Anonymised version

Case C-284/23

Request for a preliminary ruling

Date lodged:

2 May 2023

Referring court:

Arbeitsgericht Mainz (Germany)

Date of the decision to refer:

24 April 2023

Applicant:

TC

Defendant:

Firma Haus Jacobus Alten- und Altenpflegeheim gGmbH

…

ARBEITSGERICHT

MAINZ

(Labour Court, Mainz)

Order

In the case of

TC

Applicant

… …

v

Firma Haus Jacobus Alten- und Altenpflegeheim gGmbH, …, Osthofen

Defendant

… …

The Court of Justice of the European Union is requested under Article 267 TFEU to give a preliminary ruling on the question whether the German national provisions of Paragraphs 4 and 5 of the Kündigungsschutzgesetz (Law on protection against dismissal; 'the KSchG'), according to which a woman who, as a pregnant woman, enjoys special protection against dismissal must also mandatorily bring an action within the time limits laid down in those provisions in order to retain that protection, are compatible with 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).

The proceedings are stayed pending the ruling from the Court of Justice of the European Union on this question.

A. Subject matter and facts of the main proceedings

The applicant was employed by the defendant as a health care assistant from 1 August 2022 under a one-year employment contract. The defendant terminated that contract by letter dated 6 October 2022 with effect from 21 October 2022.

On 9 November 2022, the applicant was found to be seven weeks pregnant. She informed the defendant of this fact on 10 November 2022.

By letter dated 13 December 2022, she filed with the Arbeitsgericht (Labour Court) an 'action for protection against dismissal … on the ground that she had been dismissed on 7 October 2022 despite being pregnant'.

B. Applicable national law

Paragraph 17 of the Mutterschutzgesetz (Law on the protection of working mothers; 'the MuSchG') provides:

(1) [1]An employer may not dismiss a woman

1. during her pregnancy,

2. until the expiry of four months following a miscarriage after the twelfth week of pregnancy; and

3. until the end of her period of protection after childbirth, but at least up until the expiry of four months after childbirth; if the employer is, at the time of the dismissal, aware of the pregnancy, the miscarriage after the twelfth week of pregnancy or the childbirth, or if that information is communicated to the employer within two weeks following receipt of the notice of dismissal. [2]Exceeding this period shall not be detrimental if the woman is not responsible for the delay and the notification is then made immediately. [3]Sentences 1 and 2 shall apply analogously to preparatory measures taken by the employer with a view to dismissing the woman.

(2) [1]The supreme *Land* authority responsible for occupational health and safety or the body designated by it may exceptionally declare dismissal permissible in special cases not connected with the condition of the woman during pregnancy, following a miscarriage after the twelfth week of pregnancy or after childbirth. [2]The notice of dismissal must be issued in writing and must state the reason for dismissal.

In addition, the Kündigungsschutzgesetz provides:

Paragraph 4 of the KSchG: Redress before the Arbeitsgericht (Labour Court)

[1]Where an employee wishes to assert a claim that his or her dismissal is socially unjustified or legally ineffective on other grounds, he or she must bring an action before the Labour Court within three weeks after receiving the written termination notice in order to seek a finding that the employment relationship has not been dissolved due to the termination. [2]If Paragraph 2 applies, the action may seek a finding that the modified working conditions are socially unjustified or legally ineffective on other grounds. [3]Where an employee has submitted an objection to the works council (Paragraph 3), he or she should include the position taken by the works council with the document instituting proceedings. [4]To the extent to which the dismissal requires the approval of an authority, the time period for seeking redress in the Labour Court shall commence only once the employee has been notified of the decision of such authority.

Paragraph 5: Admission of late actions

(1) Where, despite making all reasonable efforts under the circumstances, an employee was hindered from filing an action within three weeks of receiving a written notice of dismissal, upon request the filing of the action shall be accepted retroactively. [2]The same shall apply if, due to circumstances beyond her control, a woman did not become aware of her pregnancy until after the time period set out in sentence 1 of Paragraph 4 had elapsed.

(2) [1]The claim shall be submitted together with the filing of the action; where the claim has already been submitted it shall be referred to in the filing of the action. [2]The claim must also describe the circumstances justifying the delayed submission and must contain the means by which those circumstances can be substantiated.

(3) [1]The claim shall be admissible only if submitted within two weeks following the removal of the cause of non-compliance. [2]Once six months have elapsed following the missed deadline, the claim may no longer be filed.

C. Need to obtain a ruling by the Court of Justice of the European Union

In accordance with the case-law of the Bundesarbeitsgericht (Federal Labour Court) (judgment of 19 February 2009, 2 AZR 286/07), sentence 4 of Paragraph 4 of the KSchG is not applicable in the case of pregnancy subsequently notified to the employer, such that the failure to observe the three-week period set out in sentence 1 of Paragraph 4 of the KSchG in accordance with Paragraph 7 of the KSchG leads to the effectiveness of the dismissal despite the special protection against dismissal under Paragraph 17 of the MuSchG, unless an application for subsequent admission under Paragraph 5 of the KSchG is submitted.

The applicant did not make such an application, with the result that the action would simply have to be dismissed if the provisions of Paragraphs 4 and 5 of the KSchG in this case are not contrary to European law.

The referring Chamber is unsure in this regard, as the Court of Justice of the European Union ruled in the *Pontin* case (C-63/08) that a pregnant woman's opportunities for bringing such actions had to be effectively regulated.

From this it was concluded in respect of German law that 'the special procedural modalities, such as the juxtaposition of different deadlines, each of which leads to the exclusion of legal protection, declarations to different bodies (employer and labour court), particularly short deadlines which are further shortened by delayed personal knowledge, as well as non-transparent procedural regulations, such as sentence 4 of Paragraph 4 of the KSchG, which even experts consider to be misleading, make legal protection for women excessively difficult' … (reference to legal literature). That critical view is also taken in the current *Erfurter Kommentar* … (reference to legal literature).

In the context of the present case, it can be argued that the period for bringing an action under Paragraph 4 of the KSchG is in principle designed to provide the employer with legal certainty, albeit with certain exceptions, which result from Paragraph 5 thereof. In the same way, Paragraph 17 of the MuSchG links the special protection against dismissal in principle to the employer's knowledge of the pregnancy – also, however, with the exceptions resulting therefrom.

If the MuSchG, which is determined by EU law, grants a pregnant woman the possibility, in such a case, to assert her special protection against dismissal by means of subsequent notification well after the expiry of the three-week period of Paragraph 4 of the KSchG and after the expiry of the notice period, it is not discernible – with regard to the principle of effective legal protection under European law – why she should have to comply in addition with the approach set out in Paragraph 5 of the KSchG. If a woman approaches her former employer

after the expiry of the notice period and informs him that she was pregnant at the time when the notice was given, this cannot be understood by the employer in any other way than meaning that she is asserting the invalidity of the termination of her employment relationship.

As a rule under Paragraph 4 of the KSchG, the employer is uncertain as to whether the dismissed employee accepts the dismissal, and the employer should be exposed to this uncertainty only for a short period of time. When a pregnancy is subsequently notified, however, it already suggests that the employee does not accept the dismissal. The *ratio legis* of Paragraphs 4 and 5 of the KSchG is irrelevant here, which is why the subjection of these cases to the requirement of a subsequent admission of an action within a time limit, as required by the clear wording of Paragraph 5 I 2 of the KSchG (in the version in force from 2004 onwards), appears to be questionable under European law.

Mainz, 24 April 2023

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