SUMMARY

2018/14 Dismissal for reorganisation during pregnancy gives right to protection indemnity if not based on objective factors (BE)

<p>The Labour Court of Brussels ordered an employer to pay a protection indemnity to an employee following termination on the basis of reorganisation during her pregnancy because (i) the employee benefited from a specific protection against dismissal and (ii) the employer failed to prove that the dismissal of the employee was based on reasons unrelated to the pregnancy.</p>

Facts

The employee had been employed as a research manager since 15 November 2010 by an advertising agency.

On 28 November 2011 the employee informed her employer of her pregnancy. On 2 February 2012 the employer dismissed the employee for reasons of reorganisation with the payment of an indemnity in lieu of notice corresponding to four months' salary.

The employee filed a claim for breach of the protection against dismissal for pregnancy before the Labour Tribunal of Brussels. By a judgment of 29 September 2014, the Tribunal rejected the. On 17 December 2014 the employee appealed the decision before the Labour Court of Brussels.

Judgment

The employee had claimed before the Tribunal that the employee was obliged to pay six-months' salary in compensation for not observing her protection against dismissal based on

her pregnancy, in accordance with Article 40 of the Labour Act of 16 March 1971 or, in the alternative, by virtue of the Act of 10 May 2007 aimed at combatting gender discrimination.

Article 40 states that, except for reasons unrelated to pregnancy, the employer cannot dismiss an employee from the moment it has been informed of the pregnancy and until one month after the end of the maternity leave. The burden of proof lies with the employer. Otherwise, compensation equal to six months' gross salary is payable to the employee.

The Labour Court acknowledged that the employer was facing financial difficulties at the time of dismissal and that it had to reduce staff. However, the Court stated that the financial situation of the employer and the reorganisation it had to implement were not sufficient to justify the dismissal of a pregnant employee. The employer had to demonstrate that, during the restructuring, the choice of the employees to be made redundant was not related to her pregnancy, but it failed to do so.

More particularly, the employer failed to work out whether there was a place for the employee within the new structure, or whether she could have been reassigned to another function. It seems that another employee may have been kept on instead because she was bilingual and had a better knowledge of the files. But the employer was not able to provide any evidence in support of this.

Therefore, the Labour Court ruled in favour of the employee, as it believed there had been a breach of the protection against dismissal related to her pregnancy and ordered the employer to pay lump sum compensation for unlawful termination equal to six months' gross salary.

Commentary

This case highlights that pregnancy does not protect employees against dismissal for reorganisation if they are selected based on objective, non-discriminatory factors. In the case at hand however, the pregnant employee was entitled to compensation because the employer was unable to demonstrate the existence of objective factors, external to the pregnancy. Bilingualism and better knowledge of the files were invoked but the employer – who had the burden of proof – could not adduce any evidence in support of this.

This shows that employers must tread carefully when implementing redundancy plans, especially with regard to pregnancy. Gender is a protected characteristic under the non-discrimination legislation but the burden of proof is normally shared between employee and employer. Thus, usually it falls first to the employee to establish facts from which it may be presumed that there has been direct or indirect discrimination, and then to the employer to prove that the dismissal was not related to gender. But if the employee is already on maternity

leave, she is automatically protected against dismissal and the burden of proof is reversed so that the employer must in all circumstances be able to prove that the dismissal is not related to pregnancy – even if there are no *prima facie* elements pointing towards discriminatory treatment. Therefore, it is not sufficient for the employer simply to say that the employee falls within the scope of a redundancy plan. It must consider the matter in depth and provide objective, substantiated grounds. These grounds must then be communicated to each pregnant employee.

This case may be read in parallel with judgment C-103/16 of the ECJ of 22 February 2018, in which it was held that "*Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited*".

Although the case described in this case report did not involve a collective redundancy, it seems that the Labour Court of Brussels follows the similar logic in considering that employees on maternity leave may be dismissed because of a reorganisation of the company, but only if they have been selected on the basis of objective, substantiated criteria, unrelated to pregnancy.

