SUMMARY

2010/44: Court allows dismissal of pregnant employee despite no "exceptional case" (DE)

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Facts

Directive 92/85/EEC protects female workers who are pregnant, have recently given birth or are breastfeeding their baby. Article 10(1) enjoins Member States to take the necessary measures to prohibit the dismissal of such workers "during the period from the beginning of their pregnancy to the end of the maternity leave [...] save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice [...]". Article 10(2) provides that if such a worker is dismissed during the said period "the employer must cite duly substantiated grounds for her dismissal in writing".

Danish law is, or states to be, in compliance with Directive 92/85/EEC. It contains a presumption that it is illegal to dismiss an employee who is pregnant - a presumption that can be rebutted by proving, for example, that the dismissal is based on the conduct of the employee or that the dismissal is based on redundancy due to a decline in business. Thus, if an employer decides to terminate a pregnant employee's employment, the burden of proof that the termination is due to a decline in business is on the employer.

In this case from the Western High Court, the employer succeeded in discharging the burden. The case concerned a woman, the only employee on a permanent contract at a jeweller's shop.

Six months into her employment, she told her employer that she was pregnant. About one month later the jeweller decided to terminate her contract, citing financial difficulties. The employee sued, claiming unfair dismissal.[1]

Judgment

The Western High Court found for the jeweller, being satisfied that he had proved that, whilst turnover had been the same for several years, gross profits had fallen by more than 10% owing to an increase in the cost of materials. Having regard to the fact that the jeweller had taken a pay cut himself, the Court held that it had been necessary to restructure the business by dismissing staff and the dismissal was therefore not pregnancy-related in any way.

Commentary

The case shows that it is possible for employers to discharge the generally quite heavy burden of proving that a dismissal is not pregnancy-related in any way, so long as it can be proved that there are operational reasons for the dismissal(s) and also that the protected employee is the one whom the business needs least.

In this case, the pregnant employee was also the only employee and thus the only one who could be dismissed. However, it is remarkable that the Court accepted a decrease in profits of around 10% as sufficient proof.

As articles 10(1) and (2) of Directive 92/85/EEC only allow the dismissal of pregnant workers "in exceptional cases" and require the employer to "cite duly substantiated grounds [...] in writing", I can only assume that this case may have had another outcome in other jurisdictions. I personally find it a bit unclear from the judgement whether the parties were aware of these requirements and, furthermore, it seems unclear whether the court took this into consideration. Neither the requirements nor whether they were met is addressed as such in the judgement.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, the employer would have needed to seek the approval of the employment court before issuing the notice. Under the Mother Protection Act (*Mutterschutzgesetz*) a planned dismissal may be approved only if (i) the business or one of its organisational sub-units is closed or (ii) a line of products or services is discontinued. In addition, the employer must prove that there is no suitable alternative employment for the pregnant worker. A loss in gross profits of 10% would probably not have been accepted by an Austrian court as a reason for the dismissal of a pregnant worker.

Belgium (Isabel Plets): Taking all the facts into account, the judgement would probably have been similar in Belgium. Under Belgian law, a pregnant employee is protected against dismissal as from the moment she duly informed her employer of her pregnancy until one month after the end of her maternity leave. The employer is only entitled to terminate the employment contract, if it has reasons unconnected to the employee's physical condition due to pregnancy or birth. If not, compensation equal to six months' gross remuneration is payable. Reinstatement is not possible under Belgian law.

The burden of proof in Belgium is also considered relatively heavy: the employer must prove the existence of objective circumstances showing that the dismissal is not connected to the employee's physical condition (e.g. economic reasons, such as restructuring or financial difficulties or reasons related to the employee's performance or behaviour) and a causal link between the said circumstances and the dismissal (i.e. do the circumstances mean that the dismissal is necessary?).

Germany (Paul Schreiner): In transposing the Directive 92/85/EEC the German legislator provided a particular form of dismissal protection in §9 of the Protection of Working Mothers Law (*Mutterschutzgesetz, abbreviated MuSchG*). Section 9 of the MuSchG generally prohibits the dismissal of an employee during pregnancy and maternity leave (for up to four months after the confinement). An employee cannot waive this protection in advance. Admittedly, section 9 III of the MuSchG contains an exception under particular circumstances, as follows:

Firstly, and apparently in contrast to Danish law, the law provides for an administrative procedure by which a dismissal may be declared valid. This approval requirement is in accordance with European Law: Article 10 (1) of Directive 92/85/EEC expressly mentions this possibility. Notably, the permission must be obtained before the notice of termination is issued, as the German courts will not accept late permission.

Secondly, a dismissal is only allowed in exceptional cases or for exceptional reasons, not associated with the employee's pregnancy. German case law has found such exceptions only very rarely. For example, in 1983 the Higher Administrative Court of Hamburg held that a dismissal during pregnancy was justified in the event that not dismissing the employee were to jeopardise the employer's existence.

Applied to the present case, my assumption is that a German court would be unlikely to have ruled in the same way as the Western High Court. The fact that the employerÕs gross profits had fallen by more than 10% owing to an increase in the cost of materials, does not suggest there was any serious risk to the employer's existence.

The Netherlands (Peter Vas Nunes): Directive 92/85/EEC is not one of the anti-discrimination directives. It aims to enhance occupational health and safety and is one of the many individual directives pursuant to Framework Directive 89/391/EEC. The reason for the prohibition on dismissing pregnant workers has nothing to do with non-discrimination. According to the recital to the directive, the reason is that any risk of dismissal may have harmful effects on a pregnant worker's physical or mental health. It is interesting to see that Denmark sees the implementation of Directive 92/85/EEC as a matter of non-discrimination law.

United Kingdom (Anna Sella): Under UK law, termination of employment for a reason relating to the employee's pregnancy is treated as an automatically unfair dismissal (and also unlawful sex discrimination), but this does not apply where the employer can establish that the principal reason for the dismissal was redundancy. However, where the redundancy occurs during the maternity leave period, the employer must show that it was "not practicable by reason of redundancy" to continue to employ the employee under her existing contract (Maternity and Parental Leave Regulations 1999, regulation 10). Moreover, in this situation, the employer must also look for a suitable alternative vacancy for the employee (and, if one exists, offer it) on terms not substantially less favourable than those she enjoys under her existing contract. The upshot is that a woman on maternity leave will often be offered a suitable alternative job in preference to anyone else who is at risk of being made redundant.

Footnote

1 She could, in theory, have claimed reinstatement, but in Denmark this remedy is hardly ever used.

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