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CARING ABOUT THE CAREGIVERS: CHALLENGES FOR FEMALE CAREGIVERS IN LITHUANIAN AND ESTONIAN LABOUR LAW

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ABSTRACT

While considerable efforts are being made to consolidate and implement the principle of gender equality, the gender pay gap remains a real problem. One of the reasons for this gap is the traditional role of women in caring for children and other relatives. By devoting a significant part of their time to the unpaid care function, women have fewer opportunities to participate in employment relationships. This leads to women's poorer financial situation, limited career opportunities, and a higher risk of poverty in old age. Therefore, both at the EU and national level, there has been a search for optimal ways to enable female caregivers to remain in the labour market and ensure their income levels. This article provides an overview of the situation of female caregivers and the legal measures taken by Lithuania and Estonia (both EU Member States) to improve the situation of women performing unpaid care functions in labour relationships.

KEYWORDS

Women, care, labour, pay gap, equality, work-life balance

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INTRODUCTION

While the principle of gender equality is enshrined at international, European, and national levels, the gender pay gap remains a real issue. This problem becomes especially apparent at retirement age: after receiving lower working incomes and paying lower social security contributions during the working period, women thus receive lower old-age pensions and face a greater risk of poverty. One of the most important reasons¹ for women's disadvantage is the established stereotypical images of women's social roles and the behavioural practices that follow these images. Traditionally, women have been assigned with caring responsibilities within the household (e.g., collecting, storing, and preparing food, taking care of the household, caring for relatives in the case of old age or health impairment), whereas men's area of activity has been traditionally perceived as being outside the household, providing material support for the family. For these reasons, a significant proportion of women's work is neither accounted for nor remunerated. Such stereotypical images and practices remain² despite the equal opportunities discourse and feminist movements of the 20th and 21st centuries.³ The European Union and its Member States, including Lithuania and Estonia, are taking various measures to change the current status quo. As the problem is triggered by a "care penalty" (a situation in which women's caring activities result in lower income and other negative social consequences), ways are being sought to find optimal solutions to enable female caregivers to remain in the labour market and secure their income levels.

The purpose of this article is to review, compare, and evaluate legal measures taken in Lithuania and Estonia to improve the situation of female caregivers in employment relationships. One of the important distinctions made here is between childcare and care for persons other than children (long-term care). Although the interests of the caregivers must be safeguarded in both cases, this does not negate the fact that the two types of care mentioned above have their own specificities and differences, which also lead to differences in the legal framework applicable to the two types.

¹ Other commonly mentioned reasons include stereotyping, segregation of education and employment, non-standard employment, and discrimination. See Susan Bisom-Rapp and Malcolm Sargeant, *Lifetime Disadvantage, Discrimination and the Gendered Workforce* (Cambridge: Cambridge University Press, 2016), 9.

² There is no doubt that stereotypical perceptions of gender are detrimental to both sexes, but this article outlines a study of women's caring functions and unaccounted for female work.

³ The study "Challenges for Mothers Reconciling Family, Work and Private Life," by the Lithuanian Office of the Equal Opportunities Ombudsman noted in 2021 that "decisions about parental leave were more often made intuitively or 'by default.'" This essentially meant following social norms and examples that children should be raised by women and that men should work and pursue a career. The women also mentioned that they felt that a man's career was more important to the family, and that the distribution of "I will raise children and the man will work" seemed natural and organic.

The study is limited in two aspects. Firstly, it examines the situation in two specific jurisdictions, Lithuania and Estonia. These countries were chosen because they have many things in common, including a similar Soviet past, the regaining of independence, the transition to different types of economic relations, and similar demographic, geopolitical, and economic indicators. At the same time, the two states have quite different regulations on the rights of caregivers. Secondly, the study is limited to legal employment relationships and does not delve into social security measures.

The method of analysis of legal and other documents was used for data collection. The data collected were analysed using systematic, historical, and teleological methods. A benchmarking approach was used to identify best practices.

The first part of the article provides a more detailed overview of the unequal position of women in the employment relationship resulting from unaccounted for care and challenges faced by female caregivers. The second part of the article analyses the specific mechanisms enshrined in Lithuanian and Estonian labour laws to redress this inequality. The third part assesses the influence that anti-discrimination law has or may have on both countries in addressing this issue.

1. THE TRADITIONAL ROLE OF WOMEN IN CARE AND EMERGING CHALLENGES

In legal doctrine, there is an entrenched distinction between formal and substantive equality.⁴ Applying this distinction to female caregivers reveals that formal equality is enshrined in legislation and does not raise any major doubts. The principle of gender equality (and the protection of motherhood) is enshrined in Article 23 of the EU Charter and in a series of directives,⁵ as well as in national constitutions (Article 29 of the Constitution of the Republic of Lithuania⁶ and Article 12 of the Constitution of the Republic of Estonia⁷) and other legal acts (e.g., the Law on Equal Opportunities

⁴ Marc De Vos, "The European Court of Justice and the march towards substantive equality in European Union antidiscrimination law," *International Journal of Discrimination and the Law* Vol. 20, No. 1 (June 2020) // <https://doi.org/10.1177/1358229120927947>.

⁵ See, e.g., *Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women* (OJ L 045, 1975, 0019 – 0020); *Council Directive 76/207/EEC of 9 February 1976 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* (OJ L 039, 1976, 0040 – 0042); *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* (OJ L 303, 2000, 16–22); *European Parliament and Council Directive 2006/54/EC 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 (recast)* (OJ L 204, 2006, 23–36).

⁶ *Constitution of the Republic of Lithuania* (Parliamentary Record, 1992, no. 11).

⁷ *Constitution of the Republic of Estonia* (RT 1992, 26, 349).

for Women and Men of the Republic of Lithuania,⁸ the Gender Equality Act of the Republic of Estonia⁹).

However, formal equality does not mean substantive equality. Numerous surveys show that, despite the rising involvement of women in the labour market in recent decades, the time spent by women in domestic and family care has remained virtually unchanged. It continues to be essentially a female activity and occupies a significant proportion of women's active time.¹⁰ In both developed and developing countries, women spend two-thirds of their time on unpaid work at home and one-third on paid work. Men in developed countries devote two-thirds of their time to work in the workplace and one-third of their time working at home. Furthermore, in developing countries, men spend only a quarter of their time caring for the household.¹¹ In the EU, women spend on average 17 hours a week caring for children or grandchildren, whereas men spend 10.6 hours on the same activities; women spend 12.9 hours a week on housework, and men spend only 5.5 hours. Women are also more likely to look after elderly or disabled relatives, spending 5.7 hours on this compared with 4.8 hours for men.¹²

This kind of female work in the care of the household and relatives remains in the shadow zone. On the one hand, such activities ensure the quality and diversity of human resources and provide a significant boost to economic development. On the other hand, they do not fall under any economic indicators of states,¹³ are unappreciated and underestimated, and, although it takes a significant part of women's active time, they are not reflected in any way in women's income. Moreover, caring is often incompatible with a professional career and prevents both the full realisation of women in employment relationships and financial creation.¹⁴ In 2020, women accounted for 43.2% of the inactive population due to care responsibilities in

⁸ *Law on Equal Opportunities for Women and Men of the Republic of Lithuania* (Official Gazette, 1998, No. 112).

⁹ *Gender Equality Act of the Republic of Estonia* (RT I 2004, 27, 181).

