

PREGNANCY DISCRIMINATION: SOME INTERNATIONAL COMPARISONS

ALEXANDRA HERON

OCTOBER 2004

ACKNOWLEDGEMENTS

The author thanks the OECD for facilitating the research for this report and acknowledges the invaluable contributions of Dr. Susanne Burri of the Law Faculty, Utrecht University, the Netherlands and Dr. Bettina Graue of Oldenburg University, Germany, to its preparation.

PREGNANCY DISCRIMINATION: SOME INTERNATIONAL COMPARISONS

1. Introduction

1.1 This report builds on other work undertaken by the General Inquiry into pregnancy discrimination "Pregnant and Productive", conducted by the Equal Opportunities Commission in 2003 and 2004. It is intended to provide an overview of some of the relevant legal provisions in a number of other countries which prohibit pregnancy dismissal and discrimination (see Appendix A for details). The differences between the countries covered and between these countries and the UK, in terms of their socio-economic and legal cultures are acknowledged. Thus, brief background details of the unfair dismissal systems are provided for some of the countries examined, and selected statistics are provided (see Appendix B) to provide some context for any comparisons made. Nevertheless, all the countries have much in common, not least EU membership (except Norway which, of course, shares many of the characteristics of its Nordic EU member neighbours). It is hoped that, by looking at other ways of tackling the systemic problem of pregnancy and maternity discrimination, the discussion of the possible legislative steps which Parliament could take to make British law more effective in this area, may be broadened.

1.2 Of the countries examined in this report, none appear to have systematically measured the extent of the problem of pregnancy dismissal and discrimination; even agencies advising women on these problems often do not keep detailed statistics showing how often this issue arises¹. Nevertheless, where some attempt at measurement has been made, the issue is clearly very much a live one. The Finnish Ombudsman's office provides, as a rough estimate, that it receives several formal and informal inquiries each week about pregnancy issues. It reports that it intends to hold a seminar on pregnancy discrimination in the autumn of 2004. In its fifth report, in 2000, to the UN Committee for the Elimination of Discrimination Against Women, Norway included the comments of its Gender Equality Ombud. She referred to "the problems related to recruitment and promotion of pregnant women, and employees returning from maternity leave. This subject is regularly on the agenda in Norway".² Although the Norwegian Ombud provides figures³ on her website for the number of complaints coming before her in 2002 (422)⁴ and the number of telephone inquiries for 2001(444) and states that 175 cases related to employment discrimination, no numbers are available for pregnancy discrimination cases or inquiries. However, she notes that questions relating to pregnancy and parental leave have increased during 2002. Concerns were

¹ Countries, such as Germany, where dismissals of pregnant employees must be authorised by a government authority, have dismissals statistics kept on a local basis. Some of these four areas of Germany are included in Appendix A.

² Norway's 5th Report to CEDAW 2000, downloaded on 18 Mar 2004 at:

http://www.bayefsky.com/reports/norway_cedaw_c_nor_5_2000.pdf

³ Norway, Gender Equality Ombud's web site, downloaded on 18 Mar 2004 at:

<http://www.likestillingsombudet.no/english/>

⁴ 50% of complaints lodged in 2002 came from women, men accounted for 30% and the remaining cases were brought by a range of organisations.

expressed informally by academics and Commissions/Ombuds for equal opportunities in several countries of the emerging problem of the non-renewal of fixed term contracts of pregnant employees, despite ECJ jurisprudence on this issue.

1.3 The EOC's work so far has highlighted several areas for possible legal reform. The provisions in selected countries (outlined in Appendix A) are discussed below in relation to some of these areas. Occasional reference is made to countries not covered in Appendix A for the reason that sufficient information about their pregnancy discrimination and dismissal systems could not be obtained in English. Not a great deal of information is published in English about the protection provided on pregnancy discrimination and dismissal in non-English-speaking jurisdictions. This report is based on such material as is available, the invaluable assistance provided by Dr Susanne Burri, Law Faculty, Utrecht University, the Netherlands and Dr. Bettina Graue, Law Faculty, University of Oldenburg, Germany is acknowledged as is the information generously provided by telephone and by e-mail from persons and organisations as acknowledged in the text. Any errors are, however, solely the responsibility of the author. In the discussion below, references in brackets to paragraph numbers are to the appropriate paragraphs in Appendix A.

2. Protection against pregnancy discrimination and dismissal

2.1 The countries examined all have separate but overlapping systems for dealing with pregnancy discrimination and dismissal, as in the UK. This partly reflects the fact that the EC Directives on equal treatment and the protection of pregnant workers are separate pieces of legislation, enacted at different times. In relation to **discrimination**, particularly at the point of **recruitment**, several provisions are worth noting which explicitly prohibit discrimination on the basis of pregnancy. The Finnish Act on Equality between Women and Men (the EWMA) prohibits direct and indirect discrimination on the basis of sex which is expressly defined to include pregnancy and childbirth. A gender neutral prohibition on discrimination on the basis of parenthood or family responsibilities is also included in the Act. The prohibition of discrimination in recruitment reiterates that refusing employment on the basis of pregnancy or childbirth is discriminatory [para 1.5]. "Direct differential treatment" in Norway is explicitly defined in its Gender Equality Act (GEA) as actions which place the woman in a worse position than that in which she otherwise would have been because of pregnancy and childbirth. Also prohibited, without the need for a comparator, are actions which place a woman or a man in a worse position than that in which she/he otherwise would have been, because she/he has taken leave of absence reserved for one of the sexes (nine weeks for the mother and four weeks for the father) [para 1.23].

2.2 In Germany, as in France⁵, there is case law establishing that an employer may not ask at job interview whether an employee is pregnant⁶. [para 1.9]

2.3 Broadly two approaches are taken in the countries covered to protecting pregnant women and those on maternity (and other) leave against dismissal. Most similar to the UK, is that taken in Finland and Norway. These systems appear to provide stronger unfair dismissal protections generally than in the UK, especially Norway, but they are not as different as, for example, the Dutch and German systems. Both have specific legislation dealing with unfair dismissal which also prohibits termination if the reason for it is a woman's pregnancy (and because the employee is on family leave in Finland), but they expressly provide that dismissal during pregnancy will be regarded as being for that reason unless other grounds can be shown by the employer - thus making who bears the burden of proof clear [paras 1.6 & 1.24]. Strengthened protection against individual redundancy dismissal during maternity and other leaves is provided in Finland, where redundancy termination may only occur where an employer's operations cease completely [1.7]. The Norwegian protection during maternity/parental leave (during the first year after childbirth) is an absolute prohibition of any dismissal becoming effective during this period; if a lawful dismissal does occur during this time, a notice which is valid shall be extended so as not to come into effect until this period is over [para 1.24].

2.4 Other countries (e.g. Austria, France⁷, Germany, Italy and the Netherlands) simply prohibit dismissal during pregnancy and maternity/parental leave and then provide for a limited number of exceptions, rather than making protection dependent - at least initially - upon demonstrating what the reason for the dismissal was. How much difference this makes in practice is hard to assess in the absence of comparative studies and must depend on how limited the exceptions are (e.g. in Austria only serious misconduct as defined in the legislation is permitted [para 1.2]) and how strictly interpreted. Italy provides an example of a jurisdiction where the three permitted exceptions⁸ to the prohibition on dismissal during pregnancy and for one year after childbirth, are likely to be strictly enforced [para 1.16]. Additionally, any improved protection levels evident from such an approach might well be linked to the further requirement in, for example, the Netherlands, Germany and Austria, that such dismissals cannot occur till first approved by an external administrative body or a court⁹. Germany is an interesting example of this type of protection, as external authorisation of dismissal is not required in ordinary unfair dismissal cases, unlike the Netherlands [para

⁵ See "Pregnancy discrimination at work: A review", by Grace James, published by the UK Equal Opportunities Commission in February 2004, page 16.

⁶ Landesarbeitsgericht Hamm, judgement dated 01.03.1999, DB 1999, p 2114 ; Erfurter Kommentar zum Arbeitsrecht, Schlachter § 611a BGB Rn. 13.

⁷ James, op.cit. fn.5, p.17.

⁸ Serious misconduct, closure of the enterprise where a worker was employed, or the conclusion of a fixed term contract.

⁹ Prior authorisation from a public authority is also required in Portugal. There, the Commission for Equality at Work and in Employment is required to authorise the dismissal of the pregnant or breast-feeding worker. A statutory presumption that the dismissal of such a worker is unfair exists. In practice, gross misconduct or collective

1.8]. Though it must be recognised that special extra protection of pregnant workers and workers on maternity leave is provided for in the Netherlands too [para 1.20].

2.5 The approach outlined in paragraph 2.4 has the merit of expressly defining the period during which a pregnant worker and a worker on maternity/parental leave is protected from dismissal. Without exception, these five countries provide for that period to continue beyond maternity leave to cover the earliest period of time a woman may be back at work (as in France).¹⁰ In the Netherlands, the prohibition on dismissal continues for the first six weeks back at work [para 1.20]. If an employee does not return to work directly after the end of the maternity leave, because of illness related to pregnancy or confinement, the six weeks starts when the employee has recovered and returned to work. In Germany, the protection continues for eight weeks beyond the statutory maternity leave period [para 1.10] (and during any period of parental leave); in Italy until the end of the first year after childbirth [para 1.16], maternity leave there usually being for four months after confinement; in Austria for four months after childbirth (maternity leave being for eight weeks before and eight weeks after confinement) - and up to one year after childbirth if maternity leave is followed by parental leave [para 1.1].

2.6 In differing ways, the maternity leave period is also provided with protection additional to that provided for during pregnancy in Finland [para 1.7], the Netherlands [para 1.20] and Norway [para 1.24] – as in France¹¹.

2.7 Even where dismissal during pregnancy/maternity leave is permitted in Germany (and the indications are that this is unusual as the exceptions are for closure of the business and similar reasons and for serious misconduct but this exception is only applied very cautiously), the health insurance system ensures that the dismissed employee receives maternity pay by making up the (large) employer contribution to this, which she would otherwise lose.¹² Employer knowledge of pregnancy is necessary to obtain the statutory protection in Austria [para 1.1] and Germany [para 1.1.10], but the employee can notify the employer of the pregnancy within five and 14 days after dismissal (the latter provision being similar to that in France)¹³

2.8 It is hard not to imagine that obtaining permission to dismiss (or even just notifying a prospective dismissal) to an external body would not deter many pregnancy/maternity leave dismissals and allow time for the problems giving rise to the possibility of dismissal, to be conciliated. Moreover, in at least two jurisdictions (Italy and Germany) there are provisions requiring resignations of pregnant employees to be notified to a government authority, presumably to ensure that the prohibitions on dismissal of pregnant employees etc are not circumvented by involuntary resignations [paras 1.13 & 1.16]. But the information

redundancies are accepted as valid grounds for dismissal. (See Special Report on Pregnant Workers by the TUTB Observatory, downloaded on 10 Feb 2004 at: <http://www.etuc.org/tutb/uk/pdf/1997-07-p08-12.pdf>

¹⁰ James, op.cit. fn.5, p.18.

¹¹ James, op.cit. fn.5, p.18.

¹² Missoc database, downloaded on 18 Mar 2004 at:

http://europa.eu.int/comm/employment_social/missoc/2002/germany_en.pdf

¹³ James, op.cit. fn. 5, p.17.

so far available does not permit any concrete conclusions to be drawn about the effectiveness of the different regimes.

