Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 April 2017 [1]

Case C-174/16

H.
v
Land Berlin

(Request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany))

(Reference for a preliminary ruling — Revised Framework Agreement on parental leave — Concept of 'rights acquired or in the process of being acquired' — Equal treatment of men and women in matters of employment and occupation — Rules of a Member State providing for the expiry of the two-year probationary period of a civil servant on probation for a management post, by operation of law and with no possibility of extension, even in the case of absence due to parental leave — Justification — Breach of European Union law — Compensation)

1. Is it permissible, having regard to Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2] and Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC ('Directive 2010/18'), [3] for the two-year probationary period to be completed by a civil servant on probation newly appointed to an executive post not to be suspended for the duration of her parental leave? That is, in essence, the point at issue in this reference for a preliminary ruling.

1 Original language: French.

2 OJ 2006 L 204, p. 23.

3 OJ 2010 L 68, p. 13.

Legal framework

European Union law

Directive 2006/54

2. Under Article 14(1)(a) and (c) of Directive 2006/54:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(c) employment and working conditions, including dismissals and pay …'

3. Article 15 of Directive 2006/54 provides that 'a woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence'.

4. Article 16 of Directive 2006/54 states that 'this Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence'.

Directive 2010/18

5. The revised Framework Agreement on parental leave, concluded on 18 June 2009 ('the revised Framework Agreement'), is set out in the Annex to Directive 2010/18. Clause 1(1) and (2) of the revised Framework Agreement reads as follows:

'1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents. …

2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State.'

6. Clause 2(1) of the revised Framework Agreement provides that 'this agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners'. Clause 2(2) states that 'the leave shall be granted for at least a period of four months'.

7. Under Clause 5 of the revised Framework Agreement, which concerns employment rights and non-discrimination:

‘1. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

2. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply.

…

4. In order to ensure that workers can exercise their right to parental leave, Member States and/or social partners shall take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements and/or practice.

…’

German law

8. Paragraph 97 of the Landesbeamtengesetz (Land Civil Service Law, LBG)[4] is worded as follows:

‘1. Posts falling within grade A 13 and higher … shall be … [filled] initially [by] civil servants on probation in the Berlin administration … The probationary period shall be two years. It may not be extended.

…

4. Upon successful completion of the probationary period, the civil servant shall be accorded status as a civil servant for life in accordance with paragraph 1. … By way of derogation …, dismissal … shall be possible after the expiry of a period of 12 months if it is established within the first year that the civil servant will not pass probation. In case of doubt as to the successful completion of probation, discussions shall be conducted with colleagues and superiors regularly, at least every three months from the time reasonable doubt arises. If the post is not made permanent, any entitlement to remuneration from that post shall cease. No further entitlements shall exist. The civil servant may not be reappointed as a civil servant on probation for that post within one year. In cases where the probationary period was not successfully completed for the first time only because the executive post was not exercised for a long period, the highest administrative authority may permit exceptions to the seventh sentence.

…’

4 As amended by the Dienstrechtsneuordnungsgesetz (Law on the reorganisation and modernisation of federal civil service law) of 22 June 2011.

The dispute in the main proceedings, the questions referred and the procedure before the Court

9. Ms H., the applicant in the main proceedings, has been a civil servant for life in the Berlin municipal administration since 2002. Following a recruitment procedure, she was upgraded, by instrument of appointment dated 20 September 2011, to the status of civil servant on probation assigned to an executive post (post of counsellor in grade B2), whereas up to then she had held a junior post with less responsibility and lower pay (post of counsellor in grade A16).

10. From 25 July 2011 to 19 January 2012, Ms H. was on sick leave for reasons connected with her pregnancy. From 20 January 2012 to 29 May 2012, she took statutory maternity leave followed by convalescent leave. From 30 May 2012, her employer granted her parental leave, which was extended several times at the request of the applicant in the main proceedings and ended on 20 February 2015.

11. By decision of 4 September 2014, the Landesverwaltungsamt Berlin (Administrative Office for the Land of Berlin, Germany), in its capacity as the agency responsible for personnel matters for the Land Berlin (Land of Berlin, Germany), informed the applicant in the main proceedings that she had not successfully completed her two-year probationary period in the executive post to which she had been assigned as a civil servant on probation. Because she had never occupied that post, it notified her that her status as a civil servant on probation had ended on 19 September 2013 in accordance with Paragraph 97(4) of the LBG. In that decision, Ms H. was informed that she would be reinstated to the more junior post which she had held prior to her appointment in 2011.

12. In the second half of 2012, a new competition was held for the executive post for which Ms H. was to complete her two-year probationary period, which was awarded to another person.

