

Parents who want to reconcile work and care: which equality under EU law?

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1. Introduction

Mr Roca Álvarez wanted to reduce his daily working time in order to be able to take care of his baby. According to Spanish legislation, he was not entitled to such a working time reduction because the mother of his child was self-employed. Only fathers of children whose mother was employed had such a right. The Court of Justice of the EU (hereafter: the CJEU or the Court) considered that mothers who are employed always had such a right, while fathers only had a derived right, i.e. when the mother was employed. Such direct sex discrimination is contrary to EU law.¹ Three years later, the CJEU decided in a quite similar Spanish case that Mr Betriu Montull was not entitled to some benefits related to leave, because the mother of his child did not fulfil the conditions required in order to entitle the biological father of her child to such rights. Mr Betriu Montull, just as Mr Roca Álvarez, had only a derived right from the mother's right, but he had no individual, autonomous right. In his opinion in the *Betriu Montull* case AG Wathelet applied the Court's reasoning in the *Roca Álvarez* case and concluded that also in this case the principle of sex discrimination had been infringed. In his view entitlements to leave were denied to fathers in both cases, which were very similar and no justification for this direct sex discrimination applied. However, the Court followed a different approach and instead emphasized the special relation of the mother and the child.² Fathers in the same situation as Mr Betriu Montull are thus denied rights related to their parenthood. What happened in these two cases and in other cases on issues relating to rights of parents who want to care for children? How were the concepts

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

2 Case C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, [n.y.p.].

of non-discrimination and equality interpreted by the Court? Much of the academic work of Titia Loenen addresses the conceptualisation of the principle of equality.³ And the issue of care is prominent in her work.⁴ The aim of this contribution is to discuss and assess in particular some case law of the CJEU in relation to care when parents are denied rights – for example the right to take leave – at the national level and seek to be entitled to such rights by invoking EU law. How does the issue of comparability play a role in such cases? What are the added value and shortcomings of EU law in this field? The contribution starts with a description of the main EU legal norms which are applicable to issues of the reconciliation of work and care in order to delimit the scope of parental rights.⁵ The most relevant cases of the CJEU illustrating the added value and shortcomings of EU law are discussed, followed by an assessment. The conclusion is that EU law has added value, but there are also shortcomings that could be addressed in future legislation.⁶

2. EU law on the reconciliation of work and care

The main pieces of EU legislation providing for specific rights in relation to reconciliation issues are the Pregnancy Directive 92/85⁷ and the Parental Leave Directive 2010/18.⁸ EU sex equality law is also relevant, in particular the prohibition of direct and indirect sex discrimination in the field of pay

3 See in particular her dissertation: LOENEN 1992.

4 LOENEN 1997.

5 The contribution is limited to the field of employment; statutory social security matters and issues related to the access to and supply of goods and services are not discussed here.

6 See for a more in-depth analysis of some issues discussed in this contribution: BURRI 2014b and BURRI forthcoming b.

7 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 348 p. 1).

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

and employment.⁹ The EU Charter of Fundamental Rights applies as well to reconciliation issues. Finally, EU law addresses the working conditions of part-time workers (Directive 97/81)¹⁰ and flexible working arrangements. Historically, the prohibition of direct and indirect sex discrimination was first applied by the Court to reconciliation issues.

2.1. *Direct and indirect sex discrimination*

Discrimination on the ground of pregnancy or maternity amounts to direct sex discrimination and EU law offers strong protection against such discrimination.¹¹ The refusal to appoint a woman because she is pregnant is prohibited and cannot be justified by financial consequences (*Dekker*).¹² A comparator is not required in such pregnancy cases.¹³ The Court ruled in *Brown* that disorders and complications related to pregnancy, which may cause an incapacity to work, form part of the risks inherent in pregnancy and less favourable treatment on that ground, or perhaps even dismissal, also amounts to direct sex discrimination.¹⁴ The *Melgar* case shows that where the non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, this constitutes direct sex discrimination as well.¹⁵ This prohibition of dismissal applies not only to permanent, but also to fixed-term contracts, even if the worker did not inform the employer of her condition when the contract was concluded and if she was unable to work

9 Article 157 TFEU (the former Articles 119 EEC and 141 EC) and 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 L 204, p. 23).

