EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/33 The concept of ‘maternity’ does not include, and therefore does not protect, mothers regarding discrimination related to ‘childcare’ (BE)

The Brussels Labour Court of Appeal, in a judgment of 10 September 2019, has ruled that the notion of ‘maternity’ contained in the Belgian Gender Act does not go as far as protecting mothers against discrimination with regards to childcare, since this would confirm a patriarchal role pattern. However, a recent legislative change introducing ‘paternity’ as a protected ground might cast doubt on the relevance of this ruling for the future.

Summary

p style="margin-right:-34px">The Brussels Labour Court of Appeal, in a judgment of 10 September 2019, has ruled that the notion of ‘maternity’ contained in the Belgian Gender Act does not go as far as protecting mothers against discrimination with regards to childcare, since this would confirm a patriarchal role pattern. However, a recent legislative change introducing ‘paternity’ as a protected ground might cast doubt on the relevance of this ruling for the future.

Legal background

p style="margin-right:-34px">The consolidated Directive 2006/54/EC of 5 July 2006 (which replaces Directives 76/207, 86/378, 75/117 and 97/80) prohibits direct and indirect discrimination on grounds of sex in matters of employment and occupation in the public and private sectors.

p style="margin-right:-34px">For the purposes of this Directive, Article 2(2) stipulates that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC, while a woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence (Article 15).

p style="margin-right:-34px">This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity leave. Paternity is not a protected ground as such but those Member States which recognise rights to paternity leave shall take the necessary measures to protect working men against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence (Article 16).

p style="margin-right:-34px">In Belgium, the Gender Act of 10 May 2007 incorporates *inter alia* a prohibited direct distinction on grounds of sex, the direct distinction based on pregnancy, childbirth, maternity and gender reassignment. It should be noted that since February 2020, the Gender Act has extended its scope and is now offering a broader protection than European legislation. Indeed, the Gender Act now incorporates a direct distinction on grounds of sex, the direct distinction based on breastfeeding, adoption, assisted reproductive techniques, sexual characteristics, co-maternity and paternity.

Facts

p style="margin-right:-34px">In the present case, the employer decided to modify the working hours applicable in the undertaking, with the result that a female employee could no longer pick up her child, who was in childcare, on time.

p style="margin-right:-34px">She therefore decided not to comply with the employer's new schedule changes and the employee was then dismissed for serious cause (insubordination and abandonment of post).

p style="margin-right:-34px">She then complained that the dismissal was (i) irregular and (ii) linked to her pregnancy. In addition, she also claimed that she was a victim of direct or indirect discrimination contrary to the Gender Act on the ground of maternity which, as a criterion, is treated as a direct distinction based on sex.

p style="margin-right:-34px">She asserted that she was discriminated against by her employer because of childcare problems with her first child. She could not pick him up from childcare due to the changes to the employer's timetable.

First judgment

p style="margin-right:-34px">In a first judgment confirming the decision of the lower court, the Labour Court had already ruled that (i) the dismissal for serious cause of the employee was indeed irregular but (ii) was not linked to her pregnancy.

p style="margin-right:-34px">The Labour Court also reopened the debate to determine whether there could be an alleged discrimination based on childcare problems through the protection, by the Gender Act, of the concept of 'maternity'.

Second judgment

p style="margin-right:-34px">In this second judgment, the Labour Court did not even examine whether there was discrimination. Indeed, according to the Court, the notion of 'maternity' contained in the Gender Act (Article 4(1)) did not cover any childcare situation. Therefore, this ground of protection could not be applied.

p style="margin-right:-34px">As a matter of fact, the Court held that, when the Gender Act equates a direct distinction on the ground of maternity with a direct distinction on the ground of sex, this notion of maternity must be read in the sense of the European Directives that justified its adoption (i.e. Directives 75/117/EEC, 76/207/EEC, 86/378/EEC, 97/80/EC, 2004/113/EC, 86/613/EEC and 79/7/EEC).