13. Ms H. brought a complaint against the decision of 4 September 2014, arguing inter alia that the decision was contrary to Directives 2006/54 and 2010/18 in so far as it entails discrimination against a woman on parental leave. The Administrative Office for the Land of Berlin dismissed her complaint on 10 November 2014. It based its decision on the fact that in the civil service an executive post for life can be filled only if the candidate has successfully completed a probationary period the length of which was fixed at two years, with no possibility of extension. In the case of an abnormally long absence, it must be assessed whether the time remaining for actual performance of duties is sufficient to adopt a positive decision concerning the probation. However, Ms H. did not perform the executive duties for a single day; the administration could only find that she had not successfully completed her probation on 19 September 2013. This rule applies equally to men and to women; men have the same rights as women in terms of parental leave and their absence on that ground has the same consequences having regard to Paragraph 97 of the LBG. The Administrative Office for the Land of Berlin therefore disputes that there has been direct discrimination within the meaning of Directive 2006/54. In its view, there is also no indirect discrimination as, even recognising that the failure to take into consideration pregnancy-related incapacity, in calculating the length of the probationary period, primarily affects women, Paragraph 97 of the LBG is justified by the legitimate aim pursued, which is to review aptitude to perform the role, which will be demonstrated only after the duties have actually been performed over a relatively long period. With regard to Directive 2010/18, the Administrative Office for the Land of Berlin accepted that, under the second sentence of Clause 5(2) of the revised Framework Agreement, rights acquired or in the process of being acquired apply at the end of parental leave 'including any changes arising from national law' and considers that the alteration to the applicant's situation at the end of her parental leave is the result of such a change by virtue of the application of Paragraph 97 of the LBG. Since Ms H.'s status as a civil servant on probation had ended in accordance with the law, there was no breach of Directive 2010/18.

14. Ms H. lodged an appeal with the referring court, which asks about the compatibility of Paragraph 97 of the LBG with Directives 2006/54 and 2010/18. It states that the higher authority did not exercise its discretion so that Ms H. could continue her probation on her return from parental leave, but that the national legislation is in any event insufficient in this respect, especially since the

post, which was a priori earmarked for the applicant in the main proceedings if she had successfully completed her probationary period, was permanently filled and awarded to another person. Assuming that the rules under which the probationary period for promotion to an executive post in the civil service ends by operation of law, with no possibility of extension, two years after appointment as a civil servant on probation, even if the civil servant is on parental leave for that period, breach Directive 2006/54 or Directive 2010/18, it must still be determined what consequences the national court must infer from that finding in Ms H.'s situation, when her post has been awarded to another person, equivalent posts are rarely available and, where they are, they have to be filled following a new selection procedure which may last several months.

15. In these circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) decided to stay the proceedings and, by order for reference received at the Registry on 24 March 2016, referred the following questions to the Court for a preliminary ruling:

'(1) Are the provisions of [Directive 2010/18] and the provisions of the [revised] Framework Agreement … to be interpreted as precluding rules of national law under which the probationary period, during which an executive post has been assigned to a person with the status of a civil servant on probation, ends by operation of law and with no possibility of extension even in the case where the male or female civil servant has been and still is on parental leave for most of that probationary period?

(2) Are the provisions of [Directive 2006/54], in particular Article 14(1)(a) or (c), Article 15 or Article 16 thereof, to be interpreted as meaning that rules of national law with the content referred to in Question 1 constitute indirect discrimination on grounds of sex in the case where a very much higher number of women than men is affected, or may potentially be affected, by those rules?

(3) If the answers to Questions 1 or 2 are in the affirmative, does the interpretation of the abovementioned provisions of EU law preclude such rules of national law even in the case where the latter are justified by the objective of being able to assess, during the probationary period, the probation for an executive post to be assigned permanently only if the duties are actually performed continuously over a lengthy period?

(4) If the answer to Question 3 is also in the affirmative, does the interpretation of European law allow a legal consequence other than continuation of the probationary period immediately following the end of the parental leave — for the duration of the period not yet elapsed at the beginning of the parental leave — for the same or a comparable official position, in the case where, for example, such a position or an equivalent established post is no longer available?

(5) Does the interpretation of European law require, in this case, for the purpose of filling another official position or another executive post, that a new selection procedure including other candidates in accordance with the provisions of national law should not be held?'

16. In the present case, written observations were submitted by the applicant in the main proceedings, the Land of Berlin and the European Commission.

Analysis

17. The questions referred to the Court seek to ascertain whether Paragraph 97 of the LBG is compatible with the rights guaranteed by Directives 2006/54 and 2010/18 (first to third questions) and the consequences of any incompatibility, in other words what form any 'compensation' due to Ms H. should take (fourth and fifth questions).

