SUMMARY

2011/31 Dismissal, not (discovery of) pregnancy, triggers dismissal protection time-bar (LU)

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Facts

The plaintiff in this case was dismissed by her employer, a bank, by registered letter posted on Friday 26 November and received on Monday 29 November 2010. On 7 December 2010 she discovered that she was pregnant. She went to see a doctor, who on Thursday 9 December 2010 gave her a certificate that she was pregnant and had been pregnant since late October 2010. The plaintiff sent the certificate to the bank with a registered letter on Monday 13 December 2010.

Article L. 337-1 of the Luxembourg Labour Code allows the courts to nullify a dismissal given

during pregnancy and to order reinstatement. However, the deadlines for obtaining such a nullification are short:

"1. It is forbidden for the employer to [dismiss] an employee when she is in a medically certified state of pregnancy [...].

2. In the case of [dismissal] before the pregnancy has been medically certified, the employee can, within a time period of eight days from the notification of the dismissal, justify her state by the delivery of the certificate by registered letter.

3. Any dismissal notified in violation of [§ 1 or § 2] is void.

4. Within fifteen days of the termination of the contract, the employee can apply to [the court] for an order to declare the dismissal void [...]."

In this case, paragraph 2 applied. This meant that the deadline for sending the registered letter with the doctor's certificate ran until 29 November[1] + 8 days = 7 December 2010. Paragraph 4 meant that the deadline for filing a petition to the court ran until 29 November + 15 days = 13 December. On both counts, the plaintiff was too late. What to do?

The plaintiff relied on a Statute of 22 December 1986. This Statute provides: "If a person has not acted within the given time, they can in all matters obtain leave to proceed out of time if, without any fault on their part, they did not know about the event that launched the given time period to proceed or they were prevented from proceeding.". The plaintiff took the bank to court on 16 December 2010, arguing that "the fact that launched the given time period to proceed" was her discovery that she was pregnant, which was 7 December 2010. Proceeding from this premise, the eight-day deadline did not expire until 15 December and the 15-day deadline did not expire until 22 December 2010.

Judgment

The court turned down the plaintiff's request to proceed out of time. It agreed with the defendant that "the event that launched the given time period to proceed" within the meaning of Article L. 337-1(4) was the dismissal, not the discovery of the pregnancy. The plaintiff knew when she was dismissed, so there was no reason to grant her leave to proceed out of time. The court also held that the eight-day period of Article L. 337-1 (2) does not constitute a procedural time-limit as provided in the statute of 22 December 1986.

Given that Luxembourg law does not allow an appeal against a decision to grant or to turn down a request to proceed out of time, this was the end of the matter.

Commentary

The court took a formalistic approach that seems to ignore the ECJ's case law relating to dismissal during pregnancy, in particular the ECJ's 2009 ruling in the Pontin Đ v Đ Comalux case (C-63/08) (reported on page 38 of EELC 2010-1), in which the ECJ held:

"Articles 10 and 12 of Directive 92/85 (...) must be interpreted as not precluding legislation of a Member State which provides a specific remedy concerning the prohibition of dismissal of pregnant workers [...] laid down in Article 10, exercised according to procedural rules specific to that remedy, provided however that those rules are no less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render practically impossible the exercise of rights conferred by Community law (principle of effectiveness). A fifteen-day limitation period, such as that laid down in the fourth subparagraph of Article L. 337-1(1) of the Luxembourg Labour Code, does not appear to meet that condition".

In the Pontin case the referring court had asked the ECJ to rule on the compatibility with Directive 92/85 of both the eight-day time limit for delivering the medical certificate (paragraph 2 of Article L337.1) and the 15-day period for applying to the court (paragraph 4). However, the ECJ noted, "that, unlike the 15-day period, the eight-day period does not appear to constitute a procedural time-limit within which a court must be seised. It is for the referring court to determine whether it is such a time-limit"[emphasis added]. For this reason, the ECJ limited its review to the 15-day time-limit and did not go into the question of whether an employee who has failed to send her employer a medical certificate of pregnancy within the eight-day deadline of paragraph 2 has the right to bring proceedings pursuant to paragraph 4. In this regard, the Advocate-General had remarked in the Pontin case "that, contrary to the impression created by the wording of the first question, the possibility under national law of bringing proceedings evidently does not depend on compliance with the notification requirement [...] [T]hat wording must be understood to the effect that by its question the national court draws attention implicitly to the fact that compliance with that time-limit for notification has consequences for the operation of dismissal protection and, thus, also indirect consequences for the potential success of a claim." Be this as it may, the ECJ's Pontin ruling did not deal with the eight-day period, merely with the 15-day period. In the present case, where the dismissal occurred before the employee knew she was pregnant, and therefore before she could obtain a medical certificate, it was the eight-day time-limit that was at issue.