10 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work (OJ L 14, p. 9).

11 See the definition of direct discrimination in Article 2(1)(a) of Directive 2006/54. Less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c) of Directive 2006/54).

12 Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990] ECR I-03941.

13 For example AG Wahl acknowledged this in his opinion in case C- 363-12 (*Z.*) at para. 55.

14 Case C-394/96, *Mary Brown v Rentokil Ltd.*, [1998] ECR I-4185, at para. 22.

15 Case C-438/99, *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios*, [2001] ECR I-06915.

for a large proportion of its duration (*Tele Danmark*).¹⁶ Less strong rights are provided in the field of pay, following the case of *McKenna*.¹⁷ Absences due to pregnancy-related illness during pregnancy prior to maternity leave and after the end of the maternity leave may be treated, with regard to pay, similar to absences related to other forms of illness as far as the protection in relation to pregnancy and maternity is guaranteed.

The prohibition of indirect sex discrimination has been developed by the Court of Justice in particular in relation to part-time work.¹⁸ This case law has contributed to improving the working conditions of part-time workers, especially in relation to access to occupational pensions and to training facilities.¹⁹ Indirect sex discrimination is defined in Article 2(1)(b) of Directive 2006/54.

A disadvantage related to care responsibilities or care leave might amount to indirect sex discrimination, given the fact that many more women than men take up care responsibilities and leave. The Court recognised, for example, in the *Danfoss* case back in 1989 that if the criterion of mobility was understood to include 'the employee's adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly'.²⁰ The employer can justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee. The concept of indirect sex discrimination has been applied

16 Case C-109/00, *Tele Danmark A/S/Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*, [2001] ECR I-6993.

17 Case C-191/03, *North Western Health Board/Margaret McKenna*, [2005] ECR I-07631.

18 See for a recent overview of the relevant case law in relation to reconciliation issues: European Network of Legal Experts in the Field of Gender Equality, BURRI and AUNE 2013 and BURRI and AUNE 2014.

19 See for instance TOBLER 1999; BURRI 2000 and TRAVERSA 2003.

20 Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark/Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199, at para. 25.

by the Court in relation to parental leave, for example in the *Lewen* case, in which a Christmas bonus was at stake.²¹

2.2. Reconciliation and the general principle of equal treatment in the EU charter

The EU Charter of Fundamental Rights not only prohibits sex discrimination, but addresses explicitly the issue of family and professional life in its Article 33(2), which reads: ‘To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child’. The inclusion of such an article in the Charter underlines the importance of reconciliation issues for the EU, which is considered a fundamental social right by the Court (*Chatzi*),²² but also illustrates the rather limited scope of EU law in this field. In the *Chatzi* case, the Court considered that the principle of equal treatment had implications for the situation of the parents of twins in relation to parental leave. The general principle of equal treatment can thus play a role in reconciliation issues, in particular when no specific rights of, for example, the Parental Leave Directive 2010/18 or the Pregnancy Directive 92/85 apply.

2.3. The pregnancy directive 92/85

The main aim of the Pregnancy Directive 92/85 is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. The most important right in practice concerns maternity leave. Member States have to ensure that women enjoy a period of at least 14 weeks’ maternity leave (Article 8). During maternity leave, workers are entitled to the payment being maintained and/or the entitlement to an adequate allowance (Article 11 (1) and (2)(b)). Such an allowance is adequate if it guarantees an income which is at least equivalent to sick pay (Article 11 (3)).

