SUMMARY

# 2014/44 Constitutional Court strikes down law requiring disclosure of pregnancy (HU)

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**Summary**

The Hungarian Constitutional Court has found a provision of the new 2012 Labour Code to be unconstitutional. Based on that law pregnant employees and employees undergoing fertility treatment are protected from dismissal. The new provision obliged these employees to disclose their condition before receiving a notice of dismissal from the employer. Failure to do so caused employees to lose the right to rely on the prohibition of termination during pregnancy/fertility treatment. The court held that the provision is unconstitutional as it breached the constitutional rules on privacy, dignity and equal treatment.

**Facts**

The old Labour Code, which was in force until 30 June 2012, contained provisions protecting pregnant employees, employees who had recently given birth and employees who were

undergoing fertility treatment (collectively: 'pregnant employees') against dismissal. These provisions were amended by the new Labour Code (in force since 1 July 2012).

Under the old law, a pregnant employee was protected from dismissal. The law did not specifically require the employee to inform the employer of her pregnancy and therefore an employer could not know whether a dismissal was valid. To mitigate the burden of this on employers, the courts also considered the employees' obligation to keep the employer informed of all relevant circumstances, known as the "good faith cooperation duty", and held the view that if an employee intentionally concealed a pregnancy when the employer gave notice of dismissal to the employee, this did not comply with that duty. However, this requirement could not apply in cases of employees who were not aware of their pregnancy at the time of receiving notice of their dismissal.

Pregnant employees who were given notice of dismissal had 30 days to challenge the notice. A challenge would render the notice unlawful and the employee could demand reinstatement and damages. In the event the employee was unaware of her pregnancy at the time of receiving the notice, she still could challenge the notice, but the deadline for doing so was not completely clear. In one instance, the courts accepted a claim for illegal termination two years after notice had been given[1].

On 1 July 2012 the new Labour Code came into force. The new law requires pregnant employees to inform their employer of their condition before notice of termination is given if they wish to rely on the rule prohibiting termination during pregnancy. An employee who fails to comply with this obligation and is subsequently given notice of termination can no longer rely on the rules on dismissal protection. The new rule was based on the good faith cooperation duty. Given that an employee may not know that she is to be dismissed until receipt of the notice of dismissal (by which time it may be too late to inform her employer of her condition), the new rule effectively forces pregnant employees to reveal their condition to their employer immediately.

The Ombudsman challenged the constitutionality of the new law. He did so based on two groups of arguments: the right to human dignity and right to the privacy. He applied to the Constitutional Court for a ruling.

**Judgment**

On 30 May 2014, the Constitutional Court found the new law to violate the Constitution (now known as the "Fundamental Law") and, therefore, to be invalid and ineffective. The court based its decision on the following considerations.

The fact that an employee is pregnant forms part of her private sphere and this information is protected as personal data under the Hungarian Fundamental Law. The court emphasized that the information would be disclosed in the context of a hierarchical relationship between the employer and the employee, and whilst in theory it is voluntary, in practice it is required if the employee wishes to be able to rely on the dismissal protection during pregnancy.

The requirement to provide prior notice of pregnancy is independent of the employer's intention to terminate the employment relationship. The Labour Code cannot be interpreted as allowing the employee to inform her employer of her pregnancy or fertility treatment at the time a dismissal notice is given (as was the view of a number of legal commentators). The statutory provision requires the female employee to inform her employer of a matter within the sphere of her privacy independently of the employer's intention to issue a dismissal notice. The court ruled that the requirement for employees to provide prior notice of pregnancy in order to be protected from dismissal is not a proportionate restriction on the right to privacy and human dignity, and is therefore unconstitutional.

In terms of the right to private life, dignity and data protection on one side and the pregnancy dismissal protection on the other, the court found that there was no reasonable necessity for the employer to be informed of matters within the employee's private sphere unless and until the employer demonstrates an intention to terminate the employment relationship. The court noted that the employer may ask the employee immediately before giving notice of dismissal whether she is aware of any circumstances creating dismissal protection. Given health and safety requirements, in some circumstances, employers are already under a duty to do this.

As for maternity protection, the court referred to several international treaties and conventions on the protection of women against dismissal during pregnancy or maternity leave. The court relied, *inter alia*, on Article 10 of Directive 92/85/EEC, which specifically requires Member States to prohibit dismissal during pregnancy and maternity leave (see the ECJ's rulings in *Webb*, case C-32/93, and *Tele Danmark*, case C-109/00); on the Charter of Fundamental Rights of the European Union, which protects the family and stipulates a right to protection against dismissal for reasons connected with maternity (Article 33); and on Article 8 of the European Social Charter, which contains a prohibition against dismissal during maternity leave.

As for equal treatment, based on the principle of non-discrimination provided in, for example, Directive 76/207 (now Directive 2006/54), the protection of women against dismissal must be acknowledged for the duration of pregnancy and maternity leave. The court referred to the ECJ's ruling in *Mary Brown*, case C-394/96. The court also considered the situation of employees who are not aware of their pregnancy at the time dismissal notice is given. Since

such employees cannot comply with the requirement to give prior notice, they are later excluded from reliance on dismissal protection. Therefore the relevant provision of the Labour Code also breaches the general requirement of the Hungarian Fundamental Law for equal treatment.

The Constitutional Court's ruling only covers the prior notice requirement in the Labour Code in relation to dismissal. The Labour Code still contains the rule that, as a condition precedent for protection, the employee must inform the employer of her pregnancy, but based on the court's decision, it will be sufficient if the employee informs her employer of her protected status, not before, but at the point when the employer issues a dismissal notice.

Note that the ruling does not change the fact that employees must inform their employer about their pregnancy to benefit from special rules on working time and health and safety, as they apply to pregnant mothers.

