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Pregnancy and job offers (NL)

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Summary

A discriminatory refusal to offer an employee a new employment contract upon expiry of a fixed term contract is not discriminatory dismissal but a discriminatory refusal to give access to employment. The employer is liable for emotional damages.

Background

Discrimination based on gender is prohibited in the Netherlands, including with regard to the termination of an employment agreement and the decision as to whether to offer an employment agreement. Dutch law distinguishes between these two types of discrimination. A claim for discriminatory dismissal becomes time-barred from two months after the dismissal. In proceedings, the former employee can ask for the dismissal to be annulled or can request financial compensation. If the issue is the discriminatory refusal to enter into a contract, the claim becomes time-barred after five years following the unlawful refusal to hire the employee. The claimant may only request compensation for harm suffered in proceedings. The difficulty is that it is often hard to prove that the claimant actually suffered harm as a result of the discriminatory refusal to enter into a new contract.

Facts

The plaintiff was employed based on two successive employment contracts for a fixed term. The second contract ended on 1 October 2013. During the term of her first contract, her hours were increased from three to four days per week. On 24 September 2013 the plaintiff met with her employer to discuss the continuation of the contract after 1 October 2013. One of the topics discussed was the fact that she was pregnant. The plaintiff stated that she had raised this issue before. During the meeting there was a debate about the duration of pregnancy leave. The employer stated that it was for six weeks. The plaintiff argued it was for 16 weeks. The meeting ended without the parties reaching a conclusion. During a follow-up on 26 September 2013 the employer informed the plaintiff that she would not get a new contract. The employer alleged that this was due to poor performance dating from the start of her employment. The employer did not substantiate these allegations.

The plaintiff argued that her employer did not offer a new contract on discriminatory grounds. She lodged a claim beyond the two-month time limit following the end of the contract. The employer argued that the claim was therefore time-barred.

Judgment

The cantonal court held that the refusal to enter into a new contract was based on the pregnancy of plaintiff and as such was gender discriminatory. The court correctly shifted the burden of proof to the employer to prove there was no breach once the facts of the claim had been set out, as laid down in Article 19 of EC Directive 2006/54.

The cantonal court then had to address two fundamental questions:

a. Was the discriminatory refusal to enter into a new employment contract after expiry of the fixed term contract a dismissal or a refusal to give access to employment?
b. How should the non-economic harm be calculated in a case of gender discrimination?

With regard to the first question, referring to the ECJ judgment in *Kuso* (ECJ 12 September 2013, case C-614/11), the employer argued that its refusal to renew the contract should be considered as a dismissal. Since the claim was filed more than two months after the refusal, he argued that the claim was time barred.

The cantonal court did not concur. The court considered the fact that the employer did not want to re-employ the plaintiff as a refusal to enter into a new con-

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tract. This meant that the claim was not time-barred. The court reasoned that, although the ECJ held in *Kuso* that the term 'dismissal' should be construed widely, the decision of the ECJ in *Melgar* (ECJ 4 October 2001, case C-438/99) still stands. In the *Melgar* case the ECJ held that the refusal to re-employ an employee after a fixed term contract has ended had to be regarded as a refusal to hire an employee and not as a dismissal. The ECJ explicitly referred to that decision in the *Kuso* case.

Further, the facts in the *Kuso* case are not comparable with the present case. In *Kuso*, the contract ended by operation of law because Ms Kuso had reached the age of 60. For men the contract would have ended at the age of 65. The question at stake in *Kuso* was whether it was discriminatory for contracts to end at an earlier age for women than for men. The issue was not whether the contract needed to be renewed.

Based on the above, the cantonal court drew the conclusion that the current case concerned a refusal of new employment, which is more in line with the *Melgar* case. With regard to financial compensation, the cantonal court held that there were grounds for compensation for non-economic harm. The sanction for this should be effective, deterrent and proportionate. The judge referred to the cases of *Marshall* (ECJ 2 August 1993, C-271/91) and *Draehmpaehl* (ECJ 22 April 1997, C-265/95). However, EU case law does not offer grounds for punitive damages in cases like this. According to the cantonal court, this flows from the case of *Arjona Camacho* (ECJ 17 December 2015, C-407/14).

According to the cantonal court, the Dutch Civil Code was in line with these European precedents with regard to indemnification for non-economic harm. The plaintiff was claiming an amount of € 10,000, but without substantiating this part of the claim. The court considered that, taking into account the circumstances of the case and with reference to Dutch case law, an amount of € 5,000 for non-economic damages was fair.

With regard to material damages the cantonal court held, with reference to Dutch case law on manifestly unreasonable dismissal, it was fair to assume that the plaintiff would have had an employment contract for a term of five years. She therefore had to be compensated for loss of income during that period. Unemployment benefit needed to be deducted from the lost income. Therefore, the employer was ordered to pay € 21,000 in material damages.

Thus, the total sum the employer had to pay the plaintiff was € 26,000.

Commentary

In my view, the cantonal judge applied EU case law correctly and the compensation is effective and deterrent. Whether it is proportionate is harder to assess. It is difficult to say what the future might have held if the plaintiff had been offered a new contract – and what is fair in terms of emotional damages is almost impossible to quantify.

Comments from other jurisdictions

Cyprus (Panayiota Papakyriacou, George Z. Georgiou & Associates LLC): The issue of time-barred claims on grounds of discrimination was first examined by the Cypriot Courts earlier this year, as reported in this issue of EELC. It concerned a claim of sexual harassment. The Court ruled that employee had been sexually harassed but that the employee's claim was time barred. Therefore, the Court did not award any compensation to the employee on grounds of sexual harassment but instead made award for injury to feelings of € 22.000.

See the Cyprus case report in this issue for further details.

Subject: Discrimination; gender

Parties: Employee – v – Logis. P.B.V.

Court: *Kantonrechter Zwolle* (Cantonal judge Zwolle)

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