p style="margin-right:-34px">In that regard, said the Court, a detailed analysis of the case law of the European Court of Justice (ECJ) must be made and this analysis shows that a distinction must be drawn between, on the one hand, maternity leave provisions relating to the biological condition of women during and after pregnancy and, on the other hand, parental leave aimed at giving both parents the opportunity to care for their child (ECJ 8 November 1990, *Dekker*, C-177/88; ECJ 12 June 1984, *Hofmann*, C-184/83, paragraphs 25-26; ECJ 18 March 2004, *Gomez*, C-342/01, paragraph 32; ECJ 18 November 2004, *Sass*, C-284/02, paragraphs 52-53; ECJ 14 April 2005, *Commission – v – Luxemburg*, C-519/03, paragraph 32; ECJ 20 September 2007, *Kiiski*, C-116/06, paragraphs 45-46; ECJ 19 September 2013, *Montull*, C-5/12, paragraph 49; ECJ 18 March 2014, *C.D. – v – S.T.*, C-167/12, paragraphs 35-36; ECJ 04 October 2018, *Dicu*, C-12/17, paragraph 34; ECJ 29 November 2001, *Griesmar*, C-366/99, paragraphs 43-44; ECJ 30 September 2010, *Alvarez*, C-104/09, paragraphs 31, 33, 35-37; ECJ 16 June 2016, *Sanchez*, C-351/14; ECJ 19 March 2002, *Lommers*, C-476/99, paragraphs 41-42).

p style="margin-right:-34px">More particularly, in view of the *Lommers* case, the Labour Court underlined that for the ECJ it should always be verified that the protection of maternity, which is intended to eliminate a *de facto* inequality, did not contribute to the perpetuation of a traditional division of roles between men and women (ECJ 19 March 2002, *Lommers*, C-476/99, paragraphs 41-42).

p style="margin-right:-34px">In other words, the protection of maternity should only concern the protection of the biological condition of the woman and the special relationship with the child during pregnancy, childbirth, breastfeeding and maternity leave. Maternity protection should therefore not be extended to measures related to parental status, which concerns both women and men.

p style="margin-right:-34px">Thinking otherwise, according to the Court, could indeed lead to the perpetuation of a role model in which the mother should mainly take care of the children, as opposed to fathers.

p style="margin-right:-34px">The Court therefore ruled that the application of maternity protection to childcare problems would be inadequate and contrary to the principles outlined above, since both parents must be able to take responsibility in that regard. The appeal was thus rejected.

p style="margin-right:-34px">An appeal in cassation, still pending, was however lodged against the judgment.

Commentary

p style="margin-right:-34px">It is difficult to say whether this judgment would still be acceptable today considering the insertion of ‘paternity’ as a new protected criterion in Belgian legislation. On the one hand, fathers as well as mothers are now protected. If one analyses the parliamentary debates having led to this new criterion, the intent has been to protect fathers as much as mothers against sexist behaviour. On the other hand, the scope of application of this new criterion remains unclear, to say the least. Maternity is restrictively interpreted by the ECJ as encompassing the time spent on maternity leave and no more than that, in view of the specific biological situation of women before, during and right after childbirth. One may suppose that a father being granted paternity leave after the birth would be protected as well during the time they enjoy such a leave or if they are deprived thereof by their employer.

p style="margin-right:-34px">But would such protection go further and for instance include situations related to parental leave or more widely differences of treatment related to taking

up family tasks as a mother and/or father? The ECJ's case law does not adopt such a wide reading, at least for the maternity criterion. Belgian law is also restrictive in the sense that only a direct distinction based on paternity or maternity is a direct distinction based on gender. If the distinction is indirect, one falls back on the normal rules and principles so that it should be proved that the measure, although neutral in appearance, favours one sex over the other. As regards parental leave or more widely taking up parental tasks, it would then remain easier for women than men to prove that they belong to a disadvantaged group as they take on more family tasks than men, statistically speaking. Men, on the other hand, would find it more difficult to prove that they are being disadvantaged as a group by measures affecting parental tasks, since they are less involved in them. In the present case, for instance, the employee could have tried to invoke indirect distinction based on gender to strengthen her case, comparing her situation with male colleagues not impacted or less impacted by the change of schedule. However, she did not do so. This is perhaps intentional because in the case of indirect distinction based on gender the range of acceptable justifications for the employer would have been much wider.

p style="margin-right:-34px">In my opinion, insertion of 'paternity' as a protected criterion for direct discrimination is a step forward for equality but one that falls short of challenging role pattern distribution among men and women. With a view to doing so, it would seem necessary to create a new protected criterion: family responsibilities. During parliamentary debates preceding the adoption of the Law of 4 February 2020, this possibility was discussed but finally abandoned because the notion of 'family responsibilities' was considered difficult to circumscribe.

