SUMMARY

2013/56 Termination during maternity leave was self-inflicted (DK)

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Facts

The case concerned two women who were both employed by their local municipalities as child-minders.

It was a fundamental condition of their employment that they performed the work in their own homes and that the employers had inspected and approved the homes.

Following the birth of the employees' children, the employees went on maternity leave; one for about 12 months, the other for about 15 months. While on leave, they both decided to move house. One of the employees relocated to another municipality close to the municipality where she used to live, whilst the other moved to an entirely different part of the country. The employees then informed their employers of the relocation.

The employers had the opinion that by relocating from their approved homes to new homes in other towns, the employees had to accept that this resulted in their employers considering the employment relationships as terminated.

The employees disputed that their employment had been terminated. They filed complaints to the Danish Board of Equal Treatment, arguing that their employers had dismissed them and that their dismissals were in conflict with the Danish Act of Equal Treatment of Men and Women which prohibits dismissal based on pregnancy and/or childbirthrelated leave. The employees claimed that they were entitled to monetary compensation and that their employment continued at least until the end of their maternity leave. This was relevant because during the leave the employers were under an obligation to pay the amount in salary and pension contributions which exceeded the state maternity benefits.

The central issue in the case before the Board was whether or not the resignations or dismissals, as the case may be, were linked to the employees' maternity leave. The employers argued that the termination of the employment relationships had nothing to do with the fact that the employees were on maternity leave – only the employees' relocation. The employees stressed that if they wanted to do so, they were entitled to leave the country during their maternity leave and, thus, they were not required to keep their homes open for child-care during their leave. Consequently, it was not relevant if they lived in homes approved by their employers during the leave.

Judgment

As the termination of the employment relationships was effected while the employees were on childbirth-related leave, the burden of proving that the termination was not influenced by the employees' leave rested with the employers.

Even so, the Board decided in favour of the employers. The Board stated that the employees' decision to move from the municipalities where they were employed and the homes that their employers had approved constituted notice of resignation.

Accordingly, the employers were entitled to consider the employees as having terminated their employment themselves, and for this reason the employees' childbirth-related leave could not have been a factor in the termination. Thus, the termination of the employment relationships was not in conflict with the Danish Act on Equal Treatment of Men and Women.

Commentary

The Board's decision shows that employees must fulfil their conditions of employment even during childbirth-related leave. If an employee chooses to act in such a way that there is no possible way that he or she can resume work after the leave has ended, it is not in conflict with the Danish Act on Equal Treatment of Men and Women if the employer considers the employment as terminated.

The Board did not, however, answer the question of when the termination took effect.

To decide whether the termination would be effective from the date when the employees moved house, the date when the employees notified the employers of the relocation or the date when the employees were supposed to resume work was beyond the jurisdiction of the Board.

In order for this issue to be decided, the cases must be brought before either an industrial arbitration tribunal or the ordinary courts, and it is not yet clear whether this will happen.

It should be noted that the scope of the Board's decision is very limited as it only applies to employees in a similar situation with similar conditions of employment.

Comments from other jurisdictions

Austria (Andreas Tinhofer): The implicit termination of an employment contract by a certain action or omission is possible also in Austria, but the requirements applied by the courts are very strict. It must be crystal clear that the employer or employee wanted to terminate the employment relationship. It is rather unlikely that the Austrian courts would have regarded the relocation of the child-minders during their maternity leave as an implicit resignation. The fact that during their active employment the employees were obliged to perform their work in their homes and those had to be approved by their employer would not have made any difference.

Germany (Dagmar Hellenkemper): Germany has strict laws concerning the dismissal of pregnant employees. First of all, the employer could not simply 'consider the employment relationship as having been terminated by the employees. Section 623 of the German Civil Code provides that termination of an employment contract is required to be in writing. The fact that the two employees moved to different cities could therefore not have been considered to be a termination on their part. That said, the dismissal of a pregnant employee is not entirely impossible under German Law, if we consider Section 9 Maternity Protection Act. The employer needs the consent of the competent regional authority before proceeding with the dismissal. Consent will only be given if the termination of the employment is based on a 'special case' (besonderer Fall) and only if this special case is in no way connected to the pregnancy.

The Netherlands (Peter Vas Nunes): In reply to a question I asked the author of this case report, she informed me that there is no prohibition in Danish law against dismissing a pregnant employee or against dismissing an employee for a non-discriminatory reason during maternity leave. This may have to do with the manner in which the Danish legislator

transposed the Maternity Directive 92/85 and the directives on equal treatment of men and women (currently, Directive 2006/54). The right to maternity leave, as provided in Article 8 of the Maternity Directive, was implemented in Denmark in the Act on Entitlement to Leave and Benefits in the Event of Childbirth, whereas the right to be protected against dismissal, as provided in Article 10 of the Maternity Directive, was implemented in the Act on Equal Treatment of Men and Women. Apparently, the legislator saw the prohibition against dismissal during pregnancy or shortly thereafter as exclusively a non-discrimination issue, not also as a health and safety issue. This may be the reason that in Denmark there is no prohibition against dismissing a pregnant employee or an employee shortly after childbirth if the dismissal is for a non-discriminatory reason. Dutch law is more protective of pregnant employees and those on maternity leave.

United Kingdom (Bethan Carney): This is a very interesting case that would throw up some difficult issues under UK law too. In the UK, the employees' relocation would not amount to a resignation but it would be possible for the employer to terminate employment, if employment was conditional upon the employees living in approved homes. It is possible to dismiss an employee on maternity leave although such a dismissal could give rise to sex discrimination and unfair dismissal claims if the reason for it is childbirth or pregnancy. In this case, however, the reason for the termination was purely the relocation and so would not give grounds for a discrimination claim. The employees might still have unfair dismissal claims (provided they had two years' service) if the reason was not a fair one or the employer did not act fairly in all the circumstances of the case. If it is a statutory requirement for employment that the employee lives in an approved house, this would be a sufficient reason for dismissal.

However, in most circumstances, a fair procedure would involve consulting with the employee before dismissal and this might be more difficult whilst the employee is on maternity leave. The employer might be able to do the consultation by telephone or at a location near the employee's home. Alternatively it might choose to wait until the end of maternity leave to try to dismiss. Even if the employee is dismissed before the end of maternity leave, she remains entitled to any remaining statutory maternity pay. However, the position on any enhanced maternity pay would be more complicated. (Because statutory maternity pay is not generous, some employers offer an additional amount of 'enhanced' maternity pay. Local authorities and public sector employers are particularly likely to offer additional 'enhanced' maternity pay.) If the right to enhanced maternity pay was contractual, the contract would have to be construed to determine whether the right continued for what would be the remainder of maternity leave if the employee was dismissed before its expiry. It seems likely that in most circumstances, enhanced maternity pay would be deemed to end when employment ended. However, if the

scheme mirrored the statutory scheme in other respects, the employee might be able to argue that the contractual scheme should mirror the statutory scheme in continuing to be paid for the duration of what would have been the entitlement if employment had continued. If the enhanced maternity pay was discretionary, the employer could choose whether or not to continue to pay it after termination. It can be seen that, if this scenario arose in the UK, it would throw up a number of possibilities depending upon the facts and would have to be analysed carefully.

Subject: Gender discrimination

Parties: FOA on behalf of A and B -v- employers C and D respectively

Court: The Danish Board of Equal Treatment

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EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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