**Commentary**

Obviously, the best course of action for an employer is to ask employees who are to be given notice of termination whether they are aware of any circumstances giving rise to special dismissal protection. They should do this immediately before giving notice, and should record the question as well as the employee's answer in writing. If a pregnant employee answers that she is not aware of any such circumstances, but becomes aware that at the time she replied she was actually pregnant – in our view – she should be able to claim for dismissal protection provided she can prove this.

If the employer has not asked a pregnant employee whether she is pregnant, but simply gives notice of termination, we believe the employee should still be able to claim dismissal protection. It is also possible that the employer and employee agree that the notice of dismissal should be revoked. If the employee refuses to agree, the employer could challenge this in court relying on the defence of mistake. If the employee challenges the notice of dismissal in court, the employer may argue that the employee failed to notify the employer of her pregnancy, thereby violating her good faith cooperation duty.

**Comments from other jurisdictions**

Austria (Manuel Schallar): in line with the requirements of European law (i.e. the Maternity Directive 92/85) the Austrian legal system provides significant protection for mothers before and after childbirth, as implemented in the Maternity Protection Act (*Mutterschutzgesetz, the 'MSchG'*). As with the Hungarian Labour Code 2012, § 10 of the MSchG requires the disclosure of the pregnancy for full dismissal protection to be provided. However, the disclosure may be made up to five working days after the dismissal or – if the employee is prevented from informing the employer through no fault of her own, particularly if she does not know she is pregnant – it is sufficient that the pregnancy is disclosed without undue delay after the reason preventing her from informing the employer has ceased to exist.

Denmark (Mariann Norrbom): In contrast to Hungarian and Dutch law, the Danish implementation of the Maternity Directive (the Danish Act on Equal Treatment of Men and Women) does not prohibit the dismissal of pregnant employees, although it does prohibit the dismissal of employees on grounds of pregnancy. Further, if a pregnant employee is dismissed, the burden of proving that she was not dismissed in whole or in part because of her pregnancy is on the employer. In cases where the employee was pregnant when she was given notice and the employer was not aware of her pregnancy, the burden of proof is still on the employer.

Under Danish case law, however, the fact that the employer was unaware of the employee's pregnancy when she was given notice will generally make it possible for the employer to discharge the burden of proof. In an assessment of whether the employee was dismissed because of her pregnancy, the timing of the employer's decision to dismiss the employee is crucial. If the decision to dismiss the employee was made before the employee informed the employer of her pregnancy, there is a presumption that no discrimination occurred (i.e. dismissal on grounds of pregnancy), and in this case the courts would most likely rule in favour of the employer. Thus, unlike Hungarian and Dutch law, there is no subsequent time bar allowing the employee to nullify the dismissal on grounds of pregnancy.

The Netherlands (Peter Vas Nunes): Article 10 of Maternity Directive 92/85 requires the Member States to take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases. Accordingly, Dutch law prohibits dismissal during this period, regardless of whether the employer is aware of the pregnancy. An employee who has been given notice in breach of this

prohibition can nullify the notice within two months, in which case the notice is deemed not to have been given and the employment continues. Strangely, Dutch law does not contain a provision that would allow a pregnant employee to invoke the nullity of her dismissal after the two-month time bar has expired, for example in the event she was not aware of her pregnancy until afterwards. There is no case law on that situation, perhaps because in the vast majority of cases, notice cannot be given until after a dismissal permit has been issued, and the permit application usually lasts at least one month.

There is, however, some case law on the issue of when pregnancy begins (other than in *in vitro* situations). In 1990, the Supreme Court was called upon to rule in the following situation. A female employee was dismissed on 31 March. Some time later, she claimed that she was pregnant on that date. She submitted a doctor's certificate that stated that, according to the employee (i.e. not according to the doctor), the first day of her last menstruation period was 15 March and that she must therefore have been pregnant on 31 March. She gave birth on 24 December. The Supreme Court reasoned that (i) if it appears from the date of birth that the pregnancy **could** have existed on the date claimed by the employee, then (ii) it must be accepted that that is the case unless the employer proves that it was not the case. How an employer is to deliver such evidence is not clear to me.

The United Kingdom (Bethan Carney): Unlike in Hungary and the Netherlands it is possible to dismiss a pregnant employee in the UK. However, employees are regarded as unfairly dismissed if the reason or the principal reason for the dismissal is a reason relating to pregnancy, maternity or childbirth, maternity leave or any of the other family-related types of leave (adoption, parental, paternity leave or time off for dependents). If the employee has sufficient service to claim unfair dismissal (two years), the employee is not obliged to prove their case, they simply have to produce some evidence to create a presumption that dismissal was for one of the inadmissible reasons. If the employer wants to argue that dismissal was for a different reason it will have to prove that and also prove that the reason was one of the statutorily prescribed fair reasons (conduct, capability, redundancy, etc). However, if the employee has less than two years service, they are required to prove that the reason for dismissal was an inadmissible one (e.g. connected to pregnancy). They are not required to have any particular length of service in order to bring the claim of automatic unfair dismissal, it merely affects the burden of proof. For a claim for automatically unfair dismissal for a reason connected with pregnancy to succeed the employer must know or believe (or at the very least, suspect) that the employee is pregnant. An automatically unfair dismissal on one of the proscribed grounds will almost certainly also be pregnancy, maternity or sex discrimination.

**Footnote**

[1] This case was adjudicated under the old Labour Code, when the six month time-bar rule – which was introduced by the new Labour Code – was not yet in force.

*Subject: discrimination/gender, termination/maternity protection*

*Parties: Ombudsman*

*Court: Magyarország Alkotmánybírósága (Hungarian Constitutional Court)*

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**Creator**: Magyarország Alkotmánybírósága (Hungarian Constitutional Court)
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