21 Case C-333/97, *Susanne Lewen v Lothar Denda*, [1999] ECR I-7243.

22 Case C-149/10, *Zoi Chatzi v Ypourgos Oikonomikon*, [2010] ECR I-8489.

According to a proposal aimed at amending the Pregnant Workers Directive, the minimum maternity leave should be 18 weeks.²³ The European Parliament is in favour of maternity leave of at least 20 weeks, fully paid.²⁴ If the pending proposal aiming at amending Directive 92/85 would be adopted, fathers would receive more specific rights, such as paternity leave. There is however little possibility that this proposal will be adopted; the Council of the EU has not reached a decision on this proposal up to now and if there is no agreement before mid-2015, the proposal will be withdrawn according to the Commission's work programme for 2015.²⁵

2.4. The parental leave directive 2010/18

Directive 2010/18 repealed Directive 96/34 and implements the revised agreement on parental leave that the European social partners reached in June 2009.²⁶ Workers with an employment contract are entitled to an individual right to unpaid parental leave for at least a period of four months on the grounds of the birth or adoption of a child so as to take care of that child until a given age (up to eight years). Member States are not obliged to introduce (partially) paid parental leave and the Directive does not impose any obligations on Member States to ensure that employees continue receiving social security benefits during parental leave (*Gómez-Limón*).²⁷ Workers who take parental leave must be protected against less favourable treatment and dismissal. The Court ruled in *Meerts* that this rule articulates

23 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637.

24 T7-0373/2010.

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 A New Start, COM (2014) 910 final, at p. 12.

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

27 Case C-537/07, *Evangelina Gómez-Limón Sánchez-Camacho / Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), Alcampo SA*, [2009] ECR I-06525.

a particularly important principle of Community social law which cannot therefore be interpreted restrictively.²⁸

2.5. *Flexible working arrangements*

Some flexible working hours imposed by employers might be difficult to harmonize with care responsibilities, for example given the (un)availability of child care facilities or the school hours of (young) children.²⁹ Applying such a criterion might therefore amount to indirect sex discrimination (see Section 2.1).

Opportunities to work part time are addressed in the Part-time Work Directive 97/81, but these rights are rather weak. The employers should, for example, as far as possible ‘give consideration to: requests by workers to transfer from full-time to part-time work that becomes available in the establishment’ and to ‘requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise’ (Clause 5(3)). A similar provision can be found in Clause 6(1) of the framework agreement on parental leave. In the framework of the social dialogue, Member States are encouraged to promote equality between men and women, and flexible working arrangements with the aim of facilitating the reconciliation of work and private life.³⁰ There thus exists no strong right to adjust working time and/or working hours in EU law up to now. EU legislation refers to flexibility which should meet the needs of workers and employers. However, this might entail a conceptualization of ‘flexibility’ which can render the reconciliation of work and care more difficult. It is submitted that the issue of the worker’s influence on working hours might be crucial given, for example, the (lack of) availability of affordable child care facilities, in particular for single parents.

28 Case C-116/08, *Christel Meerts v Proost NV*, [2009] ECR I-63. A similar approach is taken in C-588/12, *Lyreco Belgium NV v Sophie Rogiers*, [2014].

29 See also EUROSTAT 2009, at p. 20.

30 Article 21(2) of the Recast Directive 2006/54.

3. Comparability issues

Some of the cases described above illustrate the difficulties concerning comparability issues when applying the prohibition of sex discrimination. It became clear, for example, that while, at the one hand, no comparator is required in pregnancy cases (*Dekker*), the Court on the other hand considered absences due to pregnancy-related illness to be comparable to absences due to other illnesses before and/or after the end of maternity leave in relation to pay (*McKenna*).

