Right to parental leave must not require employment at the time of birth (C-129/20)

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Abstract
In the recent case XI v Caisse pour l’avenir des enfants (C-129/20), the CJEU was asked to rule on three issues regarding parental leave. First, whether the Directive in force at the time of the submission of the application to take parental leave (96/34) or the one in force at the time of birth or adoption (2010/18) was to be applied. Second, a question was raised on the condition of access to said leave, more specifically, a continuous minimum length of service. Third, the most intriguing problem was whether employment at the time of birth may be a condition for the right to parental leave under Directive 2010/18/EU.

Keywords
Parental leave, work-life balance, temporal scope, worker status

Factual background
In September 2011, XI concluded a fixed-term employment contract with the Luxembourg State as a teacher, which expired in January 2012. On 4 March 2012, at a time when she was unemployed and not registered with the social security bodies, she gave birth to twins. In mid-June 2012, she was granted unemployment benefits and therefore re-registered with the social security institutions. After having concluded two fixed-term contracts with the Luxembourg State in September 2012 and August 2013, XI signed a permanent contract with the state in the field of education on 15 September 2014. She then applied for parental leave starting on 15 September 2015.

Procedural history
The President of the Caisse pour l’avenir des enfants (Caisse) rejected the application, because Luxembourg law required that the worker be legally employed in a job with social insurance at
the time of the child’s birth. This decision was confirmed by the Governing Board of the Caisse. XI challenged the decision at the Social Security Arbitration Board in Luxembourg, which found that the conditions under Luxembourg law were incompatible with the framework agreement on parental leave in the appendix to Directive 96/34/EC. The Caisse appealed to the Higher Social Security Board which agreed with the Governing Board of the Caisse. Finally, XI appealed to the Court of Cassation, which referred the issue to the CJEU.

Applicable law
Before Directive 2010/18 introduced the revised framework agreement, Directive 96/34 already provided a framework agreement on parental leave. The former replaced the latter with effect from 8 March 2012 – four days after the birth of the twins. Although the national courts looked at the compatibility with the old Directive (in place at the time of birth), the CJEU made clear that the submission date of the application to take parental leave (i.e. March 2015) determined the applicable law, while the fact that the twins were born before the coming into force of Directive 2010/18 was irrelevant. Therefore, the underlying case was governed by the revised framework agreement annexed to Directive 2010/18, and the CJEU reinterpreted the submitted questions from the national court accordingly.

In general, the CJEU confirmed its former case law (Commission v Luxembourg, C-519/03) and the fact that the Parental Leave Directive is applicable to a situation where children were born before it entered into force. This is particularly relevant, as Directive 2010/18/EU will be repealed by the Work-life Balance Directive (2019/1158) as of 8 August 2022. With new provisions governing parental leave, more cases could arise with birth and application submission possibly taking place while different Directives are in force. This will raise again the question of which one is the governing Directive.

Continuous minimum length of service
Luxembourg law requires the minimum period of work to be without interruption. To answer the question of whether national law may require 12 consecutive months of service, the CJEU looked at the wording of the revised framework in Directive 2010/18. Clause 3(1)(b) allows a Member State to make the right to parental leave conditional upon a period of work that may not exceed one year. Therefore, legally speaking, 12 months is within the range. The same provision requires that the sum of successive contracts must be taken into account when calculating this period. National legislation may, hence, require it to be continuous.

Employment status at the time of birth
However, Luxembourg legislation required on top of the minimum continuous period of 12 months’ work that the parent met the status of worker at the time of birth or adoption. To evaluate the compatibility of such requirement with the Directive, the CJEU looked at the Framework Agreement’s objectives. According to Recital 8 and the general considerations, the Framework Agreement aims at improving equality between men and women and the reconciliation of professional, private and family life, even citing Articles 23 and 33 of the European Union Charter of Fundamental Rights. The Court went on to declare parental leave is a particularly important EU social right that must not be interpreted restrictively. So, while the birth or adoption of a child
and worker status are definitely conditions that give rise to the right to parental leave, and such leave would not be possible without the two, it cannot be inferred from the Framework Agreement that a parent must be employed at the time of birth.

Besides being contrary to the aims of the Directive, such a requirement would also prolong the minimum period of work in cases where the application for leave is made more than one year after the birth: Luxembourg legislation states that a person may claim parental leave if ‘lawfully employed in a workplace […] at the time of birth […] and is so employed without interruption […] for at least 12 months.’ Contrary to maternity leave, parental leave is not only meant for taking care of a child shortly after the birth but also at a later stage, namely, until the child reaches the age of eight, according to Directive 2010/18. Thus, the twofold requirement goes against the exact wording of the Framework Agreement which does not allow for a longer minimum period of work than 12 months.

**Main takeaway**

The individual right to parental leave must be evaluated in light of the Directive’s aims (gender equality and better reconciliation of professional and family life), and therefore cannot be interpreted restrictively in such a way that the worker status requirement must be fulfilled during the period of leave itself but also at the time of birth or adoption. Since the new Directive 2019/1158 pursues the same aims as Directive 2010/18 and also provides for parental leave until the child reaches the age of eight under the condition of a minimum period of work that must not exceed one year, this case would likely have had the same outcome under the terms of the new provisions.

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