SUMMARY

2010/60: Dismissal following notice that employee was undergoing fertility treatment not presumptively discriminatory (DE)

<p>It was up to a female sign language interpreter undergoing fertility treatment to show facts that raised a presumption of discrimination when she lost her job in a round of redundancies.</p>

Summary

It was up to a female sign language interpreter undergoing fertility treatment to show facts that raised a presumption of discrimination when she lost her job in a round of redundancies.

Facts

A provincial centre for deaf people experienced a loss in business when a competitor set up close by. When the competitor then merged with another business in Copenhagen, the crisis became acute and the centre had to reduce the number of sign language interpreters from 28 to 17. Six of the 28 interpreters were covered by special rules protecting them against dismissal. The issue was how to select for redundancy the remaining 22 interpreters, of whom five would have to be dismissed. The employer decided to select the five employees on the basis of a number of defined criteria.

A female interpreter did not score high enough and was dismissed. In her opinion, she had been picked out because she had told her employer two months earlier that she was

undergoing fertility treatment. She felt discriminated against and therefore brought a claim against her employer. The judgment does not reveal whether she was pregnant at the time of the dismissal. Under Danish law this was not a relevant question, because in 2003 the Supreme Court held that the prohibition of dismissal on the ground of pregnancy applies equally to dismissal on the ground that an employee is undergoing fertility treatment.[1]

Judgment

The parties agreed that job cuts had been necessary. Against this background, the Court held that the fact that the interpreter had told her employer about the fertility treatment did not in itself shift the burden of proof onto the employer, in which case the latter would have had to prove non-discrimination. In addition, the Court held on the evidence of the witnesses and the general information about the selection method that the interpreter had failed to provide the necessary proof of discrimination. Accordingly, the Court ruled in favour of the employer.

Commentary

This case was adjudicated solely on the basis of domestic Danish law, namely the Act on Equal Treatment of Men and Women, without reference to European legislation. Although Article 9 of the Act does not prohibit termination during pregnancy or maternity leave, it does prohibit termination on the grounds of such leave. This prohibition carries two elements in it that are linked, both in Danish and in EU law. One element, as provided in Directive 92/85, is that pregnant women, women who have recently given birth and their newborn babies deserve extra protection against occupational health and safety hazards. Article 10 of Directive 92/85 does this by outlawing the dismissal of pregnant workers except 'in exceptional cases' and, in the event such an exceptional case arises, by requiring the employer to 'cite duly substantiated grounds [...] in writing'. In Denmark, this means that in the event of termination during either pregnancy or maternity leave, the employer must prove that it was absolutely necessary to dismiss the pregnant employee instead of another employee.[2]

The other element, as provided in Directive 2006/54, is that women should not be treated less favourably on the ground of their sex. Both elements come together in Article 2(2)(c) of this directive, which defines 'discrimination' as including 'less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EC'. Directive 2006/54 includes a provision reversing the burden of proof in the event of a presumption of discrimination.

In most cases, it makes no difference to a female employee whether she claims under the rules protecting pregnancy etc. or whether she claims under the sex discrimination rules. This case, however, illustrates that there can be a difference. Had the plaintiff been pregnant at the time

she was dismissed, her employer would have had to prove that it was absolutely necessary to dismiss her rather than another employee.[3] As the plaintiff was not pregnant, she needed to rely on the sex discrimination rules, which required her to make a prima facie case that the decision to select her for redundancy was linked to her having undergone fertility treatment.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian courts have decided a similar case (Supreme Court 16. 6. 2008, 8 Ob A 27/08s): a (female) employee was dismissed. At the date on which she was given notice of her dismissal, her ova had been fertilised in vitro, but not yet transferred back to her uterus. The employee claimed that she was pregnant at this time and therefore under the protection of the Austrian Act on the Protection of Mothers (*Mutterschutzgesetz*), which allows termination only with the consent of the Employment Court and only if evidence is provided by the employer that termination was absolutely necessary. The Austrian Supreme Court referred the case for a preliminary ruling to the ECJ, which stated in C-506/06 (Mayr) that the prohibition of dismissal of pregnant workers as provided in Article 10(1) of Directive 89/391/EEC must be interpreted as not extending to a female worker who is undergoing in vitro fertilisation treatment but where the fertilised ova have not yet been transferred into her uterus. The ECJ also pointed out that such a termination might be in breach of the principle of equal treatment for men and women inasmuch as it is established that the dismissal is essentially based on the fact that a woman has undergone fertility treatment. The Austrian Supreme Court took up these arguments and confirmed the validity of the dismissal as the employee neither raised the issue of discrimination nor furnished prima facie evidence for it as provided in the Equal Treatment Act (*Gleichbehandlungsgesetz*). The legal situation therefore seems to be very similar to the Danish one reported above.