¹⁰ Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy. Who Cares?* (London & New York: Routledge, 2020), 14; Susan Bisom-Rapp and Malcolm Sargeant, *supra* note 1, 61; Ariane Ophir and Jessica Polos, "Care Life Expectancy: Gender and Unpaid Work in the Context of Population Aging," *Population Research and Policy Review* Vol. 41 (2022) // <https://doi.org/10.1007/s11113-021-09640-z>.

¹¹ Susan Bisom-Rapp and Malcolm Sargeant, *supra* note 1, 62.

¹² Eurofound, *Striking a balance: Reconciling work and life in the EU* (Luxembourg: Publications Office of the European Union, 2018).

¹³ Although there is a growing recognition that informal and unpaid care work has a high economic value and significance for society, it should be recognised as an active economic activity, but this is not translated into concrete action. See Oxfam International, "Time to Care Unpaid and Underpaid Care Work and the Global Inequality Crisis" (January 2020) // <https://www.oxfam.org/en/research/time-care>; Ona Gražina Rakauskienė, Eglė Krinickienė, and Vaida Servetkienė, *Moterų ir vyrų pajamų atotrūkis Lietuvoje* (Vilnius: Mykolas Romeris universitetas, 2020), 40.

¹⁴ *Ibid.*, 39; Susan Bisom-Rapp and Malcolm Sargeant, *supra* note 1, 89; Josephine C. Jacobs, Courtney H. Van Houtven, Terri Tanielian, and Rajeev Ramchand, "Economic Spillover Effects of Intensive Unpaid Caregiving," *PharmacoEconomics* Vol. 37 (March 2019) // <https://doi.org/10.1007/s40273-019-00784-7>.

Estonia,¹⁵ compared to only 6% for men.¹⁶ In Lithuania, women accounted for 28.1% of the inactive population due to care responsibilities,¹⁷ and men accounted for 7%.¹⁸ The gap between men's and women's time spent on care was highlighted by the quarantines of the COVID-19 epidemic. During the quarantine, in both Lithuania and Estonia, mothers of children under 12 were three times more likely than fathers to take over care activities due to the closure of educational or care institutions.¹⁹

The gender pay gap must also be considered when assessing the unequal situation of men and women in the labour market. In Estonia, the gap between men's and women's wages has remained one of the largest in Europe for a number of years, reaching 21.1 percentage points in 2020. Meanwhile, Lithuania is stable in the middle of the list of EU countries with the gap of 13% in 2020. In addition, both countries have recently experienced a downward trend in the pay gap.²⁰

A separate set of problems is caused by the ageing of European societies, which is particularly noticeable in Lithuania and Estonia. The number of elderly people in the need of care is growing (and will continue to do so for the foreseeable future), and state care resources will be under increasing pressure. It seems inevitable that it will be mostly women who will be forced to devote themselves to caring for such persons. In this way, the ever-decreasing number of caregivers (mainly women) will have to provide care for an increasing number of people in need.

2. CAREGIVERS' LABOUR CONDITIONS

One of the ways to address these identified negative trends is to provide additional protection and opportunities for female caregivers in their employment relationships. In particular, caregivers' opportunity to participate in employment is facilitated by providing differential treatment for certain working conditions and by creating the possibility of combining paid work with unpaid care, thus allowing caregivers to compete with those employees who do not provide care. Although the focus of the

¹⁵ Trading Economics, "Estonia – Inactive population due to caring responsibilities: Females" (April 2022) // <https://tradingeconomics.com/estonia/inactive-population-due-to-caring-responsibilities-females-eurostat-data.html>.

¹⁶ Trading Economics, "Estonia – Inactive population due to caring responsibilities: Males" (April 2022) // <https://tradingeconomics.com/estonia/inactive-population-due-to-caring-responsibilities-males-eurostat-data.html>.

¹⁷ Trading Economics, "Lithuania – Inactive population due to caring responsibilities: Females" (April 2022) // <https://tradingeconomics.com/lithuania/inactive-population-due-to-caring-responsibilities-females-eurostat-data.html>.

¹⁸ Trading Economics, "Lithuania – Inactive population due to caring responsibilities: Males" (April 2022) // <https://tradingeconomics.com/lithuania/inactive-population-due-to-caring-responsibilities-males-eurostat-data.html>.

¹⁹ OECD, "Caregiving in Crisis: Gender inequality in paid and unpaid work during COVID-19" (December 2021) // <https://www.oecd.org/coronavirus/policy-responses/caregiving-in-crisis-gender-inequality-in-paid-and-unpaid-work-during-covid-19-3555d164/>.

²⁰ Eurostat, "Gender pay gap in unadjusted form" (February 2022) // https://ec.europa.eu/eurostat/databrowser/view/sdg_05_20/default/table?lang=en.

current analysis is on women, it becomes equally important to provide alleviated working conditions for men's careers, as these measures relieve the burden on women and equalise the family obligations of both sexes. Such adapted working conditions can be divided into two categories: flexible work measures and specific periods of leave.

2.1. FLEXIBLE WORKING CONDITIONS

Flexible working conditions are generally perceived not only as an opportunity for the employer to reduce or increase the number of employees quickly and at low cost in response to economic and other external changes, but also as a form of work organisation characterised by non-standard working conditions. This enables the participation in the labour market for persons of socially vulnerable categories, who, for various reasons, find it difficult to work under standard conditions is difficult, such as for the young, the disabled, the elderly, and mothers with small children. Flexible working conditions help to strike a balance between the performance of paid and unpaid work functions.²¹ Therefore, when assessing the extent to which the labour law system favours the participation of persons providing unpaid care, it is necessary to assess the possibilities offered by the system to combine work and care in the household by adapting working time or the form of work according to the needs of such employees.

Although flexible working conditions have traditionally been applied to parents caring for young children, research shows that flexible working conditions can also be successfully applied in the case of unpaid care for family members or other persons.²² The EU Directive on Work-Life Balance for Parents and Carers²³ (Balance Directive), which had to be transposed into the legal systems of the Member States by August 2, 2022, provides that the flexible working conditions workers may request to combine their working and supervisory activities include adjusting their work regime, including agreements on remote work, flexible working schedules, and reduced working hours. The categories of workers covered by such regulation include parents with children under the age of at least eight years of age and other caregivers

²¹ Heejung Chung and Tanja van der Lippe, "Flexible Working, Work-Life Balance, and Gender Equality: Introduction," *Social Indicators Research* Vol. 151 (2020) // <https://doi.org/10.1007/s11205-018-2025-x>; Office of the Equal Opportunities Ombudsperson of Lithuania, "Challenges for Mothers Reconciling Family, Work and Private Life" (2021) // <https://www.lygybe.lt/data/public/uploads/2021/11/seimos-darbo-ir-asmeninio-gyvenimo-derinimo-issukiai-mamoms.pdf>.

²² Hugh T.J. Bainbridge and Keith Townsend, "The effects of offering flexible work practices to employees with unpaid caregiving responsibilities for elderly or disabled family members," *Human Resource Management Journal* Vol. 59, No. 5 (February 2020) // <https://doi.org/10.1002/hrm.22007>.

²³ *European Parliament and Council Directive (EU) 2019/1158 of 20 June 2019 on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU* (OJ L 188/79, 2019, 79–93).

who are defined as workers who live in the same household as the person who needs significant care or support for a serious medical reason.