Comments from other jurisdictions:

Germany (Kerstin Belovitzer, Luther Rechtsanwaltsgesellschaft mbH): The essence of the Belgian decision is that a pregnant employee can be dismissed for operational reasons if the dismissal is not connected to her pregnancy and provided it is based on substantiated reasons. This decision could equally have been made by a German labour court. It is characterised by the principle that pregnant women must not be discriminated against because of their pregnancy. However, the basic German principles for protection of pregnant employees and the request for a valid dismissal differ from the Belgian standards.

Dismissals of pregnant women are forbidden by the German Maternity Protection Act and are therefore invalid. This special protection lasts until four months after the birth. In exceptional cases, the employer can apply to the competent state authority to dismiss a pregnant employee, and with permission, the dismissal will be valid. However, the fact of the pregnancy or birth must not be the reason for the dismissal. Therefore, if an employer of a pregnant employee obtains the approval of the state authority before the dismissal for a reason other than the pregnancy, dismissal is possible.

Certain amendments to the German Maternity Protection Act came into force in January 2018

and these strengthen the protection still further. According to these new rules, even preparations for a later dismissal are forbidden if performed during the special protection period. Preparations could include a works council hearing, the consent of the Integration Office (in the case of a disabled pregnant employee) or the giving of notice of a collective redundancy to the German Employment Agency. The new rules stipulate that employers must wait to do these things until the special dismissal protection ends. However, if the proposed dismissal of a pregnant employee is unrelated to her pregnancy, preparations can be made during the special dismissal protection period. To ensure a dismissal is not connected with an employee´s pregnancy, we recommend obtaining the consent of the competent state authority before taking any other preparatory action.

Greece (Elena Schiza, KG Law Firm): Under Greek Law 1483/84, termination of an employment agreement either during pregnancy or for 18 months thereafter (or longer if for illness resulting from the pregnancy or childbirth) – is prohibited, unless there is a significant reason to justify it. The reason must not be the fact of pregnancy itself or its consequences; the termination must be in writing; the reasons for the termination must be communicated to the affected employee; and the competent labour inspectorate must be notified. Any breach of these conditions will result in the termination being invalid and the employer will be obliged to accept the work done by the employee and pay salary.

The Greek Courts have ruled that the permanent closure of the branch of a business where a pregnant employee worked was a justified reason for termination, as her job ceased to exist. By contrast, the courts have also held that cancelling a job just to increase profits and reduce costs was not a justified reason for termination of employment during pregnancy.

Romania (Andreea Suciu, Suciu I The Employment Law Firm): Dismissal during pregnancy has always been a topic of interest in Romania. Employers are not allowed to dismiss pregnant employees from the moment they have been informed of the pregnancy, unless for judicial reorganisation, bankruptcy or dissolution of the company. Dismissal because a job has been cancelled is not an option. Thus, employers cannot dismiss a pregnant employee even if an entire department is being reorganised or a branch is being closed. Employers that choose to ignore these rules risk being sued. The pregnant employee would be entitled to claim reinstatement as well as arrears of salary from the date of termination of employment. She would also be entitled to claiming for damages, to be decided at the court's discretion.

Considering the above, employers often try to reach an agreement with the employee, and this can often involve either a sizeable pay-out or an offer of another job within the company.

Although the strict legislation causes problems in practice, there is no call at the moment for

amendment of the current law. However, we consider that the dismissal of a pregnant employee to enable reorganisation, based on objective, substantiated criteria unrelated to pregnancy, should be an option, rather than the dismissal being banned *per se*. We hope that judgment C-103/16 of the ECJ of 22 February 2018 will lead to changes along these lines in Romania.

Subject: Gender discrimination, unfair dismissal

Parties: Mrs X. – v – SA Y.

Court: Cour du Travail de Bruxelles (Labour Court of Brussels)

Date: 21 February 2017

Case Number: R.G. 2014/AB/1136

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