3. Health and safety at work

3.1 Risk assessments must be carried out in all the countries covered and some provide specific protections at work for pregnant and breast-feeding women. For example, in the Netherlands, pregnant and breast-feeding workers are entitled to extra paid breaks (subject to a daily maximum). Such an employee is also entitled to a steady and regular working time pattern and cannot usually be required to work nights or do overtime [para 3.8 & 3.7]. Germany and Italy also make provision for paid breast-feeding breaks [paras 3.4 & 3.5].

3.2 With regard to the preparation of risk assessments, Finland provides in its legislation, that where an employer does not have adequate expertise for its preparation, an appropriate external expert must be engaged to prepare one. The cost of risk assessments at the workplace can be partially reimbursed by the government where these have been approved by the health and safety service used by the employer [para 3.2].

3.3 Where women are suspended from work for health and safety reasons during pregnancy, the social insurance systems rather than their employers meet the cost of paying them during this period in Finland, Italy and the Netherlands. However, in Italy and in Finland, this only meets a proportion of their wages (80% and 70% respectively – paras 3.5 & 3.2).

4. Pre-complaint procedures

4.1 Both Finland and Norway provide procedures under their sex discrimination provisions which may be of interest when considering how to tackle recruitment discrimination. The UK questionnaire procedure is similar and may be more thorough – but these provisions are set out explicitly in the legislation. Upon request, a **Finnish** employer must provide a written report on his or her actions to any person who considers that he/she has been subject to sex discrimination in recruitment, selection for a particular task or training, terms of payment, other terms of the employment relationship, management within the workplace or dismissal. Where the discrimination involves selection for a job or training, the report must include the grounds for the employer's choice, the education, training, work and other experience of the person who was chosen instead and any other clearly demonstrable qualifications and considerations that have influenced the employer's choice [para 4.1].

In **Norway** a job applicant who has not obtained an advertised position may obtain a written statement from the employer providing details of the education, experience and other clearly demonstrable qualifications for the position, which are possessed by the person of the opposite sex appointed to the position [para 4.2].

5. Time limits

5.1 None of the jurisdictions covered provide an unlimited time limit for bringing either discrimination or dismissal claims - unlike France¹⁴. Arrangements vary considerably and different time limits are often provided for depending on which legislation a claim is made under and whether reinstatement or merely compensation is sought. A time limit also has a very different meaning where an employee has been kept in a job pending an administrative or court decision as to whether the proposed dismissal should go ahead. Each country covered is different in its approach but it is worth noting here that discrimination claims under the EWMA in Finland must be brought within one year, and claims under the ECA, the unfair dismissal legislation, must be made within two years of the date when the employment has been terminated [para 5.3].

6. Enforcement

6.1 Certain countries provide structures for enforcing anti-discrimination law which are easy to access and free to use. The Ombudsman's Offices in Finland and Norway are described paras 6.1- 6.5 and 6.14 & 6.15 of Appendix A. In relation to enforcement, their decisions are not enforceable of themselves. Provision is made for enforcement by Equality Boards, a type of appeal Tribunal from the decisions of the respective Ombudsmen. Possibly of most interest is the Dutch Equal Treatment Commission [paras 6.7 - 6.13] which is supported in its work by between 20-40 local NGO-run anti-discrimination boards. It too provides a free service and is dedicated to ensuring that its procedures remain informal and can be understood by complainants and employers alike. Apparently some 10-15 percent of complainants before the Commission are represented by the anti-discrimination boards. Another 10-20 percent of complainants pay for representation before the Commission if, for example, they are already involved in legal proceedings. Otherwise, complainants represent themselves or have informal representation provided by a friend or relative.

6.2 All these bodies, to some degree, try to facilitate the settlement of complaints before they have to issue formal decisions. A situation more like that in France in relation to compulsory conciliation¹⁵ (which does not have a specialist Ombud/Commission like those in Finland, the Netherlands and Norway) can be found in Switzerland. There, discrimination complaints under the federal legislation on equality between women

¹⁴ James, op.cit. fn.5, p.19.

¹⁵ Where compulsory conciliation must be attempted before discrimination cases will be heard by the appropriate tribunal – see James, op.cit. fn. 5, p.20.

and men are usually made to the appropriate Cantonal Tribunal. However each Canton must have its own conciliation office to advise the parties to a complaint and help them reach an agreement. A Canton can decide to make the conciliation procedure (which is free) compulsory before a complainant is permitted to take legal proceedings¹⁶.

7. Remedies/penalties

7.1 Reinstatement is not as much of an issue where dismissal cannot occur until authorised by an external body as the initial determination of the permissibility of a proposed dismissal is made whilst the employee is still in a job. Given the real difficulties of reinstating an employee once she has left the workplace, this would appear to be a good way of ensuring that an employee whose dismissal is not justified, does not lose her job. Unfortunately, there does not appear to be evaluations, in English at least, of the effectiveness of such systems in preventing the dismissal of pregnant employees and those on maternity leave. Nor is there research available into the levels of compensation obtained where such dismissals do occur.

7.2 Norway, although it does not require the authorisation of pregnancy/maternity leave dismissals by an external body, does make provision for reinstatement in unfair dismissal cases. Probably more importantly, it also provides for keeping an employee in her job until the fairness of a dismissal has been determined by a court [para 1.22]. It also makes provision for unlimited compensation in discrimination and dismissal cases [para 7.6 & 7.7] and the possibility of criminal prosecution in anti-discrimination complaints. It is not clear whether this Norwegian provision has been used, but a similar one also exists in Finland where some cases have been brought before the District Courts by the District Attorneys [para 7.3].

8. Other areas

8.1 Material on sharing leave, positive action requirements and (very much only in outline) accrual of rights during maternity leave are provided for some of the countries covered as general background. Material about the right to return to the same job is also included but again, it is difficult to know how this right is working in practice. Statistics which would assist to some extent with doing this, those which show the number of women not working, and in full-time and part-time work when their first child is aged 12 months, do not appear to be readily available. Quantitative research evaluating these provisions has not been found. The Norwegian Ombud's Office comments that it receives a lot of inquiries about the right to return after parental leave as many women find their jobs have changed on their return to work but that few complaints are made, probably because the employee concerned does not wish to damage her relationship with her employer. This appears to indicate that, as in the UK, research into this field would be

¹⁶ "L'egalite dans la vie professionnelle: Informations sur la loi federale sur l'egalite entre femmes et hommes", published by the Swiss Federal Bureau for the Equality between Women and Men, Berne 1996, procedure confirmed by e-mail from Claudia Bloem of the Bureau on 3 Feb 2004.

illuminating. It is also interesting that in the Netherlands, too, there is very little litigation about the right to return. There it appears that where women do wish to return to work after childbirth, they do so early (ie after their 16 weeks maternity leave) as they can do this part-time. It maybe that there is a link between being able to return to exactly the same job after short maternity leave and increased difficulties in doing so after a longer time off work. (See also the situation in Austria, footnote 2 in Appendix A). However, in the absence of detailed research¹⁷ it is impossible to know.

9 Planning and pregnancy

9.1 Some of the provisions in Germany may provide some ideas as to how planning for pregnancy could be undertaken, though such a resource intensive system may not be possible in the UK. The notification by an employee to her employer that she is pregnant both brings with it an immediate and strong protection from dismissal, as described in Appendix A, and carries with it a requirement for the employer to immediately notify the supervising Labour authority. Apart from the protection from dismissal, the notification to the supervising authority appears to be designed to enable that authority to provide general supervision and advice in relation to the protection and safety of pregnant workers. It may also encourage pregnant employees to inform their employer early of their pregnancy. Any proposed resignation of pregnant employees is also supervised. Although a minor point, it may be worth noting that employers are required to display at the workplace a copy of the Protection of Gainfully Employed Mothers Act. Although it may not be written in an easy to read style, it nevertheless is a step in the right direction in providing information about the rights of pregnant women at the workplace.

¹⁷ Research exists about what is the optimal length of maternity leave which safeguards women's attachment to the

PREGNANCY DISCRIMINATION: SOME INTERNATIONAL COMPARISONS

INDEX

	Page numbers
1. Protection against pregnancy discrimination and dismissal	2
2. Information at the beginning and end of employment.	10
3. Health and Safety provisions, including right to paid time off for ante-natal care.	11
4. Pre complaint procedures.	14
5. Time limits.	15
6. Enforcement bodies and procedures.	17
7. Remedies and penalties	21
8. Sharing leave.	23
9. Accrual of rights during maternity leave.	25
10. Right to return to the same job	25
11. Positive action requirements	27

labour force does exist and may provide some guidance.

1. Protection against pregnancy dismissal and discrimination

Austria¹⁸

1.1 **Anti-discrimination** laws are contained in the Law on Equal Treatment of Men and Women. They cover employees and agency workers but not the self-employed. The Law on the Protection of Mothers implements the Pregnant Workers Directive. **Dismissal** of a pregnant woman is prohibited during the period a woman is pregnant and for four months after childbirth (maternity leave being for eight weeks before and eight weeks after confinement). The employer has to be aware that the woman is pregnant but he may be notified of this up to 5 days after the dismissal.

1.2 The only situation in which dismissal can be justified is summary dismissal for gross misconduct. The situations which constitute gross misconduct are listed exhaustively in the relevant legislation. They are gross negligence in the performance of work, dishonesty, disclosure of confidential business information, physical assault or serious verbal abuse of the employer, other workers etc. Dismissal for business reorganisation is not permitted. A dismissal in any of the above circumstances cannot take place without the approval of the Labour and Social Tribunal. A dismissal which occurs without such an approval is void.

1.3 This protection applies during the periods of parental leave which are taken up to two years after childbirth (which may in certain circumstances be taken part-time) plus four weeks after the end of such leave. However after the child's first birthday the protection is substantially weaker, as dismissal can be permitted for business reasons or if continuing the contract poses unfair hardship on the company.¹⁹

Finland²⁰

1.4 *[Statute provides that termination by the employer with and without notice to the employee is possible and reviewable by the courts. In both sorts of cases, the employer must tell the employee the grounds for*

¹⁸ Information was provided for this section by Ms. E Fehringer, Ms. G. Ercher and Ms. E. Stech of the Federal Ministry for the Economy and Labour, Austria.

¹⁹ In the context of these differing levels of protection, it is interesting to note that only about 25% of Austrian mothers return to their previous employer upon expiry of parental leave, while another 25% return upon expiry of leave but do so by changing employer in order to facilitate working part-time - the length of time of parental leave taken is not specified in either case (see "Babies and Bosses: Reconciling Work and Family Life – Volume 2 Austria, Ireland and Japan", page 15, OECD, Paris, 2003).

²⁰ Material is drawn from the following: Act on Equality between Women and Men (EWMA) - <http://www.tasa-arvo.fi/www-eng/legislation/index.html>; Act on Contracts of Employment (ECA) <http://www.finlex.fi/pdf/saadkaan/E0010055.PDF>; Act on Equality Ombudsman and Equality Board (EOA) - <http://www.tasa-arvo.fi/www-eng/legislation/index.html>; the Penal Code.

Material on Finland has also been provided by the Office of the Finnish Ombudsman for Gender Equality.

