

## SUMMARY

# 2015/17 Employee may not be dismissed on the day after returning from parental leave (LV)

***&lt;p&gt;Latvian Labour Law does not prohibit the employer from making the employee&rsquo;s position redundant while the employee is on parental leave. However, if it does this the employer must remember that it is still obliged to offer the employee similar or equivalent work on no less favourable conditions and terms of employment. Labour law does not make this obligation conditional on what the employer is able to achieve.&lt;/p&gt;***

### Summary

Latvian Labour Law does not prohibit the employer from making the employee's position redundant while the employee is on parental leave. However, if it does this the employer must remember that it is still obliged to offer the employee similar or equivalent work on no less favourable conditions and terms of employment. Labour law does not make this obligation conditional on what the employer is able to achieve.

### Facts

The plaintiff in this case was an employee who claimed that her employer, the Ministry of Education and Science (the Ministry), had terminated her contract unlawfully on the grounds of a reduction in the number of employees. The employee, as is typical in such cases, requested the court to reinstate her in her previous job and to pay her compensation for the period of forced absence from work.

Under Latvian Labour Law a “reduction in the number of employees” is the termination of an employment contract for reasons not related to the conduct of an employee or his or her abilities, but is based on the performance of urgent economic, organisational, technological or similar measures within the business.

The employee was granted maternity and parental leave, first from 13 November 2010 to 12 June 2012, and then from 7 December 2011 to 6 June 2013. On the very first day the employee returned from leave, i.e. on 7 June 2013, she was served with an employment termination notice based on a reduction in the number of employees. The employment actually terminated on 8 July 2013, i.e. after the expiry of one month’s notice.

The termination notice explained that the employee’s position had been liquidated by the Ministry on 18 June 2012, i.e. while the employee was on leave, as a result of various structural and organisational changes. Further, it stated that the employer was unable to offer the employee any other job that corresponded with her qualifications and skills. Both the court of first instance and the court of appeal rejected the employee’s claim.

The employee appealed to the Latvian Supreme Court. One of her arguments was that the lower court had failed to assess whether the Ministry had complied with the requirements of Section 156 (4) of the Labour Law, which states that: a) an employee who returns from parental leave is entitled to his or her previous job or b), if this is not possible, the employer must offer the employee similar or equivalent work on no less favourable terms and conditions. The employee stressed that the employer must comply with this provision of the Labour Law in all circumstances. Compliance is not optional.

## **Judgment**

The issue before the Supreme Court was whether the employer’s duty to ensure an employee who returns from the parental leave is given the same or equivalent work is absolute or depends on the employer’s ability to do it.

The Supreme Court supported the employee’s view. It ruled that the Labour Law does not prohibit the employer from making an employee’s position redundant while he or she is on parental leave but if it does, the employer is still obliged to find the employee similar or equivalent work on no less favourable conditions than before. The court concluded that the Labour Law does not make this obligation conditional on the employer’s ability to comply.

On the basis of this line of reasoning, the Supreme Court cancelled the judgment of the court of appeal and ordered it to retry the case.

## **Commentary**

The Court of appeal heard the case a second time and by its judgment of 25 February 2015 satisfied the employee's claim. It remains to be seen whether the Ministry will again appeal the judgment of the court of appeal.

In any event this judgment is likely to change current practice, which allows employers to terminate employment contracts with employees who return from parental leave if they have no job for them. The existing approach is based on the assumption that the prohibitions on the employer against terminating the employment contract of certain categories of employees are set out exhaustively in just one Section of the Labour Law (Section 109), and employees who return from parental leave generally do not fall into any of these categories.

There are also other issues raised by this judgment, for example, for how long must the employer retain an employee who has returned from parental leave and when would it be appropriate for the employer to terminate the employment contract with such employee based on a reduction in the number of employees? And what happens in situations where both the employer and employee are aware from the very beginning that the employer is not able to ensure any further work for the employee?

