SUMMARY

2016/7 The prohibition against gender-based discrimination applies to self-employed contractors (HU)

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In accordance with EU law, the prohibition against gender-based discrimination (in this case: dismissal relating to pregnancy) cannot be limited to employment relationships as defined in national law: it must also apply to other types of legal relationship, where one party provides services to another party for consideration, for an open-ended period of time under the supervision of a principal.

Facts

The defendant in this case was an international law firm. It engaged the claimant, a lawyer. It did so based on an agreement which was not an employment agreement, but under which the claimant agreed to perform services for the defendant in consideration of a monthly service fee. In 2004 the claimant became a partner at the defendant firm. She became entitled to a certain share of the profit in addition to her monthly fee. The parties' agreement provided that it could be terminated at six months' notice as at the end of any calendar half-year.

In 2006, the claimant announced that she was pregnant. Due to the pregnancy, she did not provide any services from the second quarter of 2006. In 2008 the defendant asked the

claimant to provide office management services, but the claimant had to refuse this due to the birth of her second child.

In 2009 the claimant informed the defendant that she was ready to return and provide services again after her absence. On or about 2 December 2009 the defendant verbally informed the claimant that it did not intend to continue the arrangement with the claimant.

The claimant brought an action, claiming her service fee for the duration of the notice period (€ 73,500) and her share in the profit for the year 2006 (€ 22,458).

The defendant argued that the parties had terminated their service relationship with mutual consent in 2006, when the claimant informed the defendant that she was discontinuing her services due to pregnancy. Consequently, in the defendant's view, there no longer was any contractual relationship.

Judgments

The first instance court rejected the claim, stating that, since the claimant had not provided any services to the defendant since mid-2006, she could prove neither the legal ground for, nor the amount of her claim. The claimant filed an appeal.

The second instance court accepted the claim and ordered the defendant to pay the total amount claimed, being € 95,958 with interest for late payment. The court stated that the service relationship between the parties had not terminated based on a mutually agreed separation, but as a result of the defendant's termination notice communicated on 2 December 2009. Therefore, given the contractual notice period of six months, the contract terminated on 30 June 2010. Even though the defendant did not request services to be performed during the notice period, this did not affect the obligation to pay the service fee, seeing that the claimant had offered to perform her contractual services and that the non-performance of those services was a result of the defendant's failure to make use of that offer. Therefore, the court found that the claimant was entitled to the contractual service fee for six months and to profit sharing based on the results in her last active year.

The defendant submitted a claim for extraordinary review to the Hungarian Supreme Court (Curia), in which it requested the court overturn the judgment of the second instance court and reject the claim. One of the defendant's arguments was that the service agreement had terminated in 2006, since the claimant had not provided any services to the defendant since that time. The parties had not agreed on suspension of their service agreement, hence they must be deemed to have agreed that the relationship terminated with mutual consent, even if this was not agreed in writing.

Alternatively, the claimant argued that, if the court were to find that the defendant's verbal statement made on 2 December 2009 was a notice to terminate the agreement, that statement must be considered to have constituted termination with immediate effect. In that case, since the defendant did not ask the claimant to provide any services during the notice period, the claimant was not entitled to any service fee, and she was also not entitled to any profit sharing.

The Curia rejected the extraordinary review. It reasoned as follows.

The service agreement was not terminated in 2006, since the parties did not make any statement to that effect. Additionally, the fact that in 2008 the defendant asked the claimant to provide office management services indicated that even the defendant considered that the service relationship between the parties still existed. The Curia found that the service relationship had been terminated by the defendant's termination notice served on 2 December 2009. The service contract is clear about the termination conditions which must apply. The fact that the claimant did not provide any services during the notice period has no relevance regarding her entitlement to the service fee and therefore the claimant is entitled to the service fee for the notice period.

The Curia went on to observe that, since the service relationship was only terminated after the end of the claimant's absence due to childbirth the defendant's practice regarding pregnant partners and partners who are absent due to childbirth is also relevant. As highligh|ted by ECJ case law, the prohibition of discrimination and the rules on protection of pregnant women must apply during the whole term of the pregnancy and maternity leave. Dismissal due to pregnancy or another pregnancy-related reason can only affect women; therefore, it always means a direct gender-based discrimination (Paquay, C-460/06). The court argued that under EU law, the term 'worker' is wider than the definition of 'employee' in the national laws: the essential point is that the person provides services during a given time for and under the direction of another person in return for remuneration (except for minor, supplementary activities) (Lawrie-Blum, case 66/85; Collins, C-138/02). This applied in the present case.

Continuing, the Curia observed that the ECJ applies the requirement of equal treatment not only in employment relationships but also in legal relationships similar to legal relationships such as in the given court case. Based on the practice of the ECJ, direct or indirect gender-based discrimination (including dismissal) is prohibited in both the public and private sectors (Danosa, C-232/09). The ECJ provides the same protection to employees and self-employed persons (i.e. Maternity Directive 92/85; Equal Treatment Directive 76/207; Directive on Equal Treatment of Self-Employed Workers 86/613). The dismissal of an employee on account of pregnancy, or related to pregnancy, can affect only women and therefore constitutes direct gender discrimination. Regarding the rights of pregnant women and women who have given

birth, the purpose of EU law governing equality between men and women is to protect those women before and after they give birth. This purpose could not be achieved if the protection against dismissal granted to pregnant women under EU law were to depend on the formal categorisation of their employment relationship under national law or on the choice made at the time of their appointment between one type of contract and another. (Danosa).

