EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/14 Termination indemnity based on reduced remuneration for worker dismissed during part-time career break compatible with EU law (BE)

According to the Labour Court of Mons, calculating the termination indemnity of a worker based on the reduced remuneration paid during a career break called 'time-credit' is compatible with EU law, despite the Meerts judgment.

Summary

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Legal background

Under Collective Labour Agreement no. 103 ('CLA 103'), a worker is entitled to require from their employer the benefit of a so-called '*credit-temps*' ('time-credit'), which allows the worker to suspend their work or reduce their working hours for a certain period and for certain reasons (taking care of a child until they reach the age of eight years old, palliative care, seriously ill family members, etc.).

Article 21, §4 of CLA 103 provides that an employer cannot dismiss a worker without serious cause or for reasons related with the use of the time-credit. If it does so during the period of protection starting from the employee's application for the time-credit until three months after the end of the time-credit, it must prove that the reason(s) for dismissal bear no link with it. In a case where it fails to adduce that proof, the employer must pay compensation on top of the indemnity in lieu of notice provided by law, equal to six months' wage.

Facts and claims

A female worker ('the Claimant'), working part-time under the benefit of a time-credit in order to take care of her child was dismissed. She claimed that the dismissal was based on the use she made of the time-credit, asking her employer to pay the six months' protection indemnity.

The employer ('the Defendant') argued that the reasons for dismissal were her late arrivals and lack of organisation, thus holding no connection with the time-credit.

Subsequently, the Claimant brought the case before the Labour Tribunal of Charleroi. Her cause was supported by an intervening party, the Institute for the Equality of Women and Men ('the Institute').

Not only did the Claimant ask for the payment of the protection indemnity, but also that its calculation and the calculation of her indemnity in lieu of notice should be based on her full-time wage. The Claimant argued that, by analogy, the *Meerts* judgment of the ECJ (case C-116/08, 22 October 2009) should have been applied.

According to that judgment:

"*Clause 2.6 and 2.7 of the framework agreement on parental leave concluded on 14 December 1995, which is annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, must be interpreted as precluding, where an employer unilaterally terminates a worker's full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, whilst the worker is on part-time parental leave, the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place*".

The said Framework Agreement on parental leave grants that right in order "*to take care of [a] child until a given age up to eight years to be defined by Member States and/or social partners*" (Framework Agreement, clause 2.1). Moreover, "*the leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis*" (clause 2.2).

Beside the application by analogy of the *Meerts* judgment required by the Claimant, the Institute stated that the calculation basis retained for the termination indemnity implied an indirect gender discrimination, since, statistically speaking, more women than men apply for the time-credit particularly based on family reasons. Therefore the Institute requested the

payment of a lump sum indemnity for violation of the anti-discrimination legislation.

Alternatively, the Institute asked the Labour Tribunal to submit a preliminary question to the ECJ hinging on Article 157 TFEU and Directive 2006/54 (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation), as to the compatibility with these articles of the calculation basis retained.

Judgment

The Labour Tribunal of Charleroi, competent in first instance, held that the dismissal was connected with the use of time-credit, and that the Defendant was therefore liable for payment of the six months' protection indemnity. The other claims were dismissed: the Labour Tribunal saw no indirect discrimination based on gender, nor the necessity of applying the *Meerts* judgment. On appeal, the Labour Court confirmed the judgment.

Firstly, it distinguished the case from the *Meerts* judgment. According to the Labour Court, the time-credit (in order to take care of a child under the age of eight years old) does not come from EU Law, unlike the parental leave legislation. Even though, following the Court, the two systems are very similar in wording, the calculation basis for compensation in case of dismissal during parental leave is specifically regulated by law. Indeed, the Belgian legislator gave force to the *Meerts* case law through a legal amendment adopted in 2009 that is only applicable in a parental leave situation. Second, so stated the Court, the norms applicable to the time-credit and to parental leave originate from different sources, the objectives pursued by these norms and the conditions that apply to benefit from these norms are different. Accordingly, the Court refused to apply the *Meerts* judgment by analogy.

The Labour Court also rejected the claim of discrimination based on gender. The Labour Court first asserted that Article 157 TFEU and Directive 2006/54/CE strive in essence to grant an equal wage for similar tasks, regardless of a person's gender.

Secondly, the Court distinguished the case from a decision in another very similar Belgian case in which the Labour Court of Ghent held that there was indirect discrimination based on gender in a situation where reduced salary during a time-credit was used to calculate the indemnity in lieu of notice, since, statistically speaking, more women than men made use of the time-credit. As a result, the Labour Court of Ghent granted an indemnity in lieu of notice based on the full-time salary.

