Labour Law and Gender

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Abstract

The chapter presents an overview of key labour law institutions, aiming at discussing the importance of the gender perspective in labour law. Therefore, the introductory section of the chapter will put this issue into the context of historical and conceptual framework genesis of regulating employment relationships. These issues are connected with the legal subordination and economic dependence of employees, which produce the need to create and implement norms that protect employees, as a weaker party to the employment relationship. This includes the limitation of employers' (managerial, normative and disciplinary) prerogatives, in order to create the conditions for effective enjoyment of the right of jobseekers and employees for protection against gender-based discrimination. The labour law is, in this regard, traditionally conceived according to the model of a male worker, who is employed on the basis of a standard employment contract (open-ended full time employment contract). This then results in a failure to recognise or provide sufficient consideration of the specific needs that women have as participants in the labour market. The use of the feminist method, which included the understanding of gender as an analytical category in the field of labour law, opened up a new set of labour law issues. For example, in easing the ban on women working in physically demanding jobs, and the conceptualisation of the need to reconcile the professional and family duties of employees.. On the other hand, contemporary labour law, when creating conditions for achieving gender equality, is aimed primarily at women's empowerment in the world of work. Persisting with this approach can lead to an oversimplified understanding of the principle of gender equality, ignoring the special needs of men in the world of work, as well as ignoring the importance of their role for consistent implementation of the principle of gender equality and women's empowerment. The second section of the chapter will provide analysis of gender-based discrimination during the hiring process. Other sections will cover the risk of gender-based discrimination regarding rights, obligations and duties deriving from employment relationship, labour law measures to encourage improvements in the occupational safety and health, work-life balance for parents and caregivers, sexual harassment at work and promotion of gender equality in collective labour law.

17.1 Introduction

The employment relationship, as the central institute of labour law, is connected with the idea that an employee exclusively or predominantly makes a living by working on behalf and under prerogatives of an employer. This is because an employer, in addition to the *de facto* authority, manifested in economic dominance, also has the legally recognized managerial, normative and disciplinary prerogatives. Labour law allows for this deviation from the principle of equality of the parties to a contract because employers could not organise their activities without issuing orders and instructions, supervising employees and imposing disciplinary sanctions. Legal subordination and economic dependence of employees, however, produce the need to create and implement norms that can prevent abuse of employer's prerogatives and protect employees, as a weaker party to the employment relationship. In that sense, the history of labour law can be seen as a process of gradual limitation of the employer's prerogatives, in order to create the conditions for effective enjoyment of labour rights—including the right of jobseekers and employees to protection against discrimination. This is why the principle of equality and the principle of non-discrimination appear as basic principles of contemporary labour law.

An important segment of protection for jobseekers and employees from discrimination is their protection from gender-based discrimination. The labour law is, in this regard, traditionally conceived according to the *model of a male worker who is employed on the basis of a standard (open-ended full time) employment contract.* This results in a failure to recognise or provide sufficient consideration of the specific needs that women have as participants in the labour market. This is further reflected in the field of social security law,[1] which is built on the *male breadwinner model*, where the female takes care of (young and old) family members who are dependents. Thus, marriage and motherhood emerge as an alternative to paid work for an employer.[2] This approach survived after the Second World War, even after the lifting of the ban on employment of married women, which existed in certain countries and certain work environments.[3] This further means that unequal treatment of men and women in the world of work was based, above all, on the inequality that existed between them in the family and society. Since the power that men had in the family and society facilitated their domination in the world of work and *vice versa.*[4] Resulting in a labour law that contributed to the legal invisibility of women, as well as to the legitimisation of the patriarchal concept of work.[5] The period following the end of World War II was marked by the intensive inclusion of women in the labour market in Europe and North America. However, the labour legislation traditionally regulated only a few marginalised "women's" labour issues, primarily *maternity*

[1] See Chap. 10.

[2] Lyonette (2013), pp. 198–203.

[3] Deakin (2005), p. 57.

[4] Pascall (1997), pp. 30–31.

[5] Hunter (1991), p. 320.

protection and special protection of women due to their weak constitution. Biological differences between men and women were considered to be the key reason for making qualitative differences between male and female workers.[6] Although the legislative intervention in the area of maternity protection was an improvement, given the period of labour exploitation that preceded the adoption of protective labour legislation, some of these solutions eventually led to a "legal blockade" of women's opportunities to work and earn, under the same conditions as men.[7] This practice is also referred to as *'benign discrimination'*.

► **Definition** "Benign discrimination" is, above all, related to the ban on night work of women in industry and the ban on employing women in physically demanding jobs, such as jobs performed underground, underwater or in construction.

Apart from these issues, and, later, the issue of equal pay for men and women for equal work, (national and international) labour legislation, as a rule, did not take into account experiences typical for female workers. Nor did it identify the specific consequences that the seemingly neutral labour law rules or practices had on them. Also, the tension between the professional and family duties of female workers has traditionally been considered a natural and inevitable consequence of women's participation in the labour market, which is why the legislation lacked instruments aimed at facilitating the reconciliation of these duties.[8]

When it comes to labour law as a scientific discipline, sex or gender, as a rule, are not considered important analytical categories. This was reflected in the content of labour law textbooks, in which issues related to the position of female workers were often ignored, or only mentioned in several footnotes. The best case scenario would be one or two lessons discussing the issue, but only in terms of typical women's labour law topics.[9] In the 1980s, social sciences started applying a *feminist method*,[10] which influenced the conceptualisation of the need to reconcile the professional and family duties of employees.[11] As a result, a new set of labour law issues was opened up such as re-examining the tendency to make employment relationships more flexible from a gender perspective. However, this coincided with the establishment in the 1980s of a dominant neoliberal strategy of economic development. Consequently, a number of non-standard employment contracts emerged as well as new forms of work. Many of these new forms of work were extremely precarious, where women were disproportionately more represented than men.[12] In addition to the changes that have taken place in the family structure and the affirmation of the new

[6] Kollonay-Lehoczky (2017), p. 359.
[7] *Ibid.*
[8] Conaghan (2017), p. 94.
[9] Hunter (1991), pp. 307–308.
[10] Conaghan (2017), p. 100.
[11] Marry (2012), pp. 342–343.
[12] Fredman (2004), p. 299.

concept of a *dual breadwinner model*,[13] new gender-sensitive issues have emerged. However, modern legal systems do not recognise all of these changes and some are waiting to be recognised by the lawmakers and social partners (trade unions, employers and employers' organisations). Since some of these changes are perceived as accidental, i.e. as part of the social context in which labour law is created, applied and interpreted. Finally, we should not lose sight of the fact that contemporary labour law, when creating conditions for achieving gender equality, is aimed primarily at women's empowerment in the world of work. This approach is justified, given that female workers are more likely to face unfavourable treatment and are more likely to be discriminated against than men. However, persisting with this approach can lead to an oversimplified understanding of the principles of gender equality, *ignoring the special needs of men in the world of work, as well as ignoring the importance of their role for consistent application of the principle of gender equality and women's empowerment*.[14] Therefore, in order to eliminate gender-based discrimination from the world of work, the special needs of men needs to be taken into account, in addition to the needs of female workers. This applies pressure on men to accept and abide by gender stereotypes in the world of work, including the stereotype that measures concerning the reconciliation of professional and family duties of employees should only be addressed to women. As well as to the stereotype that male workers do not need special protection in the workplace.[15] On the contrary, labour law should strive for the equal treatment of all genders, especially regarding participation in family duties, through fair rules on family related leave.

Learning Goals

- The chapter is designed to create a framework for understanding the gender perspectives on key labour law institutions and their re-evaluation on the basis of gender equality principle.
- The chapter tends to stimulate students to critical thinking and cooperative learning in order to better conceive the need, challenges and obstacles for effective implementation of gender equality principle in the world of work.
- Students should be able to use the gender equality principle as a basis for re-evaluating applicable sources of law and legal concepts and theories, as well as existing legal problems regarding the status of women, persons with

(continued)

[13] Certain authors, instead of the dual breadwinner model, cite the *adult-worker model family*, which presumes that all adult family members participate in the labour market. On the other hand, there are authors who, having in mind the low wages earned by female workers, primarily due to their part-time work or work on the basis of some other non-standard employment contract, use the term *one-and-a-half earner model* to denote this new family model. Acc. to Lewis (2001), pp. 152–169.

[14] International Labour Office (2013), pp. 2–3.

[15] Resolution concerning gender equality at the heart of decent work, adopted by the General Conference of the International Labour Organization at its 98th Session on 17 June 2009, para. 6.

family duties and non-binary people in the world of work. This is followed by the review of the capacity of legal instruments to ensure gender equality in the labour market.

17.2 Gender-Based Discrimination During the Hiring Process

17.2.1 Access to Employment and Occupational Segregation

The need for economic security is one of the basic needs of every human being. It can be satisfied by entering into employment relationships, where the worker, in addition to procuring means of subsistence, gets the opportunity to develop his/her personality, by working for the employer. For the employer, the purpose of employment is to recruit workers who are expected to perform their tasks to the best of their abilities. This further means that an employer's freedom of enterprise, freedom of contract, as well as responsibility to ensure proper functioning of the organisation, allow for significant freedom in choosing co-workers. Including prerogatives to manage the hiring process, to establish the job requirements and to select the person for the job. In that sense, one of the basic duties of an employer is to respect the dignity of the candidates and treat them in accordance with the skills and abilities crucial for their performance, and not based on *prejudices and stereotypes related to their sex/gender*.[16] Stereotypes above all concern physical capabilities, but are not limited to them. However, we must not lose sight of the so-called *statistical stereotypes* that have influenced the institution of the (male) sex, as a special requirement for certain jobs, only because the physical capabilities of an average woman are less than the physical capabilities of an average man.[17] This regularly leads to *occupational segregation*, in terms of giving preference to workers of one sex when hiring for certain jobs. We should also have in mind that even though women graduate from university in greater percentages than men, they are, in general, more likely to get a job in lower-paying sectors. Despite their higher education, they also represent a smaller portion of the total number of employees in more attractive advanced-career sectors.[18] On the other hand, men are underrepresented in the areas of education (which is true for primary and secondary school but not higher education) for health care and social protection. In this regard, we should bear in mind that work in female dominated fields is often paid less than work

[16] Fenwick and Hervey (1995), p. 446.

[17] Holzleithner (2017), p. 38.

[18] Across the EU, in 2016, the employment rate for women was 65.3% compared to 76.8% for men. In the same year, women represented 3/4 of workers who pursue paid work on a part-time basis (22% of those women worked less then 20 h a week) and they tend to work in lower-paying sectors and at more junior levels than men. Acc. to: Eurofound (2020), p. 13; European Group on Ethics in Science and New Technologies (2019), p. 32.

in male dominated fields, regardless of the level of education and experience of workers.[19] This practice exists in almost all European countries, with the consequences of segregation differing from one country to another. In this regard, one should take into account that many women work in modestly paid, insecure jobs,[20] often without a legal basis and that many female workers encounter the '*glass ceiling'* phenomenon.

▶ **Definition** The metaphor '*glass ceiling'* refers to invisible barriers that prevent persons of a certain gender (typically women) from rising beyond a certain level in a job hierarchy.

On the other hand, for most women, working for an employer is accompanied by unpaid work in the household, i.e. housework and child care (and not only childcare by mothers, but also grandmothers in raising grandchildren) and care for family members dependent on assistance from others. This *double working engagement of women* represents a great challenge for female workers and their employers, as well as for society as a whole. Especially because the culture of capitalism does not value such tasks as taking care of family members.[21]

The risk of gender-based discrimination is first and foremost, expressed in terms of *establishing job requirements*. As these conditions must be *directly related to a specific job*, direct gender discrimination will only exist if gender is required for a job where it is not necessary for successful performance of duties.