Based on the above, the Curia found that the claimant was entitled to the service fee and profit sharing based on her results in her last active year.

Commentary

In practice, contracting parties often decide to conclude a service relationship instead of an employment relationship in order to have more flexibility. This court decision is significant since it highlights that such fundamental principles as the prohibition of gender-based discrimination and equal treatment apply, not only to employment relationships, but also to similar contractual relationships. Therefore, parties cannot 'contract out' these principles by choosing another form of legal relationship.

It is, however, not clear why the Curia needed to refer to gender-based discrimination, since the claimant did not claim damages and did not argue that the decision to terminate her contract was discriminatory. She merely requested payment of her service fee for the notice period and profit sharing for the first part of 2006. The notice period was regulated in the contract between the parties and the profit sharing depended on the defendant's results in the year 2006. The claimant did not claim dismissal protection in the given case.

It is questionable how the court would have decided if the claimant had claimed compensation for damages caused by the defendant's breach of the prohibition of gender-based discrimination by terminating the service relationship. Article 2(2)(c) of Equal Opportunities Directive 2006/54 states that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Maternity Directive 92/85. The defendant, however, did not provide any reasoning for the termination, nor did it need to. Therefore, it is not clear what the reason for the termination was. In addition, at the time of communicating the termination notice, the claimant was neither pregnant nor on maternity leave; she was simply informing the defendant that she was back from her leave and ready to provide services again. In our view, without at least arguing that the reason for the termination was the claimant's previous pregnancy and/or maternity leave, it is unlikely that gender-based discrimination could be argued.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is likely that a German court would have come to the same conclusion, but with a different reasoning. As both the Hungarian and Dutch commentaries point out, the claim was not based on discrimination but on non-payment of (1) fee during the notice period and (2) bonus for the last active year. The bonus was something the claimant had already worked for. Within the statute of limitation she was within her rights to claim the bonus from her partners/the other contracting party, a claim resulting directly from the contract. The payment of the notice period was also directly based on the contract. The parties had agreed on this rather longer notice period in the contract. The contracting party was well in their contractual rights to terminate the relationship under observance of the notice period. Any other form of termination would probably present a breach of contract with the effect that the contracting party was bound by the contract until the first possible termination date under observance of the notice period. Hence, a German Court would have based its reasoning on the contractual provisions and not on discrimination. Nevertheless, had there been an unequal treatment of the lawyer because of her pregnancy, the majority of legal opinion tends towards applying the Equal Treatment Act also to corporate relationships, not only employees. Following the ECJ's Danosa decision, self-employment within a partnership or corporate relationship between shareholders falls within the scope of the protection against discrimination as well.

Although it might seem that the termination was based on the pregnancy, it seems to me that the problem did not arise with the pregnancy itself but only when the plaintiff decided to come back to the firm. The plaintiff, from what I derive from the case report, did not claim damages for discrimination. This raises the question of whether this case really was based on a pregnancy-rela|ted issue or whether the Hungarian Court had a more political agenda, as the author implies.

The Netherlands (Peter Vas Nunes): It is indeed surprising, as the author of this case report notes, that the Hungarian Supreme Court found reason to introduce the equal treatment doctrine into a dispute in which the claim was not based on discrimination. Perhaps it did this to send a message to employers in Hungary where, according to the author, parties "often choose to conclude a service relationship instead of an employment relationship to have more flexibility".

It is also surprising to see how the court underpins its findings on equal treatment. It does so by referring to three EU directives:

Maternity Directive 92/85 ;

the 1976 Gender Equal Treatment Directive 76/207 (now part of Recast Directive 2006/54)

the Self-Employed Gender Equal Treatment Directive 86/613.

and to four ECJ judgments:

Lawrie-Blum (1986);
Collins (2004);
Paquay (2007);
Danosa (2010).

Lawrie-Blum and Collins had nothing to do with sex discrimination. The issues were whether a teacher (Lawrie-Blum) and an unemployed job-seeker (Collins) are 'workers' within the meaning of the free movement provisions of the EC Treaty. Directive 92/85, which was the subject of Paquay and Danosa, applies to employees, not to self-employed workers such as (ostensibly) the claimant in the case reported above. The same applies to Directive 76/207 (and its successor 2006/54). Directive 86/613 does apply to self-employed workers, but as I read it, it does not cover dismissal. Article 4 provides: "As regards self-employed persons, Member States shall take the measures necessary to ensure the elimination of all provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC [...]" The latter directive defines the principle of equal treatment as "equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions [...]" In brief, the Hungarian Supreme Court seems to have had difficulty, understandably, in identifying EU legislation or case law that prohibits the termination of a self-employed worker's contract. The court seems to have struggled, creatively and commendably, to find reasoning on which to base the message that such terminations should not be sex-discriminatory.

Subject: sex discrimination

Parties: not known

Court: Kuria (Hungarian Supreme Court)

Date: not known

Case number: Pfv.V.21.851/2014. or EBH2015.P.7.

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