No. 1 / 2009

European Gender Equality Law Review

In this Issue:

Sylvaine Laulom
Gender Pay Gap in France

Aileen McColgan
The Goods and Services Directive: a curate's egg or an imperfect blessing?

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

2009–1

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Commission
Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit EMPL/G/2
Theme
Equality, Action against Discrimination: Legal Questions

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15 November 2006).
For more information on PROGRESS see:
http://ec.europa.eu/employment_social/progress/index_en.htm

Production:

Susanne Burri
Frans van Eck
Hanneke van Eijken
Titia Hijmans van den Bergh
Titia Kloos
Simone van der Post
Sacha Prechal

Manuscript completed in June 2009.
The information contained in this review reflects, as far as possible, the state of affairs on 16 March 2009.

Contents

Introduction

Susanne Burri[*]

The European Network of Legal Experts in the Field of Gender Equality has produced this bi-annual *European Gender Equality Law Review* since 2008. This review is now available not only in electronic form, but also on paper (in English). The role of the Network is twofold. On the one hand, the Network gives independent advice, analyses and information to the European Commission on relevant national policies, legislation and case law in the field of gender equality, assisting the Commission in its monitoring tasks and providing relevant information for the development of possible future new legislative instruments at EU level in this field. Various specific matters are further addressed in thematic publications. On the other hand, the Network's role is also one of disseminating information among a broad public on the legal aspects of gender equality. This review is one of the publications that we hope contributes to meeting this second objective.

In the various contributions to this review, independent legal experts on gender equality highlight interesting developments both at European and at national level. In their contributions, the national experts of the Network discuss legislative initiatives, recent case law and current policies in the 27 Member States of the European Union and three EEA countries (Iceland, Liechtenstein and Norway) at national level. National experts report on cases or legislative proposals concerning mobbing (Austria); sexual harassment (Cyprus, Sweden); sexist advertisements (Bulgaria); headscarf issues (Denmark, Germany, Norway); the refusal of a Muslim man to shake hands with persons of the opposite sex (the Netherlands) and the right of a transsexual person to register the new identity while remaining married (Finland). The implications for the independence of Equality Bodies are discussed in the context of the dismissal of the National Equality Adviser by the Labour Minister in Italy. Some experts also point out the (potentially) detrimental effects of budget cuts in the field of gender equality (Lithuania, Ireland). Positive developments are also reported. In Portugal, for example, the new labour law introduces the concept of 'parenthood', which replaces the traditional concepts of 'maternity' and 'paternity', thus emphasizing the partnership of both parents in this area; and in Spain, paternity leave has been extended for certain groups.

Turning now from the brief updates by members of the Network to the longer thematic articles also included in this issue of the Review, Sylvaine Laulom presents in her article an analysis of the role that legislation has played in France in fighting the gender pay gap. France has had legislation on this issue since 1946, but recently adopted a new law on the subject. Sylvaine Laulom discusses the French legal framework from 1946 to 2006, paying specific attention to the most recent legislation. She analyses how not only individual litigation, but also the role of collective bargaining has been stressed as suitable mechanisms for identifying and eliminating pay gaps between women and men.

The European Network of Legal Experts in the Field of Gender Equality has recently issued several publications which are available to the general public. In the first place,

---

[*] Dr Susanne Burri is co-ordinator of the European Network of Legal Experts in the field of Gender Equality and a Senior Lecturer at Utrecht University, Utrecht School of Law (Gender and Law).

the official publication *EU Gender Equality Law* (published in November 2008 in English, French and German), provides a general overview of existing legislation and case law of the European Court of Justice at EU level. This publication is targeted at a broad – and not necessarily legal – public.[1] It is clear that in the field of gender equality, national policies, legislation and case law are of paramount importance. In the electronic publication *Gender Equality Law in 30 European Countries*, the national experts of the Network describe how central concepts such as direct and indirect discrimination, (sexual) harassment and instruction to discriminate are implemented in national regulations in different fields such as (access to) employment, social security and access to goods and services. This publication also provides an overview of maternity, paternity and parental rights.[2] A regular update of this information is foreseen.

New issues arise with the adoption of Directive 2004/113/EC on equal treatment between men and women on the access to and supply of goods and services. Is it, for example, legal according to EU law and/or national law to apply different pricing for women and men for entrance to nightclubs, or to offer some sports facilities to women only or to operate a women's only taxi service? Such questions and similar cases are presented and analysed in the electronic report of the Network on *Sex-Segregated Services*.[3] These issues, and more generally, the theme of equal treatment between women and men in the access to and supply of goods and services, are discussed in her article in the present review by Aileen McColgan, one of the authors of the report on *Sex-Segregated Services*. The Network will also provide information to the European Commission on the transposition of Directive 2004/113/EC in a separate publication (not yet finalized at the time of writing).

Another example of the Network's role in monitoring the transposition of the gender equality directives is the electronic report *The Transposition of Recast Directive 2006/54/EC*.[4] In the Recast Directive older directives concerning equal pay, the access to employment and working conditions, occupational pensions and the burden of proof have been brought together into one single legal instrument in order to modernize and simplify this legislation at EU level.

Two proposals of the European Commission in the field of gender equality are still pending. The first concerns the application of the principle of equal treatment between men and women engaged in a self-employed capacity, which will repeal Directive

---

1 S. Burri & S. Prechal, *EU Gender Equality Law*, Luxembourg: Office for Official Publications of the European Communities, 2008. This publication is available at http://bookshop.europa.eu free of charge.

2 European Network of Legal Experts in the Field of Gender Equality, S. Burri & S. Prechal, *Gender Equality law in 30 European Countries*, Luxembourg: European Commission, November 2008, available at http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes, accessed 13 May 2009.

3 European Network of Legal Experts in the Field of Gender Equality, S. Burri & A. McColgan, *Sex-Segregated Services*, Luxembourg, European Commission, December 2008, available at http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes, accessed 13 May 2009.

4 European Network of Legal Experts in the Field of Gender Equality, S. Burri & S. Prechal, *The Transposition of Recast Directive 2006/54/EC*, Luxembourg: European Commission, February 2009, available at: http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes, accessed 13 May 2009.

86/613/EEC if adopted.[5] The second is aimed at amending 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. Finally, it is worth mentioning that the European social partners have reached an agreement on the issue of parental leave, which might lead to an amended Parental Leave Directive (96/34/EC). We hope to provide more information on these issues in the next *European Gender Equality Law Review*.

The publications of the European Network of Legal Experts in the Field of Gender Equality can be found at:
http://ec.europa.eu/social/main.jsp?catId=641&langId=en

For further information and the submission of proposals for future articles, you can contact:
Susanne Burri, co-ordinator, S.Burri@uu.nl
Hanneke van Eijken, assistant co-ordinator, H.vanEijken@uu.nl

[5] Proposal for a Directive of the European Parliament and 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 Directive 86/613/EEC, COM (2008) 636 final.

Members of the European Network of Legal Experts in the Field of Gender Equality

Co-ordinator:
Susanne Burri, Utrecht University, the Netherlands
Assistant co-ordinator:
Hanneke van Eijken, Utrecht University, the Netherlands

Executive Committee:
Sacha Prechal, Utrecht University, the Netherlands
Christopher McCrudden, Oxford University, United Kingdom
Hélène Masse-Dessen, Barrister at the Conseil d'Etat and Cour de Cassation, France
Susanne Burri, Utrecht University, the Netherlands

National experts:
Anna Sporrer (Austria), Attorney at law
Jean Jacqmain (Belgium), Free University of Brussels, Faculty of Law
Genoveva Tisheva (Bulgaria), Bulgarian Gender Research Foundation
Evangelia Lia Eftstratiou-Georgiades (Cyprus), Advocate
Kristina Koldinská (Czech Republic), Charles University, Faculty of Law
Ruth Nielsen (Denmark), Copenhagen Business School, Law Department
Anneli Albi (Estonia), University of Kent, Kent Law School
Kevät Nousiainen (Finland) Helsinki University, Faculty of Law
Sylvaine Laulom (France), University Jean Monnet, Saint-Etienne, Faculty of Law
Beate Rudolf (Germany), Free University of Berlin, Department of Law
Sophia Koukoulis-Spiliotopoulos (Greece), Attorney at law
Csilla Kollonay Lehoczky (Hungary), Eötvös Loránd University, Department of Labour and Social Law
Herdís Thorgeirsdóttir (Iceland), Bifrost University, Faculty of Law
Frances Meenan (Ireland), Barrister, Four Courts, Law Library, Dublin
Simonetta Renga (Italy), Ferrara University, Faculty of Economics
Kristīne Dupate (Latvia), Practising lawyer
Nicole Mathé (Liechtenstein), University of Vienna
Tomas Davulis (Lithuania), Vilnius University, Faculty of Law
Anik Raskin (Luxembourg), National Women's Council of Luxembourg
Peter G. Xuereb (Malta), University of Malta, Faculty of Law
Rikki Holtmaat (the Netherlands), University of Leiden, Faculty of Law
Helga Aune (Norway), University of Oslo, Faculty of Law
Eleonora Zielinska (Poland), University of Warsaw, Faculty of Law and Administration
Maria do Rosário Palma Ramalho (Portugal), University of Lisbon, Faculty of Law
Roxana Teşiu (Romania), Independent legal adviser
Zuzana Magurová (Slovakia), Slovak Academy of Sciences, Institute of State and Law
Tanja Koderman Sever (Slovenia), Independent legal adviser
Berta Valdes (Spain), Castilla-La Mancha University, Faculty of Law
Ann Numhauser-Henning (Sweden), Lund University, Faculty of Law
Aileen McColgan (United Kingdom), King's College London

Ad hoc experts:
Dagmar Schiek, University of Leeds, United Kingdom
Christa Tobler, University of Leiden, the Netherlands and University of Basel, Switzerland

Gender Pay Gap in France

Sylvaine Laulom[*]

1. Introduction

Despite the increasing participation of women in the labour market (in 2007, the female activity rate was 65.6%),[1] the gender pay gap shows little sign of improvement in France. According to a recent report,[2] in 2006, the gender pay gap (the difference between the average hourly pay for women and men) was around 16 % (the average is 17.4 % in the European Union). Women's total earnings are on average 27 % lower than those of men.

The gender gap could partly be explained by structural factors, namely qualification, occupation, career breaks, company size and sector. The report shows differences in this gap according to age (the hourly wage gap is more significant among older workers, increasing from 8 % in earnings per hour for workers aged under 35, to 26 % for those aged over 55), sector and the diplomas of the workers. The higher the workers' education, the more significant the gap is. The explanation could be that well-educated women more often work in lower-paid sectors. Generally, women also receive far fewer bonuses than men do. Up to 50 % of the gap in bonuses can be explained by the gender difference in exposure to risks and arduous working conditions, such as noise and night work, which affect men more. Women do less overtime than men. The hourly wage gap is also greater among management staff (19.4 %) and blue-collar workers (16.7 %), while it is over 6.7 % among administrative staff. With regard to sectors, the pay gap is greater in feminised sectors (financial sectors for example), while it is less wide in sectors with fewer women, like construction, transport and the car industry. Women are also over-represented in part-time jobs and low-paid activities. Occupational segregation is significant in France, directing women to less valued sectors. According to the report, part of the gap cannot be explained by objective factors. It could be linked to individual factors which have not really been taken into account until now (type of job, level of responsibility, experience, interruption of career, family situation). Part of the gap could also reflect discriminatory practices or processes that play a role in women's careers, even before they start working.

Paradoxically, the persistence of this gender gap runs parallel with a long history, in France, of the legal principle of equal pay for men and women. Successive French governments have taken specific measures toward equal pay since 1946. From 1983 to 2006, three major laws were passed on equality in employment. The law of 23 March 2006 on equal pay between men and women constitutes, for the moment, the last legislative attempt to reduce wage disparities and demonstrates the will of the government to move forward on this issue.

This paper presents the role of the law in fighting the gender pay gap in France. First, it will present the development of the French legal framework from 1946 to 2001 and how the French legislator has progressively stressed the role of collective

---

[*] Lecturer at Saint-Etienne University, France.

[1] *Employment in Europe 2008*, European Commission, October 2008, http://ec.europa.eu/social/BlobServlet?docId=678&langId=en, accessed 24 April 2009.

[2] L. Muller 'Les écarts de salaire entre les hommes et les femmes en 2006: des disparités persistantes' *Premières synthèses*, *Dares*, octobre 2008, n°44.5.

bargaining to identify and eliminate pay gaps between women and men. Therefore, the enforcement of the equal pay principle in France 'traditionally' relies on individual litigation and on an increasing role of collective actors. Second, I will analyse the effectiveness of this legal framework and show that until now the legislator's attempts to reduce the gender gap have not reached their objectives.[3]

2. The development of the French equal pay legal framework

It was after the Second World War that equal pay for men and women started to be addressed in France. The principle of equality between men and women was first recognized in 1946 in the Preamble to the French Constitution.[4] Concerning equal pay, the law of 11 February 1950 included this principle in the mandatory provisions that have to be inserted in collective agreements. The interest of France in the application of this principle, at that time, was also demonstrated by the introduction of Article 119 into the EEC Treaty, which was strongly advocated by the French delegation for reasons of economic competitiveness.[5] The French delegation was concerned about being placed in a position where other Member States could profit from a situation in which women workers could be paid less than men.

In 1972, in order to integrate the ILO convention into the French system, the principle of equal pay for work of equal value for men and women was introduced into the Labour Code. However, the law provided no criteria for the production of pay information and no criteria to guide the courts in determining whether the jobs were of equal value. There were very few cases on that issue, and courts seemed to be reluctant to limit employers' freedom and to recognise sex discrimination in pay.[6] As such, the introduction of this principle into the Labour Code did not change the way wages were determined in enterprises.

The next important step was the 1983 '*Roudy* law', because it was seen not only as introducing some additional provisions in the field of sex equality and implementing France's obligations under the equal treatment and equal pay directives, but also as a reconceptualisation of the legislative treatment of men and women in employment.[7] For the first time, the question was not only to recognize the principle of equality but also to define some rules to improve its effective application. One of the most important measures taken was the introduction of an instrument to measure and analyse occupational differences between men and women. Thus, since the 1983 law, employers in enterprises with at least 50 employees must present to the works council, each year, a written report on the comparative situation of men and women in the enterprise. The employer must record in this report the measures taken in the enterprise in the previous year towards attaining employment equality, and an outline of the objectives for the year ahead. This information should ensure that the 'equality situation' in the enterprise is known and debated and should encourage the employer

---

3 For a general presentation of the French legal framework, see P.Y. Verkindt 'L'égalité de rémunération entre les hommes et les femmes', *Droit Social* 2008, p. 1051. Also see *Conseil économique, social et environnemental, 1968-2008: évolution et prospective de la situation des femmes dans la société française*, Avis et Rapport, 2009.

4 According to the preamble of the Constitution, 'the law guarantees women equal rights to those of men in all spheres'.

5 S. Burri & S. Prechal *EU Gender Equality Law*, European Commission, September 2008, p. 4.

6 M.-Th. Lanquetin 'Chronique juridique des inégalités de salaires entre les femmes et les hommes', *Travail, genre et sociétés*, 2006/1, p. 69.

7 C. Kilpatrick *The Circulation, Use and Conceptualization of European Sex Equality Norms: a Comparative Analysis*, IUE Thesis, 1997, p. 19.

and workers' representatives to integrate professional equality into their considerations.

Another important part of the law was the introduction of 'employment equality plans'. Indeed, the report on the comparative situation between men and women, and the information it gives, was conceived as an instrument for the employers and trade unions to negotiate an equality plan containing actions to promote equality. This plan can present temporary measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities.

In the same period, the '*Auroux* laws' redefined the collective rights of workers. The information right of workers' representatives was reinforced and has included, since 1982, the requirement to give employment equality information. For example, the Law of 28 October 1982, which deals with the development of institutions representing the workforce, introduces the requirement for the employer to retrace, month by month, the evolution of the number and qualifications of employees by sex, indicating the number of employees on permanent contracts, the number of fixed-term contracts and the number of part-time employees. The Law of 13 November 1982, which concerns collective bargaining and the recognition of an obligation to negotiate annually, states that in the first meeting of the annual obligation for unions and employers to negotiate at enterprise level, the employer must provide the trade union representatives with information which allows a comparative analysis of the situation of men and women in the field of jobs, qualifications, pays, hours worked and the organisation of working time. Furthermore, the information must clarify the reasons for these situations as revealed by these statistics.

With the new laws of 1982 and 1983, the enforcement of the equal pay principle no longer relies on individual litigation only. The law recognizes the importance of information on equality and it also implies an explication and analysis of the difference between men and women. The objective was that trade unions and works councils integrate a concern for professional equality. Some specific powers were also granted to the labour inspectorates.[8] However, part of the law simply was not applied and the obligations laid down in the law have never been properly implemented.[9] Very few employment equality plans were actually adopted; the reports on the comparative situation of men and women in the enterprise were not presented by employers to works councils, which did not ask for them. As Claire Kilpatrick concluded about this period: 'Despite the multiplicity of institutional equal value options in France, not only has individual litigation failed to develop, but EC equal value developments have not been integrated and paralegal applications (employer-led or collectively negotiated re-evaluations of feminised pay structures) of equal value have not taken place'.[10]

---

[8] The French labour inspectorate is charged with ensuring the application of labour law, including the principle of equal pay for work of equal value. Labour inspectors may require the employer to provide information on the different elements determining pay in the enterprise. They must also receive the report on the comparative situation. However, professional equality has never seemed to be a priority for labour inspectorates.

[9] After 18 years, only 34 companies have negotiated 'employment equality plans', and only 1500 contracts 'for the sex-desegregation of jobs' ('contrats pour la mixité des emplois') have been concluded (these contracts are supported by the State to facilitate women's access to predominantly male jobs, see below). See J. Laufer 'Equal Employment Policy in France: Symbolic Support and a Mixed Record', *Review of Policy Research*, June 2008, vol. 20 issue 3, p. 423.

[10] C. Kilpatrick *The Circulation, Use and Conceptualization of European Sex Equality Norms: a Comparative Analysis*, IUE Thesis 1997, p. 59.

The '*Génisson* law' of 9 May 2001 was the subsequent step aimed at promoting gender equality at work. When presenting the law to Parliament, the MP, Ms Génisson, highlighted the persistent gender inequalities in the workplace, in terms of recruitment, salary, access to training and career development and argued that even if formal equality between men and women had been achieved in France, this was not the case for substantive equality and that instruments aimed at promoting occupational gender equality should be reinforced.

Collective bargaining at professional branch and enterprise levels has been the main tool used by the '*Génisson* law' to promote gender equality.[11] First, the law of 9 May 2001 integrates gender objectives in the general negotiations on wages, working time and organisation of work, applying here a mainstreaming approach as the issue of equality should be taken into account in every topic of bargaining. Second, the law creates specific duties to bargain on occupational gender equality. Thus every year, the employer has a duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to attain these objectives. If an agreement is reached, the obligation to negotiate will only apply every three years. The report on the comparative situation between men and women in the enterprise, which the employers have had to produce every year since 1983, remains the main instrument for these collective negotiations. This is the reason why the 2001 law improves the contents of this report, which should include pertinent indicators defined by decree.[12] The law also provides for the mandatory publication of these indicators at the workplace by the employer, allowing a detailed analysis of the report, and the employees, if they wish, have the right to access this report directly. The 2001 law also recognizes a duty to bargain on equality at professional branch level every three years, on the measures to be taken towards attaining occupational equality and on catch-up measures tending to remedy inequalities which have been ascertained. A report on the comparative situation of men and women in the sector is to be drawn up to be used as a basis for the negotiations.

After the 2001 law, management boards and unions were clearly designated as the key agents in the process of implementation of equal opportunities, with collective bargaining expected to promote equality at work. This policy complements a more traditional approach to equality where the enforcement of the equal pay principle remains based on an individual employment rights model through individual litigation. However, even if some progress has been made, if we look at the effectiveness of these two different types of implementation, it seems that until now both have produced little effect.

---

[11] In France, collective bargaining mainly takes place at professional branch and company or enterprise levels. Collective agreements have an *erga omnes* effect. Most of the workers are at least covered by a collective agreement at branch level. This level is particularly important for workers of small enterprises. In order to promote collective bargaining, since 1982, enterprises in France have had the duty to bargain every year on wages, working time and organisation of work at branch and enterprise levels.

[12] The report must contain a comparative analysis between men and women in terms of recruitment, training, qualification, pay, working conditions and balance between professional and private life; this comparative analysis should contain relevant statistically based indicators.

3. Limited effectiveness of the French legal framework?

3.1. The scarcity of litigation

Implementation of the equal pay principle partly relies on individual litigation. Concerning this individual approach, the French legal framework has been strongly influenced by European legislation[13] and has progressively integrated the European concepts.[14] Direct and indirect discrimination are prohibited; the burden of proof was first adapted by case law, and second by legislation, as required by European legislation; specific sanctions apply with regard to discriminatory acts. The legislation also contains additional flanking measures which aim to provide a more effective level of protection against discrimination. For example, the right to bring legal proceedings concerning discrimination has been recognized for trade unions and for associations legally established. The HALDE, the French Equal Opportunities and Anti-Discrimination Commission, was established at the end of 2004. This independent statutory authority is in charge of assisting any and all individuals who turn to it in identifying discriminatory practices and countering them. It provides advice on legal options and helps establish proof of discrimination. Notwithstanding its recent creation, the HALDE has quickly established itself as an important actor in the fight against discrimination, as is evidenced by its annual reports.

Despite the recognition of these different instruments intended to strengthen the enforcement of equal treatment rights, there are very few claims on the grounds of sex discrimination in general and on pay in particular in France.[15]

In France, a general principle under which workers have a right 'to equal pay for equal work' has been recognized by the *Cour de Cassation* since 1996. Although there are numerous cases on 'equal pay for equal work', there are very few cases on sex discrimination in wages because most of the time, litigations on equal pay are not based on sex discrimination but on a difference between one worker and other workers placed in the same situation.

Commentators have concentrated on the application by the tribunals of this general principle and, for example, on the reasons considered by the *Cour de Cassation* as sufficient to justify unequal pay but not on the specificities of cases on sex equality.[16]

---

[13] The Burden of Proof Directive (Directive 97/80), the Directive on equal treatment of men and women in employment (76/207 as amended by Directive 2002/73/EC), the Framework Directive on equal treatment in employment and occupation (Directive 2000/78/EC) and now the Recast Directive (Directive 2006/54/EC).

[14] The 1983 law redefined the concept of equal pay for work of equal value; the very important Anti-Discrimination law of 16 November 2001 sought to implement the EU Framework Directive on Equal Treatment, and was part of a government programme of anti-discrimination measures. The law adds new prohibited grounds of discrimination, adjusts the burden of proof in discrimination cases and makes it easier to bring court cases. Finally, the new anti-discrimination law of 27 May 2008 was adopted aiming to complete the implementation of all relevant EC directives on discrimination. For example, for the first time, a definition of direct and indirect discrimination is given by the law.

[15] At least before the *Cour de Cassation*. The last report of the *Cour de Cassation* indicates 111 decisions on discriminations in general in 2007, on a total of 5359 decisions for the Chamber of the *Cour de Cassation* specialized in employment relations (*Rapport annuel de la Cour de cassation 2008. Les discriminations dans la jurisprudence de la Cour de cassation*. Paris, La Documentation française 2009). In France, the decisions of the other tribunals (Courts of Appeal and in labour law industrial tribunals) are rarely published. Therefore, there are no figures on litigation on equal pay at those levels.

[16] See for example, Ch. Radé 'Variations autour de la justification des atteintes au principe 'à travail égal, salaire égal', *Droit Social* 2009, p. 399.

Moreover, among the cases on sex discrimination, the position of the *Cour de Cassation* seems rather strict and it does not seem to favour comparison of jobs of equal value.[17] For example, a decision of the *Cour de Cassation* of 26 June 2008[18] seemed to interpret in a very restrictive way the principle of equal pay for work of equal value. In this case, a woman working as a human resources director asserted that she was paid less than other specialised, male directors. For the Court of Appeal of Poitiers, the other directors were on the same hierarchic level in the enterprise, with the same professional classification, all belonging to the Board of Directors. The Court confirmed the discrimination based on sex, as the employer could not explain any differences in the positions which could have justified the difference of treatment. However, the *Cour de Cassation* overruled the Court of Appeal's decision. It stated that although the employer must provide the same pay to men and women for the same job or for a job of equal value, in this case workers did not have the same position in the company. This decision is very disturbing, as the *Cour de Cassation* does not compare the woman's work with the men's work at all. Of course, if the positions are different, this could justify a difference in pay, but the decision seems to state that the work has to be the same for it to be compared. It is indeed a very restrictive approach to sex discrimination and seems far away from the ECJ's approach. Another, less restrictive interpretation of this decision would be to consider that the *Cour de Cassation* wants courts to compare the positions of the workers to decide if there is a job of equal value. The Court of Appeal relied on the classification and not on an actual analysis of the positions of the workers. However, the *Cour de Cassation* does not make any reference to ECJ case law and does not give any indication on how to compare the positions. The lack of clarity in the decision is in itself disturbing.

A recent decision of the Court of Appeal of Paris, of 6 November 2008,[19] gave an interpretation of this principle that is in closer conformity with the principle of equal pay for equal work or work of equal value. This case was about a woman who was responsible for the legal services, general services and the human resources services of a company. She did not have the title of 'director' but did belong to the Board of Directors. She asserted that she was paid less than other male workers. In the company, only men had the title of 'director' and they were paid more than she was. The Court of Appeal concluded that sex discrimination had occurred because the woman's work, her responsibilities and her position had the same value as the work of the other directors. Presenting his observations, the public prosecutor[20] referred to the *Cour de Cassation*'s interpretation, which seemed to admit that if the positions of workers are different, this could justify a difference of pay. Thus, a comparison could only be made if the work is the same. For the public prosecutor, this interpretation was too restrictive and should not be followed. The Court of Appeal followed his opinion, as in its decision it clearly compares the work done by the woman and the men and their positions, to conclude that the work of the woman had the same value as the work of the directors and thus should have been paid equally. Compared to the

---

17 J.-Ph. Lhernould 'Egalité en matière de rémunération : le droit français trop dur à l'égard des femmes', *Liaisons sociales Europe* 2009, n°222 p. 2.

18 Cass. Soc. N°06-46204, note S. Laulom 'La difficile appréciation de la valeur égale d'un travail: un arrêt peu compréhensible', *Revue de droit du travail*, décembre 2008, p. 474. M.-Th. Lanquetin, *Droit Social* 2008, p. 1133.

19 *Droit ouvrier*, mars 2009, p. 135.

20 In civil cases, the public prosecutor can always present observations regarding the application of the law; this may occur when there is a specific problem in the interpretation of the law.

decision of the *Cour de Cassation* of 26 June 2008, the decision of the Court of Appeal conforms with European legislation, as the work done by various workers has to be compared to analyse if it has the same value.

First, these two recent decisions show that there are uncertainties on how to apply and to interpret the principle of equal pay for work of equal value and that it will be necessary for the *Cour de Cassation* to clarify its position on this essential issue. Perhaps more importantly, they show that French courts and French legal academics have not developed the necessary expertise and tools for the application of the gender concept of equal pay for equal work. Generally, the techniques of indirect discrimination and statistical comparison are also rarely used, perhaps because the judicial approach is more that of an equal treatment approach (where the claimant just has to prove the difference in treatment) than of a discriminatory approach (where the claimant has to establish that the difference of treatment is based on a prohibited ground).

The first indications of change are starting to appear. Lawyers, courts and the legal literature are becoming more and more familiar with the instruments of anti-discrimination legislation. For example, the decision of the Court of Appeal clearly appears more convincing than the decision of the *Cour de Cassation*. Another very important indication of this positive development is the last annual report of the *Cour de Cassation*.[21] Of particular interest is the fact that the report is dedicated to discrimination in the case law of the *Cour de Cassation*. The report presents an analysis of its case law and very clearly distinguishes the notion of equal treatment and the notion of discrimination. It also criticizes the confusion regarding these two concepts. The report shows the willingness of the *Cour de Cassation* to clarify the concept of discrimination and to give instructions to courts and lawyers on how to apply these concepts. In this context, the decision of June 2008 should be interpreted not as a decision narrowing the scope of the principle of equal pay, but just as a very badly written decision.

The HALDE could also play a very important role in the dissemination of the European concepts. Even if gender claims represent only 6 % of the claims registered in 2007, the HALDE has delivered some deliberations[22] on equal pay[23] that demonstrate better knowledge of the specificities of these claims. However, it is still very difficult for an individual worker to build a solid argumentation that her work is of equal value to someone else's. Very often, the necessary information and analysis are missing. This is the reason why collective actors could be in a better position to tackle the pay gap. Unfortunately, until now, social partners have not demonstrated much interest in that issue.

3.2. The scarcity of collective bargaining

The law of 9 May 2001, which created the new obligation to negotiate on sex equality, did not 'work' very well, as very few collective agreements on occupational gender equality were concluded. The situation where the employer often fails to draw up a report on the comparative situation between men and women has continued. An inquiry of the Senate shows that 72 % of the companies (57 % of the big companies)

---

[21] *Rapport annuel de la Cour de cassation 2008. Les discriminations dans la jurisprudence de la Cour de cassation*. Paris, La Documentation française 2009.

[22] Deliberations are the HALDE's decisions based on the complaints lodged. They are not legally biding but very often have practical effect.

[23] See Délibérations n° 3009-38, 9 February 2009; n° 2008-263, 1 December 2008; n° 2008-74, 14 April 2008.

did not start any negotiations concerning gender equality.[24] Thus, other initiatives have been taken to support collective bargaining.

In the spring of 2004, an important cross-industry national agreement on a balanced representation of both sexes and professional equality between women and men was concluded, indicating the growing interest of social partners on this issue.[25] This agreement recognized the responsibility of social partners to guarantee 'the mixing of sexes' and professional equality at work. It emphasised some particular points: maternity should not hinder a mother's career and to avoid this, two things must happen. Firstly, a link must be maintained with the company during periods of leave. Secondly, the company must provide a specific interview, both before and after the leave is taken, in order to discuss her career development; unjustified wage differentials between men and women must be rectified; the stereotypes about women's work combated; and access to training must be the same for everyone. This agreement also aimed to guide career choices towards occupations with a bright future, to ensure gender balance in recruitment and career development, and to reduce gendered pay differentials. Concerning wages, the agreement provides that when a pay gap is ascertained, the sectors and the companies have to make its reduction a priority.

The agreement is important as it addresses the structural obstacles to equality at work and it challenges pay discrepancies based on career choices, gender imbalance in the sharing of family responsibilities, the glass ceiling, job segregation, etc. However, it is a framework agreement whose application has to be worked out at sector and company levels. It also has been criticized because it contains neither specific statistical targets nor disciplinary measures, its goal being simply to set out parameters for future sector and company-level bargaining.

3.2.1. The ambitious 2006 law

In January 2006, acknowledging the persistence of the pay gap, the French President Jacques Chirac, during his traditional New Year meetings, asked his government to draw up legislation on the pay gap with a very ambitious objective: eliminating the pay gap between men and women within five years! The law on equal pay between men and women followed this declaration and was adopted on 23 March 2006; it is specifically devoted to the reduction of wage disparities. Indeed it specifies that the gap must disappear before 31 December 2010.[26] Continuity between the previous law and the 2004 national agreement is maintained, as the law mainly refers to collective bargaining for the accomplishment of that aim.

Some provisions of the law dealing with pregnancy and maternity directly influence women's wages. According to the legislation, wages must be increased after maternity leave, in order to reflect general pay increases as well as the average individual increase enjoyed during that period by employees of the same category.

Concerning the main provisions of the law, they largely constitute an extension and reinforcement of existing provisions. The contribution of the 2006 law is to fix an

---

[24] M.-Th. Lanquetin 'L'égalité des rémunérations entre les femmes et les hommes, réalisée en 5 ans?', *Droit Social* 2006, p. 631.

[25] Accord national interprofessionnel relatif à la mixité et à l'égalité professionnelle entre les hommes et les femmes: http://www.lexisnexis.fr/pdf/DO/mixite.pdf, accessed 24 April 2009.

[26] On the 2006 law, see M.-Th. Lanquetin 'L'égalité des rémunérations entre les femmes et les hommes, réalisée en 5 ans?', *Droit Social* 2006; J.-F. Cesaro, 'Le code du travail est pavé de bonnes intentions', *JCP ed. S*, 2006, 2173; 'L'application de la loi du 23 mars 2006 relative à l'égalité salariale entre les femmes et les hommes', *JPC ed. S*, 2007, 1501.

impossible deadline to reach equality. But the negotiation on the pay gap is not a specific negotiation and takes place in the framework of the mandatory annual negotiation on wages. It should be based on a precise diagnosis of the gap between the remuneration of men and of women. In companies, the report of the comparative situation between men and women is still the main instrument of this diagnosis.

To promote the negotiations, the legislator has also provided for financial support.[27] Companies with fewer than 300 employees can conclude an agreement with the State to receive financial assistance in order to carry out a study of their employment equality situation and of the measures which would be appropriate for them to take to re-establish equal opportunities between men and women (Article R 1143-1 of the Labour Code). The financial incentives can account for up to 70 % of the costs of the audit. Companies employing fewer than 300 employees can also obtain financial assistance from the State to draw up a forward-looking job and skills management plan[28] incorporating actions to foster equality at work (L.5121-3 of the Labour Code). Companies with fewer than 50 employees can receive financial support to replace women on maternity leave. Specific contracts[29] have also been introduced to facilitate recruitment, transfer or promotion of women in occupations where they are under-represented. These contracts enable companies with fewer than 600 workers to receive funding from the State to cover 50 % of the training costs, 50 % of the other costs and 30 % of these women's wages during the training period. The State offers financial incentives to enterprises that introduce plans, particularly those concerned with training, promotion and work organisation which constitute 'exemplary actions' for realising employment equality.[30] More recently, to promote equality, an 'Equality Label' was also created in 2005. This Equality Label is awarded to businesses with the best gender equality at work practices, using objective criteria defined with management and employees. By late February 2009, 36 businesses had been awarded this label.

