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Introduction

The Shared Parental Leave Regulations (Northern Ireland) 2015 ('the Regulations') came into force on 15 March 2015 for the parents of children born or placed for adoption on or after 5 April 2015. The Regulations create Shared Parental Leave ('SPL'), which allows eligible parents to share up to 50 weeks of leave (and, if entitled, up to 37 weeks of Statutory Shared Parental Pay) in the first year of their child's life¹. The Regulations replicate law which is already in force for the rest of the UK². The aims of the legislation were to attempt to address the gender imbalance in parenting by encouraging more fathers to take extended leave to care for their child and establish a more flexible scheme to enable them to do so.

This case note will argue that due to the eligibility requirements which govern SPL, the scheme breaches EU law, more specifically the Parental Leave Directive³ and the Equal Treatment Directive⁴. Both directives have been revised from their original versions. The revised Parental Leave Directive entitles each parent to a period of at least 4 months leave, at least one of which should be on a non-transferable basis⁵. This means that one month of the leave period should be reserved exclusively for one parent, and if it is not taken, it is lost. This provision will be considered again below. The Equal Treatment Directive prohibits discrimination on grounds of sex in relation to hiring employees, their conditions of employment including pay, access to training and promotion and any action taken to dismiss them⁶. The case upon which a legal challenge could be founded is *Konstantinos Maistrellis*⁷, recently heard before the Court of Justice of the European Communities ('CJEU').

Facts

Maistrellis concerned a male judge who was refused parental leave by the Greek authorities. The Greek Civil Service Code only allowed a father to take parental leave if his spouse was either working or had health problems which prevented her from looking after their child. The claimant's application to take parental leave was refused on the basis that his wife did not

¹ Shared Parental Leave Regulations (Northern Ireland) 2015, SI 2015/93, reg.6

² Shared Parental Leave Regulations 2014, SI 2014/3050

³ Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC OJ L68/13 (Parental Leave Directive)

⁴ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation OJ L204/23 (Equal Treatment Directive)

⁵ *Ibid* (n3), cl. 2(1) Framework Agreement

⁶ *Ibid* (n4), art. 1

⁷ *Case C-222/14 Maistrellis v Minister for Justice, Transparency and Human Rights* [2015] IRLR 944 CJEU

work. When he claimed discriminatory treatment, the national court asked the CJEU whether the provision of the Civil Service Code was in breach of the Parental Leave and/or the Equal Treatment Directive.

Decision

The CJEU began by focusing on the wording of the Framework Agreement which was the basis of the original Parental Leave Directive (which is now repealed, but the principle of an individual right to parental leave is replicated in the revised version). The original version provided that parental leave should be an individual right for at least 3 months i.e. for each of the child's parents⁸. That was a minimum requirement which could not be undermined by a later clause⁹ which allowed some discretion to member states about how the scheme was to work in practice e.g. the notice periods required to be given by employees to employers. The court found that there was nothing in the later clause which allowed member states to deny access to one parent based on the employment status of his or her spouse or partner. The CJEU also found that two of the objectives of the Parental Leave Directive (encouraging women back into work and men to take 'an equal share of family responsibilities'¹⁰) supported this interpretation. Thus it found the national law to be incompatible with the Parental Leave Directive.

The CJEU then turned to the Equal Treatment Directive. In the directive, direct discrimination is defined as 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'¹¹. Significantly, the court asserted that 'the situation of a male employee parent and that of a female employee parent are comparable as regards the bringing up of children'¹², thus enabling them to be compared for the purposes of discrimination. The court found that mothers who are civil servants were unconditionally entitled to parental leave whereas fathers who were civil servants were entitled to it only if their spouse worked or had ill health. In other words the fact of being a parent was not enough to qualify male civil servants for parental leave. The court found this to be direct discrimination against the claimant. The national law was not justified because it was not a measure which constituted positive action nor did not specifically protect the health and safety of mothers as regards pregnancy and maternity. The Advocate General, in her Opinion, also commented that

⁸ Directive 1996/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC OJ L145/4, cl 2.1 Framework Agreement

⁹ Ibid (n8), cl 2.3 Framework Agreement

¹⁰ Ibid (n3), Preamble to the Framework Agreement, para 8

¹¹ Ibid (n4), art 2(1)(a)

¹² Ibid (n8), para 47

the provisions of the Parental Leave Directive could not in effect be removed by the Equal Treatment Directive¹³.