Lithuania

At the outset it should be noted that in the Labour Code of Lithuania²⁴ (LC), the work-life principle is directly accentuated and covers the possibilities of caregivers to combine the performance of care and work. According to Article 28, employers must take measures to help employees fulfil their family commitments. In such cases, as provided for in the LC, employee requests related to the fulfilment of family obligations must be considered by an employer and given a written response. Also, employees' conduct and their actions at work must be assessed by their employers with a view to the practical and effective implementation of the principle of work-life balance.

The LC contains several groups of flexible working measures that can help to work and family responsibilities. The first group includes time-related measures, of which the most extensive and most helpful for caregivers in terms of flexibility is the agreement on part-time work (Article 40(5) of the LC). Research confirms that part-time work increases women's participation in the labour market.²⁵ The return to the labour market of women who have given birth is driven by the possibility of returning to their previous job, not full-time, but with a part-time workload.²⁶ However, it should also be assessed that this measure does not help the workers who use it in the long-term because lower wages lead to lower contributions to social security funds, lower pension benefits, and a higher risk of poverty.²⁷ Therefore, part-time work as an employer's binding measure should be applied proportionately, taking into account the extent of the employee's family obligations. The LC states that a part-time arrangement can be requested by a pregnant employee, an employee who has recently given birth, an employee who is breastfeeding, an employee who is raising a child under the age of eight, a single parent raising a child under the age of 14, and an employee who is raising a disabled child under the age of 18 (Article 40(5) of the LC). Such a wide range of entitled persons meets the requirement of proportionality because the marital situation of the employee is considered. Other time-related flexible measures established in the LC include the right to choose a

²⁴ *Labour Code of Republic of Lithuania* (TAR, 2016, No. 23709).

²⁵ Paolo Barbieri, Giorgio Cutuli, Raffaele Guetto, and Stefani Scherer, "Part-time employment as a way to increase women's employment: (Where) does it work?" *International Journal of Comparative Sociology* Vol. 60, No. 4 (June 2019) // <https://doi.org/10.1177/0020715219849463>.

²⁶ Office of the Equal Opportunities Ombudsperson of Lithuania, *supra* note 21.

²⁷ Ona Gražina Rakauskienė, Eglė Krinickienė, and Vaida Servetkienė, *supra* note 13, 62; Violeta Šilingienė and Gintautas Radvila, "The Differentiation of Gender Wage in the Baltic States," *Management Theory and Studies for Rural Business and Infrastructure Development* Vol. 38, No. 3 (2016) // <http://dx.doi.org/10.15544/mts.2016.24>.

work shift for a person raising a child under the age of three and, whenever possible, for a person raising a child under the age of seven (Article 115(3) of the LC). These measures are complemented by the limited possibility for an employer to assign passive on-call duty or passive on-call duty at home with respect to certain categories of caregivers. In particular, the worker's consent is required for women who have recently given birth and are breastfeeding, and for those who are raising a child under the age of 14 or a disabled child under the age of 18 (Article 118(5) of the LC).

Finally, the latest amendments to the Labour Code (Article 112(5) of the LC) provide for a reduced working time of thirty-two hours per week (retaining salary of full working time) for one of the parents raising a child up to the age of three. The norm applies only to persons working in the public sector. This measure is intended to encourage parents of young children (especially mothers) to maintain their qualifications and combine work with childcare. In case of success, it is predicted that the private sector will also apply the measure.²⁸

Meanwhile, there are significantly fewer preferential conditions for non-childcare. An employee who has to care for a family member or a person living with the employee may request a part-time agreement (Article 40(5) of the LC), whereas a person caring for a disabled person may be placed on the passive on-call duty or passive on-call duty at home only with their consent (Article 118(5) of the LC).

The second group of measures intended to balance work and family responsibilities is related to the form of work. Studies show that women who have given birth would be able to return to work more quickly if they could work remotely.²⁹ Unlike part-time work, remote work does not have a negative impact on the employees' income, so this type of employment should be more beneficial for caregivers. However, the LC provides that remote work can be allocated to the same group of persons as part-time work (i.e., pregnant women, new mothers, breastfeeding mothers, employees raising a child under the age of eight, single parents of a child under the age of 14 or a disabled child under the age of 18 (Article 52(2) of the LC). It should be noted that the amendments to the Labour Code, which came into effect on the 1st of August 2022, not only cancelled the rather strict regulation according to which the law guaranteed these persons at least one-fifth of the total working time to work remotely but also granted the right to demand remote work to caregivers for their relatives (those who have submitted a medical certificate from a care institution based on the need to take care of (supervise) a family member

²⁸ State Labour Inspectorate of the Republic of Lithuania, "Changes to the Labor Code from January 1, 2023: Frequently Asked Questions" (December 2022) // https://www.vdi.lt/Forms/Naujienos1.aspx?Tekstai_ID=3859&lang=lt.

²⁹ Office of the Equal Opportunities Ombudsperson of Lithuania, "Annual Report for the Year 2018" (March 2019): 50 // <https://lygybe.lt/data/public/uploads/2019/04/Igk-2018-m.-veiklos-ataskaita-.pdf>.

or a person living with them). Such a step by the legislator was expected and welcomed in the context of balancing family and work obligations.

Another flexible form of work is the job share employment provided for in Article 93(3) of the LC, which, if possible, in terms of organisation and production, must be concluded at the request of an employee raising a child under the age of seven. This form of work allows the employee to plan their flexible working time, but it usually means shorter working hours and lower wages. The threshold chosen by the legislator, the age of the child, is adjusted to the age at which the child starts school and gives more flexibility to caregivers of children.

The third group of measures designed to protect employees both raising children and caring for relatives concerns a different way in which to an employment contract can be terminated. In particular, caregivers benefit from additional guarantees in case of the termination of an employment contract at the will of the employer. Firstly, it is forbidden to terminate an employment contract or to give a notice of termination to a pregnant employee until her baby reaches the age of four months (Articles 61(1), 61(2) of the LC). Secondly, it is not possible to terminate an employment contract at the will of the employer with employees who are raising a child under the age of three if there is no fault by the employee (Article 61(3) of the LC). Thirdly, the contract may not be terminated with an employee who is on pregnancy and childbirth leave, paternity leave, or childcare leave (Article 61(3) of the LC).

Several additional measures are applied when an employment contract is terminated at the employer's initiative when there is no employee's fault. The right of priority to keep their jobs due to redundant work function, when several employees perform it, and only a part of them is dismissed, applies to employees who are raising more than three children under the age of 14 or who are single parents raising biological/adopted children under the age of 14 or a disabled child under the age of 18 (Article 57(3.2) of the LC). The second measure concerns longer notice periods for terminating an employment contract: the notice periods (which normally are one month or two weeks) are tripled for pregnant employees, for employees raising a child under the age of 14, and for employees raising a disabled child under the age of 18 (Article 57(7) of the LC).

Caregivers for other family members who have been recognised as having less than 55% of their working capacity or family members who have reached the age of old-age pension and who have been identified as having a high or average level of special needs also have the right of priority to keep their jobs in case of the termination of the contract at the initiative of the employer due to redundant work function, when several employees perform it, and only a part of them is dismissed

(Article 57(3.2) of the LC). Caregivers who cannot perform their work function properly because they are caring for a family member at home (child, father, mother, husband, wife) or a person living with the employee who has been prescribed special need for permanent nursing or special need for permanent care may use a shorter than usual (five working days) notice period to initiate the termination of an employment contract (Art. 56(1.3) of the LC).

