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Uladzislau Belavusau, Florence/Berkeley*

From Lëtzebuerg to Luxembourg: EU Law, Non-Discrimination and Pregnancy

(Virginie Pontin ⁄ T-Comalux SA, ECJ (Third Chamber), Judgment of 29 October 2009, C-63/08)

In autumn 2009 the ECJ made another step forward in fostering gender equality through the instrumental framework of the EU law. The case triggers the right of pregnant women to protection against employers, who use inadequately constructed procedural norms to disguise an illegal dismissal. The Court holds that where the only remedy available under national legislation to a worker dismissed during pregnancy does not provide reasonable time bars on claims for wrongful dismissal, that legislation introduces less favorable treatment linked to pregnancy and constitutes discrimination against female employees. The Court held that a 15 days limit to bring proceedings was insufficient in terms of the principle of effective judicial protection of an individual's rights under EU law. A pregnant woman should equally enjoy other remedies beyond an action for nullity and reinstatement, such as an action for damages, in case the analogous recourses are available for other categories of dismissed workers. The Court therefore clarified an essential element for the implementation of the Pregnant Workers' Directive in the Member States.

(1) **Facts**

(a) Instruments

Articles 10 and 12 of Council Directive 92/85/EEC [1992] and Article 2 of Council Directive 76/107/EEC [1976] set out the legal basis for the protection of female employees through the matrix of EU law. The two directives essentially harmonize the binding policy goals for the Member States (such as gender equality in promotion, vocational training, workplace safety, maternity leave, ban on dismissal linked to pregnancy and possibility of redress) though leaving the concrete legal embodiment to those ends to the discretion of the national legislators. Thus Article 12 of Directive 92/85/EEC [1992], the so-called ***Pregnant Workers' Directive***, provides a general principle that «*Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national law and/or practices) to recourse to other competent authorities*». The Council Directive 76/107/ECC [1976], the so-called ***Equal Treatment Directive***, imposes general rules on gender non-discrimination.

In Luxembourg it is the *Code du travail* (Labor Code) that transposes the Council Directives. It prohibits the dismissal of an employee where she has been medically certified as being pregnant or within twelve weeks of her giving birth. The Code also imposes a ***15-day time bar*** to bring the proceedings for nullity in case such a dismissal occurs, starting from the date on which the contract at stake is terminated.

(b) Procedural history

Ms Virginie Pontin worked for the Luxembourg undertaking T-Comalux from November 2005 under a full-time contract for an indefinite period. On 25 January 2007 she was notified of her dismissal with immediate effect «*on grounds of serious misconduct*» consisting of the «*unauthorized absence for more than three days*». The very next day Ms Pontin sent a registered letter to T-Comalux where she clearly revealed the fact of her pregnancy and claimed that by virtue of the laws of Luxembourg her dismissal was without legal effect. As she had not received a reply from T-Comalux, on 5 February 2007 Ms. Pontin brought her case before the Employment Tribunal of Esch-sur-Alzette in Luxembourg. The Tribunal however lacked jurisdiction to hear the application and the dispute ought to have been referred directly to the president of the court. Ms. Pontin turned to the court again with a second action brought on 18 April 2007, where she claimed for damages against T-Comalux.

(c) Dispute

Evidently in strictly procedural terms, if calculated from 18 January 2007, Ms. Pontin ***failed to bring an action for nullity and reinstatement*** before the president of the national labor tribunal ***within 15-days upon the termination of the contract***, nor did she provide her employer with a ***medical certificate*** of her pregnancy ***within 8 days after the dismissal***, as required by the laws of Luxembourg.

Therefore, the national court was essentially challenged by the common sense doubts on the adequacy of the national time bars at stake in the light of the EU law. It referred the matter to the ECJ for a preliminary ruling. The first question was on the clarification as to whether Community law precludes national legislation, which makes legal action brought by a pregnant employee dismissed during her pregnancy subject to short procedural deadlines likely to deny her the opportunity to bring an action for the safeguarding of her rights. And secondly, whether Community law precludes national legislation, which denies her the ***possibility of bringing an action for damages*** against her employer, which is available to other employees who have been dismissed.