3.2.2. Uncertain results

3 years after the adoption of the 2006 law and less than two years before its deadline, has there been any development of collective bargaining on equal pay? Have the social partners followed the path drawn by the legislator?

The law itself provides for a mid-term evaluation of the negotiations by the High Council for occupational equality between women and men, but, until now, no report has been published. Some indications of the consequences of the law can be found in the annual report on collective bargaining.[31] This report is published every year in June and gives the general figures on collective agreements concluded in the year before. This is why these figures are only for the year 2007, covering only one year after the adoption of the law. According to the latest report, the 2006 law has brought a development in the number of collective agreements concluded on equality. More than 800 collective agreements are reported for 2007. At sector level, nine specific agreements on equality were concluded (against one in 2006, and two in 2005) and 24 agreements refer to equality (against 18 in 2006 and 30 in 2005) on a total of more than 1000 agreements concluded at sector level in 2007. At company level, 854 agreements were concluded on equality. This represents only 4.2 % of the total of

---

27 These financial incentives are not new and some have been given since 1983.

28 Actions 'de gestion prévisionnelle des effectifs et des compétences'.

29 'Contrats pour la mixité des emplois'.

30 'Contrat pour l'égalité professionnelle', Article D. 1143-2 of the Labour Code.

31 Ministère du travail, *La négociation collective en 2007*, Bilan et Rapport, June 2008.

agreements concluded in 2007 (around 20 170). However, it is better than the previous years (only 1.3 % in 2005 and 2.1 % in 2006). Thus there is a constant but very moderate increase in the number of agreements dealing with the professional equality issue. However, the content of these agreements varies and many of them just vaguely refer to equality between men and women in the context of a general agreement on wages. Nor does the fact that the subject of equality is mentioned in the agreement mean that the inequalities have been measured or that precise measures have been defined to reduce the inequalities.

A recent report published by the 'Study Center for Corporate Social Responsibility' (ORSE) on a quantitative and qualitative evaluation on agreements concluded on equality[32] confirms this trend. The report records 159 agreements at company level and 35 at professional branch level since 2002. It does not observe an increase in the number of agreements concluded at company level since 2007. With one or two exceptions, companies signing the agreements employ more than 1000 employees. Some of the agreements contain very vague provisions on equality. But some others contain real, concrete and various measures on the gender pay gap with, for example, the definition of a methodology to measure the differences, measures on parenthood (balance between family and work life), recruitment, the mixing of sexes in jobs, fighting stereotypes of men/women, promoting female managers to tackle the glass ceiling, etc. Therefore, these agreements could provide significant contributions to the enforcement of gender equality.[33]

Looking at the small number of collective agreements concluded, it seems that until now, the 2006 law has failed to stimulate a real stream of collective bargaining on equality. One of the reasons is that the French legislator often uses obligations to negotiate as a policy instrument, to encourage the development of social dialogue on a specific issue. Over the last few years, there has been an increase in these obligations. For example, in 2005, an obligation was introduced to negotiate a plan about employment for people with disability and the social partners are required to hold negotiations on measures to promote the employment of disabled workers every three years at sector level and every year at company level. Since 2005, the law also requires companies with at least 300 employees to negotiate every three years on 'forward-looking labour force and skills management' (*gestion prévisionnelle des effectifs et des compétences*). Here, the objective is to reduce redundancies and to anticipate reorganisations in providing measures to help workers adapt to their future jobs. Through these obligations to negotiate, the Government wants the social partners to enter into negotiations and find answers to complex questions. Confronted with these numerous obligations, social partners could choose to negotiate on one issue rather than on another. For example, negotiations on future reorganisations seem to have been more successful than negotiations on discrimination and on wage equality between men and women.[34]

Since 2006, other measures have been taken to try again to encourage collective bargaining. In order to reinforce the effectiveness of the legal framework, the Government first modified the content of the report on the comparative situation of men and women in the enterprise. There is no doubt that this report is a fundamental tool to tackle the pay gap and the discrimination. Without a shared and complete

---

[32] http://www.orse.org/site2/maj/phototheque/photos/actualite/bilan_accords_egalite_060309.pdf, accessed 24 April 2009.

[33] Also see, J. Laufer & R. Silvera 'L'égalité des femmes et des hommes en entreprises. De nouvelles avancées dans la négociation ?', *Revue de l'OFCE*, avril 2006, p. 245.

[34] H. Rouilleault 'Obligation triennale de négocier, où en est-on ?', *Droit social* 2007, p. 988.

diagnosis of the equality situation, collective negotiations do not have any chance to succeed and the content of the collective agreements will be very weak. A new decree, dated 22 August 2008,[35] modifies the indicators which should be used in the report to measure the equality between men and women in enterprises. The aim of the decree is to clarify and simplify the elaboration of the report. The Government has also published models of reports to be used by enterprises.

The next step should be the definition of financial sanctions, to be imposed on companies that have not complied with the obligation to draw up the report and to negotiate on equality. The Government has threatened to introduce financial sanctions several times, but until now those sanctions have not been adopted. This new measure is expected by the end of 2009. It could be argued that sanctions are essential to oblige companies to fulfil their obligations, but it is doubtful whether this measure will be enough. Negotiations on the gender gap are very complex and social partners, especially in small companies, do not have the necessary instruments to analyse and promote measures to reduce it. For those small companies, collective agreements at sector level are essential. If specific sanctions were adopted, this could result in more reports on the comparative situation and negotiations being written. But any collective agreements concluded could remain very vague and formal. The present economic context could also have some important consequences, as equality is not going to be the priority of social partners in many enterprises.

4. Conclusion

France is now at a parting of ways. For years, the successive laws adopted to tackle the gender pay gap seemed to be rather ineffective. However, some positive changes can now be observed. As the last report of the *Cour de Cassation* shows, courts and lawyers are becoming more familiar with the instruments of anti-discrimination regulation and more claims on the ground of sex discrimination before courts and/or the HALDE could develop. The French legal framework is also characterised by the importance given to social partners to fight the pay gap. Of course, it is obvious that the objective of the 2006 law is unattainable and that the pay gap is not going to disappear by the end of 2010. One may even wonder if it has really contributed to its reduction. However, the 2001 and 2006 laws were not useless and have produced more effect than the 1983 law. Even if few collective agreements have been concluded, there is a slow trend, especially in larger companies, to develop negotiations on the gender pay gap. The content of those agreements shows that social partners can contribute to the realisation of gender equality, but this trend in collective bargaining needs to be confirmed. It is now important to focus on the implementation of the legal framework, and the definition of specific sanctions could also be a useful tool. The financial incentives available must also be given more publicity. Nevertheless, the reduction of the gender pay gap cannot only be the responsibility of the social partners and it is necessary to think about other ways to tackle these persistent inequalities.

[35] *Décret n°2008-838*, 22 August 2008, JO 26 August.

The Goods and Services Directive: a curate's egg or an imperfect blessing?*

Aileen McColgan[**]

1. Introduction

Council Directive 2004/113/EC (the Goods and Services Directive) imposes Community obligations relating to gender discrimination in access to goods and services.[1] In 2008-2009 the European Network of Legal Experts in the Field of Gender Equality undertook two studies on the Directive and has to date produced one report (*Sex-segregated Services*[2]), the other currently being in draft form. The purpose of this article is to draw attention to some of the findings of those studies and to make a few wider remarks about the concept of gender equality in this context. In particular, I will ask whether the shortcomings of the Directive are such that they undermine the purpose of it, or threaten gains made elsewhere in EC gender equality law.

2. Council Directive 2004/113/EC

The Goods and Services Directive is one element of the web of Community law regulating discrimination between men and women. The bulk of this legislation concerns employment, broadly defined, as well as occupational and statutory social security schemes.[3] What is perhaps most obviously interesting about Directive 2004/113/EC, when considered together with the other gender equality provisions, concerns the gaps in its coverage; by contrast with Directive 2000/43/EC (the Race Directive), the Goods and Services Directive explicitly excludes from its material scope discrimination in 'the content of media and advertising' and in education.[4] It further, and again by contrast with the Race Directive, contains exceptions relating to the use of actuarial factors in insurance (Article 5).

The Race Directive explicitly regulates, in addition to the broad area of employment, discrimination in relation to (Article 3) '(e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and

---

* The expression 'a curate's egg' originally meant something that is partly good and partly bad, but as a result is entirely spoiled. It derives from a cartoon in satirical *Punch* magazine which pictured a curate (lowly clergyman) breakfasting in his Bishop's house. When the Bishop remarks that the curate has a bad egg, the curate replies 'Oh, no, my Lord, I assure you that parts of it are excellent!' While the phrase is now often used to indicate something having a mixture of good and bad qualities, its original sense was that the bad parts spoilt the whole.

** Professor of Human Rights Law, School of Law King's College London.

1 OJ L 373, 21/12/2004 P. 0037 – 0043.

2 European Network of Legal Experts in the field of Gender Equality, S. Burri & A. McColgan, *Sex-segregated Services*, Luxembourg, European Commission, December 2008, available at http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes, accessed 13 May 2009.

3 E.g. Directives 79/7, 86/378, 86/613, 92/85, 96/34, 2006/54. See S. Burri and S. Prechal, *EU Gender Equality Law*, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, Luxembourg: Official Publications of the European Communities, September 2008.

4 Though discrimination in vocational training, which will include at least some forms of third level education, is covered by Directive 2006/54/EC.

supply of goods and services which are available to the public, including housing.' The Goods and Services Directive covers (Article 3(1)) the provision of 'goods and services, which are available to the public (…) which are offered outside the area of private and family life (...)' Article 3(2) goes on to state that 'This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex'. And Article 3(3) excludes from the material scope of the Directive 'the content of media and advertising [and] education.'

Discrimination between men and women as regards 'social protection, including social security and healthcare' and 'social advantages' is regulated to some extent by Directives 79/7 (state social security) and 86/378[5] (occupational social security). It is worth noting, however, that extensive exceptions apply to the prohibition of gender discrimination in statutory schemes. Further the Race Directive, unlike the Goods and Services Directive, explicitly regulates discrimination in access to housing; it does not contain any proviso concerning transactions carried out in 'the area of private and family life'; and it makes no reference to freedom of contract. These differences in the text, coupled with the exclusion from the Goods and Services Directive of education and 'the content of media and advertising' and the provisions regarding actuarial factors in insurance, strongly suggest that gender discrimination in this area is viewed with less concern than is race discrimination. Interesting questions perhaps arise as to the appropriate sphere of 'private' or 'family' life in which the regulation of discrimination on gender or other grounds would threaten breaches of Article 8 of the European Convention on Human Rights.[6] But the reference to freedom of contract is perhaps odd given the extent to which prohibitions on discrimination on multiple grounds have been imposed in the context of employment, and prohibitions on race discrimination imposed across an extremely wide material scope, without apparent concern for the freedom of contracting parties. And the exclusion of the content of media and advertising from the scope of the Goods and Services Directive is particularly open to question in view of the absence of any such exclusion from the Commission's 2008 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.[7]

The Network's reports did not cover the areas of insurance, financial services or social protection, which are the subject of specific further research on behalf of the European Commission. It is however noteworthy that a significant number of the Network's experts drew particular attention, in the preparation of the reports on Directive 2004/113/EC, to discrimination in connection with pregnancy in the context of health insurance. It should be pointed out that recital 20 of the preamble to the Directive states that 'Less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services' and that 'Costs related to risks of pregnancy and maternity should therefore not be attributed to the members of one sex only'. Notwithstanding this, a number of experts reported the imposition of long waiting periods in respect of coverage for pregnancy-related illness, an approach upheld by the Netherlands' Supreme Court in July 2008.[8]

---

5 As amended by Directive 96/97/EC.

6 Examples might include the legal regulation of the division of childcare or domestic work within the home.

7 Brussels COM(2008) 426.

8 Hoge Raad 11 July 2008, *LJN* BD1850.

3. General findings

3.1. Extent of gender discrimination

The Network's reports threw up relatively few examples of gender discrimination in the context of goods and services, at least outside the area of insurance and financial services, education and the content of media and advertising. Some of the examples which they provided concerned pregnancy-related treatment, including refusals of access to abortion and other reproductive health services provided for by law (particularly in Poland) and (again in Poland), shockingly bad treatment of women undergoing maternity care. Women continue to be refused access to air travel in the later stages of pregnancy, and/or to be required to produce evidence of fitness to fly during pregnancy, and to be refused services because of concern for foetal wellbeing. Also relatively common is differential charging in relation to access to nightclubs, hairdressing and dating services. And sex segregation is commonplace in the context of fitness clubs, saunas, spas and similar and public swimming pools, and sometimes takes place in 'private' clubs and in relation to taxi services and parking facilities reserved to women alone.

3.2. Implementation of the Directive

The vast majority of Member States have implemented the Goods and Services Directive, whether by the adoption of fresh legislation or the amendment of existing provisions. Exceptions include the Czech Republic where President Klaus has vetoed the draft Anti-Discrimination Act on the basis that it is 'unnecessary, counterproductive and bad';[9] Poland (whose government has failed on a number of occasions to secure the passage of implementing legislation); and Greece.[10]

In a significant number of states the goods and services provisions form part of much broader legislation governing discrimination on multiple grounds across a wide material scope. Elsewhere they are part of wide-ranging gender equality law with a minority of states transposing the Directive by means of 'stand-alone' legislation dealing only with gender discrimination in goods and services and similarly few echoing the material scope of the Goods and Services Directive. In a significant proportion of states the legislation covers at least the same material scope as the Race Directive or is described as being of general application, and even where this is not the case most legislation covers education and/or, in a number of states, media and advertising. This suggests that the EU has fewer reasons to be concerned about member state resistance to the plugging of the 'loopholes' in EU gender equality law than it might have anticipated when it adopted the Goods and Services Directive in its current form.

The transposition of the Directive has in many cases been criticised as resulting in abstract or confusing legislative provisions, generally because of a reliance on a 'copy out' approach. In particular, there is a lack of clarity in many states as to definitions of goods and services. This is particularly problematic given the uncertainty which exists at Community level as to the precise coverage of (for example) health services by the Directive. Further, and despite ECJ caselaw including discrimination against transsexuals within the concept of gender discrimination, most transposing legislation does not make this explicit and it is not everywhere regarded as implicitly included

---

9 http://www.eurofound.europa.eu/eiro/2008/06/articles/cz0806029i.htm Eironline, June 2008, 'Anti-discrimination law still in limbo'.

10 The Greek Constitution prohibits sex discrimination, vertically and horizontally, across all areas, but no caselaw has arisen in connection with goods and services.

within the concept of gender/sex. Similarly, few states have taken any steps in their transposing legislation to clarify the application of the prohibition of gender discrimination to discrimination on the grounds of someone's else's gender, or the perceived gender of the person discriminated against.[11] And while most states explicitly regulate pregnancy discrimination in the context of goods and services, there is a lack of certainty as to what this prohibition means.

The Directive allows (Article 4(5)) 'differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. It also permits (Article 6) 'specific measures to prevent or compensate for disadvantages linked to sex' where these measures are taken '[w]ith a view to ensuring full equality in practice between men and women'. There is, however, no provision allowing (for example) health and safety considerations to outweigh gender equality. It seems, therefore, that the prohibition of less favourable treatment on grounds of gender (including, Article 4(1)(a) 'less favourable treatment of women for reasons of pregnancy and maternity') must cover the refusal to allow pregnant women to fly, or to take part in (for example) bungee jumping. The temptation to avoid at least the latter scenario may well put pressure on legislatures and/or the court to adopt an approach to pregnancy discrimination along the lines of the early US decision in *Geduldig* v *Aiello* (1974) in which the US Supreme Court ruled that the exclusion from California's employment insurance programme of normal pregnancy did not violate the Equal Protection Clause of the Fourteenth Amendment.[12] According to a majority of the Court:

> '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not (...) The program divides potential recipients into two groups – pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.'

That kind of reasoning has not been accepted by the ECJ in the context of employment-related pregnancy discrimination. It would be unfortunate if it were permitted, as a matter of EU law, to apply in the area of goods and services.

4. Sex segregation, differential pricing and gender discrimination

As noted above, among the most common examples mentioned of differential treatment of men and women in the context of goods and services are those concerning the provision of sex-segregated services, and the differential pricing of services according to gender. Ombudsmen and courts in a number of states have reached contrasting views on the legality of sex-segregated services. In Slovenia, for example, the Advocate for the Equal Opportunities for Women and Men rejected a challenge by a man refused entry to a sauna on the one day a week in which it was closed to men. And in the Netherlands the Equal Treatment Commission rejected a challenge to the (non-symmetrical) provision by a sauna of a 'woman's day' on the basis that there was insufficient demand to have a day reserved to men. In Hungary, however, the Ombudsman upheld a challenge to the refusal of access on the part of

[11] As is required explicitly and by implication by the decision in *Coleman*.
[12] 417 US 484.

women to a Turkish baths, accepting that sex-segregation was justified on decency grounds but ordering that the baths also open for women-only sessions during the week (the level of attendance having the effect that those sessions now account for one day a week). Women's gyms have also been accepted as lawful in Hungary, but a women-only section of a mixed gym categorised as unlawful in Ireland on the basis that the justification (women's potential embarrassment at exercising in the same area as men) was undermined by the fact that the area was in full view of men.[13]

Social reasons have been accepted in Ireland for sex segregation in members' clubs (there is a bar on female membership of one of Ireland's most prestigious golf clubs).[14] In that case the High Court ruled that 'there is nothing inherently undesirable with persons seeking – in a social context – the society of persons of the same gender'. Irish legislation applies to members' clubs but provides that 'a club shall not be considered to be a discriminating club by reason only that (…) (a) (…) its principal purpose is to cater only for the needs of (i) persons of a particular gender (…)'.[15] The High Court interpreted the legislative exception broadly to apply to the discrimination in access to membership despite the fact that women were not, in fact, barred from the club's facilities, being allowed to play golf and to have 'access to the bar and restaurant and all other Clubhouse facilities available at the Golf Club', but being denied membership (and so treated in effect as second class citizens).

Social reasons for single-sex facilities were also accepted by a Polish court in a challenge to a small chain of 'ladies club/cafeterias' ('Babie Lato') which was established to promote a specifically 'female' atmosphere and featuring 'chairs wide enough to be comfortable for seating even for chubby women with their handbags [and] tables tall enough to enable to keep legs comfortable, even while wearing 11 cm high heels'.[16] Elsewhere, the Dutch Equal Treatment Commission accepted that the prohibition on gender discrimination applied to a rifle association whose members were admitted by a vote, because the association rendered services in public (having public shooting facilities and the ability to participate in official matches).[17]

4.1. A principled approach?

The national decisions on sex-segregation indicate that the prohibition on sex discrimination in access to goods and services, while not perhaps immediately appearing to be as important in terms of gender equality as (say) prohibitions on discrimination in employment and pay, in fact poses real issues of principle as regards the meaning of discrimination. In many cases sex segregation is not consistent with the principle of equality. It can encourage a 'separate spheres' approach to men and women which relies on and reinforces sex stereotyping and, particularly in the case of children and young people, can contribute to the production of gendered differences (where, for example, girls are encouraged to engage in sedentary activities and boys in physical activities which increase muscle strength). It can also entrench inequalities by facilitating male networking, and contribute to the denigration and commodisation

---

[13] See the report on sex segregation, fn. 2 above. Contrasting approaches have also been taken in Denmark, where sex segregation in this context has been accepted, and the Netherlands where it appears to be regarded as unlawful.

[14] *Equality Authority* v *Portmarnock Golf Club & Ors* [2005] IEHC 235, 10 June 2005.

[15] Equal Status Act 2000, Section 9(1)(e).

[16] Polish legislation is not in conformity with Directive 2004/113 but imposes some restrictions on discrimination in access to goods.

[17] See ETC Opinion 2001-27. The complaint was however not proven.

of women (because all-male groups are more likely to engage in 'laddish' behaviours such as visiting lap-dancing clubs.

4.1.1. Promoting socially beneficial ends

Sex segregation may, however, be designed to further a socially beneficial end (such as fitness) by trying to encourage participation by those who would otherwise be prevented from taking part by cultural or religious attitudes to decency, or by embarrassment, or fear of sexual harassment. It may also be designed to facilitate engagement by women or men in activities involving public nakedness (for example in the use of saunas); to recognise women's vulnerability to certain types of criminal assault (in the case of, for example, taxi services or parking places reserved to women); or to counter the impact of gender stereotyping (for example by providing courses in 'DIY'[18] for women or the parenting of young babies for men).

Permitting practices which are designed to further socially beneficial ends by accommodating concerns about decency or sexual harassment serve to further rather than to damage gender equality by encouraging women's full access to the public sphere. Differential treatment in this context may be objectionable if it is disproportionate: if, for example, single-sex provision for one sex is not adequately balanced by the provision of appropriate opportunities for persons of the other sex to access the facility or service at issue. But equality here, particularly if the position of women and men whose religious or cultural practices limit the circumstances in which contact between men and women is regarded as appropriate is taken into account, might be regarded as requiring *equivalent* rather than *uniform* service provision. This is not to say that every swimming session provided for women (and children) has to be balanced by one restricted to men. Relevant questions will concern the level of demand for single-sex swimming and how that demand can fairly be met. But there is nothing intrinsically hostile to sex (as distinct from race) equality in providing separate services in some cases for women and men. The fact that views as to the appropriate level of social contact between men and women, or the clothing appropriate to such contact, will differ across ethnic and religious groups does not make it any less important to meet the needs of those (particularly women) who will not be able to engage in activities such as swimming and other sports except in conditions of sex segregation.

4.1.2. Decency

Turning to participation in activities involving public nakedness, whether or not saunas are particularly beneficial to health (and many would suggest that they are), there appears to be no principled reason to object to sex segregation in this context, any more than in the provision of single-sex communal changing rooms, as long as there is no unjustifiable disparity in the levels of access provided to men or women. Indeed the provision of single-sex services may be necessary in order to allow women to avoid sexual harassment, thus again bringing into play Article 6. It may also be required in order to facilitate access on the part of men and women who, because of religious or cultural norms governing modesty or decency, do not wish to appear semi-clothed other than in same-sex groups. It is the case that the use of single-sex facilities may provide opportunities for networking, but it is likely to be disproportionate to restrict them on this basis, not least where they involve positive discrimination (by, for example, enabling the creation of female networks to provide

[18] 'Do it yourself', which concerns household decoration and repairs.

support for women in male-dominated activities, or facilitating access to services by those who might otherwise be isolated within their religious or cultural groups). Similarly, while sex-segregation for reasons of safety or personal security may be regarded as resting on negative stereotypes about male sexual and other violence, it is undoubtedly the case that male-female violence is commonplace, frequently involves sexual assault, and (for the most part) is inflicted on women by men, rather than vice-versa. Again subject to considerations of proportionality as regards the provision of services to men, where such services are required, there ought to be no principled objection to the provision of sex-targeted services such as women-only taxi services or parking areas where they are designed to facilitate public engagement by women and do not result in disproportionate disadvantage to men. Sex-targeted services designed to counter stereotyping of women (or men), or the effects of such stereotyping, should also be regarded as furthering the legitimate aim of sex equality rather than being inconsistent with it and as a result being justified under Article 6 as well as Article 4(5), in each case subject to reasonable considerations of proportionality.

4.1.3. Social sex segregation

More problematic is sex-segregation designed for essentially social reasons, such as male-only golf clubs or women's cafés. Where the target group is women such segregation can be seen as allowing a retreat from a male-dominated social space, escape from sexual harassment and the threat of sexual harassment and other forms of sexual violence, and the opportunity to create networks which can begin to counter the differential power wielded by men in society. (Whether this means that such segregation is justified in a particular case will depend on a proportionality analysis: see further below.) On the other hand, male-only preserves allow the perpetuation of power imbalances through networking. It may be that the correct approach to Article 4(5) results in the conclusion that the exclusion of women from (for example) a prestigious golf club at which, more than likely, numerous 'networking' opportunities are available to men involved in business, the professions and similar, cannot be regarded as justified by any legitimate aim pursued by appropriate and necessary means. Where, however, women-only networking organisations are intended to counteract the impact of male dominance in culture, business, academia etc there will be a legitimate aim for segregation which, further, may (Article 6) 'compensate for disadvantages linked to sex' and be taken '[w]ith a view to ensuring full equality in practice between men and women'. The objective of furthering equality would serve also (as would considerations of personal security and the right to be free from harassment) to justify, under Article 4(5), the provision of services targeted to women or men and intended in fact to be utilized by gay men or lesbian women. Allowing gay men and/or lesbian women a safe social space in which to create and further relationships between persons of discriminated-against minority groups must surely be seen as a legitimate aim. And given the abundance of services available to men and women other than on the basis of this type of sex-related distinction, it is unlikely that such sex segregation will have any disproportionate effect.

4.1.4. Differential pricing

Interesting questions also arise in relation to differential pricing practices. As they apply to hairdressing services such practices, although they may have their roots in broad generalisations as to the amount of effort involved in (for example) cutting

men's and women's hair, are indefensible when the obvious alternative exists of pricing services on the basis of the effort required to be expended on them (length of hair, for example, and/or requirements for blow-drying or other styling). Distinct problems arise in relation to differential pricing designed to encourage greater participation by persons of one sex *in order to* attract greater numbers of persons of the opposite sex, as where women are given cheaper access to dating services or nightclubs etc, or are provided with cheaper drinks than men in the latter context. The difficulty with this type of differential treatment is that it carries overtones of the commoditisation of women, their objectification as 'bait' by which the 'real' (male) customers can be 'reeled in'. The intention in these cases is not to attract women *for the sake of attracting women* (as might be the case, for example, where fees for a physics course which traditionally attracted disproportionately male applicants were set at a lower level for women). The real target is (high-spending) men and the weapon is sex. This practice is objectionable in the extreme because it perpetuates the common view of women as 'game' and, more than likely, contributes to sexual harassment.

5. Enforcement

One of the most interesting points to emerge was the relative lack of case law generated by the Directive and, in those states with long-standing prohibitions on gender discrimination in access to goods and services, by such provisions. This is generally attributed to the disproportion between the costs and effort of pursuing litigation, against likely recoverable damages. Even where discrimination is accepted as having occurred, there may be no entitlement to damages (as may be the case in practice in Sweden, for example). It is particularly important, therefore, that provision be made for enforcement other than by the action of individuals in the courts. Of particular concern in this context is the fact that equality bodies in many member states have no standing before the courts,[19] or are unable to litigate in the absence of an actual victim. This has the effect that even flagrant breaches of domestic equality provisions by nightclubs etc are not subject to judicial determination, much less the imposition of any sanction.

6. Conclusions

Directive 2004/113/EC has extended the prohibition on gender discrimination into the area of goods and services but has done so in a partial and imperfect way. The gaps in coverage, and the hierarchy to which this has given rise, have been highlighted above. The adoption of the draft directive governing discrimination on grounds of sexual orientation, disability, religion or belief and age will push gender towards the bottom of the list of protected grounds in some respects. This does not mean, of course, that the flawed Directive is for this reason worse than nothing at all. The same applies to difficulties as regards enforcement. There are serious concerns, however, as to the approach taken in the Directive to pregnancy discrimination, in particular, the failure to define what this means and the legality or otherwise of measures intended to safeguard maternal and/or foetal health. The failure to grapple with this difficult issue may threaten gains achieved elsewhere with the extremely robust approach of the ECJ

[19] Austria, the Czech Republic, Germany, Greece, Liechtenstein, Lithuania, Norway, Poland, Portugal and Slovenia.

to pregnancy-related discrimination in the context of employment. Notwithstanding this potential problem, it is probably safe to conclude that the Directive is more of an imperfect blessing than a 'curate's egg', properly understood.[20]

[20] See fn. * above.

EU Policy and Legislative Process Update

November 2008 – April 2009

1. On 13 March 2009, the European Parliament adopted a resolution on Gender Equality and Women's Empowerment in Development Cooperation, which calls for various actions to promote gender equality in development countries. The resolution calls among other things for qualified gender-equality specialists in local projects, promotion of access to education for girls and access to sexual and reproductive health information, services and supplies to empower reproductive health and rights.
OJ C 66E, 20.3.2009, pp. 57–66
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:066E:0057:0066:EN:PDF

2. On 13 March 2009, the European Parliament adopted a resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (2007/2116(INI)). The Parliament stresses the need for gender equality in prison policies, considering the position of female prisoners.
OJ C66 E, 20.3.2009, pp. 49–56
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:066E:0049:0056:EN:PDF

3. On 10 March 2009, the Commissioners Group on Fundamental Rights, Anti-Discrimination and Equal Opportunities met in the context of International Women's Day. The extraordinary session took stock of progress under the existing 2006–2010 Roadmap on Gender Equality and discussed future challenges for EU gender equality policy.

4. On 3 March 2009, the European Commission launched an information campaign in all EU countries about the gender pay gap. Materials on gender pay gap can be ordered or downloaded from the campaign website of the European Commission.
http://ec.europa.eu/social/main.jsp?langId=en&catId=681

5. On 27 February 2009, the European Commission published its yearly report on Equality between Women and Men of 2008 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. The report sets out the main progress recorded in the area of equality between women and men in 2008 and outlines the future challenges.
COM(2009) 77 final
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0077:FIN:EN:PDF

6. On 15 January 2009, the European Parliament adopted by a large majority an alternative resolution on the transposition and application of Directive 2002/73/EC on the principle of equal treatment for men and women as regards access to employment. The initiative was taken by Teresa Riera Madurell in a report describing the insufficient transposition of the Directive in various Member States and calling for careful monitoring of the application of this Directive by the Commission.
EP412.284
http://www.europarl.europa.eu/oeil/file.jsp?id=5597852

7. On 10 December 2008, by own-initiative report procedure, a report on the transposition and application of Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions was published.
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0491+0+DOC+PDF+V0//EN&language=EN

8. On 27 November 2008, the European Commission sent reasoned opinions to Austria, Lithuania, Slovenia, Hungary, Italy and Malta to fully implement EU rules prohibiting discrimination in employment and occupation on the grounds of sex (Directive 2002/73/EC). The main problems of incorrect implementation include the definitions of direct and indirect discrimination, rights of women on maternity leave and the functioning of equality bodies.
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1821&format=HTML&aged=0&language=EN&guiLanguage=en

9. On 26 November 2008, the European Commission published a midterm progress report on the Roadmap for Equality between Women and Men (2006-2010) in a communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.
COM(2008) 0760 final
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0760:FIN:EN:PDF

European Court of Justice Case Law Update

November 2008 – April 2009

Case C-559/07, 26 March 2009
Commission of the European Communities v Hellenic Republic, n.y.r. (only available in Greek and French)
Article 141 EC

Facts
The Commission sought a declaration from the Court of Justice that the provisions of the Greek Civil and Military Pensions Code providing for differences between male and female workers with regard to pensionable age and minimum length of service required infringe the principle of equal treatment. The system lays down retirement conditions which are less favourable to men than to women, because the conditions for men are stricter than for women. The Greek Government pointed out that the differences are justified, because the provisions compensate disadvantages that women face due to shorter working lives.

Judgment of the Court of Justice
The Court considers the pension at stake to fall within the scope of Article 141 EC. The Court points out that it is contrary to the principle of equal pay to impose age conditions and rules on minimum periods of service required which differ according to sex for workers in identical or comparable situations. The principle of equal treatment does not preclude a Member State from applying measures providing for specific advantages intended to facilitate the exercise of a professional activity by the under-represented sex or from preventing or compensating for disadvantages in professional careers (Article 141(4)). Furthermore, national measures covered by the principle of equal treatment must, in any event, contribute to helping women conduct their professional life on an equal footing with men. The Court holds that the provisions of the Greek Civil and Military Pensions Code do not offset the disadvantages to which the careers of female civil servants and military personnel are exposed by helping them in their professional life. The Court concludes that the age conditions and period of service are incompatible with Article 141 EC.

Case C-41/08, 4 December 2008
Commission of the European Communities* v *the Czech Republic, n.y.r. (only available in Czech and in French)
Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes and Directive 96/97/EC amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes

Facts
The Commission sought a declaration from the Court of Justice that the Czech Republic has not taken all the necessary legislative, regulatory and administrative measures in conformity with Directive 86/378/EEC and the amending Directive 96/97/EC and has not notified the Commission of the relevant provisions. Therefore

the Czech Republic has not fulfilled its obligations as to the transposition of these Directives and Article 54 of the Act concerning the conditions of access of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the amendments to the Treaties on which the European Union is founded. These provisions should have been transposed by 1 May 2004.

Judgment of the Court of Justice
By not taking within the prescribed time limits all the legislative, regulatory and administrative measures necessary to comply with the obligations set in Directives 86/378/EEC and 96/97/EC, the Czech Republic has not fulfilled its obligations with regard to these Directives and Article 54 of the Act concerning the conditions of access of the Czech Republic.