Example

The decision of the editorial staff of an all-male fishing magazine, not to hire a woman for the position of a journalist, due to the belief that she would be uncomfortable and unhappy to work in an all-male work environment (UK Equality Act/2010/Code of Practice on Employment, para. 3.14). ◀

On the other hand, indirect discrimination is established by seemingly neutral provisions, criteria or practices. The application of which puts job seekers of one gender at a disadvantage compared to other workers, as is the case with prescribing certain physical characteristics as job requirements (height, weight or Body Mass Index, strength and other conditions that are impossible or much harder for women to meet), although they are not necessary for successful performance of duties. The general prohibition of establishing personal characteristics as special requirements for employment is not to be confused with the permissible differentiation between jobseekers by sex/gender. In these situations, the prohibition of differentiation could jeopardise the proper functioning of the organisation because for the jobs in

[19] Müller (2019), pp. 20–21.
[20] Auvergnon (2008), pp. 13–14.
[21] Grgurev (2014), p. 136.

question, sex is a *genuine and determining occupational requirement*. Reasons of professional necessity that in exceptional cases justify sex as a special requirement for employment can be numerous, starting with *authenticity*, which allows an employer to hire only persons of a specific sex due to their physical appearance. Such is the case with models hired to present a collection of men's or women's clothing, theatre, ballet or opera artists, as well as models in painting and photographic studios.[22] Sex can also be determined as a special requirement for *reasons of decency*, in jobs that involve physical contact of an employee with employer's clients (concerning certain social and cultural expectations).[23] Furthermore, sex may be established as a special employment requirement when prescribed by the *nature of the institution* in which the work is to be performed, such as penitentiaries, or institutions in which persons requiring special care or supervision are housed, if they are exclusively male or exclusively female. In addition, sex can be specified as a special requirement if the worker is expected to work or live in the household of the employer or the employer's client, which includes intensive contact with certain persons and access to intimate details of their lives. In this regard, it is necessary to assess in each case whether a job requires an employee of a certain sex, so that the permitted exception wouldn't lead to the widespread exclusion of women/men from certain professional fields. This was confirmed in the case law of the European Court of Justice (ECJ).

Example

Unjustified exclusion of women from all military tasks involving the use of weapons, resulting in women only being hired for military health service jobs and military orchestras can be deemed as widespread exclusion of women from this professional field, as ECJ confirmed in Case C-285/98, *Tanja Kreil* v *Bundesrepublik Deutschland*, (ECJ 11 January 2000), para 27. ◄

[22] Nevertheless, artistic freedom enables employers in these businesses to entrust certain female acting, opera or ballet roles to women, or men, if the director of the play decides to abandon the conventional approach.

[23] For example, in the early 1980s, the European Court of Justice confirmed that societal expectations regarding decency and privacy (more precisely, the specific quality of the relationship established between a patient and a midwife, i.e. the sensitivity of a patient who had just given birth) justify exclusive training and hiring of women for midwifery—Case C-165/82, *Commission* v *UK* (ECJ 8 November 1983), para. 18. In the following decades, access to this profession was provided to men both in the United Kingdom, as the country against which the aforementioned proceeding was initiated, and in all other EU Member States, which underlined the importance of the obligation to periodically review the legitimacy of excluding persons of a certain sex from certain professions. Barnard (2012), p. 365.

The Court has also confirmed in a number of judgments (e.g. with regard to the work of police officers and the marines)[24] that EU Member States enjoy the discretion to exclude certain professional activities from the scope of secondary anti-discrimination legislation in the EU. This prerogative is, however, limited by the requirement that the exclusion concerns only certain activities and the obligation that states periodically review the legitimacy of the exclusions, as they may become illegal after a period of time. The same view is found in the standards of the Council of Europe and the jurisprudence of the European Court of Human Rights, which has repeatedly concluded that banning the employment of women in public companies because they have not served in the military, which is only allowed for men, represents discrimination of the right to respect for private and family life.[25]

On the other hand, the small number of women engaged in physically demanding occupations can be explained by the fact that *physical ability tests* are often designed with male workers (and dominant ethnicity) in mind—as a kind of a "universal worker", against whom the abilities of all workers are evaluated.[26] Gender-based discrimination should also be prevented in further stages of the hiring process. This especially goes for the *interviews with the candidates*, conducted by the employer (or the hiring committee) and, of course, for the *selection decision* itself. In practice, women are often asked about family planning. This is however, difficult to prove in anti-discrimination proceedings e.g. in Greece, Hungary, Germany, Croatia and the Czech Republic, especially because many female workers decide not to initiate proceedings against employers due to the economic pressure to ensure subsistence from employment.[27] Further, due to the fear of victimisation when applying for other jobs. Oversight of the employment process is, therefore, very important, especially via the participation of the labour inspectorate. However, some countries try to prevent the use of the off-limits questions in interviews by having trade union or works councils representatives present. Furthermore, in some legal systems there is a rule stating that a candidate has the right not to answer the employer's off-limits questions and that their actions will not be considered illegal.[28] Moreover, in some

[24] See: Case C-222/84, *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary* (ECJ 15 May 1986); Case C-273/97, *Angela Maria Sirdar* v. *The Army Board and Secretary of State for Defence* (ECJ 26 October 1999).

[25] The court qualified the dismissal of a worker as discrimination against the enjoyment of the right to respect for private and family life, due to the fact that such a drastic measure, as dismissal for being a female, violates the worker's self-esteem and, consequently, her private and family life, especially bearing in mind the possibility to work in future jobs she specializes in, since she had passed the professional exam for work in the public sector. App. No. 61960/08, *Case of Emel Boyraz v. Turkey* (EctHR 2 December 2014). See: App. No. 30733/08, Case *of Hülya Ebru Demirel* v. Turkey (EctHR 19 June 2018).

[26] Holzleithner (2017), p. 18.

[27] Masselot et al. (2012), pp. 13–14.

[28] See: French Labour Code (*Code du travail*/2018/, Art. L1225-2), Slovenian Law on Employment Relations (*Zakon o delovnih razmerjih*, Uradni list, št. 21/13, 78/13, 47/15, 33/16, 52/16, 15/17, 22/19, 81/19, 203/20, Art. 29, para. 2); Croatian Labour Law (*Zakon o radu*, Narodne novine, No. 93/14, 127/17, 98/19, Art. 25). The European Committee of Social Rights has not directly

legal systems, candidates have the right to provide false answers to the employer's off-limits questions, which cannot be considered a violation of the principle of good faith. The employer, therefore, cannot claim that he was misled about the essential characteristics of the contracting party, and accordingly, cannot seek the annulment of the employment contract.[29] The same solution is provided by the ILO standards, which prohibits the possibility of disciplinary punishment of an employee (including dismissal, as the most severe of the disciplinary measures) who gave a false answer to a question not directly related to the performance of duties. Unless there are exceptional reasons that justify the collection of sensitive personal data.[30]

17.2.2 Positive Action Measures

Protecting the right to equal access to employment does not only mean banning the exclusion of women or men from the labour market. Implementing *programs should also be done, which can help workers return to the world of work or improve their position in the labour market after a career break due to family duties* (e.g. by refreshing their knowledge and acquiring skills needed to adapt to innovations in technology or science that have occurred in the meantime).[31] In addition, states are obliged, through employment services, to implement measures to employ vulnerable categories of workers who encounter problems during professional reintegration (e.g. victims of domestic violence, Roma people and workers from other marginalised groups). This includes the obligation of public employment services to ensure equal access of their services for all genders. Further, employment and self-employment of the underrepresented gender must be encouraged with the inclusion of a larger number of persons of the underrepresented gender in certain active employment policy measures. Also, public employment services are obliged to prevent the publishing of advertisements where conditions are related to sex/gender. Thus, the prohibition of advertisements with discriminatory content, includes an obligation for *gender-neutral advertising of vacancies.* This can be done by omitting from the advertisement illustrations suggesting that a job should be performed by a worker of a specific sex. Employers should also refrain from using terms that imply preference for candidates of a certain sex and gender in the wording of job titles, such as for stewardesses, firemen etc. It is considered good practice to clearly state in the advertisement that persons of both sexes may apply for the job, either by explicitly stating this by announcing the job title is open for both genders, or by

formulated such a requirement as a condition for the effective application of Article 20 of the Revised European Social Charter, but its practice shows that it positively rates national regulations that explicitly prohibit questions on pregnancy, adoption or family planning. Kollonay-Lehoczky (2017), p. 368.

[29] Radé (1997), p. 128.

[30] Protection of workers' personal data. An ILO code of practice, point 6.8. in connection with points 6.5–6.7.

[31] Kollonay-Lehoczky (2017), p. 366.

marking it "m/f". However, with regard to the third gender, it can be argued that presented labels in advertisements could lead to discrimination against non-binary people. Therefore, preference should be given to the existing gender-neutral advertising, or to advertisements indicating that the advertised jobs are available for m/f/x.[32] This rule may be derogated for positive action measures, provided that the advertisement indicates the reason for the different treatment.

When it comes to *positive action measures*, the state must intervene in order to facilitate employment of workers who have traditionally faced unfavourable treatment, as well as groups of workers who would not be able to improve their position in the labour market without these measures. The content of positive action measures can vary widely, from providing support and encouraging workers from these groups to apply for jobs, over assisting them to gain experience and improve their skills, to employment quotas.[33] International instruments for the protection of human rights and fundamental freedoms, including CEDAW (Article 4), confirm the possibility of introducing positive action measures and the same applies to EU law.[34] Public authorities in certain countries reaffirm the obligation to give priority to recruiting candidates of the under-represented sex. The underepresented sex may have difficulty finding and retaining employment in certain jobs due to prejudices and stereotypes related to the roles and abilities of members of different sexes. For example, there is a 30%, quota for female cadets in military and police academies, or for training women for police and military jobs, which is reflected in the employment of women in the security sector. These measures can also be introduced in favour of men, as is the case for kinder garden jobs in the Nordic countries, which is traditionally a female-dominated sector, due to the association of child care being a woman's job.[35] In this regard, it should be noted that the implementation of these measures raises delicate legal issues. European countries share a negative experience with the implementation of quotas for employment of women, as evidenced by the judgment in the *Kalanke* case. The ECJ found the measure that allows, in case of

[32] KU Leuven (2016), p. 56.

[33] This is particularly evident when giving preference to candidates of the under-represented sex in the field of higher education, because the number of full professors at higher education institutions in EU Member States is far beneath the expected, given the gender structure of graduates at universities (European Commission. 2019. *She figures*, Luxembourg: Publications Office of the European Union, 115). However, implementation of quotas in this field is accompanied by serious dilemmas regarding their justification, bearing in the importance of the merit system. Wallon et al. (2015), p. 42.

[34] See: Treaty on the Functioning of the EU, Art. 157, para. 4; Charter of Fundamental Rights of the EU, Art. 23, para. 2; Directive 2006/54/EC, Art. 3; Costello and Davies (2006), pp. 1600–1601.

[35] In addition to these stereotypes (and stigmatization of men who choose to pursue this career), the authors cite low earnings of pre-school teachers as an important factor in the low representation of men in the field of preschool education. On the other hand, pedagogical and psychological research shows that the contact of young children with pre-school teachers of both sexes have significant psychological value for children, which is why they need to be provided with a more diverse educational environment, in which teachers will mirror the gender differences in society, as well as ethnicity, social origin, etc. International Labour Office (2013), p. 15.

lower representation of women in work environments, automatic and unconditional advantage in employment and advancement to women compared to men with the same abilities, to be illegal. Such measures, in the opinion of the ECJ, went beyond the legal instruments for promotion of equal opportunities for men and women because it replaced that goal (promotion of equal opportunities) with the outcome (equal representation) that should result from equal opportunities.[36] That position has, since the *Badeck* judgment, been nuanced and, to some extent, abandoned in favour of the position on the *conditional nature of positive action measures*. Namely, the ECJ's new approach to this issue implies that quotas can be applied under two conditions: (a) that women are not automatically and unconditionally given preference when female and male job candidates have the same qualifications; (b) that the employer makes an objective assessment of the candidates' abilities, with the possibility of taking into account the specific personal circumstances of each candidate.[37] The second condition implies, more precisely, a *saving (hardship) clause*, which allows, in the process of selection, deviation from preferential treatment of women, if there are reasons of greater "legal weight" on the side of the male candidate, e.g. if he is a war veteran. The ECJ stated that the measures of positive action consisting of strict (automatically and unconditionally applicable) quotas in the selection stage are unacceptable. The further development of jurisprudence has confirmed the position that these measures can be applied only if, during the consideration of the submitted applications and verification of the abilities of the candidates, two or more candidates with the best qualifications have been selected. If their (best) qualifications are equal, the female candidate should be given preference over the male candidate. Conversely, if the male candidate has better qualifications, the female candidate cannot be given preference over the male candidate.[38] On the other hand, in the *Marschall* and *Abrahamsson* cases, the EU Court of Justice concluded that the provisions favouring women, without taking into account the specificities of the relevant qualifications of male candidates, which were better, does not constitute a legal exception to the prohibition of discrimination.[39]

17.3 Equal Treatment at Work

Indeed, the right to equal opportunities and equal treatment is a fundamental principle of EU law, of particular relevance in the field of employment and occupation. Article 157 (3) of the Treaty on the Functioning of the EU provides a specific

[36] Case C-450/93, *Eckhard Kalanke* v *Freie Hansestadt Bremen* (ECJ 17 October 1995), paras. 22–23.