## **Comments from other jurisdictions**

*Austria (Daniela Krömer):* Austrian laws – the Mothers Protection Act (MSchG) and the Fathers Parental Leave Act (VKG) – stipulate a somewhat “graded” protection against termination of an employment contract while on parental leave (§ 10 (3) to (7) MSchG). In any case, labour law courts have to agree to the termination, and they can only do so if the legal requirements are met. Before the child has turned one year old, a termination is only possible if the establishment the employee has worked in is shut down or significantly reduced; between first and second birthday of the child, a termination is possible if the employee has been made redundant for economical or organisational reasons, and no other less protected employee's contract could have been terminated instead. If the employee chooses parental part time, the same level of protection against termination continues to exist until the child has turned four. Hence, an absolute prerogative of the employee's interest over the employer's possibilities does not exist. However, in practice the hurdle of winning the court's approval by proving the above mentioned conditions turns out to be a very high one.

*Croatia (Dina Vlahov):* In the case at hand, the Croatian courts would most probably have come to the same conclusion as the Latvian Supreme Court. Pursuant to the Croatian Labour Act, the employer is not allowed to dismiss an employee, for example, during pregnancy, parental leave, work in half-time working hours or within 15 days following one of these

periods. The absolute prohibition of the dismissal in these situations exists regardless of the type of the dismissal (i.e. ordinary or extraordinary). If the employer knows of the employee's rights at the time of the dismissal but goes ahead and serves a termination notice, the dismissal will be void (*Vrhovni sud Revr-140/02- 2, 2 October 2002*).

The employee has the right to return to his or her previous job upon return from maternity or parental leave. The employee must give the employer one month's notice of return. If there is no longer any need for the employee's previous job, the employer must offer the employee another appropriate job with no less favourable working conditions, regardless of any structural or organisational changes at the employer. Only if the employee does not accept a new job may the employer dismiss the employee for economic, technological or organisational reasons.

Further, an employee who has exercised his or her right to return to the old job or an equivalent job is entitled to additional training if any changes have occurred in technology or working methods during his or her absence, as well as to any other benefits arising from improvements to working conditions.

*Czech Republic (Nataša Randlová)*: As in Latvia, Czech employers are not prohibited from making an employee's position redundant while he or she is on parental leave. However, the employer must give a returning employee work in accordance with the terms and conditions agreed in the employment contract, especially terms relating to the type of work and place of work. In contrast to the decision reported above, if the employer does not have any work for the returning employee, it may terminate the employment by notice for organisational reasons.

In my view, it is important that employees on parental leave should be protected, but this protection should not interfere with the rights of employers to decide on the number and type of employees they need, especially if the parental leave lasts several years for example, as is not unusual in the Czech Republic. This ruling therefore seems harsh for employers. If the employer does not have a suitable position for an employee returning from parental leave, in my view, it should not be forced to create one artificially.

*Denmark (Mariann Norrbom)*: Similar to Latvian law, the Danish act implementing the Maternity Directive (the Danish Act on Equal Treatment of Men and Women) includes a right for women on maternity leave to return to similar or equivalent work without less favourable conditions than before going on maternity leave. However, this right is not unconditional, as it is not prohibited to dismiss pregnant employees or employees on maternity leave on grounds of redundancy. The main requirement is that the employer can justify that the employee is not

dismissed on grounds of pregnancy.

It appears that the ruling of the Latvian Supreme Court in this case means that it is not possible to dismiss a pregnant employee or an employee on maternity leave on grounds on redundancy. Thus, Latvian law warrants wider protection for employees on maternity leave than required under the Directive compared to the Danish interpretation of the Directive.

