

SUMMARY

2014/59 Employee may interrupt (unpaid) parental leave to start new period of (paid) maternity leave (FI)

<p>On 13 February 2014 the ECJ delivered its judgment in the <i>Kultarinta </i>case (see EELC <nbsp;<2014-1 <nbsp;<page 34)1. The Finnish Labour Court, which was the referring court in that case, has now ruled on the validity of a provision in several collective agreements in the light of the ECJ’s ruling. The provision in question deals with where an employee wishes to interrupt a period of (unpaid) parental leave in favour of a new period of (paid) maternity leave in connection with another pregnancy.</p>

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Facts

Ms Kultarinta's employment was governed by the collective agreement for the health services sector. It entitled her to payment of full salary for a period of 72 weekdays during maternity leave. She became pregnant with her first child and went on maternity leave, during which she was paid her full salary. Following her maternity leave she took unpaid parental leave for the

period from 7 January 2010 to 11 April 2012. Shortly after this unpaid leave began, she notified her employer of her intention to stop her unpaid leave on 9 April 2010 in connection with another pregnancy and to start a second period of paid maternity leave. The employer accepted the interruption of the parental leave but refused to pay Ms Kultarinta salary during this second period of maternity leave. It did this on the basis of the collective agreement which provided that, if an employee's maternity leave starts during a period of unpaid leave, there is no right to payment of salary. Ms Kultarinta's union brought proceedings on her behalf before the Labour Court against both her employer and the employer's association of which it was a member. The claim was for payment of € 5,770 plus interest, being salary for 72 days.

Similar proceedings were brought before the same court by Ms Novamo against her employer Nokia-Siemens. The collective agreement in that unrelated case contained a roughly similar provision as that referenced above.

The court was not sure whether the relevant provisions in the two collective agreements (the 'provisions at issue') were compatible with Maternity Directive 92/85 and Equal Treatment Directive 2006/54. It therefore referred a question to the ECJ.

The ECJ interpreted the Labour Court's question broadly. It assumed that the Labour Court also wished to know whether the provisions at issue were compatible with Directive 96/34 on parental leave. On 14 February 2014 the ECJ ruled that:

"Directive 96/34 [...] must be interpreted as precluding a provision of national law, such as that provided for in the collective agreements at issue in the main proceedings, pursuant to which a pregnant worker who interrupts a period of parental leave within the meaning of that directive to take maternity leave within the meaning of Council Directive 92/85 with immediate effect [...] does not benefit from the remuneration to which she would have been entitled had that period of maternity leave been preceded by a minimum period of resumption of work."

The case was then returned to the Finnish Labour Court (along with a third similar case which had been stayed pending the ECJ's ruling).

Judgment

The Labour Court began by noting that the ECJ's ruling did not address the compatibility of the provisions at issue with the Maternity Directive or with Equal Treatment Directive 2006/54. The court therefore concluded that there was no incompatibility with those directives.

The Parental Leave Directive is silent on remuneration to be paid to a pregnant employee who interrupts unpaid leave in order to start a new period of maternity leave. However, the ECJ did hold that the provisions at issue violated the effectiveness of the Parental Leave Directive and that, therefore, national provisions which exclude an employee's right to remuneration in such a situation are unlawful.

The Labour Court considered that Finland has implemented the Parental Leave Directive in the Finnish Employment Contracts Act (55/2001, as amended) and therefore, the Employment Contracts Act must be interpreted in compliance with the phrasing and intention of the Parental Leave Directive. Under the Employment Contracts Act, employees are entitled to take maternity or paternity leave, parental leave and childcare leave. The Labour Court ruled that the provisions of the collective agreements at issue prevent the fulfilment of such rights and that consequently, they are void if they exclude the employee's right to salary during maternity leave in a situation where the new maternity leave starts during a period of unpaid childcare leave.

Based on this reasoning, the court ordered the defendant employers to pay the plaintiff employees salary for the periods specified in the relevant collective agreements.

Commentary

Most Finnish collective agreements include similar maternity leave provisions or have in practice been interpreted to entitle employees to maternity leave salary only if the employees are on active duty when commencing the maternity leave. In consequence of these new cases, the parties to collective agreements will have to remove or amend the existing clauses and/or adopt a new interpretation. It can also be expected that more employees will claim their maternity leave salary retrospectively. Further, claims for compensation due to breach of the Equality Act cannot be excluded. The Helsinki Court of Appeal found in a similar case that the provisions of a collective bargaining agreement requiring an employee to work at least six months prior to being eligible for a new period of paid maternity leave, violated the Equality Act. The Court of Appeal imposed a € 10,000 compensation payment the employer for breach of the Equality Act.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Martina Hunger): In Austria, employment is strictly prohibited for pregnant employees eight weeks before the (expected) childbirth and between eight and twelve weeks afterwards, depending on the date of childbirth. During this "restricted period" the employee is entitled to a maternity allowance (Wochengeld), paid by the social security fund. The amount of this allowance depends on the average net remuneration during the last

three months before the restricted period (plus a surcharge for special payments).

After the restricted period has ended (usually eight weeks after giving birth), the employee may take maternity leave. This may last until the child's second birthday. During this period, the employee receives a childcare benefit (Kinderbetreuungsgeld) paid by the social security fund. This continues for between 12 and 30 months, depending on the payment mode selected by the employee. The benefits are based on the employee's remuneration over the previous 12 months.

Thus, if an employee becomes pregnant again during maternity leave and bears her child during the period in which she receives childcare benefit for the previous child, she is entitled (for the second child) to a maternity allowance for eight weeks before and eight weeks after giving birth, paid by the social security fund. During the period of maternity allowance, the entitlement to childcare benefit is suspended. However, the amount of the maternity allowance (for the second child) depends on the selected model of childcare benefit for the previous child (e.g. in case of a childcare calculation based on the last pay, the maternity allowance is calculated as follows: childcare benefit (for the 1st child) +25%). Since both payments are paid by the social security fund, the present case would not have been an issue in Austria.

Germany (Dagmar Hellenkemper): This problem existed in Germany until 2012, when the legislator introduced a new provision to the Parental Leave Act, allowing mothers on parental leave to end the parental leave prematurely in order to take advantage of maternity leave for a new pregnancy. The employer has to be informed of this but does not need to agree.

Subject: Maternity and parental leave

Parties: unions on behalf of Ms Kultarinta, Ms Ovamo and Ms Jussinniemi – v – employer associations and their member companies Mehiläinen Oy, Nokia Siemens and Lidl Suomi Kommandiittiyhtiö, respectively

Court: Työtuomioistuin (Labour Court)

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