*the proposed dismissal and give him/her the opportunity, with a representative present if necessary, to be heard, prior to dismissal (Collective dismissals are dealt with differently).]*²¹

1.5 Ss.7 & 8 of the Act on Equality between Women and Men (EWMA) prohibit **direct and indirect discrimination** on the basis of sex which is expressly defined to include pregnancy and childbirth and also different treatment on the basis of parenthood or family responsibilities. The prohibition on discrimination in recruitment reiterates that refusing employment on the basis of pregnancy or childbirth is discriminatory as is refusing to extend an employment contract, an explicit provision to protect fixed term employees²². The provisions have been interpreted broadly in accordance with EU law in relation to dismissal because of pregnancy or being on maternity leave²³. The **burden of proof** requirements in the EWMA (s.8) are similar to those in the UK Sex and Discrimination Act (SDA), following the requirements of the EC Directive 97/80 on the Burden of Proof.²⁴ The type of workers protected by the provisions against employment discrimination do not include the self-employed; agency workers are only covered in relation to the conduct of their employment agency. The aspects of employment covered by the provisions against employment discrimination are similar to those in the SDA.

1.6 The Act on Contracts of Employment (ECA) prohibits **termination of employment** on the basis of the employee's pregnancy or because the employee is exercising his/her right to family leave (which includes maternity leave, special maternity leave (for health and safety reasons) and paternity and parental leaves)²⁵. On request, the employee must present the employer with proof of pregnancy²⁶. The ECA specifically states that where termination occurs during pregnancy or maternity leave, it is deemed to have taken place on the basis of one of these two grounds, unless the employer can prove there was some other reason²⁷. (The Act provides for other reasons for termination such as serious breach of the employment contract (with notice) and gross misconduct (without notice)).

1.7 The ordinary protection against **redundancy and reorganisation dismissals** is available to pregnant and non-pregnant workers, but it has been strengthened for those on maternity leave (and on special maternity leave, paternity leave, parental and child care leave) as termination may only occur where an employer's operations cease completely²⁸. Though no extra protection from termination for redundancy

²¹ The Act on Contracts of Employment and the ILO National Labour Law Profile: Finland, downloaded on the 3 May 2004 at: <http://www.ilo.org/public/english/dialogue/ifpdial/ll/observatory/profiles/fin.htm>

²² S.8(1) EWMA.

²³ Confirmed by e-mail communication of 26 Apr 2004 from Ms. Outi Alarotu, LL.M, researcher in the Department of Criminal Law, Procedural Law and General Jurisprudential Studies, University of Helsinki.

²⁴ Eleventh Meeting of European Labour Court Judges, Florence, 24 Oct 2003: "European equality law in Labour Court proceedings", downloaded on 26 Apr 2004 at:

http://www.ilo.org/public/english/dialogue/ifpdial/downloads/lc_04/finland_1.pdf, and

Website for Ombudsman for Equality, Finland, significant Court decisions related to the Act on Equality between Women and Men in 2001, downloaded on 26 Apr 2004 at:

<http://www.tasa-arvo.fi/www-eng/court/index.html>

²⁵ Ch.7, S.9(2) ECA.

²⁶ Ch.7, S.9(1) ECA.

²⁷ Ch.7, S.9(2) ECA.

²⁸ Ch.7, S.9(3) ECA.

during pregnancy is provided it is worth noting that express statutory provisions exist in relation to all employees to try and prevent individually targeted redundancies²⁹.

Germany³⁰

1.8 *[The Protection against Dismissal Act applies to establishments of over 5 (about to change to 10) full-time employees and protects workers who have completed a six-month qualifying period. A distinction is made between ordinary dismissal with notice (of between four weeks and seven months) which must be for a reason such as poor performance, illness etc, or an extraordinary termination without notice which, as its title implies, is appropriate where serious misconduct occurs. In either case, where a works council exists, the employer must consult it before dismissing in either circumstance even though the council's response is not binding. Termination without such consultation (the council is given three days to express its views in the case of summary dismissal) is ineffective. But it should be noted that in 1999 works councils only existed in 4.2% of workplaces employing five to 20 employees, whilst they were organised in 97.5% of establishments with over 1000 workers. An employee may file a complaint against termination within three weeks of receiving notice and the burden of proof is on the employer to show the dismissal is justified. If the court holds the dismissal to be invalid, employment continues - though it is not clear how much this occurs in practice as opposed to a monetary settlement being concluded].³¹*

1.9 The Civil Code (CC) prohibits **direct and indirect sex discrimination** at work in relation to recruitment, terms and conditions of employment, promotion and dismissal³² and implements the Equal Treatment Directive. Pregnancy and maternity leave discrimination are prohibited in accordance with EC case law but this is not stated explicitly in the Code. The self-employed are covered by these provisions. A duty not to discriminate between men and women is also imposed on participants in negotiating collective agreements at national, sectoral and company levels. Case law has expressly held that an employer must not ask at a job interview whether an applicant is pregnant. The burden of proof complies with the requirements of the Burden of Proof Directive.

1.10 The specific protection against **pregnancy and maternity leave dismissal** (other than the above protection for discriminatory dismissals) is contained in the Protection of Gainfully Employed Mothers Act

²⁹ Ch.7, Ss.3 & 4 ECA. Redundancy occurs where the work of an enterprise has diminished substantially and permanently for financial or production-related reasons or for reasons arising from reorganisation of the employer's operations. But where a new employee has been engaged to do the same duties as a person made/proposed to be made redundant, or the enterprise's work has not been reduced because of a reorganisation resulting in a supposed redundancy, dismissal is prohibited. If the dismissal is a genuine redundancy, there exists a requirement for alternative work to be offered and where necessary and appropriate for training required by new work duties to be provided.

³⁰ Material for Germany has been drawn from the Civil Code, the Protection of Gainfully Employed Mothers Act and the Educational Allowance Act and from that provided by Dr. Bettina Graue, Law Faculty, University of Oldenburg, Germany.

³¹ Lovells' client note, "*Laws on the dismissal of employees across Europe - 2003*", downloaded on 27 Apr 2004 at: <http://www.lovells.com/germany/ControlServlet/de/publication/pubId/641>

(PGEMA) and S.134 of the Civil Code. It comprises a prohibition on dismissal (subject to exceptions, see below) during pregnancy, for the 2 months maternity leave after confinement (six weeks being taken beforehand), and a further eight weeks and during any period of parental leave.³³, ³⁴. Temporary or fixed term employees, trainees, homeworkers and domestic staff are all covered by this prohibition. The duration of the employment relationship and the size of the employer are not relevant for obtaining this protection³⁵. The specific protection during pregnancy (and four months after the child's birth) applies even if the employer did not know of the pregnancy provided he/she was informed of it within two weeks after receipt of any dismissal notice³⁶. The employer may require the employee to provide a doctor's or midwife's certificate confirming the pregnancy and including the expected date of delivery. A dismissal contravening this protection is void and the employee's employment continues until the end of the protected period. However, notice given to an employee before she becomes pregnant is valid even if it takes effect during her pregnancy, whereas notice given during the protected period never becomes effective.

1.11 The system for ensuring this dismissal prohibition is complied with, applies only to the dismissal of pregnant women and women on maternity leave and not to any other type of employee; that is, it is specifically designed for pregnant workers. Firstly, the employer is under an obligation to inform the relevant state Labour protection authority of the pregnancy of an employee immediately she has notified him. This notification enables this supervising authority to provide health and safety advice and supervision (see below) as well as enabling the protection against dismissal to be properly enforced. That protection requires an employer to contact the supervising authority for authorisation to dismiss a pregnant woman or an employee who has given birth within the previous four months (or who is on parental leave - this protection would apply also to a man on parental leave). The employer must do this before giving notice to the employee. At that point, the authority must hear the woman's point of view (she may be represented by her trade union) and make further inquiries, for example seeking information from the Works Council, before making a decision as to whether to authorise dismissal³⁷.

1.12 The special circumstances which may give rise to dismissal authorisation are most likely to be redundancy situations. Apparently, small businesses of up to 20 employees can make a special case that their very existence is endangered by the continued payment of wages during maternity leave (in Germany, the employer is responsible for paying most of the maternity leave payment). However,

³² S.611a CC.

³³ Parental leave is available for three years, see paragraph 8.2 below for more details.

³⁴ S.9 PGEMA and S.18 Educational Allowance Act.

³⁵ The protection does not apply to women receiving IVF or similar medical treatment nor to those who have had an abortion or miscarriage.

³⁶ S.5 PGEMA.

³⁷ Two areas in Germany (Bremen & Oldenburg, population c.70,000) authorised a total of 40 pregnancy/maternity leave/parental leave dismissals in 2003 and another area (Niedersachsen, population c.8m.) authorised a total of 124 in 2001. Apparently, the authorising authorities in some cases publicise (by press release) figures of the dismissals of pregnant employees.

authorisation cannot be obtained where it is possible to find alternative work for an employee. Serious misconduct which might otherwise justify dismissal without notice may not be sufficient to obtain authorisation as the supervising authority is very cautious about authorising such dismissals in case any alleged misconduct may be connected with pregnancy and childbirth.

1.13 An employer also has to inform the supervising authority if a pregnant worker/worker on maternity leave has handed in her notice, or if he/she and that worker have signed a contract to terminate her employment. In such circumstances the supervising authority will provide advice on the consequences of such actions.

Italy³⁸

1.14 *[Dismissal may occur without notice for a just cause, (in effect serious misconduct), or with notice for a justified reason which includes reasons relating to productivity and work organisation including the elimination of a particular job (executives are treated differently). Fixed-term/task employees are terminated at the end of their contract. Dismissal may be challenged in the courts and if annulled, in the case of an employer with more than 15 employees at a particular establishment (or 60 employees in total wherever located) reinstatement is required (unless the employee prefers to receive additional compensation) plus compensation. In small workplaces the employer must pay the employee compensation of between 2 ½ to six months salary. However, the burden of proving the legality of a dismissal rests with the employer]*^{39 40}

1.15 Law No 903 of 1977 implemented the EC equal pay and treatment directives. It prohibits sex **discrimination** in relation to access to employment, vocational training, pay, job evaluation and classification, assignment of work and promotion, as well as social security protection.⁴¹ A subsequent law of 1991 (No.125) expressly prohibited indirect discrimination⁴².

³⁸ In the report prepared for AFEM (Association des femmes de l'Europe meridionale) and funded by the European Union 'Concilier vie familiale et vie professionnelle pour les femmes et les homes: du droit a la pratique' (draft March 2004) by Masselot A., Lanquetin M-T, Letablier M-T, Moussourou L., Petroglou P., Del Re A., De Simone G., do Rosario Palma Ramalho M., and Perista H, the Italian section notes the growing number of persons working as independent contractors or hired for a fixed term. It comments that although the latter theoretically have the same rights to maternity and parental leave as permanent employees, in practice they do not as they can seldom take leave and face the risk of failing to be reemployed by their employer.

³⁹ Lovells' client note, "Laws on the dismissal of employees across Europe - 2003", downloaded on 27 Apr 2004 at: <http://www.lovells.com/germany/ControlServlet/de/publication/pubId/641/>

⁴⁰ ILO International Observatory of Labour Law, National Labour Law Profile: Italy, downloaded on 15/03/04 at: <http://www.ilo.org/public/english/dialogue/ifpdial/ll/observatory/profiles/it.htm>

⁴¹ ILO EEO website, Italy, EEO Legislation, downloaded on 22/04/04 at: <http://www.ilo.org/public/english/employment/gems/eoo/law/italy/act6.htm>

⁴² ILO EEO website, Italy, EEO Legislation, downloaded on 22/04/04 at: <http://www.ilo.org/public/english/employment/gems/eoo/law/italy/act14.htm>

1.16 From the beginning of pregnancy until one year after the child's birth, **dismissal** is prohibited unless the employer can prove it occurred because of serious misconduct, closure of the enterprise or the ending of the specific work/work period for which a woman was hired⁴³, ⁴⁴. Similar restrictions apply from the date of publication of a proposed wedding until one year after the ceremony. A 2002 case interpreted these restrictions on the dismissal of a married woman strictly, in that a dismissal which would otherwise have been legitimate due to the amount of sick leave the complainant had had, was held to be unlawful as none of the above three grounds was shown to apply.⁴⁵ Any **resignation** by an employee must be confirmed before an office of the Ministry of Labour to ensure that it is voluntary⁴⁶.