p style="margin-right:-34px">Yet, one should not forget that Belgium has ratified, as have many other EU Member States, the ILO Convention (No. 156) of 1981 on Workers with Family Responsibilities. This Convention provides among other things that:

p style="margin-right:-34px">"*with a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.*"

p style="margin-right:-34px">One should also keep in mind that other protected factors are not clearly described. The notion of motherhood has given rise to much case law. So has the notion of handicap for non gender-based equality of treatment. The ILO Convention also provides a regulatory framework which sets limits for this notion.

p style="margin-right:-34px">Finally, such a novelty would be in line with the initial intent of the Belgian MPs for whom it was important "*to give the signal that men have too an equal place within the family and that it is perfectly normal for them too to assume family responsibilities*". For this initial intent to materialise in practice, it seems important that fathers be recognised not only as fathers and mothers as mothers but both as parents protected against differences of treatment, direct and indirect, related to taking on family tasks.

p style="margin-right:-34px">Whether the Gender Act would be the right and only place for implementing these international obligations is a further subject of discussion. In my opinion, gender neutral allocation of family responsibilities would be better protected under the General Act of 10 May 2007 on equal treatment. This legislative change would highlight that family responsibilities should not be approached from a gender perspective setting up men against women but as a protected ground in itself under general anti-discrimination law, comparing parents with non-parents.

Comments from other jurisdictions

p style="margin-right:-34px">*Austria (Andreas Tinhofer, Zeiler Floyd Zadkovich)*: This is an interesting case since it turns on the question of whether measures putting employees with childcare duties at a disadvantage could be challenged on the basis of discrimination law. In Austria, such a situation would be analysed according to the criteria for indirect discrimination as laid down in Article 2(1)(b) of Directive 2006/54/EC.

p style="margin-right:-34px">In my view the ECJ's decision in *Lommers* does not support the Belgian Labour Court's reasoning. That case dealt with a decree issued by the Minister for Agriculture advising Ministry staff that he was making available a certain number of nursery places to female staff. Children of male employees could be given a place 'only in cases of emergency'. In the end the ECJ decided that such a regulation could qualify a measure to promote equal opportunity for men and women within the meaning of Article 2(4) of Directive 76/207/EEC.

p style="margin-right:-34px">In contrast, the measure at hand in the current case (modification of working hours) does not distinguish between men and women. Therefore, the rules on 'positive action' (Article 2(4) of Directive 76/207/EEC; now Article 3 of Directive 2006/54/EC) do not apply. Instead, the plaintiff could have argued that the measure indirectly discriminated on the ground of sex since up to now a great majority of employees taking care of their children are female. In that case the employer would have had to justify the measure.

p style="margin-right:-34px">The Austrian Supreme Court has already decided that men and women can rely on sex discrimination legislation if they are disadvantaged because they want

to take parental leave (9 ObA 78/11 b). The legal reasoning behind that judgment is based on the concept that sex discrimination law not only prohibits discrimination on the ground of the biological sex but also on the ground of the socially and culturally determined role of men and women (gender).

p style="margin-right:-34px">*Denmark (Christian K. Clasen, Norrbom Vinding)*: The Belgian case report illustrates how some changes to employees' terms and conditions of employment may directly or indirectly affect their daily family life. Accordingly, the case gives rise to a consideration of if, and under which circumstances, such changes may constitute gender discrimination.

p style="margin-right:-34px">Recently a case involving issues similar to the ones in the Belgian case was heard by the Danish Board of Equal Treatment and, subsequently, by a district court. The Danish case concerned a female employee who shared three children with her ex-husband in a custody arrangement. According to the arrangement, the children stayed with the employee or her ex-husband for a week at a time. At some point, the employer decided that the employee's position should involve travelling activities which, among other things, meant that the employee should be able to travel on short notice. According to the employer's assessment, the employee would not – due to the joint custody arrangement – be able to meet this increased requirement for flexibility, and for that reason she was dismissed. Based on the statistical information provided during the case, the district court found that the increased requirement for flexibility would disproportionately affect women. As the employer had not proven that the criterion of flexibility was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate and necessary, the court found that the dismissal was contrary to the Danish Act on Equal Treatment of Men and Women. The Danish Board of Equal Treatment had came to the same result.