Estonia

Employment Contracts Act of Estonia (ECA) provides for a very limited number of flexible measures designed to balance the family and working interests of the caregivers. Basically, they are directed at two groups of caregivers: pregnant employees and employees entitled to maternity leave. These caregivers have the right to demand that the employer temporarily provide them with work corresponding to their state of health if the employee's state of health does not allow for the performance of the duties prescribed in the employment contract on the agreed-upon conditions (§ 18(1) of the ECA), and they may be sent on a business trip only with their consent (§ 21 of the ECA). Also, this group of caregivers cannot be required to work overtime (§ 44(5) of the ECA). Estonian labour law does not provide any protection for any other group of caregivers, including parents with small or disabled children, such as flexible working schedules, the possibility of choosing working time, or the form of work. However, the specificity of the labour law provides an opportunity for employers and employees to agree on working conditions: § 43(1) of the Employment Contracts Act provides that the parties to an employment contract may agree on a shorter working time (part-time work). In practice, however, there are often problems in reaching a mutual agreement,³⁰ while leaving the task of balancing of working conditions to the will of the employer leaves caregivers without any real guarantee.

Broader protection for caregivers is provided in the case of the termination of an employment contract. Similar to the Lithuanian regulation, there are restrictions on the termination of an employment contract with persons providing unpaid care. Firstly, a pregnant woman or a woman who has the right to maternity leave is protected. An employer may not terminate employment due to a decrease in the employee's capacity for work. In addition, the Employment Act § 93 (1), (2) provides that an employer may not cancel an employment contract with a pregnant woman or workers on leave for childcare (maternity leave, paternity leave, adoptive parent leave, or parental leave due to lay-off), except upon cessation of the activities of the

³⁰ European Commission, "Estonia – Country Report Gender Equality 2021" (2021): 41 // <https://www.equalitylaw.eu/downloads/5502-estonia-country-report-gender-equality-2021-1-38-mb>.

employer or declaration of the employer's bankruptcy. Admittedly, this rule does not automatically protect caregivers because it applies only when the employee has warned the employer of the pregnancy or the right to leave related to the raising of the child before receiving the notice of the dismissal or within 14 of calendar days thereafter. The doctrine calls into question the compatibility of such conditional protection with European and international standards on maternity protection.³¹ The second measure is the preferential right of keeping a job in case of the cancellation of an employment contract by an employer for economic reasons (§ 89(5) of the ECA). This right belongs to an employee who is raising a child under the age of three.

Meanwhile, there are no flexible employment measures for caregivers for relatives in Estonian labour law.

Summing up, the norms of Lithuanian labour law provide for both a wider range of flexible working tools, which can help to balance the caring responsibilities and work functions, and a wider range of subjects than in Estonia. In both countries, pregnant workers and parents with minors are the main group of caregivers to whom the vast majority of measures are allocated. In Lithuania, in certain cases, flexible measures are also granted to parents of children under the age of 14 or children with disabilities under the age of 18, whereas Estonia does not provide protection for these caregivers. In Lithuania, caregivers of adult relatives have less choice of flexible working conditions compared to those who raise children, while in Estonia, they may not benefit from any flexible measures at all. As regards the flexibility measures provided for in the labour laws of the Republic of Lithuania, part-time work and remote work should be evaluated positively, but there are doubts about a too-narrow circle of persons who have the legally guaranteed right to work remotely. Both states do not provide for flexible working schedules as a measure for balancing work and family life, although there is no doubt that this would be of particular benefit both for persons caring for children and those caring for relatives.

2.2. PERIODS OF LEAVE AND DAYS OFF

If flexible employment measures allow caregivers to balance family and work functions, the second group of measures, that is, leave periods, allow caregivers to temporarily exclude themselves from active employment activity to devote more time to their family responsibilities, while at the same time maintaining the possibility for such workers to return to their jobs and receive financial benefits from the state social security system. Traditionally, periods of leave are associated with the

³¹ Gaabriel Tavits, "Estonian Employment Contracts Act: Cornerstone in Applying the Flexicurity in Estonia?" *Juridiskā zinātne / Law. Journal of the University of Latvia* No. 6 (2014).

biological function of a woman (pregnancy, childbirth, and childcare in the early years of its development), so it is a woman who withdraws from the employment relationship during the early child-raising periods. Without questioning the influence and importance of the mother on the development of the child in their early stages, it must be acknowledged that the mother's long withdrawal from an employment relationship has negative consequences for her career and financial situation. Firstly, a woman who has left employment often finds it difficult to return to it later.³² This trend correlates with the number of children raised in the family. Lithuanian scientists note that "[t]he participation of women in the labor market decreases with every subsequent child."³³ When women return to employment after the maternity leave, they often face a "maternity penalty"; studies show that the biggest pay gap is between a man and a woman with children, while the gap between a man and a woman without children is minimal. The doctrine even calculates the amount of the maternity penalties.³⁴ Moreover, as has already been said, it is women who bear the greater burden of caring for relatives. As a result, to ensure gender balance and alleviate the burden and consequences of unpaid care for women, recent EU policies have shown a trend towards greater involvement of men in care responsibilities. In this situation, a major breakthrough is expected to come from the Balance Directive, which provides for three types of leave: paternity leave (10 working days on the occasion of the birth of the worker's child), parental leave (each worker has an individual right to four months that is to be taken before the child reaches a certain age, up to the age of eight, and two months of parental leave that cannot be transferred), and caregivers' leave (five working days per year).

Lithuania

There are several types of caregiver leave periods in the Lithuanian LC. The first of these is the leave related to the birth of children and their upbringing in the early years, which can be granted to a sufficiently wide circle of caregivers. Firstly, women are granted pregnancy and childbirth leave (Article 132 of the LC), which cover 70 calendar days before a childbirth and 56 calendar days after the childbirth. Secondly, men are granted consecutive paternity leave from the child's birth until they reach the age of one (Article 133 of the LC), which lasts 30 calendar days and can be divided into no more than two parts.

³² Kathrin Morosow, *A Family Leave Length Trade-off? Women's Labour Force Status in Comparative Perspective* (Stockholm: Stockholm University, 2019).

³³ Rūta Brazienė and Sonata Vyšniauskienė, "Paid Leave Policies and Parental Leave Choices in Lithuania," *Tiltai* Vol. 85, No. 2 (2021) // <https://doi.org/10.15181/tbb.v85i2.2189>.

³⁴ Susan Bisom-Rapp and Malcolm Sargeant, *supra* note 1, 120.

Finally, there is paternal leave, known in the Lithuanian legal system as “childcare leave” (Article 134 of the LC), which lasts until the child reaches the age of three years and can be granted, at the choice of the family, to a wide range of relatives: mother (adoptive mother), father (adoptive father), grandmother, grandfather, and other relatives who actually raise the child, as well as an employee appointed as the child’s guardian. Childcare leave may be taken all at once or in parts, and different relatives entitled to this leave may take it in turns. From the 1st of January 2023, a new regulation entered into force, establishing a non-transferable two-month childcare leave. Either parent can take it at any time, until the child turns eighteen or twenty-four months old, all at once or in parts, but both parents cannot take non-transferable childcare leave simultaneously. This norm fulfils the requirements of the Balance Directive as well as involves the father in the care of the child, while at the same time reducing the negative consequences of motherhood for the mother.

