

Ms Kristalina Georgieva, Vice-President for Budget and Human Resources
Ms Věra Jourová, Commissioner for Justice, Consumers and Gender Equality
European Commission
Rue de la Loi 200
1049 Brussels

Brussels, 30 September 2016

Dear Vice-President Georgieva,
Dear Commissioner Jourová,

Reproductive rights: discrimination against LGBTI+ staff members of the EU institutions

The ÉGALITÉ association promotes equality for Lesbian, Gay, Bisexual, Trans* & Intersex (LGBTI+) staff across all EU institutions. We have recently received complaints from staff members on two specific issues, to which we would like to draw your attention.

1. Discrimination against LGBTI+ staff with regard to reimbursements for fertility treatments

A lesbian colleague has been going through assisted reproduction treatments to have a baby with her wife. Her requests for reimbursement of 7 insemination expenses were rejected under the EU Joint Sickness and Insurance Scheme (JSIS) on the basis of the condition for insemination reimbursement which requires demonstrating **pathology from the male person of the couple** (with a medical report).

While the AIPN has argued that this condition is the same for all couples, it clearly discriminates against lesbians since there is no male person involved. The requirement to have one (and only one) male person constitutes a **direct discrimination, as only heterosexual couples can possibly qualify** in demonstrating pathology "from the male person of the couple". Since LGBTI staff could never fulfill this condition, they are automatically excluded from the reimbursement of the costs of insemination treatments.

We consider that, with political will, the EU institutions can ensure equality of treatment for LGBTI colleagues. **Since it was possible in the past and under the existing legal framework to cover insemination and IVF expenses for lesbian colleagues**, we ask the European Commission to go back to a more inclusive interpretation of the rules.

We propose that the AIPN issue guidance, setting out that:

- **LGBTI+ staff may benefit from the same reimbursement of insemination treatments as heterosexual couples, without having to demonstrate any pathology;**

- **LGBTI+ staff may benefit from the reimbursement of IVF treatments without having to demonstrate any pathology, after a given number of failed inseminations, taking into account the scientific literature.**

2. Discrimination of male couples for maternity leave/special adoption leaves in case of surrogacy

The only parents that cannot – under a strict interpretation of the decision on leave – benefit from 20 weeks of leave are those parents whose children are born to the intended parents with the help of a third woman. The altruistic surrogacy is legal in several EU member states¹ as well as in other developed countries such as United States of America and Canada. The practice where the male homosexual couples are not entitled to a leave equivalent to maternity or adoption leave directly discriminates against them, putting them into an inferior position compared to other staff members. The United Kingdom is a good example where the male homosexual parents can benefit from the equivalent leave to the maternity leave in case of surrogacy.²

We urge the European Union institutions to make the maternity (or equivalent) leave gender-neutral and to systematically grant male homosexual couples a 20-weeks leave in cases when;

- **both male parents are on the birth certificate. In this case leave should be granted to one of the parents (the EU official), or in case both are EU officials, a possibility to split the leave between them should be made possible;**
- **one male parent (EU official) is on the birth certificate with another woman who has renounced her maternity rights;**
- **male parent (EU official) is the only person on the birth certificate.**

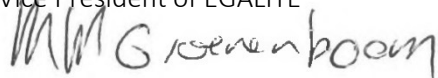
You can find in annex of this letter more details about the cases we encountered; however, ÉGALITÉ is available to meet with you at your convenience to further discuss this matter.

We thank you in advance for the attention you will give to this request.

Yours sincerely,

Margreet GROENENBOOM

Vice President of ÉGALITÉ



¹ Altruistic surrogacy is legal and practiced in the Netherlands, Belgium, United Kingdom, Czech Republic, Greece and Cyprus.

² <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors/maternity-leave>

Annex 1 – Additional explanations

Discrimination against LGBTI+ staff with regard to reimbursements for fertility treatments

In rejecting the art.90 complaint introduced by the colleague related to the non-reimbursement of insemination expenses, the AIPN argues that the JSIS *only covers costs connected with a sickness*. This is not correct, since the JSIS covers many costs that are not connected with any illness at all (e.g. costs related to pregnancy and delivery, consultation of a dietician, orthodontic treatment for children, etc.).

