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Failure to reinstate an employee upon her return from parental leave in her initial position or a similar position with equivalent remuneration can constitute indirect gender discrimination (FR)

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Summary

Failure to reinstate an employee upon her return from parental leave in her initial position or a similar position with equivalent remuneration can constitute indirect gender discrimination.

Facts

At the end of a full-time parental leave of almost three years, Ms K, an employee of the French company Kiosque d'or holding an accountant position, was relegated to administrative and secretarial tasks unrelated to her job and qualification. Her accountant position was definitively assigned to the employee who had replaced her during her absence. Two years later, Ms K was dismissed for economic reasons for having refused her transfer to another geographic area. Ms K lodged a lawsuit against her former employer, notably for breach of its legal obligation to reinstate her in her accountant role upon her return from parental leave and claimed EUR 30,000 in damages for discrimination on account of her pregnancy.

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Judgment

The Court of Appeals of Lyon dismissed her discrimination claim. In its decision dated 24 February 2019, the Court of Appeals held that even though it was indisputable that the company had breached its obligation to reinstate Ms K in her accountant role upon her return from parental leave, she did not produce precise and consistent facts allowing to suggest the existence of discrimination on account of her pregnancy. Her claim of EUR 30,000 in damages for discrimination was dismissed; however the Court of Appeals granted her EUR 5,000 in damages for the company's breach of its loyalty obligation for failing to execute the employment contr
The French Supreme Court did not follow the Court of Appeals' ruling. In its decision dated 14 November 2019, the Supreme Court held:

"*Considering Article L.122-45 of the Labor Code applicable at the time, together with the framework agreement on parental leave in the appendix to Directive 96/34/EC of June 3, 1996, applicable at the time;*
Whereas it follows from the case-law of the Court of Justice of the European Union that it appears from the first paragraph of the preamble to the framework agreement on parental leave and from section 5 of the general considerations thereof, that this framework agreement constitutes a commitment by the social partners, represented by inter-professional organizations with a general vocation, namely UNICE, CEEP and CES, to put in place, by minimum requirements, measures intended to promote equal opportunities and treatment between men and women by offering them the possibility of reconciling their professional responsibilities and their family obligations and that the framework agreement on parental leave is part of the fundamental objectives set out in section 16 of the European Union Charter of workers' fundamental social rights relating to equal treatment between men and women, to which this framework agreement refers, objectives which are linked to the improvement of living and working conditions as well as to the existence of adequate social protection for workers, in this case those who have requested or taken parental leave (Court of Justice of the European Union, decision of October 22, 2009, Meerts, C-116/08, points 35 and 37; decision of February 27, 2014, Lyreco Belgium, aff. C-588/12, points 30 and 32; decision of May 8, 2019, Praxair, aff. C-486/18, point 41).
[…] by ruling as such, without investigating whether, in light of the considerably higher number of women than men who choose to benefit from parental leave, the

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employer's decision in violation of the above-mentioned provisions to entrust to the employee, upon her return from parental leave, administrative and secretarial duties unrelated to her previous duties as an accountant did not constitute an element suggesting the existence of indirect discrimination on grounds of gender and whether this decision was justified by objective elements unrelated to any discrimination, the Court of Appeals had not validly rendered its decision."

The case was remanded by the Supreme Court to the Court of Appeals of Nancy for reconsideration.

Commentary

In order to reconcile professional life with the education of a young child, a male or female employee who establishes a minimum period of employment of one year within the company on the date of birth or adoption of his/her child has the right to request a full-time or part-time parental leave up to the child's third birthday. Pursuant to Article L.1225-55 of the French Labour Code, by the term of the parental leave the employee regains "his/her previous position or a similar position with at least equivalent remuneration".

In the case at hand, the Supreme Court sets a presumption of indirect gender discrimination for breach of Article L.1225-55, since a considerably higher number of women than men choose to go on parental leave, that can be overturned by objective factors unrelated to any discrimination.

This decision is a clear illustration of the influence European Union law and decisions of the Court of Justice of the European Union ("CJEU") exert on the French Supreme Court in matters of equal treatment between male and female workers. Indeed, in its ruling the Supreme Court relies upon (i) former Article L. 122-45 of the French Labour Code on prohibition of discriminations, (ii) the framework agreement relating to parental leave in the appendix to Directive 96/34/EC of 3 June 1996, the purpose of which is to promote equality of opportunity and treatment between men and women by offering them a possibility to reconcile their professional responsibilities and their family obligations, and (iii) the ECJ case law.