The issue of comparability might also be problematic in indirect sex discrimination cases in relation to parental leave. In the judgment in *Österreichischer Gewerkschaftsbund*, the Court considered that unpaid periods of leave due to military service and such periods due to parental leave were not comparable.³¹ The Court held that ‘in the present case, parental leave is leave taken voluntarily by a worker in order to bring up a child. The voluntary nature of such leave is not lost because of difficulties in finding appropriate structures for looking after a very young child, however regrettable such a situation may be’. The Court emphasized that the performance of national service, on the other hand, corresponds to a civic obligation laid down by law and is not governed by the individual interests of the worker.³² The public/private divide is clearly reflected in the approach of the Court in this case and fails to take into account the context of lacking child care facilities. The EU case law also shows tensions between protective measures for women and reconciliation policies designed in view of a more balanced division of work and care between men and women.

4. Protection of women versus fathers’ rights

It is submitted that a long period of protection in relation to maternity after the birth of a child might have the effect that sex-neutral rights on the ground of parenthood are not or are less available to both men and women. It is thus interesting to investigate how far the protection provided

31 Case C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich*, [2004] ECR I-5907.

32 At paras. 60-61.

by EU law in relation to pregnancy and maternity reaches and whether this assumption is indeed substantiated in the case law of the Court.

In the German *Hofmann* case of 1984 the issue at stake was how far the statutory protection of mothers after giving birth reaches in relation to the rights of a father who has acknowledged the paternity of a child.³³ Mothers were not allowed to work for eight weeks after giving birth. After that period, they could take voluntary maternity leave until the child reached the age of six months and were entitled to a daily allowance. At that time no statutory parental leave existed in Germany. Mr Hofmann enjoyed unpaid leave provided by his employer for the period of eight weeks after the birth of his child until the child was six months old. The mother resumed her work eight weeks after the birth of the child. Mr Hofmann asked for the maternity leave allowance, which was not granted because only mothers on voluntary maternity leave were entitled to this allowance. According to Mr Hofmann, the aim of the voluntary maternity leave was not to give the mother social protection on biological and medical grounds, but the protection of the child. The Court did not agree and considered that ‘first, it is legitimate to ensure the protection of a woman’s biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment’.³⁴ The Court’s reasoning here was criticised because of the emphasis placed on protecting women in this way, especially in their relationship with her child, an approach which threatened to undermine the genuine sharing of family responsibility between men and women.³⁵

Thirteen years later, the Court observed that: ‘Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course

33 At stake was Directive 76/207 (now repealed by Directive 2006/54): Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, [1984] ECR 3047.

34 At para. 25.

35 See for example McGLYNN 2000.

of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the member states as being the natural corollary of the equality between men and women, and which is recognised by Community law' (*Gerster and Hill*).³⁶ Although the Court still placed emphasis on *protecting* women (and men) in this field, the fact that it pointed out that there is a natural corollary between this principle and equality between men and women offers more room to address problems in this field, even if there are no specific entitlements in a particular case.

In the already mentioned *Roca Álvarez* case, the Court went a step further. At stake was Spanish legislation already adopted in 1900 entitling female workers to daily 'breastfeeding' leave for nine months after birth.³⁷ Fathers also had this right since 2007, but only if the mother was employed: they thus had a derived right. The mother of Mr Roca *Álvarez's* child was self-employed and Mr Roca *Álvarez* was therefore not entitled to the requested daily leave. The Court considered that this legislation had the effect of changing working hours. However, mothers who were employed were always entitled to 'breastfeeding' leave, whilst fathers who were employed were only so entitled if the child's mother was also an employed person. The Court stated: 'Thus, for men whose status is that of an employed person the fact of being a parent is not sufficient to gain entitlement to leave, whereas it is for women with an identical status. However, the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child.'³⁸ As the leave no longer refers to 'breastfeeding', it can be taken by the father and the mother and thus seems to 'be accorded to workers in their capacity as parents of the child. It cannot therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a

36 Case C-1/95, *Hellen Gerster/Freistaat Bayern*, [1997] ECR I-05253, at para. 38 and Case C-243/95, *Kathleen Hill and Ann Siapleton v. The Revenue Commissioners and Department of Finance*, [1997] ECR I-03739, at para. 42.

