

## SUMMARY

# 2017/5 Unlawful dismissal of pregnant employee upon business takeover (CY)

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### **Summary**

The dismissal of a pregnant employee upon her employer's business takeover was deemed to be unlawful discrimination.

### **Facts**

The employee had been employed since 1 June 2006 as a marketing officer by a local company dealing with the import, export, purchase and sale of motor vehicles in Cyprus. Pursuant to the terms of employment, her pay package comprised of a monthly salary of € 2,000, as well as a discretionary entitlement to an extra month's salary (i.e. a thirteenth salary) and a performance bonus (also equal to a month's salary). On 7 February 2012, she duly informed her employer that she was pregnant.

Her employer informed her in writing on 30 April 2012 that, because of the takeover of its business by another local company, all obligations arising from her employment contract would be transferred to, and assumed by, the new owners, without disruption to the continuity of her employment.

On the same date, the new owners informed the employee in writing that she was being made redundant and shortly thereafter paid her € 3,692,31 in lieu of notice, plus € 633 as the pro rata amount she was entitled to as a discretionary payment.

The employee (the 'Applicant') brought proceedings against the new owners of the employer company (the 'Respondents') before the Industrial Disputes Court, claiming damages for

unlawful dismissal on the basis of: (a) pregnancy, in breach of the Protection of Maternity Law (Law 100(I)/1997) and (b) sex discrimination, within the meaning of the Equal Treatment of Men and Women in Employment and Vocational Training Law (Law 205(I)/2002); or alternatively, for compensation by the Redundancy Fund, if her dismissal was found to be due to redundancy.

In their defence, the Respondents argued that: (i) they were unaware of the Applicant's pregnancy at the time of her dismissal and (b) the dismissal was fair, as it was wholly or mainly attributable to redundancy, based on the fact that there was now no marketing department in which the Applicant could work, nor was there any other job she could do.

### **Judgment**

In considering whether the Applicant's dismissal could be regarded to redundancy, the Court examined the circumstances under which an employee is made redundant and is entitled to a redundancy payment under the Termination of Employment Law (Law 24/1967), but on the evidence, it found no reason to justify the Applicant's dismissal on those grounds.

The Court confirmed that according to the Termination of Employment Law, dismissal on grounds of pregnancy is unlawful. Having regard to Law 100(I)/1997, as harmonised by Directive 92/85 and ECJ case law, the Court stressed that a pregnant employee enjoys full protection against dismissal once she informs her employer about her pregnancy. The Court found that the Respondents had been informed of the Applicant's pregnancy by means of the pregnancy certificate she submitted on 7 February 2012.

In deciding whether the Applicant had been also a victim of discrimination, the Court referred to Law 205(I)/2002, implementing Directives 76/207 and 2006/54, as well as to Cypriot case law, which provides that any unfavourable treatment of a woman (including dismissal) due to pregnancy constitutes direct discrimination on grounds of sex. On this reasoning the Court held that the Applicant's dismissal was sex discriminatory and therefore unlawful.

The Applicant was awarded € 22,500 in damages for all losses she had suffered as a result of her unlawful dismissal from the date of the dismissal up until three months after the maternity leave ended. In arriving at its decision about the level of compensation, the Court took into account the Applicant's monthly salary, her length of service and her young age. It then deducted the payment the Applicant had received in lieu of notice and the maternity benefits she received during her maternity leave, which amounted to 75% of her monthly salary.

### **Commentary**

Whilst Cypriot law has been harmonised with European Directives so as to protect both pregnant workers and working mothers, discrimination claims on grounds of pregnancy and maternity are rare in Cyprus. In reaching its decision the Court confirmed that the dismissal of a pregnant woman due to her pregnancy is unlawful and constitutes an absolute violation of her rights.

If the facts of the case involved a straightforward unfair dismissal claim, the Court would have awarded the Applicant 13 weeks' salary, amounting to € 6,500. However, the high amount awarded to the Applicant reinforces the protection of pregnant women during employment. The Court's judgment is a welcome precedent for pregnant women – who often become victims of discrimination in the workplace. It raises awareness of Cypriot anti-discrimination law, demonstrating that more needs to be done when it comes to enforcing it in practice.

### **Comments from other jurisdictions**

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): Section 9 of the German Maternity Protection Act (Mutterschutzgesetz, the 'MuSchG') provides extended protection against dismissal. The dismissal of a female employee is prohibited both during pregnancy and four months after birth. Section 9 of the MuSchG is an absolute prohibition. All cases of dismissal in these circumstances will be void.

However, this special protection against dismissal requires the employer to know about the pregnancy before making the decision to terminate, or if not, to have been told about it within two weeks of notifying the employee of her dismissal. A woman who fails to inform her employer within the two-week window, will not be protected.

Section 613a.4 of the German Civil Code (Bürgerliches Gesetzbuch, the 'BGB') clarifies that the dismissal of an employee as a result of a business takeover is invalid. Section 613a of the BGB is the German transposition of Directive 77/187. In addition, the German Protection Against Dismissal Act (Kündigungsschutzgesetz, the 'KSchG') also applies. An employee who is included within the scope of the KSchG can still be dismissed on personal grounds, for misconduct or for operational reasons.

In the case at hand, a dismissal for operational reasons could have been assumed, at least when the new owners of the employer company no longer provided a marketing department in which the applicant could have worked and no other comparable job was available. But aside from that, it is likely that a German labour court would have regarded the dismissal as void under Section 9 of the MuSchG, particularly given that the applicant had informed her former employer about her pregnancy. The new owners of the company should be

accountable for this knowledge.

Romania (Andreea Suciu and Catalin Roman, Noerr): The decision of the Cypriot court is very well received, given that pregnant women often become victims of discrimination in the workplace. It is well known that some employers discourage women from having children by letting them know that when they return to work after maternity leave they will be passed over or fired. This is understood by the Romanian National Council against Discrimination, which has sanctioned numerous employers for such conduct.

The Romanian National Council against Discrimination has stated in decisions that if a pregnant woman or working mother who has recently returned from maternity leave is dismissed or bullied, the employer will be considered to be discriminating against her based on gender. This support from the National Council against Discrimination has meant that working mothers can now file successful claims for damages for discrimination based on gender.

The ECtHR has often said that differences in treatment become discrimination when they are applied in similar cases without reasonable justification for the difference. Although the case of a pregnant woman who has recently returned to work after maternity leave cannot easily be compared to another situation, her dismissal can still be regarded as discriminatory.

As far as the case at hand is concerned, in Romania it would also have been an unlawful dismissal, based on both the provisions of both the Labour Code and the Law on transfers of undertakings No. 67/2006.

Subject: Discrimination; pregnancy

Parties: Maria Hadjidaniel – v – Demstar Automotive Ltd and Redundancy Fund

Court: Industrial Disputes Court

Date: 28 December 2016

Case number: 813/2012

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**Creator:** Industrial Disputes Court

**Verdict at:** 2016-12-28

**Case number:** 813/2012