EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/48 Norwegian parental benefits provisions disadvantaging men found outside the scope of Equal Treatment Directive (NO)

On 13 December 2019 the European Free Trade Association (EFTA) Court held that a national provision that renders a father's entitlement to parental benefits during a shared period of leave dependent on the mother's situation, but not vice versa, fell outside the scope of Directive 2006/54/EC (the Equal Treatment Directive) since it did not concern "employment and working conditions" within the meaning of Article 14(1)(c) of that Directive. The action brought by the EFTA Surveillance Authority (ESA) was thus dismissed. The Court consequently did not consider whether the Norwegian rules amounted to unlawful discrimination under the Directive. Furthermore, no assessment was made as to the potential breach with the general principle of equality of gender under EEA law, as this had not been pleaded by ESA.

Summary

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consequently did not consider whether the Norwegian rules amounted to unlawful discrimination under the Directive. Furthermore, no assessment was made as to the potential breach with the general principle of equality of gender under EEA law, as this had not been pleaded by ESA.

Legal background

The Norwegian parental benefits scheme is regulated in the National Insurance Act (NIA) ('*Folketrygdloven*'), Chapter 14. The main rule is that each parent gains a right to parental benefits through employment activities. Additionally, the NIA lists certain other activities as equal to employment activities, for example paid leave of absence during education and periods of military service. In order to qualify for parental benefits, the parent must have been employed for at least six of the last ten months. The benefit is calculated according to the parent's salary, and the period in which the parent may receive the benefit depends on the rate of the benefit: 100% over the span of 49 weeks, and 80% for a total of 56 weeks. If both parents fulfil the conditions, they both have an independent right to ten weeks of the parental benefit period, which must be used by the respective parent. The remaining part of the period (referred to as the 'common period'), may be divided between the parents however they may choose. Although the conditions for acquiring the right to the parental benefits are the same for both parents, the NIA contains specific rules that only apply to the father:

The father is only entitled to parental benefits as part of the common period if the mother undertakes certain activities after birth/adoption, mainly that she returns to work, full-time education, or a combination of such activities.

If the mother works less than 75% after birth/adoption, the father's benefit is calculated based on the mother's work percentage.

If the father is the only one of the parents to fulfil the requirements for parental benefits, he will not be entitled to the benefit, unless the mother goes on to perform certain activities, such as full-time employment, full-time studies etc.

Consequently, the Norwegian parental benefits scheme makes a father's entitlement conditional on the mother's situation, but not vice versa.

While access to parental *benefits* are regulated in the NIA, the right to parental leave from work follows from provisions in the Working Environment Act (WEA). The two sets of rules are to a large extent complementary. The right to unpaid leave from work presupposes the

existence of social (public) benefits in lieu of salary.

Following the WEA, parents are afforded a total of 12 months combined leave from work without pay. However, an employee will be entitled to parental leave for as long as parental benefits are paid pursuant to the NIA, irrespective of whether the 12-month period is exceeded. Consequently, the right to leave from work is linked to the right to the parental benefits, since being eligible for parental benefits is also one possible condition for having the right to parental leave.

Facts and proceedings

The case brought before the EFTA Court was initiated by the EFTA Surveillance Authority (ESA), which has a similar enforcement role as the European Commission when it comes to the EEA-EFTA countries. ESA considered that since mothers and fathers are in a comparable situation when it comes to bringing up children, the different treatment of fathers constituted unlawful discrimination in violation of Article 14(1)(c) of the Equal Treatment Directive. That provision prohibits "direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to [...] employment and working conditions [...]". As support for its finding that the disputed provisions concerned "employment and working conditions", ESA relied inter alia on the ECJ's judgment in Case C-222/14 (*Maïstrellis*).

That case concerned a Greek provision providing that a male civil servant was not entitled to parental leave if his spouse did not work or exercise any profession, unless this was due to serious illness or injury. No similar rule applied to female civil servants. Consequently, female civil servants were entitled to parental leave, regardless of the employment status of their husbands. The ECJ held that the Greek rule constituted direct discrimination on grounds of sex, within the meaning of Article 14(1)(c).

