SUMMARY

2017/17 No legal protection against termination for a pregnant employee who does not hold a valid work permit (FR)

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Facts

Ms X, a Moroccan national, was hired to provide child care by a French couple (the 'Employer') on 25 October 2010. On that day, Ms X provided the Employer with her temporary residence permit, allowing her to work in France, which was set to expire on 31 October 2010. On 26 April 2011, the French administrative authorities informed the Employer in writing that Ms X's work permit request for childcare was denied and she could no longer carry out any salaried activity in France.

Ms X was invited by the Employer to a preliminary dismissal meeting on 2 May 2011. A few days later, she informed her Employer in writing of her pregnancy. She was subsequently dismissed for failing to hold a valid work permit. Ms X sued her Employer, invoking protection of pregnant employees against termination and sought the nullity of her dismissal with payment of damages.

Judgment

The Court of Appeal of Paris, following in the footsteps of the Employment tribunal, ruled that the work ban which was notified to the Employer justified Ms X's dismissal. Therefore, the protection of pregnant employees could not be invoked.

Court of Appeal of Paris, 13 January 2015, no S 12/0949.

This decision was upheld by the Supreme Court which ruled that "public policy provisions of Article L.8251-1 of the [French] Labour Code are applicable to the employer who cannot, directly or indirectly, keep to its service or hire for any length of time, a foreigner who does not hold a work permit, enabling him/her to pursue a salaried activity [in France], an employee in such position cannot benefit from protective legal provisions forbidding or restraining termination of pregnant employees".

Commentary

In this unprecedented case, the French Supreme Court had to settle, for the first time, a difficult conflict between two sets of public policy rules.

On the one hand, under Article L.8251-1 of the French Labour Code, employers are strictly forbidden to hire employees who do not hold a valid work permit in France (or to keep them employed). This principle is a public policy rule with no possible derogation, under penalty of civil and criminal sanctions.

On the other hand, Article L.1225-4 of the French Labour Code provides solid protection against termination of pregnant employees through two levels of protection:

Relative protection, applicable as soon as the pregnancy is discovered until maternity leave, as well as ten weeks' post maternity leave, where the pregnant employee can only be terminated for serious misconduct or the impossibility of maintaining the employment relationship, unrelated to the employee's pregnancy or childbirth;
Full protection, covering the entire period of maternity leave, during which the employment contract is suspended and any type of dismissal is strictly forbidden, under penalty of nullity and reinstatement.

Article L.1225-4 meets the requirements of EU law, which has incorporated requirements of Directive 92/85 of 19 October 1992, which compels Member States to take all necessary measures to forbid the termination of employment of pregnant employees or those nursing or recently having given birth, with the exception of cases which are not linked to the pregnancy

and are allowed by national legislation.

In the case at hand, settling the conflict between these two sets of rules was particularly thorny, as both norms are public policy rules with the same legal value. Nevertheless, the Supreme Court decided that the ban on hiring a foreign employee without a valid work permit prevails over the ban on terminating the employment of a pregnant employee.

Although the Supreme Court's decision dismisses the interests of the pregnant employee and her child, the reasoning behind it is in line with French and European law requirements. The Supreme Court's decision can be justified by two-fold reasoning:

EU law provides for exceptions to the protection of pregnant employees and refers to the national law of Member States. As detailed above, French law allows for the termination of an employment contract for serious misconduct or the impossibility of maintaining the employment relationship, making this decision compliant with the EU requirements; Article L.8251-1 of the French Labour Code, applicable to foreign nationals, is a prerequisite to the protection of pregnant employees, implying the existence of a valid employment contract that can be duly executed.

In its explanatory statement, the Supreme Court stated that Article L.8251-1 is "a precondition for the application of any protection, necessitating a valid employment contract". The Supreme Court also drew a parallel between the present case and a previous case involving the dismissal of a staff representative – a status which also offers protection against dismissal under French law. It was ruled that this protection had to be set aside if the employee did not hold a valid work permit in France and therefore the dismissal could be implemented without the prior authorisation of the labour inspector.

Cass. Soc. 10 October 1990, N° 88-43683.

The same solution could apply to other cases where the employee benefits from a specific protection against termination, such as termination of an employee on strike or on leave of absence due to occupational sickness or accident.

In summary, if there is no valid employment contract, there can be no valid work-related protection.

Comments from other jurisdictions

Bulgaria (Rusalena P. Angelova, Djingov, Gouginski, Kyutchukov & Velichkov): Individual

employment agreements under Bulgarian law may be validly terminated unilaterally by the employer only on the grounds explicitly stated in the Bulgarian Labour Code. One of these grounds of termination is: "objective impossibility of performance of the work under the employment agreement". The courts treat termination of an employment agreement for lack of valid work permit as meaning that it is objectively impossible for the work to be performed.

Pregnant employees and female employees in an advanced stage of in vitro treatment enjoy protection against dismissal in the case of unilateral termination on certain grounds (e.g. restructurings leading to certain jos being redundant), but they may be terminated unilaterally by the employer without protection on limited statutory grounds, including the objective impossibility of performance of the work under the employment agreement.

Thus, as in France, in Bulgaria a pregnant employee with no valid work permit does not benefit from protection against dismissal.

Ireland (Orla O'Leary, Mason Hayes & Curran): The Supreme Court in Ireland had to decide on a similar issue in 2015, where the employee did not have the legal right to work in Ireland.

The background to this case was that in 2002, Mohammad Younis began working for restaurant owner Amjad Hussein after being recruited from Pakistan with the promise of a decent job as a chef. Although Younis had a valid permit to work in 2002, Hussein refused to renew Younis' work permit and Younis was an illegal worker between 2003-2009. Younis worked up to 80 hour weeks in Hussein's restaurant for seven years for € 0.51 per hour. In 2010, Younis brought a number of claims (i.e. failure to pay holidays, failure to comply with the 48 hours working week, failure to pay the minimum wage, failure to provide a contract of employment) to the Rights Commissioner. The Rights Commissioner awarded Younis the gross sum of approximately € 91,000 for breach of his employment rights. Hussein did not appeal the decision, nor did he appeal the award. In these circumstances, upon Younis' application, the Labour Court directed enforcement of the decision of the Rights Commissioner.

Hussein applied to the High Court to have decisions of the Labour Court judicially reviewed and quashed on the basis that Younis had no standing to invoke the protection afforded by the employment legislation, since by definition the alleged contract of employment was an illegal one in the absence of an employment permit. The High Court, although admitting this was an entirely unsatisfactory result, held that neither the Rights Commissioner nor the Labour Court could lawfully entertain an application for relief in respect of an employment contract which was substantively illegal and for that reason, the decisions of the Labour Court could not be allowed to stand. It was later argued this High Court decision effectively gave employers a

"license to exploit" undocumented migrant workers without consequence and went against public policy.

The decision of the High Court was appealed, and overturned by the Supreme Court. The Supreme Court noted that the High Court had made a new finding of fact, which had not been made by either the Rights Commissioner or the Labour Court. The Supreme Court held that in judicial review proceedings it was not open to the High Court to make a new finding of fact on the merits of the case for the purpose of determining whether the original decision was right or wrong. The Supreme Court pointed out that if Hussein had been dissatisfied with findings of fact in the decisions of the Rights Commissioner or considered that the Rights Commissioner had erred in law in his decisions, he could have appealed them under the legislation to the Labour Court – he did not. As such the Labour Court had no jurisdiction to review the decision of the Rights Commissioner.

This case is slightly unusual in that it was the decision of the Labour Court which was the subject of judicial review, even though it was the Rights Commissioner who made the decision to award compensation. It would have been interesting to see how the matter would have been ultimately resolved had Hussein had appealed the decision of the Rights Commissioner in the normal manner, such that the superior courts were judicially reviewing an actual decision and not just the power to enforce a decision.

Subject: Unfair dismissal, Work and residence permit

Parties: Ms X – v – Mr and Mrs Z

Court: Cour de cassation (French Supreme Court)

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