EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 11 November 2010, case C-232/09 (Dita Danosa – v – LKB Lizings SIA), Gender discrimination

<p>Even if Ms Danosa is not a “pregnant worker” within the meaning of Directive 92/85, if her removal as a Board member was on account of her pregnancy (bearing in mind the reversal of the burden of proof), that removal would be contrary to Directive 76/207. In as much as Latvian law allows such a removal, it is not in line with EU law (§ 74).</p>

Facts

In December 2006, Ms Danosa was appointed as the sole member of the Board of Directors of the newly established company, LKB. She was awarded salary and other benefits, but her legal status (employee/agent?) was not determined. In July 2007, the General Meeting of Shareholders (“the GMS”) decided to remove her as a member of the Board of Directors (“a Board member”). She was pregnant at the time, but it is not clear whether the shareholders knew this and, if so, whether her pregnancy played a role in the decision to remove her. Ms Danosa brought an action claiming that she had been unlawfully dismissed as an employee, given that the Latvian Labour Code outlaws dismissal during pregnancy.

National proceedings

LKB based its defence on the Latvian Commercial Code, which authorises the GMS to dismiss a Board member at any time. Whether this defence was successful is not known. What is known is that the court of first instance and the appellate court dismissed Ms Danosa’s action. She appealed to the Supreme Court. In the Supreme Court case proceedings she argued that she should be treated as a worker for the purpose of EU law regardless of whether she was to be considered as such for the purposes of Latvian law, and that Article 10 of Directive 92/85

obligates Latvia to ensure that pregnant workers are protected against dismissal. LKB countered that Board members do not work under the direction of another person and cannot therefore be treated as workers for the purposes of EU law. The Supreme Court was of the opinion that, where a Board member comes within the concept of "worker" as determined in ECJ case law, Directive 92/85 applies, whether or not the individual in question holds a contract of employment, and that both Directive 92/85 and Directive 76/207 prohibit termination of the employment relationship in the case of a pregnant woman. Nevertheless, the Supreme Court found it necessary to refer two questions to the ECJ: (1) are Board members "workers" in the meaning of EU law? and (2) is the provision of the Latvian Commercial Code, which allows Board members to be dismissed even when they are pregnant, incompatible with Directive 92/85?

ECJ's ruling

1. The referring court's questions are based on the premise that the removal of Ms Danosa from her post as a Board member took place, or may have taken place, essentially because of her pregnancy. There is no reason to suggest that the questions referred to the ECJ are hypothetical or unrelated to the main proceedings (§ 35-37).

2. The concept of "worker" in Directive 92/85 must be defined in accordance with objective criteria that distinguish the employment relationship. The essential feature of an employment relationship is "that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration". The nature of the relationship under national law – e.g. agency, *sui generis*, self-employed or Director – is irrelevant (§ 39-42).

3. It is clear that Ms Danosa provided services to LKB for a certain period of time and in return for remuneration. The question, therefore, is whether her relationship to LKB involved the degree of subordination required for her to qualify as a "worker" in the meaning of the ECJ's case law. LKB maintained that the relationship between a company's shareholder(s) or supervisory board and a Board member is one of independent agency and must be based on trust, which means that it must be possible to terminate it if ever that trust is no longer

forthcoming. The ECJ does not subscribe to this view: the fact that Ms Danosa was a Board member does not rule out the possibility that she was in a relationship of subordination to LKB. Whether or not this was the case depends on: (1) the circumstances in which she was recruited, (2) the nature of her duties, (3) the context in which those duties were performed, (4) the scope of her powers and the extent to which she was supervised and (5) the circumstances under which she could be removed (§ 43-47).

4. Given that Ms Danosa had to report to and cooperate with LKB's supervisory board and that the GMS, over which she had no control, had the power to dismiss her, she satisfied *prima facie* the criteria to qualify as a "worker" in the meaning of the ECJ's case law (§ 48-51).

5. Was Ms Danosa a "pregnant" worker as defined in Directive 92/85, that is to say "a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice"? It is for the referring court to determine whether Ms Danosa had informed LKB of her pregnancy. However, even if she had not done this at the time of her dismissal, account must be taken of Article 10 of Directive 92/85, which prohibits the dismissal of pregnant (etc.) workers, save in exceptional cases for reasons unrelated to the worker's condition. It would be contrary to the spirit and purpose of the Directive not to apply this prohibition in a situation where the employer knows that the employee is pregnant even though she has not formally informed her employer of that fact (§ 52-55).

6. Supposing Ms Danosa cannot claim dismissal protection under Article 10 of Directive 92/85, either because she does not fall within the concept of "worker" or "pregnant worker", or because the decision to dismiss her was unconnected to her pregnancy and the reason for the decision was substantiated in writing and permitted under Latvian law, she can still possibly rely on the protection against discrimination on the grounds of sex under Directive 76/207 (§ 58-64).

7. The dismissal of a worker (essentially) on account of pregnancy constitutes direct sex

discrimination. It would be contrary to the principle of Directives 76/207 and 86/613 (which applies to self-employed persons) and against the principle of equality between men and women as enshrined in Article 23 of the Charter of Fundamental Rights of the EU to accept that a company can remove a Board member on account of her pregnancy, even if she does not qualify as a "pregnant worker" in the meaning of Directive 92/85 (§ 65-73).

Ruling

Even if Ms Danosa is not a "pregnant worker" within the meaning of Directive 92/85, if her removal as a Board member was on account of her pregnancy (bearing in mind the reversal of the burden of proof), that removal would be contrary to Directive 76/207. In as much as Latvian law allows such a removal, it is not in line with EU law (§ 74).

Creator: European Court of Justice (ECJ)
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