EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/36 A fixed term employment contract cannot be challenged where pregnancy was not disclosed in the application procedure (GE)

<p>If pregnancy is not disclosed during the application procedure, the employment contract cannot be challenged even though the applicant is not able to render services because of the pregnancy for a significant time period. The Regional Labour Court of Cologne, as the appellate court gives its first statement on this situation and extends the case law of the Federal Labour Court (Bundesarbeitsgericht, the ‘BAG’).</p>

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Facts

The defendant law firm was seeking to employ someone to cover for another employee, who was absent on maternity leave (October 2011 to September 2013). When the plaintiff applied for the job she was also pregnant, although at that point she was not unable to work. However, it was clear from the beginning that she would be unable to work for the entirety of the fixed term.

On 3 January 2012, the defendant annulled (rescinded) the employment contract for wilful deceit. The defendant argued he would never have employed the plaintiff had he known she was pregnant.

On 19 January 2012, the plaintiff sued the defendant, claiming that the employment relationship still existed. The labour court ruled in favour of the plaintiff.

On appeal, the defendant argued that he would never have concluded an employment contract with a pregnant woman to cover for another pregnant woman. He believed he had been maliciously deceived and the employment contract was void.

The plaintiff argued that she had not even known that she was pregnant at the time the employment contract was concluded.

Judgment

The Regional Labour Court (the 'LAG') held that the employment contract was valid. The plaintiff was under no obligation to inform the defendant about the pregnancy even if she had known she was pregnant. An applicant is not obliged to give such information, since a question regarding the existence of pregnancy would be contrary to obligations on both parties to act in good faith and would violate section 3 of the Equal Treatment Act (the *Allgemeines Gleichbehandlungsgesetz*, 'AGG'), the German transposition of Directive 2000/78 for being discriminatory on the grounds of sex.

The defendant himself expressly stated that he did not want to employ the plaintiff since she was pregnant. Therefore, he apparently intentionally violated the AGG. The defendant was not justified in discriminating against her, since she was able to work for a significant part of the employment and, therefore, the older case law of the BAG which allowed for an employment contract to be rescinded if the employee was not able to work at all did not apply. This meant that the rescission was unlawful and void and the employment contract was still in effect.

Commentary

I agree with the decision. The defendant seems to have wished to discriminate against pregnant persons, who are always women. Unequal treatment between pregnant and non-pregnant persons constitutes direct discrimination. By section 8(1) of the AGG:

"A difference of treatment on any of the grounds referred to under section 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine

and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

In Germany pregnant women are excluded from working under certain conditions. In other words, it is accepted in law that there are jobs that pregnant women must not do at all. Therefore pregnancy of an employee can qualify as a determining occupational requirement, if there is no possibility that the employee can do the job.

Where a prohibition against a pregnant employee doing a job only covers part of the employment, this is indistinguishable from a situation in which the employee becomes pregnant immediately after starting the job. Indeed, the consequences are the same: the employee is unable to render services for a portion of the fixed term of employment. The legislator has decided that the employer must bear the financial consequences of pregnancy in the latter situation and so there is no reason to justify discrimination in the former.

In German legal literature ,this case has been described as a landmark decision. Personally, I do not find this to be the case – in my view, the case has simply clarified the existing position.

Comments from other jurisdictions

Denmark (Mariann Norrbom): Under the Danish Act on Equal Treatment of Men and Women employers are prohibited from terminating the employment contract with an employee on grounds of pregnancy or childbirth-related leave, regardless of the circumstances. There are no exceptions to this rule and it is not necessary to consider whether the dismissal constitutes gender discrimination or whether it was objectively justified.

However, employers are allowed to dismiss an employee during pregnancy or childbirth-related leave for other reasons, such as operational reasons. But if the employer chooses to dismiss an employee during pregnancy or childbirth-related leave, the burden of proof that the dismissal was for reasons other than pregnancy or childbirth-related leave rests with the employer.

A case such as the present one, where a pregnant employee is a substitute for another pregnant employee is no exception to this rule.

Further, it is not a requirement that a pregnant candidate informs the potential employer of the pregnancy during the recruitment process. If an applicant is rejected explicitly or tacitly because of pregnancy during the recruitment process, she may be awarded compensation equivalent to approximately EUR 3,350, whereas an employee who is dismissed because of pregnancy may be awarded compensation of up to 12 months' pay.

In such a situation, the Danish Act on Equal Treatment of Men and Women includes an option for the courts to decide that the dismissal is void, with the result that the employment contract is still in effect. This option is, however, only theoretic under Danish case law and has not yet been used.

