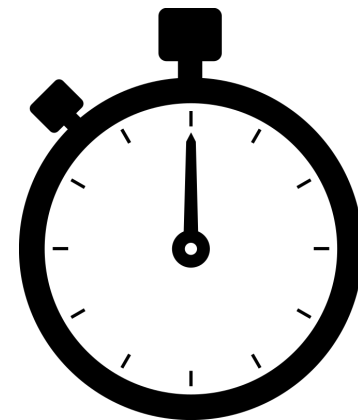
Carers' leave



Flexible working
arrangements

PARENTAL LEAVE

LEGAL GAPS AND ENFORCEMENT ISSUES



1

Legal provisions

Lack of clear, easily enforceable, specific provisions

2

Service time

Not always counted as such in relation to the acquisition of work-related rights, pay and bonuses, promotions...

3

Compensation

Payment is not compulsory under EU law and varies at national level

4

Complexity

Rigidity, lack of flexibility, complex procedures

5

Underreporting

Lack of monitoring, reporting and lack of enforcement in courts

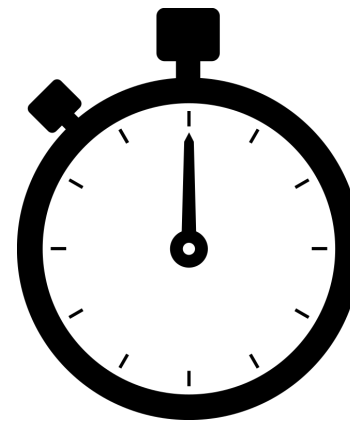
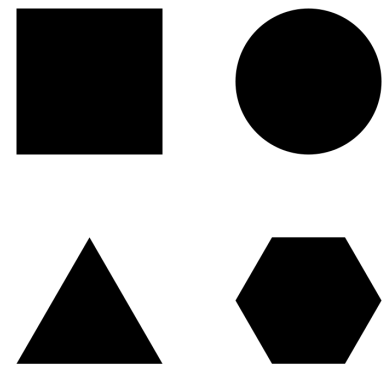
PERCENTAGE OF FATHERS WHO TAKE UP PARENTAL LEAVE

Selected comparative outlook



PATERNITY LEAVE

LEGAL GAPS AND ENFORCEMENT ISSUES



1

Lack of harmonization

Not mandatory,
heterogeneous provisions
at national level

2

Rigidity

Lack of flexibility of the
leave's format, complex
conditions of application

3

Duration

Length of paternity
leave varies across the
countries but remains
short overall

4

Legal protection

No or no specific protection
against
discrimination/dismissal
and insufficient judicial
enforcement