37 At stake was Directive 76/207 (now repealed by Directive 2006/54): Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, [2010] ECR I-8661.

38 At paras. 23-24.

mother and her child.³⁹ The regulation at stake is in addition not a positive action measure. The Court considered that when only a mother who is employed qualifies for the leave, whereas a father with the same status can only enjoy this right but not be the holder thereof, this 'is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.'⁴⁰ The provision at stake is thus contrary to EU sex equality law. The Court has here clearly chosen for an equal position of women and men in parenthood, enabling both parents, employed or self-employed, to take this leave.

As already mentioned in the introduction, a different approach was taken by the Court in the Spanish *Betriu Montull* case on a similar regulation.⁴¹ The father was also employed while the mother was self-employed. The father had only a derived right to leave with an allowance. The leave that Mr Betriu Montull requested was not granted, because the self-employed mother was not affiliated to a statutory social security regime. AG Wathelet, taking up the Court's reasoning in *Roca Álvarez*, considered it evident that the measure at issue established a difference in treatment on grounds of sex as between employed mothers and employed fathers. He recalled that in *Roca Álvarez*, the Court considered comparable the positions of a male and a female worker, father and mother of a young child, with regard to their possible need to reduce their daily working time in order to look after their child.⁴² The Court in *Betriu Montull* however emphasised that 'pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation' that particularly during maternity leave cannot be compared to that of a man or a woman on sick leave.⁴³ The measure at stake is justified by the protection of women in relation to pregnancy and maternity. It is legitimate to protect a woman's biological condition during and after pregnancy and to protect the special relationship between a woman

39 At para. 31.

40 At para. 36.

41 See para. 34; Case C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, [n.y.p.].

42 At paras. 67-68.

43 At para. 49.

and her child over the period which follows childbirth.⁴⁴ The father had therefore no right to this leave following the maternity leave of the mother. In the *Betriu Montull* case, considerations on reconciliation issues are lacking and the need for the protection of mothers who have recently given birth is once again emphasized. Such an approach tends to deny rights to fathers when they are not entitled to specific individual rights and in the author's view this certainly does not contribute to a more balanced division of work and care between men and women.

5. Surrogacy leave

Different approaches to comparability issues, the need to protect women in relation to pregnancy and maternity and fathers' rights are also illustrated by two diverging opinions of AG Kokott and AG Wahl on surrogacy leave.⁴⁵ These cases concerned the right to pregnancy and maternity leave for commissioning mothers. In the case *C.D.*, AG Kokott explored the personal scope of Directive 92/85. She considered the situation of the biological mother and the commissioning mother to be different with regard to pregnancy and birth, but comparable in relation to breastfeeding. In both situations there are health risks.⁴⁶ She emphasised the importance of care by a commissioning mother and took the *Hofmann* case as a starting point. She submitted that a commissioning mother should fall under the personal scope of the Pregnancy Directive, even if she is not breastfeeding, given the necessary protection of the special relationship between the mother and child. In her view, precisely because the commissioning mother was not pregnant, it is a challenge for her to build up a relationship with the child, to include it in the family and to get used to her role as a mother. She considered this situation not to be comparable to adoption, where generally speaking the building up of the relationship with the child does not begin upon the birth of the child. AG Kokott did not pay any attention to the role of the father in the case of surrogacy. In her view, the Directive applies to a commissioning

44 At para. 62.

45 Opinion of AG Kokott in case C-167/12 (*CD*) and the opinion of AG Wahl in Case C-363/12 (*Z*), 26 September 2013. See also: BURRI 2014a.

46 At para. 44.

mother who is a worker, and is thus entitled to maternity leave and the surrogate mother and the commissioning mother should share this leave. She adopted a broad interpretation of the personal scope of Directive 92/85, putting emphasis on care by (commissioning) mothers.

