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Prohibition of dismissal of pregnant employee (RO)

CONTRIBUTORS Andreea Suciu and Teodora Mănăilă*

Summary

Analysing the national legal framework in relation to the protection of pregnant employees and employees who have recently given birth or are breastfeeding, provisions which transposed the regulations of Directive 92/85/EEC and of the conclusions in case C-103/16, *Jessica Porras Guisado – v – Bankia S.A. and Others*, the Constitutional Court of Romania ascertained that the dismissal prohibition of a pregnant employee is strictly restricted to reasons that have a direct connection with the employee's pregnancy status. As for other cases where the termination of the employment contract is the result of disciplinary misconduct, unexcused absence from work, non-observance of labour discipline, or termination of employment for economic reasons or collective redundancies, the employer must submit in writing well-reasoned grounds for dismissal.

Legal background

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) has been transposed into national legislation through several normative acts, respectively:

a. Law no. 202/2002 on the equality of chances and treatment between women and men prescribes that maternity cannot be a reason for discrimination and that dismissals cannot be ordered during the period during which the employee is pregnant or is on maternity leave, save in exceptional cases for judicial reorganisation, bankruptcy or dissolution of the employer.
b. In addition, Government Emergency Ordinance (GEO) no. 96/2003 regarding the protection of maternity at the workplace provides that an employee must not be dismissed for reasons directly related to her pregnancy. Further, the dismissal protection will not apply in case of the employer's bankruptcy, judicial reorganisation or dissolution.

The Romanian Labour Code prescribes a prohibition on dismissing a pregnant employee if the employer knew of the pregnancy at the time of making the dismissal decision, save in exceptional cases for judicial reorganisation, bankruptcy or dissolution of the employer.

Facts

Mrs P.M.C. was employed by Cash Club S.R.L. as an HR specialist. After informing her employer about her pregnancy, the worker was later disciplinarily dismissed due to an unjustified absence from work.

The employee challenged the decision in court and requested to have the dismissal decision annulled arguing that the provisions of the Labour Code prohibited the dismissal of a pregnant employee who has informed her employer prior to issuing the dismissal decision.

The employer disputed the lawfulness of the legal provisions raised by the former employee and made reference to the provisions of GEO no. 96/2003 which provide that a pregnant employee can be dismissed should the reason for such decision not be connected to her pregnancy status. Moreover, the employer invoked the non-constitutionality of the provisions of the Labour Code and requested the Constitutional Court of Romania to be called in to analyse the constitutionality of the provisions.

In its arguments for supporting the non-constitutionality of the provisions contained in the Labour Code, the employer argued that the respective legal provisions provide an absolute prohibition for an employer to dismiss a pregnant employee without providing any distinction, thus creating a discriminatory situation in relation to female employees who have carried out disciplinary wrongdoings and are not pregnant.

The Constitutional Court was called in to analyse the constitutionality of the provisions of the Labour Code while the court continued the trial.

In the case at hand, the court ascertained that the disciplinary dismissal decision constituted only an excuse for

* Andreea Suciu and Teodora Mănăilă are Managing Partner and attorney-at-law at Suciu | The Employment Law Firm, Bucharest, Romania.

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the disciplinary sanctioning of the pregnant employee and that the real reason why the employer decided to terminate the employment relationship was her pregnancy status – the employer carried out several acts in an attempt to get the employee to resign (e.g. late payment of salary/maternity indemnity, secondment at several work units located 130 km away from her normal workplace, five invocations for disciplinary investigation, etc.).

Judgment

In its judgment the Constitutional Court determined that the provisions regulated by Law no. 202/2002 and GEO no. 96/2003 were adopted with a view to harmonising the national legislation with the *Acquis Communautaire*.
The Court made reference to the provision of Article 10 of Directive 92/85/EEC which provides that:

> "*Member States shall take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent*."