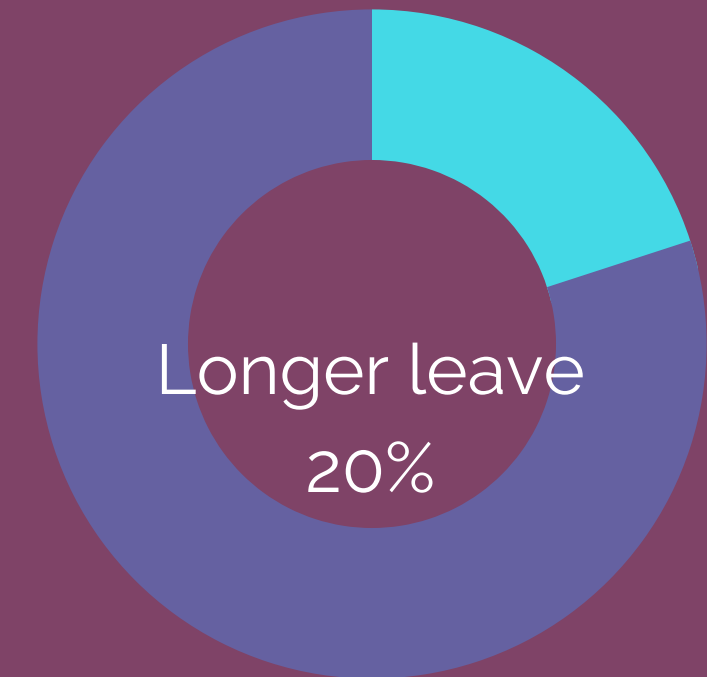
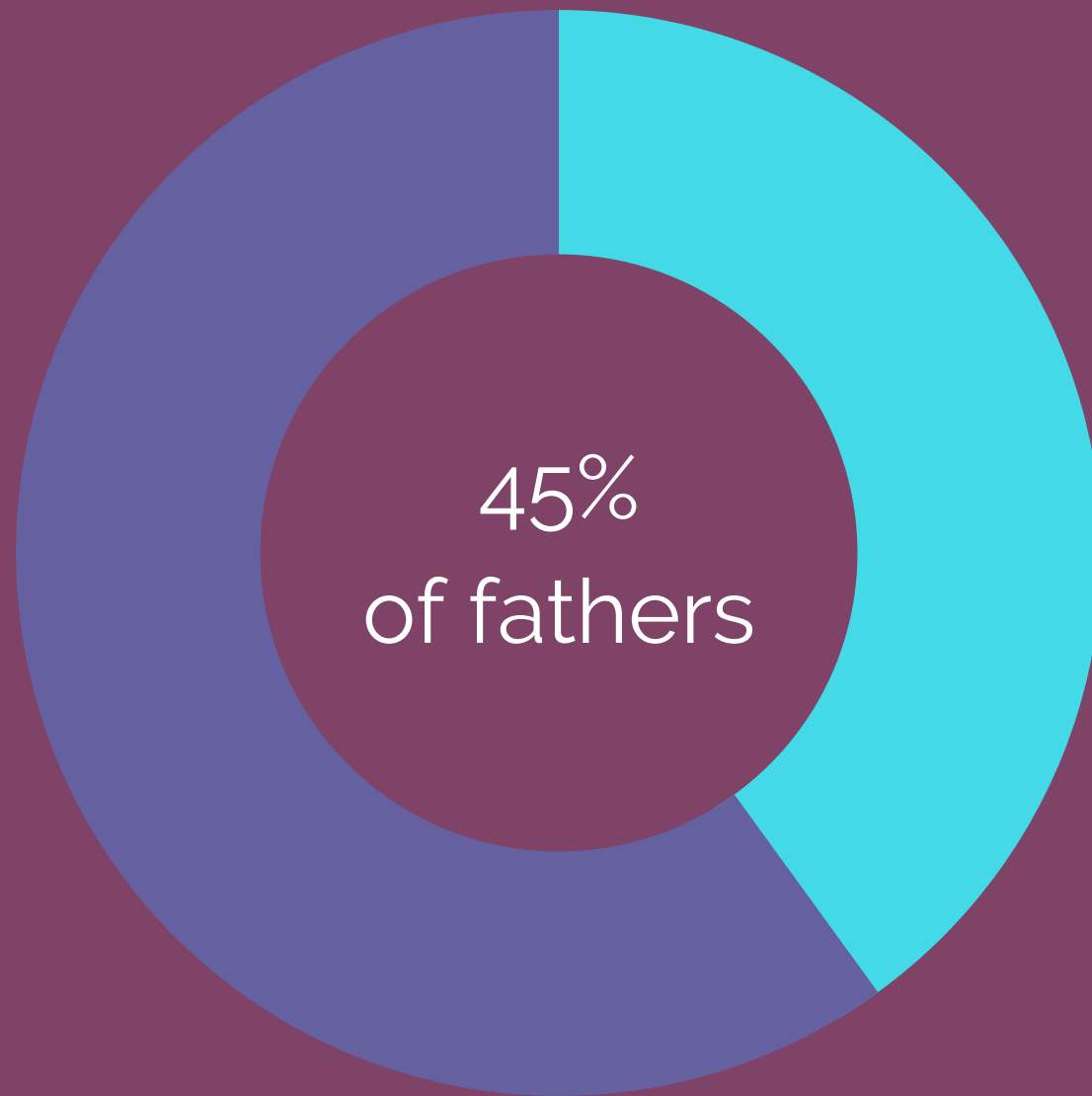
5

Cultural attitudes

Gender-based
stereotypes, lack of
awareness from
employers and
employees...