Pregnancy and childbirth leave, paternity leave and childcare leave are all paid in accordance with the procedure laid down in the Law on Sickness and Maternity Social Insurance of the Republic of Lithuania (childcare leave is paid but only for the period until the child reaches the age of two). Thus, Lithuanian labour laws provide for a long period of time, and a considerably wide range of persons are entitled to periods of leave for the purpose of caring for a child. The only exception is the childcare leave granted to the mother, which lasts up to 56 days after the birth of the child, after which there is a legal possibility to involve other relatives in the care. However, statistics show that it is usually mothers who take parental leave. For example, in 2020, 75.6% of women and only 24.4% of men used this type of leave.³⁵

As mentioned above, during the period of non-participation in employment due to child care, caregivers lose the various bonuses that their non-caregiver co-workers receive (e.g., promotions or pay rise). Such cuts contribute to the pay gap and the poorer financial situation of women. The Lithuanian LC provides a solution to such a situation; according to the Article 131 (2), the employer shall ensure the employee’s right, after pregnancy, childbirth, paternity, or childcare leave, to return to the same or equivalent workplace of that previously, including remuneration, and to make use of all improved conditions, including the right to increased remuneration to which the employee would have been entitled if they had been working. Thus, the caregiver is guaranteed by the law not only to retain their job post but also to return to their workplace on equivalent non-discriminatory terms. In addition, protection is provided

³⁵ Rūta Brazienė, “Lithuania Country Note”: 395; in: Alison Koslowski, Sonja Blum, Ivana Dobrotić, Gayle Kaufman, and Peter Moss, eds., *17th International Review of Leave Policies and Research 2021* // 10.18445/20210817-144100-0.

not only to the woman, but also to the father and other relatives who have taken parental leave.

The second group of benefits available to caregivers relates to the annual leave. Some caregivers (pregnant employees and employees raising at least one child under the age of three, employees raising at least one child under the age of 14 or a disabled child under the age of 18, and employees raising two or more children) can choose annual leave time as a matter of priority (Article 128(4) of the LC). The LC also provides that the employer must satisfy the request to grant annual leave to a pregnant worker before or after pregnancy and childbirth leave and to the father during the pregnancy and childbirth leave taken by the mother of their child or before or after a paternity leave (Article 128(5) of the LC). Secondly, employees who are single-handedly raising a child under the age of 14 or a disabled child under the age of 18 are granted longer annual leave, that is, 25 or 30 working days (Article 138(1) of the LC). Thirdly, employees raising one child under the age of 12 are granted one additional day off per three months (or eight hours less per three months), employees who are raising a disabled child under the age of 18 or two children under the age of 12 are granted an extra day off per month (or two working hours less per week), and those raising three or more children under the age of 12 get two additional days off a month (or four working hours less per week). For employees who are raising a child under the age of 14 and who are not entitled to extra day off, the law grants at least half a working day off per year on the first day of school (Article 138(4) of the LC). All of the above leave periods are paid. Finally, caregivers have the opportunity to get unpaid leave. Thus, an employee raising a child under the age of 14 is granted up to 14 calendar days of unpaid leave, an employee raising a disabled child under the age of 18 is granted up to 30 calendar days, and a father, at his request, during the pregnancy, childbirth leave, and childcare leave taken by the mother of their child (or a mother during childcare leave taken by the father) may take a leave of up to three months (Articles 137(1.1), 137(1.3) of the LC).

Finally, Lithuanian labour law provides for two measures to help employees caring for relatives. Firstly, the employer must satisfy the request of the employee caring for sick family members and for the disabled to grant annual leave (Article 128 (5.4) of the LC). Secondly, an employee caring for a disabled relative can request an unpaid leave of up to 30 days, or an employee caring for a sick relative can request the time as is recommended by the healthcare institution (Articles 137(1.2), 137(1.4) of the LC).

Estonia

Estonia's Employment Contracts Act provides for a number of leaves to ensure safe and adequate conditions for childbirth and the upbringing of little children. Firstly, all employed mothers are eligible for maternity leave, including women working under temporary contracts if the contract lasts more than one month. Maternity leave lasts up to 100 calendar days and becomes collectible 70 calendar days before the estimated date of the child's birth (§59 of the ECA). The second type of childcare-related leave period is paternity leave to the extent of 30 calendar days (§60 of the ECA), which benefits fathers. This type of leave can be used flexibly: either all at once or in parts (yet the employer has the right to refuse to grant paternity leave in parts shorter than seven calendar days) during the period starting from 30 days before the estimated date of the child's birth until the child reaches the age of three.

The third type of leave is parental leave (§62 of the ECA), which belongs to a parent raising a child. The use of parental leave is flexible as it may be taken until the child is three years old. However, only one of the parents is entitled to parental benefit at the same time, except for the 60-day period during which the child's parents can be together on parental leave and both receive parental benefits.³⁶

Therefore, under Estonian legislation, only the parents of the child are entitled to the periods of leave. Statistics show that this right is more often used by women: according to 2021 data, 87.3% of the recipients of the benefit were women, and only 12.8% were men.³⁷ Recently, the Estonian regulation of the parental leave has been made more flexible and contributes to achieving gender balance by combining work and family functions. For example, from the 1st of July 2020, the duration of paternity leave became 30 days instead of 10 days, and from the 1st of April 2022, the 140-day-long pregnancy and childbirth leave was replaced by 100 days of maternity leave.

Similar to the Lithuanian LC, §18 (5) of the ECA provides for an equivalent guarantee to caregivers returning to work after maternity leave: upon termination of maternity leave, a woman has the right to use the improved working conditions that she would have been entitled to during her absence. The scope of protection is narrower in Estonia: it is granted only to women only after maternity leave. Caregivers returning after paternal or paternity leave are not guaranteed a non-discriminatory return.

The second type of annual leave granted to caregivers includes paid and unpaid child leave and the right to choose the time of annual leave. The latter right is

³⁶ *Family Benefits Act of the Republic of Estonia* (RT I, 2016, 1).

³⁷ Katre Pall and Marre Karu, "Estonia Country Note": 243; in: Alison Koslowski, Sonja Blum, Ivana Dobrotić, Gayle Kaufman, and Peter Moss, eds., *17th International Review of Leave Policies and Research 2021* // 10.18445/20210817-144100-0.

provided for in the Employment Contracts Act §69, which establishes the right to demand an annual holiday at a suitable time for a woman immediately before and after maternity leave or after parental leave; for a man immediately after parental leave or during a mother's maternity leave; for a parent raising a child of up to the age of seven; and for a parent raising a child from the age of seven to ten during the child's school holidays. Estonian labour law also provides for child leave for parents of children under the age of 14 and parents of a disabled child under the age of 18. The duration of the paid child leave is 10 working days per calendar year per child until the child reaches the age of 14 years (§ 63 of the ECA). If a parent has more than one child, the parent has the right to a maximum of 30 calendar days of child leave per one calendar year. Child leave for parents of a disabled child (§ 63¹ of the ECA) is extended to one working day per month until the child reaches the age of 18. All leaves are paid according to the provisions of the Family Benefits Act. The duration of unpaid leave for this group of caregivers is up to 10 working days every calendar year (§ 64 of the ECA).