The European Commission supported ESA and held that the Norwegian rules established discriminatory criteria as regards the eligibility for the parental benefits.

The Norwegian Government, on the other hand, argued that the benefits in question did not constitute "employment or working conditions" within the meaning of Article 14(1)(c) of the Directive, since they were provided as part of a social security scheme. The Government therefore argued that *Maïstrellis* should be distinguished from the case before the EFTA Court, and could not be relied on as support for ESA's conclusion that the Norwegian provisions breached the Equal Treatment Directive.

Furthermore, the Government also argued that the provisions did not constitute discrimination on the grounds of sex, since the difference in treatment of fathers and mothers reflected differences in circumstances of men and women. Finally, the Government argued that even if the provisions were *prima facie* considered discriminatory, this could be justified as "positive action" according to Article 3 of the Directive. The rationale was that the rules were designed to promote shared parenting by creating an incentive for women to return to work and thus reduce the disadvantages to a mother's career as a result of childbirth.

Judgment

The EFTA Court agreed with the Norwegian Government that the parental benefit scheme did not constitute "employment and working conditions", and that the disputed provisions thus fell outside the scope of the Directive. For that reason, the Court did not consider whether the scheme constituted direct discrimination of fathers on the grounds of sex.

The Court started out by noting that the parental benefits in question were granted as part of a social security scheme, and that the Equal Treatment Directive was, in principle, not intended to apply to such benefits. This exclusion should, however, be interpreted strictly, considering the fundamental importance of the principle of equal treatment. Consequently, benefits cannot be excluded from the scope of the Directive simply because they are part of a national security system. The decisive test is whether the subject matter concerns employment and working conditions, which is the case where a benefit is necessarily linked to an employment relationship by its aim and function, and the conditions for obtaining the benefits. However, the Court noted that it is not sufficient that the conditions for entitlement may affect employment and working conditions for the Directive to apply.

The Court then went on to assess the disputed provisions. It noted that the aim and function of the Norwegian parental benefits is to provide parents with income in relation to the birth or adoption of a child, making sure that the parents are able to meet their needs while caring for the child.

With reference to the ECJ's judgment in joined cases C-63/91 and C-64/91 (*Jackson and Cresswell*), the EFTA Court held that where the aim of a benefit is to provide income support, this is unrelated to an employment relationship. Therefore, the Court considered that the Norwegian parental benefits did not affect the employment relationship of the parents.

In support for this finding, the Court made reference to the fact that the disputed provisions listed several activities that are unrelated to an employment relationship, but still qualify for

the entitlement to parental benefits, including unemployment benefits and periods of military service.

Interestingly, the Court also rejected ESA's argument that *Maïstrellis* supported the view that the conditions for entitlement to the parental benefits were considered employment and working conditions. The EFTA Court held that *Maïstrellis* was limited to the question of whether the granting of parental leave was in line with Article 14(1)(c), but that it gave no assistance in determining whether parental benefits fell within the scope of the Directive.

Commentary

The difference in the entitlement to parental benefits for fathers has been a controversial issue in Norway for a long time, and concerns as many as 6000 fathers every year. The Equality and Anti-Discrimination Ombud has, at least since 2006, held that the rules are in breach of the Norwegian Gender Equality Act, and argued for an amendment of the NIA. The matter has also been pleaded before the Norwegian Social Security Court and Courts of Appeal, and many of those cases were placed on hold to await the outcome of the EFTA Court's ruling.

The EFTA Court's conclusion that the matter fell entirely outside the scope of the Directive has thus been a great disappointment to many.

In our opinion the EFTA Court's finding is unconvincing, and seems at odds with the provision in the NIA concerning the right to parental benefits, which explicitly states that "the right to parental benefits is obtained through employment activities". In fact, the right to parental benefits is considered to have a closer connection to employment activities than other social security benefits in the NIA, such as sick pay. The close link between parental benefits and employment is further illustrated by the provisions in the WEA, setting out that an employee is entitled to unpaid leave from work for as long as the individual receives parental benefits. The right to parental leave is therefore, at least partly, made conditional upon eligibility to parental benefits. This is in line with the general system prevalent in Norway, where on the one hand the right to unpaid leave follows from the WEA, while on the other there is a corresponding right to receive social benefits in the NIA. In our opinion, the Court does not address this link in a satisfactory manner.