On the one hand the judgment reported here is arguably not incompatible with Directive 92/85, given that in Pontin, the ECJ had found the eight-day time-limit not to appear to "constitute a procedural time-limit". On the other hand, however, the ECJ had instructed the

referring court to determine whether the eight-day period really was not "a time-limit whose expiry is likely to prejudice the exercise of an individual's rights". The ECJ had remarked that if the eight-day period was such a time-limit, the principles of equivalence and effectiveness, which make the 15-day period incompatible with EU law, would apply equally to the eight-day period.

In the judgment reported here, there is no indication that the court applied the equivalence and effectiveness tests. It merely noted that the eight-day period is, formally, not such a time-limit, without taking account of the fact that materially, it affects the right of a pregnant employee to exercise her right to dismissal protection. This is because an employee who cannot produce evidence of pregnancy until the 15-day time-limit has expired (or has almost expired) effectively has no dismissal protection. Her claim will simply be turned down.

This judgment also seems to disregard what the Luxembourg government had stated in its brief in the Pontin case. In that brief, the government admitted that the 15-day period cannot begin to run against a pregnant employee who is unaware of her pregnancy, precisely because such an employee is prevented from proceeding in court: see ¤¤ 37 and 90 of the Advocate-General's opinion and ¤ 64 of the ECJ's judgment.

What the Luxembourg court in the case reported here should have done is assess whether the eight-day period is equivalent to similar time-periods in domestic law. In my view the answer is affirmative. Luxembourg law contains shorter time-periods. For example, an employee who claims to be medically unfit for work has three days to produce a doctor's certificate to that effect. In comparison, the eight-day period is more favourable and in my view it passes the equivalency test. As for the effectiveness test, the court should have assessed whether the eight-day period is sufficient for the employee (in the wording of Article L. 337-1 Labour Code:) "to justify her state by sending by registered letter a certificate". The court should have investigated how realistic it is for a pregnant employee to comply with this requirement.

In any event, it is difficult to imagine how the approach of the Luxembourg court can be reconciled with the requirement of protection of pregnant employees that, according to Article 10 of Directive 92/85 must be granted "during the period from the beginning of their pregnancy to the end of the maternity leave". In the Advocate General's opinion in Pontin (point 90) she observed that: "it is hardly permissible for that extensive protection in relation to the prohibition on dismissal to be limited on grounds of an omission to notify a pregnancy, in particular, and, at any rate, not where the worker, herself, was unaware of the pregnancy."

The present case illustrates what I perceive to be a flaw in Directive 92/85. Article 2(a) defines "pregnant worker" as "a pregnant worker who informs her employer of her condition, in

accordance with national legislation and/or national practice." Literally, this means that an employee who does not know that she is pregnant (and who therefore does not inform her employer that she is pregnant) is not protected against dismissal. On the other hand, there is Article 10 of the Directive. This is inherently contradictory, in that it provides that workers "within the meaning of Article 2" (i.e. workers who have informed their employer) are protected against dismissal "from the beginning of their pregnancy" A ruling by the ECJ will be necessary to resolve the contradiction between Articles 2 and 10 of the Directive.

Only time will tell whether the Luxembourg judgment reported above will stand alone, but in any event, it shows that the consequences of Pontin are still uncertain in Luxembourg.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Act on the Protection of Mothers (Mutterschutzgesetz) provides that a female employee cannot be dismissed without the consent of the court during pregnancy. However, the pregnancy must either have been known to the employer at the time the employment contract was terminated, or the employer must have been informed of the pregnancy or delivery within five days of notice being given. If the employee has no knowledge of her pregnancy she will still be considered to have informed the employer in due time if she informs it immediately after she has become aware of it. This provides gradual duties of information based on the state of knowledge of both the employer and the employee Ð and means that it remains possible for the expectant mother«s rights to protection against dismissal to be exercised.