The Netherlands⁴⁷, ⁴⁸

1.17 *[In the Netherlands, before giving notice (statutory notice is 1-4 months depending upon length of service) to an employee with an indefinite contract, the employer needs to have the approval of the Central Organisation for Work and Income (COWI). He/she must apply for permission to dismiss and make a case for it. The Organisation allows the employee to respond in writing. Without its permission, termination is void. Even if given, the employee may still institute court proceedings. Alternatively the employer can file a request with the District Court for dissolution of the employment contract; again, the employee will be given the chance to respond to such a request. This latter procedure is rather quicker than the former and the court can award compensation to the employee. These procedures are not necessary in cases of gross misconduct where dismissal can occur without permission and without notice. (The courts are apparently reluctant to accept this type of termination⁴⁹). However such a dismissal also can be challenged in the courts. These procedures do not apply to fixed term contracts, though the termination of such a contract before its expiry date requires the approval of the COWI or court authorisation].*

1.18 The implementation of the EC sex equality directives has been provided for in Dutch law by the Dutch Constitution and several pieces of legislation, the most important of which are the Civil Code (the CC) articles 7:646 and 7:647, the Equal Opportunities Act and the Equal Treatment Act (the ETA).

⁴³ Email from Mr. Sergio Barozzi, solicitor, of Eversheds Solicitors, Milan, dated 16 April 2004; Emire database, Italy, pregnancy and maternity, downloaded on 15/03/04 at:

<http://www.eurofound.eu.int/emire/ITALY/PREGNANCYANDMATERNITY-IT.html>

⁴⁴ Note, of course *Melgar v. Ayuntamiento de Los Barrios* [2001] IRLR 214 ECJ where the ECJ decided that refusing to renew a fixed term contract was unlawful discrimination if the reasons for this action was the worker's pregnancy.

⁴⁵ EC Bulletin on legal issues in equality, number 3/2002, report from Italy, page 29 and footnote 77 downloaded on 15/03/04 at: http://europa.eu.int/comm/employment_social/equ_opp/newsletter/bulletin2_2003_en.pdf

⁴⁶ Rapport *ibid* fn.19 and email *ibid* fn.24.

⁴⁷ Material for the Netherlands is drawn from the Code of Civil Procedure, the Equal Treatment Act and the Equal Opportunities Act and from that provided by Dr Susanne Burri, Law Faculty, Utrecht University, the Netherlands.

⁴⁸ Both the Dutch Equal Treatment Commission and Ms Burri have mentioned informally the number of pregnancy dismissal cases occurring at present, in relation to non-renewal of fixed term contracts.

⁴⁹ Note on *Employment/Labour Law-Netherlands* published by the International Law Office, February 2003, downloaded on 7 Apr 2004, at:

<http://www.internationallawoffice.com/overview.cfm?country=Netherlands&workareas=Employment%2FLabour>

Direct and indirect discrimination are prohibited by both the ETA and the CC. In the Civil Code direct discrimination are expressly defined to include discrimination on the basis of pregnancy, confinement and motherhood⁵⁰. The circumstances where discrimination is expressly prohibited are in relation to the public advertising of employment and procedures leading to the filling of vacancies, the commencement and termination and the terms and conditions of employment⁵¹ and permitting staff to receive education or training during or prior to employment and promotion. The ETA applies to work relationships generally and covers those in temporary employment agencies as well as the self-employed. The Act has to be applied by any person or body involved in determining or applying working conditions, for example recruitment agencies or the Minister of Education. The Civil Code covers employees only.

1.19 The prohibition of direct discrimination applies in cases of less favourable treatment related to pregnancy, childbirth and maternity, in line with ECJ case law and there is no need to find a male comparator. The protected period is not expressly defined in the ETA but it has been interpreted to comply with ECJ case law. The burden of proof requirements follow those established by the EU Directive on the Burden of Proof and Indirect Discrimination (EC/97/80). It is probably difficult to show discrimination as a reason for dismissal under the ETA if the employer does not know the relevant employee is pregnant. But knowledge of the pregnancy is irrelevant to the dismissal protection described below under the Civil Code provided the employee can prove she is pregnant; the employer is entitled to request a doctor's or midwife's certificate to this effect.

1.20 Specific protection for pregnant women from **dismissal** is contained in Article 670(2) of the Civil Code, when an application for permission to dismiss is made to the COWI. In the Code, specific prohibitions on dismissal in particular cases are set out. These include the situation where an employee is pregnant, on statutory maternity leave (up to a six week period before confinement and 10 weeks after childbirth, plus any time unused prior to confinement) and during the first six weeks back at work.⁵² If an employee does not start to work directly after the end of the maternity leave, because of illness related to pregnancy or confinement, the six weeks starts when the employee has recovered and returned to work.⁵³ The prohibition also applies in the case of the closure of business or the part of it in which the employee mainly works, if the employee is already on leave⁵⁴. It does not apply during the probationary period nor

⁵⁰ Art 7:646(5) CC.

⁵¹ Both the Commission in 1998 and a District Court in 2000 Case no 99/4166 have decided that where a teacher's pregnancy/maternity leave coincides with one of the school holidays, she should receive extra leave to make up for this loss. See ILO Equal Employment Opportunities website, the Netherlands, Case law, Public Sector Teachers Pregnancy Leave Case, 2000 downloaded on 22 Apr 2004 at:

http://www.ilo.org/public/english/employment/gems/eo/law/nether/cl_dc.htm

⁵² Other employees covered by this special protection include works council members, and during the first two years of sick leave.

⁵³ The two year special protection against dismissal due to sickness mentioned in fn.35 is to be adjusted soon to ensure that the two year period does not include any period of pregnancy-related sickness.

⁵⁴ Art. 7:670b(2).

where a serious reason defined in art. 7:678(2) for dismissing is presented to and accepted by the COWI⁵⁵. Pregnancy or maternity leave can never amount to such a serious reason. In relation to all applications for permission to dismiss, the COWI is under a statutory obligation to have particular regard to combating discrimination.

1.21 Where an employer applies to the District Court for the termination of the employment relationship, the protections for pregnant employees or those on maternity leave mentioned above, do not apply directly. Nevertheless, the judge must ensure that the requested dismissal is not related to any of the specific prohibitions on dismissal including the pregnancy/maternity leave prohibition, and only approve it where a serious reason is shown. And, of course, the general prohibition on sex discrimination is also applicable. Dismissal applications are split nearly equally between these two jurisdictions but no breakdown specifically for pregnancy dismissal applications exists.

Norway^{56 57},

1.22 *[Dismissal is either with notice and for objectively justifiable reasons such as curtailment of an enterprise's operations or rationalisation measures or to do with the employee, or else summary for serious misconduct. Both may be challenged in court which may order reinstatement or compensation. Termination with notice may also be the subject of formal employer/employee negotiations prior to the court hearing. If negotiations occur (at the employee's demand or that of the employer; in the former case the request must be made within two weeks of receipt of the dismissal notice) the employee may remain in his post. S/he may also do so if legal proceedings are instituted within eight weeks of receipt of notice or conclusion of negotiations AND before the notice period has expired, until the proceedings are finished – this can take 9-12 months in Oslo. The court can, nevertheless, decide that it is inappropriate for an employee to remain in post pending a decision; but inappropriate "lockouts" may result in reinstatement pending the court decision. If the employee is dismissed summarily, s/he does not have this right to remain in post, but s/he may ask the court to order that s/he does so until the cases decided. Even if the dismissal is found to be unfair, the court may terminate the employment and grant compensation only.]*⁵⁸

1.23 S.3 of the GEA prohibits **direct and indirect differential treatment** of women and men. Direct differential treatment is explicitly defined as actions which place a woman in a worse position than that in which she otherwise would have been because of pregnancy and childbirth. It continues "or place a

⁵⁵ Art. 7:670b(1).

⁵⁶ Norway is not a member of the European Union but complies with the sex equality directives.

⁵⁷ Material for Norway is drawn from the Gender Equality Act (GEA)), downloaded on 28 Apr 2004 at:

http://www.likestillingsombudet.no/english/act_act.html

and the Worker Protection and Working Environment Act (WPWEA), downloaded on 28 Apr 2004 at:

<http://www.arbeidstilsynet.no/regelverk/lover/pdf/7529.pdf>

⁵⁸ WPWEA; Legal 500.com "Norwegian Labour Legislation", downloaded on 18 Mar 2004 at:

http://www.legal500.com/devs/norway/le/nole_001.htm

woman or a man in a worse position than that in which the person concerned otherwise would have been because of her or his exercise of rights to take leave of absence that are reserved for one of the sexes”.

Indirect differential treatment is defined as meaning “any apparently gender-neutral action that in fact has the effect of placing one of the sexes in a worse position than the other”. This is in line with the wording of the amended Equal Treatment Directive⁵⁹ and is an easier hurdle to overcome than the definition contained in EC Burden of Proof Directive (and the UK SDA). The **burden of proof** requirements apply to both direct and indirect discrimination and state that if there is information which gives reason to believe that there has been differential treatment, the employer must show it to be “probable” that it is not in contravention of the GEA. S. 2, 4 and 6 apply the GEA to “all areas” except internal affairs of religious communities and expressly includes employment, promotion, training, dismissal or redundancies.

1.24 The WPWEA expressly prohibits **termination of employment** on the basis of pregnancy⁶⁰. It is stated that pregnancy shall be regarded as the reason for the dismissal of a pregnant employee unless other (acceptable) grounds are shown to be “highly probable” (a similar provision is made in relation to an employee who is absent from work due to accident/illness during the first six months of inability to work). If so required by the employer, a medical certificate of pregnancy shall be produced. Whilst an employee is on maternity or parental leave (for up to one year), s/he must not be given a notice of dismissal which becomes effective during that time (provided that the employer is aware of the reason for the absence or the employee notifies the employer without undue delay of such a reason for the absence). If the employee is lawfully dismissed during such a period, a notice which is valid shall be extended so as not to come into effect until the maternity/parental leave is over. Usually, such an employee would decide to receive her notice payments and not return to work during the notice period.

2. Information at the beginning and end of employment

Finland

2.1 Certain written information must be provided in one or several documents or by reference to legislation or a collective agreement when an employee starts work⁶¹. [Information about discrimination rights is not one of the subjects required to be included]. On termination of employment the employee must receive if he/he requests it, a written certificate of the duration of the employment and the nature of the work duties. If the employee requests it, the certificate shall include the reason for the termination and an assessment

⁵⁹ Directive 2002/73/EC amending Council Directive 76/297/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

⁶⁰ S.65 WPWEA.

⁶¹ S.4, ECA.

of the employee's working skills and behaviour⁶². Note, too, the rights to be heard before dismissal, described above.

Germany

2.2 An employer must post the Protection of Gainfully Employed Mothers Act up on a notice board or other suitable place, if he employs more than three women. Once a supervising authority has been notified of an employee's pregnancy, he is under a general duty to give her advice. Finally, where a notice of dismissal is valid, it must be in writing and provide details of the reasons for dismissal.