The first, second and third questions

Directive 2010/18

18. Directive 2010/18 and the revised Framework Agreement annexed thereto implement, while respecting national law, collective agreements and/or practice,[5] the minimum requirements on parental leave, described as 'an important means of reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women'.[6] The revised Framework Agreement applies to all workers, men and women, who have an employment contract or employment relationship.[7] The event giving rise to parental leave is the birth of a child[8] and its objective is to permit the parents to take care of that child.[9] Its duration is at least four months.[10] Clause 5 of the revised Framework Agreement establishes the worker's right to return to the same job or, if that is not possible, to an equivalent or similar job 'consistent with their employment contract or employment relationship'.[11] In addition, rights acquired or in the process of being acquired at the time when the worker starts their parental leave are 'maintained as they stand until the end of parental leave'.[12] Member States are also required to take appropriate measures to protect workers against less favourable treatment on grounds of the taking of parental leave.[13] Lastly, the European Union's commitment to this instrument which allows family life and professional life to be reconciled is such that this social right has been elevated to a fundamental right since it was enshrined in Article 33(2) of the Charter of Fundamental Rights of the European Union.[14]

19. It is essentially in the light of Clause 5 of the revised Framework Agreement that Ms H.'s situation must be examined, given that the Agreement is applicable to civil servants, as the Court has already ruled.[15]

20. First, I must straight away reject the argument put forward by the Land of Berlin that the protection conferred by the revised Framework Agreement is provided to the worker during and at the end of her parental leave only for the mandatory minimum period of leave, namely four months.[16] One need only look at the Court's case-law based on Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.[17] For example, reading the judgment in *Meerts*,[18] in which the Court ruled on the conditions for dismissal of a worker during her parental leave, there is no indication of such a limitation. The Court had held that the clause in the Framework Agreement on parental leave ('the Framework Agreement') governing the conditions for the return of a worker who has taken parental leave was 'intended to avoid the loss of or reduction in rights derived from an employment relationship, acquired or being acquired, to which the worker is entitled when he starts parental leave, and to ensure that, *at the end of that leave*, with regard to those rights, he will find himself in the same situation as that in which he was before the leave'.[19] Doubt might remain, at most, in so far as in that case the Member State concerned had

5 See Clause 1 of the revised Framework Agreement.

6 Paragraph 1 in the preamble to the revised Framework Agreement.

7 See Clause 1(2) of the revised Framework Agreement.

8 Or its adoption: see Clause 2(1) of the revised Framework Agreement.

9 See Clause 2(1) of the revised Framework Agreement.

10 See Clause 2(2) of the revised Framework Agreement.

11 Clause 5(1) of the revised Framework Agreement.

12 Clause 5(2) of the revised Framework Agreement.

13 See Clause 5(4) of the revised Framework Agreement.

14 See judgment of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraphs 37 and 63).

15 See, in particular, judgments of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraphs 27 to 30), and of 16 July 2015, *Maïstrellis* (C-222/14, EU:C:2015:473, paragraph 29).

16 See Clause 2(2) of the revised Framework Agreement.

17 OJ 1996 L 145, p. 4.

18 Judgment of 22 October 2009 (C-116/08, EU:C:2009:645).

19 Judgment of 22 October 2009, *Meerts* (C-116/08, EU:C:2009:645, paragraph 39). Italics added.

opted to align the length of parental leave with the minimum period provided for at the time by the Framework Agreement. Nevertheless, in my view, the solemnity of paragraph 37 of the judgment in *Meerts*,[20] in which the Court states that 'the framework agreement on parental leave is in line with the fundamental objectives enshrined in paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers on equal treatment for men and women …, objectives which are associated with the improvement of living and working conditions and with the existence of proper social protection for workers, in the present case those who have applied for or taken parental leave' militated against an interpretation restricting the protection provided for such workers solely to the minimum period of parental leave. In any event, the doubt is dispelled definitively in the judgments in *Chatzi* and *Riežniece*.[21] Those judgments concerned a maximum period of parental leave fixed at 18 and 9 months respectively. It therefore went well beyond the minimum under the Framework Agreement. The Court held, without qualification, that the Agreement provided for the right for the worker to return, at the end of parental leave, to the same job or to an equivalent job.[22] *Mutatis mutandis*,[23] Ms H. may therefore rely on the protection conferred on workers by Clause 5 of the revised Framework Agreement, even though the Federal Republic of Germany opted for a maximum period of parental leave much longer than the minimum under that Agreement.

21. Second, it is necessary to respond to the claims made by the defendant in the main proceedings that it fully complied with the requirements laid down by the revised Framework Agreement, since, on her return from parental leave, Ms H. returned to an equivalent job to the junior post which she held prior to the instrument of appointment of 20 September 2011 (namely, a post of counsellor in grade A16) and she could not lay claim to any right acquired or in the process of being acquired in relation to the post of counsellor in grade B2 as she had never actually performed those duties. The defendant in the main proceedings asserts in this regard that the fact that Ms H. lost her status as a civil servant on probation by reason of the expiry of the two-year probationary period during her parental leave must be seen as the mere consequence of a 'change' in the law, as provided for in Clause 5(2) of the revised Framework Agreement. In any event, the right to reinstatement must necessarily be interpreted as being limited in time, otherwise employers would be required to leave posts vacant for an indefinite period, which would jeopardise the good functioning of undertakings, whereas general consideration 23 of the revised Framework Agreement specifically provides for the need 'to avoid imposing … constraints in a way which would hold back the creation and development of small and medium-sized undertakings'.