AG Wahl followed quite a different approach. In his view, the protection of the special relationship between mother and child is closely related to the birth of the child. The scope of the Directive should not be interpreted as applying to the protection of motherhood, or even parenthood. A broad interpretation of the personal scope of the Directive would have the effect that an employed commissioning mother would be entitled to paid (maternity) leave, but an adoptive mother or the father involved in a surrogacy arrangement would have no such right.⁴⁷ The consequence is that intended mothers have no specific maternity leave rights that could be based on existing EU law. Clearly the member states can adopt measures on parental leave in the case of surrogacy arrangements. According to AG Wahl, there is in this case no sex discrimination. The difference of treatment occurs between a commissioning mother and a woman who has given birth or an adoptive mother. A male parent of a child born through surrogacy would receive the same treatment as a commissioning mother. He finally considered that the provisions of the Charter can be taken into account for the interpretation of secondary EU law, but cannot extend the material scope of Directive 2006/54 or affect the validity of the Directive in this case.⁴⁸

In both cases the Court followed the approach suggested by AG Wahl on the interpretation of Article 2 (personal scope) and Article 8 (pregnancy and maternity leave) of Directive 92/85.⁴⁹ In the *C.D.* case, the CJEU (Grand Chamber) considered that the aim of this Directive in the light of existing case law (in particular the *Hofmann* and *Betriu Montull* cases) is the protection of the biological condition of the pregnant woman and the especially vulnerable situation arising from her pregnancy. The protection of the special relationship of the mother and the child only applies to the

47 At para. 51.

48 Paras. 69-76, at para. 73.

49 Case C-167/12, *.D. v S.T.*, [2014] and Case C-363/12, *Z. v A Government department and The Board of management of a community school*, [2014].

period after the pregnancy and the confinement. The Court thus mentioned once again the two-fold goal of the pregnancy and maternity leave. Article 8 of the Pregnancy Directive presupposes that the worker entitled to maternity leave has been pregnant and has given birth. Member states are not required to provide maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even if she may or does breastfeed the baby following the birth. However, member states might adopt more favourable provisions. The Court also ruled in *C.D.* that the employer's refusal to grant maternity leave to a commissioning mother does not constitute discrimination on grounds of sex. The comparison is made between the surrogate mother who was pregnant and has given birth and the commissioning mother, both women. There is no indirect discrimination either; as there is nothing in the file to establish that the refusal to grant leave puts a female worker at a particular disadvantage compared to a male worker. In the *Z.* case, the Court followed a similar reasoning.⁵⁰ In both cases, neither of the commissioning parents were entitled to rights derived from EU law.⁵¹

6. Assessment

The overview of EU legislation relevant in the field of reconciliation issues shows that it addresses, in the first place, the health and security of pregnant workers and leave in relation to pregnancy, maternity and parenthood. However, there is a declining scale of protection and rights provided in case of pregnancy and maternity. A strong protection is ensured against dismissal related to pregnancy and maternity, while rights related to pay and social benefits during leave are less protected. Rights based on parenthood are still rather weak. Parental leave is unpaid and social security benefits during parental leave are principally a matter of national law and agreements between the social partners. EU research shows that paid parental leave is one of the main factors that would influence the taking of parental leave by

50 At paras. 51-57. The Court also considered that the inability to have a child does not prevent the mother from participating fully and effectively in professional life on an equal basis with other workers.

51 See further BURRI forthcoming a.

fathers.⁵² However, protection against dismissal related to parental leave is rather strong.

As regards the principle of equal treatment between part-time and full-time workers, the rights offered by Directive 97/81 are limited, as only working conditions are addressed.

Specific rights relating to flexible working arrangements are to a large extent lacking or weak. In this area, it is important to acknowledge which kind of flexibility is at stake: some working time schedules might hamper the reconciliation of work and care, while others might facilitate such reconciliation. Worth mentioning is the complementary role that the principle of equal treatment between men and women can play when no specific rights apply. Potentially, the EU Charter could play an even more important role in the case law of the CJEU in relation to reconciliation issues.