A public service employer must keep in contact with an employee on maternity or parental leave and inform her about further vocational training opportunities and new jobs within the relevant public service area.

Netherlands

2.3 Giving notice of termination of employment does not have to be in writing unless the person receiving the notice requests written reasons (art. 7:669 CC).

Norway

2.4 S.57(2) WPWEA sets out the information which an employer must supply in writing when terminating an employee whether with notice or, in the case of gross misconduct, summarily. The information required to be given is comprehensive and includes a detailed statement of his/her legal rights (to demand negotiations, to institute legal proceedings, to remain in the job under section 61 and the time limit applicable to each of these rights). In addition, where dismissal is with notice, if it is not given in writing or does not contain the requisite information, no time limit for instituting legal proceedings shall apply.

3. Health and Safety provisions, including right to paid time off for ante-natal care

Austria

3.1 An employer has to take the necessary measures to adjust a pregnant worker's working conditions and/or the working hours. If this is not possible the employer shall move the worker to another job. If there is no other job available, the worker is granted leave on her previous salary calculated as an average of her remuneration over the previous 13 weeks. It is also possible for a pregnant employee (though not low paid ones who must remain reliant on their employer) to obtain a maternity allowance paid by the social insurance system, if the Labour Inspectorate Doctor issues a certificate stating leave is necessary for her

⁶² S.7, ECA.

health. Concerns have been raised that this has led employers to pressurise women into obtaining such a certificate⁶³.

Finland

3.2 An insured woman receives a special maternity allowance of 70% of previous salary up to a ceiling (as with the maternity leave allowance), if suspended because she cannot be removed from a hazardous work situation by being given alternative employment. This is paid by the national sickness insurance scheme⁶⁴. The Occupational Safety and Health Act 2002 provides that risk assessments must be carried out in the workplace. If the employer does not have adequate expertise for its preparation, he/she must use an appropriate expert⁶⁵. The cost of risk assessments which must be carried out at each workplace can be partially reimbursed by the government (between 50-60 percent of the cost). This can occur if its preparation has been sanctioned by an approved occupational health and safety service used by an employer. (All Finnish enterprises must have an occupational health and safety service either in-house or shared with another enterprise, or bought from private or municipal health centres)⁶⁶. In relation to workplace inspections, priority is given to the most dangerous workplaces which may be inspected annually; other workplaces may be inspected only once every five years⁶⁷.

Germany

3.3 An employer must provide an evaluation of the safety of the workplace and the working conditions for pregnant women and employees who are breast-feeding. He/she must inform the concerned employees as well as the works council about the result of this evaluation. Where a woman cannot continue in her employment for health and safety reasons, and the employer cannot find her alternative work, she must be suspended on full pay which the employer is fully responsible for paying. A number of specific prohibitions in employment also have to be observed in relation to pregnant women, for example there is a prohibition on piecework, work additional to the usual hours, night work and Sunday work.

3.4 If an employee returns to her job after the first eight weeks after the child's birth, she is entitled to paid breaks of half an hour at least twice a day to breastfeed her child.⁶⁸ If her work hours are in excess of eight hours, the breaks must be 45 minutes twice a day. This right continues until the child is one year old, but

⁶³ EC Implementation report on the Pregnant Workers Directive 92/85, dated March 1999, available at: http://europa.eu.int/comm/employment_social/equ_opp/news/preg-en.pdf

⁶⁴ EC implementation report, see footnote 46 above.

⁶⁵ The Occupational Safety and Health Act 2002, section 10 (a similar provision is included in the 2003 Act not available on the Internet) the downloaded on 26 Apr 2004 at: <http://www.finlex.fi/pdf/saadkaan/E0020738.PDF>

⁶⁶ E-mail communication dated 22 Apr 2004 from Professor Helena Taskinen MD, Finnish Institute of Occupational Health.

⁶⁷ E-mail communication dated 23 Apr 2004 from Mr. T.Suurnakki, Occupational Safety Specialist, Centre for Occupational Safety, Helsinki, Finland.

⁶⁸ S.7 PGEMA.

the case law is unclear as to whether it continues after that. If her health requires it and she has a medical certificate to that effect, during the first months after her child's birth, an employee can reduce her working hours/do lighter work but remain on her original pay.⁶⁹

Italy

3.5 Various legal provisions require employers to take all necessary measures in running their businesses, to protect the physical, mental and moral well-being of their employees. Employees, through their representatives, have the right check the application of such measures and promote their development and implementation⁷⁰. Payment during leave from work for health and safety reasons is the same as maternity leave pay (80% of salary). It is, however, paid by the social insurance system not the individual employer, as are maternity leave payments. Specific rules regulating women working at night continue in force in Italy and are stricter in relation to pregnant women and women during the first year after childbirth⁷¹. During the first year after childbirth, a woman is entitled to two paid hours per day (reduced to one hour if the daily hours are six hours or less) for breast feeding; this period has now become also time simply for caring for small children⁷².

The Netherlands⁷³

3.6 A "risk inventory and assessment report" must be prepared by employers specifying how employees can work in a safe and healthy way and including an inventory of specific risks during pregnancy, the period shortly after confinement, and during breast-feeding. The following measures apply (including to home and outworkers) once the employee has notified her pregnancy to the employer. Within two weeks of such notification the employer should provide the pregnant employee with information about potential risks for pregnant workers. Where risks have been identified, the employer must take measures to eliminate or reduce them. If risks cannot be reduced, the employer must enable the employee to temporarily adjust her work or modify her working hours or breaks (see also below, the Working Time Act in relation to pregnant workers' breaks). Initially this should be done by mutual agreement, but failing this both employer and employee can seek advice from the Safety, Health and Welfare Service. (Though it is

⁶⁹ S.6 & S.11 PGEMA.

⁷⁰ ILO Equal Employment opportunities web site, Italy, Legislative Decree on Health and Safety, downloaded on 27 Apr 2004 at:

<http://www.ilo.org/public/english/employment/gems/eo/law/italy/act16.htm>

⁷¹ ILO Equal Employment opportunities web site, Italy, Legislative Decree on 532 of 1999, downloaded on 27 Apr 2004 at:

<http://www.ilo.org/public/english/employment/gems/eo/law/italy/act11.htm>

⁷² Rapport, ibid fn.21.

⁷³ ILO EEO website, Netherlands, EEO Legislation, The Working Conditions Act, Regulations & Decree and the Working Time Act, downloaded on 15/03/04 at:

http://www.ilo.org/public/english/employment/gems/eo/law/nether/1_wt.htm

http://www.ilo.org/pubcgi/links_ext.pl?http://www.bzfnv.nl/arbbs197/arbframe.html

http://www.ilo.org/public/english/employment/gems/eo/law/nether/1_wca.htm

http://www.ilo.org/public/english/employment/gems/eo/law/nether/1_wcr.htm

the Labour Inspectorate which deals with formal complaints). If such an adjustment cannot be made, alternative work must be offered. If this is not possible, the employee must be offered temporary leave, paid through the social insurance scheme by means of an allowance of up to 100% of previous pay⁷⁴. This may be subject to an earnings ceiling, but this information is not available.

3.7 The Working Time Act provides that work for a pregnant worker must be organised to take into account her special circumstances. She is entitled to alternate work with one or more breaks in addition to normal work breaks. These breaks, of at least 15 minutes duration, may take place as often and for as long as necessary, but must not amount in total to more than 1/8 of total working hours; they are counted as working time. She is entitled to work in a steady and regular working time pattern and cannot be obliged to work on night duty or overtime unless such an exemption cannot reasonably be asked of the employer. She has the right to attend the necessary pregnancy-related medical checks during working time.

3.8 The Working Conditions Decree provides detailed requirements for employer-provided rest areas. A pregnant employee and one who is breast-feeding or expressing milk, must have access to a private room where she can rest with a bed or proper couch. The Working Time Act provides that female employees, who have a child under nine months of age, have a right to breast-feed or express milk during working hours. These breaks, of at least 15 minutes duration, may take place as often and for as long as necessary, but must not amount in total to more than one quarter of total working hours. The employee should establish the time and length of the nursing breaks after consultation with her employer. Time spent on breast-feeding is part of working hours and has to be paid as such.

Norway

3.9 The WPWEA provides that pregnant employees are entitled to paid time off from work for antenatal examinations when these cannot reasonably take place outside working hours⁷⁵. It also states that a nursing mother is "entitled to request" the time necessary for breast-feeding, at least 30 minutes twice daily or alternatively that her working hours be reduced by up to one hour per day⁷⁶.

4. Pre complaint procedures

Finland

4.1 S.10(1) & (2) EWMA provides that upon request, the employer shall provide a written report on his or her procedure to any person who considers that he/she has been subject to sex discrimination in recruitment, selection for a particular job or training, terms of payment, other terms of the employment

⁷⁴ EC implementation report, dated March 1999, on the pregnant workers directive 92/85/EEC.

⁷⁵ Ss.31(7) WPWEA.

⁷⁶ S.33 WPWEA.

relationship, or dismissal. Where the discrimination involves recruitment, selection for a job or training, or dismissal the report must include the grounds for the employer's choice, the education, training, work and other experience of the person who was chosen instead and any other clearly demonstrable qualifications and considerations that have influenced the employer's choice. The procedure helps the applicant/employee to consider whether there are grounds for discrimination proceedings, but it is not known how widely it is used⁷⁷.

See also the right to know the grounds for a proposed dismissal and the right to be heard before it is implemented, described above.

Norway

4.2 S.4(3) of the GEA provides that a job applicant who has not obtained an advertised position may obtain a written statement from the employer providing details of the education, experience and other clearly demonstrable qualifications for the position, which are possessed by the person of the opposite sex appointed to the position.

5. Time limits

Germany

5.1 Where dismissal has been authorised under the PGEMA (a process which can take anywhere between one to 12 months), the employee can contest this by objecting within one month of receiving the decision. This initial objection is to the supervising authority and if rejected, she has a further month within which to take legal proceedings to an administrative court. Whilst that court is checking whether the authorisation was appropriate, the employee may commence proceedings in the Labour Court but this must be done within three weeks of receiving the supervising authority's decision.

5.2 Claims brought under the discrimination provisions of the Civil Code must normally be brought within six months of the cause of action arising. In relation to recruitment or promotion claims, this period is shortened to 2 months from receipt of the rejection letter. Both these time limits may be altered by the terms of applicable collective agreements.

Finland

5.3 Claims for **dismissal** under the ECA must be made within 2 years where employment has been terminated (other claims under that Act must be brought within 5 years)⁷⁸. Claims for **discrimination** under the EWMA must be brought within 1 year⁷⁹.

⁷⁷ E-mail communication of 26 Apr 2004 from Ms. Outi Alarotu, LL.M, researcher in the Department of Criminal Law, Procedural Law and General Jurisprudential Studies, University of Helsinki.

⁷⁸ Ch13 S.9 ECA.

Italy

5.4 Where a woman is dismissed during the protected period (pregnancy plus one year) or not allowed back to her job, and claims under dismissal law and/or claims under anti-discrimination law, she make her claim to the courts within five years⁸⁰.

The Netherlands

5.5 Generally, other than the termination of fixed term contracts, the validity of a pregnant woman's dismissal is decided while she remains in her job (if she has not already gone on maternity leave). Where dismissal takes place without the authorisation of the COWI, this may be challenged within six months. If authorisation to dismiss is given by the COWI, this must be challenged in the District Court within two months.