22. With regard to rights acquired or in the process of being acquired, the Court has ruled that it was apparent from both the wording of Clause 2(6) of the Framework Agreement — equivalent to the present Clause 5(2) of the revised Framework Agreement — and its context that that provision was 'intended to avoid the loss of or reduction in rights derived from an employment relationship, acquired or being acquired, to which the worker is entitled when he starts parental leave, and to ensure that, at the end of that leave, with regard to those rights, he will find himself *in the same situation* as that in which he was before the leave'.[24] Furthermore, the Court highlighted in particular the fact that 'having regard to the objective of equal treatment between men and women which is pursued by the framework agreement …, [that clause] must be interpreted as articulating a particularly important

20 Judgment of 22 October 2009, *Meerts* (C-116/08, EU:C:2009:645).

21 Respectively, judgments of 16 September 2010 (C-149/10, EU:C:2010:534), and of 20 June 2013 (C-7/12, EU:C:2013:410).

22 See judgments of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraph 57), and of 20 June 2013, *Riežniece* (C-7/12, EU:C:2013:410, paragraphs 50 and 51).

23 In the light of the Court's finding in paragraph 47 of the judgment of 16 June 2016, *Rodríguez Sánchez* (C-351/14, EU:C:2016:447), the assessments made by the Court regarding Directive 96/34 and the Framework Agreement annexed to that directive are also valid in relation to Directive 2010/18 and the revised Framework Agreement where the latter has not introduced changes, which is the case with the protection conferred on workers on their return from parental leave (by way of comparison, see, on the one hand, Clause 2(5) and (6) of the Framework Agreement and, on the other, Clause 5(1) and (2) of the revised Framework Agreement).

24 Judgment of 22 October 2009, *Meerts* (C-116/08, EU:C:2009:645, paragraph 39 and the case-law cited). Italics added. See, also, judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-486/08, EU:C:2010:215, paragraph 51).

principle of Community social law which cannot therefore be interpreted restrictively'.[25] Consequently, the concept of 'rights acquired or in the process of being acquired' within the meaning of the Framework Agreement and the revised Framework Agreement 'covers all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts'.[26] Thus, 'national legislation which would result in the rights flowing from the employment relationship being reduced in the event of parental leave could discourage workers from taking such leave … This would run directly counter to the aim of the framework agreement on parental leave, one of the objectives of which is to make it easier to reconcile working and family life'.[27]

23. It should be recalled that, according to the documents before the Court, Ms H. was promoted to the status of civil servant on probation assigned to an executive post on 20 September 2011, when she was on sick leave for reasons connected with her pregnancy. It was not until 30 May 2012 that her parental leave granted by her employer started. The theoretical two-year probationary period had therefore begun to run more than eight months previously.[28] On that date — that is to say, the date on which parental leave started — it is true that she had not performed her duties as a civil servant on probation but she could legitimately claim to do so by virtue of the instrument of appointment of 20 September 2011. It should also be stated that there was a certain eagerness on the part of Ms H.'s employer, which launched a new selection procedure to fill the same post in the second half of 2012.

24. Ms H. was thus appointed when she was not only pregnant but also already absent. Her application for parental leave and the successive extensions were accepted by her employer in a normative context which fixes the maximum period of parental leave at three years. These successive extensions cannot be used in any way whatsoever as a pretext to criticise Ms H. for the length of her absence, for three reasons. First, because, although in the end she took the near-maximum length of parental leave as prescribed by national legislation (from 30 May 2012 to 20 February 2015), her employer in any event considered her to be in default from 19 September 2013 (after just over 15 months' parental leave). Second, in fixing the maximum period of parental leave Member States exercise a broad discretion, having due regard to the minimum length under the revised Framework Agreement, and it must be presumed that in doing so they weighed the interests of workers with those of employers. It is therefore unsatisfactory, both legally and intellectually, to think that what has been given to workers with one hand — the right to parental leave for a certain period — is taken away from them with the other, criticising them on the ground that their absence is organisationally unacceptable for the employer and/or forcing them to return to work. Third, I can understand that this absence, only the maximum length of which can really be expected, may pose difficulties for the employer. However, the Framework Agreement itself provides that such difficulties may be brought to the attention of the worker. If a good understanding of relations between workers and employers is not sufficient in itself to be convincing, I would point out that Clause 6(2) of the revised Framework Agreement advocates that, in order to 'facilitate the return to work following parental leave, workers and employers are encouraged to maintain contact during the period of leave'. It is not evident from the documents before the Court that, for example, Ms H.'s employer informed her of any difficulty with retaining the post to which she was to be assigned as a civil servant on probation pending her return. In addition, it did not notify her until 4 September 2014 that her probationary period had expired as from 19 September 2013, when it had already taken steps to replace her just a few months after the start of her parental leave. In doing so, the Land of Berlin deprived the applicant in the main proceedings of an

25 Judgment of 22 October 2009, *Meerts* (C-116/08, EU:C:2009:645, paragraph 42 and the case-law cited). This importance has since been confirmed by the Charter of Fundamental Rights of the European Union; see point 18 of this Opinion.