The interpretation of EU legislation by the CJEU offers strong rights to both men and women which might facilitate the reconciliation of work and care and provides protection against unfavourable treatment in relation to pregnancy, maternity and parenthood. However, the rights allotted differ depending on the issue and area at stake, as the Court is bound by the limitations of the legislation at stake. The approach of the Court to comparability issues is sometimes problematic when it endorses a private/public divide without recognizing the value of care. Nevertheless, the case law of the Court has led in some areas to strong rights and/or protection. Generally speaking, the protection of women during the pregnancy and maternity leave provided by the case law is rather strong. The same is true for the prohibition of pregnancy discrimination in relation to dismissal. However, in the field of pay, absences due to pregnancy or pregnancy-related illness often means less income, just as in the case of absences due to illness. The analysis provided above also highlights divergences in the approach to the protection of motherhood and rights based on parenthood. This leads to a lack of legal certainty as illustrated by the *Roca Álvarez* and *Betriu Montull* cases. While the Court in some cases extended the protection of mothers

52 EUROSTAT 2009, at p. 98.

who have recently given birth in such a way that fathers who want to care for their child are denied rights, it sometimes acknowledged the rights of both parents. It is submitted that emphasizing the protection of women who have given birth for a rather long period might hamper a more balanced division of work and care between men and women and might perpetuate gender stereotypes concerning the traditional roles of women and men in relation to care for children.

7. Conclusions

EU legislation refers explicitly to the reconciliation of work and family life and its inclusion in the EU Charter points towards a conceptualisation of such reconciliation as a fundamental right alongside the principle of equal treatment. However, the scope of Article 33(2) of the Charter is rather limited, as it covers only the reconciliation of family and professional life in relation to maternity, parental and adoption leave. Inspiration can be drawn from the CJEU case law when it is willing, with a reference to this provision, to apply a general principle of equal treatment to reconciliation issues where no specific rights can be derived from EU legislation and when it recognized the right to parental leave as a fundamental social right (*Chatzi, Meerts*).

The case law of the CJEU has contributed to protecting women against pregnancy and maternity discrimination, in particular in the access to employment and in relation to dismissal. As far as working conditions are concerned, the case law also offers possibilities to strengthen the position of workers who want to reconcile work and care. However, the case law is casuistic, complicated and not always consistent, in particular in relation to comparability issues. It has been submitted that by emphasizing the protection of women who have given birth in its case law, the CJEU sometimes hampers a genuine sharing of care responsibilities between men and women. The issue of gender stereotypes and the danger of reinforcing the traditional roles of men and women in relation to work and care are only addressed explicitly in a few judgements of the CJEU (e.g. *Roca Álvarez*). However, EU case law certainly offers indications towards recognising the need to share care responsibilities between parents which could be further developed by the Court.

Discussions at the EU level aimed at extending the possibilities to reconcile work and care might be taken further if the pending proposal in the Pregnancy Directive is withdrawn. Future legislative proposals might include more possibilities to reconcile work and care, for example in the form of paternity leave, shared parental leave, forms of care leave and more influence by workers with care responsibilities on working time and working hours. It is submitted that a more comprehensive EU approach to leave, working time adjustments, and (child)care facilities should include more rights to be able to take caring responsibilities, not only for mothers and fathers, but also for other relatives. In a society where participation in the labour market of both women and men is increasing and becoming more balanced, the need to address the care of children, older people and the disabled becomes more urgent. However, this contribution was limited to the potential of EU law for parents who want to reconcile work and care when they are denied rights in national law. The interpretation of the principle of equality by the CJEU in this field shows some shortcomings, but also has added value. The equality of parents in relation to work and care in EU law is certainly *not* nothing but trouble.

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