*Poland (Marcin Wujczyk)*: Similar problem, as in a commented ruling of the Latvian Supreme Court, appeared pursuant to provisions of the Polish Labour Law. Under the Art. 1864 of the Polish Labour Code an employee, who returns from a parental leave, shall be ensured by an employee with a current position. If it is impossible, the employer shall reinstate the employee to an equivalent position or to a position corresponding to the employee's professional qualifications. The employee is entitled to remuneration which is not lower than the remuneration received before the beginning of the parental leave. Initially the jurisprudence claimed, that the employer is obliged to provide the employee returning from maternity leave with work, regardless of whether there is a position adequate for the employee. Over time, such approach has undergone some alterations. Recently, it has been indicated more frequently that if the employee is pregnant at the time of returning to work, the employer may be entitled to terminate employment relationship when it is not possible for him to provide employee with work. Such approach seems to be rational. It eliminates situations when the employee is allowed to perform work just to terminate the employment contract afterwards. In such cases the employer's interest shall be also taken into account. If there is objectively no possibility to continue employing the employee, it is difficult to hold the employer responsible for creating a new workplace for such employee. Although the issue of employee's rights, who returns from the parental leave is not fully clarified, the recent view of lawyers indicates that the Polish courts would adopt a position different from a position expressed by the Latvian Supreme Court.

*Romania (Andreea Suci, Andreea Tortov)*: Romanian law, by Government Ordinance No. 111/2010 regarding parental leave, expressly prohibits the employer from terminating an employment agreement during parental leave and for six months after returning to work even in cases of urgent economic, organisational, technological or similar issues. The law provides one exception: where the dismissal is due to insolvency or judicial restructuring.

This has also been confirmed in case law. The Bucharest Court of Appeal ruled in Decision No. 644/R of 4 February 2014 that the employer was not allowed to dismiss the employee for six months after returning from parental leave, even as a disciplinary sanction. In this case, an employer dismissed an employee for disciplinary reasons 20 days after returning from parental leave. The Court mentioned that the prohibition does not mean that employees have

no disciplinary responsibility, but it “limits the employer’s ability to consider that misconduct is serious enough to justify dismissal, so the appropriate sanction should be chosen from the other disciplinary sanctions available”. Moreover, the Court mentioned that “even if the employee has intentionally breached the disciplinary rules, disciplinary dismissal cannot be applied”. The Court considered that since the dismissal breached the prohibition, it was not necessary to go on to analyse whether it was sound.

In our view, such an interpretation of the law is excessive, as it limits the employer’s right to choose the proper disciplinary sanction without justification. The employer should be allowed to dismiss its employees for misconduct, as this does not relate to the fact that the employee has been on parental leave. In addition, this interpretation of the law might lead to discrimination against other employees who have been dismissed for the same misconduct.

Considering the fact that the Romanian courts tend to be employeefriendly and keeping in mind the decision described above, we think it is likely that a dismissal within six months of return from parental leave would be considered void in any situation other than bankruptcy or judicial restructuring.

*Slovak Republic (Beáta Kartíková)*: The Slovak Labour Code prohibits employers from terminating employment during maternity or parental leave (i.e. protected periods) except where this is by agreement. The prohibition against terminating the employment applies only to employment during maternity or parental leave and so there is nothing in Slovak law to prevent an employer terminating an employee after his or her return to work if there are reasons for termination under the Labour Code. This could, for example, include a decision by the employer to reduce the number of employees.

If an employee returns to work after the end of his or her maternity or parental leave, the employer must give the employee his or her original type of work and workplace. If this is not possible the employer must provide other work, based on the employment contract. The employer must not give the employee less favourable conditions than he or she enjoyed at the time the maternity or parental leave began. The employee is entitled to any benefits arising from improvements to the working conditions that he or she would have received if he or she had not taken leave. However, note that if the employee refuses to accept work offered, this will be considered as a legitimate reason to terminate the employment.

*Subject: Parental leave*

*Parties: Employee – v – Ministry of Education and Science of the Republic of Latvia*

*Court: Latvijas Republikas Augsta- ka- s tiesas Civillietu departaments (Supreme Court of the Republic of Latvia (civil section))*

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