SUMMARY

2010/46: Rules protecting pregnancy also apply after having stillborn baby (GR)

<p>Prohibition against terminating the employment agreement of a pregnant woman even in the case of a stillborn child.</p>

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Facts

The plaintiff was a medical sales rep. She had been hired in 2002 by the defendant company. She worked in her original position until January 2004, when, in connection with her pregnancy and by common agreement, she was re-assigned the duty of promoting the defendant's products as a beauty consultant in a pharmacy. She worked in this new position until 23 June 2004, when during her regular visit to the gynaecologist, she discovered that her baby was dead. She was hospitalised the next day, in order to give birth and gave birth to a stillborn baby. She received medical leave of absence of 34 days until 27 July 2004 and then she took her regular annual leave of absence for 17 days. When she returned to work on 23 August, the company proceeded to dismiss her.

Procedure

The plaintiff brought an action before the Athens First Instance Court claiming that her dismissal was void, since it had taken place only 8.5 weeks after birth, i.e. within a period of one year from the date of the birth, during which Greek law prohibits dismissal. She also argued that her dismissal was related to her pregnancy and therefore violated the principle of equality between men and women. Consequently, she asked the court to order the defendant

(1) to pay her salary etc. from the date of her dismissal until the date of the judgement; (2) to continue paying her salary in the future; and (3) to pay compensation for moral damages.

The Athens First Instance Court, by decision no 1613/2005, ruled that the termination was valid and rejected the claim. The court reasoned that the provisions of the law aim to safeguard the employee's job during her pregnancy and one year thereafter, so that she can devote herself to the birth and bringing up her child without the risk of dimissal. If the baby is stillborn, the special conditions in which the employee is protected (taking care of and bringing up the baby) do not exist. As for the discrimination claim, the court ruled that it had not been proven that the plaintiff's termination was linked to her gender, the true reason for the termination being abuse by the plaintiff of the mobile phone her employer had granted her. It was established that the plaintiff had made a habit of phoning during her work time on a daily basis, for personal purposes and for quite a long time, often exceeding one hour, without necessity.

The plaintiff appealed. The Court of Appeal, by decision no 3618/2007, ruled that the protection of pregnant women against termination covers, not only women who give birth to live children, but also women whose children are born dead or die within nine weeks after confinement.[1] Such protection, the court considered, is imposed in order to allow pregnant women to recover from the ordeal of having given birth. The Court of Appeal reasoned that an opposite interpretation would be contrary to the spirit of the law, which aims to protect maternity and to encourage female employees to have children. Such protection derives already from the provisions of ILO Conventions Nos 103 (1952) and 183 (2000) concerning maternity protection, incorporated into Greek legislation by Law 1302/1982, as well as from Presidential Decree 176/1997. This Presidential Decree is the Greek transposition of Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Article 2(b) of this directive defines a "worker who has recently given birth" as a worker who has recently given birth "within the meaning of national legislation and/or national practice". Given that Greek law lacks any definition of giving birth, the court needed to determine the purpose of the dismissal prohibition. It pointed out that Greek law is to be construed in accordance with the purpose of the directive, which is to safeguard, not only the care of the newborn, but also to protect the health of the mother and her recovery from pregnancy and confinement, and to restore her to normal health, regardless of whether the child was born dead or alive.

The case reached the Supreme Court by means of a recourse filed by the defendant. The Supreme Court confirmed the reasoning of the Court of Appeals' decision and rejected all the reasons for the recourse.

Commentary

This is the first time the Supreme Court has ruled that the protection of pregnant women against dismissal during pregnancy, as well as one year after the delivery, also covers also the situation where a baby is stillborn.

The Supreme Court based its judgement not only on the letter of the law, which does not make any distinction between a child born dead or alive, but also on the purpose of the law, which is to protect maternity in general and to encourage female employees to have children. This aim is achieved by aiding the recovery of the mother to the state of health she was in before her pregnancy.