26 Judgment of 22 October 2009, *Meerts* (C-116/08, EU:C:2009:645, paragraph 43). See also judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-486/08, EU:C:2010:215, paragraph 53).

27 Judgment of 22 October 2009, *Meerts* (C-116/08, EU:C:2009:645, paragraph 47).

28 Given that the defendant in the main proceedings notified Ms H. that her status as a civil servant on probation had ended on 19 September 2013, it should be stated that the two-year probationary period was not 'suspended' either during her pregnancy-related sick leave or during her maternity leave, which might raise problems in the light of the special protection which EU law offers to pregnant women and women who have recently given birth or are breastfeeding. However, this is not the subject of the questions referred to the Court.

opportunity to be able to organise an anticipated return to work by failing to inform her of the consequences of her absence and by immediately organising a selection procedure to replace her. It therefore breached the abovementioned principle of good cooperation between the employer and its employee on parental leave.

25. Lastly, consideration should be given to two independent elements. First, in the specific context of the civil service, the fact that Ms H. was appointed as a civil servant on probation in the post of counsellor in grade B2 following a selection procedure can be treated in the same way as a promotion to a higher grade, in particular as she did not change her employer. [29] Second, advancement to that post with greater responsibility was naturally accompanied by a salary increase.

26. It thus follows that at the start of her parental leave Ms H. did not have a definitive right to hold the post to which she was appointed on 20 September 2011. For that reason, I tend towards the view that Clause 5(1) of the revised Framework Agreement does not constitute an adequate basis for answering the first question. More than a right to return to a post which she had never actually occupied, it is the elements characterising her employment relationship when she left that must be protected under Clause 5(2) of the Agreement. Thus, in order for her to be placed, as is required by case-law, in the same situation as that in which she was before her parental leave, she had to be given the opportunity, on her return, to demonstrate her capacities to occupy the post to which she had been provisionally promoted during the probationary period preceding final appointment.

27. It must also be stated that there is no possible argument, even merely textual, [30] in support of the view taken by the Land of Berlin, as it not stated anywhere in the revised Framework Agreement that the right to reinstatement or protection of rights acquired or in the process of being acquired are limited in time and do not cover the entire length of parental leave. This is confirmed by the requirement laid down in case-law that the clause governing return from parental leave cannot be interpreted restrictively. [31]

28. Nor is there any possible comparison with the situation of a worker with a fixed-term contract, as it is clear from the facts of the present reference for a preliminary ruling that the two-year probationary period under Paragraph 97 of the LBG should be seen as a kind of trial period in the specific context of a promotion within the local civil service. In addition, the expiry of the two-year period during Ms H.'s parental leave likewise cannot be seen as a 'change arising from national law' within the meaning of the second sentence of Clause 5(2) of the revised Framework Agreement, as no change arose from the law for Ms H.'s rights during her leave. [32]

29. Therefore, the fact that, under Paragraph 97 of the LBG, a civil servant who has been successful in the selection procedure for advancement to an executive post is obliged to complete a two-year probationary period before her effective appointment without being able to suspend the expiry of that period during her parental leave or to defer the start date to a time immediately after such leave has the effect of encouraging her not to exercise her right to that leave [33] and thus of discouraging such a worker from taking leave, and runs directly counter to the aim of the revised Framework Agreement, forcing civil servants on probation to make a choice between their professional life, in this case career progression, and their family life, when the revised Framework Agreement advocates improved

29 It is because of this 'internal' nature of the change in the professional situation of the applicant in the main proceedings that, despite some ambiguity in the wording of Paragraph 97(4) of the LBG, I will not examine the present case in the light of the provisions governing protection against dismissal.

30 For example, Clause 5(2) of the revised Framework Agreement provides that rights acquired or in the process of being acquired are to be maintained 'until the end of parental leave' and not until the end of the maximum length of parental leave under the revised Framework Agreement. In addition, the Court itself has not accepted such a limitation: see judgments of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraph 57), and of 20 June 2013, *Riežniece* (C-7/12, EU:C:2013:410, paragraph 32).

31 See footnote 25 of this Opinion.

32 Paragraph 97 of the LBG was thus not adopted during Ms H's parental leave.

33 See, by analogy, judgment of 13 February 2014, *TSN and YTN* (C-512/11 and C-513/11, EU:C:2014:73, paragraphs 49 and 51).

reconciliation of those two legitimate, but sometimes conflicting interests. In the majority of cases, it is women [34] who have to make this choice and the legislation at issue in the main proceedings thus hampers their career progression and their advancement to positions of responsibility, thereby contributing to maintaining the glass ceiling.

