SUMMARY

2010/48: Bonus scheme pro-rated bonus for periods of pregnancy-related inactivity not discriminatory (NL)

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Facts

This judgement is the result of the appeal in the case that was reported as EELC 2009/14. It concerns a bonus scheme under which employees received an annual bonus depending on a mix of the company's results and each employee's individual performance. The scheme provided that absence from work in excess of one month in any year, for whatever reason, would lead to a *pro rata* reduction of the bonus. The employee in question was absent for several lengthy periods, partly due to maternity leave (16 weeks per child) and partly due to pregnancy-related and post-pregnancy sickness. As a result, her bonuses for the years 2004, 2006 and 2007 were pro-rated. She claimed payment of the balance between full bonuses and what she actually received. The court of first instance awarded her claim, holding that the bonus scheme constituted direct discrimination. The employer appealed.

Previously, the Equal Treatment Committee, having been asked to render an opinion solely regarding the period of maternity leave in 2006, had also ruled in her favour.[1] For more details, see EELC 2009/14.

Judgment

One issue in the Appellate Court case was whether the bonus qualified as salary. This question was inspired by the rules in the Dutch Civil Code, which make a distinction between the employer's financial obligations during sickness on the one hand and during maternity leave on the other. During sickness an employee is, as a rule, entitled to continued payment of (at least) 70% of his or her salary, in which case non-time-based salary (e.g. in the form of an annual bonus) is averaged, whereas during maternity leave there is no entitlement to any salary at all, the rationale being that during this leave the employee is eligible for maternity benefits, paid by the government, that as a rule are equal to full salary.[2] The Appellate Court, setting aside an old (1941) Supreme Court judgement and stating that modern types of remuneration require a new approach, defined the bonus at issue as salary. This meant that employees are not entitled to a bonus during maternity leave and that, therefore, the employer in this case was not under an obligation to take the maternity leave period into account when applying the bonus scheme.

As for the period during which the employee was absent on account of pregnancy-related sickness, the Appellate Court, seeking guidance from the ECJ's judgement in the *McKenna* case, found that there was no discrimination.[3] The Court noted that in the bonus scheme at issue the reason for the inactivity was irrelevant. This fact led the Court to conclude that the employee was treated in the same manner as her male colleagues.[4] Accordingly, the Appellate Court reversed the lower court's judgement and the employee's claim was denied after all.

Commentary

The judgement seems correct to me inasmuch as it relates to the period of maternity leave. I am not convinced that it is correct inasmuch as it relates to the period of pregnancy-related sickness. I will try to explain this below.

The ECJ has generally provided a broad interpretation of the rights related to pregnancy and maternity and it has delivered numerous judgements connected to these topics. Cases have been decided on different grounds for different reasons (*inter alia* the Community law in force at the time of judgement): Directive 75/117/EEC (equal pay: e.g. *Gillespie*[5], *Alabaster*, *McKenna*); Directive 76/207/EEC (equal treatment: e.g. *Brown* and *Herrero*); and Directive 92/85/EEC (health and safety: e.g. *Lewen*).

The above-mentioned cases, amongst others, provide us roughly with the following general conclusions regarding the underlying matter, all applied in *McKenna*:

1. pregnancy does not constitute illness, and accordingly there should be no comparison as

such between a pregnant woman and a sick person;

2. if a rule providing, within certain limits, for a reduction in pay to a female worker during her maternity leave does not constitute discrimination based on sex, neither can a rule providing, within the same limits, for a reduction in pay to that female worker who is absent during her pregnancy by reason of an illness related to that pregnancy, be regarded as constituting discrimination of that kind;

3. it does not necessarily follow from the finding that pregnancy-related illnesses are *sui generis* (that is to say, they affect only female employees) that a female worker who is absent by reason of pregnancy-related illnesses is entitled to maintenance of full pay, whereas a worker absent by reason of an illness unrelated to pregnancy does not have such a right;

4. during an absence resulting from such an illness a female worker may thus suffer a reduction in her pay, provided she is treated in the same way as a male worker who is absent on grounds of illness, and provided that the amount of payment made is not so low as to undermine the objective of protecting women before and after giving birth (note: the threshold is an income at least equivalent to sick pay, which level is set by national law).