(2) **Judgment**

(a) Principles of effectiveness and equivalence as regards judicial protection

The judgment began with a general observation about the right to bring an action against wrongful dismissal, emphasizing the risk of disguised discrimination against pregnant women in the light of the ***principle of effective judicial protection*** of an individual's rights under EU law. The Court puts aside the issue of the ***8-day period*** (to provide an employer with a respective medical certificate), suggesting that the ruling about the ***15-day time limit*** (to bring a legal claim before the court) can be applied *mutatis mutandis*. Member states must take the necessary measures to protect pregnant workers, or indeed those who have recently given birth or are breast-feeding from the consequences of an unlawful dismissal. Thus despite the lack of precision of the term for redress in the EU Directives, the respective national norm must, firstly, ensure ***effective and efficient legal protection***; secondly, it must have a ***genuine dissuasive effect*** with regard to the employer; and thirdly, it must be commensurate with the injury suffered. The ***principle of equivalence***, in addition, suggests that the national implementation norms must be no less favorable than those governing similar domestic actions. Nonetheless, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to determine whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law. It is also for domestic courts to ensure that the law complies with Community principle and to consider both the purpose and the essential characteristic of allegedly similar domestic actions. The Court identifies three primary criteria in this regard – whether the actions concerned are similar as regards their (I) ***purpose***, (II) ***cause of action*** and (III) ***essential characteristics***. The national courts should be guided by the analysis of (1) the role played by those rules in the procedure as a whole, (2) the conduct of that procedure and (3) any specific features of those rules.

(b) The 15-day time bar

In the previous case law, the Court recognized that it is compatible with EU law to establish reasonable procedural time bars in the interests of legal certainty. However, the Court also considers that the ***15-day time limit*** is, first of all, so ***evidently short*** that it is likely to have unfavorable consequences on the pregnant employees, in particular, making it difficult to obtain advice or assistance from a specialist legal adviser. Secondly, the Court compares the 15-day limitation for nullity (as a remedy available to pregnant employees) to the ***3-month limitation period for damages*** (available to other categories of workers) and, thus, establishes the subjective inadequacy between two procedural time limits at stake. Thirdly, some of the days included in the 15-day time bar may expire before the pregnant woman received the letter notifying her of the dismissal, since it would seem that period begins to run from the time the letter of dismissal is posted and not from the time it is received. If the referring court were, after conducting the necessary legal and factual verifications, to hold that the 15-day limitation period does not comply with the ***requirement of effective judicial protection*** of an individual's rights under Community law, such a time limit would infringe the Pregnant Workers' Directive.

Therefore, the Court held that a 15-day limitation period, such as that passed into law in Luxembourg, seemingly feels to meet the criteria of EU law, subject to the Pregnant Workers' Directive, and that it is a matter for the referring court to determine.

(c) Exclusion of an action for damages

According to the law applied by the Tribunal in Luxembourg, the only remedy open to a pregnant woman dismissed during pregnancy is an ***action for nullity and reinstatement*** within the undertaking, to the exclusion of all other remedies under employment law, such as an ***action for damages***.[1] The Court links this imbalance between a national rule on remedy and a remedy rule, derived from the implementation of the EU norm, to the violation of the ***principle of equivalence***.

Therefore if it emerges, after verification by the referring court, that the procedural rules (relating to the only action available in the event of the dismissal of pregnant workers) do not comply with the ***principle of effective judicial protection*** of an individual's rights under Community law, such limitation of available remedies introduces less favorable treatment of women related to pregnancy and thus constitutes discrimination within the meaning of the Equal Treatment Directive.

(3) **Comment**

(a) Effectiveness versus legal certainty

The controversial question of what constitutes an ***appropriate time bar*** for a dismissed pregnant employee to bring a claim before the court seems to be the most ambivalent issue for the ECJ. First of all, the procedural time limits for the claimants are not harmonized and will hardly be «harmonizable» by virtue of the EU directives. The proper estimation of the reasonable time bars is essentially dependent on the concrete organization of the national procedural law and labor legislation.[2] Secondly, a vague open-ended time frame for pregnant workers inevitably creates much ***uncertainty for employers*** in terms of the proper organization and maintenance of the enterprise as well as the inevitable financial losses. Thirdly, neither the Court nor the Advocate General in her submission[3] engaged in any analysis of the empirical medical expertise (should such data exist) on the health of women [psychological and physical condition] in the first weeks of pregnancy when a woman is likely to feel particularly sick and stressed.