[37] Case C-158/97, *Georg Badeck et al.* v *Landesanwalt beim Staatsgerichtshof des Landes Hessen* (ECJ 28 March 2000), para 23.

[38] Hieβl (2012), p. 51.

[39] See: Case C-409/95, *Hellmut Marschall* v *Land Nordrhein-Westfalen* (ECJ 11 November 1997); Case C-407/98, *Katarina Abrahamsson and Leif Anderson* v *Elisabet Fogelqvist* (ECJ 6 July 2000).

legal basis for the adoption of measures to ensure the application of this principle—including the principle of equal pay for equal work or work of equal value. In addition, Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibits "any discrimination on grounds of sex" and enshrines the right to "equal treatment between men and women in all areas, including employment, work and pay".

In fact, Directive 2006/54 and its interpretation by the ECJ, is the reference in this area, without prejudice to other international and national legal instruments. It contains specific provisions to implement the principle of equal opportunities and equal treatment of men and women regarding access to employment, promotion and vocational training, working conditions, in particular pay, and occupational social security schemes (Article 1).

The Directive includes mechanisms to ensure the effective application of the principle of equal treatment to all persons who consider themselves wronged by failure to apply that to them. It comprises measures "to ensure real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in any case dissuasive and proportionate measures to the damage suffered".[40] A relevant instrument of defence is the reversal of the burden of proof which allows potential victims of discrimination, on grounds of sex, to present "before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination". In this case, the respondent has the burden "to prove that there has been no breach of the principle of equal treatment".[41] (Articles 18 and 19).

17.3.1 Working Conditions and Promotion

The principle of equal treatment means the absence of direct or indirect discrimination on grounds of sex "in the public or private sectors, including public bodies, in relation to employment and working conditions, including dismissals as well as pay as provided for in Article 141 TEC –currently Article 157 TFEU–" (Article 14 (1) (c) of the Directive 2006/54).

The expression "working conditions" is broad and includes, among others, remuneration, classification in a salary group, recognition of previous periods of service, entitlement to leave, additional payments and overtime supplements. It is clear from the case-law of the ECJ that "unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Indeed, only women can become pregnant, so that any less favourable treatment based on pregnancy or maternity constitutes direct discrimination on grounds of sex and, as such, is not justifiable".[42] For instance, "a woman who is deprived of the

[40] Art. 18 of Directive 2006/54.

[41] Art. 19 of Directive 2006/54.

[42] Case C-284/02, *Land Brandenburg v Ursula Sass* (ECJ 18 November 2004), paras. 35–36.

right to an annual assessment of her performance and, therefore, of the opportunity of qualifying for promotion as a result of absence on account of maternity leave, is discriminated against on grounds of her pregnancy and her maternity leave. Such conduct constitutes discrimination based directly on grounds of sex".[43]

The consequences of maternity on working conditions may represent a handicap for women. The same occurs for working women and men when exercising rights to paternity and/or adoption leave. To this respect, Directive 2006/54 contains particular provisions in terms of protection of the woman's biological condition during pregnancy and maternity. Further, it contains measures aimed to guarantee working conditions of male and female workers when taking paternity or maternity leave. In this way, women on maternity leave and working men and women exercising the rights to paternity and/or adoption leave, are entitled, after the end of said-leave period, to return to their job or to an equivalent post, on terms and conditions which are no less favourable to them. Further, they will be able to benefit from any improvement in working conditions to which they should have been entitled during their absence (Arts. 15 and 16 of Directive 2006/54).

The aim is "to avoid the loss or diminution of rights arising from an employment relationship, acquired or in the process of being acquired, to which the worker is entitled when he/she starts maternity leave or parental/adoption leave, and to ensure that, at the end of such leave, he/she is in the same situation as he/she was in before the leave".[44] A relevant concept in this respect is "rights acquired or in the process of being acquired". Related to a parental leave, the ECJ has established that this concept covers "all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts Directorate-General for Justice (European Commission)".[45] We can consider that this may be applied to maternity leave.

To summarise, maternity leave and paternity/adoption leave may not entail the loss of employment rights for the beneficiary. As long as the employment relationship persists, the worker who is on such leave must continue to have the same working conditions that apply to workers who derive from this employment relationship.

Example

For instance, in a case of salary promotion where the entire period of maternity leave is not taken into account in the calculation of the qualifying period for

[43] Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* (ECJ 30 April 1998), para. 32.

[44] Case C-537/07, *Evangelina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA.* (ECJ 16 July 2009), para. 39, and Case C-116/08, *Christel Meerts contra Proost NV* (ECJ 22 October 2009), para. 39.

[45] Case C-116/08, cited, para. 43.

classification in a higher salary grade, there is a clear disadvantage. Only the first 8 weeks of maternity leave were taken into account, but not the subsequent 12 weeks, to the detriment of the worker. There is a difference in treatment compared to other workers—men and women—who move up the pay scale without this type of maternity-related limitation.[46] ◀

17.3.2 The Principle of Equal Pay of Men and Women and Gender Pay Gap

The principle of equal pay for equal work or work of equal value for men and women constitutes an essential part of the *acquis* which has been extensively developed in the case-law of the ECJ. The principle is laid down in Art. 157 TFEU (previously Art. 141 TEC and before that Art. 119 TEEC) and developed by Directive 2006/54.

Several questions arise. Firstly, the concept of "pay". From the *Defrenne I* judgment, the case-law has developed a very broad concept of pay within the meaning of Art. 119 TECC, "that comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer."[47] "The fact that certain benefits are paid after the end of the employment does not prevent them from being paid within the meaning of the aforementioned Article".[48] This is the concept set out in the current Art. 157 TFEU, which includes a wide variety of benefits according to the case-law, for instance:

- "The rail travel facilities granted in kind by the employer to the retired employee or his dependants directly or indirectly in respect of his employment";[49]
- Compensation awarded to a worker for unfair dismissal, insofar as it is paid by virtue of his employment relationship. It occurs when such compensation comprises, on the one hand, the part of the remuneration that the worker would have received if he had not been dismissed and, on the other hand, compensation for the damages caused by the dismissal, i.e. due to the expenses incurred and the loss of earnings.[50]
- The benefits of the occupational pension scheme based on an agreement between the employer and the works council which supplements the social benefits paid

[46] Case C-284/02, cited.

[47] Case 80/70, *Gabrielle Defrenne v Belgian State* (ECJ 25 May 1971).

[48] Case 12/81, *Eileen Garland v British Rail Engineering Limited* (ECJ 9 February 1982), para. 5, and Case C-109/91, *Gerardus Cornelis Ten Oever contra Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* (ECJ 6 October 1993), para. 8, para. 10.

[49] Case 12/81, cited, paras. 7–9.

[50] Case C-167/97, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* (ECJ 9 February 1999), paras. 26–28.

> under generally applicable national legislation, which are fully financed by the employer and received by the employee by virtue of his or her employment relationship.[51]

Secondly, the meaning of "same work" and "work of equal value" under the principle of equal pay.

> Art. 4 of Directive 2006/54 states that "for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex".

On the one hand, the ECJ has identified the following criteria for determining when it is "the same work" for the purposes of applying the principle of equal pay: (1) the nature of the work or tasks performed, (2) the training requirements for its exercise, and (3) the working conditions under which it is carry out. These criteria apply even when different groups of workers, who do not have the same professional qualifications for their occupation, perform an apparently identical activity. For example, the special training factor may objectively justify a pay difference between workers performing the same work, where the employer demonstrates that it is for the performance of specific tasks entrusted to the employee.[52]

On the other hand, the concept of "work of equal value" is linked to job classification systems and is a source of retributive discrimination. It has been questioned whether a classification system is compatible with the principle of equal pay, when it is based on criteria that favours one sex over the other, (e.g. based on the criteria of muscle demand or muscular effort and the heaviness of the work). The ECJ has ruled that "where a job classification system is used in determining remuneration, that system must be based on criteria which does not differ according to whether the work is carried out by a man or by a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex". In addition, "even where a particular criterion, such as that of demand on the muscles, may in fact tend to favour male workers [. . .] it must, in order to determine whether or not it is discriminatory, be considered in the context of the whole job classification system, having regard to other criteria influencing rates of pay. A system is not necessarily discriminatory

[51] Case C-170/84, *Bilka - Kaufhaus GmbH contra Karin Weber von Hartz* (ECJ 13 May 1986), paras. 20–22, Case C-262/88, *Douglas Harvey Barber contra Guardian Royal Exchange Assurance Group* (ECJ 17 May 1990): the Court decided that all forms of occupational pension constituted pay for the purposes of former Article 119, and that the principle of equal treatment therefore applied to them.

[52] Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* (ECJ 17 October 1989), para. 23.

simply because one of its criteria makes reference to attributes more characteristic of men. In order for a job classification system as a whole to be non-discriminatory (. . .) it must, however, be established in such a manner that it includes, if the nature of the tasks in question so permits, jobs to which equal value is attributed and for which other criteria are taken into account in relation to which women workers may have a particular aptitude".[53]

Lastly, the issue of "gender pay gap". This is a clear indicator of the imbalance between male and female workers in labour relations, with direct effects on women's lower pensions, leading to a higher risk of poverty for women. The causes of the gender pay gap are varied, more noticeable in the private sector than in the public sector, and in any case related to the way women work. Women tend to work part-time temporary jobs or jobs with little stability, in feminised sectors or jobs with poorer working conditions. These differences tend to worsen with age and are also affected by the career breaks that women often experience for family reasons.

A theoretical distinction is made between the adjusted and non-adjusted gender pay gap. The adjusted one takes into consideration not only the gross income of male and female workers, but also various socioeconomic and cultural factors that influence this difference. Such as differences in education and training, work experience, the productive sector in which they work, whether they are predominantly male or female jobs, duration of working time and type of activities. The non-adjusted gender pay gap, which is officially used in the UE,[54] represents an average of differences between the gross earnings of male and female workers, regardless of other socioeconomic and cultural considerations. Therefore, the gender pay gap is one of the indicators that best illustrates the differences between men and women in the labour market. It is a broader concept than equal pay for work of equal value, which reflects the average hourly wage difference between male and female employees in the economy as a whole. The gender pay gap levels vary significantly across the EU.[55]

17.3.3 Gender Equality, Flexible Employment Contracts and Flexible Working Conditions

As Directive 2006/54 states, (Recital 11), "the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market," could be addressed "by means such as flexible working time arrangements, which enable both men and women to combine family and work commitments more successfully".

[53] Case C-237/85, *Gisela Rummler v Dato-Druck GmbH* (ECJ 1 July 1986), paras. 13 and 15.

[54] See Directorate-General for Justice, European Commission (2014), p. 5.

[55] In this regard, see the full report by Eurostat "Gender pay gap statistics" https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics.