The reference made to the European Union case law demonstrates the Supreme Court's firm commitment to having the employers respect equal treatment between men and women at work, in particular after parental leave. The reference to the Praxair case is telling as the aforementioned objectives were reiterated by the CJEU with regard to French law relating to the calculation of the severance pay for employees on part-time parental leave.

Indeed, in the Praxair case, the CJEU held, following a preliminary question posed by the Supreme Court, that French law which provides for the calculation of the severance pay of an employee on part-time parental leave on the basis of her reduced remuneration constitutes indirect gender discrimination. The reason put forward by the Court of Justice was that a considerably higher number of women than men choose to take part-time parental leave and the resulting difference in treatment cannot be explained by objective factors. The exact same phrase is used by the Supreme Court in this case to set the presumption of indirect gender discrimination.

In order to overturn the presumption of indirect gender discrimination set by the Supreme Court, Kiosque d'or must produce objective factors before the Court of Appeals of Nancy. One objective factor could be that Ms K's accountant role was no longer available as it was occupied by another permanent employee and Kiosque d'or could not have been expected to dismiss the latter to reinstate Ms K in her role. However, we anticipate that such justification may not convince the Court, unless it can be demonstrated that given the nature of Ms K's role and duties it was not possible to replace her by a temporary worker and that Kiosque d'or had no other choice other than to recruit a permanent employee in her role.

Following this decision of the Supreme Court, one could assume that the presumption of indirect gender discrimination could also apply to other types of leave, such as family solidarity leave, caregiver leave, etc. provided that it is statistically demonstrated that women are considerably more numerous than men in taking these types of leave.

Consequently, employers must remain vigilant and mindful of the employees' reinstatement right upon their return from parental leave. Indeed, if an indirect gender discrimination claim is characterized, termination of employment shall produce the effects of a null and void dismissal which is more costly for the employer and can also result in the employee's reinstatement in the company.

Comments from other jurisdictions

Austria (Dr. Karolin Andréewitch and Dr. Jana Eichmeyer, Eisenberger & Herzog Rechtsanwalts GmbH):

The prohibition of gender discrimination in the workplace was implemented in Section 3 *et seq*. of the Austrian Equal Treatment Act 2004. The right of reintegration after parental leave is based on Section 15 of the Austrian Maternity Protection Act 1979.

In Austria, the Supreme Court approved the right of reintegration after parental leave in a ruling 0f 2018. In general, the employer is obliged to reintegrate the employee after parental leave into the same position as before. However, according to Austrian case law it is the content of the employment contract that is decisive here and not the actual position exercised before the parental leave (e.g. the assignment to another position on the

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basis of a contractual transfer clause was permissible). It is open to discussion whether this case law fully complies with EU law (especially with Section 5 of the framework agreement on parental leave in the appendix to Directive 2010/18/EU). However, in the case at hand the Austrian courts would have decided similarly to the French court and would have approved the right of reintegration, if the accountant position was the only one agreed on in the employment contract. So far, the Austrian Equal Treatment Act and discrimination issues have not been raised or addressed in connection with reintegration claims. There only exist a few academic debates on this topic in Austria. Nevertheless, the problem of indirect discrimination in this context does, in general, also exist in Austria, since the increased impact on women in contrast to men indicates indirect discrimination in Austria as well. It therefore remains to be seen how the Austrian courts would decide if a reintegration case is raised from an equal treatment point of view.

Germany (Jana Voigt, Luther Rechtsanwaltsgesellschaft mbH):
In Germany, after the end of parental leave (which must be distinguished from part-time employment during parental leave) an employee is also entitled to be employed according to the employment agreement. In a case where the parties have agreed upon a specific job without a transfer clause, this would be the former position held. However, this is very rare. Usually, the parties agree upon a transfer clause at least. This results in the employee's claim to be employed on the specific or a comparable position. Otherwise, the employer would breach its obligation for employment and the employee can object the breach of contract. The employee is then entitled to bring a claim for employment according to the employment agreement. Furthermore, a claim for compensation according to Section 15 of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG) would most presumably be recognized in a comparable case.
However, regarding the claim for compensation according to Section 15 AGG, specific time limits apply. The employee must assert an entitlement for compensation within two months after having knowledge of the discrimination. Furthermore, the employee must file a respective lawsuit within three months after asserting the entitlement for compensation according to Section 61b para. 2 of the German Labour Law Act (*Arbeitsgerichtsgesetz* – ArbGG). Otherwise, a possible claim for compensation lapses.

Subject: Parental leave and indirect gender discrimination

Parties: Ms K – v – Kiosque d'or

Court: Supreme Court

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