5.6 Discrimination dismissal claims under s.8 Equal Treatment Act must be made within either two or six months. The two month time limit applies where the employee challenges the validity of a notice of dismissal as discriminatory. She can in theory continue working and being paid but this is unusual in practice. More common is initiating a claim within the six months time limit after dismissal for lost salary (and bringing a claim in tort for compensation and other remedies).

5.7 The Equal Treatment Commission has discretion as to whether to institute an investigation into a complaint of discrimination. One reason for not taking on a case is that the period of time which has elapsed since the act of discrimination is so long that it cannot reasonably be investigated.

Norway

5.8 The normal time limits for unfair dismissal claims under the ECA apply. Thus legal proceedings must be instituted within eight weeks from the end of the statutory negotiations or from the date the dismissal notice has been given and before it expires, if the employee wishes to stay in her job during these proceedings. Alternatively, where compensation and not reinstatement is claimed, the time limit is six months from the date the dismissal notice is given⁸¹. But particular provision is made to waive these time limits (and those for requesting negotiations) where they have not been complied with in pregnancy dismissal cases under S.65(3) which provides for the Court to disregard the time limit when requested by the employee and when it is considered reasonable to do so.

⁷⁹ S.12 EWMA.

⁸⁰ Email from Mr. Sergio Barozzi, 20 April 2004, *ibid.* fn.26.

⁸¹ S.61(3) ECA.

5.9 Time limits for claims under the GEA made by an individual to the Ombud, are at the discretion of the Ombud. Appeals against an opinion issued by the Ombud to the Gender Equality Board (see below in section 6) must be made within three weeks of the decision by the dissatisfied party. Claims may be made to the ordinary courts under the GEA but rarely are because of the cost.

6. Enforcement bodies and procedures

Finland

6.1 The occupational health and safety authorities supervise the ECA⁸² as well as the health and safety laws⁸³. They are entitled to be provided by the employer with copies of documents which they need for this supervision and a detailed report on any agreements concluded orally.

6.2 The Equality Ombudsman monitors the observance of the EWMA⁸⁴ (covering unlawful **discrimination**) The Ombudsman's team communicates, gives advice and opinions and prepares statements for cases brought under the Act. Advice and statements are free of charge. In relation to proceedings under the EWMA in the ordinary courts, trade unions play a large part in providing the financial support for these as legal aid available from some municipal authorities which is not very generous.

6.3 The Ombudsman has the power to gain information both from public and private authorities and employers and private people, along with the additional right to inspect work places if the employer appears to have contravened the EWMA. The Ombudsman may obtain assistance in carrying out an inspection, may specify a reasonable period of time within which she must receive the information/document required and has the right to impose a conditional fine (which is not subject to appeal but to confirmation by the Equality Board, see below)⁸⁵. The Act on the Equality Ombudsman and the Equality Board (EOA) state that the Ombudsman may assist a person who has been subjected to discrimination, and if necessary do so in court proceedings (though this last has never been done). It appears that the Ombudsman may initially try to conciliate between the parties and says informally that its best results are obtained in such a way. It may then give an opinion about a complaint, usually upon written information from both parties. The opinion cannot be enforced.

6.4 Apart from Court proceedings, the next step would be for an unresolved issue to be brought before the statutory Equality Board (comprising a chairperson and four members appointed for three years) by written application of the Equality Ombudsman⁸⁶. The Board may prohibit anyone who has breached these

⁸² Ch.13 S.12 ECA.

⁸³ S.65 Occupational Safety and Health Act.

⁸⁴ S.16 EWMA.

⁸⁵ Ss.17 & 18 ECA.

⁸⁶ S.12 EOA.

provisions from continuing or repeating the practice and state the date from which a prohibition is to be observed. This may be done under threat of a penalty of a fine if not complied with. However, this procedure has only been used once. A Court may request an opinion from the Equality Board in matters concerning compensation in a discrimination case and this occurs about twice a year.

6.5 The Equality Ombudsman's Office handles about 200 written discrimination cases annually, half of these relate to working life and about 70% are from women. Apart from private citizens, the County Administrative Courts, trade unions and various associations also ask for opinions from the Ombudsman in relation to particular issues⁸⁷. They provide a rough estimate that they receive several informal or formal inquiries each week regarding pregnancy discrimination. They have also noticed (apart from problems relating to the right to return to work and the termination of fixed-term contracts of pregnant employees) that women are often asked a job interview if they are or plan to become pregnant. Their advice to employers is that such questions are unlawful. The Ombudsman's office is planning a seminar on pregnancy discrimination issues in September 2004.

Germany

6.6 See under paragraphs 1.11 – 1.13 above.

The Netherlands⁸⁸

6.7 The Equal Treatment Commission (the ETC) is an independent statutory body with 9 legally qualified members and 9 deputy members; they must all possess the qualifications necessary to be appointed as district court judges. They are appointed by the government. The ETC deals with several grounds of unlawful discrimination including gender, race, sexual orientation, disability and discrimination on the basis of the number of hours worked. Its powers include conducting discrimination investigations on its own initiative to determine whether discrimination is systematically taking place in, for example, the public service or in one or more sectors of society (but not in individual organisations, though this power is

⁸⁷ See the English website of the Gender Equality Ombudsman, downloaded on 28,004 at:

http://www.tasa-arvo.fi/www-eng/omb_for_eq/omb_f_eq6.html

⁸⁸ Material for this section is taken from the sources listed below. Acknowledgement is also made of the generous provision of advice about the Commission's procedures provided by Mr Richard de Groot of the Netherlands Equal Treatment Commission.

Anti-discrimination law in the Netherlands. Experiences of the first seven years (2001), speech given by Professor Goldschmidt at the international conference on equal treatment between persons and prohibition of all forms of discrimination held in Budapest, December 2001, downloaded on 6/04/04 at:

<http://www.cgb.nl/english/download/anti-discriminationlaw.pdf>

Equality law and the work of the Equal Treatment Commission in the Netherlands, published by the Equal Treatment Commission, the Netherlands, 2001.

Homepage of the Dutch Equal Treatment Commission, downloaded on 6 Apr 2004 at:

<http://www.cgb.nl/english/default.asp>

Document on the Equal Treatment Commission, The Netherlands on the EC web site

http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/nl_equaltrat_en.pdf

Specialised bodies to promote equality and/or combat discrimination, final report, May 2002 published by the EC and prepared by PLS Ramboll Management, consultants, downloaded on 6 Apr 2004 at:

expected to be conferred on it soon). For example, it has undertaken an investigation into collective agreement provisions on pre-pension facilities⁸⁹. It may make recommendations and publish its findings. Employers and organisations may request an assessment of their own actions, for example an employer may ask whether a specific regulation on part-time work is permitted. A judge hearing an equal treatment case may ask the ETC for its opinion although as at December 2001, this had never been done.

6.8 It is the main source of advice and assistance for individuals complaining of discrimination (together with local antidiscrimination boards – see below) and also adjudicates on many complaints made to it but its decisions are not enforceable. It has the power to bring individual cases to court to compensate for this lack but has decided not to do this as yet⁹⁰. Its opinion can however be of considerable assistance in any subsequent court proceedings, though the exact legal status of a Commission opinion is unclear and it has requested that this be clarified legislatively and due weight be accorded to it in such proceedings.

6.9 Its telephone line provides initial advice as to whether a case can be sent to the Commission or should go elsewhere. An individual should then put her complaint in writing (before or simultaneously with court proceedings). Making the complaint is free of charge. The requirement of a written complaint is acknowledged as a possible barrier for potential complainants, but if necessary an intake interview/telephone call is held to help the complainant specify the contents of their complaint. There are also about 20-40 antidiscrimination boards, which are different types of NGOs receiving government core funding, available to assist with putting the complainant's case in writing and to represent her at commission hearings (see below). Very approximately 10-15 percent of complainants are represented by these bodies at Commission hearings.⁹¹ They (and other organisations such as works councils) can also file a complaint on behalf of the complainant (though the complainant cannot remain anonymous). The antidiscrimination boards may also request that the Commission investigate alleged discrimination where several cases appear to be occurring in the same area, without naming individuals.

6.10 Once the Commission has decided it has jurisdiction to investigate a complaint, it will question both the complainant and person/organisation against whom s/he has made the complaint, usually in writing. The Commission also has powers to seek independent expert advice and to obtain information from third parties. Sometimes it may try to facilitate the settlement of cases before holding a hearing, if this appears possible, but it does not have much experience in mediation. This may, however, change as the Commission has commenced a mediation project to study seeking a more active role in mediation and intervention during the earlier stages of a complaint. Nevertheless, many cases are settled before a

http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_final_en.pdf

⁸⁹ These enabled employees working c.80% or more of normal working hours to reduce those hours by 10% and receive the same salary, during the few years before retirement. The Commission found this to be discriminatory against those working fewer hours than the 80%.

⁹⁰ See booklet published by the Equal Treatment Commission referred to in footnote xx above, page 39.

⁹¹ Telephone communication from the Equal Rights Commission on 6 April 2004.

hearing is necessary as the Commission facilitates settlements where these appear achievable. Currently, once the Commission has collected enough information, it will close an investigation and hold a hearing. Hearings should preferably take place within six months of a complainant submitting a written complaint to it. An emergency procedure exists for urgent cases such as dismissals and thus a Commission opinion may play a part in the proceedings before the COWI or the District Court.

6.11 The three Commissioners and their legal adviser hold a pre-meeting to discuss the content and format of the hearing. The hearing itself is usually public and the Commission tries to ensure that it only lasts about one hour; its informality is considered very important. Both parties can testify and bring an expert along and the Commission will ask questions. The Commissioners also inform the parties on the law and its application as they find that the parties are more likely to comply with a decision when they have been informed about how the relevant laws apply and their aims. Apart from the representation provided by the local antidiscrimination boards mentioned above, about another 10-20 percent of complainants pay for a representative before the Commission if, for example, they are already involved in legal proceedings. Usually, if a complainant has a representative at all it is, for example, a family member or friend. Due to the Commission's procedure it is not necessary to have a representative even if the employer has one. The Commissioners give considerable attention as to how they communicate with the parties in the hearings. Their role is not just to decide the rights and wrongs of the case but, during the hearing, to encourage the parties to cooperate and find solutions. Internal communication officials provide feedback to individual Commissioners so they can continuously improve their personal communication strategies. Commissioners also place considerable emphasis on drafting precise and persuasive opinions.

6.12 Subsequently and within at least eight weeks after a hearing, the Commission will issue an opinion. As mentioned earlier, this is not legally enforceable. In practice however, its opinions are usually complied with. When it gives a decision, it requests information on the action parties intend taking to implement it. It considers then how to respond, e.g. providing a recommendation about the action to be taken. In this process there is scope for the Commission to recommend in general terms that, for example, a complainant be offered a new contract by the employer or be paid compensation. The evaluation of the Commission's first term (1994-1999/2000) indicated that the respondents observed the opinion in the majority of cases where the Commission found a complaint was well founded. In one third of the successful cases, measures were also taken to improve the respondents' practices or regulations so as to avoid discriminatory treatment in the future.

6.13 Each year, the Commission publishes an annual report and a collection of its opinions and other relevant case law on equal treatment. This publication also contains commentaries on the opinions written by independent experts in the field of equal treatment legislation. Of the 206 opinions handed down by the Commission in 2002, 98 concerned sex discrimination with a further 35 relating to discrimination on the basis of working hours and marital status. It receives about 1000 phonecalls/e-mails annually.