Take up of parental leave

The example of Denmark

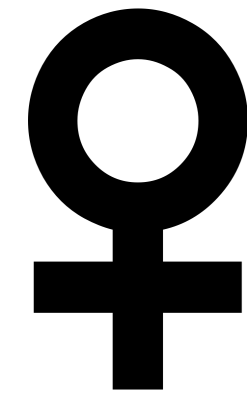
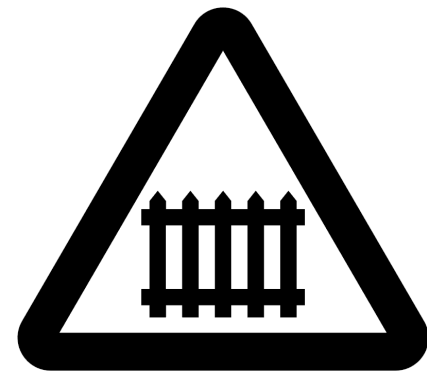


Experienced discrimination



CARERS' LEAVE

LEGAL GAPS AND ENFORCEMENT ISSUES



1

Heterogeneous

Scope, beneficiaries, purposes, length...vary greatly at national level

2

Barriers & restrictions

Due to complex conditions of application, lack of transparency of regulations, and lack of flexibility

3

Compensation

Payment typically provided under the social security system but varies across countries

4

Legal protection

No or no specific protection against discrimination/dismissal and insufficient judicial enforcement

5

Gender effect

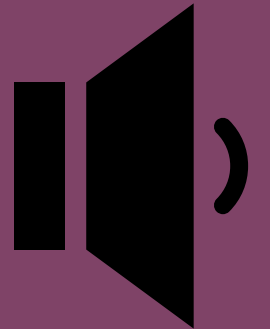
Vicious circle of gender segregation, devaluation, low pay, gender stereotypes

Access to Justice and effective enforcement

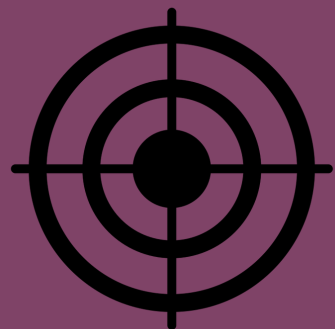


Access to justice is costly

Awareness and information



Legal proceedings are considered too long



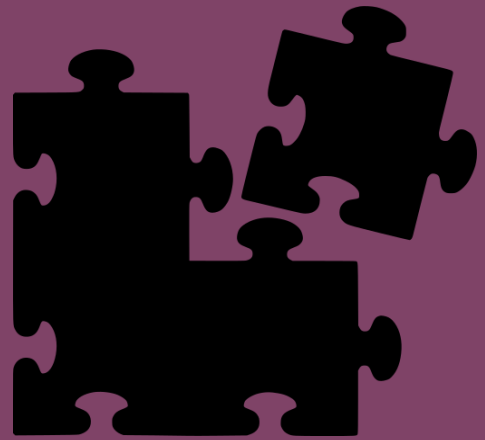
Victimisation and the fear of victimisation especially for people in precarious work during time of economic crisis

Some legal concepts are not applied correctly or understood properly by national courts



Legal procedures are complex and some workers have little faith in the ability of the courts to provide unbiased outcome

Gap between
law and reality
'highly
defective
enforcement'

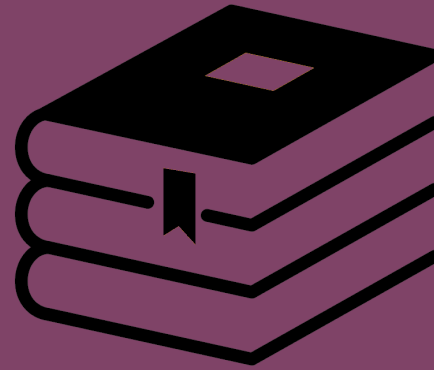


Women
disproportionately
affected by
discrimination



CONCLUSIONS

Need for EU
harmonisation
&
improvements



Need for a more
holistic approach



Better management of
information

- awareness-raising
- information dissemination
- better access to justice