Flexibility is a necessary tool in the labour market, both for companies and employees. Companies need to increase flexible working conditions to function better in order to respond to changes in demand and remain competitive. While employees need more flexibility to reconcile work with personal and family life. A balance of interests needs to be found so that the flexibility demanded by companies, especially in working time (overtime, part-time work, flexible schedules, night work, shift work, working from home, atypical working hours, staggered working hours, etc.), does not harm the health and well-being of workers in terms of gender equality.

The EU established a basic framework for working time through the Working Time Directive 2003/88[56] and the Part-Time Work Directive 97/81.[57] The objectives of the Framework Agreement on part-time work, which was annexed to the latter, was on one hand, to "provide for the removal of discrimination against part-time workers and to improve the quality of part-time work.", On the other hand, "to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers" (Clause 1 of Directive 97/81). In this field, the principle of non-discrimination means, in respect of employment conditions, that "part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time, unless different treatment is justified on objective grounds." (Clause 4.1).

From a gender perspective, working time flexibility has a positive value, as more individualised working time helps employees to maintain a work-life balance. However, greater flexibility may have a negative effect on gender equality. In fact, part-time work is the framework for indirect gender discrimination to the detriment of women. Precisely because in many countries, part-time work is mostly performed by women for various reasons and is concentrated in low-paid sectors with little or no training and career opportunities, even affecting their social security rights.[58]

In order to determine the existence of indirect discrimination, the case-law carries out three successive and mutually exclusive tests. First, it determines whether there is a difference in treatment between full-time and part-time workers, by comparing the particular aspect concerned (e.g. pay). If the answer is yes, the ECJ checks, secondly, whether the difference in treatment affects significantly more women than men (a statistics test). Third, if the answer to the previous question is affirmative, the question arises whether the difference in treatment can be justified on the basis of objective factors unrelated to discrimination.[59] Finally, the absence of justification

[56] Directive 2003/88/EC of 4 November 2003 *concerning certain aspects of the organisation of working time*. OJ L 299, (2003), pp. 9–19.

[57] Directive 97/81/EC of 15 December 1997 *concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC*. OJ L 14, (1998), pp. 9–14.

[58] Plantenga and Remery (2010).

[59] Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and*

will determine the existence of discrimination. Conversely, if the difference in treatment is justified, the suspicion of discrimination disappears.

For instance, "the provision of a collective agreement which allows employers to maintain a distinction as regards overall pay between two categories of workers, that is to say, those who work for a minimum number of hours per week or per month and those who perform the same type of work but do not work such a minimum number of hours, constitute discrimination against female workers vis-à-vis male workers, if in fact a much lower percentage of men work on a part-time basis than women [. . .]. In order to exclude discrimination, it must be shown that the difference in treatment between the two categories of workers is based on objectively justified factors unrelated to any discrimination on grounds of sex".[60] Regarding justifications, the ECJ has rejected employers' arguments based on economic issues. Thus, "so far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify the discrimination [. . .] solely on the ground that avoidance of such discrimination would involve increased costs".[61]

17.3.4 Gender-Based Discrimination Regarding Termination of Employment

The principle of non-discrimination on grounds of sex "is not confined to discrimination based on the fact that a person is of one or other sex. It also comprises discrimination arising from the gender reassignment of a person in so far that such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Therefore, where a worker is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment".[62] It may be considered a discrimination on grounds of sex, unless the employer's decision is objectively justified.

One of the reasons for dismissal is often maternity. "The risk of dismissal on grounds of sex related to maternity may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or workers who are breastfeeding, including the particularly serious risk of inciting a pregnant worker to voluntarily terminate her pregnancy".[63] This justifies specific protection against dismissal. Article 10 of Directive 92/85 encourages Member States to take

Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg (ECJ 15 December 1994), paras. 23–26.

[60] Case C-184/89, *Helga Nimz v Freie und Hansestadt Hamburg* (ECJ 7 February 1991), para. 12.

[61] Case C-243/95, *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* (ECJ 17 June 1998), para. 40.

[62] Case C-13/94, *P v S and Cornwall County Council* (ECJ 30 April 1996), paras. 17–21.

[63] Case C-394/96, *Mary Brown v Rentokil Ltd* (ECJ 30 June 1998), para. 18.

the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding. This should be during the period from the beginning of pregnancy to the end of maternity leave, "save in exceptional cases not connected with their condition" (par. 1).[64]

Regarding the latter expression, the case-law has underlined that the "reasons not relating to the individual workers concerned" may be those specific to collective redundancies, i.e. economic, technical or organisational reasons, or reasons connected with the organisation or production of the undertaking. Those circumstances do not preclude the employer from providing a higher level of protection for pregnant workers, workers who have recently given birth or workers who are breastfeeding.[65]

This protection against dismissal also covers the period before maternity leave, when the dismissal is due to reasons related to a pregnancy-related illness. The employer must give written notice of the reasons justifying his decision to dismiss. In addition, workers must be protected from the consequences of unlawful dismissal.

The prohibition of dismissal of workers during pregnancy and until the end of maternity leave is not limited to the notification of dismissal but concerns other preparatory acts of dismissal. A contrary interpretation would deprive Art. 10 of Directive 92/85 of its effectiveness. The prohibition of dismissal covers, for example, the pregnancy phase of the worker. This can be seen if the employer advertises a job in a newspaper in order to start looking for a permanent replacement for her, with the clear intention of dismissing her because of her pregnancy or the birth of a child.[66]

The prohibition of dismissal provided for in Art. 10 of Directive 92/85 applies to both fixed-term and open-ended contracts. The non-renewal of a fixed-term contract when it has reached its expiry date cannot be regarded as a dismissal prohibited by that provision. Unless it is motivated by the pregnancy of the worker, in which case it would constitute direct discrimination on grounds of sex (as such unjustifiable).

The protection of women workers against discriminatory treatment, on the grounds of pregnancy, includes legal action under national law to enforce their rights in the event of dismissal. On the basis of Art. 12 of Directive 92/85, Member States must provide for measures to ensure effective and efficient judicial protection, with a real deterrent effect against the employer and, in any case, adequate in relation to the damage suffered. Thus, the ECJ has considered less favourable treatment of a woman, in relation to her pregnancy, the procedural rules that provide for an action for annulment and reinstatement as the only means of appeal against her dismissal

[64] Directive 92/85 of 19 October 1992, *on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*. OJ L 348, (1992), pp. 1–7.

[65] Case C-103/16, *Jessica Porras Guisado v Bankia SA and Others* (ECJ 22 February 2018), para. 49.

[66] Case C-460/06, *Nadine Paquay v Société d'architectes Hoet + Minne SPRL.* (ECJ 11 October 2007), para. 35.

excluding an action for damages. Whereas such an action is available to any other employee who has been dismissed.[67]

Similar protection applies in Art. 16 of Directive 2006/54, in relation to workers (men and women) exercising paternity and/or adoption leave rights, where the dismissal is due to the exercise of these rights. In particular, protection against dismissal when the worker has applied for or taken parental leave extends to the calculation of dismissal compensation. As the case-law points out, a redundancy payment paid to a worker employed for an indefinite period and on a full-time basis, calculated on the basis of the reduced salary they received while on temporary part-time parental leave, is not admissible.[68]

17.4 Labour Law Measures to Encourage Improvements in the Occupational Safety and Health

The Community Charter of the Fundamental Social Rights of Workers (1989), states that every worker must enjoy satisfactory conditions of safety and health in his working environment (par. 19). To this end, the Directive on Health and Safety at Work states that particularly sensitive risk groups must be protected against risks arising specifically from work.[69] One such group is pregnant workers, workers who have recently given birth or workers who are breastfeeding, for whom Directive 92/85 sets out the measures necessary to encourage improvements in occupational safety and health. A challenge in this area is to ensure that protective measures do not disadvantage women in the labour market and in their working conditions, nor contradict the principle of equal treatment of men and women. As regards to this principle, "the ECJ has consistently recognised the legitimacy of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality".[70]

17.4.1 Occupational Risk Assessment and Prevention

Besides the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance and protection against dismissal for reasons associated with their condition, Directive 92/85 lays down several obligations for the employer. These range from the assessment of risks according to the particular circumstances of the worker due to her pregnancy or breastfeeding, to the adoption of a series of measures to protect her from those risks

[67] Case C-63/08, *Virginie Pontin v T-Comalux SA* (ECJ 29 October 2009), para. 76.

[68] Case C-116/08, cited, para. 56.

[69] Directive 89/391 of 12 June 1989 *on the introduction of measures to encourage improvements in the safety and health of workers at work*. OJ L 183, (1989), pp. 1–8.

[70] Recital 24 of Directive 2006/54.

that cannot be eliminated or avoided. A relevant aspect is that the worker must inform the employer of her particular maternity condition, whatever stage she is in (Art. 2). It is supposed to make it possible for the employer to take the necessary measures to protect her from the point of view of occupational risk prevention. The measures are as follows:

1. A Risks Assessment
   "For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of pregnant workers, workers who have recently given birth or workers who are breastfeeding, either directly or by way of the protective and preventive services. It will allow to assess any risks to the safety or health and any possible effect on the pregnancy or breastfeeding of them, and decide what measures should be taken. The related workers or their representatives should be informed of the results of such assessment and of all measures to be taken concerning health and safety at work". (Art. 4 of Directive 92/85).

   The case-law has noted that "a risk assessment is a systematic examination of all aspects of work which comprises at least three phases: the first phase consists of identification of hazards (physical, chemical and biological agents; industrial processes; movements and postures; mental and physical fatigue; other physical and mental burdens). The second phase provides for identification of worker categories (pregnant workers, workers who have recently given birth or workers who are breastfeeding) which are exposed to one or several of those risks. The third phase, namely, the qualitative and quantitative risk assessment, represents the most delicate phase in the process, in that the person carrying out the assessment must be competent and take due account of relevant information . . . in applying appropriate methods in order to be able to conclude whether or not the hazard identified entails a risk situation for workers".[71]
2. Adaptation of working conditions or working time.
   If the results of the assessment referred to in Art. 4 (1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of the worker concerned, the employer shall take the necessary measures to ensure that, by temporarily adjusting her working conditions and/or her working hours, the exposure of that worker to such risks is avoided. (Art. 5 (1) of Directive 92/85).
3. Functional mobility.
   If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job. (Art. 5 (2) of Directive 92/85).

[71] Case C-531/15, *Elda Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social* (ECJ 19 October 2017), para. 48.

4. A leave from work.
   If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health. (Art. 5 (3) of Directive 92/85).

   In the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for the workers concerned must be ensured (Art. 11 (1) of Directive 92/85).

17.4.2 Maternity Protection

The aforementioned provisions (adaptation of working conditions or working time, functional mobility or a leave from work) shall apply, mutatis mutandis, if a female worker engaged in an activity prohibited for pregnancy or breastfeeding becomes pregnant or starts breastfeeding and informs her employer thereof (Art. 5 (4) of Directive 92/85). Prohibited activities are, for example, the underground mining work or activities involving a risk of exposure to certain physical, biological and chemical agents (Art. 6 and Annex II of Directive 92/85).

In addition, pregnant workers and workers who have recently given birth or are breastfeeding are not obliged to perform night work (as defined on Directive 2003/88). It aims to strengthen their protection by establishing the principle that they are not obliged to perform night work as long as they submit a medical certificate indicating the need for such protection on the basis of their safety or health (Art. 7 of Directive 92/85). The ECJ considers that "night work may have a significant effect on the health of pregnant women, women who have recently given birth or women who are breastfeeding. The risks for those women vary with the type of work undertaken, working conditions and the individual concerned. Consequently, because of increased tiredness, some pregnant or breastfeeding women may not be able to work irregular or late shifts or work at night. In such cases, a transfer to daytime work, or a leave from work, or an extension of maternity leave (where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds) should be made possible".[72]

In cases of night work, employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for workers must be ensured (Art. 11 (1) of Directive 92/85).

[72] Case C-41/17, *Isabel González Castro v Mutua Umivale and Others* (ECJ 19 September 2018).

In particular, another protective provision is the right of pregnant workers to attend ante-natal examinations when they have to take place during working hours, without loss of pay (Art. 9 of Directive 92/85).