The third group of benefits is given to persons who provide care for adults with a profound disability (§ 65¹ of the ECA). They are entitled to the caregiver's leave up to five working days per calendar year. A caregiver's leave is compensated according to the minimum wage.

Thus, Lithuanian and Estonian labour laws provide for a wide list of annual leave benefits that can be used by persons raising children. These caregivers may be entitled to both preference for choosing annual leave time, additional paid rest days each month, and access to unpaid leave. Additional annual leave benefits for caregivers exist only in Lithuania. The circle of persons who can take advantage of the benefits of annual leave is wide enough in both countries. It is true that the criteria for granting preferences are not always transparent. For example, it is not clear why in Lithuania an additional day off per month is not given to parents raising one child under the age of 12 or why the age threshold for granting preferences is 14 years in some cases and 12 in others. Meanwhile, in Estonia, single parents cannot benefit from annual leave, but, unlike in Lithuania, child leave is more flexible and can be used throughout the year.

The Lithuanian LC provides for a wide range of persons who can take parental leave and allows the family to choose the most acceptable childcare model. Meanwhile, Estonian labour law limits the circle of caregivers to only the mother and the father, and the guarantee to use the improved working conditions is provided only to mothers after returning from maternity leave. However, both countries have extended parental leave up to three years. Given that, despite the increasing opportunities for fathers to get involved in childcare, women still bear the main

burden; such policy is unfavourable to women's career opportunities and financial security. In both countries, parental time off is inversely proportional to the age of children; as children grow older, parental benefits decrease. Both countries provide leaves for caregivers caring for relatives, but Estonia provides for paid (and shorter) leave, while Lithuania provides longer-term but unpaid leave.

3. ANTI-DISCRIMINATORY LABOUR LAW RULES

It is common for caregivers to have a more limited ability to fully devote themselves to work activities compared to employees who have no care obligations. It is very likely that caregivers will be at the risk of discrimination. The question arises as to what anti-discrimination mechanisms, which operate in parallel with the labour law institutes discussed above, these persons can benefit from. The EU, whose main activity is the development of the principle of equality, has not included care-based discrimination among the prohibited discriminatory grounds. Therefore, to prove discrimination, caregivers have to establish a link between the disadvantages caused by their caring responsibilities and one of these recognised grounds.³⁸

Firstly, given that most caregivers are women, indirect gender discrimination can be used to defend caregivers' rights.³⁹ Secondly, the ECJ has developed a case law whereby the protection of caregivers in the case of discrimination is associated not with the caregiver themselves, but with the person in need of that care.⁴⁰ According to the ECJ, caregivers are protected by virtue of their relationship (association) with a caregiver who has a characteristic protected by non-discrimination standards. As a consequence, the protection of caregivers should be granted because of an association with a disabled person or a person of a certain age.

Lithuania

The principle of gender equality is enshrined in Article 29 of the Constitution of the Republic of Lithuania; however, associated discrimination is not mentioned here as a prohibited form of discrimination. Although the linguistic analysis of this article leads to the conclusion that the list of grounds for non-discrimination set out in the Constitution is exhaustive, the case law of the Constitutional Court of the Republic of

³⁸ Eugenia Caracciolo di Torella and Annick Masselot, *supra* note 10, 107.

³⁹ However, indirect discrimination is not always an appropriate form of defence, as in some cases, such as caring for a spouse, care is provided by both men and women. Therefore, indirect discrimination on grounds of sex would be difficult to take advantage of in this case (see *ibid.*, 110).

⁴⁰ *Coleman v Attridge Law and Steve Law*, European Court of Justice (2008, Case C-303/06); "*CHEZ Razpredelenie Bulgaria*" *AD v Komisija za zashtita ot diskriminatsia*, European Court of Justice (2015, Case C-83/14).

Lithuania interprets Article 29 not formally, but comprehensively.⁴¹ Such a position allows courts to be flexible in their response to the situation and to interpret the list of grounds for non-discrimination referred to in Article 29 of the Constitution in an expanded manner. Non-discrimination in employment relations is developed in the three other laws. First of all, Article 2 of the Law on Equal Opportunities for Women and Men⁴² is important for the protection of caregivers in employment and prohibits both direct and indirect discrimination on grounds of gender, in particular by reference to marital or family status. Secondly, Article 2 of the Law on Equal Treatment⁴³ prohibits direct and indirect discrimination on the basis of gender. Both laws provide that the implementation of equal opportunities at work is the duty of the employer and must be ensured at all stages of the employment relationship. However, neither of these laws provides for a prohibition of associated discrimination. Because in the case of discrimination against caregivers, indirect discrimination on the grounds of gender is not always sufficient, the non-recognition of associated discrimination makes it difficult for caregivers to defend their rights. A draft amendment to the Law on Equal Treatment was submitted to the Parliament of the Republic of Lithuania in 2019,⁴⁴ in which associated discrimination is defined as discrimination against a person on the basis of a real or alleged relationship with another person on the basis of that person's sex, race, nationality, language, origin, social status, belief, belief or opinion, age, sexual orientation, disability, ethnicity, or religion and is defined as a separate form of discrimination; however, this proposal has not yet been adopted. Meanwhile, the third law that establishes the protection of caregivers' equal treatment, the LC, provides for a broad list of grounds for discrimination (Articles 2 and 26). In caregivers' case, the most relevant discriminatory grounds would be gender, marital and family status, and circumstances unrelated to the employees' professional qualities, which could cover almost all cases of discrimination against caregivers. The implementation of the principles of equality is the duty of the employer, and both direct and indirect discrimination is prohibited at any stage of the relationship between the employer and the employee. Actions of a descriptive nature against other employees or third parties during work or at the workplace are considered as a gross violation of labour discipline and are the basis for termination of an employment contract at the employer's initiative due to the employee's fault ((Article 58 (3.4) of the LC)).

⁴¹ *On the Convention for the Protection of Human Rights and Fundamental Freedoms*, Constitutional Court of Republic of Lithuania (1995, No. 22/94).

⁴² *Law on Equal Opportunities for Women and Men of the Republic of Lithuania*, *supra* note 8.

⁴³ *Law on Equal Treatment of Republic of Lithuania*, Official Gazette (2003, No. 114-5115).

⁴⁴ *Draft Amendment to Law on Equal Treatment of Republic of Lithuania* (2019, No. XIIIIP-3512).

Thus, it can be concluded that the principle of equality, especially with regard to gender equality, is sufficiently enshrined in the Lithuanian labour law system and reflects the aims set out in the EU directives. However, when assessing its application in practice, it should be noted that cases of a discriminatory nature, and thus cases relating to the defence of the rights of caregivers are almost non-existent in the case law. The first decision on caregivers' rights and on the balance of equal opportunities was taken in 2003 by the Supreme Court of Lithuania.⁴⁵ In this case, a conflict arose over the guarantee not to be dismissed during the period of raising a child under the age of three. The LC in force at the time prohibited the termination of an employment contract at the initiative or will of the employer with a pregnant woman and a mother raising a child under the age of three and only if there was no mother, father, or guardian raising a child up to the same age. Therefore, only single fathers could benefit from the said guarantee. In the situation investigated in the case, the employer not only failed to satisfy the man's request to take childcare leave until he was three years old, but also dismissed him. The Supreme Court stated that this was incompatible with non-discriminatory legal norms and gender equality, since a man can take care of a child in the same way as a woman. Another important case defending the equal opportunities of caregivers was decided by the Supreme Court in 2021. The court examined the situation⁴⁶ where the employer, having been informed about the employee's pregnancy, unreasonably issued an order for idle time, deprived all the work equipment provided to the employee, disconnected her from all electronic systems, and did not grant her leave, despite the employee's right to annual leave. In this case, the court recognised indirect discrimination on the basis of gender.