Cyprus (Natasa Aplikiotou): These matters are regulated in Cyprus by Article 4 of the Law Providing for the Protection of Maternity of 1997 [Law 100(I)/1997] which, in a similar way to the Luxembourg Law, forbids the employer to issue a notice of dismissal to a pregnant employee who has previously informed it of her state of pregnancy and provided the evidence of a medical certificate. This prohibition lasts for three months after the end of the maternity leave. However, three situations fall outside the sope of these provisions, as follows: (a) where the employee has been found guilty of serious breaches of the terms of employment; (b) where the business has closed down; and (c) where the employment has a fixed duration and it has come to an end.

What is important to mention is that Cypriot Law does not establish any time frame similar to that of Luxembourg Law within which the employee is able to evidence her state of pregnancy and contest her dismissal as void. This matter is left to the discretion and interpretation of the courts.

Further, Cyprus law, in common with the situation in Luxembourg, does not provide

protection in situations where an employee does not know she is pregnant.

Czech Republic (Natasa Randlova): Under Czech law a pregnant woman is protected against dismissal from the beginning of her pregnancy. This protection is automatic even if the employee does not know she is pregnant and/or does not inform her employer that she is pregnant. If the employer dismisses an employee and she finds out afterwards that she was pregnant at the time of the dismissal and informs the employer, the dismissal will, in most cases, be invalid and the employer will be obliged to continue to offer work to the employee. Such a dismissal would only not be invalid if the employer or part of it were shutting down or relocating, or if the employee had seriously breached the disciplinary rules.

However because the Czech Labour Code is based on relative invalidity, the pregnant employee must claim it was invalid in the court within two months after the invalid notice of termination was given to her. If the employee does not claim invalidity in court and does not dispute the withdrawal of the notice of termination, the notice of termination will remain valid even though it was given to the employee while she was pregnant.

Germany (Henning Seel): The German legal situation is slightly different to the situation in Luxembourg in terms of the deadline for informing the employer of the pregnancy. Section 9 of the Maternity Protection Act ("MuSchG") stipulates the following: Dismissal of a woman during pregnancy and in the first four months following delivery shall be unlawful if the employer was aware of the pregnancy or delivery at the time it gave notice of dismissal or is informed of it within two weeks after the notice of dismissal was served. If this period is exceeded, no repercussions shall ensue if the delay was for reasons beyond the woman's control and the notification was then made without undue delay.

According to section 4 of the Protection against Unfair Dismissal Act ("KSchG") an employee who wishes to assert a claim that his dismissal is socially unjustified must petition the Labour Court within three weeks of receiving the termination notice to find that the employment relationship has not been dissolved by reason of termination.

In the judgment reported here, the plaintiff received notice of dismissal on Monday 29 November 2010. On 16 December 2010 she took the bank to court. The period according to section 4 KSchG was therefore met. However, the bank was not aware of the pregnancy at the time it gave notice of dismissal. This means, that Ð following German law Ð it is crucial whether the plaintiff informed the employer of her pregnancy properly in accordance with section 9 of the MuSchG. As a rule, the information must be given within two weeks of the notice of dismissal. The plaintiff informed the bank with a registered letter on Monday 13 December 2010. Thus, the period of two weeks was also met, but even if the time period of two

weeks had been exceeded, no repercussions would ensue if the delay was for reasons beyond the woman's control and the notification was then made without undue delay. In the present case, the plaintiff notified without delay once she had received a doctor's certificate. A German labour court would therefore have ruled in favour of the plaintiff.

Footnote

1 Some judgments let the 15-day period run from the date the dismissal letter is sent; others let it run from the date on which that letter is received: see ¤ 28 of the ECJ's ruling in Pontin.

Subject: Unfair dismissal, gender discrimination

Parties: X - v - Banque de Luxembourg

Court: Presidente du Tribunal du Travail de Luxembourg

Date: 25 January 2011

Case number: 343/11

Creator: Presidente du Tribunal du Travail de Luxembourg
Verdict at: 2011-01-25
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