17.4.3 Protection of Workers Who Have Recently Given Birth

To complete the protection, workers are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement. This leave must include compulsory maternity leave of at least 2 weeks allocated before and/or after confinement (Art. 8 of Directive 92/85). The case-law specifies that "maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment."[73] In this respect, the Court accepts that a provision, in a national collective agreement reserved to female workers and not to male workers, who bring up their child themselves, the right to leave after the expiry of statutory maternity leave. Provided that such leave is intended to protect workers in relation to the effects of pregnancy and maternity.[74]

For the provisions on maternity leave to be useful, the employment rights of workers must be guaranteed and in particular, the maintenance of adequate pay and/or the right to an adequate allowance (Art. 11(2) of Directive 92/85). The allowance shall be considered adequate, "if it guarantees an income at least equivalent to that which the worker concerned would receive in the event of a break in her activities for reasons connected with her state of health, subject to the limits laid down by national legislation" (par. 3).[75]

17.4.4 Protection of Workers Who Are Breastfeeding

"The condition of a breastfeeding woman is intimately related to maternity, and in particular to pregnancy or maternity leave, so workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth".[76]

[73] Case C-184/83, *Ulrich Hofmann v Barmer Ersatzkasse* (ECJ 12 July 1984), para. 25, and Case C-12/17, *Ministerul Justiției and Tribunalul Botoşani v Maria Dicu* (ECJ 4 October 2018), para. 34.

[74] Case C-463/19, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle v Caisse primaire d'assurance maladie de la Moselle* (ECJ 18 November 2020), para. 74.

[75] Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission* (ECJ 27 October 1998), para. 40, and Case C-167/12, *C. D. v S. T.* (ECJ 18 March 2014), para. 33.

[76] Case C-531/15, *Elda Otero Ramos v Servicio Galego de Saúde e Instituto Nacional de la Seguridad Social* (ECJ 19 October 2017), para. 59.

As stated above, during breastfeeding, the employer must carry out a risk assessment and if necessary, take measures to protect the worker by adapting working conditions and working time, or through functional mobility or, finally, through work leave.

In order to be in conformity with the requirements of Art. 4 (1) of Directive 92/85, the ECJ underlines that "the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk. Employers will need, for as long as those women continue to breastfeed, to review the risks regularly to ensure that such female workers are not exposed, or exposed as little as possible, to risks that could damage health or safety [. . .]. A certain number of those substances are excreted through breast milk, and the child is presumed to be particularly sensitive".[77]

17.5 Protection of Workers on Work-Life Balance for Parents and Caregivers

One of the most complex issues that affects equality between women and men both directly and indirectly is that of caring for children and family members. Traditionally, the cultural and social model of role distribution considered men to be the breadwinners, while women took care of the family, given that they were not fully incorporated into the labour market. In short, this has contributed to the construction of a gender stereotype creating unequal expectations about the role of women and men in society, attributing to women caring and nurturing tasks, although progress has been made in recent times.

Currently, women tend to assume the majority of unpaid work, with huge differences in the time spent between men and women, a fact that is clear throughout the world.[78] This is also evident in the EU Member States, with significant data emerging from Eurofound's study on *Striking a balance: reconciling work and life in the EU*, based on the European Working Conditions Survey (EWCS) as well as the European Quality of Life Survey (EQLS). The analyses show that equal sharing of work and care activities is the exception rather than the rule in all EU countries, although there are significant differences among them.[79]

It is a fact that an adequate equal treatment policy requires the protection of workers' rights to adapt working conditions to family responsibilities. In this sense, at an international and European level, rules have been drawn up to balance private and working life in order to facilitate it.

[77] Case C-531/15, cited, para. 49 and 51.

[78] Addati et al. (2018).

[79] https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18065en.pdf.

Firstly, within the ILO framework, the Maternity Protection Convention, 2000 (C183) and the Workers with Family Responsibilities Convention, 1981 (C156) address these needs, giving them the importance they require. The content of C183 establishes the rights to maternity and highlights that the exercise of maternity rights cannot constitute a source of discrimination in employment. As far as C156 is concerned, the articles do not go beyond a mere programmatic exercise, given that its fundamental aim is expressed in line with other international instruments on equal opportunities and equal treatment for men and women. Both Conventions refer to different international instruments on the elimination of all forms of discrimination against women. Yet C156 mentions that the States Parties recognise that in order to achieve full equality between men and women, it is necessary to modify their traditional role in society and in the family. On this issue, the Convention offers a vision of the future, directing States to develop, as part of their national policy objectives, various aspects that seek to ensure that the exercise of work-life balance does not lead to discrimination in employment for workers (Art. 3). In line with this objective, awareness-raising policies should be formulated through education and information, as well as guidance and training for the retention of workers with family responsibilities in the labour market. One of the most ambitious objectives is to address their needs by planning local or regional communities and in turn, by developing or promoting community services, public or private, such as childcare and family assistance services and facilities. Undoubtedly, the eventual implementation of these measures would enable the exercise of work-life balance with a public service vocation.

Secondly, as far as the EU framework is concerned, the content of its normative development is more comprehensive and complex, closely related to the Institution's equality policies and in line with UN action on this issue. The EU policy "*in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded (. . .) as being the natural corollary of the equality between men and women (. . .).*"[80] Moreover, following the enactment of the European Charter of Fundamental Rights, leave periods related to childbirth and childcare have acquired a "constitutional" nature. Article 33.2 of the Charter states "*To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.*"

These rights have been developed by the UE law, incorporating minimum provisions, which allow the exercise of family responsibilities and promote equal treatment as well. On the other hand, Directive 96/34/EC initially regulated work-life balance but was revised by Directive 2010/18/EU of 8 March 2010 *implementing the revised Framework Agreement on parental leave concluded by*

[80] Case C-243/95, *Hill and Stapleton v The Revenue Commissioners and Department of Finance* (ECJ 17 June 1998), para. 42.

BUSINESSEUROPE, UEAPME, CEEP and ETUC.[81] The latter directive has been repealed by Directive (EU) 2019/1158 of 20 June, *introducing appropriate measures to aim at a fair sharing of family responsibilities*.[82] Specifically, Directive (EU) 2019/1158 establishes rights that allow the exercise of care work, configured around two institutions: firstly, the figure of leaves of absence, in a broad sense, and secondly, the organisation of work with flexible working hours. These are minimum provisions, which make it possible to exercise family responsibilities, reinforcing more equal sharing, as well as to promote equal treatment, as set up in its Recitals.

Moreover, although these institutions are key elements in the development of parenting and care, their use sometimes leads to indirect discrimination against women. Thus, despite the enormous progress that has been made, there are still gaps to be filled. Consideration should be given to the fact that entering rules to eliminate or reduce gender inequality can also perpetuate their traditional gender roles and place men in a secondary position in terms of assuming family responsibilities.[83] Specifically, it is necessary to overcome the concept of conciliation to move on to other more gender-sensitive, such as co-responsibility or sharing of responsibilities. The change in terminology would clearly imply a paradigm shift and would promote far-reaching social changes.[84] Therefore, the EU's action continues, with its institutions, to make a commitment to gender equality and to develop strategies to address this issue, in accordance with Sustainable Development Goal (SDG) 5 of the UN's 2030 Agenda to achieve equality for women.

17.5.1 Maternity Leave, Assisted Reproduction Techniques and Surrogate Maternity

The relationship between parents and children as an element of reconciliation is common to maternity leave, paternity leave and parental leave. The purpose of maternity leave, its distinguish feature, is to protect not only the relationship between a woman and her child after pregnancy and childbirth, but also the biological condition of women during and after pregnancy and her physical recovery.[85] Accordingly, the ECJ has argued in its rulings the differences between maternity leave and parental leave.

[81] OJ L 68, 18.3.2010, 13–20.

[82] OJ L 188, 12.7.2019, 79–93.

[83] Cases C-476/99, *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* (ECJ 19 March 2002) para. 41 and C-104/09, *Pedro Manuel Roca Alvarez v Sesa Start España ETT, S.A* (ECJ 30 September 2010) para. 36. See: Cabeza Pereiro and Ballester Pastor (2015), pp. 116–121.

[84] Ballester Pastor (2011), pp. 17–18.

[85] This interpretation derived to the Case C-184/83, *Hofmann,* cited. has been partially questioned in the Opinion of advocate general Bobek, delivered on 9 July 2020, Case C-463/19, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle v Caisse primaire d'assurance maladie de Moselle,* para. 38–80.

Maternity leave is a right

► **Definition** "*intended to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.*"[86]

Furthermore, parental leave

► **Definition** is a right "*. . . granted to parents to enable them to take care of their child (. . .) until the child has reached a given age.*"[87]

Notwithstanding, certain problems have arisen regarding the consideration that should be given to attempting maternity through assisted reproduction techniques, such as in vitro fertilisation and/or hormonal treatments. Currently in modern society, women have been delaying the age of maternity, among other factors, to consolidate their employment situation.[88] This fact, together with the evolution of family models, has developed fertility treatments, as they are used by women with difficulties in conceiving, those who experience motherhood alone and homosexual couples.

Nevertheless, this social change has not been received within a legislative framework and reservations are expressed about the extension of the Directive 92/85 to the protection of women under fertility treatments. Consequently, "*an employee who undergoes an in vitro fertilisation procedure is not a 'pregnant worker' for the purposes of the first part of Article 2(a) of Directive 92/85/EEC, if, at the time at which she was given notice of termination of employment, her ova had been fertilised in a laboratory but had not yet been transferred to her body.*"[89]

On the other hand, Directive 2019/1158 does not include leaves to facilitate fertility treatments which, in addition to being financially costly, might also require the temporary absence from work. Indeed, the legislation has not provided a solution for women undergoing fertility treatments, only protecting them against possible actions contrary to the principle of equality under the Directive 2006/54/EC. Furthermore, it should be borne in mind that fertility treatments involve hormone treatment which may cause the woman a discomfort incompatible with her work. Accordingly, if women need to rely on the common rules of the sick-leave scheme to undergo to in vitro fertilization (IVF) treatments, this fact could lead to dismissal, given that illness is not a cause of discrimination prohibited by EU directives. In any

[86] Case C-519/03, *Commission v Luxembourg* (ECJ 14 April 2005), para. 32, and Case C-315/14, *Estrella Rodríguez Sánchez v Consum Sociedad Cooperativa Valenciana* (ECJ 16 June 2016), para. 44.

[87] Case C-519/03 and Case C-315/14, *ut supra*.

[88] The 2018 Fertility Survey of the Spanish National Institute of Statistics reveals a direct link between these two factors. https://www.ine.es/prensa/ef_2018_d.pdf.

[89] Opinion of advocate general Ruiz-Jarabo Colomer, delivered on 27 November 2007, Case C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHGayr*, para. 48.

case, as the CJEU has ruled,[90] this situation would be discrimination on grounds of sex, as it is only women who can suffer this type of sick leave. Therefore, protection for pregnancy should at least be extended to those cases in which undergoing fertility treatments is the immediate step prior to becoming pregnant, by facilitating reconciliation and reinforcing the guarantees against possible discriminatory treatment.

Another new phenomenon are surrogacy techniques with two common types. Firstly,

Example

when a heterosexual couple, male homosexual couple, or a single male parent find a surrogate mother to be artificially inseminated with the husband's, one of the intended fathers or an anonymous donor sperm. ◄

These are the traditional cases where the surrogate is also the biological mother of the child. Notwithstanding, by the popularising of IVF, it allowed women to fertilise healthy eggs in a laboratory and have them implanted in another woman. This is known as a gestational surrogate, when the mother will not be genetically related to the child and setting up a second type of surrogacy.