In the case reported above, the Appellate Court referred to *McKenna*, thus treating the case as an equal pay issue, not as a pregnancy protection issue. In this respect one needs to bear in mind that according to settled case law, the concept of pay within the meaning of Article 141 of the EU Treaty (formerly Article 119, now Article 157 of the TFEU) includes all consideration paid to a worker in respect of his employment by his employer, whether immediate or future and whether paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis.

Does the bonus at issue fit within this definition? I do not see any reason why it should not. In this respect I also refer to *Lewen* – v – *Denda* (1999). Although that decision dealt with an annual Christmas bonus, it also provides arguments as to how to navigate when it comes to a bonus scheme.[6]The ECJ ruled that the Christmas bonus at issue fell within the concept of pay of (the former) Article 119 of the Treaty, regardless whether or not it was paid mainly or exclusively as an incentive for future work or as a reward for loyalty to the undertaking, or both. For the purpose of Article 119 the reason for which an employer pays a benefit is of little importance, provided that the benefit is granted in connection with employment.[7]

Notwithstanding this conclusion, the bonus at issue in *Lewen*, not being intended to ensure the required minimum level of income during a worker's maternity leave, could not be regarded as falling within the concept of pay in the meaning of Article 11(2)(b) of Directive

92/85/EEC.[8] (As an aside, I wonder how the ECJ would rule if a bonus is not merely a fringe benefit, but represents a substantial part of income.)

In *Lewen*, the ECJ further concluded that, if a bonus constitutes retroactive pay for work performed (which is to be determined by the national court), work actually performed as well as motherhood protection periods that are equated to time worked, should be taken into account.

In the case reported above, the Appellate Court did not refer to *Lewen*, which would have been an obvious thing to do in my opinion, given the underlying bonus issue. If it had, would the outcome have been different? As set out above, the employees under the bonus scheme at issue received an annual bonus depending on a mix of the company's results and each employee's individual performance. This was clearly retroactive pay for work performed.

Should the Appellate Court have ruled that the employer should have taken the period of maternity leave into account? In my opinion, yes, whether or not the bonus was linked to company results and/or to individual performance. In this respect I also refer to *Herrero* where the ECJ in a related matter ruled that maternity leave has to be included in the calculation of seniority when determining conditions for access to work.[9]

I am hoping that a pending ECJ case (*Gassmayr*), based on Directive 92/85/EEC (health and safety at work) in another related matter will shed more light on this topic. In that case one of the questions at issue is whether or not a female employee (a doctor in Austria) should continue receiving an allowance for on-call duty while being away from work by reason of (illness related to) maternity leave.[10] The allowance at issue is not a flat-rate benefit received by all doctors regardless of actual performance, but it is directly linked to special duties. The allowance is individually calculated by reference to (i) the general hourly rates of pay provided for in the relevant administrative regulations and (ii) the time each employee has actually performed on-call duties.

As Advocate-General Maduro in that case puts it, referring to *McKenna*: *"The issue is not one of discrimination on the basis of sex (although pregnancy-related illnesses will affect only women, there are illnesses exclusive to men) but of the principal of protecting pregnant women."*[11]

He states that Community law does not prevent employers from paying additional benefits or allowances to their employees for the performance of specific tasks, nor from making such payments conditional on the actual performance of those tasks.[12] Maduro concludes by proposing to allow an employer to refuse payment of an allowance for on-call duty if there are no duties performed due to maternity leave.

An interesting detail in the *Gassmayr* case is, as it seems, whether under Austrian law sick employees receive the on-call duty allowance and, if so, how the ECJ will deal with that issue.