30. The revised Framework Agreement does not offer any possible justification for such dissuasion. Consequently, Clause 5(2) of the revised Framework Agreement must be interpreted as precluding national legislation under which a civil servant on probation who has been successful in the selection procedure for advancement to an executive post is obliged to complete a two-year probationary period before her final appointment when the expiry of that period cannot under any circumstances be suspended during her parental leave and when the start date of that period also cannot be deferred to a time immediately after such leave.

Directive 2006/54

31. It should be noted, as a preliminary point, that Directive 2006/54 applies to civil servants. [35] Article 14(1)(a) of Directive 2006/54 prohibits any direct or indirect discrimination on grounds of sex, including in the public sector, in relation to 'conditions for access to employment …, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'. I have described Ms H.'s situation in particular as being in the specific context of a career promotion within the German local civil service. I will therefore focus my analysis on Article 14(1)(a) of Directive 2006/54. [36]

32. Under Article 2(1)(a) of Directive 2006/54, indirect discrimination occurs 'where an apparently neutral provision … would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision … is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. [37] Whilst it is not difficult to determine the neutrality of the wording of Paragraph 97 of the LBG such that it seems to apply, prima facie, in the same manner to male civil servants on probation and to female civil servants on probation, the question whether it places women at a particular disadvantage is more contentious. In any event, this finding must be made by the referring court, which is required to ascertain whether, in the Member State concerned, a much higher number of women than men take parental leave, such that women are more likely than men to be affected by the application of the provision at issue in the main proceedings. The referring court has expressly acknowledged that 'in the Land of Berlin, a much higher number of women than men take parental leave'. [38] However, it is not able to base its assertion on statistics allowing a comparison of data for the different categories of persons to which

34 According to the Court's case-law, it is for the national courts to make such a finding (see judgment of 20 June 2013, *Riežniece*, C-7/12, EU:C:2013:410, paragraph 40 and the case-law cited). On page 26 of its request for a preliminary ruling, the referring court states that it 'assumes that, in the Land of Berlin too, a *much higher number* of women than men take parental leave' (italics added). I will return to this point in my analysis in relation to Directive 2006/54.

35 See judgment of 16 July 2015, *Maïstrellis* (C-222/14, EU:C:2015:473, paragraph 12).

36 The present reference cannot be examined in the light of Articles 15 and 16 of Directive 2006/54. Article 15 of that directive is a specific provision to protect a woman on maternity leave on her return to work 'after the end of her period of maternity leave'. Article 16 of Directive 2006/54 seeks to protect the specific situation of parents who have taken paternity and/or adoption leave. The difficulties encountered by Ms H. on her return are not linked directly to her maternity leave, but in fact result from her parental leave, which is a specific form of leave, distinct from those mentioned in Articles 15 and 16 of Directive 2006/54 (with regard to the particular features of maternity leave compared with parental leave, see, in an extensive body of case-law, judgments of 19 September 2013, *Betriu Montull* (C-5/12, EU:C:2013:571, paragraphs 48 to 50), and of 16 June 2016, *Rodríguez Sánchez* (C-351/14, EU:C:2016:447, paragraphs 43 and 44)). With regard to my doubts as to whether Ms H. was granted adequate protection for her maternity leave, see footnote 28 of this Opinion.

37 See, also, judgments of 20 June 2013, *Riežniece* (C-7/12, EU:C:2013:410, paragraph 39 and the case-law cited); of 18 March 2014, *D.* (C-167/12, EU:C:2014:169, paragraph 48 and the case-law cited); and of 18 March 2014, *Z.* (C-363/12, EU:C:2014:159, paragraph 53 and the case-law cited).

38 See page 26 of the request for a preliminary ruling. Challenging that statement, the Land of Berlin provided statistics (see page 16 of the written pleading of the Land of Berlin). According to the table provided, in the year when Ms H.'s parental leave started (2012), 34.1% of children in the Land of Berlin had a father in receipt of parental leave allowance. However, that table does not indicate the proportion of mothers who took parental leave or the comparative length of that leave depending on whether it is taken by the mother or by the father.

Paragraph 97 of the LBG applies because there are few executive posts to be filled in the Land of Berlin and the number of civil servants on probation is therefore relatively low. The number of civil servants on probation on parental leave is even lower, partly because civil servants move to executive posts at an advanced age.