p style="margin-right:-34px">A requirement for flexibility is *per se* considered a gender neutral criterion. Such a requirement may, however, give rise to indirect discrimination if the application of the criterion affects women to a larger degree than men.

p style="margin-right:-34px">Given the facts of the Danish case, the outcome may be slightly surprising. Seen from an objective point of view, it may be difficult to understand why a requirement of flexibility affects women to a larger degree than men in a specific situation where the children spend equal amounts of time with the mother and the father.

p style="margin-right:-34px">Accordingly, the Danish case – like the Belgian case – illustrates some of the issues that may arise with regard to potential discrimination on grounds of gender related to childcare and specifically raises questions concerning the assessment of whether or

not a criterion may disproportionately affect parents of a specific gender.

p style="margin-right:-34px">*Germany (Nina Stephan and Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH)*:

p style="margin-right:-34px">Based on the findings made in the German jurisdiction regarding the term 'maternity' in connection with potential discrimination, it may be assumed that the German courts would have come to a similar conclusion.

p style="margin-right:-34px">Similar to the Belgian legislation, mothers in Germany also enjoy special protection. Among other things pregnant women, women and mothers on maternity leave (according to German law maternity leave regularly starts six weeks before giving birth and ends between eight and 12 weeks after giving birth) enjoy special protection against dismissal under the Maternity Protection Act (*Mutterschutzgesetz*, "MuSchG"). In addition, different maximum working time limits apply and the employer is subject to special protection obligations. Furthermore, mothers and fathers on parental leave also enjoy special protection under the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz*, "BEEG"). In addition, Section 3 para. 1 sentence 2 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, "AGG") prohibits direct discrimination against women due to pregnancy or maternity. It explicitly states that:

p style="margin-left:47px; margin-right:-34px">"*Direct discrimination on grounds of sex shall also be taken to occur in relation to Section 2(1) Nos 1 to 4 in the event of the less favourable treatment of a woman on account of pregnancy or maternity.*"

p style="margin-right:-34px">According to Section 2 para. 1 Nos. 1 to 4 AGG the following applies:

p style="margin-left:47px; margin-right:-34px">"*For the purposes of this Act, any discrimination within the meaning of Section 1 [discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation] shall be inadmissible in relation to:*

p style="margin-left:47px; margin-right:-34px">*1. conditions for access to dependent employment and self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion;*

p style="margin-left:47px; margin-right:-34px">*2. employment conditions and working conditions, including pay and reasons for dismissal, in particular in contracts between individuals, collective bargaining agreements and measures to implement and terminate an employment relationship, as well as for promotion;*

p style="margin-left:47px; margin-right:-34px">*3. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*

p style="margin-left:47px; margin-right:-34px">*4.membership of and involvement in an organisation of workers or employers or any organisation whose members carry on a particular profession, including all benefits provided for by such organisations; […].*"

p style="margin-right:-34px">According to Section 3 para. 1 sentence 2 AGG pregnancy and maternity would have the same status. With respect to the period in which (expecting) mothers are on maternity leave, it can be assumed that times in which childcare becomes relevant are no longer protected by Section 3 AGG. In this case, only direct discrimination on the grounds of gender could be considered. However, direct discrimination does not already exist with unequal treatment on the grounds of childcare, but only if it is apparent that particularly women (or men) with children are treated worse.

p style="margin-right:-34px">Against this background, it is not surprising that the BAG did not declare a dismissal of an employee with a child to be invalid simply because she refused to perform her work because of her child, but rather focused on whether it was impossible or unreasonable for the employee to perform her work because of her obligation to care for her child.

p style="margin-right:-34px">**Subject**: Gender Discrimination, Other Forms of Discrimination

p style="margin-right:-34px">**Parties**: [Employee] and the Institute for the Equality of Women and Men – v – Dylisa Store BVBA

p style="margin-right:-34px">**Court**: Labour Court of Brussels (3rd Chamber – Dutch section)

p style="margin-right:-34px">**Date**: 10 September 2019

p style="margin-right:-34px">**Case number**: 2017/AB/659

p style="margin-right:-34px">**Internet publication**: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20190910-2

Creator: Tribunal du travail francophone de Bruxelles (Labour Tribunal of Brussels)
Verdict at: 2019-09-10
Case number: 2017/AB/659