EJC 7 September 2017, case C-174/16 (H), Maternity and parental leave, Gender discrimination

H. – v – Land Berlin, German case

Summary

Clause 5(1) and (2) of the revised Framework Agreement on parental leave precludes rules of national law which make promotion conditional on having successfully completed a probation, if probation has not taken place because of parental leave.

Facts

Ms H. entered service of the Land of Berlin in 1999 as a civil servant for life. On 20 September 2011, following a selection procedure, she was promoted to a management position on a two-year probation. However, Ms H. never took up duties in her new post. From 25 July 2011 to 19 January 2012, she was on sick leave due to pregnancy. Subsequently, she was on maternity leave until 27 April 2012. After that, she took leave until 29 May 2012, before being granted parental leave from 30 March 2012 to 20 February 2015 (including various extensions).

On 4 September 2014, the Administrative Office for the Land of Berlin informed Ms H. that she had not successfully completed the probationary period in her new position, as she had not actually occupied it. By applicable law, her probationary status had ended on 19 September 2013 and so she would be returned to her former post. It appeared that in the second half of 2012, the management position had been readvertised and filled.

Legal background

Directive 2010/18 adopts the (revised) Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.[2] It aims to improve the balance of work, private and family life for working parents and equality between men and women with regard to job opportunities and treatment at work across the EU. The Framework Agreement contains various minimum requirements:

- Clause 2(2) stipulates that parental leave shall be granted for at least four months.
- Clause 3 provides Member States with options to define the conditions of access and the detailed rules for parental leave, provided that the minimum requirements of the Framework Agreement are met.
- Clause 5(1) grants workers the right to return to the same job at the end of parental leave. If that is not possible, the worker is entitled to an equivalent or similar job, consistent with their employment contract or employment relationship.
- Clause 5(2) stipulates that rights acquired or in the process of being acquired on the date on which parental leave starts shall be maintained as they stand until the end of parental leave.
- By Clause 5(3), Member States and/or social partners shall define the status of the employment contract or employment relationship for the period of parental leave.

Directive 2006/54 concerns the equal treatment of men and women at work. Articles 14(1), 15 and 16 forbid direct or indirect discrimination in relation to employment conditions, including promotion and for reasons connected with maternity and paternity leave.

National proceedings

Ms H. lodged a complaint against this decision with the Administrative Office. Upon its rejection, she brought an action to the Berlin Administrative Court, claiming that the contested decision infringed Directives 2006/54 and 2010/18. The Berlin Administrative court decided to ask preliminary questions to the ECJ.

Questions put to the ECJ[3]

Must Clause 5(1) and (2) of the revised Framework Agreement be interpreted as precluding rules of national law, such as those at issue in the main proceedings, which subject definitive promotion to a managerial post in the civil service to the condition that the candidate selected successfully carries out a prior two-year probationary period in that post, and by virtue of which, in a situation where such a candidate was on parental leave for most of that period and still is, that probationary period ends by operation of law after two years with no possibility of extending it and the person concerned is consequently, on her return from parental leave, reinstated in the post, at a lower level both in status and in terms of remuneration, occupied before that probationary period.

If the answer to the first question is in the affirmative: must Clause 5(1) and (2) be interpreted as meaning that

2. This Directive replaced Directive 96/34, which contained the former Framework Agreement.

3. As rephrased by the ECJ.

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such rules of national law may nevertheless be justified by the objective pursued by the probationary period, which is to enable the assessment of suitability for the managerial post to be assigned permanently and, consequently, requires that probation to extend over a long-term period?

What consequences arise under EU law, in circumstances such as those in the main proceedings, from the incompatibility of rules such as those at issue in the main proceedings with Clause 5(1) and (2) of the revised Framework Agreement?

ECJ's findings

First, the ECJ established that Ms H. had been absent on parental leave during most of the probationary period and that was also the case at the point when the Administrative Office informed her that she would be reinstated in her former post. Consequently, national law should be examined solely in the light of Directive 2010/18 and the (revised) Framework Agreement on maternity and parental leave, which also applies to civil servants (*Chatzi*, C-149/10).

In order to enable new parents to interrupt their professional activities to devote themselves to their family responsibilities, Clause 5(1) of the Directive provides assurance that they will return to the same job, or an equivalent or similar job, should that not be possible. Similarly, Clause 5(2) aims to avoid the loss of (or reduction in) rights during parental leave (either acquired or being acquired) that derive from an employment relationship (*Gómez-Limón Sánchez-Camacho*, C-537/07 and *Meerts*, C-116/08). Although Clause 5(3) stipulates that Member States and/or social partners govern the rights and obligations of an employment relationship during parental leave, this must be without prejudice to the minimum requirements of the Framework Agreement, particularly Clauses 5(1) and (2). This also applies to periods of parental leave granted exceeding the minimum period specified in the Framework Agreement. Otherwise, workers would be dissuaded from taking longer parental leave and the objective of the Framework Agreement would be frustrated.

The ECJ found it was not relevant that Ms H. had never actually occupied the probationary post, as the employer had already offered it to someone else during the period that she took her parental leave. When she was on sick leave for reasons connected with her pregnancy, the post had already become hers.

The ECJ found that the fact that the applicable German law automatically denied her civil servant the right to return to her post at the end of her parental leave – and the probation could not be extended – was not in accordance with the Framework Agreement. Once parental leave has been granted in accordance with national law, it cannot be taken away, even if this is justified by the objective of the probationary period to assess the worker's suitability for the job and this has turned out to be impossible.