In addition, after 7 failed inseminations, the lesbian colleague introduced a request for authorization for In Vitro Fertilization (IVF) treatment over a month ago. The AIPN has rejected this request on the basis that there was no pathology. Again, this is due to a restrictive interpretation of the rules. The General Implementing Provisions (GIPs) of the JSIS state: *"The costs of in vitro fertilization resulting from sterility connected with a pathological condition of the member or his/her spouse or partner will be reimbursed subject to prior authorization [...]"*.

Like for insemination, this restrictive interpretation of the rules is again prejudicial to lesbians, as the woman trying to have a baby may not have any pathology but may however suffer from unexplained infertility. It is important to know that scientific literature recommends switching to IVF after a number of failed inseminations as the success rate is higher with IVF³.

ÉGALITÉ finds the present situation unacceptable for institutions which publically claim to fight discrimination on the basis of sexual orientation.

GIPs often simply do not foresee the case of LGBTI+ colleagues, which is not surprising, given the fact that the GIP on the JSIS for instance dates back to 2007. However, the existing legal framework can be interpreted in a way which meets the EU non-discrimination laws and the reality of the 21st century. The AIPN should adopt new decisions on how to interpret the GIPs in order to guarantee equal treatment of staff regardless of their sexual orientation.

We note that in more and more Member States the health insurance covers the costs of fertility treatment for lesbians and/or for single women, as mentioned in the parliamentary question raised by

³ An article published in "Fertility and Sterility" summarises the findings of a study "Predictive factors for pregnancy after intrauterine insemination (IUI): an analysis of 1038 cycles and a review of the literature" (Merviel P, Heraud MH, Grenier N, Lourdel E, Sanguinet P, Copin H., Jan. 2010). The article states: *"In women under 40 years of age, 3-4 cycles should give a reasonable chance to achieve a pregnancy, and if the patient is open to other types of treatment after this many cycles of IUI, IVF should be recommended. In women with an ovulatory cycles or when donor sperm is used, IUI can be attempted up to 6 times."*

Malin Björk, MEP⁴. The EU institutions are clearly lagging behind several Member States when it comes to the reproductive rights of the LGBTI+ staff.

There are now 12 EU Member States where couples (regardless of the partners' sexual orientation and/or gender identity) are not facing any legal barriers in order to get fertility treatment, with often at least partial reimbursement of costs: Austria, Belgium, Croatia, Denmark, Finland, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. Under the Belgian system in particular, lesbians benefit from the reimbursement of all insemination and IVF costs except the acquisition and preparation of sperm.

By issuing guidance as we request, the AIPN would allow the EU institutions to be aligned with this growing number of Member States.

Discrimination of male couples for maternity leave/special adoption leaves in case of surrogacy

The Staff regulation allows most parents to benefit from 20 weeks of leave to take care of their children. In line with the EU Decision on leave of 16 December 2013, granting either Maternity leave (II.a.14), Leave for adoption of a child (II.a.13) or Leave following death of the mother during/before maternity leave (II.a.9).

The only parents that cannot – under a strict interpretation of the decision on leave – benefit from 20 weeks of leave are those parents whose children are born to the intended parents with the help of a third woman.

The jurisdictions and the way the birth of the child and parental rights are regulated can vary greatly;

1. In some jurisdictions, the two intended parents are indicated on the birth certificate and thus neither of the intended parents is legally adopting the child but they are de facto legal parents from birth. A male colleague from the European Parliament was denied the 20 weeks leave, even though the birth certificate listed only him and his husband. His husband, who is not an EU official, did not benefit from the maternity (or equivalent) leave either. Therefore, this married couple was put in an inferior position compared to other EU staff who automatically benefit from a maternity leave/adoption leave.
2. It is possible that the birth certificate lists a male person and the surrogate mother who has renounced her maternity rights. In that case, the spouse of the genetic father adopts the child. Under the current rules that couple would not benefit from a leave equivalent to the

⁴ Parliamentary question P-00556-16 of 6 July 2016.

maternity/adoption leave putting the couple into a disadvantaged position compared to other EU staff.

3. In other cases, the birth certificate can show only one person. A male colleague from the European Commission presented such a birth certificate and was given the equivalent to maternity leave.

It cannot be argued that parental leave should be used instead, because that leave can be used in all the other cases in addition to the original 20 week leave entitlement. Taking non-paid parental leave is simply not feasible for most couples, forcing the male couples to return to work shortly after the birth. On the other hand, a heterosexual or lesbian couple, where a female parent exists, benefits from a maternity leave.