OPINIONS OF ADVOCATE-GENERALS

Case C-63/08, Opinion of Advocate-General V. Trstenjak of 31 March 2009
Virginie Pontin v T-COMALUX SA (Available in French, German and other languages)
Directive 92/85/EEC and Directive 76/207/EEC

On 12 February 2008, the Tribunal du Travail de et á Esch-sur-Alzette (Luxembourg) referred the case Pontin to the Court of Justice (see for the preliminary questions EGELR 2008-1, p. 42). The facts in this case are as follows: Ms Pontin worked from November 2005 as secretary for T-COMALUX. She had a permanent appointment. In January 2007, Pontin was dismissed without any notification of reasons, when she was on leave for reasons of disability. In a notice dated several days later, the company based the dismissal of Pontin on non-compliance with the existing procedures regarding disability leave. Several days later, Pontin submitted a medical certificate stating that she was pregnant and argued that the dismissal was invalid. According to the Luxembourg Code du Travail, a woman can prove her pregnancy by submitting a medical certificate within 8 days after a notice of dismissal. Within 15 days, the woman can apply to the Tribunal du Travail with a request to declare the dismissal void because of pregnancy.

The Tribunal asked the Court of Justice if those periods are compatible with Directive 92/85/EEC and Directive 76/207/EEC. Moreover, in Luxembourg, women who are dismissed during pregnancy cannot claim compensation, whereas workers facing unlawful dismissal on other grounds do have such rights. The referring tribunal asked the Court of Justice whether this legal provision is in compliance with Directive 76/207/EEC.

The Advocate-General has advised the Court of Justice to answer the Tribunal as follows:

– Article 2 of Directive 76/207/EEC has to be interpreted such that if under national law workers who are dismissed are entitled to compensation upon dismissal, women who are dismissed during pregnancy should have the same rights;

– Under the circumstances of the case a national period of 8 days to inform the employer of pregnancy is not incompatible with Articles 10 and 12 of Directive 92/85/EEC;
– The period of 15 days to start a procedure against an unlawful dismissal because of a dismissal during pregnancy is not compatible with Articles 10 and 12 of Directive 92/85/EEC if this period violates the principles of effective legal protection, effectiveness and equivalence.

Case C-537/07, Opinion of Advocate-General Sharpston of 4 December 2008
Evangelina Gómez-Limón Sánchez-Camacho* v *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA
Directive 96/34/EC and Directive 79/7/EEC

El Juzgado de lo Social referred a matter to the Court of Justice in December 2007. In short, the case concerns a conflict on the calculation of the invalidity pension of Ms Gómez-Limón. In 2001, she agreed with her employer to reduce her working days to two thirds, in order to take care of a child under the age of six. The amount of an invalidity pension payable to her was calculated by taking into account the salary effectively received and the contributions effectively paid during her period of parental leave, after her working time was reduced, rather than the salary and contributions that would have corresponded to full-time employment.

The referring tribunal asked the Court of Justice five questions on the compatibility of the calculation with Community law (Directive 96/34/EC and Directive 79/7/EEC).[1]

The Advocate-General has advised the Court to answer the questions as follows:
– Clause 2(6) of the framework agreement on parental leave annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC does not apply to matters of social security;
– Clause 2(8) of that framework agreement does not impose a clear, precise, and unconditional obligation on Member States and therefore cannot be relied upon against the public authorities of the Member State before the national courts;
– Legislation under which an invalidity benefit is calculated pro rata temporis on the basis of the time actually spent at work in case of part-time employment is not incompatible with Community law, even if the reason for the reduction in working time is a period of parental leave.

[1] See for the referred questions *European Gender Equality Law Review* No. 1/ 2008, p. 40 and OJ C 064 of 8 March 2008, pp. 16-17.

Case C-44/09
Commission of the European Communities* v *Hellenic Republic, 30 January 2009, OJ C 69 of 21 March 2009, p. 29
Directive 2004/113/EC

Form of order sought
Declare that, by not adopting the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, or in any event by not notifying those provisions to the Commission, the Hellenic Republic has failed to fulfil its obligations under that Directive.

Pleas in law and main arguments
The time limit for transposition of Directive 2004/113/EC into domestic law expired on 21 December 2007.

Case C-15/09
Commission of the European Communities* v *Czech Republic, 12 January 2009, OJ C 69 of 21 March 2009, p. 25
Directive 2004/113/EC

Form of order sought
Declare that by not taking all necessary legal and administrative measures to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, or in any event by not communicating those measures to the Commission, the Czech Republic has failed to fulfil its obligations under Article 17 of that Directive.

Pleas in law and main arguments
The prescribed period for the transposition of the Directive into domestic law expired on 21 December 2007.

Case C-577/08
Reference for a preliminary ruling from the Arbeidshof te Antwerpen, Afdeling Hasselt (Belgium) lodged on 29 December 2008, Rijksdienst voor pensioenen* v *E. Brouwer, OJ C 55 of 7 March 2009, p. 16
Directive 79/7/EEC

Referred question by the *Arbeidshof*
1. Are the Royal Decrees (…) enacted pursuant to Article 25 of the Royal Decree of 21 December 1967 laying down general rules for the retirement and survivor's pension for employees (*Koninklijk Besluit tot vaststelling van het algemeen reglement betreffende het rust- en overlevingspensioen voor werknemers*) – which

establish lower notional and/or flat-rate daily wages for the calculation of the retirement pension for female frontier workers than for male frontier workers – in accordance with Article 4(1) of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security?

Case C-471/08
Reference for a preliminary ruling from the Helsingin käräjäoikeus (Finland) lodged on 4 November 2008, Sanna Maria Parviainen* v *Finnair Oyj, OJ C 19 of 24 January 2009, p. 13
Directive 92/85/EEC

Question referred by the *Helsingin käräjäoikeus*
1. Is Article 11(1) of the Protection of Pregnant Workers Directive to be interpreted as meaning that a worker who is transferred to other lower-paid work because of her pregnancy must, on the basis of that provision, be paid as much as she received on average before the transfer, and is it relevant in that respect what kind of allowances and on what basis the worker was paid in addition to her basic monthly pay?

C-452/08
Reference for a preliminary ruling from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Spain) lodged on 16 October 2008, Emilia Flores Fanega* v *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Bolumburu S.A., OJ C 06 of 10 January 2009, p. 13
Directive 96/34/EC

Questions referred by the Tribunal
1. Is Clause 2(6) of Annex 1 to Council Directive 96/34/EC of 3 June 1996 to be interpreted as meaning that observance of rights in the process of being acquired extends to a pension for life on the ground of a person's total and permanent incapacity to perform her usual work, arising during the period of a year's parental leave taken in the form of a reduction in the working day and pay, as a result of an occupational disease contracted in carrying out the work she was employed to perform for the undertaking that gave the parental leave and revealing itself during that leave period, having regard to the fact that Social Security covers that benefit in subrogation to the obligations of the undertaking, by reason of the relationship of compulsory insurance against the risks of accidents at work and occupational diseases?
2. If the reply to the first question is affirmative, is that provision to be interpreted as meaning that the guarantee of protection which it provides is infringed by a provision of domestic law that, with the object of determining the amount of pension for total permanent invalidity on account of occupational disease, takes into consideration the pay received by the worker concerned and the contributions actually made on the basis of that pay in the 12 months before the operative event, during the greater part of which the worker made use of that leave with a reduction in her working day, pay and contributions, but does not provide any

correcting factor making it possible to ensure that the object of that provision of Community law is achieved?

3. In all events, and whatever the tenor of the answer to the foregoing questions, are Clauses 2(8) and 4(2) of Annex I to that Directive to be interpreted as meaning that the obligations and measures that they prescribe are incompatible with the application of a rule of calculation such as the one described?
4. Irrespective of the replies to the foregoing questions, is Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in conjunction with Article 5 thereof, to be interpreted as meaning that it is contrary to the principle of equal treatment to apply a calculation formula such as that referred to, given that, according to statistics, female workers form the overwhelming majority of workers using the form of parental leave described?

European Court of Human Rights Case Law Update

November 2008 – April 2009

31 March 2009, Case of *Weller* v *Hungary* (Application No. 44399/05)

Facts

Three Hungarian nationals lodged a complaint that Hungary had violated Articles 8 and 14 of the Convention because they had been refused maternity benefit on grounds of nationality and their parental status. Under Hungarian law only Hungarian mothers who have obtained settlement permits (as Union citizens or refugees) are able to request a maternity benefit. The first applicant was a father of Hungarian nationality whose request had been denied because only mothers could make such a request. The second and third applicants were mothers without Hungarian nationality or a settlement permit.

Judgment

The Court observed that neither the domestic authorities nor the Government had put forward any objective and reasonable ground to justify the general exclusion of natural fathers from a benefit aimed at supporting all those who are raising newborn children, when mothers, adoptive parents and guardians are entitled to it. It therefore concluded that the first applicant suffered discrimination on the ground of his parental status in the exercise of his right to respect for his family life.

Since the Government had failed to put forward any convincing argument to justify the second and third applicants' exclusion from the benefit in question, the Court concluded that this difference in treatment amounted to discrimination.

Decisions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW)

November 2008 – April 2009

***Ms Zhen Zhen Zheng* v *the Netherlands*, 7 November 2008, CEDAW/C/42/D/15/2007**

Ms Zhen Zhen Zheng, a Chinese asylum seeker living in the Netherlands, lodged a communication alleging a violation of article 6 of the Convention by the Dutch Immigration and Naturalisation Service (IND). Ms Zhen Zhen Zheng had been trafficked into the Netherlands for the purpose of prostitution, but she was able to escape together with other Chinese women.

She requested asylum in the Netherlands, but the IND refused to grant her a residence permit, because she was not able to give any details of her trip from China to the Netherlands, she did not have identity documents and had waited for 8 months before applying for asylum. Later, the IND also decided to refuse to grant her a residence permit as a minor or on grounds of her motherhood because China offers sufficient care to minors and has sufficient and adequate reception facilities for single mothers and their children, according to the IND. Ms Zhen Zhen Zheng also applied for a residence permit based on special circumstances (the length of her stay, her adjustment to Dutch culture), which was also refused. At the time of the communication to the Committee her appeal was still pending against this latter denial by the IND.

According to Dutch migration law women who are the victims of trafficking could obtain a residence permit, when certain conditions are fulfilled. The IND did not inform the complainant about this possibility, although she did request a residence permit on a couple of occasions and the IND was aware of her circumstances (according to Ms. Zhen Zhen Zheng).

The Netherlands argued that the complaint was inadmissible, because an appeal was still pending before the Dutch courts against the last refusal of the residence permit. In this procedure Ms Zhen Zhen Zheng also invoked article 6 of the Convention. Moreover, the Dutch government stressed that as the claimant had not provided much information on her circumstances, there were therefore no elements in her statements that should have prompted the IND to notify her concerning the Dutch special procedure for trafficking victims.

The Committee decided to declare the communication inadmissible on the basis that not all domestic remedies had been exhausted (article 4 (1) of the Optional Protocol).

Source: http://www2.ohchr.org/english/law/jurisprudence.htm

News from the Member States and EEA Countries

AUSTRIA – *Anna Sporrer*

Policy developments

After the Austrian parliamentary elections in September 2008, a coalition between the Social Democratic Party and the People's Party was formed. The programme of this coalition for the current legislative period contains several aspects related to gender equality.

As one of the measures aimed at promoting economic growth and employment, the Government is going to introduce an obligatory last year in Kindergarten, at no charge, for children before they enter school. The federal government intends to spend EUR 70 million on this in 2009 and 2010, after which the impact of this project shall be evaluated. Furthermore, so-called specific 'placement foundations' shall be developed aimed at promoting the employment of women. In the framework of a specific labour market programme, women shall be actively encouraged and supported to choose qualified vocational training in professions of better income and better future perspectives. Moreover, parents returning to the labour market after child rearing or care for family members shall be better supported.

In addition, the system of research and science human resources shall be further developed, *inter alia* by the promotion of women in high-level jobs, in monitoring positions and commissions at universities and other research institutions. Moreover, gender budgeting shall be better implemented into research funding. Furthermore, female junior scientists shall explicitly be promoted in the natural and technical sciences and the reconciliation of scientific careers and child rearing shall be improved.

As one of the instruments of family policy, the system of childcare allowances shall be further developed, in particular by the introduction of calculation factors depending on the (former) income of the parent, by introducing more flexibility and by simplifying the rules for the earnings which are permitted in addition to the allowances. Moreover, models of better integration of fathers into the family after the birth of a child shall be developed, entailing new labour law and social protection for fathers on leave. In general, reconciliation of work and family life shall be improved and parents shall be better informed about the different options. Furthermore, local networks of communities, enterprises, interest groups, care-facility organisations and parents' organisations shall be founded in order to identify local and individual needs.

Public childcare facilities shall be improved by initiatives involving the federal state, the regions and communities in order to create maximum synergy. Further qualified childcare facilities shall be continuously developed and extended, in particular for children under 3, for full-time childcare facilities with fewer closing days.

Finally, a National Action Plan on De-facto Equality of Women and Men shall be elaborated by the Government in cooperation with the social partners. This plan shall be designed for a period of 5 years, accompanied by annual evaluation reports. An inter-ministerial working group shall develop indicators, in particular on the development of full-time work and labour participation of women, the development of women's incomes and representation of women in leading positions. This NAP shall entail the following measures: promotion of gender equality in the labour market, in

particular increasing women's employment in full-time and quality jobs, quality part-time work for women and men, development of further programmes on gender-specific research, encouragement of affirmative action programmes in private enterprises, use of social criteria such as the promotion of women's employment in public procurement, improvement of personal and budget resources for the Equality Ombudspersons and strengthening of their independency, and the publication of the decisions of the Equal Treatment Commission within the federal law information system. As measures combating the gender pay gap, the programme lists the continuation and extension of initiatives aimed at support for girls and women to choose quality jobs and quality vocational training in non–traditional professions, awareness raising of employers for non-traditional career choices of women, joint initiatives with the social partners for the elimination of hidden forms of discrimination against women in collective agreements and the elimination of stereotypes in the assessment of work, the conducting of pilot projects in the private and public sector in these fields, promotion of transparency in careers and salaries in enterprises, support of women's careers, initiatives in cooperation with the social partners aimed at supporting the return from part-time to full-time work, improvement of data collection on part-time work, promotion of women in top positions and in particular the continuation and extension of mentoring programs, encouragement of a self-binding obligation of private companies for the creation of gender-balanced boards of directors into the Austrian Corporate Governance Code, creation of a public database for female candidates for boards of directors of private companies, raising of women's representation in management and boards of directors of enterprises with significant public shareholding and the improvement of measures aimed at the raising of women's participation in top positions in science and research, public administration and politics.

Legislative developments

Legislation

In the run-up to the parliamentary elections in the autumn of 2008, the lack of childcare facilities and costs of child rearing played an important role. As an outcome of these discussions, an agreement between the Federal State, represented by the Minister for Education, Arts and Culture, and the nine Austrian federal provinces, which are competent in the field of legislation and administration regarding public childcare, was concluded on the development of institutional childcare facilities, on the introduction of mandatory early language support by institutional childcare facilities, and on a federal pre-school education plan (OJ II 478/2008).

Furthermore, as families usually have extra costs at the beginning of a new school year, the monthly family allowance has been doubled for the month of September (OJ I 131/2008).

In the reform of the provisions on the vocational training of judges, new final examination subjects such as equality law and anti-discrimination law, as well as protection against violence (OJ I 147/2008), have explicitly been introduced into the statutes for judges.

In order to improve career choices for young people, the Act on Vocational Education has been amended and now provides for special allowances for employers to introduce measures aimed at the improvement of equal access of young women and young men to technical professions (OJ I 82/2008).

Administrative law

Under the Federal Equal Treatment Act, all federal ministries have to issue affirmative action plans for women, which have to be revised every other year and have to formulate concrete aims and goals for the advancement of women in all fields and at all levels. Several such action plans have recently been amended: Ministry of the Interior,[1] Ministry for European and International Affairs,[2] Ministry for Agriculture, Forestry, Environment and Water Management,[3] Ministry for Justice,[4] Ministry for Economy and Labour,[5] for the Parliament,[6] Ministry for Education, Science and Culture,[7] and the Ministry for Traffic, Innovation and Technology.[8] The action plans have the legal status of a binding regulation and are to be regarded as means of enforcement of the Federal Equal Treatment Act, which provides for legally binding provisions on the promotion of women, including the quota of 40 % for the representation of women in all levels and income classes. Thus, all action plans reaffirm *de facto* equality between women and men as a major goal and all ministries commit to proactive policies towards this aim. The action plans contain provisions on hiring and career advancement, job advertisements, protection against harassment, promotion of women in vocational training, career planning, adequate representation of women in commissions and councils as well as measures for better reconciliation of work and family life for women and men. Furthermore, most of the action plans provide for binding goals for the percentage of women in areas where women are still under-represented, which have to be reached within the next two years.

Case law of national courts

Supreme Court

The Supreme Court confirmed decisions of lower labour courts which awarded the amount of EUR 2 500 as compensation in a case of gender-specific harassment (mobbing) at the workplace. The female employee was humiliated and verbally harassed by a male colleague for a certain period of time. The Supreme Court held that when calculating the amount of compensation the courts have to consider duration, mode and intensity of the harassment as well as the intimidating and degrading atmosphere which is created at the workplace. Furthermore, compensation has to have a deterrent effect. As the claimant had to suffer psychological problems and had to fear the loss of her employment, the amount awarded was ascertained as justified (Supreme Court 2 September 2008, 8ObA59/08x).

1 OJ II 418/2008.
2 OJ II 18/2009.
3 OJ II 293/2008.
4 OJ II 459/2008.
5 OJ II 317/2008.
6 OJ II 34/2009.
7 OJ II 76/2009.
8 OJ II 258/2008.

BELGIUM – *Jean Jacqmain*

Policy developments

As a consequence of the global financial crisis, a fresh political drama resulted in major changes within the federal government; moreover, the federal and federate authorities found themselves confronted with a new wave of collective redundancies in various enterprises. Against such a background, one can only regret that very little attention has been given to gender issues during the period under review.

Legislative developments[9]

Protection of maternity and paternity leave

The Various Purpose Act of 22 December 2008 introduced two minor improvements:

– concerning maternity leave for employees: when an employee has 'saved up' at least two weeks of her facultative five-week prenatal leave in order to lengthen the compulsory nine-week postnatal leave, she is now allowed to divide those two weeks into single days which may be used after she has resumed work. An ancillary Royal Decree, to organise the necessary arrangement with the employer, is still expected;
– concerning the ten-day paternity leave for employees: as from 1 January 2009 it may be used within the four months (instead of the month) following the child's birth.

As to self-employed women, a Royal Decree of 23 December 2008 amended the Royal Decree of 20 July 1971 (Sickness and Maternity Insurance for Self-Employed Persons and Assisting Spouses), with the purpose of making maternity leave considerably more flexible. As from 1 January 2009, the compulsory part of the leave is reduced to three weeks (one immediately before and two immediately after the child's birth); the remainder (five weeks, or six in case of a multiple birth) is facultative and may be used to lengthen the prenatal (by two weeks) or the postnatal leave and, in the latter case, the facultative leave may be divided into single weeks over a maximum period of 21 weeks following the compulsory leave.

Anti-discrimination legislation of federate authorities

In succession, several federate parliaments have adopted legislation in order to transpose the EC 'gender' and 'Article 13' directives concerning matters that fall within their respective jurisdictions. Although the three federal Acts of 10 May 2007 (on 'Race', 'Gender' and 'Discrimination in General') usually served as a model, the various parliaments acted in a piecemeal and rarely coordinated way, so that gaps will still have to be filled before a full transposition can be achieved, especially concerning Directive 2004/113/EC. The 'Recast' Directive 2006/54/EC is not mentioned in some of those pieces of legislation (and, indeed, also not in the federal Acts), but the omission is formal rather than substantial.

Here is the list of the new instruments:

– the Dutch-Speaking Community and the Flemish Region: *decreet* of 10 July 2008;

[9] All legal instruments quoted under this heading are available at http://www.juridat.be, in French and Dutch, accessed 3 July 2009.

– the Brussels-Capital Region: two *ordonnances/ordonnanties* of 4 September 2008;
– the Walloon Region: *décret* of 6 November 2008, amended by another one of 19 March 2009;
– the French-speaking Community: *décret* of 12 December 2008.

Case law of national courts

There is only one important decision to report.

Constitutional Court, judgment n°17/2009 of 12 February 2009[10]
After the federal parliament had adopted the three anti-discrimination Acts of 10 May 2007, a group of some 200 persons, all connected with *Vlaams Belang*, the extreme right-wing Flemish political party, or its French-speaking equivalents, had jointly applied to the Constitutional Court to annul the new legislation, presenting a variety of grounds.

In its (very long) judgment, the Constitutional Court completely dismissed the application. This is certainly a huge relief for all victims of discriminations and legal practitioners. However, although the three Acts are aimed at transposing Directives 2000/43/EC, 2000/78/EC and all 'gender' directives, and on several grounds the applicants were challenging certain novelties which were inspired by the ECJ's case law, the Constitutional Court hardly referred to EC law at all in its decision.

On 11 March 2009, the Court similarly dismissed other applications to annul the 'Race' and 'Discrimination in General' Acts (judgment Nos 39, 40 and 41/2009).

BULGARIA – *Genoveva Tisheva*

Introduction and policy developments

Stagnation of reforms in the field of gender equality
The end of 2008 and the beginning of 2009 marked a period of reforms initiated in the field of gender equality but which have stagnated due to a lack of political will for the implementation and continuation of these reforms. The main reason for this is the low priority attributed to the issue by the Bulgarian Government and its concentration on chasing political and more lucrative objectives through the forthcoming double elections this summer – for a new national and a new European Parliament.

There are no serious arguments for attributing the stagnation of the reforms to the global financial and economic crisis. In fact, the Prime Minister, Sergey Stanishev, said that Bulgaria is experiencing its first economic crisis as a capitalist country but he has noted that, not being immune to the difficulties facing its economic partners, Bulgaria's problems are actually less severe than those of other members of the European Union. Furthermore, decisive steps with real results in the area of gender equality have not been undertaken during the whole mandate of the current government. Therefore the last year of this mandate marked by the beginning of the crisis cannot serve as an excuse; the real underlying political and conceptual deficits and hypocrisy are more than obvious.

[10] Available at http://www.constitutionalcourt.be (in French, Dutch and German), accessed 3 July 2009.

Legislative developments

New Draft Law on Gender Equality

This absence of a real political will has the potential to distort otherwise positive legislative initiatives.

The new Draft Law on Gender Equality introduced in the National Assembly at the end of November 2008, and providing for a specialized body on gender equality, passed with a very tight majority through several parliamentary committees and was approved by the leading Committee on Human Rights and Religious Denominations for introduction in plenary session for its first reading. The law provides for a separate governmental structure and mechanism for the policy on gender equality, for regional and local structures and for the opportunity to adopt temporary special measures in the field.

The above-mentioned draft has currently reached a deadlock in the overloaded parliamentary schedule and has little possibility of being put on the agenda and approved prior to the end of the mandate. Once the draft has been abandoned by this parliament, there are no real perspectives for a new draft law on gender equality to be considered in the coming two years. There is a real risk of the new government being unstable due to the predicted very tight vote and the close result among the opposing political parties. In addition, a new proposal will need at least a year to be elaborated, promoted and passed by the new parliament. The concept of such a law, which has already been discussed for 10 years, can now be considered to be a lost opportunity.

In the absence of a special law and the respective mechanisms for a gender equality policy, all related issues remain without any mechanism for coordination and real implementation.

New legislation on reconciliation

This is also the case with the overall positive developments in the legislation concerning some reconciliation measures. The new provisions in the Labour Code and in the Protection against Discrimination Act (PADA) clearly follow the requirements and the trends in EU legislation. The solutions concerning parental and paternity leave are still new to Bulgarian reality as well as to Bulgarian mentality. Strong stereotypes still persist in this sphere and they correspond to stereotyped and patriarchal concepts among many politicians and employers in Bulgaria.

Despite this, the new law shows a shift at least in the Bulgarian legislation from focusing on the special protection of women as mothers towards reconciliation measures ensuring more equality for both women and men. As the changes are still very new, it will take some time for the implementation and practice to develop and to impact positively on *de facto* equality.

According to Art. 163 LC (Labour Code), a female worker or employee has the right to paid maternity leave for a period up to 410 days for each child, 45 days of which have to be used prior to the estimated date of confinement. New provisions in force since the 1st of January 2009 (Art. 163 paras 7 and 8) stipulate that when the parents are married or cohabit, the father has the right to 15 days paternity leave upon the birth of the child. Furthermore, after the child has reached the age of six months and with the consent of the mother/adoptive mother, the father/adoptive father is allowed to use the remaining leave of up to 410 days instead of the mother.

The mother or the father is insured during maternity/child-care leave and during the 15 days' paternity leave under the Code of Social Insurance if they had been

insured for the previous 12 months. The compensation is generally equivalent to 90 % of the average salary received during the last 12 months.

An important trend in the direction of reconciliation and compliance with EU law are the additional rights for parents returning from maternity or child-care leave, provided for in the PADA with its latest amendments from December 2008:

– when a mother who has taken maternity or child-care leave, or a father who has taken paternity and child-care leave according to the LC, return to their work, they have the right to occupy the same position or a similar one and to benefit from any improvements in the working conditions;
– they have the right to an adequate increase in their salaries and, in the case of technological changes, to benefit from necessary training.

Furthermore, according to the latest amendments to the Labour Code from December 2008, there is an absolute prohibition on dismissing a worker or employee who is taking maternity or child-care leave under Art. 163 LC, except in cases where the enterprise has to close down. Thus fathers who take child-care leave will also benefit from the protection accorded by the law.

Amendments to the law on Protection against Domestic Violence

By the end of 2008, amendments to the law on Protection against Domestic Violence had been prepared by the government in cooperation with women's NGOs. The draft provides for increased protection for victims of violence by also envisioning financial sustainability for prevention and protection activities under the law. Despite the declared goodwill concerning the adoption of the changes, the process of amending the law became entangled in bureaucratic obstacles in relation to the financial mechanism. The main reason for this was an unwillingness among the ministries, the Ministry of Labour and Social Policy included, to assume the coordination and the responsibility for implementing this very important piece of legislation. As a result, there is a serious risk that the opportunity to introduce the changes in Parliament and to have them passed will be missed.

Draft Family Code

The same can be said concerning the Draft Family Code, which was introduced in Parliament last year and which has not yet been adopted. Thus the provisions, among others, on pre-marital contracts and registered partnerships which would benefit gender equality, risk remaining in draft form if the Family Code is not put on the agenda of the national assembly by the end of its mandate. In the meantime, MPs seem to have been more sensitive to the conservative opinions of religious and pro-life organizations, rather than to common sense, social reality and European equality standards.

National Strategy for the Promotion of Gender Equality for the period 2009 - 2015

Against the background of the political obstacles to the promotion of all of these important changes, at the end of 2008 the Council of Ministers adopted the National Strategy for the Promotion of Gender Equality for the period 2009- 2015, prepared by the Ministry of Labour and Social Policy. Although very ambitious, this document does not bring anything new for gender equality in Bulgaria. It lacks a concrete focus, new ideas and concrete mechanisms for implementation. The main part, entitled 'Strategic goals and fields of action', is very short and contains obsolete provisions. Some of the strategic goals for the period up until 2015 in fact represent already adopted provisions in existing laws which have not yet been implemented. For

example, the elimination of gender stereotypes in education has been explicitly provided for in the Protection against Discrimination Act since 1 January 2004. The Strategy does not provide anything new to ensure its implementation and merely reiterates this policy once again as a goal in the first 10 years after the adoption of the PADA. The NGOs which are active in this field have been almost omitted from this strategy. The lack of substantial and progressive provisions is complemented by the lack of financial mechanisms to ensure gender equality in Bulgaria.

Thus the legislative process concerning gender equality has, as expected, ground to a halt.

Equality body decisions and legal practice

Discriminatory sexist advertising of alcohol

The lack of political will for the legislative reforms is also reflected in the legal practice. A case on an overtly discriminatory sexist advertisement for alcohol – for 'Peshtera' anisette by the producer Vinprom 'Peshtera' – Plovdiv, is currently with the Commission for Protection against Discrimination. The case was instigated in September 2008 by 13 female alleged victims, but no concrete steps have yet been taken by the Commission. Initially, the Commission declared that it was not competent by trying to direct the case towards the Commission for the protection of the consumers. This preliminary decision was appealed and the Supreme Administrative Court stated that it is up to the Commission for Protection against Discrimination to decide on an issue of gender equality. Since then the case has become embroiled in procedural obstacles at the Commission or has become entangled in economic and political interests. The case is obviously exceptional and uncomfortable because cases before the Commission are usually investigated and decided in a relatively quick procedure.

Other important issues brought before the court and not yet decided upon are admission quotas at military high schools, which are discriminatory for female candidates.

CYPRUS – *Lia Efstratiou-Georgiades*

Policy developments

The National Action Plan for Gender Equality

The National Action Plan for Gender Equality which was adopted by the Government in 2007 and covers the period 2007-2013 comprises six targets: (a) promotion of equality between men and women in employment and occupational training; (b) promotion of equality in education, science and research; (c) promotion of equal participation and representation of men and women in the political, social and economic fields; (d) combating all types of violence against women, including human trafficking; (e) promotion of equal access to and equal application of social rights for men and women; (f) change of social stereotypes and formulation of a collective social awareness in favour of women as well. The relevant Ministries work on the implementation of the National Action Plan through various programmes and measures, which promote equality between men and women and the reconciliation of family and professional life.

Furthermore, some favourable developments were noted, which took place in recent years: (a) the participation of women in the labour market increased to 62.4 % (ages 15-64), in comparison to the increase in the participation of men to 82.9 % (ages 15-64) and (b) there was a gradual improvement of the pay gap between men and women (from 29 % in 1995 to 23 % in October 2007).

Legislative developments

Recast Directive

Recast Directive 2006/54/EC is in the final stages of transposition. Three relevant bills and draft regulations[11] are now before the House of Representatives and are expected to be voted into law soon, after being discussed in the Parliamentary Committees of Labour and Equal Opportunities.

Case law of national courts

Industrial Tribunal Court of Limassol: case on unlawful dismissal

One case is worth reporting: Application No. 312/2005 Industrial Tribunal Court of Limassol between E. Diamantidou and M & M Investments Ltd for termination of services because of pregnancy and for unlawful dismissal on the ground of sex. In her application, the applicant claimed from the defendant company: (a) payment in lieu of notice of termination of services; (b) damages for unlawful dismissal; (c) salary due for 19 days; (d) a proportion of the 13th month salary; (e) a proportion of the annual leave. The applicant claimed compensation for unlawful dismissal because of pregnancy contrary to the provisions of the Protection of Maternity Law No. 100(I)/1997 as amended by Law No. 45(I)/2002 and for unlawful discrimination contrary to the provisions of the Equal Treatment of Men and Women in Employment and Occupational Training Law, No. 205(I)/2002, as amended by laws No. 191(I)/2004, 40(I)/2006, 176(I)/2007. Article 4 of Law No. 100(I)/1997, as amended, provides that the employer is prohibited from terminating the employment of an employee who has provided a notification of her pregnancy and has presented a certificate to this effect by a registered medical practitioner. The defendant alleged that: a) the applicant did not submit a medical certificate confirming her pregnancy and b) the applicant by her misconduct rendered herself liable to be dismissed (failure to arrive punctually at work). The Court, having heard the witness evidence presented by both sides, rejected the allegations of the employer and found that there was unlawful treatment of the applicant because of her pregnancy and that her dismissal was unlawful. It awarded the following compensation and damages in favour of the applicant under Laws No. 100(I)/1997 and 205(I)/2002, Article 11(1): (a) EUR 7 580.45 plus legal interest from 19 May 2005 (for unlawful dismissal);

[11] a. The bill entitled The Equal Treatment for Men and Women as regards Access to Employment and Vocational Training (Amendment) Law of 2008 amends Law No. 205(I)/2002, as amended by laws No. 191(I)/2004, No. 40(I)/2006, No. 176(I)/2007 (Directives 76/207/EEC, 97/80/EC, 2002/73/EC);
b. The bill entitled The Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed (Amendment) Law of 2008 amends Law No. 177(I)/2002, as amended by laws No. 42(I)/2004, No. 193(I)/2004 (Directives 75/117/EEC, 97/80/EC);
c. The bill entitled The Equal Treatment for Men and Women in Occupational Social Insurance Schemes (Amendment) Law of 2008 amends Law No. 133(I)/2002, (Directive 86/378/EEC).
d. Draft Regulations for the Provision of Independent Assistance to Victims of Discrimination of 2008.

(b) EUR 1 400.82 as payment in lieu of notice including 19 days salary for services rendered and the proportion of the 13th month salary plus legal interest from 23 June 2005; and (c) EUR 1 700 lawyer's fees plus V.A.T.

If this application had been tried under the Termination of Employment Law No. 24/1967, as amended, the Court would have awarded the applicant the sum of (a) EUR 469.87 for a two-week's notice; b) the sum of EUR 469.87 as compensation for two weeks, for unlawful dismissal; c) the sum of EUR 355.96 as a proportion of the 13th month salary and 19 days salary for services rendered at EUR 579.70. This case was the first to be brought before the Industrial Tribunal Court in Cyprus.

Equality body decisions/opinions

Sexual harassment

The Ombudsman, in her capacity as Equality Authority, examined the complaint of a complainant, Mrs B.P., employed as secretary at the Union of Scientific Staff of the Electricity Authority of Cyprus (SEPAHK), about being sexually harassed by an official of the Union (Assistant Secretary of the Union), who was a member of the Executive Committee. The complainant mentioned in her complaint that she had submitted her complaint in person to the President of SEPAHK on 6 June 2008 and that she was asked to submit it in writing. She submitted her complaint in writing on 19 June 2008. The Union of SEPAHK, as her employer, asked her on 23 June 2008 to hand in the keys of the Union building, to take all her personal belongings from the office and to take obligatory holiday leave paid by the Union.