The Supreme Court's decision has been commented on as being not only fair, but humane and in absolute line with the ECJ's decisions in C-506/06 (*Sabine Mayr*) and C-460/06 (*Paquay*). In *Sabine Mayr* the ECJ ruled that Article 10 of Directive 92/85/EEC must be interpreted as not protecting a woman against dismissal, where, on the date of her dismissal she had undergone *in vitro* fertilisation, but had not yet had the fertilised ova transferred back into her body. However, if her dismissal were essentially to be based on the fact that she had undergone such treatment, that would be in breach of Directive 76/207/EEC on gender discrimination. In *Paquay*, the ECJ held that Directive 92/85/EEC must be interpreted as prohibiting, not only the actual dismissal during the protection period, but also the taking of preparatory steps for such a decision. In *Paquay* the ECJ held, *inter alia*, that a dismissal on the grounds of pregnancy and/or childbirth is contrary to Directive 76/207/EEC (gender discrimination) even if it occurs after the protection period has ended.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austrian employment law there is a distinction between stillbirth (*Totgeburt*) and miscarriage (*Fehlgeburt*). In the first case the foetus weighs at least 500 grammes, in the latter case, less than this. A miscarriage ends the special protection of the pregnant woman under the relevant statutory provisions. If a woman is unable to work after a miscarriage she is entitled to continued payment by the employer under the general rules. However, during the so-called "protection period" of eight weeks before and after the calculated date of birth, where employment is prohibited, the employee receives a special allowance (*Wochengeld*) under social insurance instead of her remuneration.

If a child is stillborn the absolute ban on working during the protection period has to be

observed as if the child were born alive (eight weeks after confinement or twelve weeks, if the confinement has taken place before the expected date). Accordingly, it can be argued that the special protection against dismissal also applies in the same way as if the child were born alive. This would mean that the employee must not be dismissed without prior approval by the court for a period of four months after delivery. So far, there has been no case law on this issue.

Germany (Christian Busch): In contrast to the situation in Greece, similar cases have already been ruled on by the German courts. Concerning the essential question of whether the dismissal of an employee who gives birth to a stillborn baby is effective, section 9 of the Protection of Working Mothers law (*Mutterschutzgesetz, abbreviated MuSchG*), which prohibits the dismissal of an employee during pregnancy and up to 4 months after the delivery, is decisive.

In the current case, the pivotal question is whether the employee delivered a baby or not. If she did, section 9 of the MuSchG would have applied and therefore the dismissal on 23 August 2004, which was only 8.5 weeks after the birth of a stillborn baby - and hence within the four month respite - would have been invalid.

In previous decisions the Federal Labour Court differentiated between abortion and stillbirth, whereas only stillbirths are protected by section 9 of the MuSchG. The difference between abortion and stillbirth is - based on a recommendation of the WHO - that in the latter case, babies are generally viable (this is assumed to be the case from the 22th to 24th week of pregnancy, where the baby weighs 500 grammes and is 35cm in length). Otherwise it is an abortion which is not protected by section 9 of the MuSchG.

Although there is no specific information about these matters, the employee was in at least the 6th month of pregnancy, and so it is likely that the baby would have fulfilled these requirements. A German Court would therefore have held in the same way as the Supreme Court of Greece and applied the dismissal protection - and concluded that the dismissal of the employee was invalid.

United Kingdom (Anna Sella): Women in the UK who give the required notice are entitled to take up to one year's maternity leave, and "childbirth" for these purposes includes a stillbirth (after 24 weeks of pregnancy). In most cases, dismissal on grounds of absence following a stillbirth would be regarded as a reason relating to pregnancy and childbirth and so automatically unfair (Maternity and Parental Leave Regulations 1999, regulation 20). However, this only applies where the dismissal ends the employee's statutory maternity leave.

In other words, an employee is not protected from a childbirth-related dismissal that occurs after the end of her maternity leave period. This is consistent with the position under EU law (*Larsson* [1997] IRLR 643).

In the UK, by far the most common remedy for unfair dismissal is an award of compensation. Reinstatement (in the same job) and re-engagement (in another job) are possible but very rarely granted. A decision to dismiss, even it is found unfair, is never declared "null and void".

Footnote

1 Greek law provides for 17 weeks of maternity leave, of which eight are to be taken before and nine following the delivery of the baby. In practice employees usually take all 17 weeks after the delivery.

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