In terms of non-compliance with EU legislation, individuals may rely upon the provisions of a directive (and Framework Agreement) against a Member State, particularly in its capacity as an employer, if these are unconditional and sufficiently precise (*Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08). This is the case in relation to Clauses 5(1) and (2).

Consequently, the ECJ noted that the referring court must determine whether it was possible for the Land of Berlin to comply with Clause 5(1) and (2), as the Land of Berlin had not so far explained why it could not have kept the post vacant or appointed someone to fill it temporarily. Even if this were not possible, the Land of Berlin had not explained why it could not have offered Ms H. a similar position. Regarding the term of the probation, Clause 5(2), the ECJ's view was that it would need to be reapplied. Lastly, Ms H. has already successfully participated in a selection procedure and this requirement could not be reimposed.

Ruling

Clause 5(1) and (2) of the revised Framework Agreement on parental leave set out in the Annex to Council Directive 2010/18 must be interpreted as precluding rules of national law, which subject definitive promotion to a managerial post in the civil service to the condition that the candidate selected successfully carries out a prior two-year probationary period in that post, and by virtue of which, in a situation where such a candidate was on parental leave for most of that period and still is, that probationary period ends by operation of law after two years with no possibility of extending it and the person concerned is consequently, on return from parental leave, reinstated in the post, at a lower level both in status and in terms of remuneration, occupied before that probationary period. The infringements of that clause cannot be justified by the objective pursued by the probationary period, which is to enable the assessment of suitability for the managerial post to be assigned permanently.

It is for the referring court, if necessary by disapplying the rules of national law at issue in the main proceedings, to ascertain, as required by Clause 5(1) of the revised Framework Agreement on parental leave set out in the Annex to Directive 2010/18, whether, in circumstances such as those of the main proceedings, it was not objectively possible for the *Land* concerned, in its capacity as an employer, to enable the person concerned to return to her post at the end of her parental leave and, if so, to ensure that she is assigned to an equivalent or similar post consistent with her employment contract or

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relationship, without that assignment of a post being made conditional upon holding a new selection procedure beforehand. It is also for that court to ensure that the person concerned may, at the end of parental leave, continue, in the post thus returned to or newly assigned, a probationary period under conditions that are in compliance with the requirements of Clause 5(2) of the revised Framework Agreement.

ECJ 13 September 2017, case C-570/15 (X), Free movement, Social insurance

X – v – Staatssecretaris van Financiën, Dutch case

Summary

A Dutch employee who resides in Belgium and performs only 6.5% of his hours worked in Belgium (and the rest in the Netherlands), cannot be regarded as 'normally' pursuing an activity in two or more Member States. The special rule in Article 14(2)(b)(i) of Regulation No 1408/71, stating that a person normally employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides, does not apply in this case.

Facts

In 2009, a Dutch employee residing in Belgium, worked for 1,872 hours as an account manager and manager of telecommunications for his employer in the Netherlands. Out of those 1,872 hours of work, he performed 121 hours in Belgium. This is approximately 6.5% of the total hours worked that year. It comprised 17 hours visiting clients and 104 hours working from home. Those activities were not carried out according to a set pattern and X's employment contract did not contain any arrangement for working in Belgium. The employee performed the rest of his work, amounting to 1,751 hours, in the Netherlands. He spent this time either working in the office, or visiting potential clients.

The dispute in the main proceedings between X and the *Staatssecretaris van Financiën* (State Secretary for Finance) concerns the assessment of income tax and social insurance contributions imposed for the tax year of 2009.

Legal background

Regulation (EEC) 1408/71 is applicable for determining which social security law should apply. Regulation No 1408/71 was repealed and replaced with effect from 1 May 2010 by Regulation (EC) No 883/2004, but remains applicable *ratione temporis* in this case.

The general conflict rule of Regulation No 1408/71, contained in Article 13(2)(a), points to the applicable legislation of the Member State of employment. However, Article 14(2)(b)(i) of the Regulation states that a person normally employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides.[4]
Therefore, if the activities pursued by Mr X in Belgium were disregarded, the general conflict rule contained in Article 13(2)(a) would apply, pointing to the applicable legislation of the Member State of employment (the Netherlands). If those activities were included in the assessment, Article 13(2)(a) would apply, resulting in the applicable legislation changing from the Netherlands to Belgium every time the work location switched from the Netherlands to Belgium, and vice versa. Alternatively, it could be considered that Mr X was normally employed in the territory of two Member States, the Netherlands and Belgium, and that therefore, based on the special rule in Article 14(2)(b)(i) of Regulation No 1408/71, only the legislation of the Member State of his residence (Belgium) applied to him.

National proceedings

The Regional Court of Appeal of 's-Hertogenbosch, in the Netherlands, in the appeal against the judgment of a district court, ruled that the work performed in Belgium in 2009 was merely occasional. It held that those activities should not be considered in determining which social security law applied and therefore, in accordance with Article 13(2)(a) of Regulation No 1408/71, Dutch law applied for the tax year of 2009. X appealed.

The Dutch Supreme Court decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling.

Questions put to the ECJ

What standard or standards should be used to assess which law is designated by Regulation No 1408/71 in the case of a worker residing in Belgium who performs the bulk of his work for his Dutch employer in the

4. Article 13(1)(a) of Regulation No 883/2004 modifies the conflict rule previously contained in Article 14(2)(b)(i) of Regulation No 1408/71 by introducing the requirement for a 'substantial' part of a person's activity to be pursued in the Member State of residence.

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