In dealing with the complaint, the Ombudsman strictly confined herself to examining whether the employer (SEPAHK) had acted according to the Equal Treatment of Men and Women in Employment and Vocational Training Law of 2002-2007, because the employer had started to examine the sexual harassment complaint. So, the Ombudsman did not examine the substance of the complaint. Nevertheless, the act of her employer to dismiss her led to her victimisation.

The Ombudsman studied all the facts relating to this case and emphasised the following: (a) the body which was to examine the complaint of B.P., consisting of eight persons, all men, of which the accused was an official, could not guarantee that the judgment would be objective and impartial; and (b) the conclusion of the Executive Committee that the complaint was unfounded, not based on evidence and false, was reached in the absence of the complainant. Also, she was not heard in order to refute the accused's version of the case and she was not allowed to give her own evidence to support her complaint. The result of all the above was her dismissal and from the reasons given for her dismissal it follows that the reason for her dismissal was connected with her complaint about sexual harassment. Therefore, she was actually victimised. The Ombudsman, taking into consideration all the above and also the provisions of the Equal Treatment between Men and Women in Employment and Vocational Training Laws of 2002-2007 (Directives 2002/73/EC, 97/8/EC) reached the following conclusions: (a) the dismissal of B.P. is null and void, since it was connected with the complaint she had made about sexual harassment, unless the employer can prove that the dismissal was due to any other reason not connected with the accusation of sexual harassment, and (b) the Union SEPAHK, as employer, failed to act in accordance with the provisions of the Equal Treatment between Men and

Women in Employment and Vocational Training Laws of 2002-2007 and did not examine the complaint of B.P. in substance.[12]

Miscellaneous

Activities on Gender Equality by NGOs

All NGOs, trade unions and employers' organizations, either jointly or independently, take an active part in the implementation of the actions mentioned in the National Action Plan for equality. A delay is observed in the field of education, where the dimension of the sexes has not been integrated in the educational programme to a satisfactory degree.

The NGOs organized seminars to emphasise the reasons why gender equality has not yet been achieved, and also educational programmes.

The Women's Organization Protoporia, as part of the programme 'Information' organized a seminar on the subject of reconciliation of family and professional life and also distributed a DVD which includes the legislation and publications of the Ministry of Labour relating to maternity allowances, pensions, children allowances, etc.

The Women Workers' Branch of PEO, as part of the programme 'Changing perceptions and stereotypes' held interviews with women working either in professions dominated by men or in managerial positions. The Women Branch of SEK, as part of the programme 'Pandora' presented, among other things, good practices for reconciliation of family and professional life.

The National Machinery of Women's Rights, Ministry of Justice and Public Order, subsidize the seminars which are organized by NGOs on matters which promote the implementation of the actions included in the Plan.

CZECH REPUBLIC – *Kristina Koldinská*

Policy developments

In late 2008, the Czech Government agreed to a proposal made by the Ministry of Labour and Social Affairs. The proposal, which should be presented to Parliament in April 2009, aims to improve the situation of families with small children, while paying special attention to reconciliation of work and family life.

The proposed package, called the 'pro-family package', includes the following new benefits and advantages:

– Paternity allowance – a benefit provided from the system of sickness insurance, which is to be provided to fathers who care for small children, either alone, or together with the mother. The benefit is provided for one week, in the same amount as the benefit which the mother receives (70 % of daily wage) and the father may claim it during the first 6 weeks after the baby is born;
– Support for several types of childcare services – this is a proposal to financially support various types of childcare services, so that parents have a greater range of possibilities to choose from to care for their children. There would also be the possibility of an agreement between several families, where one of the parents

[12] Information on www.ombudsman.gov.cy, File No. A.K.I. 45/2008, dated 19.01.2002 (in Greek), accessed 14 May 2009.

would care for all children belonging to the families concerned. Entrepreneurs operating au pair services would also be supported financially by the State;
- Tax benefits for employers who help their employees find proper care for their children, or who run childcare services;
- Lower social contributions for employers who employ people part time.

The proposed changes should be an important improvement to the situation of Czech families and should introduce some modern elements into the quite rigid Czech system of social benefits. It is, however, uncertain whether the proposal will be approved by Parliament and what the outcome will be of the political compromise that may be reached, also for family benefits. The style of the current government is to motivate and activate people, while the opposition operates on a campaign which emphasises the provision of benefits, without many motivating elements. The current proposal is already being contested now. At any rate, the currently proposed pro-family package seems to be a good and modern idea.

On 1 January 2009, the Czech Republic took over the EU Presidency for six months. One of the issues of the Czech Presidency is the aim to contribute to current debates on family policy and gender issues, by organising conferences, seminars and several round tables. This seems quite paradoxical, as the Czech Republic is active in policy (the main slogan of the presidency is 'Europe without barriers') on the one hand, but on the other hand, it still has not adopted the Anti-Discrimination Act.

In February 2009, the Minister for Human Rights and National Minorities declared that Czech politics needed affirmative action in favour of women, for more women to have a seat in Parliament and to have a direct influence on the current and future development of culture, human rights and politics in Czech society. The Minister implied that it was almost scandalous that in the Chamber of Deputies, out of 200 Deputies, only 30 were women.

In early March 2009, the Chief of the Czech Medical Chamber (the law prescribes obligatory membership in the CMC for all physicians providing diagnostic and/or therapeutic treatment in the Czech Republic) declared that female doctors are not as good as male doctors. He said that the fact that the majority of people working in the Czech healthcare system are women is one of the causes for the crisis in the healthcare system. According to the Chief of the CMC, women cannot concentrate as well on their work and because of their family duties they are not as reliable as men. His statement was supported by one of the best and most famous surgeons, who said that female surgeons can never be as good as male surgeons because they are not able to decide rapidly and effectively, as is required in this area of medicine. These statements have been strongly contested not only by doctors, but also by the general public.

Legislative developments

The Anti-Discrimination Bill is still under discussion in Parliament. The Chamber of Deputies should discuss it in the session starting 17 March 2009. However, the result of the possible voting is still uncertain.

Case law of national courts

Supreme Administrative Court – Case No. 4 ADS 57/2008-52

In October 2008, the Supreme Administrative Court had to decide in a case dealing with the difference in pensionable age of men and women. Article 32 of Act

No. 155/1995 *Coll*. on Pension Insurance stipulates different pensionable ages for men and women, where the pensionable age for women is lower than that for men and can even be reduced if a woman raises one or more children. This provision does not apply to men, even if they raise children alone.

There have already been some cases in which men who are single fathers complained that they have no possibility to retire earlier, even if they raised their children alone, simply because they are men, as this legal condition only applies to women.

In October 2007, the Constitutional Court decided that Article 32 of the Pension Insurance Act is not unconstitutional and that it is not against the principle of equality, and rejected the proposal of the Supreme Administrative Court to abolish this part of the Pension Insurance Act.

Therefore, the Supreme Administrative Court simply repeated the legal opinion of the Constitutional Court, even though this was contrary to the legal opinion of the Supreme Administrative Court, and stated that in this case it was not possible to decide against the legal opinion of the Constitutional Court.

DENMARK – *Ruth Nielsen*

Policy developments

Debate on wearing hijab in public functions

At present, there are no female judges in Denmark wearing *hijab* during hearings but the possibility that some Muslim female judges might want to do so in the future led to public debate in the autumn of 2008. On 19 December 2008, the Government proposed an amendment to the Administration of Justice Act, prohibiting judges from exhibiting any religious or political symbols or views in the courtroom during hearings.

In the new version, Section 56 of the Danish Administration of Justice Act will read:

> A judge must not appear in hearings in a manner that is likely to be perceived as a statement concerning any religious or political affiliation or a statement on his or her position on religious or political issues in general.

In the preparatory works, the Ministry of Justice, on behalf of the Danish Government, explains that the proposed ban will include cases where the judge during the hearing visibly wears a Christian cross like a Dagmar Cross or a crucifix, where the judge wears Muslim headgear like the *hijab*, or where the judge wears a Jewish calotte (*kippa*). Also, at hearings the judge must not express any support or criticism of any specific political parties, visibly wear a party badge or anything similar, or express in any way his/her personal political position on other important community issues, regardless of whether they are international, national or local issues.

In the preparatory works, the Ministry of Justice states that the proposal is in accordance with the Danish Constitution, with Articles 9 and 10 ECHR and with the Employment Framework Directive.

The amendment to the Administration of Justice Act is likely to be adopted in April 2009 and enter into force on 1 July 2009. The legal interpretations underlying

the amendment are in accordance with Danish case law on employers' rights to prohibit political or religious symbols in headscarf cases.

Legislative developments

Proposal for amendment to the Act on equal treatment in occupational social security

On 12 December 2008, the Danish Government proposed an amendment to the Act on equal treatment of men and women in occupational social security schemes in order to implement Article 5 of Directive 2004/113/EC. The proposal aims at promoting equality between men and women by prohibiting discrimination on the basis of sex in the calculation of premiums and benefits in connection with private life insurance and non-life insurance against loss or damage. The amendment to the Act changes its title into 'Act on equal treatment of men and women in connection with insurance, pension and similar financial benefits'.

The current Act on equal treatment of men and women in occupational social security schemes applies to pensions and insurance related to employment and occupation. These provisions remain unchanged. The amendment adds a new chapter to the Act on contracts for life and non-life insurance that are not entered into in connection with employment or occupation. The main new rule is Section 18 b(1), which provides that using sex as a factor in calculating premiums and benefits related to insurance and related financial services in all new contracts concluded after 21 December 2009 must not lead to differences in individuals' premiums and benefits, subject to Paragraphs 2 and 3. A provider of insurance and related financial services, may, however, under Section 18 b(2), decide to apply proportionate differences in individuals' premiums and benefits where the use of gender is a determining actuarial factor for risk assessment. Each provider must ensure that the assessment of whether the use of gender is a determining actuarial factor in the risk assessment is based on relevant and accurate actuarial and statistical data. Under Section 18 b(3), providers of insurance and related financial services, when using the option in Paragraph 2, must periodically collect, publish and maintain accurate data relevant to the use of sex as a determining actuarial factor. The Financial Supervisory Authority shall lay down detailed provisions. The proposed amendments will come into force on 21 December 2009.

Case law of national courts

Dismissal of a pregnant woman

There have been no important new developments in the case law of the courts. The Western High Court (*Vestre Landsret*) awarded compensation of 6 months' pay to a pregnant woman who had been employed for two months and who was dismissed after informing the employer that she was pregnant (case U.2009.30V). The employer was in difficult economic circumstances but the court held that he had not produced sufficient evidence that the dismissal was unrelated to the woman's pregnancy. The ruling is in accordance with previous case law. A compensation of 6 months' pay is, in practice, the minimum compensation in pregnancy dismissal cases. There is a reversal of the burden of proof and in practice it is very difficult for an employer to meet the burden of proof.

Equality body decisions/opinions

Establishment of Equality Complaints Board

On 1 January 2009, a new Equality Complaints Board for all prohibited grounds of discrimination was established. The new general Complaints Board is modelled on the previously existing Complaints Board for Gender Equality. It has – like the previous gender equality complaints board – the authority to deal with complaints about discrimination. It has no competence to conduct independent surveys concerning discrimination, publish independent reports or make recommendations on any issue relating to such discrimination and it will not be able to start cases at its own initiative. It is therefore not a monitoring body in the sense required by Article 12 of Directive 2004/113 or Article 20 of the Recast Directive (2006/54). The new Complaints Board started work on 1 January 2009. It has three chambers: one for gender equality, one for ethnic equality and one for the remaining prohibited discrimination grounds. The four persons who were members of the previous Complaints Board for Gender Equality have been appointed as members of the new Complaints Board and operate as the chamber for gender equality. This means that for matters of gender equality there will be continuity in the case law of the old and the new complaints board.

ESTONIA – *Anneli Albi*

Policy developments

Parliament has recently adopted several Acts that regulate the implementation of the principle of equal treatment and gender equality. Due to the current economic climate, some of the social protection measures which had aimed to compensate family-related costs have been reduced. In February 2009, Parliament adopted amendments to the state budget, which had an impact on the equal treatment measures. Whereas under the newly adopted Equal Treatment Act the mandate of the Gender Equality Commissioner (since 1 January 2009 'Gender Equality and Equal Treatment Commissioner') was widened to cover other grounds of discrimination, no additional resources were allocated to the Commissioner. This raises concerns as to whether the new institution will be able to effectively fulfil the obligations established under the law.

Legislative developments

Parliament adopts Equal Treatment Act, amending inter alia the Gender Equality Act

On 11 December 2008, Parliament adopted the Equal Treatment Act (hereinafter ETA). By adopting the ETA, Parliament also made several amendments to the Gender Equality Act (GEA). The Act took effect on 1 January 2009.

The ETA provides protection against discrimination on the grounds of race, ethnic origin, colour, religious or other beliefs, age, disability and sexual orientation. The main purpose of the Act is to transpose Directives 2000/43 and 2000/78. The scope of the protection provided corresponds to that of the Directives.

The ETA establishes the position of the Gender Equality and Equal Treatment Commissioner, who monitors the implementation of the requirements of the GEA and

the ETA. The person fulfilling the duties of the Gender Equality Commissioner continued to fulfil the duties of the Gender Equality and Equal Treatment Commissioner. The provisions concerning the powers of the Commissioner are provided in the ETA; respective provisions of the GEA were repealed.

The implementing provisions of the ETA make several amendments *inter alia* to the GEA, the Labour Contracts Act (LCA) and the Civil Service Act (CSA). Some of these amendments were stipulated by the Draft Act to amend the GEA, CSA and LCA (No. 317, currently pending in Parliament).

Article 4 of the GEA was amended to bring the content of the principle of shared burden of proof in line with the Directives. Article 4(1) establishes that the person who submits a complaint to a court or a labour dispute commission has to provide evidence of the factual circumstances from which it may be presumed that there has been direct or indirect discrimination in breach of Article 6 or 8 of the GEA (employment-related discrimination). Article 4(2) stipulates that the respondent has to prove that the principle of equal treatment has not been breached. Refusal to prove this is deemed to constitute acknowledgement of discrimination.

Further, Article 3(2) (definitions of the employer and employee), Article 12 (resolution of discrimination disputes) and Article 13 were amended. Under Article 3(2) within the meaning of the GEA the term 'employee' includes a person working under a contract to provide services, and the term 'employer' includes a person authorizing work under a contract to provide services. According to the rephrased Article 13(3), the amount of compensation no longer depends on whether the discriminatory treatment has ended. The GEA is amended by Article 13(4) specifying that a candidate who has not been appointed to a post due to sex discrimination may not request his or her nomination to the post (thus only compensation will be available).

The LCA provisions concerning the application of the principle of equal treatment were repealed; instead, the LCA refers to the relevant provisions of the GEA and ETA.

The CSA was amended by Article 2(2)(12) establishing the office of the Gender Equality and Equal Treatment Commissioner and Article $36^{(1)}$ concerning the principle of equal treatment was added to the CSA.

Parliament adopts new Labour Contracts Act

Parliament adopted the new Labour Contracts Act (LCA) on 17 December 2008. The Act fully revises the previous LCA. The Act aims to make the labour market more flexible by reducing the level of protection for employees against dismissal, while increasing the social security benefits in case of dismissal. The LCA will take effect on 1 July 2009.

Article 3 stipulates that the employer has to guarantee that employees will be protected against discrimination, observe the principle of equal treatment and promote equality according to the ETA and the GEA. Article 18 regulates the working conditions of pregnant women and women having a right to pregnancy and maternity leave. As a novelty, Article 18(5) provides that upon the expiry of the maternity leave, the woman has a right to use the improved working conditions to which she would have been entitled during her leave. Articles 59 to 65 regulate the conditions for pregnancy and maternity leave, paternity leave, leave for adoption, childcare leave and extra leave for parents. Article 92(1) provides that the employer cannot dismiss the employee because she is pregnant or has a right to pregnancy and maternity leave (Article 92(1)(1)), or because the employee fulfils important family duties

(Article 92(1)(2)). Article 92(2) specifies that if the employer dismisses an employee who is pregnant or is raising a child under 3, it is considered to be a dismissal on the basis of Article 92(1)(1) or 92(1)(2), unless the employer proves that the employment contract was terminated legally. Article 93 regulates the differences with regard to the termination of a labour contract with a pregnant woman or an employee who is raising a small child. Article 93(1) provides that an employer cannot terminate an employment contract with a pregnant woman, a woman who has a right to pregnancy and maternity leave or a person who is on childcare leave or adoption leave due to redundancy, unless the activities of the employer are terminated or bankruptcy is declared.

Amendments to Income Tax Act adopted

On 19 November 2008, Parliament adopted a draft Act to amend *inter alia* the Income Tax Act (No. 347). The amendments temporarily suspend the possibility to declare additional tax deductions for persons who are raising one child, which ought to have taken effect in 2008 (in the past, the possibility of this tax deduction applied to persons raising two children but this threshold was reduced to one in view of the demographic policy needs). According to the law, this right will now take effect in 2010.

Amendments to the State Family Benefits Act, the Working and Resting Time Act and Holidays Act adopted

On 9 December 2008, Parliament adopted the Act to amend *inter alia* the State Family Benefits Act, the Working and Resting Time Act and the Holidays Act (No. 349). According to the new Act, the payment of a number of benefits (such as parental benefit and childcare benefit) to the same parent was discontinued; the state no longer reimburses the breaks for feeding a child if the parent receives a parental benefit. Furthermore, the state no longer finances paternity leave.

FINLAND – *Kevät Nousiainen*

Policy developments

Differing views on parental leave

Parental leave has been available for both mothers and fathers for more than two decades. The Finnish system of family-related leaves consists of maternity leave until the baby is about three months old, of paternity leave of three weeks simultaneously with maternity leave, and of another bonus period of two weeks on the condition that the father uses at least two weeks of his right to parental leave, and of parental leave. These forms of leave are paid from the sickness insurance benefit system. The parental leave of circa 26 weeks is transferable between the parents, and in most cases it is taken by mothers. The situation is changing only slowly, in spite of government media campaigns aimed at fathers and the introduction of the bonus paternity leave. The unequal sharing of family-related leaves between parents is exacerbated by subsidised home care of children. Parents may extend their absence from work until the child turns three and receive a flat-rate compensation from the State and often also from the municipality during that time. As a consequence, mothers with children under three tend to remain outside the labour market. This has economic consequences in the unequal sharing of the burden both for women's employers

(typically the public sector) and the women themselves. A study of the economic impact of family-related leaves carried out in 2007[13] showed that indirect costs for women's employers weaken the employers' capacity to pay wages, and thus are one of the causes of pay differentials between women and men. The pay received by mothers returning from family-related leaves lagged behind that of other women, especially when the absence from work was long. Government policy has concentrated on influencing fathers to change their attitude. The previous Government introduced a Government Bill aimed at raising the parental leave benefit of fathers only, in order to counteract the economic disincentive often assumed to underlie the fathers' unwillingness to make use of their right to parental leave. The proposal was considered discriminatory against women and thus unconstitutional by the Parliament's Constitutional Committee. The present Government has targeted media campaigns at fathers, but with little impact on the gender imbalance in childcare.

Recently, the Minister responsible for gender equality issues gave an interview to the paper of one of the three central trade unions,[14] the Finnish Confederation of Professionals, STTK, suggesting that the Icelandic model of parental leaves should be introduced in Finland. In this model, parental leave is divided into three parts, a non-transferable part being dedicated to the mother and father each and only one third transferable between the parents. The Minister suggested that the total leave would be 18 months, and with periods of six months each reserved to mothers and fathers. The Minister's proposal avoids a cut in the length of the period that most mothers at present spend with their babies, which many women consider themselves entitled to. The Minister suggested that the cost of extending the parental leave to 18 months would have to be covered from funds collected from employers. The employers and their Confederation of Finnish Industries, EK, have firmly held that parental leave should remain fully transferable between the parents so that families may choose which parent does the caring. The immediate costs of extending the parental leave are not welcomed by the industries. It may also be relevant for the employers' union that the present system of parental leaves places the burden of both direct and indirect costs on public sector employers, in the State and the municipalities, because women tend to work in the public sector. Of the three central trade unions in Finland, the Confederation of Professionals is probably the one with the most reason to worry about the gender imbalance in care, because it represents so many public sector and services unions, which have a high number of female members. The outcome of the negotiations between the EU's Social Partners on family-related leaves will also be quite important for the Finnish discussion, as the Finnish labour market is highly unionised. The Government can hardly make any decisions about family-related leaves without negotiating the matter with the labour market organisations.

---

[13] Lilja, Reija, Rita Asplund and Kaisa Kauppinen (eds) *Perhevapaavalinnat ja perhevapaiden kustannukset sukupuolten välisen tasa-arvon jarruina työelämässä?* Helsinki 2007. 130 s. (Sosiaali- ja terveysministeriön selvityksiä 2007:69 ISSN 1236-2115; 2007:69) http://urn.fi/URN:ISBN:978-952-00-2506-9, accessed 14 May 2009.

[14] STTK - lehti1/2009; http://www.sttk.fi/File/a2e0b032-0613-4928-9fcd-00734dc4745b/STTKlehti0901.pdf, accessed 14 May 2009.

Case law of national courts

Supreme Administrative Court decision on a transsexual person's right to register new identity while remaining married

The Supreme Administrative Court decided on 3 February 2009[15] that a transsexual person who has undergone a change from man to woman is not entitled to register as a woman without the consent of his/her spouse. The Act on Confirmation of the Sex of a Transsexual person, Sections 1 and 2, allows the change of registered sex and thus ID documents on the condition that the spouse of the person in question gives his or her consent to transforming the marriage into a registered partnership. The condition of spousal consent to the transformation of the marital relationship or registered partnership covers both marriage (which under Finnish law is available only to persons of opposite sex) and registered partnership (which is open to same-sex partners). In the case in question, a person who had undergone medical treatment claimed that the Act evidently violated the Finnish Constitution, in which case a court should not apply it, as decreed by Section 106 of the Finnish Constitution.

The claimant got married as a man. The claimant noted that being transsexual is not an impediment to marriage under Finnish law. Nor is there a norm in the Finnish Act on Marriage that requires spouses to remain a man or woman, and change of sex is not a ground on which a marriage is to be dissolved. The spouses had a child together, shared the Christian belief and wanted to continue their marriage. The claimant referred to Section 6(2) of the Finnish Constitution, which prohibits discrimination on an open list of grounds.

The Finnish Supreme Administrative Court discussed the case law of the European Human Rights Court, especially cases *Christine Goodwin* v *The UK*, *Grant* v *The UK* and *Wena and Anita Parry* v *The UK*. In *Goodwin*, the Human Rights Court decided that it is up to the Member States to decide on the impact of a change of sex on marriage. The Finnish Supreme Administrative Court held that the Finnish State had relied on that discretionary choice when legislating on the matter, even though the Supreme Administrative Court recognised that the Human Rights Court had paid much attention to the rapidly changing normative standards in dealing with transsexualism. The Supreme Administrative Court also referred to the case law of the European Court of Justice, *K.B.* v *National Health Service Pensions Agency* (C-117/01), S*arah Margaret Richards* v *Secretary of State for Work and Pensions* (C-423/04) and *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (C-267/06). A case decided by the German Constitutional Court in 2008 was also discussed by the Finnish Court. In that particular case, the German Constitutional Court found that the choice imposed on a married person undergoing a change of sex to receive recognition of either his/her new identity or of his/her marriage causes strong internal conflict for the person in question, and constitutes a violation of fundamental rights. The Finnish Supreme Administrative Court decided, however, that where a fair balance was to be drawn between the right to protection of the private life of transsexual persons and the dominant ideas and values in family law, the present state of legislation in Finland is within the margin of discretion allowed by the European Convention on Human Rights, and does not evidently violate the Finnish Constitution. The outcome of the Finnish Supreme Administrative Court may reflect not only a reluctance to open the institution of marriage to persons of the same

[15] Supreme Administrative Court decision KHO:2009:15, http://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2009/200900219, accessed 14 May 2009.

sex, but also the relatively limited right to judicial review enjoyed by the Finnish courts under Section 106 of the Constitution.

FRANCE – *Sylvaine Laulom*

Policy developments

In February 2009, the French Ministry of Labour proposed to the social partners to start negotiations this year on equal pay for women and men and on the reconciliation of work and family life.

Legislative developments

Longer maternity leave for independent workers
Maternity leave for independent workers and company directors has been extended from 30 days to 44 days. 14 days of maternity leave should be taken before the estimated delivery date.[16]

Senate decides against evaluation procedure of impact of proposals on equality
A Law was adopted on 27 March 2007 on the parliamentary procedure regarding the adoption of laws.[17] The National Assembly wanted this procedure to include an evaluation of the impact of proposals in terms of equality between men and women before the relevant law was adopted. The Senate refused to adopt this amendment and the final text no longer refers to equality between men and women.

Case law of national courts

Several interesting cases were decided by the Supreme Court, concerning discrimination based on pregnancy[18] and concerning the priority for part-time workers to have access to a full-time job.[19] They reveal a willingness of the *Cour de Cassation* to interpret the Labour Code in the light of the European Directives and to follow the European principles.

Two cases should be reported in more detail.

Equal pay for equal work
A decision of the *Cour de Cassation* of 26 June 2008[20] seemed to interpret in a very restrictive way the principle of equal pay for work of equal value. However, a decision of the Court of Appeal of Paris, of 6 November 2008, gave an interpretation of this principle that is in closer conformity with the European legislation. This case was about a woman who was responsible for the legal services, general services and the human resources services of a company. She did not have the title of 'director' but did belong to the Board of Directors. She asserted that she was paid less than other male workers. In the company, only men had the title of 'director' and they were paid

16 *Décret n°2008-1410 du 19 décembre 2008*.
17 *Loi organique relative à l'application des articles 31-1, 39 et 44 de la Constitution*.
18 Cass. Soc. 16 December 2008, n°06-45262, Bulletin.
19 Cass. Soc. 24 September 2008, n° 06-46.292, Bulletin.
20 See *European Gender Equality Law Review* No. 2/2008.

more than she was. The first decision of a Court of Appeal was overruled by the *Cour de Cassation* (11 July 2007). The Supreme Court considered that the Court of Appeal had not properly analysed the situation, the position and the responsibilities of the woman to see if her work had equal value. The case was thus submitted to a second Court of Appeal. In this decision, the Court of Appeal also concluded that sex discrimination had occurred because the woman's work, her responsibilities and her position had the same value as the work of the other directors. Presenting his observations, the public prosecutor referred to the *Cour de Cassation*'s interpretation that seemed to admit that if the positions of workers are different, this could justify a difference of pay. Thus, a comparison could only be made if the work is the same. For the public prosecutor, this interpretation is too restrictive and should not be followed. The Court of Appeal followed his opinion, as in its decision it clearly compares the work done by the woman and the men and their positions, to conclude that the work of the woman had the same value as the work of the directors and thus should have been paid equally. Compared to the decision of the *Cour de Cassation* of 26 June 2008, the decision of the Court of Appeal conforms to European legislation, as the work done by different workers has to be compared in order to analyse if it has the same value. The decision of the *Cour de Cassation* could lead to various interpretations and it will be necessary for the French Supreme Court to clarify its position on this essential issue.

Right to equal treatment in social security scheme

The second case is about the interpretation of Article L.351-4 of the Social Security Code. After the *Griesmar* case,[21] and the adoption of new legislation, male civil servants with children now have the same pension rights as women. However, Article L.351-4 of the Social Security Code still provides a difference between men and women in social security schemes in granting advantages to mothers who have raised children, a difference allowed by Article 7 of Directive 79/7 (women who have raised one or more children are entitled to an increase of their insurance coverage by one trimester per raising period of 12 months, with a maximum of 8 trimesters). In this recent case (*Cass. 2ème civ. 19 février 2009, n°07-20668*), the *Cour de Cassation*, applying Article 14 of the European Convention of Human Rights, held that such difference of treatment between men and women is contrary to the Convention; it could only be allowed if there is an objective and reasonable justification of this difference. Thus the man, the father of the 6 children he had raised, could ask for the same pension benefits as a woman. The decision of the *Cour de Cassation* follows a deliberation of the HALDE, which took the same position[22] and asked the legislator to modify the Social Security Code. However, one may fear that amending the law will give the legislator the opportunity to weaken women's rights and to stop women from receiving a benefit necessary to maintain a minimal pension.

Miscellaneous

Disturbing position taken by Senate

On 17 November 2008, the Senate adopted a resolution against the adoption of the proposal for a directive on implementing the principle of equal treatment between

[21] ECJ 29 November 2001, Case C-366/99, *Griesmar*.
[22] Deliberation n°2008-237, 27 October 2008.

persons irrespective of religion, belief, disability, age or sexual orientation.[23] This resolution was adopted on the initiative of both right and left-wing senators. It is clearly a declaration not only against the Draft Directive, but also against all European legislation on discrimination. This is why this resolution is very disturbing. The resolution reflects a general lack of knowledge and a lack of understanding of European legislation. For example, the Senate defines discrimination as including 'intent to be harmful'. It draws a contrast between the French concept of equality and the European concept of discrimination which could lead, according to the Senate, to *communautarisme*. This results in a type of 'diabolization' of the European approach which is not based on a realistic analysis of the various directives on equal treatment. It views equality in a very simplistic way.

GERMANY – *Beate Rudolf*

Policy developments

The persistence of a significant gender pay gap in Germany constitutes a major challenge for the legislator and social partners alike. Therefore, two opposition parties introduced separate initiatives to overcome the gender pay gap.[24] The proposal by the liberal party *Freie Demokratische Partei* (*F.D.P.)* aims at measures to ensure continuing education during parental leave, and on working out models to increase part-time work for fathers in the public service and for persons holding decision-making positions. The proposal by the socialist party *Die Linke* focuses on obliging the social partners to abolish sex-discriminating salary systems through a negotiation structure that encompasses obligatory arbitration. Both initiatives contain mere outlines without presenting concrete draft bills. They stand no chance of being realized because of the present allocation of political power in the federal legislative bodies. Rather, they express the legislative intention of these parties in the event that they form part of a future government (elections for the Federal Parliament will take place in September 2009).

Legislative developments

No significant legislative developments have been introduced by the Government in the Federal Parliament. In view of the upcoming federal elections in September 2009, the parties of the ruling grand coalition are apparently avoiding major pieces of legislation that might disrupt their cooperation.

---

[23] Sénat, Résolution européenne sur la proposition de directive du Conseil relative à la mise en oeuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, 17 November 2008. European resolutions adopted by the Senate do not have any binding legal effects. They are political statements, presenting the Senate's point of view to the Government before negotiating draft legislation. The Government is not legally bound by these resolutions, but it could take them into account when conducting negotiations at the level of the Council of the European Union.

[24] Documents of the Federal Parliament *(Bundestagsdrucksache*) No. 16/11175 of 2 December 2008 (proposal of the *F.D.P.*) and No. 16/11192 of 2 December 2008 (proposal of *Die Linke*).

Case law of national courts

Federal Labour Court (Bundesarbeitsgericht), judgment 2 AZR 701/07 of 6 November 2008

In a ground-breaking decision, the Federal Labour Court held that a dismissal on grounds of age may violate the Law on Protection against Dismissals (*Kündigungsschutzgesetz, KüSchG*). The Court considered that a discriminatory dismissal constitutes a dismissal which is 'contrary to social considerations' (*sozialwidrig*) in the sense of Section 1 of that law. In the case reported here it found, however, that the age criterion used was justified as it served the aim of ensuring a good age balance among employees.

The decision is also relevant for sex discrimination because it determines the relationship between the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, *AGG*), which transposes the European Anti-Discrimination Directives, and the Law on Protection against Dismissals. According to Section 2(4) of the AGG, the lawfulness of dismissals is solely to be determined by the Law on Protection against Dismissals. Thus, the legislature wanted to exclude dismissals from the scope of application of the AGG. The majority of academic writers on the subject considered this exclusion incompatible with the European Directives because the Law on Protection against Dismissals does not contain a prohibition of discrimination on the grounds enumerated in the Directives. Through its decision, the Federal Labour Court read the prohibition of discriminations contained in the AGG into Article 1 of the KüSchG, thus rendering German law compatible with the requirements of European law. It is doubtful, however, whether this approach satisfies the European requirement of unequivocal transposition of directives.

Federal Administrative Court (Bundesverwaltungsgericht), decision 2 B 46.08 of 16 December 2008

Cases concerning the dismissal of women wearing a headscarf for religious reasons continue to reach the courts. The Federal Administrative Court had to decide the case of a female teacher at an elementary school, who is a Muslim and had been wearing a cap fully covering her hair and her ears for about nine years. During this time, students and parents did not make any complaints. Then, the school authorities ordered her to remove the cap on the ground that it violates the State's obligation of neutrality in religious matters. The higher administrative tribunal of the state (*Land*) of Baden Wurttemberg (*Verwaltungsgerichtshof Baden-Württemberg*) upheld this prohibition because it considered the existence of an 'abstract danger' of a conflict between the students and/or parents' religious convictions sufficient to endanger the State's religious neutrality. In the decision reported here, the Federal Administrative Court (*Bundesverwaltungsgericht*) refused the applicant the permission to lodge an appeal against the judgment. In particular, it considered that the European Framework Directive (2000/78) does not require a case-by-case approach so as to render a prohibition proportionate.