Ireland (Georgina Kabemba): In Ireland the case may have been decided differently. Pregnant employees are treated in the same manner as all other employees for selection for redundancy. However, if an employee is on maternity leave (protective leave) and is provisionally selected for redundancy, notice cannot generally be issued to her until she returns from maternity leave.

In addition, whilst dismissal on the grounds of pregnancy is prohibited under the Unfair Dismissals Acts, 1977 – 2007, there is no statutory protection for an employee undergoing fertility treatment. However, the Employment Equality Acts 1998-2004, could be called upon to claim a discriminatory dismissal based on gender for example. Whilst a dismissal case concerning IVF treatment has yet to be adjudicated in Ireland, the European Court of Justice case of *Mayr v Bäckerei und Konditorei Gerhard Flöckner OGH* C-506/06 (2008) and the recent UK Employment Appeals Tribunal decision in *Sahota v Home Office and Pipkin* ET/1101513/08

will no doubt hold a persuasive position in the event that such a case arises in Ireland.

Spain (Ana Campos): In Spain, terminations during pregnancy and maternity leave are considered null and void unless the reasons for termination are justified. In other words, it is not possible to terminate an employee in such cases for unfair reasons, and this would give rise to a severance compensation. This rule was introduced in the Spanish Workers' Statute when transposing Directive 92/85/EC.

In this case, the crisis of the company due to the existence of a competitor made the job cuts necessary, so there were objective reasons that would have made the termination fair.

However, in this case, the employee was neither pregnant nor on maternity leave, so the above would not apply. However, regardless of there being reasons for the job cuts, the general sex discrimination prohibition set forth in our Constitution and laws forbids discrimination based on gender, and, as a consequence, if an employee manages to provide the court with sufficient prima facie indications of discrimination (for example, if the employer knew the employee was undergoing fertility treatment and that made the employer decide the termination), that will shift the burden of the proof to the employer, who will have to prove that the termination was unrelated to the employee's gender. In this case, it is possible that a Spanish court would have ruled also in favour of the employer, as it was proved that the employee had failed to comply with the defined criteria set forth by the company to choose the employees that would remain in employment. So the ruling in Spain would have been very similar to the one in Denmark.

United Kingdom (Bethan Carney): It appears that the legislation in the UK dealing with the burden of proof in discrimination cases works in a similar way to that in Denmark. Normally it is for the claimant to prove his or her case. However, in some circumstances, the burden of proof shifts to the respondent. If facts are put before the tribunal from which it could, in the absence of any other explanation, conclude that discrimination had occurred, the burden of proof moves from the claimant to the respondent, who must prove that it did not discriminate.

A major change in UK discrimination law occurred very recently when new consolidating legislation, the Equality Act 2010, came into force on 1 October 2010. This Act brings the different strands of discrimination law (sex, race, disability, age, sexual orientation etc) into

one place. All the previous case law on the burden of proof provisions was made under the old legislation, but commentators believe that the definition has not significantly changed so it will continue to be relevant.

Footnotes

1 The Supreme Court case concerned a woman who was undergoing fertility treatment at the time of termination. Accordingly, the Court did not decide on how to apply the rules in cases where employees have in the past undergone or will in the future undergo fertility treatment.

2 Section 16(4) of the Danish Act on Equal Treatment of Men and Women etc.

3 She referred to section 9 of the Danish Act on Equal Treatment of Men and Women etc. Had she been pregnant, she would have referred to the same section.

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