Norway⁹²

6.14 The Ombud assists with and monitors the implementation of the GEA. It provides free telephone advice (and advice by email) and free investigation and adjudication of complaints made under it. Most investigations are based on written complaints though individuals can come to the Ombud's office and have a meeting but the other parties to the complaint must be informed if this occurs. It may act on its own initiative or after receiving a complaint and may require relevant information to be given to it by an employer⁹³. If it fails to obtain a voluntary agreement to a decision (e.g. to pay compensation where a job offer was withdrawn when the job applicant revealed her pregnancy) the Ombud may bring a case to the Gender Equality Board of Appeals⁹⁴. If it decides not to, the complainant may do so herself. If waiting for a decision by the Board will cause inconvenience or harm, the Ombud may make an enforceable decision though that is appellable to the Board⁹⁵.

6.15 The Board is established by the GEA⁹⁶ and has seven members (mostly lawyers) and seven deputies. A decision of the Board may involve prohibiting an act contravening the GEA if that is in the interests of gender equity and directing the measures to be taken to ensure that the act leading to the contravention ceases and preventing its repetition (the Board cannot annul a public authority's administrative decision but can give an opinion regarding it). The Board must give grounds for its decision and it may be appealed within the judicial system. It may also award compensation (see paragraph 7.6).

7. Remedies and penalties

Germany

7.1 Under the Civil Code, **discrimination** claims may be awarded "reasonable" compensation but there is no express upper limit to the amount which may be awarded. In relation to recruitment or promotion discrimination claims, the compensation may be limited to three months' salary in some circumstances.

7.2 In relation to dismissal, an employee remains in her job whilst both the administrative court and the Labour Court (see 7 above) decide upon the validity of her dismissal. She may either be at work or at home receiving her full pay, depending upon the company concerned. If she wins her case, however, she

⁹² Material in this section and in the sections on time limits and the right to return to the same job, includes some provided by the Ombud's Office, Norway.

⁹³ S.15 GEA.

⁹⁴ S.11 GEA.

⁹⁵ S.12 GEA.

⁹⁶ S.10 GEA.

would usually – but not always, accept financial compensation instead of returning to or continuing in her employment.⁹⁷

Finland

7.2 Reinstatement is not possible without the consent of both parties, except in the public sector.

7.3 Compensation for an unlawful **dismissal** under the ECA⁹⁸, Chapter 12, must amount to a minimum of three, and may go up to a maximum of 24 months' wages, depending upon the circumstances. Under the EWMA⁹⁹, a successful **discrimination** claim must receive a minimum amount of compensation of €2820 (c.1880 pounds). This can be reduced depending on the circumstances including "the employer's attempts to prevent or eliminate the effects of the action". There is also a maximum for such a claim of €9380 (c.6250 pounds) which may be increased to up to twice as much, depending upon the circumstances of the discrimination. Criminal penalties for discrimination exist. They are not much used, but nevertheless cases under the Penal Code have been brought before the District Courts by the District Attorneys¹⁰⁰.

Italy

7.4 Where a dismissal is held to be **discriminatory**, reinstatement must be ordered¹⁰¹. **Dismissal** during the protected period, however, is not treated as a discriminatory dismissal and reinstatement is not in practice awarded¹⁰². The author of this information comments that this is a misinterpretation of the case law of the European Court of Justice¹⁰³.

The Netherlands

7.5 Pregnant women and women on maternity leave who have been dismissed might obtain reinstatement, but in practice they must in most cases rely solely on compensation.

⁹⁷ In relation to dismissal applications by employers which are turned down by the administrative authority, women would usually continue in the job though it appears from research undertaken by Dr. Graue of Oldenburg University, that there may be problems with the employer concerned in such a situation and women may be paid to leave their jobs - although, of course, the administrative authority would at least be able to advise them about the implications of doing this (see paragraph 2.2 above).

⁹⁸ Ch 12, S.2 ECA.

⁹⁹ S.11, EWMA.

¹⁰⁰ E-mail communication of 26 Apr 2004 from Ms. Outi Alarotu, LL.M, researcher in the Department of Criminal Law, Procedural Law and General Jurisprudential Studies, University of Helsinki, Finland.

¹⁰¹ Art 3 of Law 108/1990.

¹⁰² Art 54 of Law 151/2001.

¹⁰³ E-mail communication dated 2 May 2004 from Ms. Gisela de Simone, Professor of Labour Law, University of Genoa, Italy.

Norway

7.6 Under **the GEA**, “Reasonable” **compensation** can be awarded by the Gender Equality Board of Appeals (and recommended by the Ombud) for unlawful differential treatment “regardless of the fault of the employer”. Consideration will be given to the financial loss of the complainant, the situation of the applicant and the employer and all other circumstances¹⁰⁴. The GEA places no financial limit upon the compensation available. The Board of Appeals can also prohibit any act contravening the GEA employment discrimination provisions and direct how this should be done and the measures necessary to prevent its repetition. However, in relation to government decisions, it may only express an opinion as to whether the GEA has been breached. Its prohibitions can be appealed through the ordinary courts¹⁰⁵.

7.7 In relation to unlawful **dismissal** during pregnancy and maternity/parental leave, under **the WPWEA**, the provisions are the same as those set out in the introductory paragraph in section 1, with reasonable (in view of the financial loss, the respective circumstances of the employer and the employee and the other facts case) compensation (without a cap) being available where dismissal has been held to be unfair¹⁰⁶.

7.8 Provision is also made for the **criminal prosecution** of anyone who wilfully or negligently contravenes an administrative decision made by the Gender Ombud or the Gender Equality Board (see above). He/she shall be liable to a fine (s.18). However a public prosecution will not be launched unless requested by the Board which it will only do if such a prosecution is required in the public interest (s.19). In connection with these proceedings, the prosecuting authority may request a judgement approving measures to ensure that the unlawful act ceases and to prevent its repetition.

8. Sharing leave

Finland

8.1 Maternity leave is 17.5 weeks with usually four taken before confinement, although approximately eight weeks maybe taken then. The payment is based on a graduated replacement rate of approximately 70% at low-income, 40% at median income, and 25% at high income (on average, approximately 66%).¹⁰⁷ Three weeks paternity leave paid at the same rate is available. This can be extended by up to two weeks if the father takes at least the last two weeks of parental leave. Parental leave of 26 weeks may be shared between the parents and taken full-time when each parent is entitled to two blocks of parental leave, for a minimum of two weeks at a time. There is provision for either or both parents to take parental leave part-time by agreement with their respective employers, by working between 40% and 60% of usual hours,

¹⁰⁴ S.17 GEA.

¹⁰⁵ S.13 GEA.

¹⁰⁶ S.62 WPWEA.

provided this is done for least two consecutive months. A full and partial parental leave allowance (at the same rate as the maternity and paternity allowances) is payable. Additionally, childcare leave (compensated by a flat rate allowance of c.£165 per month plus supplements in some circumstances) is available to be taken by either parent. It may be taken full-time until the child's third birthday, in one or two periods for a minimum of one month. Part-time child care leave is also available to either parent until the end of the child's second year at school. This can only be refused if the arrangement would cause serious and unavoidable inconvenience to the employer.¹⁰⁸

Germany

8.2 As mentioned above, paid maternity leave is available for 14 weeks (at full pay), largely paid by the employer. There is no paternity leave but parental leave of three years can be shared between the parents and may be taken by them simultaneously, as well as consecutively. Of these, two years must follow maternity leave (though a lesser period can be taken) and up to 12 months can be taken up to the child's eighth birthday (subject to employer agreement). There is a right to take parental leave part-time in certain circumstances. An income tested benefit is received by most families during the first six months, but then the income tests are tighter and fewer qualify. It is a flat rate of approximately £200 per month for two years or a greater amount for one year.

Italy

8.3 Maternity leave (which is compulsory) is for 1 month before and 4 months after the confinement (or two before then three months after) and is paid at 80% of normal salary through the social security insurance system. Parental leave of 10 months is available until the child becomes eight. Each parent has a right to six months of this after the five-month maternity leave period (a sole parent has a right to the full 10 months). Whereas maternity leave is reimbursed at 80% of previous salary, the parental leave payment is 30% and for only six months of the 10, which six months being decided by the parents. If a father takes at least three months of the leave, the total leave is extended to 11 months and the father can take up to seven months¹⁰⁹.

¹⁰⁷ *"Families That Work: Policies for reconciling parenthood and employment"* by Gornick J. C. and Meyers M. K., Russel Sage Foundation, New York, 2003, page124 (information as at 2000).

¹⁰⁸ "Family leaves - a matter for both parents", prepared by the Ministry of Labour, Finland and downloaded on 2 October 2004 at:

<http://www.molfi/english/working/familyleavestable.pdf>.

¹⁰⁹ Masselot et al., op.cit fn.21.

Netherlands

8.4 Paid maternity leave of 16 weeks is available at 100% of wages, up to a daily maximum of approximately £100. There is paternity leave for two days, fully paid. Each parent is entitled to 13 weeks of unpaid parental leave for each child up to his/her eighth birthday after one year's employment with the employer. It is available for up to 50% of the employee's normal working time over six months. It is usually taken part-time but is available full-time, normally on request unless the employer has serious reasons for refusing it. It is also possible to take it in a maximum of three periods of at least one month each.¹¹⁰

Norway

8.5 All leave is parental leave with nine weeks reserved exclusively for the mother and four exclusively for the father. Parental leave (52 weeks on 80% pay or 42 on 100%, subject to an overall cap of approximately £28,000¹¹¹) may be combined by either parent with reduced working hours over a minimum of a 12 week period and a maximum of a 2 year one. Hours may be reduced to between 50-90% of a full-time post and part-time workers may reduce by the same fractions. The amount of parental benefit is then reduced accordingly but as the total amount payable remains the same, the benefit period is extended.¹¹² The shareable period of leave may also be taken by both parents working part-time simultaneously. One year's unpaid leave per child for each parent maybe taken after paid leave.¹¹³

9. Accrual of rights during maternity leave

Austria

9.1 Periods in receipt of maternity allowance count for pension and insurance purposes.¹¹⁴ Continuing care of children whilst on parental leave until the child is 4, entitles the caring parent to further pension credits.¹¹⁵

¹¹⁰ EC Implementation report on the parental leave directive 96/34/EC, published on 19 Jun 2003 and downloaded on 3 May 2004 at: http://europa.eu.int/comm/employment_social/equ_opp/documents/com2003358_en.pdf

¹¹¹ Annex to "Family-related leave and industrial relations" published by the European Foundation for the Improvement of Living and Working Conditions on 16 Sep 2004 and downloaded at: http://www.eiro.eurofound.eu.int/2004/03/word/cs_parental_annex.doc

¹¹² WPWEA. The employee's wishes as to length, percentage of partial leave and the manner in which it should be taken, shall be granted unless this would cause significant inconvenience to the employer. The employee has the right to return to their former working hours when the agreed period is over. Employees have right to reduce working hours in response to "health, social or other weighty reasons of welfare"(which includes wishing to spend time with one's children) if this can be arranged without particular inconvenience to the enterprise. An employee's application must state the reasons for it and the arrangement of hours and the length of time (the maximum is two years at a time). The employee must inform the employer and resume full working hours when the circumstances justifying a reduction no longer exist.

¹¹³ Annex to "Family-related leave and industrial relations", op.cit fn. 95.