As the case concerns the question of how to interpret the leading judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*) of 2003 on this issue, it is to be assumed that the applicant will bring a constitutional complaint. The Constitutional Court will eventually have to decide the question of whether the 'abstract danger' to school peace is a sufficient reason or whether the principle of proportionality requires a case-by-case approach.

State Labour Court of the State of North-Rhine Westphalia in Hamm (Landesarbeitsgericht Hamm), judgment 11 Sa 280/08 and 11 Sa 572/08 of 16 October 2008

This case before the State Labour Court (*Landesarbeitsgericht*) of North-Rhine Westphalia differed from the previous case in that the female Muslim teacher was employed at a public school under a private-law contract. Moreover, she had been wearing a headscarf for five years, and she taught Turkish to children of Turkish origin, all of whom were Muslims. As in the previous case, the dismissal (after her refusal to remove her headscarf) was based on the applicable state school law that prohibited wearing religious symbols that constituted an 'abstract danger' to the peace at school. The State Labour Court considered the dismissal lawful, holding that the law did not raise any concerns as to its constitutionality or compatibility with the Gender Equality Directive. In particular, the Court considered that the leading decision of the Federal Constitutional Court granted the legislature a wide discretionary margin concerning how to ensure the State's religious neutrality in schools. Therefore, the requirement of an 'abstract danger' to the peace at school was sufficient, irrespective of whether there had been any complaints against the teacher.

The main argument of this judgment is in line with numerous previous ones, such as the one reported above. Religious neutrality is considered an occupational requirement in the sense of the General Equal Treatment Act, which transposes the European Anti-Discrimination Directives. The applicant was granted leave to appeal this judgment to the Federal Labour Court, and it is to be expected that she will make use of this right. Eventually, the case might reach the Federal Constitutional Court as well.

State Labour Court Berlin-Brandenburg (Landesarbeitsgericht Berlin-Brandenburg), judgment 15 Sa 517/08 of 26 November 2008 (not yet final)

The State Labour Court (*Landesarbeitsgericht*) of Berlin and Brandenburg had to decide in an action for compensation and moral damages brought by a woman who asserted that she was the victim of sex discrimination in a promotion decision of her employer. To prove her claim of discrimination, the claimant submitted an expert opinion by a statistician. It showed that it was statistically extremely improbable that all 27 decision-making positions were held by men in a company where women make up two thirds of the workforce. The Court accepted this argument as sufficient to indicate *prima facie* that discrimination had occurred. Furthermore, the Court held that the employer was precluded from arguing that the claimant was not the most qualified candidate, because the company had not announced the job vacancy and could not produce any written selection criteria. As compensation, the Court awarded the claimant, for an indefinite period of time, the difference between her present salary and the salary of the position denied. Moreover, it awarded the claimant EUR 20 000 in moral damages for the discrimination, which was compounded by derogatory and intimidating remarks by her superior.

The decision is ground-breaking in that the State Labour Court accepted a probability calculation as proof of discrimination. In doing so, the Court recognizes that otherwise, victims of discrimination will not be able to make a *prima facie* case of discrimination. The lack of a job announcement and of written selection criteria are further relevant indicia showing that the employer did not search for the best qualified candidate. Moreover, the decision is ground-breaking in that it calculated the compensation without limiting it in time, as had been proposed in legal literature. It is

to be expected that there will be an appeal to the Federal Labour Court (*Bundesarbeitsgericht*).

State Labour Court Berlin-Brandenburg (Landesarbeitsgericht Berlin-Brandenburg), judgment 2 Sa 2070/08 of 12 February 2009 (not yet final)

In a case similar to the one reported above, another chamber of the State Labour Court Berlin-Brandenburg (*Landesarbeitsgericht Berlin-Brandenburg*) took an opposite position. It dismissed a claim for gender-based discrimination in a promotion decision and rejected the use of statistical data as a *prima facie* indication of discrimination. The Court argued that statistics were relevant only if they contained information about the connection between procedures of filling a position and the distribution of men and women in it. It considered mere information about the number of women and men in the overall workforce of a company as insufficient.

In fact, this requirement amounts to excluding the use of statistical data as an indication of discrimination. The reason is that it is much easier to obtain information about the number of men and women in the overall workforce of a company and on the level for which a claimant has applied than to obtain sex-disaggregated data about the promotion process. While the former are usually publicly available, the latter are confidential and hence not accessible for possible claimants. In light of these two contradictory positions within the same court, the question will probably have to be decided by the Federal Labour Court.

Labour Court Wiesbaden, judgment 5 Ca 46/08 of 18 December 2008 (not yet final)

In this case, a woman of Turkish origin brought a claim for discrimination on grounds of sex and ethnic origin. She worked as an agent for an insurance company and sold insurance in a particular area. When she returned after four months' maternity leave, she was assigned a new area that generated considerably lower premiums. Her successor was male and of German ethnic origin. She also alleged that he received better treatment, such as an office and a secretary, and that she was denied her prior special benefits, such as a laptop computer. The Labour Court found that only the allocation of a less attractive area constituted discrimination because it occurred immediately after her return from maternity leave. However, it did not consider the other facts as indicative of gender-based or ethnic discrimination. Moreover, the Court rejected her claim for compensation in so far as it was based on her loss of salary for the 29 years until her retirement. The Court held that the applicant had not suffered any material damage because the employer had increased her salary after she had brought the claim, which meant that she earned more than she had earned before her maternity leave. The Court did, however, award the claimant immaterial damages of approximately EUR 10 000.

The case made headlines in Germany because of the high material damages claimed by the applicant (EUR 434 000). As the judgment has not yet been published, it is impossible to assess the persuasiveness of the Court's evaluation of the facts brought forward by the claimant to show a *prima facie* case of discrimination.

Miscellaneous

In February 2009, the UN Committee on the Elimination of Discrimination against Women (CEDAW) examined Germany's sixth periodic report on the implementation

of the CEDAW Convention in Germany.[25] The report covered all areas of law and politics. A coalition of Women's Organizations in Germany had submitted a critical alternative report ('shadow report').[26] In its concluding observations,[27] the CEDAW Committee called for a reversal of the burden of proof in sex discrimination cases and recommended that the Federal Anti-Discrimination Body be granted investigative and sanctions power. It also called for enhancing this Agency's independence and transparency and for providing it with adequate human and financial resources. Moreover, the Committee recommended a return to the integrated approach to gender mainstreaming and the introduction of effective monitoring and sanctioning as well as gender budgeting. It criticized the Government for not making use of temporary special measures to ensure women's *de facto* equality with men in both the public and the private sector. With respect to the gender pay gap, the Committee calls upon the State to ensure that non-discriminatory job evaluations and job assignment systems are put in place and implemented.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

Policy developments

Until some time ago, Greek legislation provided for maximum quotas for the access of women to Military and Police Academies, as well as to several military and militarily organised corps, such as the corps of Border Guards and Professional Soldiers. These quotas were gradually abolished, in particular after a provision of the Greek Constitution (Article 116(2)) that allowed derogations from the constitutional gender equality norm (Article 4(2)) was repealed. This derogation norm was replaced (in 2001) by a provision requiring positive measures, in particular in favour of women.[28] After the abolishment of the quotas, legislation now stipulates common qualifications and assessment criteria for women and men. There is, however, a tendency to make these criteria stricter, in particular those relating to minimum height and athletic tests, to the disadvantage of women, meaning that there are serious indications of indirect discrimination against women. A characteristic example is provided by the common *minimum* height requirement for access to the Police Academies, which the Council of State considered compatible with both the Constitution and Directive 76/207.

Legislative developments

Quotas for access to police academies and their abolition

Until 2003, Greek legislation included *maximum* quotas for the access of women to Police Academies. Article 2(1) of Act 2226/1994 provided that the percentage of

---

[25] UN document CEDAW/C/DEU/6 of 22 October 2007. The report and all further documents mentioned here are available at: http://www2.ohchr.org/english/bodies/cedaw/cedaws43.htm, accessed on 16 March 2009.

[26] The German Women Lawyers Association (*Deutscher Juristinnenbund*, djb), which had contributed to the common alternative report, submitted an additional report; another report was submitted by an organization representing transsexual people ('XY-women'), and a further report by an association for questions about involuntary childlessness.

[27] UN document CEDAW/C/DEU/CO/6 of 10 February 2009, online available at: http://www2.ohchr.org/english/bodies/cedaw/cedaws43.htm, accessed 16 March 2009.

[28] About gender equality in the Greek Constitution, see EGLR No. 2/2008, p.57

women admitted to the School for Constables could not exceed 15 %, while their percentage for admission to the School for Officers could not exceed 20 %. This statutory provision was amended by Article 12(1) of Act 2713/1999, which fixed a maximum quota of 15 % for all Police Academies. The quotas were abolished altogether by Article 20 of Act 3103/2003, which provided that the assessment of men and women for access to all Police Academies would henceforward be made according to common criteria and requirements.

Minimum height for female candidates raised and now equal to minimum height for male candidates

Before the abolition of the quotas, the minimum height requirement was 1.70 m. for men and 1.65 m. for women for the Police Academies; following the abolition of the quotas, the minimum height for women was raised by Presidential Decree to 1.70 m.,[29] which is much taller than their average height. Indeed, the data provided by the 1st Paediatric Clinic of Athens University for 2000-2001 regarding the height of 18-year-old males and females are as follows: average height: males 1.77 m.; females 1.63 m.; minimum height of females: 1.53 m., maximum height of females: 1.75 m.[30] Consequently, the percentage of women over 1.70 m. is 18 %, while the percentage of men over 1.70 m. is 88 %. Thus, women are at a great disadvantage compared to men. The first requirement to be checked is height. Candidates who are under 1.70 m. are automatically excluded from any further assessment.

No justification for raising the minimum height of women can be deduced from the Presidential Decree which raised the minimum height for women.

It must be noted that the minimum height requirement for the Military Academies, after the abolition of the maximum quotas for the access of women, is currently 1.65 m. for men and 1.55 m. for women; calls for candidacies for the academic year 2009-2010 will require a minimum height of 1.70 for men and 1.65 m. for women.[31] One may wonder why the height for women was raised by 10 cm., while the height for men was raised by 5 cm. only. In any event, why would the height of 1.65 m. be sufficient for female military officers and insufficient for female police members?

Case law of national courts

Compatibility of quotas with the Greek Constitution and Directive 76/207

The Council of State (Supreme Administrative Court) held that the quotas fixed by Article 2(1) of Act 2226/1994 (see above) were contrary to the gender equality norm of the Greek Constitution (Article 4(2)) and Directive 76/207, and hence non-applicable.[32] However, after the amendment of this provision (see above), quite surprisingly, and without making a preliminary reference to the ECJ, the Council of State considered that the new quotas were compatible with both the Constitution and Directive 76/207. In doing so, it adopted the justification included in the explanatory memorandum to the new statutory provision: the supremacy of men due to biological

---

29 Article 2 of Presidential Decree 4/1955, as modified by Presidential Decree 90/2003.

30 See D. Chiotis et al. *Development models of the Greek population, 2000-2001*, Athens University, 1st Paediatric Clinic.

31 Articles 5(2) and 5(3) of Presidential Decree 133/2002, as it was modified by Presidential Decree 207/2007; Article 1 of Presidential Decree 66/2008, according to which Presidential Decree 207/2007 came into effect on 1 January 2009.

32 Council of State (Plen.) judgments Nos. 1917-1919/1998.

attributes, such as 'muscular strength, speed, stamina, courage and sang-froid, qualities which, according to common experience, men possess to a higher degree than women.'[33]

Compatibility of the common minimum height with the Greek Constitution and Directive 76/207

The Council of State, while accepting that the average height of Greek men is higher than the average height of Greek women, held that the fixing of a common minimum height requirement for men and women at 1.70 m. 'is justified by reasons of public interest, which are independent of the candidates' sex, and are related to the requirements of the police profession, as this height is a necessary and appropriate condition for the effective discharge of police duties'. The Council of State further held that this minimum height is among the qualifications which enable the police to exercise their duties, such as 'coping with violence during public gatherings, violent and terrorist acts and transfer of detained persons'. 'These duties, the character of the police as a militarily organized armed corps and the conditions under which they exercise their activities constitute specific and appropriate criteria, which, according to common experience justify this indirect discrimination against women, since women must have the same physical qualifications as men in order to be able to discharge the main police duties as successfully as men'.[34] It is obvious that the Council of State endorsed the justification that the competent ministry put forward as a defence at the hearing of the cases. However, this justification, which brings to mind the justification of the quotas adopted by the Council of State case law of 2002 (see above), is inadequate, since it consists of 'mere generalizations' which, according to the ECJ, are not sufficient to exclude indirect discrimination.

Minimum height: genuine occupational requirement for the police?

One may wonder whether a minimum height requirement, which completely excludes any further assessment of a candidate for the police, is a genuine occupational requirement in the first place, and if so, to what extent. It seems that in several EU Member States,[35] such as Sweden,[36] the Netherlands,[37] the Czech Republic,[38] Poland[39] and the UK,[40] there is no statutory height requirement at all; Luxembourg has no such requirement for higher officers.[41] In other Member States there is a lower than the average *minimum* height requirement, which in some Member States is a unisex

---

33 Council of State judgments Nos. 1850-1859/2002, 3714-3735/2002.

34 Council of State judgment No. 1247/2008.

35 I would like to thank very warmly the colleagues in the Network who gave me information regarding the relevance of minimum height for access to the police in their respective countries.

36 Information from the Swedish expert: www.polisen.se, accessed 25 January 2009.

37 Information from the Dutch expert: official site of the police www.politieacademie.nl and an unofficial site which refers to the abandonment of this requirement http://www.infopolitie.nl/index.php?option=com_content&view=article&id=1157:minimum-lengte&catid=134:solliciteren&Itemid=43, accessed 30 January 2009.

38 Information from the Czech expert: general conditions for applying to become a member of the police: http://www.nabor.policie.cz/podminky.php; conditions for access to the Police Academy: http://www.polac.cz/g2/view.php?uchazec/sb_in_08.html , accessed 25 January 2009.

39 Information from the Polish expert: Regulation of 30 August 2007 (Journal of Law 2007, No. 170, item 1212) issued by the Minister of Interior and Administration: http://www.policja.pl/rekrutacja, accessed 25 January 2009.

40 Information from Chris McCrudden (no explicit legislation).

41 'Inspecteur' and 'cadre supérieur' (information from the Luxembourg expert).

requirement (e.g. in Belgium, it is 1.58 m.),[42] while in other Member States the lower than average height requirement differs according to sex: e.g. in Germany, it varies across the Laender (in Berlin it is 1.60 m. for women, 1.65 m. for men), while for the Federal Police it is 1.63 for women, 1.65 for men;[43] in Italy, it is 1.61 for women and 1.65 for men.[44]

HUNGARY – *Csilla Kollonay Lehoczky*

Policy developments

No change can be observed in the overall attitude to gender equality. The growing tension regarding racial (Roma) issues and the increased public interest focusing on it, coupled with the dramatic economic situation, have reduced the relative significance of the issue of gender equality.

The issue that receives permanent attention from the Government is the employment situation of women, especially young mothers. The primary aim is to decrease the number of women living on childcare benefit, thereby increasing the low labour market participation rate. However, two negative phenomena have to be mentioned. First, gender-stereotyping public discourse treating childcare and parenthood increasingly as merely a women's ('young mothers'') problem is becoming more and more accepted. Second, the efforts to encourage women back to the workplace are not coupled with measures to help the reconciliation of work and family life.

Legislative developments

No legislation was adopted in the field of the promotion of gender equality in the second half of 2008. Some legislative developments may have indirect impact on the situation of women.

Social security – motivation to work

The overall economic cutbacks in Hungary have resulted in a change of the social security system, primarily in the system of means-tested cash benefits, in order to motivate the affected groups to try to find work instead of living on social security income.[45] Considering that most of these groups are living in remote, underdeveloped areas, where childcare facilities are rare or non-existent, the new provisions take into consideration circumstances such as raising three or more children, being a single parent or having children below 14 years of age, and for these cases the rigour of the new provisions is less strict; social security may be available under unchanged conditions. On the other hand, little seems to be happening to promote the reconciliation of work and family life. Act CXXIII of 2004 on the promotion of the

---

[42] Information from the Belgian expert (no explicit legislation). The average height of Belgian women is 1.62 m.

[43] Information from the German expert: for the Berlin police see: http://www.berlin.de/polizei/beruf/index.html; for the Federal police see: http://www.bundespolizei.de/nn_251812/DE/__Home/05__Berufsperspektiven/berufsperspektiven__node.html?__nnn=true, accessed 20 January 2009.

[44] Information from the Italian expert: Decree of the Prime Minister (d.p.c.m.) 22 July1987, No. 411.

[45] Act CVII of 2008 on the Amendment of Certain Laws on Social and Employment Matters, in force since 1 January 2009.

employment of disadvantaged labour market groups (fifty-plus, school-leavers and family carers returning to work) does not include any means of reconciliation. A new Annex added to the Act enumerates the factors of selecting for support the most disadvantaged areas and towns with respect to their economic, infrastructural, social and employment characteristics. The lack of mainstreaming is evident from the carefully composed, extended list of indicators – even including the amount of broadband internet availability per 1000 inhabitants – which does not include any indicators regarding childcare institutions.

Modification of the law on the status of military service persons

Act I of 2009 modified Act XCV of 2001 on the legal status of professional and contracted military staff. Among other things, the amendment facilitates posting military staff as temporary substitutes for other staff members or for absent public servants and public employees. According to the explanatory memorandum to the amendment, one of the aims is to facilitate replacement in cases of schooling and childbirth. The measure might thus facilitate reconciliation of work and private life in the military and other public services.

Act on Registered Partnership abolished

A resolution of the Constitutional Court,[46] adopted on 17 December 2008, invalidated and abolished with immediate effect the Act on Registered Partnership.[47] Registered partnership was available for 'two persons above the age of eighteen', which meant that, by not specifying the sex of the partners, it was available equally for homo- and heterosexual couples, attaching almost the same consequences to registration as to marriage. The reason for the invalidation was that the Act practically equated registered partnership with marriage and thereby violated the special constitutional protection of marriage as well as the provision on equal treatment. On 20 April 2009, a modified version was passed by Parliament: 'registered partnership' with all the effects of a '*quasi*-marriage' is now available only for same-sex couples.

Restraining orders – unsuccessful upgrade of protection

Due to the obvious inadequacy of the 'restraining order' provision in the Code on Criminal Procedure enacted in 2006, among other things by not permitting police intervention, weaknesses in the court procedure and a lack of provisions concerning the execution and enforcement of restraining orders, the law was generally more concerned with the protection of the defendant's rights of the violent party in a criminal procedure than with the protection of the victims of the violence. Parliament adopted another act in December 2008 on 'Restraining orders applicable in cases of violence among relatives'. The President of the Republic has not signed the law, but has sent it to the CC for a constitutionality check.

Ratification and promulgation of the Revised Social Charter

In March 2009, the Act ratifying the Revised European Social Charter was promulgated. Hungary is now party to its modified Article 8 (on a more up-to-date protection of pregnant women and women in the post-natal period) and Article 20 (on the protection of women in employment and social security). Unfortunately, Article 27 on the right to reconciliation of work and private life obligations has not

[46] 154/2008 (XII.17) AB.
[47] Act CLXXXIV of 2007.

been ratified, indicating that there is no governmental intention to improve the deficiencies of the current situation in this respect.

Case law of national courts

Equal pay – concept of pay

In a case before the Supreme Court, a female employee in a manual job ('excenter presser') had discovered that she earned less than her male co-workers in the same position. The employer defended the wage difference with reference to different job tasks and also to granting a house loan to the employee that, according to the employer, was paid as partial compensation for the wage difference. The employer referred to the interpretation of 'pay' by the ECJ, claiming that all benefits have to be considered 'pay' in this context. A detailed analysis of the scope of the job (its nature, quality and quantity, the required skills, effort, experience and responsibility) revealed that, in spite of some difference in tasks, the work was comparable with that of the male co-workers. Furthermore, the Supreme Court established that the house loan must not be taken into consideration when comparing hourly wages, partially because it was not proved that it was granted as compensation for lower wages. In its explanation, the employer could not prove that it had a transparent wage system, in part because the ECJ's case law only includes in the concept of pay the benefits that provide effective material advantage (with reference to cases C-12/81 *Gorland*, and C-262/88 *Barber*), whereas a house loan is not free material gain, because it has to be paid back. (Kfv.IV.37.332/2007/5)

Discriminatory sanctions for legitimate absence

A lower court declared lawful the regulation of an employer that excluded from wage supplements and wage increases employees who were absent for justified reasons (typically sick leave) for more than 15 days a year, in spite of the fact that such a sanction would affect parents with child-caring duties in disproportionately larger numbers. The employer explained the measure in terms of tough market competition that either does not permit any delay in deliveries or does not allow employing more staff than the minimum necessary, meaning that the employer had to prevent or minimize the absence of staff even for justified and legitimate reasons. The court accepted the explanation without requiring any evidence and declared the measure as 'reasonably necessary' therefore 'not arbitrary' and consequently not discriminatory. The Court did award some compensation to the workers: non-paid wages that originated from before the introduction of the employer's regulation. The Supreme Court, revising the case on some limited points, refrained from commenting on this part of the lower court's decision.

This decision is a further example of the uncertainties surrounding the concept of indirect discrimination, the reversal of the burden of proof and the need to revise the overly broad formulation of exceptions from the prohibition of discrimination under the Hungarian Equal Treatment Act. (BH 2008. 253)

Equality body decisions/opinions

Protection of pregnant workers and workers on parental leave
Discriminatory rejection of returning to executive job while on childcare leave

Hungarian legislation permits parents on childcare leave to resume work either part time or full time after the child's first birthday, either with the permanent employer or

with another, temporary employer, while maintaining the full benefit and the labour-law protection deriving from the status of being absent on childcare leave.[48] An employee in an executive position informed her employer that she wanted to return to work while maintaining her childcare leave benefit. The employer offered her another, non-executive and lower-paid job, claiming that her original job had been terminated and that the offered job would be more favourable for the employee considering that it could be done from home. The employee insisted on getting back her original job and submitted a claim to the Equal Treatment Authority. The ETA established that another employee, the originally hired temporary substitute, had been employed for an unlimited period in her job and therefore established that the employer discriminated against the claimant with respect to her family status (two small children) and, in addition, on the basis of her executive position, as a so-called 'other attribute' listed in the Equality Act's open-ended list of suspect grounds of differential treatment. The ETA ordered the elimination of the unlawful situation and imposed a fine of about EUR 6 000 (HUF 1.5 million), together with making the decision public for six months. *(Case 1026/2008)*

Dismissal of pregnant employee during probationary period

An applicant for a public service position learned that she was pregnant in the same period that she was interviewed for the job. She was selected and hired with a six-month probation and she did not want to notify the employer of her early pregnancy, in spite of an explicit question on this matter. When, after the twelfth week of the pregnancy, she notified the employer of her pregnancy, she was criticized for 'misleading' the employer, she was not given any substantive tasks and after four months her employment was terminated with reference to the probationary period. Upon her request for explanation, the employer, while maintaining that the law does not require any justification for termination during a probationary period, told her that it was an inappropriate situation that she, hired to replace an employee on childcare leave, would be on maternity leave herself, and that furthermore she had violated her duty of cooperation by failing to report her pregnancy as soon as she knew about it. In the proceedings before the ETA, the employer tried, but failed, to persuade the authority of inappropriate work performance on the part of the claimant, also referring to her request for a three-week absence to pass certain exams. With reference to the ECJ case C-460/06 of Nadine Paquay, the ETA declared that the termination of the employment could only be justified if a reason other than the pregnancy had been presented by the employer at the time of the termination, even if normally a termination during probation does not need an explanation. The ETA added, with reference to ECJ case C-109/00 in Tele-Danmark A/S, that dismissal of a pregnant woman is unlawful even if she was hired for a fixed term and she was not available for work during the total length of this period, and also if she failed to inform her employer of the pregnancy in spite of having been aware of it. *(Case 1201/2008)*.

[48] The purpose of this unusual opportunity is to encourage an increase in the very low female participation rate in Hungary.

ICELAND – *Herdís Thorgeirsdóttir*

Introduction

A year ago, Iceland's status as one of the most successful economies in the West was underlined when it was judged the best place to live in the world. Iceland had dethroned Norway as leading country in the UN's league table of 177 countries, which compares per capita income, education, healthcare and life expectancy. Life expectancy in Iceland is 80.55 years for males, the third highest in the world. Iceland was among the first countries to be hit by the global financial crisis with the collapse of its three major banks, plunging Iceland deeper into the current financial crisis than any other country in Europe and the entire industrialized world. Today's leading economic forecasts predict that Iceland will face two years of contraction before economic growth picks up in 2011. Due to Iceland's strong fundamentals, medium and long-term prospects are positive. Sustainable use of clean energy and marine resources backed by a good infrastructure, well-funded pension system, culture of innovation and a well-educated population will serve as the backbone of Iceland's recovery. Despite this forecast, the impact of the crisis will affect most people and not just those that are vulnerable. Upholding the welfare system during these trying times is therefore of immense importance and the outcome of the recent parliamentary elections reflect that the majority of voters voted for the left, which promised to keep up the classic Nordic welfare state.

The Prime Minister of the interim government installed in January, Johanna Sigurðardóttir, a 66-year-old openly gay woman and long-time parliamentarian for the social democrats, was the winner of the elections in April along with the left environmentalists. Disenchanted with its male decision makers, citizens of this embattled country are putting their faith in a woman whom so many say that they can trust.

Legislative developments

Regulation No. 29/2009 adopting EEC Regulations Nos. 1992/2006 and 311/2007 on social security schemes entered into force on 5 January 2009. In line with Article 7 of the EEA Agreement, an Act corresponding to an EEC regulation shall as such be made part of the internal legal order of the contracting party.

Case law of national courts

The Centre for Gender Equality lost a case that it initiated under the previous Gender Equality Act No. 96/2000 on behalf of a female professor in computer technology at Reykjavík University against the University of Iceland. The District Court of Reykjavík rejected the claim based on the decision of the Complaints Committee (which did not have a binding effect before the law was amended, see below) that there had been a breach of the Gender Equality Act when a man was appointed associate professor at the University of Iceland. The petitioner's claim for compensation was also denied. The Complaints Committee had found that the female professor was more experienced in teaching and research than the man and that she should have been appointed, as women were a minority of the staff of the computer department. Based on evidence, the Court held that rules of administrative procedures had not been violated in the hiring process and that the woman had not been

discriminated against directly or indirectly on the basis of gender. The District Court of Reykjavik hence acquitted the University of Iceland of violating the Gender Equality Act.[49]

Equality body decisions/opinions

According to Article 5 of the new Gender Equality Act No. 10/2008, the rulings of the Complaints Committee shall be binding for the parties to each case. The parties may refer the Committee's rulings to the courts. The Complaints Committee has issued its first binding ruling since the new Gender Equality Act No. 10/2008 was adopted. The case concerns a woman who complained that she had been dismissed as a security guard because of her gender and that the company, Securitas, had violated the prohibition against discrimination at work, also applying to dismissals.

Based on the material presented, the Complaints Committee considered that it was not possible to conclude that the dismissal was based on gender, and that it was mainly due to the difficult relationship between the employee and her employer. It hence ruled in this first binding ruling that the employer had done no wrong and was not to pay the costs of the complaint procedure.[50]

Miscellaneous

A report by the Minister of Social Affairs was published on gender statistics on 16 January 2009, revealing that the percentage of women in government committees was 36 % in 2007 and the percentage of women directing government institutions was 23 %. Female participation on the Icelandic labour market in 2007 was 46 %. The percentage of women directing companies (including the smallest) was 19 %.[51]

IRELAND – *Frances Meenan*

Policy developments

Economic measures

Arising from the economic recession there have been announcements of significant cutbacks in Ireland with respect to state funding. The Equality Authority[52] is to have a 43 % cut in its funding. Its Chief Executive resigned in December 2008. The representative of the National Women's Council on the Board of the Authority also resigned in December. More recently, in January 2009, the two representatives of the Irish Congress of Trade Unions, the two representatives from the Irish Business and Employer's Confederation and the representative of the Carer's Association resigned from the Board. However, subsequently IBEC have nominated two representatives. The cuts to the legal budget mean that no new cases can be brought this year.

In the last ten years of its existence, the Equality Authority has carried out significant work in respect of equality generally. Such a cutback will have very

[49] Reykjavík District Court, case No. E-1164/2008.
[50] Complaints Committee ruling of 3 April 2009.
[51] http://eng.felagsmalaraduneyti.is/media/acrobat-enskar_sidur/Women_and_Men_in_Iceland_2009.pdf, accessed 14 May 2009.
[52] www.equality.ie; http://www.independent.ie/national-news/five-resign-from-board-of-equality-watchdog-1607165.html, accessed 16 March 2009.

serious consequences in respect of staffing and the provision of services. The Authority advises and acts in a number of cases where there is a significant point of principle at issue. It is the writer's opinion that this cutback will not only have very serious consequences for the services provided by the Authority, but it will also severely restrict the services of this independent body and in particular legal advice and representation. Ireland may now be in breach of Article 20(1) of Directive 2006/54/EC, on the Implementation of the Principle of Equal Treatment (Recast), because the Authority will not have the necessary resources 'for promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex'. The lack of resources will limit the Equality Authority in its provision of independent assistance to victims of discrimination when pursuing their complaints of discrimination (Article 20(2)(a) of the Recast Directive).

Legislative developments

Act on financial measures in public interest

The Financial Emergency Measures in the Public Interest Act 2009[53] introduces a number of financial emergency measures in the public interest. It provides for a deduction from the remuneration of public servants who are members of a public service pension scheme or who have similar arrangements. Deductions shall be made from 1 March 2009. The first EUR 15 000 shall have a deduction of 3 %; the next EUR 5 000 6 % and the remainder 10 %. This Act was passed as the Government considered that the burden of job losses and salary reductions in the private sector has been very substantial and it is equitable for the public sector to share the burden. Moreover, public service pensions are significantly more favourable than those generally available in the private sector. It also provides that public bodies are allowed to reduce the professional fees that they pay to external service providers. Other changes include the childcare supplement. There shall be a review of the Act before 30 June 2010 and every year after 2010 in order to consider as to whether any of the provisions of the Act are still necessary.

Case law of national courts

Indirect discrimination and pension schemes for part–time workers

The case *Doyle* v *Jury's Doyle Hotel*[54] (on appeal) concerned a claim of indirect discrimination under the Pensions Acts 1990–2008 on the grounds of gender and age. The claimant was a member of the banqueting staff who were designated as 'permanent casual staff'. In or around 1995, the claimant enquired about joining the pension scheme, but as she was not a permanent full–time employee she was told that she could not join the scheme. Then in or around the year 2000, at which time the respondent allowed part–time workers to join the scheme, the claimant sought to join the scheme and was told that she could, but that as she was over the age of 50, she was excluded.[55] At that stage, there was one woman under 50 on the banqueting staff who was allowed to join. The claimant argued that on the gender ground she was indirectly discriminated against, in that the group of permanent casual banqueting staff of which she was a member were predominantly male. She submitted that the

---

53 http://www.oireachtas.ie/documents/bills28/acts/2009/a0509.pdf, accessed 16 March 2009.

54 http://www.equalitytribunal.ie/index.asp?locID=166&docID=-1, accessed 16 March 2009.

55 The claimant was allowed to join the respondent's scheme for Additional Voluntary Contributions in 2002.

apparently neutral provision that only full–time staff could join the scheme put the women on the banqueting staff at a particular disadvantage. On the age ground, the claimant submitted that because of the indirect gender-discriminatory effect of the exclusion of part–time and casual employees, the later application of an age limit has a disproportionate effect on the cohort of excluded workers, who are disproportionately women.

Indirect discrimination is defined in Section 68 of the Pensions Act 1990, as amended by the Social Welfare (Miscellaneous Provisions) Act 2004, as

> 'an apparently neutral rule of the scheme concerned puts persons (…) who differ in a respect mentioned in section 66(2) at a particular disadvantage in respect of any of the discriminatory grounds compared with other persons, being members or prospective members of the scheme (…) unless the rule is objectively justified and the means of achieving that aim are appropriate and necessary.'

The equality officer considered that there were two issues before him: first, which group of employees constituted the claimant's comparator group, and second, what is a 'particular disadvantage'? First the equality officer considered that the correct comparator group for the claimant should be the permanent part–time staff of the respondent at the material time, as all these workers were barred from joining the pension scheme. There was common case between the parties as to the composition of the respondent's part–time workforce at the material time. These workers were 230 men and 307 women in 1995. In percentage points, 42.8 % of part–time workers were male and 57.2 % were female, a differential of 14.4 percentage points. The next question that the equality officer asked was whether this differential can be said to represent a 'particular disadvantage' for the claimant. The equality officer considered that 14 percentage points does not establish a particular disadvantage for the claimant, as it only takes a relatively small number of roles (approximately 38 out of a part–time workforce of 537, or 7 %) to be staffed by men instead of women to achieve a parity of gender within the respondent's part–time workforce. The equality officer commented that this could easily happen within the normal staffing fluctuations, especially considering the fact that it is common case for permanent part–time staff to be deployed within all areas of the hotel's operations. While the rules with regard to the access to the pension scheme might have disadvantaged part–time workers as a group, it cannot be said that female part–time workers were put at a particular disadvantage based on their gender. Therefore, the claimant failed to establish a *prima facie* case of discrimination on the gender ground with regard to access to the pension scheme pursuant to her application to join the scheme in 1995.