Comments from other jurisdictions

Austria (Martin Risak): Under Austrian law one has to differentiate between the three periods during which an (expecting) mother does not work:

- *maternity leave* during the statutory prohibition from working, which is eight weeks before and eight weeks after birth and which entitles the mother to maternity pay from social security insurance. Maternity pay is calculated based on the mother's average pay in the last three months prior to the birth. Extra payments (such as holiday and Christmas bonuses, which are common in Austria) are only taken into account by adding a certain percentage of the wages paid; the percentage is calculated as the average extra payments for all employees in the relevant sector not taking bonuses into account;

- *extended maternity leave*, which is unpaid leave after the birth of the child, during which the mother is usually entitled to a fixed amount of childcare benefit. Her level of pay is not usually taken into account;

- *pregnancy related sick leave*, which is treated as any other sick leave during which the employer (for certain periods) must continue to pay the mother's wages. The employer must continue to make monthly payments but, in accordance with court practice (which, in my opinion, does not comply with the continuation of payment rules) does not have to take bonuses into account, as these are paid less than monthly.

Under Austrian employment law, a mother on sick leave would not be entitled to a proportion of the bonus to which she would have been entitled had she worked during this time, as is the case also for other employees on sick leave; nor would the bonus be taken into account in calculating maternity pay from the social security insurance.

The *Gassmayr* case referred to in the Commentary is not on all fours with the rules outlined above, as it concerns a public servant not working under an employment contract. The employment relationship of Ms Gassmayr was governed by administrative law, which is different from contract-based employment law. Under the provisions for public sector pay allowances for on-call duty are not considered to be "salary" in the narrow sense but "extra-pay" and this does not have to be paid either for sickness or maternity leave (where the obligation to pay salary continues to fall on the Federal Government - the employer - instead of falling to social security insurance, as it would for non-public sector employees). The

outcome of the case before the ECJ will therefore only be directly relevant to this group of public servants and not to the majority of Austrian employees (given that allowances that form part of monthly salary are not taken into account in calculating both sick pay and maternity pay).

United Kingdom (Alexandra Mizzi): The principles governing bonuses during maternity leave under UK law are notoriously complex. The generally accepted position is that where the bonus relates to individual performance, it should be treated as "remuneration" for the purposes of the Maternity and Parental Leave Regulations 1999 (the "MPLR") and so is not payable in respect of any period of maternity leave (except the two-week compulsory leave period). In contrast, a general company bonus that is not linked to individual performance is more likely to be regarded as a contractual benefit and therefore payable in respect of the whole maternity leave period.

The question becomes thornier when a bonus is based on a mixture of individual and company performance. The Scottish Court of Session's decision in *Hoyland* – v – *Asda Stores* [2006] IRLR 468 suggests that this type of bonus can be treated as "remuneration", but the circumstances in that case were unusual in that the bonus was treated as pensionable pay by the employer. However, so long as there is a clear link with individual performance, it seems unlikely that a UK tribunal or court would find that the bonus should be treated as a benefit: to date, I am aware of no successful maternity leave/bonus claims on this basis.

It is doubtful that a UK court would have reached the same conclusion in relation to the pregnancy-related sickness point. Under the MPLR, such sickness cannot be taken into account in dismissing an employee; and reducing her bonus for pregnancy-related sickness absence would amount to an unlawful detriment under the MPLR and probably sex discrimination as well.

Footnotes

1 CGB 29 October 2007, opinion 2007-188.

2 There is a maximum, also the benefits are based on fixed salary only and do not take account of fringe benefits such as bonuses.

3 ECJ 8 September 2005, C-191/03 (*McKenna*).

4 No argument was brought forward that, by not paying the bonus, the employee's salary fell below the required minimum as set out under Community (case) law.

5 ECJ 13 February 1996, C-342/93 (*Gillespie*), paragraph. 20

6 ECJ 21 October 1999, C-333/97 (*Lewen – v – Denda*), paragraphs 19 and 20.

7 *Lewen – v – Denda*, paragraphs 19 and 20.

8 *Lewen – v – Denda*, paragraph 23.

9 ECJ 16 February 2006, Case C-294/04 (*Herrero*).

10 Opinion Advocate General Poiares Maduro 3 September 2009 in Case C-194/08 (*Gassmayr v Bundesministerin für Wissenschaft und Forschung*), summarised in EELC 2010-1 page 39.

11 *Gassmayr*, opinion Maduro, paragraph. 17.

12 *Gassmayr*, opinion Maduro, paragraph. 26.

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