Therefore, what the Court is essentially undertaking reminds a subjective deliberation on the ***balance*** between the ***principle of legal certainty*** (interests of the employer) ***and principle of equivalence and effectiveness*** (rights of the employee). In this respect it is significant that Advocate General *Trstenjak* suggests answering the first question (on the time limits) in two parts. Similarly to the subsequent decision of the Court, she maintains that a 15-day time bar is particularly short in order to be deemed adequate in terms of the principle of effective judicial protection. But she also suggests that a notice of ***8 days to inform the employer of pregnancy*** is not incompatible with the Pregnant Workers' Directive.[4] To the contrary, the Court avoids a most subjective distinction between two procedural time limits at stake, shortly commenting that as far as the 8-day period is concerned, the ruling about the 15-day time bar can be applied by analogy, leaving the issue for the national court to determine whether this limit is also discriminatory.

Another issue on which the Court seems to be strikingly brief is the fact that Luxembourg law requires a pregnant worker to specifically address the president of the labor tribunal whereas otherwise employment disputes must be lodged with the tribunal which sits in a chamber (that is, with a president and two other judges). Therefore, a pregnant employee is expected to have knowledge of ***subtle procedural details***, which runs contrary to the aim of the ***principle of effective legal protection***. Even despite the fact that in her application, the plaintiff called for the attention of «*Monsieur le Président et de ses assensseurs*» (Mr. President and his fellow judges), she had to submit a further application in order to comply with the formal procedure.

Notwithstanding the fact that the ECJ leaves it to the national court to determine whether that was a violation, it is clear that the absence of a claim for damages for the illegally dismissed pregnant employees, does barely meet the Community standard.

(b) The ECJ's fight for gender equality in three battles

Dismissal of a worker due to her pregnancy also constitutes direct discrimination on grounds of sex since a dismissal occurring during the periods concerned affects only women. The relevant comparator will be constructed not as «female vis-à-vis male» but rather as «female vis-à-vis other females and males». It is unnecessary that a certain «beneficiary» condition is available to all other workers, as under Article 2 (2) of Equal Treatment Directive just one person of the opposite sex suffices for comparison.

In this respect, the ECJ case law on the rights of pregnant employees is a part of a wider judicial iceberg, where before and after the ***Equal Treatment Directive*** the Court has been consistently filling what was initially an «empty box of rights» for female workers under EU law. In this respect the ***Pregnant Workers' Directive*** constitutes another step forward for gender equality through the EU law instruments. But once again the concrete implications of this harmonization have been very often drawn from the case law of the Court rather than from the implementation initiatives of the national legislators. In this respect, as Advocate General Trstenjak points it out, these two directives do not operate merely in parallel with each other but are to a certain extent ***interlocked***.[5]

Thus, the ECJ has significantly mainstreamed the ***progressive interpretation of gender equality instruments*** in Member States. One can generally distinguish three generations of rights of female employees essentially fostered by the Court. When the ***first stage*** deals with a ***general non-discrimination of female employers*** (e.g. outright dismissal or difference in benefits for the female employers), the second and third stages trigger particular situations and categories of female workers.

In case of the pregnant workers (and those who have recently given birth and are breastfeeding), the ***second stage*** addresses an earlier case law on non-discrimination where ***pregnant women*** find themselves in a disadvantageous position on the labor market: amongst others, refusal to employ a pregnant woman to a position due to the fact that the employer can not afford paying both the maternity leave, pregnancy leave and the cost of her replacement,[6] or where an employer claims that the undertaking is too small to afford hiring pregnant employees,[7] or situations of the hard work performed by pregnant women,[8] or employer's refusal to increase pay during the maternity leave in case analogous increases became available to other employees,[9] or a situation of a woman deprived of the right to an assessment of performance due to her absence on maternity leave,[10] etc.

