SUMMARY

# 2012/20: When does fertility treatment begin? (DK)

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**Summary**

In a recent landmark judgment, the Supreme Court found that an employee who was undergoing initial check-ups before starting fertility treatment was not protected by the prohibition against dismissal on grounds of pregnancy, because she had not begun the fertility treatment.

**Facts**

Section 9 of the Danish Act on Equal Treatment of Men and Women (the "Act") prohibits employers from dismissing employees for reasons relating to pregnancy, childbirth or adoption or for exercising their parental rights to leave. Under normal circumstances, the protection under the Act commences on the date the employee becomes pregnant, irrespective of whether she or the employer knows about the pregnancy.

In 2003 the Supreme Court established that section 9 of the Act also protects employees from being dismissed for trying to become pregnant through artificial insemination. In the present case, however, the question was whether or not the employee was covered by the protection under this section, since the fertility treatment had not yet begun. The employee was dismissed while undergoing initial checkups. She had told the employer about her wish to undergo fertility treatment and she claimed that this was the reason for her dismissal.

The employee argued that fertility treatment should be viewed as a whole, to the effect that an

employee is protected against dismissal, in the same way as a pregnant employee, i.e. from the moment she knows that she will be going into fertility treatment. The employee admitted that this interpretation of the rules would give women undergoing fertility treatment better protection than women who get pregnant without fertility treatment, since the former would be protected from an earlier stage. Since the purpose of the rules is to prohibit employers from using their knowledge about an employee's wish to become pregnant in a dismissal situation, the employee argued that this difference in protection was well-founded.

The employer argued that it had to dismiss six employees on grounds of shortage of work and that, in making this decision, it had attached great importance to sickness absence. In addition to absence due to the initial check-ups, the employee had had a large number of sick days.

Because of its fundamental nature, the district court referred the case to the High Court. The High Court stated that, at the time of dismissal, the employee's own doctor was doing initial check-ups in order to clarify what kind of fertility treatment the employee should begin. Thus, the actual fertility treatment had not begun at the time of the dismissal. The High Court found in favour of the employer, ruling that situations like these are not covered by the special dismissal protection under the Act, since there is no "actualised possibility" of becoming pregnant. The employee appealed to the Supreme Court.

**Judgment**

On the same grounds as the High Court, the Supreme Court ruled that although section 9 of the Act protects employees from being dismissed for trying to become pregnant through fertility treatment, the employee in this case was not covered by the dismissal protection under the Act. This is because when she was given notice, she was only undergoing initial check-ups and had not begun fertility treatment. The Supreme Court also emphasised that there was no "actualised possibility" of becoming pregnant.

Like the High Court, the Supreme Court believed that there was no basis for establishing that, in deciding to dismiss the employee, the employer had fallen foul of the prohibition against gender discrimination set out in section 4 of the Act. Therefore, the Supreme Court was satisfied that the dismissal was justified by operational reasons. The appeal was dismissed.

**Commentary**

In 2008, the European Court of Justice ruled in the *Sabine Mayr* case (C-506/06) that an Austrian employee was not protected against dismissal at a time when her eggs had been fertilised *in vitro*. The ruling was based on the fact that the eggs had not yet been implanted in her uterus.

In the Danish case, the employee argued that the EU directives are minimal directives and that the Danish legislature has introduced stronger protection than that provided in the *Sabine Mayr* case. Unfortunately, the Supreme Court did not address the issue of whether the protection against dismissal is triggered at an earlier stage in Denmark than in Austria. The answer depends on how the expression "actualised possibility" is to be interpreted. It is not clear whether it will be deemed an actualised possibility if the employee has *in vitro* fertilised eggs that are still not implanted in her uterus – as was the case for *Sabine Mayr*. It seems most likely that the Danish implementation of the EU Directive in question is a minimal implementation.