Example

A couple (heterosexual or not), or a single parent could find a surrogate mother to be artificially inseminated with her egg (from the intended mother or from an anonymous donor's) and/or his sperm (from the intended father or an anonymous donor's). ◄

All the aforementioned examples illustrate non-biological reproductive techniques that have raised a complex legal issue as to whether they fit within the framework of Directive 92/85. First of all, the question arises as to whether, if the intended mother (or mothers in homosexual couples), meaning the one who does not carry the baby, would be entitled to maternity leave. In principle, the ECJ refused to grant protection under that directive to an intended mother who, although she had not given birth to her child, was breastfeeding the baby.[91] The Court argued the Directive (Art. 14) could not apply to the case, since its purpose is to protect pregnant workers, after childbirth or during breastfeeding for reasons of occupational health. Notwithstanding, the Advocate General's (AG) Opinion offers a wider scope in "*Directive 92/85 and framed in its historical context. In the early 1990s the practice of surrogacy was not as widespread as it is today. It is thus not surprising that the normative structure of Directive 92/85 is based on an approach which takes biological motherhood as the norm.*" For this reason, AG considers that intended

[90] Case C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHGayr* (ECJ 26 February 2008), para. 55.

[91] Case C-167/12, *C. D. v S. T.*, (ECJ 18 March 2014).

mothers deserve the same consideration as the biological mother, if she assumes custody immediately after the birth: "*In the same way as a woman who herself has given birth to a child, an intended mother has in her care an infant for whose best interests she is responsible*."[92] No differences can be made "*precisely because she herself was not pregnant, she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother*."[93] This way was also stressed by the Court, rejecting the possible application of maternity leave for surrogate mothers, considering that the refusal did not constitute discrimination on grounds of sex under Directive 2006/54 (Arts. 4 and 14).[94] In sum, these new reproductive techniques are not covered by Directive 2006/54 and can only be redirected to the provisions of Directive 2019/1158. On the other hand, it is a need for reform of Directive 92/85, considering since where surrogacy is legal, maternity leave (Art. 8) would have to be distributed between the surrogate and the intended mothers, if both are workers.

Nevertheless, the protection of the child's rights must be considered and not be reduced, therefore, the intended mother should not have her leave limited and should enjoy it in full, which would not be the case for the leave of the biological mother who only has to protect her physical recovery by not sharing the care of the baby.

Consequently, it would be necessary to consider whether the aforementioned Directives need to be revised with this approach, to guarantee the rights of those who use assisted reproductive technologies. In order to avoid a possible lack of protection of their parental rights.

17.5.2 Paternity, Parental and Carers Leave

The formula for work-life balance has traditionally focused around leave. To this end, successive EU Directives have developed an increasingly broad and co-responsible right to share responsibilities. In this regard, the new Directive (EU) 2019/1158 introduces significant changes thereby contributing to gender equality.

Firstly, the regulation of paternity leave represents an extraordinary step forward, as it incorporates a new instrument which complements the maternity leave provided for in Directive 92/85/EEC.[95] The Directive provides that on the birth of a child, the

[92] Opinion of advocate general Kokott, delivered on 26 September 2013, Case C-167/12, *C. D. v S. T.*, para. 46.

[93] Opinion of advocate general Kokott, *ut supra*.

[94] Case C-363/12, *Z. v A Government department and The Board of management of a community school* (ECJ 18 March 2014).

[95] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Brussels, 3.10.2008, COM (2008) 637 final. Initially, the possibility to reform Directive 92/85, at consolidating co-responsibility by incorporating exclusive paternity leave into

parent—or an equivalent second parent if recognised by national law—shall be entitled to ten working days of paternity leave. This entitlement shall be taken as provided for in national transposing legislation partly before or only after the birth of the child or by flexible arrangements. It shall be granted without any link to marital or family status, in order to avoid discrimination, and shall not be subject to seniority or previous periods of employment. The financial compensation with the exercise of the right has to be granted. The States should set a level for the payment or allowance at least equivalent to the level of national sick pay. Additionally, it has a reinforced protection, in the same terms that provided for maternity, in accordance with the provisions of Directive 54/2006 (Art. 16 on parental leave and adoption).

On the other hand, the parental leave has been improved and, while maintaining its duration at 4 months individually attributed, its partial non-transferability has been increased to 2 months. What is worthy of criticism is the failure to promote more decisively "*the balanced participation of women and men in professional/public life and in private/family life is (. . .) a key area for gender equality and is essential for the development of society*".[96] Nonetheless, the inclusion of an entitlement to remuneration or a financial benefit may encourage men, who usually have higher salaries, to take parental leave. The leave must be requested with a period of notice and may be conditional to a period of work qualification or to a length of service qualification of less than 1 year. For the purpose of calculating, the qualifying period shall be taken into account for the sum of successive fixed-term contracts with the same employer. The employer may, for productive circumstances, postpone the leave, in which case the employer must provide written justification. However, the Directive proposes that in these cases a flexible formula for exercising the right may be chosen.

Carers' leave is a new instrument, intended to allow individual workers to meet the needs of their family members by granting them 5 working days a year. The Directive provides that Member States may make the exercise of this leave, conditional upon adequate justification. Finally, all these measures are accompanied by the maintenance of the right already provided for in Directive 2010/18 to leave on grounds of force majeure, the purpose of which is to be able to attend to urgent family reasons, understood as cases of illness or accident, which require the immediate presence of the worker.

All rights are reinforced in the Directive to avoid discrimination on the grounds of their exercise (Art. 11). Labour rights will be guaranteed (Art. 10), as well as protecting against dismissal for this reason and, along these lines, reversing the burden of proof, which will fall on the employer who has dismissed the worker (Art. 12). All measures represent a substantial change towards equality. Further, they contribute to increased opportunities for men and women with caring responsibilities to remain in the labour force and, at the same time, reinforcing the co-responsibility.

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the Directive was raised. Notwithstanding, it was quite controversial, and has not been finally implemented.

[96] App. no. 30078/06, *Case Konstantin Markin v. Russia* (ECtHR 22 March 2012), para. 35.

Notwithstanding those positive strides, challenges remain in increasing the non-transferability of leaves to encourage co-responsibility, ensuring similar duration to paternity and maternity leave, preventing women from making more intensive use of this right.

17.5.3 Flexible Working Arrangements

Finally, it should be noted that the Directive (EU) 2019/1158 provides a significant contribution to a real work-life balance, by improving the right to flexible working arrangements. In this respect, the wording of the rules on flexitime have modernised and improved the content of Directive 2010/18. The current Directive includes the definition of flexible working arrangements in Article 3.1 (f) and devotes a single provision (Article 9) to regulate it—clarifying some questions on the exercise of the right in recitals 34–36.

The measures are outlined as follows: Firstly, it is shaped as a genuine right that is ensured to workers with children up to a certain age, which shall be at least 8 years. The same entitlement is also given to carers. Therefore, the Directive represents an important step forward for equality, not only for the extension of the entitlement, but also in the transposition methods that must be adopted in relation to the previous Directive. Indeed, the wording stipulates that the Member States shall take the necessary measures to ensure that workers have the right to flexible working time. The obligation now does not rely on transposition methods, such as collective agreements, but imposes compliance on the State. Consequently, the current Directive corrects the nature of the previous Directive as an open standard.[97] Thus, it avoids the possibility that the right becomes an empty shell by limiting the provisions to a reduction in working hours.

Secondly, it is an obligation of result, where employers are required to consider and comply with requests for flexible working time, which is different from *taking into consideration* what was previously provided for. If the request cannot be accommodated, the employer must provide adequate justification for the refusal or postponement of the request.

Thirdly, this right is independent, unrelated to other forms of leave, such as parental or maternity leave. The right to request is set up independently and can be exercised at any time within the period established by national law. Therefore, the entitlement is enhanced and differs to the regulation under the Clause 6(1) of the revised Framework Agreement, "*which relates to situations in which a worker returns to work following 'parental leave', cannot be interpreted as also covering a situation in which a worker returns from 'maternity leave' within the meaning of Directive 92/85*."[98]

[97] Case C-366/18, *José Manuel Ortiz Mesonero v UTE Luz Madrid Centro* (ECJ 18 September 2019), para. 48.

[98] Case C-351/14, cited, para. 48.

Lastly, the Directive provides for flexibility, meaning different possibilities to adjust the working patterns. Furthermore, the Directive suggests a range of possibilities such as "the use of remote working arrangements, flexible working schedules, or reduced working hours."[99] On the one hand, the exercise of the right may be subject to reasonable limitations and to certain requirements, such as a period of length qualification or a length of service (not exceeding 6 months). And explicitly targeting that "in successive fixed-term contracts with the same employer, the sum of those contracts shall be taken into account for the purpose of calculating the qualifying period."[100] On the other hand, the worker has the right to adapt the duration of the leave to his or her needs, even returning to the original working pattern before the end of the agreed period justifying a change of circumstances.[101]

In short, it is the development of a new approach to the right to a work-life balance, which contributes to keeping carers and family members, usually women, in the workplace. Thereby strengthening their position in the labour market.

17.6 Gender-Based Harassment, Sexual Harassment and Other Forms of Gender-Based Violence at Work

Violence takes on different forms in the workplace: aggressions—which can be physical, psychological or both at the same time, tensions and/or different forms of harassment. Sexual harassment at work began when women entered the labour market, although it was not recognised as a problem until 1970.[102] Harassment can come from colleagues, bosses and even third parties outside the organisation and can take place in the workplace or even outside, in person or through digital devices.[103]

Although it is a fact that both men and women can be subject to harassment, statistics prove that harassment is mostly suffered by women.[104] The reason for this

[99] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019, recital (34) and Art. 3.1 (f).

[100] Directive (EU) 2019/1158, Art. 9.4.

[101] In these cases, the employer shall consider and respond the request, taking into account the circumstances, Directive (EU) 2019/1158, Art. 9.3. In this respect, the circumstances must be taken into account without disproportionate requirements which otherwise would be discriminatory, Case C-116/06, *Sari Kiiski contra Tampereen kaupunki* (ECJ 20 September 2007).

[102] See: Rubenstein (1988), p. 2.

[103] Surprisingly sexual harassment is worse in top management categories. Approximately 75% of women have experienced sexual harassment, the percentage is a 74% of those in the professional occupational category. Vid. https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf.

[104] There are many reasons for this, listed in this chapter, e.g.: their situation in the labour market is inferior to that of men—lower salaries in similar or same jobs—greater temporality in women's contracts and also due to the difficulty of access to higher level positions and/or the assignment of less qualified tasks that justify their professional hierarchical subordination. The ILO express in a

is that sexual harassment is linked to unequal power relations, based on gender stereotypes.

▶ **Definition** Gender is the roles or stereotypes socially constructed based on the characteristics of woman or men

As the Istanbul Convention set out

"shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men."[105]

The concept of gender therefore encompasses sexual diversity, since the individuals can have a biological sexual identity that does not correspond to their gender identity. Sexual harassment is thus connected to the concept of gender, understanding such conduct as part of the structure of domination over gender identity or sexual orientation.

In 1958 the ILO approved the Convention no. 111 on discrimination in employment and occupation. While the C111 was not intended to regulate issues of violence or harassment in the workplace, sexual harassment was considered as a particular form of discrimination on grounds of sex. Understanding it was a violation of the right to equal opportunities between persons of both sexes.[106] The ILO addressed that sexual harassment significantly affected women's employment and career prospects, has a negative impact on health and safety at work, and also on the dignity in the workplace.

The European Union began to tackle this issue in 1986, when the European Parliament, in its Resolution of 11 July,[107] urged the Member States to achieve a legal definition of sexual harassment at work and worked out the needed solutions. Nevertheless, the Rubenstein Report,[108] carried out in 1987 on behalf of the Commission, conducted an in-depth study on the subject and deemed necessary the adoption of a directive specifically to cover this area. The Report resulted in the Council Resolution of 29 May 1990 and Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work, the annex to which contains a code of practice on sexual harassment.[109]

worksheet that in the European Union, 40–50% of women have reported some form of sexual harassment at the workplace.

[105] Article 3. (c) of Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

[106] The ILO Committee of Experts condemned sexual harassment under the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[107] European Parliament's Resolution on Violence against Women (1986) Doc. A2-44/86, OJ C 176, 14.07.1986, 73–83.

[108] See: Rubenstein (1988), p. 2.

[109] OJ C 157, 27.06.1990, 3–4 and OJ L 49, 24.02.1992, 1–8, respectively.