A specialised institution investigating violations of equal opportunities is the Equal Opportunities Ombudsperson. The majority of applications for the violations of equal opportunities are gender-based complaints. However, among them, situations relating to care account for a small proportion of all complaints. In 2021, the office received 1,011 applications for possible discrimination, including 32 applications on the basis of gender in the field of employment relations,⁴⁷ and among these only a few cases were based on the violations of caregivers' rights.⁴⁸ The main violations of equal opportunities for caregivers that came to the attention of the Equal Opportunities Ombudsperson were situations in which employers inquired about the

⁴⁵ *R. Aukštuolis v. AB "Pagirių šiltnamiai"*, Supreme Court of Lithuania (2003, Case No. 3K-3-747/2003).

⁴⁶ *UAB "SK Impex Service Center" v. S. G.-B.*, Supreme Court of Lithuania (2021, Case No. e3K-3-286-943/2021).

⁴⁷ Office of the Equal Opportunities Ombudsperson of Lithuania, "Annual Report for the Year 2021 (Infographics)" (March 2021) // <https://lygybe.lt/data/public/uploads/2022/03/lygiu-galimybiu-kontrolieres-2021-metu-veiklos-infografiaks.pdf>.

⁴⁸ Office of the Equal Opportunities Ombudsperson of Lithuania, "Decisions of the controller: sex" // <https://lygybe.lt/lytis>.

marital status of candidates looking for work, their plans to have children, and opportunities to combine the upbringing of children with work activities. The Ombudsperson's Office points out that such questions were asked by employers exclusively to women.⁴⁹

The cases investigated by the court and the Equal Opportunities Ombudsperson are limited to situations of childcare. There have been no cases involving discrimination on the grounds of long-term care. Naturally, in the absence of case-law, the courts have not been able to develop the doctrine of the associated discrimination recognised in the practice of the ECJ. According to experts, the low number of discrimination cases is due to the reluctance of victims to take legal action in courts or pre-trial investigation.⁵⁰

Estonia

The principle of equality of persons in Estonia is enshrined in the supreme legal act, the Constitution of the Republic of Estonia, Article 12 of which declares that "everyone is equal before the law. No one may be discriminated against on the basis of nationality, race, color, sex, language, origin, religion, political or other views, property or social status, or on other grounds." The regulation of the principle of equality by Estonia and Lithuania has developed along the same path. Although the list of grounds for non-discrimination in the Estonian Constitution is explicitly non-exhaustive, the Supreme Court has confirmed that the list of prohibited grounds for discrimination contained in the Constitution is only a sample list; therefore, it might provide a basis for protection against discrimination on any ground.⁵¹ In addition, the Constitutional Review Chamber of the Supreme Court has argued that the constitutional rule of equality and non-discrimination applies to "all spheres of life."⁵² Thus, although discrimination on the grounds of association is not mentioned in the Estonian Constitution, its subsequent interpretation would allow caregivers to rely on this basis to defend their equal rights in employment relationships.

Further, special law for the implementation of the constitutional principle of gender equality, that is, the Gender Equality Act,⁵³ prohibits direct and indirect discrimination on the grounds of gender (§ 5 (1)). It also stipulates that it is the employer's responsibility to ensure equal opportunities in employment relationships. The family-work balance is reflected by employers' duty to create working conditions

⁴⁹ Office of the Equal Opportunities Ombudsperson of Lithuania, "Annual Report for the Year 2021" (March 2021): 17 // <https://lygybe.lt/data/public/uploads/2022/03/2021-metu-lgk-veiklos-ataskaita.pdf>.

⁵⁰ European Commission, "Country Report Gender Equality. Lithuania 2021" (2021): 5 // <https://www.equalitylaw.eu/downloads/5503-lithuania-country-report-gender-equality-2021-1-01-mb>.

⁵¹ *Constitutional judgment of Supreme Court en banc of Estonia (2011, Case No. 3-4-1-12-10)*.

⁵² *Constitutional judgment of Constitutional Review Chamber of the Supreme Court of Estonia (2002, Case No. 3-4-1-1-02)*.

⁵³ *Gender Equality Act of the Republic of Estonia, supra note 9.*

suitable for both women and men and enhance the reconciliation of work and family life, taking into account employees' needs (§ 11 (3)). In the case of caregiver protection, § 6 is important and provides that the employer's activities shall also be deemed to be discriminatory if the employer, in selecting a person for employment or a position, hiring or admitting to practical training, promoting, or selecting for training or performance of a task, overlooks a person or treats a person less favourably because of pregnancy, child-birth, parenting, performance of family obligations, or other circumstances related to gender. In other words, this norm provides a sufficiently broad protection against caregivers' discrimination, especially with regard to long-term care.

The principle of non-discrimination is also enshrined in the main legal act governing employment relationships in Estonia, i.e., the Employment Contracts Act. However, the principle of equality has not been developed and is limited to the declaration of the principle of equality and the provision that it is the employer's duty to protect workers against discrimination. Further questions are addressed in the special equality laws (i.e., the Equal Treatment Act and the Gender Equality Act (§ 3)).

When assessing the cases of discrimination against caregivers, it must be acknowledged that there are only few discrimination cases in Estonia's highest courts and no discrimination cases directly dealing with violations of equal treatment of caregivers. There is also no case law on indirect discrimination⁵⁴ and no case law that would apply association-based discrimination.⁵⁵ According to literature, this situation is due to the long duration and high costs of proceedings. As a consequence, the cases are not litigated up to the Supreme Court, but rather are only decided in Labour Disputes Commission or the Court of First Instance.⁵⁶ In addition, employees lack awareness of what constitutes impermissible unequal treatment of an employee.⁵⁷ Finally, although there are several cases in which regional courts have dealt with issues of discrimination against pregnant women in dismissal, Estonian case law often gives priority to the rights of the employer. For example, in the case of termination of employment contracts where a pregnant employee accuses her employer of discrimination on the grounds of pregnancy, the employee will presumably lose the

⁵⁴ European Commission, "Country Report Gender Equality. Estonia 2021" (2021): 16 // <https://www.equalitylaw.eu/downloads/5502-estonia-country-report-gender-equality-2021-1-38-mb>.

⁵⁵ European Commission, "Report on Non-discrimination. Estonia 2021" (2021): 15 // <https://www.equalitylaw.eu/downloads/5478-estonia-country-report-non-discrimination-2021-1-12-mb>

⁵⁶ European Commission, "Country Report Gender Equality. Estonia 2021" (2021): 29 // <https://www.equalitylaw.eu/downloads/5502-estonia-country-report-gender-equality-2021-1-38-mb>;

European Commission, "Report on Non-discrimination. Estonia 2021" (2021): 36 // <https://www.equalitylaw.eu/downloads/5478-estonia-country-report-non-discrimination-2021-1-12-mb>.