33. However, the lack of available statistical data to illustrate the comparison between male civil servants on probation and female civil servants on probation cannot be sufficient to reject the existence of any indirect discrimination. As it is established that a much higher number of women than men take parental leave in the Land of Berlin, it could be accepted that it is likely this proportion will also be projected for civil servants on probation holding executive posts. It is therefore reasonable to think that the conditions governing the probationary period place civil servants on probation who have taken parental leave for a substantial period — most often women — in an unfavourable situation compared with civil servants on probation who have not taken such leave — mainly men [39] — ultimately preventing the final appointment of women to executive posts.

34. Consequently, and assuming this difference in treatment to be established, it must still be ascertained whether Paragraph 97 of the LBG is objectively justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary, as is required by Directive 2006/54. In this regard, the referring court states that the *ratio legis* of that provision is to permit the administration to ascertain the competences of the civil servant on probation, requiring him actually to perform his duties during a probationary period, which may not be deferred or extended, whose duration is two years. It seems difficult to contest the fact that the aim thus pursued, ensuring that the public employer can actually ascertain the competences of its civil servant, a fortiori in the case of senior posts with responsibilities, is legitimate.

35. It is an entirely different matter whether the means of achieving that aim are appropriate and necessary. At first sight, the general and absolute character of Paragraph 97 of the LBG is problematical. The probationary period may not be extended under any circumstances and periods of absence, however legitimate they may be, are counted as periods in which the civil servant on probation has been in default. Worse still, civil servants in default must observe a waiting period, which is one year in principle, during which they are not permitted to apply for new selection procedures. Whilst I do understand that it may be necessary to test civil servants on probation, I have some difficulty comprehending why such testing must be for a fixed duration of two years and why the German legislation does not offer the slightest flexibility for the possible deferral of the probationary period, in particular where parental leave is taken. In addition, the absence of the civil servant on probation during her probationary period due to her parental leave will be penalised twice, as not only will it prevent her final appointment, but it will also prevent the civil servant from applying for a new selection procedure for one year. The Land of Berlin invokes reasons connected with the good functioning of the service. However, these are merely general claims. It is not apparent from the documents before the Court that a vacancy in Ms H.'s post would have caused a serious disruption to the service. Furthermore, Ms H.'s employer does not seem to have reviewed whether that post could have been assigned temporarily to another person. The fact that, in the case of executive posts in the national civil service, an extension of the length of the probationary period may be granted as an exception where, inter alia due to parental leave, the civil servant on probation has not been able to complete the full required probationary period [40] tends to weaken considerably the argument relating to the good functioning of the service. A review of the aptitude of the civil servant on probation, which is the aim pursued by Paragraph 97 of the LBG, can be conducted perfectly well when the civil servant on probation returns from parental leave, with the result that the less favourable treatment

39 See, by analogy, judgment of 20 June 2013, *Riežniece* (C-7/12, EU:C:2013:410, paragraph 41).

40 According to the referring court.

accorded to civil servants on probation on parental leave — which can be reckoned to be primarily women — is ultimately not necessary for achieving the aim pursued. This is not to mention that the negative consequences associated with absence due to parental leave go well beyond what is necessary for the attainment of the aim pursued.

36. For all the above reasons, subject to confirmation by the referring court that a much higher number of women may potentially be affected by the legislation at issue in the main proceedings, Article 14(1)(a) of Directive 2006/54 in conjunction with Article 2(1)(b) of that directive must be interpreted as precluding such legislation under which a civil servant on probation who has been successful in the selection procedure for advancement to an executive post is obliged to complete a two-year probationary period before her final appointment when the expiry of that period may not under any circumstances be suspended during her parental leave and when the start date of that period also may not be deferred to a time immediately after such leave.

The fourth and fifth questions

37. In the fourth and fifth questions, the referring court essentially asks the Court to explain to it what consequences must be inferred from the breach of EU law to which the applicant in the main proceedings was subject and what compensation must be offered to her. The referring court points out in particular that the 'reinstatement' of Ms H. to the executive post which she was due to hold as a civil servant on probation might not be possible because that post has been filled and no equivalent post has been budgeted for or is available at present. In addition, as national law requires any person to participate in a selection procedure before being able to be appointed to the local civil service, if a post equivalent to that to which she had been appointed before her parental leave was to become available, she would therefore be required, in principle, to participate in such a procedure, without any guarantee of being ultimately selected.

38. According to the request for a preliminary ruling, while Ms H. is applying for reinstatement to her status as a civil servant on probation and an executive post equivalent to that to which she had been appointed before the start of her parental leave, the referring court states that Paragraph 97 of the LBG cannot be interpreted in conformity with Directive 2006/54 or Directive 2010/18. In that case, the referring court is required to apply EU law in its entirety and to protect the rights which the latter confers on individuals, disapplying any contrary provision of national law.[41] However, the Verwaltungsgericht Berlin (Administrative Court, Berlin) states that Ms H.'s post was — quickly — assigned to another person[42] and that at present there is no post to fill. It therefore seems that merely disapplying Paragraph 97 is not sufficient to restore Ms H.'s rights in a satisfactory manner.