One cannot help but wonder whether the Court was perhaps a little too eager to avoid ruling on the substance, and thus tweaked the facts – i.e. rejected the links between the parental benefits and employment and working conditions – in order to define the rules as falling

outside the scope of the Directive. It is at the very least puzzling that the Norwegian Social Security Court, in a number of judgments, has found the disputed provisions to be the same as those considered in *Maïstrellis*.

Even if one were to accept that the scheme does not concern employment or working conditions, the fundamental question of whether the parental benefits scheme discriminates fathers is still unresolved. It is not obvious why ESA did not argue in the alternative that the parental benefits scheme breached the general principle of equal treatment. Such a submission would have ensured that the Court ruled on the *substance* of the issue brought forward by ESA.

The EFTA Court's ruling will undoubtedly be consequential for pending cases before Norwegian courts with respect to the applicability of the Equal Treatment Directive in disputes concerning the parental benefits scheme. However, in addition to the general principle of equal treatment, there are a number of other anti-discrimination rules with general applicability, including the Norwegian Anti-Discrimination Act, the Equal Treatment Clause of the Norwegian Constitution (Section 98), and Article 14 of the European Convention on Human Rights.

The Equality and Anti-Discrimination Ombud still firmly holds the view that the scheme breaches the Norwegian Anti-Discrimination Act of 1978 (later replaced by the Norwegian Anti-Discrimination Act of 2018, and some of the pending cases before Norwegian courts will hopefully consider these alternative legal grounds. Only time will tell whether the conclusion will be the same as in *Maïstrellis*:

[...] a provision such as the one at issue in the main proceedings, far from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties [...] (paragraph 50).

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier, Attorneys Ltd): In Finland, mothers not very surprisingly use the vast majority of family leave. At the moment they receive a longer dedicated leave (105 days maternity leave compared to the circa 54 days paternity leave that the fathers receive), but the quotas have been proposed to change into 50/50, and a more equal division is desired for the near future. The parental leave (158 days) is that which parents can divide between them according to their needs. Unlike in Norway, Finnish employment legislation includes no

such criteria as that found in the Norwegian National Insurance Act, keeping a father from having shared parental leave depending on the mother's situation.

The Finnish Act on Equality between Men and Women (609/1986, as amended) includes a prohibition to discriminate on the basis of pregnancy or childbirth as well as of parenthood or family care duty. Furthermore, according to settled case law, observance of the principles of equality and non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. It is indeed a difficult question of whether men and women, persons who cannot give birth and persons who can, have such comparable situations in all of employment and working conditions, and it is unfortunate that, due to a halt on the issue of whether the Equal Treatment Directive is applicable, this could not be discussed by the court.

There is no relevant Finnish case law regarding paternity leave and equality. Regarding gender discrimination and the questions posed above, it would have been interesting to take a look at Kiiski, C-116/06, EU:C:2007:536, concerning the interpretation of Article 2 of Council Directive 76/207/EEC. There the Court considered pregnancy to be equivalent to an unforeseeable change leading to direct discrimination on grounds of sex, since only women could become pregnant (paragraphs 53 and 55).

It indeed is a pity that ESA did not invoke the argument that the parental benefits scheme breached the general principle of equal treatment (or other anti-discrimination rules with general applicability as a whole), ensuring a ruling on the substance of the issue.

Germany (Ines Gutt, Luther Rechtsanwaltsgesellschaft mbH): Since 2007 the German parental benefits scheme has been regulated in the Federal Parental Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz, the 'BEEG'). The BEEG includes regulations on both parental benefits and parental leave.Therefore, a division into two different laws as in Norway does not exist in German law.