As regards the age ground, the Pensions Act[56] permits pension schemes to fix an age or a period of qualifying service as a condition or criterion for admission into a scheme, where, in the context of the relevant employment, to do so is appropriate and necessary by reference to a legitimate objective of the employer, provided it does not result in a breach of equal pension provision on the gender ground. The claimant submitted that this rejection should be considered in the light of her earlier rejection in 1995, and that since this rejection happened on the gender ground, it should come within the saver provision in the Act. The equality officer disagreed and relied on the facts in the *Bilka – Kaufhaus*[57] case, where the employees had to have 15 years of

[56] Section 72(1)

[57] ECJ,Case 170/84, Bilka - Kaufhaus GmbH v Karin Weber von Hartz, ECR [1986] 1607.

full–time service to be able to enjoy the benefits of the pension scheme, a condition which was much harder to fulfil for female employees than male employees.

In respect of the current case, the claimant was over 50 years of age by the time that the respondent admitted its part–time workers into the pension scheme to comply with the Protection of Employment (Part–Time Work) Act 2001. The claimant failed to establish a *prima facie* case of discrimination in access to the respondent's pension scheme on the grounds of age.

Miscellaneous

Publication of figures on discrimination claims and gender pay gap of 2008

The Equality Tribunal[58] published its figures for year end 31 December 2008. Over 1 000 people brought claims to the Tribunal, of which 85 % were about alleged discrimination at work. This was a 28 % increase in such claims. Such claims are brought under the Employment Equality Acts 1998–2008. Almost half of the work-related cases were brought on the race ground. Age, disability and gender amount to 10 % each. The vast majority of claims were against private sector employers.

Claims under the Equal Status Acts 2000–2008 (discrimination in respect of access to goods and services) decreased by 16 %. The disability ground accounts for a quarter of the cases and a significant number of claims are brought on the Traveller[59] and race grounds. Out of a total of 154 cases, only 4 were brought on the gender ground.

A European Commission Report on the gender pay gap was published and it was noted that Irish women earn EUR 160 000 less on average than men during their lifetime, due to a pay gap caused by gender stereotypes, traditions and the problem of balancing their family and working life.[60]

ITALY – *Simonetta Renga*

Policy developments

Unpromising times

During the first months of this year, at the political level, the attention as regards the gender dimension has been catalyzed by the Decree of the Labour Minister, in agreement with the Minister for Equal Opportunities, removing the National Equality Adviser. Indeed, from a political and institutional point of view, an action based on the spoils system carried out against an independent body is an extremely worrying precedent for all bodies set up to guarantee citizens' constitutional interests, which can eventually even be in conflict with the Government's political choices.

On the whole, the new Government's first months in power appear to be quite unpromising as far as gender equality is concerned and are certainly far from achieving the objectives underlined by the programmatic guidelines of the

---

58 http://www.equalitytribunal.ie/index.asp?locID=12&docID=1961, accessed 16 March 2009.

59 The community of people commonly so called, who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

60 Irish Times, 4 March 2009; www.irishtimes.ie

Department of Equal Opportunities,[61] where Minister Carfagna stresses the importance of reconciliation policies and the necessity of instruments and proactive welfare measures geared towards increasing women's occupation, favouring gender equality and improving the career perspectives of women. Last but not least, there is no news on the implementation of the Recast Directive (2006/54/EC), despite the expiry of the term of 15 August 2008 for transposition.

Legislative developments

Health and safety at work: new evaluation of risks and discrimination on grounds of gender, age and race

The term for the entry into force of Articles 17 and 28 of the new Code for Health and Safety at Work on the evaluation of risks expired on 31 January 2009.[62] The Code extends the evaluation of risks to factors which can regard specific groups of workers, such as risks arising from work-related stress (following the European Framework Agreement signed on 8 October 2004) and from gender, age and race differences. Also, an express reference to risks concerning pregnant workers was included, although this kind of specific evaluation had already been introduced by Decree No. 645/1996 implementing Directive 92/85. Therefore, an overall assessment of risks shall take into consideration gender differences, as well as age and race differences. Moreover, the reference to work-related stress according to the European Framework Agreement involves an analysis of factors such as work organisation and processes (for instance working-time arrangements) and subjective factors (for instance social pressure, perceived lack of support), which are often obstacles to the achievement of substantial equality at work.

At first sight, this change shows an ambiguous and contrary attitude as regards gender equality. In fact, on the one hand, the need to evaluate certain aspects, such as working time or social pressure, could be a further opportunity to achieve substantial equality. Reconciliation of work and private life is often an essential step for female workers to participate fully in the labour market, and social pressure, such as stress arising from the difficulty to face stereotypes, is often a further and possibly underestimated obstacle for women to perform typically male jobs. Moreover, the struggle against discrimination could benefit from the greater power display used in the protection of workers' health and safety. Also, employers would necessarily be involved in this development, as they have the sole responsibility for workers' psycho-physical welfare, while positive actions are mainly voluntary instruments. Nevertheless, on the other hand, equal opportunities cannot be restricted to the area of protection of workers' health and safety. Indeed, the objectives of the two areas of legislation are different: achieving substantial equality, on the one hand, and workers' health and safety, on the other. Furthermore, it can be difficult to detect the risks arising from gender and their evaluation could be problematic. Very general concepts, such as work-related stress, can be evaluated as risks but may, in the end, prove to be just formal fulfilments, which are unable to really influence the working environment. An indication of this possible trend can be seen in the European Framework Agreement signed on 8 October 2004. However, in 2008, Italian social partners signed an agreement that is the mere translation of the European text; no effort at all was made to integrate it or to adapt it to the Italian situation.

---

[61] Department of Equal Opportunities, http://www.pariopportunita.gov.it/, accessed 29 September 2008.

[62] Decree No. 81/2008, in OJ 30 April 2008, No. 101, Supplement No. 108.

Case law of national courts

Reconciliation and entering the labour market

There is a case to be reported as regards possible obstacles which single parents have to face when entering the labour market. Italian law provides that an unemployed person who refuses a job offer which corresponds with his/her professional skills and is not farther away from his/her residence than 50 km. and/or 80 minutes by public transport is removed from the unemployment list for a period of six months and loses the unemployment benefit. 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 a.m. to 1 p.m. When she found out that the job was from 1 to 8 p.m., she had to give it up, as she had two children of 6 and 4 years old to take care of as a divorced mother. For the next six months she was denied any unemployment allowance and she lost the season ticket for public transport and the exemption from health expenses, which depend on the status of 'unemployed person'.

It is true that Article 1 *quinquies* of Act No. 291 of 2004 provides that an unemployed person cannot refuse a job offer which fulfils the worker's professional skills and is within said distance from the worker's residence. No reasons of justification for refusal are expressly provided by the law. Only a Directive of the Minister of Labour clarifies that a worker is entitled to refuse the job offer in case of maternity, parental leave or certified *force majeure*. Nevertheless, in this case a strict interpretation of the rules was followed, despite the intervention of the Ombudsman. Possibly, the local Equality Adviser, had it been heard on the issue, could have helped the *Provincia* (local authority, which is the competent body as regards labour market policies) apply a wider interpretation of the reasons which can justify the refusal of job offers, consistent with the *ratio* of the rules for motherhood, fatherhood and time for care and with general principles regarding gender discrimination. This case would mainly seem to be an example of a lack of awareness of items of reconciliation in the public administration and of a deficiency in the coordination of the functioning of public bodies, as the Equality Adviser was not called on for advice.

Compulsory maternity leave and promotion

The Court of Appeal of Turin recently stated that compulsory maternity leave should be considered in evaluations for the purposes of promotion.[63]

In this particular case, the employer (a Municipality) refused to evaluate the work done by the relevant employee for the year 2004 because she had been absent from work for more than six months. The Court noted that this restriction in the evaluation for the purpose of promotion is not stated in any provision or contractual clause and deemed it to be discriminatory, as working mothers have the right to be evaluated despite taking their compulsory maternity leave.

The Court of Appeal ruled that the Municipality's decision violated both the contractual clause that provides that compulsory maternity leave shall be considered to be a period of employment for the purposes of promotion and Article 42 of the Code of Equal Opportunities, which states that positive actions can be enhanced to combat differences in treatment between male and female workers in promotion.

The gist of the judgment can be wholeheartedly approved, as this interpretation of equality law ensures the effective protection of women against the possible negative effects of pregnancy on the working relationship. It actually follows a well-

[63] Decision of 14 May 2008.

established guideline in national case law concerning both compulsory maternity leave and parental leave. In this case, the Court points out that the working mother, like all other workers, does not necessarily have a full right to promotion, but does have a full right to be evaluated for the purpose of promotion based on the work she performed, although it did not cover the whole year. However, the findings of the judgment that refer to positive actions are rather puzzling. Actually, the interpretation given by the Municipality seems to be a violation of Article 22 rather than of Article 42 of the Code for Equal Opportunities. In fact, the positive actions to which the Court refers are voluntary instruments aimed at achieving substantial equality, while Article 22 expressly states that compulsory maternity leave shall be considered as effective service for the purpose of promotion, unless collective agreements provide specific requirements to be fulfilled by the worker. Although the decision can be appreciated, its scanty reasoning and the odd use of the notion of positive actions raises doubts about whether the awareness of the promotional part of equality law is sufficiently widespread.

Equality body decisions/opinions

Dismissal of National Equality Adviser: how much independence for equality bodies?

At the end of 2008, a decree of the Labour Minister, in agreement with the Minister for Equal Opportunities, removed the National Equality Adviser, Fausta Guarriello, from office. She was appointed in January 2008 by the previous Government.[64] The National Equality Adviser, which is one of the bodies entrusted with promoting equal opportunities between male and female workers and counteracting discrimination, is appointed by the Minister of Labour, after consultation with the Minister for Equal Opportunities, from among candidates who have certified experience and competence of many years in gender equality law and the labour market. The removal took place as a consequence of a spoils system procedure, carried out under Article 6 of Act No. 145/2002, which provides that the top management of both the Public Administration and the state-controlled institutions that is appointed in the six months preceding the end of the legislature can be confirmed, annulled, modified or renewed within six months from the vote of confidence to the Government. The Decree expressly states that the National Adviser is not an independent body, as this officer is appointed by the Government: it states that the appointment has a fiduciary and discretional character and not a merely technical one. The Decree also affirms that the requirement of professional competencies for this body to be appointed is not by itself sufficient to grant its political independency. Consequently, the Decree removed the Adviser on the basis that it was not 'in line' with the Government's policies. A new National Equality Adviser, Alessandra Servidori, counsellor of the Minister of Labour, was appointed.

The Decree dismissing the National Equality Adviser has been severely criticized by the labour-law community, in Italy and throughout Europe, by local equality advisers and by many politicians. Two written parliamentary questions to the European Commission were submitted by Italian Member of the European Parliament Donata Gottardi. The Italian Democratic Party presented a parliamentary question to the Labour and Equal Opportunities Ministries on the issue.

[64] Decree of 30 October 2008.

Meanwhile, the Government received a motivated opinion from the European Commission on the possibility for equality advisers to provide independent assistance to victims of discrimination when carrying out judiciary procedures (infringement procedure No. 2006/2535 as regards Directive 2002/73/EC) and a 'request for explanation' on the specific point of the equality adviser's independence in relation to the Guarriello case.

Trying to stick to the legal aspects of the case, one has to recall that the tasks of the equality bodies are to promote equal opportunities between male and female workers and to counteract discrimination: these tasks are intended to protect individual and collective interests recognised in the Constitutional Charter. In order to fulfil these assignments, the equality bodies need to be free from political conditioning and their status has to be that of a technical body being able to offer guarantees. For this reason, the Code of Equal Opportunities recognises the equality bodies' functional independence, states the office's duration and the professional requirements for being appointed, and specifically defines its tasks. Consequently, the mandate of equality bodies should not be revoked in the event of political changes in the Government. Indeed, the Constitutional Court has stated that the spoils system has to be regarded as an exception, limited to posts of direct collaboration with the political institution.[65] Until now, the Ministry of Labour in its notes had always recognised the autonomy and functional independence of the National Equality Adviser. These ministerial notes were confirmed by a consultative opinion of the *Corte di Cassazione*.[66]

Having said that, one should remember that the wording of EU directives is ambiguous where the independence of equality bodies is concerned. Indeed, in Article 20 of Directive 2006/54 (Article 8a of Directive 76/207) 'independence' is a requirement for the equality bodies' actions rather than for the bodies themselves; moreover, the directives fail to clarify the relationship between equality bodies and other institutions, i.e. it is not specified from whom the equality bodies have to be independent. Still, the independence of their actions is based on that of the body and 'independence' is widely interpreted as independence from the Government.

Therefore, the express wording of Italian legislation needs to be changed, as it is prone to misinterpretation and can fail to implement EU legislation. In particular, a ministerial appointment can smack of a political decision, despite professional requirements. Indeed, the requirement of professional competencies is not by itself sufficient to guarantee the body's political independence. Furthermore, the Adviser is located within the Labour Ministry and its staff and work instruments are provided by the Ministry.

Cooperation between equality advisers and labour-law inspectors

On 19 March 2009, the local Equality Adviser of Ferrara signed an agreement with the Provincial Labour Inspectors Board on the implementation of gender equality legislation. The agreement was made after the 2007 national agreement between the Labour Inspector General Board at the Ministry of Labour and the National Web of Local Equality Advisers. The parties to the agreement commit themselves to take any useful initiative to implement gender equality and to prevent discrimination. In particular, the local labour inspectorate will give priority, in its activity of company control and inspection, to cases of gender discrimination signalled by the local

[65] Case *Corte Costituzionale* No. 233 of 2006.

[66] Notes of the legislative office of the Labour Ministry of 13 October 2004 and of 8 June 2005; Note of the General Secretary of the Labour Ministry of 24 January 2008.

equality adviser. Moreover, the labour inspectors' board will give preference to the treatment of controversies on gender discrimination by the conciliation commission set up at the inspectorate and allow claimants to be assisted by the equality adviser during the proceedings. This agreement is an extremely important step for maintaining and improving the coordination of activities between the provincial inspectorate and the local equality adviser for the purpose of implementing gender equality and monitoring the labour market from the gender perspective.

LATVIA – *Kristīne Dupate*

Policy developments

Increasing unemployment

There is a serious economic crisis in Latvia, resulting in, among other negative effects, a considerable increase in unemployment. By March 2009, unemployment had increased to 9.5 %.[67] In March 2008, the unemployment rate was 5 %. Interestingly, for the first time the number of unemployed men is higher than that of women.[68] This could be explained by the quite strict horizontal segregation of the employment market in so-called 'male' and 'female' professions. The segregation of the labour market in Latvia is twofold. First, women are more often employed in the services sector as teachers, nurses etc, while men are more often employed in the industrial sector. Second, more women are employed in the public sector, while men are predominantly employed in the private sector.[69] Due to the economic crisis, unemployment has increased dramatically in the industrial sector but not so much in the services sector. Also, more dismissals have taken place in the private sector than in the public sector.

Proposed measures in social benefits

Due to the lack of budget resources, the Government and Parliament must very soon decide on cuts in public expenditure. Unfortunately, the majority of ideas on how to decrease public expenditure involve indirect discrimination against women. For example, the Ministry of Welfare has suggested decreasing the parental benefit (childcare social security benefit), but the recently nominated candidate for Prime Minister has suggested restricting the right to the flat-rate social security benefit for childcare. Since it is predominantly women who perform childcare and child-raising responsibilities (1/3 of Latvian children grow up only with their mother), such policy ideas could negatively affect not only gender equality, but also the rights of children and the birth rate, which has already been negative in Latvia for almost 20 years.

---

67 State Employment Agency, http://www.nva.gov.lv/index.php?cid=2&mid=2&txt=1430&from=0, accessed 6 March 2009.

68 State Employment Agency, http://www.nva.gov.lv/index.php?cid=2&mid=2&txt=1435&from=0, accessed 10 March 2009; *Bezdarbs draud izputināt valsti* (Unemployment may dissipate the State), *Neatkarīgā Rīta Avīze*, http://www.nra.lv/zinas/18210-bezdarbs-draud-izputinat-latviju.htm, accessed 5 March 2009.

69 Women and Men in Latvia 2008, Central Statistical Bureau of Latvia, Riga, 2008.

Legislative developments

Amendments to the Law on Insurance Companies and their Supervision

On 19 February 2009, Parliament adopted amendments to the Law on Insurance Companies and their Supervision,[70] which entered into force on 5 March 2009. Article 5^1 of said law intends to implement the requirements of Article 5 of Directive 2004/113. The Law on Insurance Companies and their Supervision permits proportionate differences in premiums and benefits where sex is a determining factor based on actuarial and statistical data. It also provides that insurance services which may be provided according to sex (actuarial factors and statistical data) are to be defined by a Regulation of the Cabinet of Ministers. However, such regulations have not been adopted yet.

In relation to the proper implementation of the requirements of Directive 2004/113 in the insurance field in Latvia, it is still unclear whether in relation to health insurance, equal treatment must be observed not only in relation to individual premiums and benefits, but also regarding the risk to be insured. For example, there is a question whether this provision allows exclusion of natal health services from benefits provided by health insurance.

On 12 March 2009, Parliament in the first reading adopted the Draft Law on the prohibition of discrimination against natural persons performing economic activities (self-employed).[71] Said law is intended to implement Directive 2004/113 with regard to self-employed persons. It prohibits discrimination on the grounds of sex in relation to the supply of goods and services necessary for the performance of self-employed activities.

Case law of national courts

Childcare benefits

Development of Latvian case law in matters of discrimination is still in its initial stages. In general, it still demonstrates a misunderstanding of various legal aspects and concepts of non-discrimination law. For example, an administrative district court recently ruled on the right to childcare benefits in connection to the right to maternity leave.[72] Although this decision does not concern EC law, it might have a future impact on the proper application of EC law too, since the central issue in this case is discrimination on the grounds of maternity.

In Latvia, the amount of the childcare benefit depends on the amount in social insurance payments made during the 12 months before the baby is born. However, the law contains one special provision. This provision stipulates that if a parent becomes entitled to the childcare benefit while the previous child has not reached the age of 2, he/she may claim childcare benefit in an amount equivalent to that received during the childcare leave for the previous child. This provision was implemented to improve the situation of parents who have several children in a short period of time.

---

70 Official Gazette No. 35, 04 March 2009.

71 Available on the home page of Parliament, www.saeima.lv; http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/webAll?SearchView&Query=([Title]=*Fizisko+personu,+kuras*)&SearchMax=0&SearchOrder=4, accessed 14 May 2009.

72 Decision of the Administrative District Court of 16 December 2008 in case No. A42619207 A3692-08/3, available in Latvian on http://c4.vds.deac.lv/files/AL/2008/12_2008/16_12_2008/AL_1612_raj_A-3692-08_3.pdf , accessed 15 March 2009.

This particular case was about a mother who was on maternity leave with her second child when the first turned 2. When she applied and became entitled to the childcare benefit for the second child, the first was 2 years and 10 days old. So, according to the law, the Latvian authorities decided that the claimant could not benefit from that special provision and that she was entitled to the minimum childcare benefit of EUR 80 (LVL 56) instead of the EUR 558 (LVL 392) that she had received in childcare benefit for the first child.

The claimant contested this decision on the grounds of Article 2^1 of the Social Security Law (umbrella law) providing for the principle of non-discrimination throughout the social security system, Article 11 of CEDAW providing for the prohibition of the loss of rights to any social protection entitlement due to the use of the right to maternity leave and the Administrative Procedure Act stipulating the obligation to apply the law which is higher in the hierarchy in case of collision of norms.

The Administrative District court decided that there was no violation of the principle of non-discrimination on the grounds of maternity, since the right to childcare benefit is equally provided for both sexes, and men and women with regard to the right to childcare benefit are in a comparable situation, and, although the umbrella law provides for the principle of non-discrimination, the State has a wide discretionary margin to adopt special legal regulations on the entitlement and calculation of the childcare benefit. This decision demonstrates a lack of understanding regarding the concept of discrimination on the grounds of maternity, in particular because the court did not analyse the effect of the legal provisions providing for the entitlement of special rights when children are born consecutively in a short period of time in conjunction with the right to maternity leave. It also demonstrates a lack of understanding of the role and application of the general principles provided by umbrella laws.

The decision is currently being contested before the Administrative Regional Court.

Equality body decisions/opinions

Ombudsman: various cases on childcare leave

The duties of National Equality Body in Latvia are carried out by the Ombudsman. Latvian law allows the Ombudsman to represent the interests of persons in discrimination cases. The Latvian Ombudsman decided to represent the interests of a woman whose employer did not provide her with the same or equivalent work after her return from childcare leave, as stipulated by the law, in a case before the Supreme Court. This is because the Ombudsman has recently received several complaints on the same issue. All of them are from women. Consequently, it appears to be an important matter in the light of gender equality. Thus, the Ombudsman lodged a cassation claim before the Supreme Court emphasising the necessity to refer a preliminary question to the European Court of Justice on whether a violation of the law requiring provision of the same or equivalent work after childcare leave constitutes indirect discrimination against women.

LIECHTENSTEIN – *Nicole Mathé*

Policy developments

Federal elections 2009[73]

For the first time, the gender equality commission has used the Internet for a cross-party presentation of the female candidates. The website www.frauenwahl.li was created. In addition to this, the candidates also have the possibility to present their profiles in public discussion rounds. In 2009, Liechtenstein can look back on 25 years of female suffrage. However, the success of women is still very small. The position of women has clearly improved but not sufficiently, as the field of politics is still in men's hands. It has to be noted that 24 % of female participation in Parliament is only an interim step on the way of further progress and will encourage more actions in order to increase the number of women in politics.

A special exhibition is dedicated to the theme of '100 years of female suffrage in Europe and 25 years in Liechtenstein'[74] and can be visited from 8 March to 4 July 2009. The exhibition is considered to be an awareness-raising campaign for the so-called field of equality between women and men.

Legislative developments

Law proposal concerning the implementation of the Recast Directive[75]

The Government of Liechtenstein presented a proposal to Parliament on 23 September 2008 to implement Recast Directive 2006/54/EC. The implementation proposal of the Recast Directive does not go into much detail but lists a number of national laws that will have to be changed in the future in order to be in line with the Directive.

Miscellaneous

Various projects and activities to promote gender equality

In January 2009, the Brochure on Family Promotion[76] (*Familienförderung in Liechtenstein)* was sent to all households with minor children in Liechtenstein. The brochure is an updated version of information about various services for families in Liechtenstein. It contains useful information regarding family subsidies, kindergartens, financial support, leisure time offers and much more.

The competition for the Equal Opportunities Prize 2009 was open until 6 February 2009.[77] The prize of CHF 20 000 honours and helps finance projects in the fields of gender equality, handicap, migration and integration, social disadvantage, age and sexual orientation. Candidates can be enterprises, organisations, private initiatives or individuals. The project will soon be ready to start and is meant to have a lasting effect. Second prize 2009 went to the working group Men (*Mannsbilder*) for the creation of the association 'specialist department for men's questions'. Its objective is to become a contact point for men. The association wants to support men in crises and personal changes and stands for a fair value system and communication

---

73 www.frauenwahl.li, accessed 14 March 2009.

74 Press release of the information office Liechtenstein, dated 8 March 2009.

75 Law proposal BuA 2008/118 http://bua.gmg.biz/BuA/index.jsp, accessed 14 March 2009.

76 http://www.llv.li/pdf-llv-asd-merkblatt-familienfoerderung_fl_5sept08.pdf, accessed 14 March 2009.

77 Press release of the information office Liechtenstein, dated 12 December 2008.

behaviour. This specialist institution shall help identify societal questions in the changing role of men of the 21st century. From a balanced commitment of men in professional and family life both men and women will profit. Women perceive a participation in family duties and their children a stronger image of their father. For employers the advantage is to have psychologically more balanced employees.[78]

The second Business Day[79] took place in Vaduz on 16 February 2009, focussing on diversity and its application in practice. The Business Day brings together a large number of women in key positions. This new economic forum analyses the specific needs of female managers and entrepreneurs and how they think and act. The Government of Liechtenstein is the supporting institution of this economic forum. It is meant for female managers, entrepreneurs and students as well as for women and men from the world of economics. The Business Day offers the opportunity to network and the more people attend, the more creative and innovative the exchange will be.

In March 2009, the training course in politics for women[80] (*Politiklehrgang 2009)* is starting for the current year. This course will enable and encourage women to promote their ideas and potential in political committees and in public.

Documentation concerning *Gender medicine: Health female and male* was released on 13 February 2009. It can be accessed free of charge from the website of the Equal Opportunities Office in Liechtenstein: www.scg.llv.li. There are differences in health and illness, prevention and treatment between men and women. If these differences were taken into account, quality in prevention programmes and medicine could be increased. Scientists, nurses, doctors and professionals in consultation and prevention should increase their knowledge with regard to specific differences between men and women.[81]

LITHUANIA – *Tomas Davulis*

Policy developments

Financial measures

After the centre-right coalition formed the new Government in November 2008, it announced a package of drastic measures to regain the public finances balance. In order to fill the gap in the state social insurance budget, which was under great pressure due to the introduction of the capital-covered private pension system and the new family-related social allowances, legal amendments were adopted aimed at including certain uninsured groups of contractors (artists, farmers, journalists, and other self-employed persons) into the systems of social security and state health insurance. In addition, some of the calculation rules for determining the level of social allowances were revised. In particular, before the reform, the level of allowances corresponded to the level of monthly remuneration received during the quarter preceding the month of the beginning of a maternity leave, paternity leave or child-care leave, subject to minimum and maximum limits. Now, Article 6(2) of the Sickness and Maternity Social Security Law of 21 December 2000[82] states that the remuneration on the basis of which the amount of the allowances is determined shall

78 Press release of the information office Liechtenstein, dated 9 March 2009.
79 www.businesstag.li, accessed 14 March 2009.
80 http://www.llv.li/pdf-llv-scg-folder_politik_endversion-3.pdf, accessed 16 March 2009.
81 Press release of the information office Liechtenstein, dated 13 February 2009.
82 State Gazette, 2000, No. 111-3574.

be calculated on the basis of the insured income that the insured person has had during the previous nine calendar months, and, from 1 July 2009, during the twelve calendar months preceding the month of the beginning of a maternity leave, paternity leave or child-care leave. These amendments affect:

1) maternity leave (70 calendar days before and 56 calendar days after the baby is born, and 70 calendar days after the birth in the event of complications or multiple birth), where the social allowance amounts to 100 % of remuneration;
2) paternity leave that is granted to men straight after the baby is born until the child reaches the age of one month. The social allowance amounts to 100 % of remuneration;
3) parental leave that applies until the child has reached the age of three. During parental leave from the end of the maternity leave until the child has reached the age of one, the employee is entitled to an allowance equal to 100 % of the previous remuneration, and 85 % until the child reaches the age of two.

To cover the unexpectedly huge deficit of the state social insurance budget and to minimize the possibilities of fraud, certain measures have now been taken to restrict some of these benefits. The restrictions do not change the level of benefits or the main principles of calculation but reinforce the reciprocity and proportionality of the system. However, the tension in public finances makes it likely that the level of benefits will be frozen and that some state social assistance programmes will be revised (e.g. state support for children).

Legislative developments

Equal Opportunities Act amended

Apart from the Labour Code there are two other pieces of legislation dealing with the transposition of EC antidiscrimination law in Lithuania. Equal treatment of men and women is principally regulated by the Equal Opportunities Act of Women and Men of 1 December 1999[83] (EOAWM). It includes the main definitions, defines prohibited actions by the employer and establishes the legal framework for supervision of application, in which the Office of Equal Opportunities Ombudsman plays a major role. Using the same model, the Lithuanian legislator adopted another law on 18 November 2003 (in force since 2005) which deals with other prohibited grounds of discrimination – age, sexual orientation, race or ethnic origin and religion or belief.

On 17 June 2008, the new version of the Equal Opportunities Act (in force since 5 July 2008) (EOA) was adopted, aimed at transposing EC legislation. The modernization of the law (the first version was adopted on 18 November 2003) was highly controversial due to continually raised public and political debates on the prohibition of discrimination based on sexual orientation. The new law represents another attempt to bring domestic legislation in line with Directives 2000/43/EC and 2000/78/EC. The major novelty of the Act concerns the prohibited grounds of discrimination. In addition to the grounds of race, ethnic origin, age, disability, sexual orientation, religion and belief, the new grounds of sex (!), nationality, language, and social origin were introduced. In the prohibition of discrimination based on language or social origin, the legislator does not bother to establish the special provisions for its implementation. The new law expressly refers to sex as a prohibited ground of discrimination. This has a twofold effect. A negative aspect is that the gender equality legislation overlaps with a new multi-ground Act, thus creating unnecessary

[83] State Gazette, 1998, No. 112-3100.

complexity. Two different laws refer to the prohibited ground of sex, but the content of both regulations is similar but not identical. This creates a situation of legal uncertainty, because the relationship between the two Acts remains unclear. On the other hand, the new EOA is elaborated in more detail, thus covering some legal deficits in the EOAWM. For instance, the EOA expressly defines the instruction to discriminate as discrimination, whilst the EOAWM fails to do so; the EOAWM introduces the rule on the reversal of the burden of proof in litigation involving natural persons, but the EOA requires the rule with respect to legal persons to be applied as well. Finally, the new EOA expressly covers employers in the area of public services, while the EOAWM refers to employers in the narrow meaning of employment relationship only.

Case law of national courts

Reduction of salaries of pregnant flight attendants

The female flight attendants of the bankrupt national airlines 'FlyLAL' have lodged complaints before the court challenging unlawful reductions of their salaries. Due to pregnancy they refused to work in conditions that might affect their health or the health of the child and they were therefore suspended from work (in Lithuanian: *prastova* (idle time)). For this idle time, the employer did not pay the average wage but the fixed wage agreed in the contract of employment which was nearly equal to the minimum wage. The supplements for flight hours, which usually constitute 400 or 600 % of the monthly salary, were not paid. The female flight attendants argued that their average wage was reduced illegally and that this negatively affects the level of state social allowance during maternity leave or parental leave. The State Labour Inspectorate had ordered the employer to pay the average wage, but the company refused on the ground that no work was provided.

The provisions of the Lithuanian Labour Law are sufficiently clear in this regard. Under Article 278(1) of the Labour Code 'Maternity protection', pregnant women must not be assigned work in conditions that may be hazardous and affect the health of the woman or the child. The employer shall transfer the woman (upon her consent) to another job in the enterprise, agency or organisation. If transferring a pregnant woman to another job is not technically feasible, the pregnant woman shall, upon her consent, be granted a leave until she goes on her maternity leave and shall be paid during the period of extra leave her average monthly pay (Article 278(5) of the Labour Code). The case raises a number of questions concerning gender equality. First of all, whether the Equal Opportunities for Men and Women Act will be applied by the Court or complainants, and, secondly, how the refusal of the employer to pay the average wage will affect the calculation of the maternity allowance.

Equality body decisions/opinions

Complaints received by Ombudsman of Equal Opportunities

The Office of the Ombudsman of Equal Opportunities announced that the Office received 222 complaints in 2008, compared to 164 complaints in 2007 and 135 complaints in 2006. There was a small decrease in the number of complaints related to sex discrimination: 41 complaints (18 % of the total), compared to 47 complaints in 2007. There was a remarkable decrease in complaints concerning sexual harassment: from 18 in 2007 to 2 in 2008. Out of 148 individualized complaints, 77 were initiated by women and 71 by men. One third of complaints were

related to discrimination in the sphere of employment and occupation, 27 % of complaints address the activities of the public institutions and agencies, 18 % were about the sale of goods or provision of services, and 6 % were about education.

The number of gender-related complaints tended to remain the same, but their individual share has decreased due to the introduction of new prohibited discrimination grounds (social status, place or residence, language) with the new version of the Equal Opportunities Act. The complaints arising from employment and occupation still remain one of the most intensive areas of activity of the ombudsperson. The relatively small number of complaints concerning sexual harassment indicates the persistence of social, legal and psychological obstacles to defending the right to non-discrimination.

LUXEMBOURG – *Anik Raskin*

Policy developments

Childcare fees

On 1 March 2009, the announced childcare-service voucher system was introduced in Luxembourg.[84] It gives each child the right to at least three free hours of care per week. The scheme also offers twenty-one hours at a reduced rate of EUR 3 per hour maximum. The system was announced as the first step towards free childcare.

Gender equality on local level

On 12 February 2009, the Minister in charge of equal opportunities, in collaboration with the Minister in charge of internal affairs, the Association of Luxembourg Towns and Municipalities and the National Council of Women in Luxembourg presented new tools addressing local governments. These tools are meant to support local authorities in organising, implementing and evaluating their gender equality policies.[85]

Legislative developments

Bill No. 5860

On 11 February 2009, Bill No. 5860 was adopted by Parliament. This law implements:

- the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime;[86]
- the Council of Europe Convention on Action against Trafficking in Human Beings.[87]

The new law makes Human Beings Trafficking a specific penal offence, whereas until now it was included in Chapter IV of the Penal Code, which concerns prostitution and trafficking in persons.

---

84 See *European Gender Equality Law Review* No. 2/2008, p. 77.

85 http://www.mega.public.lu/actions_projets/politique_communale/national/index.html, accessed 2 March 2009.

86 http://untreaty.un.org/English/TreatyEvent2003/Texts/treaty2E.pdf, accessed 2 March 2009.

87 http://www.coe.int/t/dghl/monitoring/trafficking/Source/PDF_Conv_197_Trafficking_E.pdf, accessed 2 March 2009.

Equality body

The *Centre pour l'Egalité de Traitement* or *CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET, in cooperation with the University of Luxembourg, organised a colloquium on 'Human Inequality' from 19 to 21 February 2009. It also launched a national campaign in order to provide information on its missions and aims.