The ruling by the Supreme Court does establish, however, that there is a period of time between the initial check-ups and actual pregnancy during which it is unclear when the dismissal protection under the Danish Act on Equal Treatment of Men and Women is triggered, and it will be interesting to follow the development in Danish case law on this topic.

**Comments from other jurisdictions**

*Austria (Andreas Tinhofer)*: In the *Sabine Mayr* case (C-506/06) the plaintiff relied exclusively on the statutory prohibition in Austrian law against dismissing a pregnant employee without prior approval by the court, which can only be given in limited situations (section 10, Maternity Protection Act, *Mutterschutzgesetz*). Having regard to the corresponding provision in the Pregnancy Directive (92/85/EC), the Austrian Supreme Court has asked the ECJ whether this protection has begun at the point when the woman's ova have been fertilised with the sperm of her partner, even though they have not yet been implanted within her.

In *Sabine Mayr* the issue of discrimination was not mentioned by the referring court, as the employer did not know about the treatment when he issued the termination letter. However, having held that Article 10 of the Pregnancy Directive did not apply to the situation at issue, the ECJ nevertheless went on to examine the case under Directive 76/207. It mentioned that the order for reference did not specify the reasons for which the worker was dismissed and that it was for the referring court to determine the relevant facts of the dispute before it. But knowing that Ms Mayr was dismissed while she was on sickness leave in order to undergo *in vitro* fertilisation treatment, the ECJ wanted to give the Austrian court some guidance on the issue of possible sex discrimination.

It pointed out that if a female worker is dismissed on account of absence due to illness there is normally no direct discrimination on grounds of sex. But if the treatment which is the reason for the absence affects only women it follows that the dismissal of a female worker essentially because she is undergoing "that important stage" of *in vitro* fertilisation treatment constitutes

direct discrimination on grounds of sex (paragraph 50). Two paragraphs later the ECJ referred to "an advanced stage" of *in vitro* fertilisation treatment, that is, "between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into the uterus" (par 52).

However, it seems that if a dismissal is issued on the grounds that a worker is trying to get pregnant by *in vitro* fertilisation (or otherwise), it would constitute direct sex discrimination irrespective of the stage of the treatment. At least in Austria, the courts are very likely to view it that way.

*Czech Republic (Nataša Randlová)*: There is a difference between Czech law and Danish law regarding the termination of the employment of a pregnant employee. Under Czech law, pregnancy is one of the situations designated by the Labour Code (such as temporary unfitness for work, maternity or parental leave or performance of military service) as a "period of protection". In this period the employee is protected against being given notice of termination (including immediate termination) by the employer.

The prohibition of giving notice to a pregnant employee is not limited to dismissal for reasons relating to pregnancy (as it appears to be in Danish law). The aim of the prohibition is to provide the employee with protection during the ensuing period from the implications of a major event, such as pregnancy.

The prohibition of giving notice applies provided an employee is already in a situation that is considered to be protected. In regard to pregnancy, the Supreme Court has held that notice of termination will not be legally effective even if the employer and/or the employee were not yet aware of the employee´s pregnancy (although the employee only has two months from the date when the employment would have ended to make a claim in court).

However, in the Czech Republic we have the same issue as described in this case report - i.e. when does pregnancy begin? A completely reliable method of ascertaining the exact moment of pregnancy does not exist, but we rely on the medical certificate of a gynaecologist to state the day pregnancy began.

*Germany (Dagmar Hellenkemper)*: A Regional Labour Court addressed a similar case nearly 15 years ago (LAG Schleswig-Holstein, 11 November 1997, Case No. 5 Sa 184/97). The employee, who worked in a dental practice, informed her boss that she was to undergo four fertility treatments in the near future. After the first (unsuccessful) fertilisation trial, the employee's contract was terminated. The employer claimed that the termination was not based on the fertility treatment as such, but on the employee's expected sick days.