The Netherlands (Peter Vas Nunes): The problem with cases such as this is (i) that unequal treatment on the ground that an employee or candidate is or will be absent for a certain period in connection with pregnancy or maternity is equaled to unequal treatment on the ground of gender and therefore constitutes direct unequal treatment (see *Dekker*, ECJ case 177/88) and (ii) that direct sex discrimination cannot be justified except in certain specific, rarely applicable situations. The combination of these two facts can sometimes lead to a court being forced to rule against its own inclination. An example (one out of many) is the Dutch case where a theater advertised a vacancy for a singer in March 2000. The singer was to rehearse for a production (probably a musical) in the months of May and June and from 1 September until 19 October (there being no rehearsels during the summer holiday period) and then the musical itself was to perform to audiences from 19 October through 23 December 2000. The succesful applicant for the vacancy was interviewed on 13 April, was engaged shortly afterwards on the basis of a fixed-term contract for May-June and was informed that it was the theater's intention to offer her a second contract for the period September-December. On 28 April she informed her employer that she was pregnant, that she expected to deliver her baby early January 2001 and that therefore she would be unable to perform in the musical for a large part, if not all during the period 19 October – 23 December 2000. To put it bluntly, she was useless for the purpose for which she was hired. She was informed that she would not be given a second contract. She applied to the Equal Treatment Commission (now: the Human Rights Commission). It held that the theater had discriminated against her directly on ground of gender and that therefore, by that fact alone, the theater had acted illegally. The Commission noted that it was aware of (what it called) the "tension" between the law and its ruling, but added that this was something to be resolved by the legislature, not the judiciary.

The Dutch case of the singer was, of course, nothing exceptional. In 1995 the ECJ had already ruled in a similar fashion in the *Webb* case (case C-32/93), although the ECJ in that case was careful to limit the scope of its ruling to the somewhat particular situation of Ms Webb, holding that EU law "*precludes dismissal of an employee who is recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave and who cannot do so because, shortly after her recruitment, she is herself found to be pregnant*".

Several Dutch scholars have wondered whether it might not be possible for a court to find in favour of an employer in cases such as these, despite the clear wording of (EU and Dutch) law disallowing justification of direct sex discrimination.

Slovakia (Beáta Kartíková): According to the Slovak Labour Code the employer is obliged to ensure the equal treatment of all its job applicants during the application procedure. During pre-contractual relationships, i.e. before conclusion of the employment contract, the employer must not, under any circumstances, request from a job applicant information about her pregnancy, family situation, criminal records, membership of political parties, trade union membership or religious affiliation.

This means that information that may be requested by the employer from an employee during the application procedure is limited to information concerning the job the employee is to perform. The employer may ask for such things as references, a certificate of employment or curriculum vitae.

If, after the conclusion of an employment contract, it is revealed that the employee is pregnant, under the Slovak Labour Code it would be possible to terminate her employment only in the following ways:

By termination of employmentduring a three-month probationary period. In the case of a pregnant employee, Slovak law prescribes that termination must be in writing and only for exceptional cases unrelated to her pregnancy. The reasons must be justified in writing.

At the end of a probationary period by the agreement of the parties.

At the end of a probationary period by notice given by the employer in certain cases, namely where there has been a serious breach of discipline or a conviction for an intentional offence.

Pursuant to the Slovak Labour Code, pregnant employees must be considered as a special category of employees having special protection against termination. In the event an employer dismisses an employee due to her pregnancy, in my view, the Slovak courts would decide, as in this case, in favour of the plaintiff.

United Kingdom (Rebecca Mullard): It is likely that this case would have had essentially the same outcome had it been heard in this country.

There was a similar situation in the UK in the early 1990s which resulted in an employment tribunal case that eventually went to the European Court of Justice (ECJ) (the case of *Webb v EMO Cargo* (UK) Ltd). Ms Webb was engaged by EMO as maternity cover, although the intention was that she would continue to be employed after the woman on maternity leave returned. After Ms Webb was appointed, it became apparent that she was pregnant herself and she was dismissed. Although the House of Lords (the forerunner of the Supreme Court) had initially thought that it would not be discriminatory to dismiss Ms Webb in this situation

(drawing a comparison with a sick man, who they deemed would also have been dismissed), the ECJ held that 'sick man' comparisons were inappropriate because pregnancy was a condition unique to women and because of the need to protect women during pregnancy (for example, from pressure to terminate their pregnancy in order to safeguard their employment).

Because it had been envisaged that Ms Webb would continue to be employed by EMO even after the return of the woman whose maternity leave she was covering, the question remained open whether it would have made a material difference to the decision if she had only been recruited to cover the maternity leave period itself. However, since that decision, the wording of UK discrimination legislation has changed to do away with the need for a comparator when considering pregnancy discrimination. (The relevant provisions are now contained within section 18 of the Equality Act 2010.)

There are very limited circumstances when an employer might be able to prevent a pregnant woman from carrying out certain roles, for example if the role would be dangerous for the pregnant woman and/or her unborn child. Even then, the law would require the employer to temporarily redeploy the woman into another role, if possible, and if no other role was available, to suspend her on full pay. Dismissal, or not hiring her, is not an option.

In the above case, the employer seemed aggrieved that the Plaintiff did not disclose her pregnancy during the recruitment process. The Plaintiff said that she had not known that she was pregnant at the time.

Regardless of whether or not she knew that she was pregnant, under UK law, she would not have been obliged to inform a prospective employer that she was pregnant. However, there is a requirement to notify the employer by a certain time in order to qualify for maternity pay.

Practically, it must be disruptive and frustrating for an employer to hire an employee specifically for a fixed period, only to find that she is going to be on maternity leave for some or all of that period. Legally, however, the employer cannot dismiss her, or refuse to hire her because of her pregnancy. If the employer needs someone to carry out that fixed term contract, they will have to get someone else in to cover for the woman while she is on her maternity leave.

Subject: Gender discrimination

Parties: Unknown

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