Comment

There is a fine line for the courts to tread in cases when fathers are claiming rights which had previously been the preserve of mothers. Governments (and therefore judges) want to ensure that mothers are entitled to a period of maternity leave in order to protect their health and, if necessary, to facilitate breastfeeding. Thus fathers who have attempted to claim rights specifically linked to maternity leave have not been successful on the basis that sex discrimination against men is justified to protect maternal health pre- and post-childbirth¹⁴. However the CJEU has increasingly adopted the concern of policymakers that fathers should not be excluded from accessing rights which are connected to their role as parents. Such exclusion risks entrenching traditional parenting roles, with the mother as the primary carer. This has resulted in some success for fathers in challenging national laws with eligibility rules which made it difficult for them to qualify. In *Alvarez*¹⁵, for example, the CJEU held that a father who was not entitled to 'breastfeeding leave' (which *de facto* was a right to work reduced hours to facilitate child care), had been discriminated against because it was only open to fathers when the mother of the child was employed. The claimant's wife was self-employed and so the claimant was not eligible. The court held that this particular right had become separated from pregnancy and childbirth such that fathers could equally well perform the role. If the courts' default position is that either parent can perform childcare once the mother is fit to return to work, then fathers can expect further success in claiming rights from which they are excluded on eligibility grounds. However this puts policymakers in a difficult situation because they want to ensure that mothers are returning to work and so frequently parental leave rights are conditional on mothers returning to work. However this leaves laws open to challenge on grounds of sex discrimination.

Application to a UK context

The government would doubtless argue that the revised Parental Leave Directive has been implemented in that both parents already have a right to 18 weeks of unpaid parental leave¹⁶. However it can be argued that as SPL is a parental leave scheme, this too should meet the criteria in the Parental Leave Directive, namely that each parent has an individual right to take parental leave i.e. one which is not dependent on the employment status of their partner. This

¹³ Ibid (n7), Opinion of Advocate General Kokott para 52

¹⁴ See, for example, C-184/83 *Hofmann v. Barmer Ersatzkasse* [1986] 1 CMLR 242 and C-5/12 *Montull v Instituto Nacional de la Seguridad Social* [2013] IRLR 976

¹⁵ C-104/09 *Alvarez v Sesa Start Espana* [2011] CMLR 28

¹⁶ Maternity and Parental Leave etc. Regulations 1999, SI 1999/3312 (as amended), reg 14(1)

key principle is not observed by the laws which establish SPL. Under those rules, mothers must be entitled to take maternity leave (or qualify for Maternity Allowance if they are self-employed) and have either returned to work or given notice to their employer that their leave will end¹⁷. Therefore in order to qualify for SPL, mothers must either be employed or, if self-employed, earning enough to qualify for Maternity Allowance. In other words, fathers with spouses or partners who have not worked prior to giving birth will not qualify for SPL. Thus it is not a free-standing right. This does appear to prejudice fathers (or any other partner of the mother) when compared with entitlement to maternity leave, which is not dependent on the employment status of a spouse or partner. A counter-argument would be that this rule does not discriminate on grounds of sex, because it applies regardless of the sex of the partner. However, if accepted by the courts, this approach would continue to exclude a large group of fathers from accessing SPL. This may be at odds with the policy goals of SPL, namely that SPL should support *working* parents, but that is irrelevant in terms of the lawfulness of the legislation.

A secondary issue of contention is that SPL, unlike other countries where the level of take up of parental leave is much higher than in the UK, does not reserve a period of leave for fathers. Interestingly the government did propose a 4-week period of leave to be reserved for fathers¹⁸, but abandoned it following discussions with stakeholders over concerns about complexity (i.e. it did not want to add yet another type of leave to the list) and cost to employers. The lack of a reserved period of leave is contrary to the wording of clause 2(1) of the Parental Leave Directive. However later in the directive, member states are provided with the discretion “to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances (including the introduction of non-transferability), as long as the minimum requirements provided for in the present agreement are complied with”¹⁹. One interpretation of this clause would be that non-transferability of leave is purely optional. That view is confirmed by the Preamble to the Framework Agreement, which says that member states are allowed to make parental leave transferable²⁰. Another interpretation would be that member states which do not introduce non-transferable leave are not fulfilling the minimum requirements of the directive and are therefore in breach. Aside from the legal arguments, an important consequence of not reserving a period of leave for fathers (or other partners) in the UK is that fewer fathers are likely to take it up. In countries with a reserved period coupled with generous pay whilst on leave, fathers generally take it up.

¹⁷ Ibid (n1), reg 5(3)(c) and (d)

¹⁸ Dept for Business Innovation and Skills, *Consultation on Modern Workplaces*, 2011

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/31551/11-699-3-consultation-modern-workplaces-parental-leave.pdf> Accessed 13 September 2016

¹⁹ Ibid (n3), cl 8(2) Framework Agreement

²⁰ Ibid (n3), Preamble to the Framework Agreement, para 16

This case note has argued that the law establishing SPL is open to legal challenge by fathers or other partners who find themselves ineligible because their partner is not working (or, if self-employed, they are not earning enough to qualify for Maternity Allowance). The CJEU appears increasingly willing to push forward the agenda of policymakers in encouraging fathers to take more parental leave by recognizing that fathers are legally comparable with mothers in terms of performing childcare. Given that the issue is so far untested in the UK, it will be interesting to see whether Employment Tribunals adopt a similar stance to any legal challenge made by fathers in this jurisdiction.