Consequently, sexual harassment was the starting point for establishing a regulation about harassment in the European Union.

The Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, now recast in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Arts. 2.1.(c) and (d) y 2.2. (a)), was the first binding legislation introducing important issues regarding sexual harassment and harassment based on sex in the framework of the European Union.

The EU has not developed a general normative instrument on harassment, but its action has been based on the principle of non-discrimination. Thus, in addition to the above, other equality directives prohibit "harassment" as discriminatory behaviour regarding race, ethnic origin, disability, religion, age or sexual orientation. These issues are covered by the Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Art. 2.3) and Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (Arts. 2.2 and 2.3).[110] Finally, Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, includes the prohibition of harassment and sexual harassment in the relationships between the self-employed worker and third parties (Art. 3 (c) and (d)).[111]

Lastly, with the adoption of the resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplaces, in public spaces, and political life in the EU (2018/2055(INI)), the European Parliament called on the Commission to submit a proposal for a directive to tackle all forms of violence against women and girls and gender-based violence (Recommendation 17). In addition, the urgent need for standards on violence and harassment at work was reiterated, which should have provided a legislative framework (Recommendation 25). On 5 March 2020, the European Commission presented its Gender Equality Strategy 2020–2025, including measures against harassment at work.[112]

[110] OJ L 180, 19.07.2000, 22–26 and OJ L 303, 2.12.2000,16–22, respectively.

[111] OJ L 180, 15.7.2010, 1–6.

[112] The situation is different with regard to members of the administration in the EU framework. Indeed, the European Civil Service Law affecting civil servants and EU agents has specific rules directly addressing harassment in general and gender-based harassment, which has been the subject of attention at the European Court of Justice. See: Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ L 124, 27.04.2004, 1–118), Council Decision of 24 September 2004 concerning the Staff Regulations of the European Defence Agency, 2004/676/EC, (OJ L 310, 7.10.1994, 64–71).

Ultimately, the recently adopted ILO Convention C190 (C190 in short) on violence and harassment is a milestone as the first binding international convention on this issue.[113] The importance of C190 is due to the fact that it offers an innovative and complete treatment of harassment at work. Measures that should be taken to prevent and address it are also spelled out and gender-based harassment is specifically addressed.[114] The C190 entered into force on 25 June 2021, but regarding the EU States it must be highlighted that the Convention covers matters which fall within the competence of the EU, such as health and safety at work, equality and non-discrimination. Consequently, the European Commission proposed a Council Decision to authorise the Member States to ratify the Convention No. 190, which has not yet been adopted by the Council.[115]

17.6.1 Gender-Based Harassment in the Workplace

The C190 set out an all-inclusive definition of violence and harassment at the workplace

> "*a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.*"[116]

Nevertheless, in accordance with the Convention, the States may provide in their national law single or separate concepts if necessary.

Considering that violence and harassment in the world of work can constitute a human rights violation or abuse, contrary to decent work, the Convention eliminates the need for the repetitive actions or the intentional nature of harassment, as is set out in many national laws. Additionally, the Convention admits that violent or harassing behaviour may be intentional (or not) when causing harm, and when the behaviour is likely to cause harm even if they do actually not cause it.

Moreover, C190 refers to sex or gender as a cause of harassment, expressly mentioning this type of discrimination as a specific and distinct modality, although included in the general definition. The Convention introduces as a priority objective the achievement of real gender equality, giving a singular treatment to workplace violence with a gender perspective as a cause of discriminatory violence at work.

[113] Together with the ILO Violence and Harassment Recommendation, 2019 (No. 206).

[114] International Labour Organization (2016): https://www.ilo.org/wcmsp5/groups/public/%2D%2D-dgreports/%2D%2D-gender/documents/meetingdocument/wcms_522932.pdf.

[115] Proposal for a Council Decision authorising Member States to ratify, in the interest of the European Union, the Violence and Harassment Convention, 2019 (No. 190) of the International Labour Organization, Brussels 22.1.2020, COM(2020) 24 final.

[116] Article 1.1.(a).

This treatment of violence and harassment with a gender perspective is an important differentiating factor, as the concept of gender goes beyond that of sex and allows for more effective protection against harassment. The C190 states that violence and harassment at work must be tackled with an inclusive and integrated approach that considers causes and risk factors (such as gender stereotypes and the abuse of gender-based power relations) or intersections with other causes of discrimination (race, age, disability, etc.), that may give rise to multiple discrimination.

17.6.2 Sexual and Sexist Harassment and Cyber-Bullying

As provided in the Convention, gender-based violence and harassment is

> "*violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.*"[117]

Jointly introducing the terms "gender" with "sex" constitutes a significant step forward in the regulation. Notwithstanding, the Convention does not differentiate between sexual harassment and harassment on grounds of sex or gender, even though it states that gender harassment includes both behaviours.

Thus, the C190 stated that sexual harassment is covered by gender-based harassment. This is because sexual harassment is a behaviour of a sexual, verbal, non-verbal or physical nature that creates an intimidating, humiliating, degrading or an offensive environment. In this particular regard, sexual harassment is not based exclusively on the satisfaction of a sexual desire, but on the consolidation of a gender stereotype, in which the one who is the active subject comes to materialise his or her position of prevalence within the sexual stereotype, confirming that sexual harassment is a variety of gender harassment. Gender-based harassment may be perpetrated by different individuals, including colleagues, supervisors, subordinates and third parties. Consequently, it may be "'*vertical' of a subordinate by a superior or vice versa, peer-group ('horizontal') harassment or harassment of a mixed type.*"[118]

Notwithstanding, the Directive 54/2006/EC establishes definitions that need to take into account this issue.[119] Firstly, in accordance with its provisions, harassment on grounds of sex is defined as

[117] Article 1.1.(b).

[118] European Parliament resolution of 20 September 2001 on harassment at the workplace (2001/2339(INI)), point 6. OJ C 77 E, 28.3.2002, 138–141.

[119] Holtmaat (2011), pp. 4–13.

▶ **Definition** "*unwanted conduct related to the sex of a person [that] occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*"[120]

Harassment on grounds of sex refers to discriminatory behaviour on the basis of a person's sex, however, the explicit recognition of gender in Convention 190 allows for a more appropriate interpretation to be consolidated.[121]

Example

Hence, gender-based harassment is, for example, when a worker (male, female or LGBTQIA+) suffers harassment for taking on childcare duties ◀

The reference to gender broadens the framework of protection. Thus, in the above example, not only those women who have taken on a feminised role, such as caregiving, but also all those who do not act in accordance with their traditional gender roles, would be protected from violence or harassment. For example, men (or LGBTQIA+ persons) who care for their children. In this way, protection from discriminatory harassment is improved for anyone affected by gender role prejudice.

Sexual harassment, which is also included in C190 but not defined, is the form of gender-based harassment most frequently studied in scientific literature. The sexual harassment could be manifested as a "conduct used explicitly or implicitly as a basis for a decision which affects a person's job"[122] a so-called *quid pro quo*, or as conducts "that creates an intimidating, hostile or humiliating working environment for the recipient",[123] called a hostile work environment. According to the definition of Directive 2000/54, sexual harassment is

▶ **Definition** "*where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*"[124]

Hence, the elements which manifest themselves as identifiers of conduct under the Directive are threefold. Firstly, the conduct may be verbal, non-verbal or physical; secondly, it must be of a sexual nature; and thirdly, it must reflect an intention or purpose to offend against a person's dignity. However, the definition in the Directive is flawed in that it appears to require a manifest refusal on the part of

[120] Article 2.1.(c).

[121] More appropriately worded than in the anti-discrimination directives, which speak of harassment without reference to gender.

[122] *Brief n°2: Sexual harassment in the world of work*, https://www.ilo.org/wcmsp5/groups/public/%2D%2D-dgreports/%2D%2D-gender/documents/briefingnote/wcms_738115.pdf.

[123] *Brief n°2: Sexual harassment in the world of work, ut supra*.

[124] Article 2.1.(d).

the victim of harassment. In this regard, the CJEU, in one of the few rulings that dealt with this issue, taking a stance against this interpretation, considering that "*victims do not have to prove that such conduct is unwelcome in order for it to qualify as sexual harassment, since that criterion needs to be fulfilled only where the facts complained of relate solely to the mere manifestation of sexual interest*".[125]

Nonetheless, it should be noted that C190 introduces a more protective legal regime for gender-based violence and harassment than that contained in the Directives, which even improves on what the Convention itself provides for violence or harassment in general.[126] Indeed, in the case of gender-based violence and harassment, as stated in Article 1.1.(b), the mere existence of the conduct constitutes harassment, even if it is not intentional, or when the behaviour is likely to cause harm even but does actually not cause it. Consequently, the Member States have to define these conducts in their laws.

Another important fact to highlight is the scope of application of the Convention (Article 3), considering that harassment may occur at work, but also in other related situations, thus expanding the application to the "world of work". This includes situations that happen at work and rest places, but also in accommodation provided by the employer, during commuting, at social or training events and on the way to and from work.

Example

Explicit or sexual jokes, unwanted comments, physical contacts, exhibition of explicit pictures, sexual assaults. ◀

However, the key point that we need to emphasise is that the Convention incorporates situations of violence and harassment through work-related communications, including those enabled by information and communication technologies. This paragraph would introduce cyberbullying, as a form of harassment, a situation encountered increasingly often at work. The addition of cyberbullying is an important step forward in protecting against this silent scourge that allows for different and increasingly imaginative forms of violence and harassment, both sexual and gender-based cyberbullying.

Example

Emails, text messages, telephone calls, dissemination of real or simulated digital content of a sexual or non-sexual nature, which are unreasonable or vexatious to the worker. ◀

[125] Case T-549/93, *D v Commission of the European Communities* (ECJ 26 January 1995). Sexual harassment court cases can only be found in the ECJ regarding EU civil servants and officers.

[126] See: Lousada Arochena (2019), pp. 61–63.

The European Parliament, in its Resolution of 11 September 2018,[127] had identified cyberbullying as an emerging problem, calling for a review of EU regulations to combat harassment (Recommendation 21).

17.6.3 Measures Provided in Convention 190 ILO

The Convention establishes different measures to guarantee the prevention and elimination of the violence and harassment at work. States shall adopt laws and regulations defining and prohibiting these behaviours in the workplace (with special care to gender-based violence and harassment).

In any case, the States should bear in mind the right to equality and non-discrimination in employment and occupation, considering the fact that some groups are more vulnerable and disproportionately affected by these issues. At the same time, the adoption of the measures need a collaboration between the Governments, employers and workers and their organisations, identifying the most exposed sectors and occupations, including any kind of work arrangements and the informal economy workers. The laws and regulations need to give effective protection to all affected groups.

The Convention also obliges Member States to follow up and monitor legislation in this area. They will also have to establish complaint mechanisms with specific procedures and sanctions, witness protection measures, privacy protection to the persons involved, and legal, social, medical and administrative assistance services for victims and complainants, always taking gender considerations into account. Hence, the C190 introduces the requirement for the States to set up measures for the protection for victims and against retaliation,[128] and guarantee that workers have the right to remove themselves without reprisal when harassment at work may affect their safety. Finally, it will ensure that the labour inspectorate has the power to act in such cases. Therefore, should be established

> "*an effective access to gender-responsive, safe and effective complaint and dispute resolution mechanisms, support, services and remedies*"[129]

and urges States indeed to recognise the effects of domestic violence in order to mitigate its impact on the world of work.

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[127] European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life in the EU (2018/2055(INI)), OJ C 433, 23.12.2019, 31–41.

[128] Even the Recommendation is a non-binding guideline, it sets out more specific measures to address gender-based violence and harassment, as well as practical measures to mitigate the impact of domestic violence in the world of work, such as: providing temporary leave for victims, flexible working hours, including domestic violence in workplace risk assessment and raising awareness of the effects of domestic violence.

[129] Article 10 (e).