From late 2008 to February 2009, the CET had to deal with about thirty claims. Most of them were beyond the competence of the CET. Among those within the jurisdiction of the CET, there was only one complaint regarding gender discrimination, which was about the name of married women. In Luxembourg, married women are automatically registered under the name of their husbands. If they want to be registered under their own name, they have to apply for it.

Miscellaneous

Reproductive and sexual rights

The NGO *Mouvement pour le Planning Familial* (Family Planning Association) launched a campaign in February,[88] asking for a revision of the 1978 law which legalised abortion under certain conditions. In Luxembourg, abortion is legal during the first 12 weeks of pregnancy under the following circumstances:

– if continuation of the pregnancy or the living conditions that may result from the birth are likely to endanger the physical or mental health of the pregnant woman;
– if there is a serious risk that the child will be born with a serious disease, physical malformation or considerable mental defects;
– if the pregnancy can be considered as resulting from rape.

A physician's certificate concerning the existence of the circumstances is required.

Beyond this 12-week period, abortion is permitted only if there is a very serious threat either to the life or health of the pregnant woman or that of the child to be born. This serious threat must be certified by two qualified physicians.

The Family Planning Association demands a liberalization of the law, by eliminating the circumstances required for abortion during the first 12 weeks of pregnancy. The Association also requires systematic integration of sexual education and information into school programmes and free access to contraceptive methods.

MALTA – *Peter Xuereb*

Policy developments

Interesting and conflicting developments

There have been interesting and conflicting developments that point to the need for new or revised policy. In the first incident, a government representative asked the relatives of patients at the main public hospital to care for their convalescing relatives at home in order to free up much-needed bed space. The Chamber of Commerce, Enterprise and Industry reacted strongly, arguing that the problems of the public sector should not be shifted on to the private sector.[89] In Malta's culture, caring

[88] http://www.planningfamilial.lu/planning.php?idp=23&id=20&idnews=15, accessed 2 March 2009.

[89] 'Caring relatives needed at workplace, Chamber tells Health Secretary', www.timesofmalta.com, accessed 19 February 2009.

responsibilities normally fall on women. On the other hand, in a second development, a recent National Commission for Higher Education report declares that the country's workforce needs to undergo a paradigm shift if Malta is to remain competitive within the European Union. A substantial expansion of the workforce is needed, with the creation of an additional 55 000 highly qualified workers and 99 000 medium qualified workers if Malta is to reach Lisbon-related targets by 2015. Malta is on course to produce about a third of those numbers. Malta needs to 'lose' about 77 000 low qualified workers. The report says that achieving these figures also translates into a further 16 600 women joining the workforce if the Lisbon target of female participation of 41 % is to be achieved by 2010.[90]

These two news items point in the direction of policy formulation that fully exploits the resource potential of women at work, also dramatically increasing the numbers of both sexes in higher education, while exposing the 'carer' issue. There has been no official government reaction as yet, but it can be expected that there will be concerted policy proposals to address the core challenge of utilising every available resource and skill, and women are a big part of this picture. At the same time, the Government has questioned the timing of the European Commission proposal to extend the minimum full-pay maternity leave entitlement to 18 weeks, saying it would have negative effects in the economy at this time of economic downturn.

Legislative developments

Amendments in line with Directive 2002/73/EC

Although not yet law, two very welcome Bills have been tabled in 2009. Both make important amendments to current law, with a view to bringing the law into line with Directive 2002/73/EC (Equal treatment in the access to employment, vocational training and promotion, and working conditions). Bill No. 20 amends the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta), while Bill No. 21 would amend the Equality for Men and Women Act (Chapter 456, Laws of Malta, henceforth referred to as EMWA).[91] The first Bill clarifies the position regarding dismissal and on the power/obligation of the industrial tribunal to award compensation. The second Bill will replace the current definitions of discrimination and indirect discrimination, the related burden of proof rule, and would amend the Equality for Men and Women Act (EMWA) to expressly provide that the National Commission for the Promotion of Equality (the gender and race equality body) shall act in an independent manner. These 'clarifications' are most welcome.

It has also been announced by the National Commissioner for Promotion of Equality (NCPE) at their 5th Annual Conference on 6 March that work is proceeding on the drafting of a Legal Notice under the terms of the EMWA to bring into force much-awaited regulations governing *inter alia* the power of the NCPE to refer a case to the competent civil court or industrial tribunal. At the same time, a circular from the Office of the Prime Minister (OPM Circular No. 6/08 February 2008) brings in the official government teleworking policy (Telework National Standard Order, 2008, Legal Notice 312/2008, made under the Employment and Industrial Relations Act of 2002, Chapter 452 of the Laws of Malta). This is of importance for the reconciliation of work and care responsibilities, by creating a flexible work environment.

---

90 www.nche.gov.mt, accessed 2 March 2009.

91 The Bills can be accessed at http://www.doi.gov.mt/EN/bills/2009, Bill 20 and Bill 21 respectively, accessed 6 July 2009.

Equality body decisions/opinions

Annual report NCPE

The NCPE (the equality body for gender and race) held its fifth annual conference on 6 March 2009, during which it presented its Annual Report for 2008.[92] The Report as usual lists complaints under a number of headings. For the first time, since the NCPE's brief was widened to include 'race', only in 2008, a complaint of discrimination on grounds of race is featured. Other complaints relate to sexual harassment, among several other headings related to gender discrimination. In accordance with its usual practice, full details and results are not given in the report, but for the first time, the Report summarises some selected key cases (part 4.5 of the Report). The Report also details the results of several projects and research studies carried out by this equality body in 2008.

Miscellaneous

1. The ('illegal') immigration debate shows signs of becoming a central issue in the run-up to the European Parliament elections in June. Immigration is a main public concern, and all candidates in the EP elections are keen to be seen proposing solutions. While gender does not feature directly, race does, in the guise of protecting fundamental values, identity and culture, and security.[93] This is of concern to those who see the ever-growing possibility of multiple discrimination, especially in regard to ethnic minority women, in the future.

2. The NCPE, which is the gender and race equality body, has published its final report in the Project 'Voice for All', a project funded under the European Community's PROGRESS (2007-2013) programme for Employment and Social Solidarity. The Project includes a comparative survey of the law and practice in a number of Member States, including Malta, across the grounds of discrimination.[94]

3. Another issue of general interest has been the extent, if any, to which the position of gay couples has been taken into account in the context of the upcoming rent law reform. The answer is, so far, not at all.[95] This raises the issue of the Government's stance on the proposed Discrimination Directive and in particular the question of discrimination in the area of housing.

4. While the gender gap persists, in particular in relation to occupations and pay, the latest labour force surveys[96] show some improvement in employment rates and some quite significant growth in women's employment in government departments and ministries.

5. A major new publication in the *Broadcasting Studies Series* has just been made available by the Broadcasting Authority in Malta.[97]

---

92 Available at www.equality.gov.mt, accessed 6 July 2009.

93 See, for example, 'Common Integration Policy for Europe', *The Malta Independent on Sunday*, 22 February 2009, http://www.independent.com.mt, accessed 6 July 2009.

94 Further information on www.equality.gov.mt, accessed 12 March 2009.

95 See for example 'Rent reform: standing up for cohabiting and gay couples' by Evarist Bartolo in *MaltaToday*, 25 January 2009, www.maltatoday.com, accessed 25 January 2009.

96 Q2 and Q3/2008, National Statistics Office, available at www.nso.gov.mt, accessed 12 March 2009.

97 Joanne Spiteri *Gender Issues in News Bulletins: A Comparative Analysis between Malta, Cyprus and Ireland* Malta, Broadcasting Authority 2008, ISBN978-99932-21-09-8.

NETHERLANDS – *Rikki Holtmaat*

Equality body decisions/opinions[98]

Opinion of the Equal Treatment Commission (ETC 2009-01) of 6 January 2009: College of higher professional education not convicted for rejecting a student because of refusal to shake hands with a coordinator of the opposite sex

The so-called clash between religious convictions and traditions on the one hand and the prohibition to discriminate on the ground of sex on the other hand continues to cause a lot of debate in the Netherlands. Recently, the Dutch Equal Treatment Commission (ETC) issued a new Opinion about a male complainant with an Islamic belief, who claimed that he had not been accepted for an education programme because of his refusal to shake hands with persons of the opposite sex. In this case, the complainant was invited for some entrance examinations and an introductory interview at a college for professional education. At the beginning of this interview, however, the complainant refused to shake hands with the (female) coordinator of the programme. This caused a dispute between the complainant and the coordinator, as the coordinator felt discriminated against. The complainant was upset and addressed the manager of the College. The manager explained to him that shaking hands is an important custom in the Dutch culture, especially with regard to the education concerned, 'Oriental Languages and Communication'. The complainant took this explanation as a rejection of his application by the College. The ETC considered that the treatment by the College constituted indirect discrimination, but the College managed to justify this treatment. The management stated that they were willing to accept alternative ways of greeting, on the condition that those who want to do so are able to put themselves in the position of the one who is greeted. The College proved that they had accepted other students who were not willing to shake hands with people of the opposite sex. They even gave an example of a male student with similar convictions, who was given the opportunity to take examinations from male teachers only. However, the complainant's attitude (according to the College) had been disrespectful and rude to the coordinator of the education programme. The ETC accepted this justification, and found that the attitude of a person who refuses to shake hands with persons of the opposite sex is decisive for the extent to which colleges have to adapt to students with religious convictions concerning touching persons of the opposite sex (to whom they are not married). Additionally, the ETC criticized the college for giving such students the opportunity to take examinations from male teachers only, as this creates sex-based differentiations which are 'undesirable and contrary to the goals of equal treatment law'.

This case is an example of how the ETC weighs the various interests in difficult cases in which gender, culture and religion are involved. Also, the last consideration (*obiter dictum*) of the ETC is important, because it shows that 'special measures' accommodating the wishes of people with religious objections may possibly be considered as unlawful. It remains to be seen how in concrete cases the ECT would deal with such a measure.

[98] To be found at the website of the Equal Treatment Commission; http://www.cgb.nl, accessed 14 May 2009.

Miscellaneous

Positive action programmes and quotas aimed at increasing the participation of women in certain sectors of the private labour market or in (semi)governmental organisations is an issue that also raises a lot of discussion from time to time. In the beginning of March 2009, the Minister of the Interior, Mrs Ter Horst (who is responsible for personnel policies in the civil service) refused to accept the candidature of a male chief of police for a large police district in the southern part of the Province of South Holland. Mrs Ter Horst justified her decision by stating that she had made an agreement with the Assembly of the chiefs of police in the Netherlands that by the year 2011 25 % of chiefs of police would be female or from a different ethnic origin (than Dutch). This percentage, it appears, will certainly not be met if no concrete action is taken. The Minister was very dissatisfied that until now no real progress has been made. Although in this particular case there were two female candidates, the Assembly of chiefs had asked the Minister to appoint a Dutch male candidate to the post. In a discussion in Parliament, the Minister declared that she could only accept a Dutch male candidate if proof were presented that no well-qualified female or 'minority' candidate was available. To this, Members of Parliament, especially from the Christian Democrat Party, reacted and said that the Minister's policy was very rigid and damaging to the interests of the police force, which should be able to appoint the most suitable candidate, regardless of his/her sex or ethnic background. After a discussion with the Chair of the Assembly of police chiefs in which it was (again) agreed to work hard to meet the targets, the Minister finally accepted the male candidate.

NORWAY – *Helga Aune*

Policy developments

Report on Gender Equality Act Section 21 and its effectiveness[99]

In 2008, the Ministry of Children and Equality initiated a research/evaluation project on the effectiveness of the requirement on gender representation in all publicly appointed boards and committees. Section 21 regarding representation of both sexes in all public committees, etc. provides detailed requirements for the composition of public bodies. In a committee with two or three members both sexes should be represented, and in a public body with four or five members each sex shall be represented by at least two members. In public bodies with more than 9 members, at least 40 % of each sex should be included.

Exceptions may be made if there are special circumstances that make it obviously unreasonable to demand that the requirements be fulfilled. The requirements do not apply to public bodies which pursuant to statute shall consist only of members from directly elected assemblies.

The provisions of the Local Government Act shall apply to committees, etc. elected by publicly elected bodies in municipalities and counties.

The result of the evaluation, carried out by the University of Oslo, was presented in March 2009 and disclosed that 38 % of all boards do not meet the requirements of

[99] http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2009/likestillingsloven--21.html?id=547656#, accessed 14 May 2009.

the law. This calls for improved control measures as well as more effective penalty actions where the requirements of the law are not met.

Wearing the hijab (headscarf) in public services

The police force has for a long time been considering whether to allow the use of the headscarf as part of the uniform.[100] Wearing a headscarf has been discussed both as a matter of freedom of religion and as a gender issue, as in practice it is Muslim women who form the majority wearing religious symbols.[101] The debate took a political turn when the Ministry of Justice first announced it would allow the headscarf as part of the police uniform, but later reached the opposite conclusion after a few weeks of political controversies. The Ministry of Justice and the Government had first attached much importance to the argument of integration of minority groups into the police force. However, many of the minority women in the force were not in favour of accepting the *hijab* as part of the uniform. They stressed the importance of representing the police uniform and its values, and not mixing it with other values that individuals may keep sacred in their private lives.

Survey of implementation of a gender perspective in all fields of Ministries' budgets[102]

The report *På sporet av kjønnsperspektivet* (On track of a gender mainstreaming perspective) is the final report after a three-year project mapping and evaluating the work of implementation of a gender perspective in all fields of the budgets of the Ministries. The overall conclusion is that the gender perspective has received more attention in the work carried out, but that the amount of focus varies across the different Ministries and that continued focus is necessary. In the report attention is given to the fact that the Ministries have very different ways of working and different areas of attention, which calls for a multilayered approach in working methods of mainstreaming a gender perspective.

Legislative developments

Proposal for amendments to Act on Occupational Compensation in case of injury

In relation to the proposal for amendments/a new structure of the Act on Occupational Compensation,[103] the Equality and Discrimination Ombud has, in its letter of consultation,[104] stated that the new sections of the Act are in violation of the Gender Equality Act, as health injuries typical for female-dominated professions are not on the list of injuries covered by the Act while injuries typically inflicted in male professions are on the list. At present, 9 out of 10 persons who receive occupational compensation are men. The Ombud points out that typical 'shaking syndromes' (injuries typical for men having worked with heavy shaking machinery) are on the

---

100 Article in the newspaper: *Dagsavisen*, 27 September 2008.

101 The military forces as well as the customs authorities and the health sector all accept the use of *hijab* with their uniforms.

102 http://www.regjeringen.no/nb/dep/bld/dok/rapporter_/rapporter/2009-2/pa-sporet-av-kjonns perspektivet---integr.html?id=547248, accessed 14 May 2009; see also DIFI rapport 2009:1, ISSN 1890-6583.

103 http://www.regjeringen.no/nb/dep/aid/dok/hoeringer/hoeringsdok/2008/horing--forslag-til-ny-framtidig-arbeids/horingsnotat.html?id=539614, accessed 14 May 2009.

104 http://www.ldo.no/no/TopMenu/Aktuelt/Forside/Yrkesskaderegelverket--i-strid-med-likestillings loven/, accessed 14 May 2009.

list, while damage to muscles and ligaments resulting in pain in neck and shoulders that are typical for female-dominated professions are not.

Case law of national courts

There are no court cases to report regarding gender equality issues, neither from the Civil Courts nor from the Labour Court in the period October 2008 – March 2009.

Equality body decisions/opinions

Discrimination on grounds of pregnancy and parental leave[105]
A woman applied for the position as the Head of a Kindergarten. At the time of the application the woman was pregnant, a fact that the employer was aware of. The female applicant was interviewed, but was named second on the list of possible candidates. The Gender Equality and Anti-Discrimination Tribunal's evaluation was that the pregnant woman had better formal qualifications in addition to longer practical work experience. Even though the Tribunal acknowledges the employer's right to consider personal attitudes and character as factors in the total evaluation, the fact that the employer had not checked any of the pregnant applicant's references did imply that the employer had disregarded her simply because of her pregnancy and the expected period of leave. The Tribunal also pointed out that the employer had not put any of its evaluations and considerations in the case in writing, thus leaving the case to be evaluated after the facts available.

Employer's discrimination against employee on grounds of reprisal regarding complaint regarding breach of provisions of Gender Equality Act[106]
A county providing nursing services in people's private homes needed to hire a nurse. Two applicants were interviewed. A got the job, while B, who had previously been receiving temporary work on an on-call basis, got the news that he was not to expect any more work. B blamed this on the fact that he had complained to the Equality and Discrimination Ombud about a lack of understanding for the need of flexible arrangements of work hours due to care responsibilities as a single parent. The Gender Equality and Anti-Discrimination Tribunal agreed that the employer's action to deny the employee work for the future was linked to the applicant's complaint and was thus in violation of the GEA Section 3, fifth paragraph.

Equal Pay[107]
Four nurses employed as Heads of Department compared their pay to two medical doctors who were also employed in positions as Heads of Department. The nurses claimed that they performed work of equal value and that the pay was not equal. The Gender Equality and Anti-Discrimination Tribunal put decisive weight on the fact that the medical doctors trained as doctors provided a specialty that the hospital was in need of and that their work was therefore not of equal value.

[105] Gender Equality and Anti-Discrimination Tribunal, case No. 25/2009, 6 February 2009.
[106] Gender Equality and Anti-Discrimination Tribunal, case No. 27/2008, 6 February 2009.
[107] Gender Equality and Anti-Discrimination Tribunal, case No. 29/2009, 6 February 2009.

POLAND – *Eleonora Zielińska*

Policy developments

Gender equality issues continue to be of minor importance for Polish policy makers and seldom appear in broader social debates. There has been no substantial progress in the process of implementation of the Service Directive; until 15 March 2009, the relevant draft law has not yet been presented to Parliament. The two bodies claiming to be responsible for antidiscrimination policy (the Department of Women, Family and Counteracting Discrimination of the Ministry of Labour and Social Policy, and the Government Plenipotentiary for Equal Treatment) continue their discussion on competences. There still is no independent equality body with a mandate to become involved in resolving individual cases. In February 2009, more than 30 women's NGOs and organisations fighting discrimination sent a letter to the European Commission drawing its attention to the reluctance of the Polish Government in this respect.[108] At the same time, public opinion has been preoccupied with the discussion on a draft law prohibiting in vitro fertilisation,[109] and with information on offences reported to the police asserting that certain doctors involved in in vitro fertilisation procedures have caused disorders in embryos (conceived children).[110] This has given public officials and the Catholic Church many occasions to express humiliating opinions about infertile persons, in particular women,[111] and has created a favourable climate for discrimination of children born as a result of medically assisted reproduction (discrimination on the ground of 'in vitro conception').[112]

Legislative developments

In the reporting period, the Labour Code[113] was amended twice; the first amendment mainly corrects and supplements the previous implementation of equality directives;[114] the second extends maternity benefits.

Amendments aimed at correcting and supplementing equal treatment provisions

The Law of 21 November 2008[115] introduces several modifications to equal treatment provisions. It improves the definitions of indirect discrimination (Section 18^{3d}(4) LC), of harassment (Section18^{3d}(5) and of sexual harassment (Section 18^{3d}(6) LC). It explicitly reflects the idea that discrimination includes less favourable treatment based on a person's rejection of or submission to such conduct (Section18^{3d}(7) LC). It

[108] www.feminoteka.org, accessed 16 March 2009.

[109] http://www.rp.pl/artykul/278606.htmlhttp://polskatimes.pl/fakty/kraj/82665,marek-jurek-donosi-na-kliniki-in-vitro,id,t.html, accessed 16 March 2009.

[110] http://polskatimes.pl/fakty/kraj/82665,marek-jurek-donosi-na-kliniki-in-vitro,id,t.htm,l, accessed 16 March 2009.

[111] http://wiadomosci.onet.pl/1921658,11,sejm_wysluchanie_obywatelskie_ws_in_vitro,item.html, accessed 16 March 2009.

[112] Parents of children conceived in vitro have established a special association to defend their rights: 'Nasz Bocian' ('Our stork'), www.Nasz-bocian.pl, accessed 16 March 2009.

[113] Labour Code Act of 26 June 1974. *Journal of Laws of the Republic of Poland* of 1994 No. 11 item 38. (hereinafter: Dz.U.). Unified text: Dz.U. 1998 No. 21 item 92 with further amendments.

[114] The implementation was criticised by the European Commission for improper transposition of Directives 2000/43/EC and 2000/78/EC. The amendment was also inspired by the need for transposition of Directives 2002/73/EC and 2006/54/EC.

[115] Amending the Labour Code Act, Dz.U. No. 223, item 1460 http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630_-u.htm, accessed 12 March 2009.

amends the Code's provisions dealing with exceptions to the principle of equal treatment (Section18^{3b}(2) LC). It also broadens the scope of protection against worse treatment when filing a discrimination claim, by extending its application to supporting and assisting persons (Section 18^{3e} LC).

Most of these modifications should be regarded as an adequate response to the criticism expressed on many occasions, since they accomplish greater consistency of the Labour Code with EU gender equality directives. However, several provisions of EU law have still not been covered and some formulations are ineffective.

A positive modification is the new definition of indirect discrimination. It now includes reference not only to existing, but also to hypothetical situations and contains reference not only to unfavourable disproportions but also to particularly disadvantageous situations. It makes reference to 'legitimate aim' and, as regards the means to achieve this aim, to the principle of proportionality. In addition, while describing the area in which indirect discrimination may occur, the Law substitutes the general expression 'in conditions of employment' by more detailed terms of 'establishing and termination of employment, conditions of work, promotion and access to training raising professional qualifications'. The definitions of harassment have been significantly improved. They now reflect a clear distinction between sexual harassment and harassment based on sex. In addition, after the amendments, definitions of harassment and sexual harassment refer to the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. Also, the new Law properly modifies the definition of harassment, by adding a reference to grounds of such behaviour similar to the grounds of discrimination. The definition of admissible exceptions to the principle of equal treatment now includes reference to the principle of proportionality and to the notion of 'legitimate aim' and provides a more precise formulation of the exception in cases related to the character of work (Section18^{3b}(2^{1}) LC). In particular, the notion of 'genuine and determining occupational requirements' was added, since previously, the type of work or conditions of its performance were enough to justify the fact of not being offered an employment contract, based on the grounds listed in the Labour Code. The differentiation based on age in establishing the conditions of work, promotion and access to training raising professional qualifications is now allowed as an exception when the criterion of duration of employment is applied.

However, some provisions of the Labour Code still need further improvement. For example, the Law fails to include a proper reflection of the concept of the prohibition to 'instruct' discrimination. The formulation of the exceptions to the principle of equal treatment is still far from adequate when compared to the EU equality directives.

Amendments aimed at enforcement of protection of pregnant women and extending maternity benefits

The Law of 21 November 2008 also provides for an explicit guarantee for women after maternity leave, regarding their return to their previous position (or, if that is not possible, to an equivalent position, corresponding with the woman's qualifications) with a remuneration equal to that received by other employees working in the same position who did not profit from maternity benefits (Section183^{2} LC). It also refers to the improvement in safety and health conditions in the work performed by pregnant employees, as well as those who have recently given birth or are breastfeeding (Section 207(2^{5})LC).

On 6 December 2008,[116] Parliament passed a law modifying the Labour Code and some others laws with respect to the length of maternity leave, extending other maternity benefits. According to the amendments, as of 2010, maternity leave will be composed of two parts: obligatory and optional. As regards the obligatory maternity leave, three presently existing time limits will be substituted according to the new regulation: 18 weeks when giving birth to the first child, 20 for every subsequent birth and 28 for multiple birth will be changed into 20 weeks (for the first and every other single birth) and 31 weeks for twins, 32 weeks for triplets etc. Extended in a similar way will be the length of leaves in case of adoption of one or more than one child simultaneously. As of 2010, the new law will give parents the possibility to take an optional maternity leave after expiration of the obligatory maternity leave. The length of this optional leave shall increase gradually from 2 weeks in 2010 to 6 weeks in 2014. At present, after expiration of 14 weeks of maternity leave, the women can transfer the remaining part of her leave to the child's caring father. The amendments envisage the introduction of a non-transferable part of the leave for the father in addition to the possibility mentioned above. This right will perish if the father does not use it during the first year of the life of the child. This so-called paternal leave will be introduced gradually starting from 2010 (first amounting to one week). The other novelty provided for by the amendments consists in the introduction of a protective period of 12 months, during which the employer will not be able to dissolve the employment contract after the employee returns from maternity (paternity) leave and decides to work a shortened work time schedule, instead of going on parental leave. The employer is obliged to accept the employee's choice. Dissolution of such a contract is possible only in case of bankruptcy or liquidation of the enterprise or for disciplinary reasons.

The law now also provides for an augmentation of the bases of the retirement and disability pensions and insurance contributions paid from the State Budget, and increases the maternity leave payment for farmers. The law also extends the maximum length of the period of payment of sickness benefits for pregnant women from 182 to 270 days. At the same time, other pro-natal measures have been introduced, such as the possibility to use the enterprise's social fund for development and maintenance of nurseries and kindergartens for children of the employees, situated at the place of employment, or the release from payment of contributions to the Employment Fund for a period of 36 months for each employee continuing work after return from maternity, paternity or parental leave.

The new regulation may be positively evaluated in many respects. Some particularly positive changes are the extension of child benefits, the introduction of incentives for employers to set up company kindergartens, conditioning the amount of maternity leave in cases of adoption on the number of adopted children, providing part of paternity leaves on a non-transferable basis and explicitly introducing the same level of protection for men using paternity leave as women have in case of maternity leave. The obligation to accept an employee's choice for maternity/ paternity leave may also be positively assessed.

On the other hand, the regulation may raise some criticism and doubts. It may be criticized with regard to the relatively short length of the non-transferable leave for the child's father and the fact that its introduction has been postponed. It has also been pointed out that extension of the obligatory maternity leave may result in reluctance of

[116] Law of 6 December 2008 on the Amendments of Labour Code and Some Others Laws, Dz.U. 2008 No. 234 item 1654; http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630_-u.htm,,accessed 12 March 2009.

employers to employ young women. This criticism has been weakened by the fact that according to the new law, this extension is significant only for multiple births (which occur rather rarely). The provision conditioning a special allowance for giving birth to a child (so-called *becikowe*) on providing a physician's confirmation that the women was under medical supervision during pregnancy raises some doubts as well.[117] It may lead to discriminatory treatment of women living in regions with poor access to medical services and in the Polish social reality it may be used as an opportunity for arbitrary control of women's behaviour or lifestyle during the pregnancy. It can be also pointed out that while extending the protection of employees returning from maternity leave, the amendment fails to add explicitly that the horizontal protection in case of discrimination also applies to any less favourable treatment of women related to pregnancy or maternity leave (this might be unclear, since the provisions dealing with the protection of paternity are not included in the chapter of the Labour Code dealing with equal treatment).

Case law of national courts

Discrimination in employment in connection with reaching retirement age

The issue of discrimination in employment in connection with reaching retirement age remains an important subject of the Supreme Court's case law. In a recently adopted resolution, of 21 January 2009,[118] the Supreme Court expressed an opinion which reads as follows: 'Reaching the retirement age and entitlement to a pension may not constitute the exclusive (sole) reason for termination of the employment contract by the employer (Article 45 Paragraph 1 of the Labour Code)'.[119] In order to justify its resolution, the Supreme Court refers to equal treatment provisions of the Labour Code which do not include reaching retirement age as one of the exceptions to the prohibition of discrimination based on age. It should be added that by using the word 'exclusively' the Supreme Court intended to stress that the situation is different when reaching retirement age is only one of the reasons lying behind the termination of a contract (if, for example, the main reason is a decrease in the number of employees resulting from a reorganisation of the enterprise). In such a situation, the release from work of an employee who is already entitled to a retirement pension is a just and appropriate solution if work is the only source of income for the remaining persons.[120]

This resolution of the Supreme Court is important for gender equality, since it shows the multiple dimensions of discrimination, for women, when reaching retirement age (5 years lower than men's retirement age) is the sole cause of termination of their employment contract.

---

[117] This provision enters into force on 1 November 2009.

[118] Resolution of the Supreme Court , Labour law, Social Security and Public Affairs Chamber (panel of 7 justices) II PZP 13/08 www.sn.pl/orzecznictwo/Index.html, accessed 15 March 2009.

[119] This resolution was not based on any particular case, but appears to be the answer to a legal question posed by the Commissioner for Civil Rights Protection as part of a special procedure which can be initiated when diverse Supreme Court jurisdictions' opinions exist on the same issue. RPO 571564 -III/07/LN/MPR. www.rpo.gov.pl, accessed 15 March 2009.

[120] Compare: judgment of Supreme Court of 10 September 1997, I PKN 246/97 and of 23 January 2001, I PKN 209/00www.sn.pl/orzecznictwo/Index.html, accessed 15 March 2009.

PORTUGAL – *Maria do Rosário Palma Ramalho*

Legislative developments

New general legislation regarding public servants working under a labour contract

On 1 January 2009, new and general legislation entered into force regarding public servants that have a labour contract - Law No. 59/2008, of 11 September 2008.[121]

This legislation deals with discrimination issues and paternity and paternity issues in much the same way as the Portuguese Labour Code of 2003 does for private workers, being divided into two parts of legislation (one called *Regime* and the other called *Regulamento*). The rules apply both to employees of administrative services with a labour contract and to nominated civil servants (Articles 8 b) and 8 d) of Law No. 59/2008).[122]

The matters addressed are equality and non-discrimination in general, gender equality and maternity and paternity issues. The Law establishes a general prohibition of discrimination in access to employment and in the course of the contract or relationship, on several grounds, namely birth, age, sex, sexual orientation, family status, genetic skills, deficiency of reduced capacity to work, chronic disease, nationality, ethnical origin, religion and ideological or political beliefs and trade union affiliation (Article 14 of the *Regime*); the concepts of direct and indirect discrimination, equal work and work of equal value are also defined (Articles 6 of the *Regulamento*) as well as the concepts of pregnant women, women who have given birth and who are breastfeeding (Article 25 of the *Regime*); harassment and sexual harassment is defined and prohibited as a discriminatory practice (Article 15 of the *Regime*); positive action in this area is permitted (Article 16 of the *Regime*); the legal enforcement of discrimination rules is realised by several instruments, including the right to legal action, the right to extended damage compensation, a procedure in which discriminatory clauses in collective agreements are automatically replaced by neutral clauses, and public inspection procedures (Articles 17, 22 of the *Regime*, and Articles 297 and ff of the *Regulamento*); finally, maternity and paternity provisions include several types of leave, such as maternity leave, paternity leave, parental leave and other special leaves, specific working conditions in order to facilitate the reconciliation of work and family life, such as part–time work, prohibition of extra work under certain circumstances, and absence for family reasons, and also specific protection for women during pregnancy and while breastfeeding, in what concerns working conditions and in dismissal (Articles 26 and ff. of the *Regime*).[123] In our view, these kinds of provisions are important since they focus on a more balanced sharing of family responsibilities between mother and father and this is an important tool for the practical implementation of gender equality also at the employment level.

---

[121] This legislation can be traced in the Portuguese Legal Journal (*Diário da Repúiblica*), which is available online (www.dre.pt), accessed 12 February 2009.

[122] Prior to this legislation, the situation was the following: employees working under a labour contract in public services were governed by the Labour Code, in matters concerning discrimination (in general and on the ground of sex) and the protection of maternity and paternity; other civil servants were governed by the Labour Code in what concerns discrimination but had their own rules in what concerns maternity and paternity.

[123] Most of these provisions are developed and complemented in the *Regulamento*.

New Labour Code

On 12 February 2009, a New Labour Code (LC) was published (Law No. 7/2009, of 12 February 2009), which replaces the previous Labour Code of 2003 and its Complementary Act, of 2004.[124] The new Labour Code entered into force on 17 February 2009, except for some provisions which are still waiting for complementary rules.

The new LC addresses issues related to equality and non-discrimination in general (Articles 23 to 28), harassment (Article 29), gender equality (Articles 30 to 32) and maternity and paternity (Articles 32 to 65) and it refers explicitly to the transposition of all directives regarding gender equality, non-discrimination, and maternity and paternity issues.

The Code introduces several changes to the rules regarding these issues. Of these changes, we would like to underline the following: the introduction of a new concept of harassment, which is wider and not necessarily related to discriminatory practices (Article 29); some provisions regarding collective agreements in order to tackle the possible discriminatory content of their clauses and to eradicate those clauses in a judicial procedure (Article 479); some important changes in provisions regarding maternity and paternity (Articles 32 to 65), such as the introduction of the new concept of 'parenthood' which replaces the traditional concepts of 'maternity' and 'paternity', as a way to emphasize the partnership of both parents in this area, changes to adoption leave, which is now in line with maternity leave (Article 44), changes to the leave that follows abortion (Article 38), and a new system for the leaves following birth, granted exclusively to the mother, to the father or to both of them (Articles 40 and ff). The importance of this new approach is, again, the promotion of a more balanced reconciliation of family and work rights and duties between men and women, which is a material condition for gender equality.

ROMANIA – *Roxana Tesiu*

Legislative developments

New Romanian Civil Code

On 11 March 2009, the Government adopted the draft of the new Romanian Civil Code. Along with the adoption of the Criminal Code, Civil Procedure Code and Criminal Procedure Code, the draft of the Civil Code sparked strong debate in Romanian society. The current Civil Code was adopted on 26 November 1864 and entered into force on 1 January 1865. While the current Civil Code underwent many transformations since its adoption, including the abrogation of all articles related to family and marriage,[125] the proposed draft aims at profoundly reforming the judicial system.