At the same time the ***Pregnant Workers' Directive*** may fairly be criticized due to its failure to put a clear balance between the rights of pregnant employees and the financial implications for employers, and consequently the distortion of competition within the common market. In fact there are clear ***variations between Member States***, for in some full salaries are paid, whereas in others only minimum statuary salaries are available to pregnant employees. On the one hand, the potential for harmonization in this area appears unclear. On the other hand, the fact that Member States adopted different solutions does not necessarily reveal the hidden rationales of market distortion. The only solution that can accommodate 27 social law traditions may be difficult to achieve.

Comparing the *Pontin* case to the early 1990s case of *Hertz*[11] (where the Court held that male and female workers are equally exposed to illness and therefore it is beyond the scope of the Directive to protect women suffering from an illness subsequent to pregnancy), one can also criticise the Court for an *ad hoc* imposition of the principle of effective protection and subjective interplay on the issue of ***adequate comparators***. If an illness is caused by pregnancy then a female employee is exposed to a higher risk of social insecurity than her male colleague who cannot get pregnant and consequently suffer from such a pregnancy-related illness. Following the ***underlining rationale*** of *Hertz*, one could have suggested that pregnancy (although not being an illness) is ***still essentially a medical issue*** and consequently both men and women should bear substantially the same obligation to inform the employer about the reasons for any unauthorized absence from work. Putting the financial implications aside, in strictly legal terms the Court does not emphasize the principle of ***effective protection*** consequently enough in its case law, nor does it distinguish pregnancy as a category with a maximum legal protection, where the position of female employees is deconstructed as particularly disadvantageous in case of pregnancy and its implications.

The hidden financial considerations are also apparent in the cautious way the Court worded its answer to the question about an employee's recourse to the action for damages, beyond pure nullity and reinstatement. The ***absence of a possibility to claim damage*** is – on its face – quite clearly a less favorable treatment. However, the Court is remarkably vague on the question of whether this constitutes a ***discrimination «in itself»***. Instead the Court held that it is a discrimination «in particular» if the procedural rules relating to the only action available do not comply with the principle of effectiveness. The Advocate General, in fact, has raised this point, suggesting «*to not have the opportunity to bring an action for damages ultimately implies a more restricted set of options than those available to the general population, a situation which, in principle, must be regarded as disadvantageous*».[12] Although from a strictly legal perspective, the reasoning of Advocate General is certainly persuasive, it leaves many socio-political considerations aside. And those considerations even go beyond a traditional «female-male» comparator. Whether a Member State should safeguard the procedural benefits for a pregnant employee is already from an ethical and political viewpoint a highly debatable question. As the Court did not engage itself in holding explicitly that the absence of the recourse to damages for an illegal dismissal is a discrimination *per se* (with no regard to whether a dismissed employee is pregnant), the consistent application of the principle of effective judicial protection (as a sort of affirmative action) with a privileged category of a «pregnant worker» on its surface may appear as a ***reverse discrimination***.

The ***third [most recent] stage*** in the protection of the rights of pregnant employees (following the Pregnant Workers' Directive) addresses the situations of ***disguised discrimination***. Along with this recent case – *Pontin ⁄ T-Comalux* – the most representative case is ***Paquay.***[13] In the latter case the ECJ was confronted with a situation where according to the national (Belgian) legislation an employer could not dismiss the employee until one month after the end of her maternity leave (in this case, until 31 January, 1996). But in the event the female worker was dismissed within once month after the protection period expired. It was established that the employer decided to dismiss the female employee whilst she was still pregnant, and before the protection period began. During the worker's pregnancy the employer had even published a notice advertising the employee's position, indicating that it will be available during the employee's maternity leave and then from August 1996 (i.e. clearly and somewhat cynically calculating the end of a normal six-month notice period starting at the end of the protection term). The ECJ held that the Pregnant Workers' Directive must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection (set down in the Directive) but also ***taking preparatory steps*** for such a decision before the end of that period. A decision to dismiss on grounds of pregnancy is contrary to the Equal Treatment Directive – irrespective of the moment when that decision to dismiss is notified and even if it is notified after the end of the period of protection. Any reasoning to the contrary would deprive the EU instruments of their effectiveness.