Moreover, the employers have specific duties, together with the workers' representatives, controlling the prevention of violence and harassment in the "world of work", devoting particular attention to the gender perspective. And, if it is reasonably practicable, they shall, firstly, adopt and implement an adequate policy. Secondly, they have to identify, evaluate, prevent and control the risk of violence and harassment at work, taking into account these risks in the management of occupational safety and health. Lastly, they shall give information and training about the risks and prevention measures of the workplace.

Finally, the C190 includes the obligation to ensure guidance, resources and training or other tools not only in general but also on gender-based violence and harassment at work to the employers, workers and their organisations, including awareness-raising campaigns (Article 11).

In short, we believe that the EU needs to tackle this problem firmly and should move forward and complete the regulation with a Directive. From our point of view more resolute action is required against harassment. Otherwise, some states may not ratify or accomplish the content of the C190 and thus fail to comply with its objectives and provisions.

17.7 Gender Perspective in Collective Labour Law

Labour law was developed with a collective vision, where an employee was viewed as an integral part or member of a group of workers.[130] By recognising collective freedoms and rights, such as freedom of association, the right to collective bargaining, the right to strike and the right to participation (in decision-making, management, and ownership), workers can be adequately represented in relations with their employer, can express their views, and take industrial action. Thus, it can rightly be said that, at a collective level, labour law creates equality which, due to legal subordination, can never be reached and achieved in full at the individual level.[131] Furthermore, the collective dimension of labour law is not only manifested through the collective rights, but is in reality almost always subtly present when exercising rights deriving from an individual employment relationship.[132] This unequivocally confirms that individual and collective employment relationships are complementary, which, when it comes to gender equality, is manifested primarily through the fact that *collective agreements are powerful tools for achieving gender equality in the world of work*. This is because the normative part of the collective agreement can regulate gender issues, as well as because all the working conditions that are otherwise regulated by this part of the collective agreement, can be reviewed from a gender perspective (pay, working hours, health and safety).[133]

[130] Adam (2005), p. 9.

[131] Supiot (2007), pp. 124–125.

[132] Supiot (1990), p. 488.

[133] International Labour Office (2007), p. 70; Blackett and Sheppard (2017), p. 669.

The same applies to the re-examination, from a gender perspective, of the criteria for the selection of candidates for employment, conditions for advancement and other issues where we have to consider the special needs that workers of a certain sex/gender. As well as workers with family duties connecting the exercise of their rights or with the taking on of certain obligations deriving from an individual employment relationship. In addition, the role of law as an instrument for achieving social change related to implementation of the principle of gender equality is rather limited.[134]

Gender issues, however, are rarely regulated by collective agreements. An important reason for this is that *women are under-represented in trade unions*, although ILO Conventions no. 87 and 98 acknowledged the right to form trade unions without discrimination. Although many national trade union confederations in European countries have women's sections, we can see that a modest number of female workers are trade union members, or members of trade union committees that participate in negotiations with employers, or members of trade union governing bodies that make important decisions.[135] There can be many reasons for this, from the burden of family duties not leaving them with enough time to participate in trade union activities, professional segregation and insufficient determination and training of women to participate in trade union activities, to gender stereotypes and the fact that trade unions are insufficiently sensitive, due to male dominance in membership and leadership, to the needs of their female members.[136] Effective implementation of the principle of gender equality, therefore, presupposes developing a culture of tolerance in work environments, as well as in sensitising workers and employers to issues related to ensuring gender equality. Especially because trade unions have a crucial role (and responsibility) in identifying and combating gender-based discrimination in the workplace, by organising trainings on how to protect against discrimination, and by providing protection, assistance and support to members who feel discriminated against.[137]

[134] However, we should not lose sight of the fact that greater prospects for promoting gender equality through social dialogue exist precisely in countries with a solid legal framework for combating gender-based discrimination, as well as legislative incentives to regulate gender issues at a company or sectoral level, as is the case, for example, in France and Spain. Briskin and Muller (2011), pp. 8–9.

[135] This is also true for trade unions in EU Member States where women make up about 40% of members, but, despite solid representation in membership, occupy on average only 5–20% of seats in union bodies, with a particularly modest number in higher status bodies, as opposed to secretariats or working groups whose members are appointed on the basis of expertise, in which the representation of women is somewhat higher. Acc. to Briskin and Muller (2011), p. 12.

[136] International Labour Office (2007), p. 70.

[137] It is therefore not surprising that the European Committee of Social Rights, in evaluating the harmonization of national legislation and practice with Revised European Social Charter regularly asks the contracting parties for information on forms of trade union participation in this area, in order to create conditions for effective exercise of the rights of workers who believe they have been discriminated against. Kollonay-Lehoczky (2017), p. 376.

In addition to strengthening the role of trade unions, it is necessary to strengthen the role of *employers and employers' organisations* in this area. This is especially true for overcoming cultural, social and economic barriers that make it impossible or difficult for women to become managers and employers. Which is why employers' associations need to encourage women's self-employment, keeping gender-sensitive statistics, and adopting gender equality action plans, codes of conduct and other instruments relevant to the promotion of gender equality.[138]

In addition to the aforementioned, the social partners play their role in achieving gender equality through strengthening *the (bipartite and tripartite) social dialogue on gender issues*, because social change would not be possible without the participation of stakeholders in the process.[139] Even more so because women are underrepresented not only in membership and the governing bodies of trade unions, but also in tripartite governing bodies and, particularly, in the governing bodies of employers' associations. Although it cannot be reliably claimed that greater representation of women at these levels necessarily contributes to better representation of their interests in the social dialogue.[140] But even with that reservation, there is a need for collective labour law to become gender sensitive. This requirement also applies to the European social dialogue, which is why we need to mention the Framework of actions on gender equality (2005), in which the European social partners (ETUC, Business Europe, UEAPME and CEEP) called on national social partners to commit to reviewing gender roles, achieving greater participation of women in decision-making, reconciling work and family duties of employees and overcoming the gender pay gap. However, when it comes to international framework agreements, gender equality is, as a rule, mentioned only as a part of the commitment of the contracting parties to the application of standards contained in eight fundamental conventions of the ILO, including Conventions nos. 100 and 111.[141]

Also, we should mention the importance of works councils and other (non)-institutional forms of employees' participation in decision-making for the effective application of the principle of gender equality, as evidenced by the provisions of the Directive 2009/38/EC on the establishment of a European Works Council. The European Works Council represents a form of participation of employees in multinational companies operating at the EU level, whose composition should reflect as much as possible the composition of employees in the company, both quantitatively and qualitatively. The latter implies a proportional representation of employees by gender,[142] while in a number of cases, European works councils signed statements,

[138] International Labour Office (2007), pp. 67–68.

[139] Supiot (1990), p. 60. This has also been confirmed at the level of the International Labour Organization (2009), p. 2.

[140] Briskin and Muller (2011), p. 8.

[141] In accordance with The ILO Declaration on Fundamental Principles and Rights at Work (1998), along with Conventions nos. 100 and 111, fundamental conventions of the ILO are Conventions regulating abolition of forced labour (nos. 29 and 105), freedom of association (nos. 87 and 98) and child labour (nos. 138 and 182).

[142] Directive 2009/38/EC, Art. 6, para. 2, point b).

together with central management of multinational companies, dedicated to gender issues.[143]

17.8 Conclusion

Despite the positive changes in labour legislation related to the adoption of anti-discrimination regulations and the proper and complete identification and regulation of certain issues in light of the special needs and risks that are particularly inherent to female workers, certain problems remain unresolved. This is particularly true of occupational segregation, which reduces women's ability to compete in the labour market on "equal footing" with men and makes it difficult to effectively enforce anti-discrimination legislation. This is accompanied by the "glass ceiling" phenomenon, especially since it is manifested not only in the obstacles that women encounter during career advancement, but also in the lack of their participation in organisation and management.[144] Finally, we should take note of the trend of increased hiring of female workers in jobs that pay less and are less secure, since many women work part-time or on the basis of other non-standard employment contracts or in new forms of work. In that context, *gender competent labour law* should be designed to create a framework for understanding gender perspectives on key labour law institutions and their re-evaluation on the basis of gender equality principle. This is followed by the review of the capacity of legal instruments to ensure gender equality in the labour market. This is because labour law rules that were adopted as a result of social recognition of the need to acknowledge, overcome or at least mitigate the particular problems faced by female workers in the labour market are insufficient to achieve equality. This is especially true, having in mind the impact of the changes that have taken place in recent years in society and in the world of work, starting with *technological changes*, which affect workers differently in different parts of the world. But also in different industries, economic activities and territorial units within the same country, with deepening inequalities among members of society, including gender inequality.[145] In addition, there are *climate changes* that are having harmful effects on businesses, although they can create opportunities for new jobs. Furthermore, the world of work is affected by *demographic changes*, especially the tendencies of population aging and increased life expectancy, which emphasise the need for rising institutional assistance as well as engagement of both genders in the care for the elderly. Also, there is a need for maintaining the working capacity (and work motivation) of older workers, as well as the need to enable young workers to gain work experience and advance in their careers. Also, the tendencies of *intensive international migration* must be taken into account, which can have a

[143] Briskin and Muller (2011), p. 6.

[144] Pascall (1997), pp. 30–31 and 50–51.

[145] Philip et al. (2020), p. 153. The World Economic Forum estimates that 57% of workers needing to move to new jobs in the next decade will be female (World Economic Forum 2018, p. 13).

positive impact on the world of work. However, this can also lead to the establishment of various statuses for migrant workers, some of which are very precarious because employment will depend on their country of origin, the length of stay in the host country, the type of residence permit or work permit, and, in some cases, their occupation and legal status, which may also prove to be especial unfavourable for women and can lead to intersectional discrimination.[146] Finally, we should look at the recent *changes in the world of work*, which can be summed up in these three words: *job quality erosion*.[147] This feature of the modern world of work, implies the widespread practice of outsourcing, the emergence of new forms of work, some of which are extremely precarious. This series is continued by the widespread informal economy, as well as the underdevelopment and degradation of social dialogue. Taken together, these changes shed new light on the problem of gender inequality in the world of work, which has a devastating effect on social cohesion and deepens the poverty pit, while increasing social stratification.

Questions

1. Please state whether sex can be determined as an occupational requirement for employment if certain working tasks are performed in a foreign country where, due to specific national cultural circumstances, women would not be able to perform them successfully.
2. Please explain whether a general ban on women's night work in industry can be qualified as exception to prohibition of discrimination or whether this qualification is only suitable during an employee's pregnancy.
3. In the context of Directive 92/85: Why does a pregnant worker have to inform her employer of her condition? And what are the consequences of failing to do so?
4. The employer has terminated the employment relationship at the end of the probationary period. It so happened that the employee was pregnant, a fact of which the employer was unaware. Analyse this peculiar situation from the perspective of gender discrimination
5. A female worker was dismissed due to repeated absences from work. It appears that she was undergoing fertility treatment at the time of her dismissal, a fact unknown to the company. There is no evidence that she was pregnant as a result of the treatment. Assess this case in light of Art. 10(1) of Directive 92/85 by consulting the Opinion of the Advocate General in Case C-103/16.
6. Read the opinion of the Advocate General in case C-463/19. Do you consider that the Directive 92/85 should be reformed to include paternity

(continued)

[146] Fudge (2014), p. 36.

[147] Philip et al. (2020), p. 154.

leave? State if the Directive 2019/1158 confers enough rights to contribute to the objective of equality promoted by the EU.
7. Read the Antidiscrimination Directives and compare their scope with the ILO C190 scope. Do you think they need an update?
8. Considering cyberharassment, what are the measures that the worker can take in accordance with the provisions of ILO C190? What are the measures that have been implemented in your country regarding this issue?
9. In your view, which mechanisms may foster gender diversity in membership and the governing bodies of trade unions, tripartite governing bodies and governing bodies of employers' associations?
10. Analyse the evolution that the regulation of gender equality at work has had in the legal system of your country. What are the most important changes that have taken place from a failure to provide sufficient consideration of the specific needs of female workers—to women's empowerment in the world of work? Does contemporary labour law in your country ignore the special needs of men in the world of work, and the importance of their role for consistent application of the principle of gender equality?

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