The first instance court held that the termination was not contrary to section 9 of the German

Maternity Protection Act, which states that termination during pregnancy is void. It determined that section 9 did not apply to women who were trying to get pregnant, whether by fertility treatment or otherwise. The court determined that the termination was also not contrary to accepted principles of morality (section 138 of the German Civil Code) or to the duty of utmost good faith (section 242 of the German Civil Code), since it was explicitly not based on the pregnancy. The employer argued that the expected labour costs had been the reason for the termination. As in Dutch Law (see below), German Law prohibits dismissal during pregnancy, rather than on account of pregnancy, meaning that mothers are protected from the first day of the pregnancy but not before. The Appellate Court upheld that decision. Given that the provisions of the Maternity Protection Act have not changed since the decision, it is unlikely that any forthcoming case would be judged differently.

*The Netherlands (Peter Vas Nunes)*: Danish law allows dismissal of a pregnant employee as long as the dismissal is not on the ground of pregnancy. I wonder whether this law is compatible with Article 10 (1) of the Pregnancy Directive 92/85, which provides that "Member States shall take the necessary steps to prohibit the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of their maternity leave [...] save in exceptional cases not connected with their condition [...]". Is Danish law to be understood as meaning that any dismissal during pregnancy, not being on the ground of pregnancy, is an "exceptional case"? In the case reported above the employer dismissed six employees, who it selected on the basis of criteria such as the number of sick days. This does not strike me as an exceptional situation.

Although Dutch law differs from Danish law in that it prohibits dismissal during rather than on account of pregnancy (and maternity, etc.), the issue addressed in this Danish case, namely when pregnancy begins, is the same. In 1990 the Dutch Supreme Court ruled on a case where discriminati on an employee was dismissed on 31 March. On 22 April she informed her employer that she was pregnant. Subsequently she submitted a certificate, signed by her doctor, stating that according to the patient, her last period had occurred on 15 March and that she was expecting to deliver on 22 December. On 24 December she delivered a baby. The Supreme Court held that, in principle, an employee that alleges her dismissal was invalid on account of pregnancy bears the burden of proof that her pregnancy existed on the date of the dismissal. However, where there is a realistic possibility that the employee was pregnant on that date, as in this case (24 December minus 40 weeks = approximately 17 March), it must be assumed that she was pregnant on the date of the dismissal unless the employer proves otherwise. Whether an employer could prove such a thing is another matter.

In October 2008 the European Commission published a proposal to amend Directive 92/85 and this proposal was adopted by the European Parliament in 2010. Among other things the

proposal adds a recital clause referring to the ECJ's ruling in the *Sabine Mayr* case, but this addition is not reflected in the text of the proposal. Moreover, in December 2011, following a full year of debate, the Council rejected a key element of the proposal, namely that maternity leave should be with full pay. This makes the fate of the proposal highly uncertain.

United *Kingdom (Colin Leckey)*: I would expect an English Employment Tribunal to reach the same decision on these facts. Our Employment Appeal Tribunal (the "EAT") has already considered the implications of the ECJ decision in *Sabine Mayr* in a case called *Sahota - v - Pipkin*. The EAT held that, in the context of IVF, the "protected period" during which women may claim pregnancy discrimination is only to be extended by a limited time period in which ova have been collected and fertilised, and implantation is "immediate". Undertaking initial checks before starting fertility treatment clearly falls some way short of this. There is, in any event, no general prohibition under UK law on dismissing pregnant employees where the employer has operational reasons to do so, although they benefit from certain additional protections such as preference for any suitable alternative vacancies.

There might, however, be scope under UK law for a female employee to pursue a claim of ordinary sex discrimination (as distinct from pregnancy discrimination), if she could show that the decision to dismiss her was motivated by the fact that she had had initial checkups for fertility treatment, as women will undergo more initial tests and check-ups than men.

*Subject: Gender discrimination*

*Parties: Trade Union Denmark on behalf of A – v - the Confederation of Danish Industries on behalf of company B.*

*Court: Højesteret (Supreme Court)*

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