The Labour Court first held (relying on settled case law of the Belgian Constitutional Court) that the rules governing the calculation basis in case of time-credit are the same for men and

women. Furthermore, the Court stated that:

The statistics used in the case of the Labour Court of Ghent were imprecise, because they related to time-credit as a whole, and not only to the time-credit in order to take care of a child under eight years old.
Belgian law grants access to time-credit to all, regardless of gender.
The decision to make use of the time-credit is a personal one. In casu, the Claimant could have asked her husband to take care of their child.
By granting a full-time wage calculation basis, the case created the possibility of discrimination towards men: there would not be any valid reason not to apply that same calculation basis to men.

The Court also refused the request made by the Institute to submit a preliminary question to the ECJ, stating that in Belgian Law part-time regulatory regimes such as time-credit are the same for both men and women, and that the calculation of the termination indemnities in those regimes is performed regardless of gender. Moreover, the Belgian Constitutional Court had already taken a stand as to the compatibility of such a calculation with the principle of equality and non-discrimination, so that it was not necessary to ask the ECJ to rule on the matter. Finally, the Belgian time-credit system originates only in Belgian law, not in EU law, and therefore the request for a preliminary ruling had no legal ground.

Following on from that, the Court held that the Claimant was entitled to a protection indemnity for dismissal related to the time-credit, but the Claimant was granted compensation of six months' wage calculated on her reduced salary at the time of the dismissal.

Commentary

This judgment is based on well-settled case law from both the Supreme Court and the Constitutional Court. Whereas the Supreme Court is of the opinion that the remuneration to be used for calculating the termination indemnity is the remuneration actually paid at the moment of the dismissal, even if the employee works under a regime of reduced hours such as time-credit, the Constitutional Court finds in that respect no infringement of the principle of equality by comparison with the specific rules applying to parental leave on the grounds that this difference is not manifestly unreasonable, mainly because the legislator has provided for a system of protection again dismissal which entitles the worker to a specific six months' indemnity in case of dismissal related to the time-credit.

In other words, Belgian supreme jurisdictions support the difference in treatment arising from

the coexistence of the regimes (time-credit and parental leave) as this difference is grounded on two distinct legal orders, the national and the European one. While this makes sense from a legal perspective as it preserves reasonable use of national sovereignty against encroachment by EU law, it is difficult for the workers concerned to understand how much will be paid when the calculation of the indemnity varies according to the legal basis by virtue of which it is granted.

This may explain the persistence of an opposition by some jurisdictions such as the Labour Court of Ghent which look for innovative ways to fight this difference of treatment based on the anti-discrimination legislation. The argument that this differential treatment may amount to indirect discrimination based on gender would, according to the Court, not be supported by the statistics referred to in the Ghent case, which would be too general and include all types of time-credit. We do not find this argument convincing since all types of time-credit pertain to personal choices related to private and family life, of which educating children is only a part. The Court should have explained why these general statistics lose significance once applied to educating children. Besides, the Framework Agreement on parental leave is adamant as to the fact that parental leave, which is similar to time-credit for educating children, is meant to close the gender parity gap.

In addition, the fact the rules are the same for men and women should not have played a part in the assessment of the Court since the Institute based its case on indirect discrimination. The latter arises from rules which are by definition neutral but which impact unfavourably a protected group.

Also, by stating that calculating the indemnity on the full wage would amount to discrimination towards men does not make sense as the Claimant was asking to be treated equally with men who are mostly occupied full time and not more favourably than the minority of men taking time-credit to educate children. The legal consequence would have been to calculate the indemnity on the full wage for everybody, while not creating a new direct discrimination between men and women working on time-credit.

Finally, the refusal to ask for a preliminary ruling because time-credit originated in national law does not make sense since the question pertains to a matter that falls undeniably within the scope of EU anti-discrimination law. The vagueness of the question suggested by the Institute should be no excuse since it is for the national judge to formulate the question as they wish. The fact that the Constitutional Court has already taken a stand on the issue of discrimination between men and women arising from time-credit should not have precluded the Court from asking for a preliminary ruling since the uniform interpretation of EU law is the sole prerogative of the ECJ, notwithstanding the case law of national constitutional courts

in that respect.

Comment from other jurisdiction

The Netherlands (Peter Vas Nunes): I concur with the author's criticism of this judgment and wonder what the outcome of the case would have been had the claimant reduced her working hours to nil. Would the protection indemnity have been nil?

Creator: Cour du travail de Mons (Labour Court of Mons)
Verdict at: 2018-11-23
Case number: 2017AM/279 – 2017/AM/364