⁵⁷ European Commission, "Country Report Gender Equality. Estonia 2018" (2018): 7 // <https://www.equalitylaw.eu/downloads/4715-estonia-country-report-gender-equality-2018-pdf-1-83-mb>.

case if an employer can point to poor work performance and prove that the dismissal was not due to pregnancy.⁵⁸ The case of Tartu County Court concerning the dismissal of a pregnant employee during the probation period is a case in point. The employer argued that the employee's appearance was not correct enough for her position as the service provider. Although the Labour Dispute Committee had ruled that the employer must pay six months of the average salary and EUR 1,000 for moral damage, the court reduced the compensation to three months' salary without compensation for moral damage.⁵⁹

In addition to the court, discrimination disputes in Estonia are dealt with by several other institutions (the Chancellor of Justice, the Labour Dispute Committee, and the Gender Equality and Equal Treatment Commissioner), which can provide an initial assessment of the situation. However, it should be noted that, as with court litigation, there are very few disputes regarding discrimination against caregivers in employment relationships. In 2018, for example, the Labour Dispute Committee received 2,716 labour dispute petitions, of which only three were related to discrimination for family reasons.⁶⁰ The Chancellor's report notes that in the period 2020–2021, the Chancellor did not initiate any conciliation proceedings, and in the period 2019–2020, the Chancellor resolved 11 petitions with complaints against discrimination, but only one of these appeals concerned the violated rights of caregivers, when during a job interview the employer had asked the applicant about the number of children and the grandparents' ability to look after them. After having heard that the child was six years old and that the grandparents did not live in Estonia, the employer refused to carry on with the job interview.⁶¹ As in the case of Lithuania, disputes regarding equal opportunities for pregnant workers in labour relations are the most common, and the Gender Equality and Equal Treatment Commissioner reports an increasing number of claims in connection with pregnancy.⁶²

In summary, the implementation of the principle of non-discrimination in Lithuania and Estonia has followed the same path. Both countries have transposed the EU non-discrimination policy rules into national law, and case law has allowed for a broad and comprehensive application of the principle of equality. The legislative framework has made it possible to address indirect gender discrimination, and this is

⁵⁸ European Commission, "Country Report Gender Equality. Estonia 2021" (2021): 44 // <https://www.equalitylaw.eu/downloads/5502-estonia-country-report-gender-equality-2021-1-38-mb>.

⁵⁹ *Judgment of Tartu County Court (Estonia) (2016, Case No. No. 2-14-57370)*.

⁶⁰ Estonian Labour Inspectorate, "Overview of Working Environment 2018" (2018) // https://www.ti.ee/sites/default/files/dokumendid/Meedia_ja_statistika/Toeoekeskonna_uelevaated/2015/Tooinspektsiooni_Aastaraamat_2018_EN_v2_veeb.pdf.

⁶¹ Chancellor of Justice of Estonia, "Chancellor's Year in Review 2019-2020. Equal Treatment" (2020) // <https://www.oiguskantsler.ee/annual-report-2020/equal-treatment>.

⁶² European Commission, "Country Report Gender Equality. Estonia 2021" (2021): 36 // <https://www.equalitylaw.eu/downloads/5502-estonia-country-report-gender-equality-2021-1-38-mb>.

a measure to protect a significant part of caregivers. However, the principle of non-discrimination is more consistently and widely established in Lithuanian labour law. This has a dual effect. This means that it is easier for employees to defend their rights if they can rely on a rule that directly protects their rights, while the broader establishment of non-discrimination rules fulfils the function of informing and educating employees. This also leads to greater activity on the part of caregivers in defending their rights in courts and pre-trial proceedings. However, it must be acknowledged that indirect gender discrimination does not cover all possible cases of discrimination against female caregivers. The case law in both countries has not yet developed the application of associated discrimination, although this would be a very useful tool for persons caring for their relatives. In addition, in both countries, the main focus is on childcare, and there is practically no protection for long-term caregivers.

CONCLUSIONS

In addressing the gender pay gap, which remains an acute social problem in Lithuania and Estonia, two main directions can be distinguished that aim to enhance the possibilities for female caregivers to remain in active employment. These are specific labour law measures (which in turn can be divided into changes in working conditions and leave periods) and anti-discrimination norms, which significantly complement labour law provisions. However, the particular regulation of these measures differs in both jurisdictions.

Comparing the first subset of rules on working conditions, the LC provides for a wider range of flexible working measures that can help balance family and work responsibilities and a wider range of subjects who can use them. Among the most important flexible measures provided for by the LC are part-time work and remote work. However, the law provides for a rather limited application of the employee's right to choose remote work. Meanwhile, Estonian labour law is characterised by the flexibility, which is more favourable to the employer than to the employee, and there are fewer measures of balancing working and family life. In particular, there are no guarantees for caregivers to choose remote work or reduced working hours. Moreover, neither Lithuanian nor Estonian labour laws call for flexible work schedules as a means for employees to reconcile work and family life, although there is no doubt that this would be extremely useful for persons caring for both children and other relatives. The introduction of this measure would benefit caregivers. The Lithuanian legislator is also advised to extend employees' right to opt for remote work, without limiting it to one-fifth of standard working hours.

Another important subset of the labour law measures concerns leave periods. Again, the LC provides for a wider range of persons who can take leave to care for a child under the age of three (in addition to the child's parents, grandparents and other relatives raising a child) and gives the family a wider possibility to choose the most acceptable model of childcare. In contrast, Estonian labour law limits the circle of caregivers who can take this type of leave to the mother and father only. It is important that both countries provide the guarantee of improved working conditions on return from childcare-related leave, but Estonia applies this guarantee more narrowly to only mothers after maternity leave, while Lithuania ensures the possibility of returning to improved working conditions for all relatives who have cared for a child under the age of three. However, the main burden of childcare in both countries still falls on women. Given that Lithuania and Estonia apply a long parental leave of three years, the current regulation of childcare is therefore detrimental to women's career prospects and financial security. The implementation of the non-transferable parental leave, as provided for in the Balance Directive, may reduce the problem by involving fathers more in caring activities and allowing mothers to focus more on work and career.

Further, Lithuanian and Estonian labour laws provide a long list of annual leave benefits that can be used by persons raising children. Caregivers have priority in choosing a vacation time, an extra day off, and the opportunity to get unpaid leave. These options should be evaluated positively as they allow for a better reconciliation of work and care obligations.

In terms of non-discrimination measures, both Lithuania and Estonia have transposed the EU's non-discrimination policy into national law, and the legal framework has made it possible to apply indirect discrimination on the grounds of gender, which is a significant defence for caregivers. However, neither the legislation nor the case law of both countries provides for the application of discrimination on the basis of association. As indirect discrimination on the grounds of gender does not cover all possible cases of care by women, the remaining gap in relation to associated discrimination means that some caregivers remain unprotected.

In both Lithuania and Estonia, labour rights and non-discrimination guarantees apply mainly to childcare. Much less attention is paid to long-term care. However, Lithuanian labour law provides more guarantees as well as a broader range of long-term caregivers than Estonian labour law. There is no doubt that in response to the challenges of an ageing society, the opportunities for caregivers to combine work and care duties will need to be further developed in the near future. Appropriate measures in Estonian labour law could include rights to part-time work, flexible working hours, and job-sharing agreements. Meanwhile, both in Lithuania and Estonia, job share

agreements or additional paid rest days per month should be provided. The suggested changes would arguably better adapt the regulation of both Baltic states to the challenges ahead.

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