Consequently, should a worker be dismissed during the period of her pregnancy, the employer must present substantiated grounds for dismissal.
The Court acknowledged that protective measures for pregnant employees, women breastfeeding or who have recently given birth are sparsely regulated in several different normative acts. However, irrespective of the fact that the Labour Code does not provide any distinction between the situations in which the disciplinary dismissal of a pregnant employee can be decided, by corroborating all the applicable legal norms concerning the protection of pregnant employees, the Court ascertained that the prohibition for dismissal is strictly restricted to motives directly related to the employee's condition (as provided by GEO no. 96/2003), and does not apply to the other cases in which the termination of the employment agreement is based on disciplinary misdemeanours, unjustified absences from work, non-observance of work discipline, closure of the workplace or collective dismissal.
The Court concluded that the provisions of the Labour Code constitute statutory law and must be applied and interpreted together with the statutory or special provisions applicable to every category of worker to which the Labour Code applies, having regard to such legislative connections and not applying them separately.
The Court also made reference to case C-103/16, *Jessica Porras Guisado – v – Bankia S.A. and Others* where the European Court of Justice stated that Directive 92/85/EEC must be interpreted as not precluding national legislation allowing an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are observed.
In what regards the claim of a discriminatory situation between pregnant employees and non-pregnant employees, the Court determined that the situation of a pregnant employee is different from the situation of other female employees and that the provisions concerning the protection of pregnant employees are objectively justified and reasonable, a protection widely recognised at European and international level. Moreover, such protection only extends to motives related to the employee's condition, while for other reasons all female employees enjoy the same legal treatment.

Commentary

Up until to the decision of the Constitutional Court, the prevailing interpretation was that the dismissal of a pregnant employee was only possible in the case of judicial reorganisation, bankruptcy or dissolution of the employer. These exceptions were regulated by all three normative acts, however the exceptions were not defined in the same way, as in some cases reference was made to different reorganisation procedures, such as closure of the workplace due to economic difficulties, technological transformation and/or reorganisation of the employer (i.e. cases of objective dismissal). However, the differences in exceptions were levelled in time.
Given the fact that such protection was regulated in three different legislative acts adopted within the same period of time created confusion and sparked debate over whether provisions in fact amended the Labour Code.
As gender discrimination was a risk associated with the dismissal of a pregnant employee, it deterred employers from initiating such proceedings and argued for a restrictive interpretation of the provisions. Given the fact that the protection conferred on pregnant employees extended also to maternity leave, child care leave and up to six months after returning from child care leave, in practice pregnant employees were regarded as being granted a high level of protection against unilateral decisions regarding the employment relationship, even higher than the one prescribed by the Directive.
The decision of the Constitutional Court has been long-awaited and within the protection limits set by Directive 92/85/EEC providing a more balanced approach between the protection of sensible categories of employees and the employer's freedom to conduct its business.

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Comments from other jurisdictions