Book I 'About Persons' explicitly provides for the principle of equality under civil law by stating that 'The civil capacity shall not be influenced by race, colour, nationality, ethnic origin, language, religion, age, sex, sexual orientation, opinion,

[124] The Labour Code of 2003 was approved by Law No. 99/2003, of 27 August 2003; the complementary legislation for this Code (LRA) was approved by Law No. 35/2004, of 29 July 2004. In the matters where complementary legislation of the new Labour Code is still to be published, the Code of 2003 and the LRA are still in force.

[125] Book 1 of the current Civil Code was abrogated and a new Family Code was created. The Family Code was adopted through Act No. 4 of 4 January 1954.

personal beliefs, political orientation, affiliation to a certain trade union, social category or disfavoured category, wealth, social origin or by any other similar ground.'[126] Such provision is very important with regard to highlighting the equality principle applicable in civil law, since this is the first time that the equality principle has been explicitly enforced under the Civil Code.

Book II 'About Family' stipulates that 'A man and a woman have the right to get married within the scope of starting a family.'[127] Representatives of non-governmental organizations defending sexual minorities' rights claimed that the adoption of this article represents a step back compared to a previous agreement on introducing the civil partnership into Romanian civil legislation. A very important novelty introduced by the current draft is represented by the legal provisions of Article 341 referring to the work carried out within the household: 'The work of any of the spouses carried out within the household or for raising children represents a contribution to the marriage expenses.'[128] This legal provision is extremely important in divorce cases because non-working women were previously not entitled to goods resulting from divorce.

SLOVAKIA – *Zuzana Magurová*

Policy developments

Institutional framework of gender equality is insufficient

In January 2008, the Government Council for Gender Equality officially started its work. Although several draft programme documents dealing with gender equality were prepared, the Council still is not a platform that may be regarded as a coordinating, consulting and advisory body of the Government in the strict sense of the word. This situation is partially caused by the composition of the Council. From 43 members of the Council, up to 23 members represent state authorities, 20 of which represent the executive. The Government has thus established an advisory body in which the Government is strongly represented and hence it actually 'gives advice' in relation to itself. NGOs are represented in the Council by three organizations only. The Council meetings held in 2008 were highly formal and the Government reserved very little time for these meetings. Both meetings in 2008 that dealt with issues of gender equality took approximately 3 hours. Due to their short duration, some of the questions were reduced to briefings addressed to the Council members by the Ministry of Labour on certain Government activities concerning gender equality, with no opportunity for subsequent discussion and creating conditions allowing the Government to take initiative and the body set up by the Government to provide some expert and consulting input.

Although the Council has its own Executive and Consulting Committees,[129] the potential of this multi-level structure is not sufficiently used. For example the

[126] Article 30 Book I 'About Persons' Title I on General Provisions.
[127] Article 276 Book II 'About Family' Title I on General Provisions.
[128] Article 341 Book II 'About Family' Title II 'Marriage' Chapter VI – Patrimonial Rights and Obligations of Spouses, Section 1.3.
[129] The Executive Committee is responsible for the preparation of documents for the Council meetings and for implementation of its conclusions. The Consulting Committee, represented by members of NGOs and other experts from academic and other specialized institutions, serves as a 'forum to exchange views' in the area of gender equality and for the solution of issues in this area.

Department for Gender Equality and Equal Opportunities of the Ministry of Labour, which fulfils tasks related to the administrative and technical safeguarding of the Council's activities, does not link up the individual committees and does not inform them of other committees' work. Neither does it create conditions allowing the members of the Council and committees to acquire information about changes prepared and implemented in legislation and to submit their comments to these changes through these structures. Such initiative is desirable, also because it may promote the systematic application of the gender aspect in the law-making process, which is not done yet in Slovakia.

In the last quarter of year 2008, at the Council meetings (particularly those of the Consulting Committee and the Council), the Government represented by the Ministry of Labour tried hard to 'settle accounts' with certain NGOs that are active in the area of human rights and women's rights, particularly in connection with their shadow report to the periodical report of Government at the CEDAW Committee.

No members of the Consulting Committee from NGOs, and no feminist NGOs were invited to submit their comments to the proposal of 'Framework Strategy of Gender Equality.'

On their websites, the Government and the ministries have published hardly any information about this Council, its committees and activities, nor have they made available any of the documents discussed or adopted by the Council.

Legislative developments

In the area of legislation several positive changes occurred. They were initiated by NGOs and are reflected particularly in the Antidiscrimination Act,[130] in the Act on Court Fees[131] and in the Civil Procedure Code.[132]

Amendment to the Antidiscrimination Act

The Antidiscrimination Act, in effect from 15 October 2008,[133] allows the Slovak National Centre for Human Rights[134] and NGOs operating in the antidiscrimination area to file public actions (*actio popularis*) in their own name in cases where violation of the equal treatment principle might lead to the infringement of rights of a larger or indeterminate number of persons, or where such violation might seriously endanger the public interest.

Amendment to the Civil Procedure Code

This amendment also took effect on 15 October 2008[135] and strengthens the options of the Centre and NGOs to participate in court proceedings in cases of violation of the equal treatment principle in the capacity of accessory. A legal person engaged in the protection of rights may participate in the legal proceedings as accessory party, in addition to the applicant or defendant.

---

[130] Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, Amending and Supplementing Certain Acts, as amended.

[131] Act No. 71/1992 Coll. on Court Fees and on the Fee for Extracts from the Penal Register, as amended.

[132] Act No. 99/1963 Coll. Civil Procedure Code, as amended.

[133] Act No. 384/2008 Coll. amending and supplementing Act No. 99/1963 Coll. Civil Procedure Code, as amended, and on amendments and supplements to certain Acts.

[134] Equality body.

[135] Act No. 384/2008 Coll., amending and supplementing Act No. 99/1963 Coll. Civil Procedure Code, as amended, and on amendments and supplements to certain Acts.

Amendment to the Act on Court Fees[136]
This amendment took effect on 1 January 2009 and decreases the court fees in proceedings on matters concerning violation of the equal treatment principle. In cases without proposal for financial compensation of immaterial damages, the court fee amounts to EUR 66 (the initial amount was EUR 100) and in cases with compensation of immaterial damages the fee is EUR 66 plus 3 % of the amount of claimed immaterial damages (the initial amount was EUR 100 plus 6 %).

Amendment to the Act on the Police Force[137]
This amendment entered into force on 15 December 2008 and might result in a slight shift in the area of legislative protection of the rights of women exposed to violence. The amendment allows police officers to evict the perpetrator from the shared housing unit. A weakness in the adopted amendment is the very short period of 48 hours, although the initial draft proposed a period of 10 days. This is the period of time during which the threatened person is allowed to address a court with the proposal for an interim measure (literally preliminary ruling).

Case law of national courts

Lack of cases
Although the Antidiscrimination Act was adopted already in 2004, it has not been sufficiently applied in practice. Only a very small number of cases where discriminated persons enforced their rights before the courts are known to the public. Although the changes in the antidiscrimination legislation introduced in late 2008 might bring a certain positive change, system weaknesses still exist and prevent the effective application of the right to equality. They include the length of legal proceedings, and insufficient preparation of legal and other decision-making or assisting professions in the field of human rights.

Equality body decisions/opinions

New publication of the Slovak National Centre for Human Rights
In December 2008, the Slovak National Centre for Human Rights issued 'A Guide to the Antidiscrimination Act'.[138] This Guide is intended for the general, particularly lay, public and should inform it about the application of these regulations in practice. The first part of the publication contains the individual provisions of the Antidiscrimination Act, including brief and clear comments.

The second part contains model forms for the most frequent actions or proposals, using which legal protection against discrimination may be requested from certain institutions that are competent to start an investigation and to take corrective measures.

The third part contains a description of specific cases of discrimination resolved particularly by the Centre, but also by other national and foreign institutions providing assistance to victims of discrimination.

---

[136] Act No. 465/2008 Coll., amending and supplementing the Acts within competence of the Ministry of Finance of the Slovak Republic in connection with the introduction of the currency EUR in the Slovak Republic.

[137] Act No. 491/2008 Coll., amending and supplementing Act No. 171/1993 Coll. on Police Force, as amended, and on amendments and supplements to certain Acts.

[138] http://www.snslp.sk, accessed 15 March 2009.

The Centre is working on the report on the observance of human rights, including the equal treatment principle, for the year 2008, which the Centre is obliged to publish by 30 April via the Internet or in national periodicals.

Miscellaneous

New publications of NGOs

In November 2008, the civic association Citizen and Democracy issued a specialized publication from the author Janka Debrecéniova entitled 'Antidiscrimination Act – Comments'. The publication contains detailed comments on the provisions of the Slovak Antidiscrimination Act and related antidiscrimination legislation. It also offers an interpretation of national legal provisions in the European context, with particular regard to the Treaty, the antidiscrimination directives and the decisions of the ECJ. The publication also contains existing case law of the Slovak and Czech courts concerning the prohibition of discrimination.

The Institute for Public Affairs (NGO) issued the publication 'She and He in Slovakia. Gender and Age in the Period of Transition',[139] which was presented to the public on 26 February 2009. This publication deals with a broad spectrum of issues related to the position of women and men in Slovak society, and its ambition is to characterize not only the present situation, but also the long-term trends. It was prepared on the basis of rich empiric material collected and analyzed in the period 2005 – 2008. It also offers a secondary analysis of data from several other surveys executed in Slovakia since the beginning of 1990s.

SLOVENIA – *Tanja Koderman Sever*

Policy developments

Are women quotas an appropriate measure to achieve a more balanced representation of women in decision making?

Political representation of women is always an important issue before parliamentary elections. However, last year, it also was an important issue after the elections, because of the unsatisfactory election results concerning a more balanced representation of women and men in the National Assembly, despite the newly introduced quota of 25 %. The number of women only increased by one, which means that twelve women in total (13.3 %) were elected to the National Assembly. For this reason, soon after the parliamentary elections, the Agency for the technical support for public policies prepared a study entitled 'Elections in the National Assembly of the Republic of Slovenia 2008 - Efficiency and Effectiveness of Regulatory Measures to Ensure a Balanced Gender Representation'. Its main purpose was the assessment of the regulatory measures and an analysis of the election results from the gender perspective. The main research findings are that 25 % women quotas did not have any impact on the number and proportion of the elected female members to Parliament regarding a slight positive change in the number of members of the National Assembly in relation to the previous parliamentary elections. According to the study, the main reason for the unsatisfactory election results was the lack of opportunity for women to stand as candidates in those electoral districts where they have the best

[139] http://www.ivo.sk, accessed 15 March 2009.

chances of being elected. It was found that only 41 % of women on candidate lists had a chance (although sometimes a minimal chance) of being elected to the National Assembly. The trend of under-representation of women in politics since the first elections in 1992 indicates that adoption and implementation of additional measures and activities are needed in order to achieve a more balanced representation of women and men in the National Assembly. The situation is slightly better with respect to the proportion between men and women in the new Government, confirmed by the National Assembly in November 2008. There are 5 female and 13 male ministers. Female ministers are in charge of the Ministry of Defence, the Ministry of the Interior, the Ministry of Culture, the Ministry of Public Administration and the Ministry of Local Self-Government and Regional Development.

Whether or not women quotas are an appropriate measure to achieve a more balanced representation of women in decision making will become more evident after the elections to the European Parliament in June 2009. Since the Women's Lobby of Slovenia ('WLS') is aware that quotas alone will not lead to a more balanced representation of women and men in politics, they joined the European Women's Lobby Campaign 50-50: 'No Modern European Democracy without Gender Equality', whose goal is to establish a fair democracy in Europe where women and men share rights, responsibilities and power equally. During the campaign, the WLS presented a brochure which will be printed in 80 000 copies. The brochure will be distributed with the leading Slovene newspaper *Delo* to people throughout the country. In addition, round-table discussions will be organized in March and April in the whole country. With their activities, the WLS would like to inform people about the importance of equal representation of women and men in the making of decisions and the importance of voting with a view to gender equality.

The equality body

Among the activities of the Office for Equal Opportunities, the publication of the manual 'Towards Gender Equality: Effective Integration of Gender Equality in Policies' is worth mentioning. The manual was created as part of the project 'Making Gender Mainstreaming Work' that is running supported by the European Commission's grant for the improvement of gender mainstreaming in national policies and programmes.

In addition, the Office for Equal Opportunities issued a report on the calls made to a free and anonymous telephone number, where anyone who feels that any of their rights have been violated or restricted because of their sex can report this. The most frequently asked questions were about gender discrimination in work relations and employment (particularly extension of the employment contract after pregnancy, mobbing and return by a woman to the same or equivalent work after pregnancy).

As briefly mentioned in the last European Gender Equality Law Review, a new Advocate of the Principle of Equality, working within the Office for Equal Opportunities, was appointed in September 2008. Numerous experts were not satisfied with the selection, since the selected candidate was politically very active in the ruling political party and does not have much knowledge of anti-discrimination issues. An unselected candidate, who is a nationwide-known trainer and anti-discrimination expert with strong knowledge of anti-discrimination issues, even filed a complaint with the Government Complaints Commission and a lawsuit with the Administrative Court of the Republic of Slovenia. In the complaint and in the lawsuit the complainant raises several issues. First, he claims that the selected candidate does not fulfil the condition of the three years work experience in the field of equal

treatment or human rights and fundamental freedoms. Second, the complainant states that the evaluation forms used in the procedure of selection were forged, since the marks of selected and unselected candidates were changed (they were replaced by a new mark) after the official evaluation procedure and in favour of the selected candidate. Third, the complainant states that the decision on non-selection lacked reasoning and was therefore arbitrary, and that the notification on further legal remedies was false.

Government activities

In late December, the Slovene Government discussed the Report on the Consideration of the Fourth Periodical Report on the Implementation of the Provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The UN Committee on the Elimination of Discrimination against Women (CEDAW) expressed concerns about women and institutions having insufficient knowledge of the Convention. They expressly mentioned Slovene courts, which have almost never referred to the provisions of the CEDAW. Furthermore, they pointed out the still deeply rooted gender stereotypes, the segregation on the labour market, the small number of cases dealt with by the Office for Equal Opportunities, the problems in achieving genuine equality between women and men, etc.

Legislative developments

New Criminal Code includes criminal offences related to gender

The new Criminal Code,[140] adopted in May 2008, entered into force on 1 November 2008. It devotes significant attention to criminal acts committed within the sphere of employment relationships, with special emphasis on the protection of workers' rights, and it introduces two new criminal offences related to gender (preventing a woman from becoming pregnant or from having a baby when concluding an employment contract and during the duration of an employment relationship, and bullying).

Equality body decisions/opinions

Gender discrimination found in a case regarding access to and supply of goods and services

In November 2008, the Advocate of the Principle of Equality ('the Advocate'), working within the Office for Equal Opportunities, decided in a case of alleged unequal treatment based on gender regarding access to and supply of goods and services. A male claimant complained that he had been discriminated against because the entrance fee to a night club after 11 pm on certain days of a week was charged only to men. The Advocate found entry fees charged only to men directly discriminatory towards men in a written opinion No. 0920-9/2008-4.

Case law of national courts

It is rather remarkable that Slovene people, who often litigate and for various reasons, rarely decide to bring gender equality cases before a court. That is why there has been no case law worth mentioning in the area of gender equality in the past five months.

---

[140] http://www.dz-rs.si/index.php?id=101&vt=6&cl=K&mandate=-1&unid=SZ|C12563A400338836C1257435005A1F1C&showdoc=1, accessed 11 March 2009.

Miscellaneous

Various activities to promote gender equality
In order to promote equal opportunities for men and women some conferences were organized. The first one that needs to be mentioned was organized in February 2009, at the Faculty of Social Sciences on Reconciliation of work, family and private life. One of its speakers was the Minister of Family, Labour and Social Affairs, who emphasized that the Government has already adopted some measures facilitating the reconciliation of family and professional life, but that there is still a lot to be done. The second one was the conference on equal treatment of women and men in the access to and supply of goods and services, which was organized by the Office for Equal Opportunities in March 2009. The purposes of the conference were to identify practices that constitute a breach of the principle of equal treatment between women and men in the access to and supply of goods and services, to find possible ways to overcome those practices and to find effective ways to raise awareness of economic and other entities that provide goods and services and of consumers at the same time.

SPAIN – *Berta Valdés*

Policy developments

Policy developments in Galicia: promotion of equal rights in the workplace and in employment policies
The promotion of equal rights in the workplace and in employment policies is regulated by Decree 33/2009 of 21 January 2009, of the Ministry of Labour of Galicia (published in the Official Gazette of Galicia No. 35, dated 19 February 2009). The decree aims to realize effectively the right to equal treatment and opportunities between men and women in Galician companies, removing all forms of discrimination on the grounds of sex. The regulation has nine chapters and sets out a number of measures, including the following: financial and technical support for the development of programmes and specific measures for the promotion of equal rights within companies; the 'Galician Mark of Excellence in Equal Rights' awarded to companies meeting certain equality standards (equal representation of women at all professional levels, including senior management personnel, equal salary, measures to prevent and punish sexual and gender-based harassment, etc.); an example of good practice in connection with equal employment opportunities and a positive approach towards occupational training.

Policy developments in Murcia: financial assistance for large families
The Ministry of Social Policy, Women and Immigration provides financial assistance to families with financial difficulties due to multiple birth or adoption, or large families with at least six children or disabled parents (Order of 30 December 2008, Official Gazette of the Murcia region of 27 January 2009). The grants are intended for expenditure on food, clothing, pharmaceutical products, nursery schools, domestic help, etc. during the year 2009.

Policy developments in Castilla-La Mancha
The Ministry of Labour and Employment of the Autonomous Community of Castilla-La Mancha has adopted the Local and Autonomous Employment Measures for 2009

(Order of 8 January 2009, Official Gazette of Castilla-La Mancha dated 12 January 2009). The programme's budget is EUR 51 million, co-financed by the European Social Fund and is intended to support employment contracts for the unemployed in Castilla-La Mancha. Priority groups will be, among others, disabled persons, women and women suffering gender-based violence. The programme also offers personalized assistance activities to improve job training, and training activities related to equal rights policies are proposed.

Programme for victims of violence in unemployment situations

Royal Decree 1917/2008, of 21 November 2008, further develops Law 1/2004 on Integral Protection against Gender Violence, establishing a specific action programme for the victims of violence in unemployment situations. The Decree aims to increase the number of working women and to eliminate labour discrimination. The measures of the programme are to promote socio-professional integration in companies, with training for women, incentives for companies that engage female victims of gender violence or that facilitate geographic mobility, and incentives for these women to initiate economic activities as independent workers. As part of these measures there are incentives to compensate wage differences when changing jobs for reasons of gender violence. When the new job involves a wage reduction compared to the previous job, the woman will be entitled to compensation of the difference, with a maximum of EUR 500 per month, for a maximum of 12 months.

Legislative developments

Paternity leave

Law 2/2008 of 23 December 2008 establishing the General Budget of the State for 2009 increases the period of paternity leave for certain families. The new duration will be 20 days for birth or adoption, increased by two days per child for multiple childbirth or adoption. This extension of the period of paternity leave is only for families who either have three children or more, or for one-parent families with two or more children. Equality Act 3/2007 contains a general provision regarding the right to paternity leave of 13 days, and states the target of a progressive extension of paternity leave from 13 days to a final total of 4 weeks. The extension stipulated by Law 2/2008 only adds 7 days and is not a general right for all families, so the new regulation is not enough to reach the aim of Equality Act 3/ 2007.

Reduction of company's contribution to Social Security in certain cases of pregnancy or breastfeeding

All employers must pay a monthly contribution to Social Security for each of the employees working for the company. Law 2/2008 of 23 December 2008, establishing the General Budget of the State for 2009, reduces the company's contribution to Social Security to 50 % in certain cases, e.g. when an employee changes her position or job because of a health risk during pregnancy or breastfeeding. This is an economic incentive for the employer, who will pay only half of the company's monthly contribution to Social Security, as the woman's changing to another job will save the employer having to pay the social-security contribution. There is no disadvantage for the worker, as the costs are paid out of the Social Security budget.

Case law of national courts

Balanced composition in committees and juries

The Constitutional Court (Ruling 13/2009 of 19th January 2009) examined certain paragraphs of the Law for the Equality between Women and Men of the Basque Parliament, No. 4/2005 of 18 February 2005, for possible violation of the Spanish Constitution. The first issue is the obligation to compose committees with a well-balanced number of women and men (for processes of selection for access to employment and promotion in the public sector) and juries (for the granting of prizes or subsidies by the Public Administration). The problem of this balanced composition, where each one of the sexes must be represented by 40 % at least, was already solved in judgment 12/2008. This condition imposed by Law 3/2007 does not violate the Constitution, as political parties have constitutional functions and the freedom of presenting a list of candidates can have some limits. The minimum of 40 % for each sex is a limit justified by a higher constitutional value such as the aim of reaching real equality in areas of political participation. The second issue concerns the lists of candidates for the elections for the Basque Parliament, which must include at least 50 % women. Law 4/2005 of the Basque Parliament in conjunction with the General Electoral Law provides that in the autonomic electoral process, women must have a minimum presence of 50 % in the electoral lists, whereas men only have a guaranteed 40 %. The Constitutional Court determined that the measures of positive action introducing this differentiated treatment are justified due to the necessity to correct a historical situation of discrimination against women.

Gender reassignment and paternity

The issue in judgment 176/2008 of the Constitutional Court is the modification of visiting arrangements between a father and son, in a case of conjugal separation in which the mother has the custody of the minor. The father is in a process of gender reassignment by means of an operation and the transsexual condition motivated a change in the agreement. A judicial decision changed the conditions of the visits, and since that time, the visits of the father and the son have always been short talks controlled by the presence of the mother and a professional psychologist. The Constitutional Court examined whether the new situation constitutes discrimination because of gender reassignment. The conclusion is that it does not constitute discrimination, because the reason of the change is not the father's gender reassignment, but the effects of the emotional instability of the father on the son. The judgment considers it a priority to protect the emotional stability of the minor of 6 years old, who feels confused because of his father's new appearance. Although the judgment concludes that no discrimination has taken place, the argument of the Constitutional Court on grounds of gender reassignment is outstanding: the Constitution must be interpreted broadly, considering that an illegal loss of rights due to being transsexual constitutes a ground of discrimination prohibited by the Constitution.

Miscellaneous

Report on the impact of Law 1/2004 against gender violence

The Ministry of Equality elaborated a Report (July 2008) on the impact of the implementation of Law 1/2004 on Integral Protection Measures against Gender Violence, in the fight against this type of violence. The Report analyses the measures

adopted by the State Administration, by the administrations of the Autonomous Communities, by the Public Prosecution Service and the Judicial Authorities. Among them, it emphasizes the investment of EUR 800 million in different policies for preventing and combating gender violence, the creation of specific institutions for protection, specific courts, prosecutors' offices and specialized assistance on gender violence. The report also provides information and data on the development of gender violence in Spain, such as, for example, the fact that over 53 000 men have been taken into custodial detention for violence against women in the past three years. The report appreciates the legislative activity and the different measures adopted in the application of Law 1/2004, but it considers that its effectiveness is limited because three years is an insufficient time considering the complexity of the problem, which requires a change to the cultural and structural basis of such violence. Moreover, the report demonstrates the need for additional safety measures and actions in the field of prevention.

SWEDEN – *Ann Numhauser-Henning*

Legislative developments

New Discrimination Act

The new Discrimination Act (2008:567), merging 7 former acts on discrimination into a Single Non-Discrimination Act implementing the European equality directives, entered into force on 1 January 2009. As of the same date, the four former ombudsmen were merged into a Single Body supervising the new Act, the Discrimination Ombudsman, DO (*Diskrimineringsombudsmannen,* DO).[141]

Case law of national courts

In early 2009, the Swedish (Supreme) Labour Court Case decided two cases concerning gender discrimination.[142]

Parental leave

Labour Court Case 2009 No. 13 concerned Section 16 of the Swedish Parental Leave Act (1995:584). The case also related to Community law: Articles 8, 11.2(a) and 11.2(b) of Directive 92/85/EEC, Article 2 of Directive 96/34/EC and Article 2.7 of Directive 76/207/EEC as amended by Directive 2002/73/EC. An employer decided to pay a bonus for the year 2006 in relation to hours worked that year. Among employees who received only a reduced bonus were three employees who had been on parental/maternity leave during 2006. The reduction was calculated in relation to the reduced working time due to the leave in question. The question at issue was whether this amounted to detrimental treatment according to Article 16 in the 1995 Parental Leave Act/discrimination according to the aforementioned Community legislation.

The Court found no detrimental treatment/sex discrimination. The bonus was found to constitute wages ex post. That the wage bonus was paid in accordance with the quantity of hours worked (and thus reduced) was found to be 'a natural

[141] See www.do.se, accessed 18 May 2009.

[142] Internet link source and additional information: http://www.arbetsdomstolen.se, accessed 18 May 2009.

consequence' of the parental leave and thus in compliance with Section 16 of the 1995 Parental Leave Act. Nor did the Court find the reduced wage bonus to be in conflict with Article 2.7 of the Equal Treatment Directive or Article 11.2 of Directive 92/85/EEC. In this case, the Labour Court referred to the ECJ's case *Lewen C-333/97*.

Maternity and parental leave

Labour Court Case 2009 No. 15 also concerned alleged discrimination on the grounds of maternity leave/parental leave, this time in relation to the Swedish Equal Opportunities Act (1991:433) and the Parental Leave Act (1995:583). It included two questions: (1) did the denial of the right to additional sick pay according to the collective agreement to a female employee during pregnancy on the grounds of inability to perform her work duties amount to sex discrimination according to Sections 15 and 17 of the Equal Opportunities Act, and (2) did the failure to make customary pension premium reservations during her parental leave amount to detrimental treatment according to Article 16 of the 1995 Parental Leave Act? The Court found no sex discrimination in issue (1). Reference was made to the design of the Swedish sickness benefits scheme, which distinguishes between sickness benefits due to inability to work for medical reasons and pregnancy benefits (*havandeskapspenning)* due to inability to perform certain tasks due to pregnancy. The Court did a 'similar/comparable situation test' and found a person on sick leave and a person on pregnancy leave not to be similarly situated. Therefore, no discrimination on the grounds of sex had taken place, nor was it contrary to national law or to Community law. For issue (2), the Court did not find the non-payment of pension premiums during the employee's parental leave to constitute detrimental treatment according to Section 16 of the 1995 Parental Leave Act. Pension premiums are by nature 'indirect wages' and the non-payment of wages is a 'natural consequence' of parental leave and as such a justified detrimental treatment under the 1995 Act.

The Labour Court made comprehensive references to the ECJ's case law for issue (1); cases such as Case C-66/96 *Höj Pedersen*, C-411/96 *Boyle* and C-191/03 *McKenna*. It is a delicate question when pregnancy problems amount to 'ordinary' sickness (*McKenna*, *Höj Pedersen*) and when it is in other ways 'naturally' related to sex (*Boyle*). Formally, the judgment seems to be in line with Community case law here. As regards issue (2), since there is no general right to pay *during* parental leave, the outcome seems to be in accordance with Community law.

Equality body decisions/opinions

In January 2009, the new Supervising Body, DO (see above), settled two cases concerning gender discrimination in the area of education. Swedish legislation since 2006 contains a ban on discrimination on (among others) the grounds of sex.

Sexual harassment

One case concerned sexual harassment of one (or more) girl/girls in primary school by a male classmate. The alleged harassment was reported to the girl's teachers. The Ombudsman found that the school had not done enough to actively prevent harassment nor to investigate the situation reported. The Municipality responsible for the school in question in the settlement agreed to indemnify the girl by paying approximately EUR 5 220 (SEK 60 000).

Sports participation
Another case concerned alleged discrimination in relation to physical activities arranged by a school in Gothenburg. Once a year, the pupils played volleyball and football against their teachers. Boys could choose which sport to participate in whereas girls could only participate in volleyball. A sixteen-year-old girl wanted to participate in the football game but was refused. The Ombudsman found the school in question to have neglected its duty to promote equal opportunities despite sex/gender and to have discriminated against the girl by denying her participation in the game. The girl received EUR 1300 (SEK 15 000) in indemnification and the school agreed to change the rules for the future.

Miscellaneous

Governmental delegations/inquiries for equal opportunities at school and higher education
The Government has recently taken the initiative to start two separate delegations/inquiries for 'Equal Opportunities at School' and 'Equal Opportunities in Higher Education'.[143] The purpose is, generally speaking, to analyse existing inequalities and propose adequate measures to come to terms with these problems.

International conference 'Rights Work!'
On 6 and 7 November 2008, Sweden, in cooperation with the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, organised the international conference 'Rights Work!' on systematic work for human rights implementation. The aim was to stimulate countries and actors to work on human rights in a systematic way and to learn from each other.[144]

UNITED KINGDOM – *Aileen McColgan*

Policy developments

The single Equality Bill
The proposed Single Equality Bill, which is intended to bring together all domestic discrimination law, has yet to be published. Current suggestions are that it can be expected in April or May 2009. It may be that, if it is introduced at this stage, it will fail to pass into law before the current Government comes to an end. As in the last issue of the *European Gender Equality Law Review*, there have been no further public developments except for a number of expressions of commitment on the part of the Government to introduce a single Equality Bill in the lifetime of the present Parliament (which must end by mid 2010). Lord Mandelson (former EU Commissioner and now Minister for Business) and Chancellor Alistair Darling have called for a moratorium on any plans that would add extra costs to business during the economic downturn and Lord Mandelson has been widely reported to be opposed to any costs likely to be imposed on employers by the Single Equality Act.

[143] See the respective directives: Directive 2008:75 and Directive 2009:7.
[144] The final report is available on: www.regeringen.se/sb/d/11087, accessed 14 May 2009.

Unequal pay

Equality activists have been lobbying hard for mandatory pay reviews in order to deal with the problem of unequal pay which has persisted in the UK despite almost 40 years of the Equal Pay Act. In particular, the hourly level of pay of part-time women by comparison to full-time male workers has barely changed in that time, hovering around 60 % and the gap for all women appears to be increasing. As was pointed out in the House of Commons' debate on International Women's Day on 'Support for Women (Economic Downturn)', women are particularly vulnerable in a recession. Recently, however, the Chief Executive of the Equality and Human Rights Commission (which functions as the gender equality body in the UK) was reported in the *Guardian* newspaper as suggesting that any proposals to make companies carry out and publish pay audits to disclose pay inequalities between men and women were too costly in the current economic climate (16 March 2009), and that a voluntary approach should be maintained. The Equal Opportunities Commission, which had been concerned solely with sex discrimination and which was absorbed into the single Equality and Human Rights Commission in recent years, had recommended that companies should carry out equal pay reviews as a first step to addressing pay inequalities.

Controversy at the Commission

The remarks reported to have been made by the EHRC Chief Executive generated a great deal of anger amongst equality activists, the Director of the Fawcett Society (a gender equality organisation) stating that 'We must not get caught in this trap of saying in difficult times we will trade in women's rights,' and the head of the equality department at the Trades Union Congress declaring that pay audits were 'a crucial part' of eliminating the pay gap. The Chief Executive and a number of other high profile staff have subsequently resigned.

Domestic violence

The Chair of the Equality and Human Rights Commission in January 2009 threatened legal action against local authorities because of a lack of service provision for victims of domestic violence and sexual assault. One of the difficulties is that these service providers, generally Non-Governmental Organisations dependent on public funding, are finding it increasingly difficult to attract public funding for reasons which include the (mistaken) perception on the part of public authorities that the Gender Equality Duty recently imposed by the Sex Discrimination Act 1975, as amended, precludes the funding of single-sex service provision, at least in cases where equivalent funding is not provided to organisations that service persons of the other sex. Given the overwhelmingly female nature of sexual assault and domestic violence victimisation this is a critical issue, and one in respect of which the CEDAW Committee in 2008 criticised the UK government.

Northern Ireland

In Northern Ireland the Local Government Staff Commission has established an initiative to assist local councils in improving the representation of women in senior positions. Working with the Equality Commission for Northern Ireland the LGSC drafted a Declaration of Principles, created a network of 'gender champions' and produced an employment equality template for councils. In the three and a half years since the initiative was established, the number of women chief executives on

Northern Irish Councils has increased from 0 (of a total 26) to 11.5 %, with significant increases in the number of women at all senior levels of employment.

Case law of national courts

Equal pay

Important decisions reached in recent months include *Redcar & Cleveland Borough Council* v *Bainbridge and Surtees* v *Middlesbrough Borough Council* [2008] IRLR 776, in which the Court of Appeal considered what actions employers must take, and when, to close pay gaps where predominantly male and predominantly female jobs of comparable value have been found to be rewarded differently. The question for the Court was whether, in attempting to eliminate long-standing pay differentials between men and women, local authorities which had re-graded jobs following job evaluation exercises were entitled to reduce rates in male dominated jobs gradually over time to the level of female-dominated jobs, rather than immediately equalising wages in female dominated jobs up to those paid to male jobs of comparable value. The Court of Appeal ruled that pay protection arrangements could be objectively justified as a proportionate means of achieving a legitimate aim, but that an employer who knew that a pay structure discriminated indirectly on grounds of sex would have great difficulty in justifying any decision not to eliminate the discrimination at once. The decision has been criticised for failing to provide clarity as to what the Equal Pay Act 1970 requires in the settlement of equal pay disputes. The case is one of many illustrations of the shortcomings of domestic equal pay law, and why a new approach is regarded by many as being imperative to the elimination of gender-based pay disparities.

European Gender Equality Law Review

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY