SUMMARY

2015/52 Protection of pregnant employees – In-vitro fertilisation (GE)

<p>An employee can benefit from special protection against dismissal from the moment an embryo is transferred into her body in-vitro</p>

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Facts

The plaintiff, born in 1975, had been employed by the defendant, an insurance agency with two employ-ees, since February 2012. There had never been any complaints about the plaintiff or her performance on the job. On January 14 or 15 of 2013, the plaintiff told the defendant that she wanted to have a child and was set to undergo another round of in-vitro fertility treatment (IVF). An embryo transfer took place on 24 January. The defendant issued notice of dismissal dated 31 January, which the plaintiff received the same day. An official approval by the competent authority for the dismissal had not been issued. During the notice period (until 28 February), the plaintiff was put on garden leave. The defendant subsequently replaced the plaintiff with an older female employee. On 13 February, the plaintiff notified the defendant of her pregnancy and claimed her dismissal was invalid. The plaintiff gave birth to her child on 1 October 2014.

The plaintiff argued that she had already been pregnant upon receipt of the notice of dismissal. According to her, the dismissal was also discriminatory and had only been issued because she had said she was going to undergo IVF.

The defendant argued that the plaintiff had not proven that she was already pregnant upon receipt of the notice of dismissal. According to him, only proof of implantation ("nidation") of the embryo would establish a pregnancy. He also argued that the dismissal had solely been based on the fact that he had not been satisfied with the plaintiffs' performance.

Both the Labour Court and the Regional Labour Court decided in favour of the plaintiff. The defendant then appealed to the Federal Labour Court (BAG).

Judgment

The Federal Labour Court (BAG) also decided in favour of the plaintiff. The Court established that the plaintiff was protected against dismissal in accordance with section 9 of the Maternity Protection Act. Section 9 provides that the dismissal of a woman during pregnancy and in the first four months following delivery is unlawful if the employer was aware of the pregnancy at the time he gave notice of dismissal or is informed of this within two weeks after the notice of dismissal was served. The State authority respon-sible for protection of employees may in special cases declare a dismissal to be permissible.

According to the BAG, the plaintiff was pregnant at the time of the dismissal. It determined that in the case of an in-vitro fertilisation, the pregnancy does not begin with the fertilisation of the ovum outside the body but with the transfer of the embryo into the female body. Whether or not the embryo successfully 'nidates' following this transfer, is irrelevant[1]. In other words if one were to follow the reasoning of the court, even if the embryo fails to nidate, the woman would still be considered to have been pregnant for the short period between the transfer of the embryo into her womb and the failure to nidate.

This failure could be likened to a miscarriage.

In the case of ordinary pregnancies, the beginning of the pregnancy is calculated backwards 280 days from the due date. In the case of an IVF, neither this method of calculation nor the date of fertilisation outside the body determines the beginning of the pregnancy. In accordance with the ECJ's judgment in Mayr (C-506/06), pregnancy does not begin with fertilisation of the ovum outside the woman's' body, oth-erwise, in theory, a woman would be able to claim pregnancy protection for years, given that fertilised ova can be frozen. The BAG ruled that the date of the embryo transfer is a reliable date for pregnancy to be deemed to commence in cases of IVF. In its reasoning, the BAG referred to section 218 of the Penal Code [2] which places the beginning of the pregnancy at the moment of nidation. However, the Court did not consider an analogy with this provision to be appropriate for the purpose of determining the beginning of pregnancy protection, given that the protected object of Section 218 is the embryo, whereas section 9 of the Maternity Protection Act protects the future

mother.

The BAG further determined that the dismissal constituted discrimination against the employee on grounds of her gender. Again, the ECJ had ruled in Mayr that there could be direct discrimination on grounds of gender if notice of dismissal is issued on the basis that the employee is undergoing IVF. The BAG held that it was more than likely that the notice of dismissal had been issued because of the em-ployee's announcement that she was about to undergo a round of in-vitro fertilisation and the possible future pregnancy that might result. The fact that the defendant had later filled the vacancy with a much older female employee did nothing to contradict this assumption. The Court also held that the previous instance courts had correctly presumed that it was very unlikely the dismissal was based on the plaintiffs' job performance, as there had been no previous issues with her performance.

Commentary

Following the ECJ's judgment in Mayr, this decision of the BAG does not come as any great surprise. The ECJ had already laid out the groundwork for this decision. However, the BAG has now determined a method of calculating (or rather, determining) the beginning of pregnancy in the case of in-vitro fertilisa-tion – and this differs from the statutory beginning of pregnancy provided in the German Penal Code. The BAG's role was to decide whether the dismissal was valid. The plaintiff could have claimed damages for discrimination under section 15 of the Equal Treatment Act, but it appears that such a claim was not filed. It is not clear whether that was intentional or an oversight.

Comments from other jurisdictions

Belgium (Isabel Plets): Belgian case law is similar. As long as the employer is not informed about the pregnancy, the employee undergoing IVF treatment is not entitled to claim protection as a pregnant em-ployee. This specific protection implies that the employer can only dismiss an employee for reasons that are not linked to her pregnancy (article 40 Working Time Act). If there is a link, the employee is entitled to compensation equal to six months' salary.

As soon as the employer is informed about the IVF treatment at an advanced stage and the dismissal is essentially based on the fact that the employee has undergone such treatment, there could possibly be direct gender discrimination. The employee will in that case be entitled to compensation equal to six months' salary.

Czech Republic (Natasa Randlová): In the Czech Republic we do not yet have a court decision on the beginning of a pregnancy, including pregnancy by IVF. However, a female employee is

protected against dismissal from the moment of becoming pregnant even if she does not yet know about her pregnancy at the moment of notice of dismissal. However, confirmation from the employees' gynecologist is usually sufficient proof. In cases where the exact date of pregnancy is at issue, an expert will be called by the court and will taking into consideration the woman's menstruation. In the Czech Republic, we do not calculate backwards from 280 days. In my view, in the Czech Republic, a female employee would be pregnant from the moment of transfer of embryo into the female body. Whether or not the embryo successfully 'nidates' following this transfer, is irrelevant. If the embryo fails to nidate, the woman would still be considered to have been pregnant for the short period between the transfer of the embryo into her womb and the failure to nidate. During this period, the female employee would be considered pregnant and therefore protected against dismissal. I am of the opinion that Czech courts would rule in the same way as the BAG.

Denmark (Mariann Norrbom): Danish and German law differ in the extent of the protection given. Accord-ing to the case report, section 9 of the German Maternity Protection Act provides that the dismissal of a woman during pregnancy is prohibited. In contrast, the Danish Act on Equal Treatment of Men and Wom-en prohibits dismissal on grounds of pregnancy. According to a judgment of the Danish Supreme Court in 2003, dismissal on grounds of fertility treatment is considered a dismissal reason so closely related to pregnancy that it is covered by the provisions on pregnancy under Danish Law.

As mentioned in the Dutch comment below, the Danish Supreme Court decided a case in 2012 about an employee who was dismissed when she was about to undergo fertility treatment with the purpose of be-coming pregnant. The decisive factor in that case turned out to be whether the employee had in fact initi-ated the fertility treatment and whether the employee could thus claim to be protected under section 9 of the Danish Act on Equal Treatment of Men and Women. The Danish Supreme Court found that the em-ployee, who was undergoing initial check-ups at her own doctor before starting the fertility treatment, was not protected by the prohibition against dismissal on grounds of pregnancy, because she had not yet un-dergone the fertility treatment. In its judgment, the Danish Supreme Court emphasised the importance of whether or not there was "an actual possibility" of becoming pregnant.

Even though employees are protected against dismissal on grounds of fertility treatment under the same section of the Danish Act on Equal Treatment of Men and Women, there is a significant difference as re-gards the burden of proof. Under Danish law, the burden of proof is reversed if an employee is dismissed during pregnancy or absence due to maternity, paternity or parental leave. If an employee who is undergoing fertility treatment is dismissed, a shared burden of proof applies. Accordingly, if the employee could establish a presumption of discrimination on grounds of fertility treatment, it would be for the em-ployer to disprove

discrimination. An employee is thus not covered by the reversed burden of proof until she is in fact pregnant.

In a case from 2011, the Danish Western High Court stated that in order for an employee to be covered by the reversed burden of proof, it must be possible to ascertain the existence of a pregnancy at the time of dismissal. In the judgment the court found it was not possible to determine that pregnancy existed until approximately 14 days after an embryo was transferred into the uterus. The employee had an embryo inserted in her uterus three days before she was dismissed and the High Court therefore found, that it was not yet possible to determine the existence of the pregnancy and so she was not covered by the re-versed burden of proof. The High Court did, however, find a presumption of discrimination to be estab-lished, due to the connection in time between the treatment and the dismissal.

Hungary (Gabriella Ormai): Under Hungarian employment law an employee would be under dismissal protection during her pregnancy and for the first six months of fertility treatment. In other words, the fertility treatment itself creates protected status for the first six months of the treatment.

When the new Labour Code came into force on 1 July 2012, the employee could rely on this dismissal protection only if she informed the employer about it before the dismissal notice was given to her. However, since a 2014 decision of the Hungarian Constitutional Court, employees are no longer required to inform employers of the circumstances before notice is communicated and therefore, if the employee in-forms the employer that she has had fertility treatment after receiving notice (and she is still in the first six months of the treatment), the notice is unfair. It was initially unclear how an employer should react in this situation, but based on a draft amendment of the Labour Code which, if accepted by the Hungarian Parliament, should come into force on 1 January 2016, the employer will be entitled to withdraw the notice unilaterally within 15 days if it learns of the employee's protected status.

The Netherlands (Peter Vas Nunes): In this case, the issue of which party bears the burden of proof in respect of the date on which pregnancy began was circumvented. The date on which the fertilised egg was introduced into the employee's womb was not in dispute and that, in the BAG's view, is the relevant date. In the more common situation in which pregnancy does not commence following an in vitro proce-dure, the issue of who needs to prove what can be more difficult. In 1990, the Dutch Supreme Court was called upon to render judgment in the following case. An employee was dismissed on 31 March. On 22 April her union sent the employer a letter claiming that she was pregnant on the date of her dismissal and that the dismissal was therefore void. The employer asked for proof. The employee complied by sending the employer a note, drawn up by her physician. The note stated "LM 15 February a

terme 22 December", meaning that the first day of the employee's last monthly period was 15 February and that she was antic-ipated to deliver the baby on 22 December. If "LM 15 February" reflected the truth, that meant that the employee must have been pregnant on 31 March. However, the statement was not based on any opinion by the physician but merely reflected what the employee had told her physician, i.e. it was effectively a statement by the employee herself. The employee delivered her baby on 24 December. The Supreme Court held that the burden of proof as to the date on which a pregnancy began rests with the employee in principle. However, where (i) it is established that the employee was pregnant 'shortly' after dismissal and (ii) the facts (in particular, the date of birth) indicate that the employee's statement may be truthful, there is a presumption of truthfulness and it is up to the employer to disprove the statement. The Supreme Court did not explain how an employer is to prove that an employee was not yet pregnant on a cer-tain date.

See EELC 20012/20 for a Danish judgment regarding the issue of whether an employee undergoing IVF can claim pregnancy protection.

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