Germany (Marcus Bertz, Luther Rechtsanwaltsgesellschaft mbH): Article 10 of Directive 92/85/EEC is a good example of how differently Member States transpose the objectives of EU directives into national law.
Article 10 requires Member States to take the necessary measures to prohibit dismissal of pregnant employees, employees who are breastfeeding or on maternity leave. This prohibition of dismissal shall in exceptional cases not apply to dismissals permitted under national law which are not related to the condition of the pregnant, breastfeeding or maternity leave employees, whereby, if required, the competent authority must give its consent.
Romania has enacted several laws, on the one hand, to implement the prohibition of dismissal laid down in Article 10 and, on the other hand, to lay down specific grounds for dismissing female employees despite pregnancy, breastfeeding or maternity leave.
Germany has taken a different approach and has even exceeded the requirements of Article 10. This is not least due to the fact that, according to Article 6(4) of the German Constitution (*Grundgesetz*, 'GG'), every mother is entitled to the protection and care of the community.
Germany has issued an absolute prohibition of dismissal for employees who are pregnant or have given birth to a child in para. 17 sec. 1 sentence 1 of the Maternity Protection Act (*Mutterschutzgesetz*, 'MuSchG'). Protection against dismissal lasts for four months after a miscarriage after the twelfth week of pregnancy or childbirth.
Although the employer can dismiss a pregnant employee or an employee who has given birth 'in special cases', it must first obtain permission from state authorities in all cases. In its application to the authorities, the employer must explain and prove that the dismissal is undoubtedly not related "to the woman's condition during pregnancy, after a miscarriage after the twelfth week of pregnancy or after giving birth". The authority makes a discretionary decision, i.e. the employer has no legal claim to the permit if it has presented facts to justify a 'special case'.
Reasons related to the character of the person of the employee are usually not sufficient to obtain a permit. However, substantial behavioural reasons may lead to a permit if they concern serious or repeated breaches of obligations. Operational reasons only constitute a 'special case' if, as in the case of permanent closure or relocation, there is no possibility of continued employment. Mass layoffs may justify the permit, but not if there are still opportunities for further employment.
Even if the employer receives official permission to terminate the employment, this does not mean that the termination is also valid under labour law. The employee can therefore not only defend themselves against the issuance of the authority's permit before the Administrative Courts, but also against the notice of termination before the Labour Courts.
In Germany, therefore, there is an extremely high level of protection against dismissal for pregnant employees and employees who have recently given birth.

The Netherlands (Peter Vas Nunes): Dutch law prohibits dismissal during pregnancy outright, regardless whether the employer is aware of the pregnancy and regardless whether there is an 'exceptional case'. Any dismissal during pregnancy, during maternity leave and during a six-week period following maternity leave is ineffective. This system, which is stricter than that provided by the Maternity Directive, has the advantage of eliminating debate on whether a dismissal is related or, in the case of Romania, 'directly' related to the maternity. Such a debate can, however, occur where an employee is not dismissed but where her fixed-term contract is not renewed, or where she is dismissed during the initial probationary period, because in those situations there is no 'dismissal'. A 'causality debate' can also arise where an employee is dismissed after the prohibited period but for a reason allegedly related, even indirectly, to previous maternity. In such situations, where the only remedy the employee has is the prohibition of discrimination on the grounds of gender, there can be, and in fact there regularly is, debate as to causality. Take, for example, a case where maternity-related absences cause friction between an employee and her manager, and, following a series of incidents, the manager decides to dismiss the employee or to refuse an extension of her fixed-term contract. The reason for the termination, according to the employer, is the friction ('broken down working relationship'). The employee will point out that the friction resulted from her maternity, which therefore is the root cause.
The Romanian Constitutional Court has apparently held "*that the prohibition for dismissal is strictly restricted to motives **directly** related to the employee's condition*". It will be interesting to see how, going forward, the Romanian courts will construe 'directly'. Will they look to Article 10 of the Maternity Directive, which prohibits dismissal during maternity "*save in **exceptional** cases not related … etc.*"? (Emphasis added)

Slovakia (Andrej Poruban, Alexander Dubček University of Trenčín): An employer may not give notice to an employee during the protection period, namely within a period while a female employee is pregnant or is on maternity leave, a female or male employee is on parental leave, or when a lone female or male employee takes care of a child under the age of three. The prohibition of giving notice shall not apply if the employer's undertaking, or the relevant part of the undertaking, is closed down. Although the Slovak Labour Code Act. No. 311/2001 Coll. subsequently transposed Directive 92/85/EEC including the term "pregnant worker" within the meaning of Article 2(a), the wording "within a period while a female employee is pregnant" implies that protection is broader and covers an employee's con-

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dition even if she hasn't informed the employer in writing of her pregnancy. In this context the Regional Court in Bratislava has stated that dismissal while the female employee is pregnant is null and void, regardless of whether the employer knew about her pregnancy (R 74/1967). This judgment is still applicable despite being decided before the provisions discussed above came into force.

Subject: Gender discrimination

Parties: employee – v – S.C CASH CLUB S.R.L.

Court: *Curtea Constituțională a României* (The Constitutional Court of Romania)

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