Thus, similar to the case of *Paquay*, the decision in *Pontin* may be regarded as forming part of a new stage in the Court's case law on non-discrimination, where the scope of protection for pregnant workers is essentially widened, taking into account the ***principle of effective judicial protection***. The most evident implication of the case is the introduction of more generous procedural rules, for claims brought by pregnant women, into the labor laws of all Member States.

* LL.M. from the Collège d'Europe (Bruges, Belgium), Ph.D. candidate at the European University Institute (Florence, Italy), currently a visiting scholar at the University of California (Berkeley, USA).

1 For deeper analysis of labor law in Luxembourg, see *Castegnaro*, Code du travail annoté et commenté, Edition 2009 (2009); *Castegnaro*, Arbeitsrecht in Luxemburg, Paul Bauler Editions (2007); *Putz,* Luxemburgisches Arbeitsrecht. Einführung und Kommentar (2006).
For a general account of EU non-discrimination law see *Schiek/Chege* (ed.), European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law (2008).

2 To this point, Advocate General *Trstenjak* makes a curious observation. In particular, she suggests that «*[…] in a legal system limitation periods generally run for several weeks of months and only in a few specific exceptional cases very short limitation periods are provided for, it is conceivable that the relevant legal system is not primed to deal adequately with short limitation periods and it is difficult, for example, at short notice to obtain an appointment to consult a lawyer, remembering moreover, that enough time must remain, should it be necessary, to draft and lodge pleadings. One would expect the position to be different in a legal system in which, for example, all dismissal protection actions are subject to short limitation periods and dealing with such is a routine element of the overall legal system including provision of legal counseling. In such latter cases, the awareness of the general public – and therefore that of potential claimants – of the brevity of limitation periods ought also to be greater than in a legal system in which short limitation periods constitute an exception*» (Opinion of Advocate General *Trstenjak* of 31 March 2009, C-63/08 *Virginie Pontin ⁄ T-Comalux SA*, para. 105).

3 *Ibid.*

4 *Ibid*., para. 95 («*In the light of the foregoing, the answer to the first part of the first question is that Articles 10 and 12 of Directive 92/85 are to be interpreted as not precluding, in circumstances such as those apparent in the main proceedings, a time-limit fixed in advance of eight days in which to inform an employer of an existing pregnancy*»).

5 *Ibid*., para. 46.

6 ECJ [1990] I-3941 *Elisabeth Johanna Pacifica Dekker ⁄ Stichting Vormingscentrum Voor Jong Volwassenen*. The Court repeatedly states that the fact that an employer suffers adverse financial consequences is itself irrelevant.

7 ECJ [2001] ECR I-6993 *Tele Danmark A/S ⁄ Handels- og Kontorfunktionærernes Forbund i Danmark*. The scope of the principle of the equal treatment in both Directives does not distinguish the prohibition of the rights depending on the size of the undertaking.

8 ECJ [1998] ECR 790 *Brown ⁄ Rentokil Initial UK Ltd*. The EU Equal Treatment Directive precludes dismissal of a female worker during her pregnancy because of absences due to incapacity for work caused by illness resulting from that pregnancy.

9 ECJ [1996] ECR I-475 *Gillespie ⁄ Northern Health and Social Services Board*. Following this decision the Pregnant Women Directive essentially harmonized the outcomes of ECJ decisions handed down in the 1990s. For a comprehensive overview of EU employment law see *Barnard*, EC Employment Law, 3d edition (2006).

10 ECJ [1998] ECR I-2011 *Caisse nationale d'assurance vieillesse des travailleurs salaries (CNAVTS) ⁄ Eveline Thibault*.
See also an article by *Davies*, Thibault «in Context»: Exiting the Maze?, 27 Industrial Law Journal [1998] 373-377.

11 ECJ [1990] ECR I-3979 *Handels- og Kontorfunktionærernes Forbund i Danmark ⁄ Dansk Arbejdsgiverforening* [the «*Hertz*» judgment].

12 Opinion of the Advocate General, *supra* note 2, para. 79.

13 ECJ [2007] ECR I-08511 *Nadine Paquay ⁄ Société d'architectes Hoet + Minne SPRL*.