¹¹⁴ EC Implementation report on the Pregnant Workers Directive 92/85, available at: http://europa.eu.int/comm/employment_social/equ_opp/news/preg-en.pdf

¹¹⁵ See Babies and Bosses op cit fn. 2, page 78.

Germany

9.2 Whilst on maternity and parental leave for up to a total of one year after the birth, the employee continues to accrue her rights to a company pension, bonuses, participation in profits and, in the public service, promotion, as is provided for in collective agreements, the individual contract etc. Legal rights depending on length of service e.g. longer periods of notice, also continue to accrue. If a woman resigns during maternity or parental leave but rejoins the same employer within 12 months of her resignation, she will be able to preserve her rights to a company pension, bonuses etc.

Italy

9.3 The period spent on maternity leave is taken into account for seniority purposes and towards holiday and pension entitlements.¹¹⁶

10. Right to return to the same job

Finland

10.1 At the end of any of the leaves provided for in relation to maternity, paternity, parental or childcare responsibilities, an employee is entitled to return to her former duties. The Act merely goes on to say that if this is not possible, she shall be offered equivalent work in accordance with the employment contract and if this is not possible either, other work in accordance with her employment contract.¹¹⁷ The Finnish Ombudsman notes on her web page that women returning to work after childcare leaves have been asking for information about their rights.¹¹⁸

Germany

10.2 A woman has the right to return to her former job or an employment of equivalent status and on the same conditions after her eight week maternity leave and following parental leave.¹¹⁹ It appears that she will often go back to her own position rather than an equivalent one where the maternity leave taken is short.

¹¹⁶ EC Implementation report on the Pregnant Workers Directive, downloaded on 26 Apr 2004 at: http://europa.eu.int/comm/employment_social/equ_opp/news/preg-en.pdf

¹¹⁷ Ch 4, s.8 ECA.

¹¹⁸ http://www.tasa-arvo.fi/www-eng/omb_for_eq/omb_f_eq6.html; confirmed by e-mail communications of 26 and 27 Apr 2004 from Ms. Outi Alarotu, LL.M, researcher in the Department of Criminal Law, Procedural Law and General Jurisprudential Studies, University of Helsinki. She reports that it appears anecdotally that non-renewal of fixed-term contracts where an employee becomes pregnant, is a problem. And problems are also apparent with the right to return after the eve, where cases occur of women being discouraged from returning by the application to them unsuitable work.

¹¹⁹ S.9 PGEMA & 611a CC.

Italy

10.3 After her maternity leave and any parental leave, a woman has the right to return to the same job or a similar one in the same geographical area with the same or similar duties¹²⁰.

Netherlands

10.4 There is very little litigation about the right to return. It appears that a large number of women return to work after maternity leave by taking their parental leave part time. Indeed, the parental leave laws require the leave to be taken part-time unless the employer permits it to be taken full-time. There are also general laws enabling anyone to seek to do their job part-time without providing a reason, subject to the employer arguing that serious business reasons do not permit this¹²¹.

Norway

10.5 Regarding the right to return to work after maternity/parental leave, this is not expressly stated in the WPWEA. Nevertheless, the right does exist but the Ombud's Office states that they do receive a lot of inquiries about the right to return after parental leave as many women find their jobs have changed when they return. Few complaints, however, are made formally on this issue because of employees' concerns about their relationship with the employer.

11. Positive action requirements

Finland¹²²

11.1 Finland has a legislative requirement that all employers shall promote gender equality, including equitable recruitment and promotion and in particular develop working conditions suitable for both women and men and facilitate the reconciliation of working life and family life.¹²³ S.6a EMWA requires companies of 30 or more employees to include measures to further gender equality at the workplace in their annual personnel and training plan or their action programme for Labour protection. Detailed guidance¹²⁴ is available to companies on how to do this, including how to chart the status of men and women in the particular workplace by their employment status, wage levels, promotion and use of training and family leaves. Advice is also available from the Equality Ombudsman, which has the role of supervising the

¹²⁰ E-mail communication dated 2 May 2004 from Ms. Gisela de Simone, Professor of Labour Law, University of Genoa, Italy.

¹²¹ Working Time Adjustment Act (2000). For an evaluation of this Act and similar German legislation see: S.D. Burri, H.C. Opitz, A.G. Veldman, 'Work-family policies on working time put into practice. A comparison of Dutch and German Case law on Working Time Adjustment', *International Journal of Comparative Labour Law and Industrial Relations*, Volume 19/3, 321-346, 2003.

¹²² S.4 EWMA also provides for a minimum percentage of 40 for both men and women on government committees, advisory boards etc. and municipal bodies (excluding municipal councils).

¹²³ S.6 EWMA

¹²⁴ "Toolkit of Gender Equality" published by the Equality Ombudsman, Finland. Downloaded on 15/3/04 at: <http://www.tasa-arvo.fi/www-eng/publications/index.html>

observance of the EMWA. Note, however, that although the law requires such plans to be made, there is no legal mechanism to enforce them. However, the Equality Ombudsman has a right to receive information necessary to supervise the Act and can impose a fine where this is not complied with¹²⁵. She also has the right to carry out workplace inspections where she suspects the obligations provided for in the Act have not been complied with¹²⁶. Resources make the full monitoring of plans difficult but it is intended that a geographical area or industrial sector is looked into each year.

Italy

11.2 Voluntary positive action schemes have been possible since 1991 (amendments to the law being passed in 2000). They are encouraged by the grant of public funds to implement approved positive action plans. The 2003 guidelines for funding include promoting plans aimed at reorganizing the workplace to desegregate part time and atypical workers¹²⁷.

11.3 National, regional and provincial equality advisers have existed since 1991. Legislation in 2000 gave them the financial resources to give effect to their pre-existing right to bring legal cases on gender discrimination issues. (They have a number of other important roles including the promotion of positive action).¹²⁸

The Netherlands

11.4 The ETA provides that prohibition on sex discrimination does not apply if its aim is to place women in a privileged position in order to eliminate or reduce de facto inequalities and the discrimination is reasonably proportionate to that aim¹²⁹. Under this provision, a regional police force has taken positive action in giving preferential treatment to women during its selection procedures. They sought the opinion of the Equal Treatment Commission about this programme and the Commission provided detailed advice as to how to decide whether the measures taken were proportionate (the employer should compare the numbers of women working in the police force with the number of qualified women in the labour market) and it concluded that the policy was lawful.

11.5 Specific legislation has been passed to help correct the imbalance of men and women in management and senior positions in educational establishments from primary schools to universities. Where women are underrepresented in such posts in such an institution, the institution must compile a

¹²⁵ S.17 EWMA.

¹²⁶ S.18 EWMA.

¹²⁷ EC Bulletin on legal issues in equality, number 3/2002, report from Italy, page 29 and footnote 77 downloaded on 15/03/04 at:

http://europa.eu.int/comm/employment_social/equ_opp/newsletter/bulletin2_2003_en.pdf

¹²⁸ EGGE – EC's Expert Group on gender and Employment: "Assessing the implementation of gender mainstreaming in Italy" by Villa P. and Bonetti S.

http://www2.umist.ac.uk/management/ewerc/egge/egge_publications/I_Napev.pdf

¹²⁹ Ss.2(3) ETA.

strategy document once every four years giving the target figures they are working towards to remedy this and describing the specific measures they will take to meet these¹³⁰.

Norway

11.6 S.1a of the GEA requires public authorities to make active, targeted and systematic efforts to promote gender equality. It also requires employers to do the same within their enterprises, and employee and employer organisations to make such efforts in their sphere of activities. Where enterprises are subject to a statutory duty to prepare an annual report, they must provide in it an account of the actual state of affairs as regards equality in the enterprise. They must describe the measures which have been implemented and those which are planned for the purpose of promoting gender equality and to prevent unlawful differential treatment. Public authorities and enterprises which are not obliged to prepare an annual report, shall give the corresponding account in their annual budget.

11.7 Provision is made for the enforcement of this duty by the Ombud and the Board of Appeals (see "enforcement" section). It also appears that prosecution under section 18 (see "remedies and penalties" section) is possible.

3/06/04

APPENDIX B

Women's employment¹³¹ rates and the gender employment gap by the presence of children, 2000¹³²

Percentage of persons aged 25 to 54 years

	No children		One child		Two or more children	
	Employment rate	Gender gap	Employment rate	Gender gap	Employment rate	Gender gap
Austria	76.0	10.5	75.6	18.5	65.7	29.0
Finland	79.2	0.1	78.5	11.8	73.5	19.7
France	73.5	9.6	74.1	18.7	58.8	32.9
Germany	77.3	7.2	70.4	21.2	56.3	35.6
Italy	52.8	26.2	52.1	40.9	42.4	49.9

¹³⁰ ILO Equal Employment Opportunities for women and men web site, Index, the Netherlands, "Proportional Representation for Women in Management Positions in Education Act 1997", downloaded on 22 April 2004: http://www.ilo.org/public/english/employment/gems/eo/law/nether/l_prop.htm

¹³¹ The employment rate is the percentage of persons in work as a proportion of the national population in this age group.

¹³² Table taken from Employment Outlook 2002, page 77, OECD, Paris.

The Netherlands	75.3	15.6	69.9	24.3	63.3	30.8
Norway	82.9	5.9	83.3	0	78	0
Sweden	81.9	-0.4	80.6	98.	81.8	9.4
United Kingdom	79.9	5.4	72.9	17.1	62.3	28.2

Part-time work, by gender and presence of children, 2000¹³³
Percentage of persons aged 25 to 54 years

	No children	Women		Total	Men Total
		One child	Two or more children		
Austria	17.4	33.6	43.7	26.7	1.9
Finland	7.5	8.6	13.6	9.2	3.7
France	20.0	23.7	31.8	23.7	4.4
Germany	24.0	45.3	60.2	35.2	3.4
Italy	20.0	27.2	34.4	24.1	5.1
The Netherlands	38.3	72.6	82.7	55.9	5.5
Norway	24.7	33.5	41.1	31.8	5.0
Sweden	14.6	16.7	22.2	17.9	4.3
United Kingdom	23.7	46.6	62.8	38.6	3.7

	Population ¹³⁴ 2001	GDP 2002 USD ¹³⁵	Fertility rate ¹³⁶ 2001	Pay gap ¹³⁷ (for 1998-2000)
Austria	8m	28 800	1.3	67% (monthly)
Finland	5m	27 200	1.7	82% (monthly)
France	59m	26 900	1.9	88.2%

¹³³ Table taken from Employment Outlook 2002, page 78, OECD, Paris.

¹³⁴ OECD in figures: Statistics on the Member Countries, OECD Observer, 2003/Supplement 1, OECD, 2003, Paris

¹³⁵ OECD in Figures, op. cit. The Gross Domestic Product stated here is per capita, at current market prices, using current Purchasing Power Parities which eliminate the differences in price levels between companies.

¹³⁶ OECD in Figures, op. cit. Figures rounded to the nearest million (except Norway).

¹³⁷ Soumeli E. and Nergaard K. "Gender pay equity in Europe" published on 30/01/02 by EIRO and downloaded on 3 May 2004 at: <http://www.eiro.eurofound.eu.int/2002/01/study/tn0201101s.html>

				(monthly)
Germany	81m	26 600	1.3	Not available
Italy	57m	26 600	1.2	81.7% (annual)
Netherlands	16m	29 400	1.7	77% (hourly)
Norway	4.5	37 100	1.9	86% (annual)
Sweden	9m	26 800	1.6	82% (monthly)
UK	60m	27 100	1.6	80.6% (hourly)