Section 1 paragraph 1 of the BEEG determines who has a claim to parental benefits. It states:

(1) A person may claim parental allowance [benefit] if:

1. their domicile or ordinary place of residence is in Germany,

2. they and their child live in the same household,

3. they care for and bring up their child themselves, and

4. they are not in gainful employment, or not in full-time gainful employment.

In addition, the following paragraphs of Section 1 BEEG provide for further special cases in which a claim to parental benefits exists.

The parental benefit is calculated according to the beneficiary's income of the last twelve months before the month of birth. The parental benefit is granted in the amount of 67% of income from gainful employment before the birth of the child. It is paid up to a maximum of €1,800 per month for full months during which the eligible person has no income from gainful employment (Section 2 paragraph 1 BEEG). Moreover, Section 2 paragraph 4 BEEG provides that parental benefit is paid at least in the amount of €300. This also applies if the entitled person has no income from gainful employment before the birth of the child. This makes it clear that in German law there is no dependence on income from employment for entitlement to the parental benefit.

In this context it should be noted that the conditions of the entitlement to parental benefits are the same for mothers and fathers. Furthermore, unlike the Norwegian law, the BEEG does not contain special rules for fathers.

In my opinion, a distinction in the BEEG as the one given in Norwegian law could amount to a discrimination because of gender according to the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, the 'AGG'). However, as such a distinction is not made in the BEEG, it is impossible that such a case will be brought before the German courts. Therefore the applicability of Directive 2006/54/EC is not relevant in Germany either. But, in conclusion, it can be stated that the AGG also serves to implement the anti-discrimination directives, so that a certain level of protection can also be assumed here.

The Netherlands (Peter Vas Nunes): This is a well-written and instructive case report, in which the author is not afraid to provide his personal opinion and even dares to take issue with his own highest national court, which is to be applauded. My commentary focuses on the issue of classification.

Directive 2006/54 consists of four Titles. Title I contains general provisions, including definitions. Title II is subdivided into three Chapters: 1. Equal pay, 2. Equal treatment in (non-statutory) occupational social security schemes, 3. Equal treatment as regards (inter alia) 'working conditions'. Directive 79/7 applies to statutory schemes that provide protection

against most employment-related risks. Directive 2010/18 on parental leave governs the right to unpaid leave. Thus, as I see it, a benefit can fall within one of six categories:

1. Pay
2. Non-statutory occupational social security
3. Working condition
4. Statutory benefit
5. Parental leave
6. None of the above

In which category do the parental benefits at issue in this Norwegian case fall?

The EFTA Court in this case noted that, "insofar as "pay" pursuant to the Equal Treatment Directive is concerned, that concept cannot be extended to encompass social security benefits, such as those at issue, which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned, and which are obligatorily applicable to general categories of employees, as well as to other beneficiaries." This rules out category 1.

The benefit at issue does not fall within category 2, because the list of occupational risks to which Chapter 2 applies does not include parental benefits.

The EFTA Court has now ruled that the benefit at issue does not fall within category 3.

The benefit at issue does not fall within category 4, because the list of risks to which the directive applies do not include parental benefits.

The benefit at issue is not parental leave as such, but a benefit paid in connection with parental leave. So that rules out category no. 5.

The conclusion would seem to be that, if the EFTA Court is to be believed (the Ombud apparently holds otherwise), the parental benefits are not governed by any of the said

Directives. This leaves the 'general principle of equal treatment', which unfortunately was not argued in this case, so that the court was able to avoid ruling on the issue of whether the law on parental benefits is in breach of that principle and, if so, what the consequences of such breach are (levelling up, levelling down, or something in between?). The author mentions Norwegian national law and the Norwegian constitution, as well as Article 14 ECHR, as a potential source for arguing breach of said principle. One could also reference Mangold (ECJ 22 11.05 C-144/04), in which the ECJ held that "the source of the actual principle underlying the prohibition of these forms of discrimination" is to be found in "various international instruments and in the constitutional traditions common to the Member States". It would have been interesting to know whether the EFTA Court concurs with the ECJ that the principle of equal treatment is a "general principle" of EFTA law.

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