39. In these circumstances, it should be recalled that the Member States' obligation pursuant to a directive to achieve the result envisaged by that directive, and their duty, under Article 4(3) TEU, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of the Member States, also in their capacity as a public employer.[43] In addition to this general obligation, there are the obligations specifically laid down by Directives 2010/18 and 2006/54. Thus, recital 14 and Article 2 of Directive 2010/18[44] require Member

41 See, by analogy, judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 40 and the case-law cited). See also judgment of 6 March 2014, *Napoli* (C-595/12, EU:C:2014:128, paragraph 50). The Court has held that Article 14(1)(c) of Directive 2006/54 is an unconditional and sufficiently precise provision to be relied upon by an individual as against a Member State because it prohibits generally and unequivocally all discrimination (see judgment of 6 March 2014, *Napoli*, C-595/12, EU:C:2014:128, paragraphs 46 to 48). The same must apply to Article 14(1)(a) of that directive. Similarly, Clause 5(1) and (2) of the revised Framework Agreement sets out two clear obligations: first, to allow a return to the same job or an equivalent or similar job on return from parental leave and, second, to maintain rights acquired or in the process of being acquired.

42 Assuming that the procedure at the end of which the executive post assigned as a matter of course to Ms H. was filled in the second half of 2012 is lawful, which must be ascertained by the referring court.

43 See judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 39).

44 Directive 96/34 did not explicitly lay down any obligation to penalise breaches of the Framework Agreement.

States to provide for 'effective, proportionate and dissuasive penalties' in the event of any breach of the obligations under that directive. Directive 2006/54 lays down the same obligation to provide for such penalties.[45] This obligation is specified by Article 18, under which 'Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered'.[46] Furthermore, Member States have an obligation to take all necessary measures to abolish normative provisions contrary to the principle of equal treatment between men and women.[47] However, those provisions do not prescribe specific measures, but leave Member States free to choose between the different solutions suitable for achieving the objectives of the directives, depending on the different situations which may arise.[48] Nevertheless, the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered.[49]

40. In the absence of forms of compensation specially prescribed by EU law and specific sanctions laid down by EU law, the referring court must therefore identify the provisions in its domestic legal order which transposed the obligations relating to penalties and compensation laid down by Directives 2006/54 and 2010/18, bearing in mind that — I would remind you — those directives require the penalty to be not only effective but also dissuasive. In this regard, although it is not for the Court to indicate to the referring court the particular measure which, in its view, would meet the objectives relating to penalties and compensation also pursued by Directives 2006/54 and 2010/18, it must nevertheless be stated that it would not be consistent with those requirements simply to permit Ms H. to participate in a new selection procedure, as in such a case there would not be either penalty, compensation or dissuasion. Lastly, if the Federal Republic of Germany did not provide for adequate means for the rights which Ms H. derives from Directives 2006/54 and 2010/18 to be restored, she could bring an action for damages against the State in the national courts for failure to implement properly the requirements of those directives, including the principle of good cooperation mentioned in point 24 of this Opinion.

Conclusion

41. In the light of all the foregoing considerations, I propose that the Court answer the questions referred by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) as follows:

(1) Clause 5(2) of the revised Framework Agreement set out in the Annex to Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC must be interpreted as precluding national legislation under which a civil servant on probation who has been successful in the selection procedure for advancement to an executive post is obliged to complete a two-year probationary period before her final appointment when the expiry of that period may not under any circumstances be suspended during her parental leave and when the start date of that period also may not be deferred to a time immediately after such leave.

(2) Subject to confirmation by the referring court that a much higher number of women may potentially be affected by the legislation at issue in the main proceedings, Article 14(1)(a) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women

45 See recital 35 and Article 25 of Directive 2006/54.

46 There must therefore be full compensation; see judgment of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraph 34).

47 See Article 23(a) of Directive 2006/54.

48 See, with regard to Directive 2006/54, judgment of 11 October 2007, *Paquay* (C-460/06, EU:C:2007:601, paragraph 44 and the case-law cited).

49 Also with regard to Directive 2006/54, see judgment of 11 October 2007, *Paquay* (C-460/06, EU:C:2007:601, paragraph 49).

in matters of employment and occupation in conjunction with Article 2(1)(b) of that directive must be interpreted as precluding such legislation under which a civil servant on probation who has been successful in the selection procedure for advancement to an executive post is obliged to complete a two-year probationary period before her final appointment when the expiry of that period may not under any circumstances be suspended during her parental leave and when the start date of that period also may not be deferred to a time immediately after such leave.

(3) In order to compensate for the injury suffered by an individual as a result of a breach of Directives 2006/54 and 2010/18, it is for the referring court to apply the specific national measures adopted by the Member State pursuant to its obligations under those directives. In doing so, it must ascertain that those measures ensure effective and efficient legal protection, have a genuine dissuasive effect with regard to the employer and are commensurate with the injury suffered.