

Brussels, 13 July 2016
Case No: 78118
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Decision No: 152/16/COL

Ministry of Labour and Social Affairs
Postboks 8019 Dep
0030 Oslo
Norway

Dear Sir/Madam,

Subject: Letter of formal notice to Norway concerning the right to parental leave in Norway

1 Introduction

1. By a letter dated 28 October 2015 (Doc No 777814), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had opened an own initiative case regarding the assessment whether the Norwegian provisions concerning the right to parental leave comply with Directive 2010/18/EU on parental leave¹ and Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation².
2. In particular, on 16 July 2015, the Court of Justice of the European Union gave its judgment in *Maïstrellis*, C-222/14³, where it concluded that the provisions of Directive 96/34/EC (currently replaced by Directive 2010/18/EU) and Directive 2006/54/EC had to be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child.
3. It appears that the Norwegian provisions on parental leave are similar to those examined in the *Maïstrellis* judgment and distinguish between the rights of employees to take paid parental leave on the basis of their sex. Consequently, those provisions infringe Directive 2010/18/EU and Directive 2006/54/EC.

¹ Act referred to at point 31a of Annex XVIII to the EEA Agreement (Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC), as adapted to the EEA Agreement by Protocol I thereto.

² Act referred to at point 21b of Annex XVIII to the EEA Agreement (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), as adapted to the EEA Agreement by Protocol I thereto.

³ *Maïstrellis*, C-222/14, EU:C:2015:473.

4. On 21 June 2016, the Authority received a complaint of a father who is not entitled to any parental leave due to the fact his wife stays home and does not work (Case No 79295). On 24 June, the Authority informed the Norwegian Government about this complaint (Doc No 809843).

2 Correspondence

5. In the above mentioned letter of 28 October 2015, the Authority requested information from the Norwegian Government in order to assess whether and how the Norwegian Government considers the provisions as compatible with Directive 2010/18/EU and/or Directive 2006/54/EC, as interpreted in *Maïstrellis*, C-222/14.
6. The Norwegian Government replied by letter of 15 December 2015 (Doc No 785308) that it considered that the Norwegian legislation was compatible with EEA law.

3 Relevant national law

7. The National Insurance Act ("*Lov om folketrygd (Folketrygdloven)*")⁴ establishes the entitlements of parents to paid parental leave i.e. benefits from the National Insurance Scheme during the parental leave.
8. According to Section 14-12 of the National Insurance Act, each of the parents has an individual, reserved right to 10 weeks of paid parental leave⁵:

"Section 14-12 Distribution of leave

If both parents satisfy the conditions for entitlement to parental benefit, 50 days (10 weeks) of the benefit period are reserved for the father (paternity leave) and 50 days (10 weeks) of the benefit period are reserved for the mother (the mother's share) . The first 30 benefit days (6 weeks) after birth are reserved for the mother, is part of the mothers share.

The father can take the paternal leave irrespective of whether the terms of § 14-13 first paragraph are met.

[...] "

9. In addition, there is a common period of several weeks of paid parental leave for both parents, which they may divide amongst themselves as they wish, see Section 14-9, fifth paragraph of the National Insurance Act⁶:

"Section 14-9 Benefit period for parental benefit

At birth the benefit period is 245 days (49 weeks) with full rate or 295 days (59 weeks) with reduced rate. The benefit period after birth is 230 days (46 weeks) with full rate or 280 days (56 weeks) with reduced rate.

In case of adoption, the benefit period is 230 days (49 weeks) with full rate or 280 days (56 weeks) with reduced rate.

⁴ LOV-1997-02-28-19

⁵ Unofficial translation by the Authority.

⁶ Unofficial translation by the Authority.

Full rate implies that the parental benefit is paid with 100 per cent of the calculation basis. Reduced rate means that the parental benefit is paid with 80 per cent of the calculation basis. The beneficiary chooses between full or reduced rate at the start of the benefit period, and the choice is valid for the whole benefit period. If both parents receive parental benefits, they must choose the same rate.

If the mother has multiple births or several babies are adopted at the same time, the period is extended with 25 days (5 weeks) for each child that exceeds one if full rate is chosen. If reduced rate is chosen, the period is extended with 35 days (7 weeks). The provisions in section 14-10 first and sixth paragraph apply equally.

If both parents have the right to parental benefit in accordance with section 14-6, the parents can divide the benefit period between them. Exempted from the shared period is the last 15 days (3 weeks) before and the first 30 days (6 weeks) after the birth, which is reserved for the mother at birth. Exempted from sharing is also 10 weeks which is reserved for the dad (paternal leave), and 10 weeks which is reserved for the mom (maternal leave), see Section 14-12. The first 6 weeks after birth which is reserved for the mother, is included in the mother's share.

[...]"

10. Section 14-13, first paragraph of the National Insurance Act however states that the father is only entitled to paid parental leave as a part of the common period (in addition to the 10 weeks), if the mother engages in certain activities enumerated in the legislation. There is no such condition concerning the father's activities if the mother wants to take up paid parental leave in addition to the 10 weeks⁷:

"Section 14-13 General conditions for paternity benefits

The father can receive parental benefits only if the mother after the birth or adoption

- a) works,*
- b) takes officially approved full-time education,*
- c) takes officially approved education combined with work that together provides full-time occupation,*
- d) due to illness or injury is dependent on help to look after the child,*
- e) is hospitalized,*
- f) attends full time introductory studies pursuant to The Introduction Act Chapter 2,*
- g) attends a full-time qualification program under the Act of 18 December 2009 No. 131 regarding Social Services in NAV"*

11. Furthermore, Section 14-13, second and third paragraph of the National Insurance Act establish that also the calculation of the paternity paid parental leave of the common period (in addition to the 10 weeks) is dependent upon the mother's situation. More specifically, if her job percentage is less than 75 percent, the father's benefit is calculated not from his own, but from the mother's work percentage. There is no provision establishing such a limitation in calculating the parental benefit for the mother⁸:

⁷ Unofficial translation by the Authority.

⁸ Unofficial translation by the Authority.

«If the mother works part-time after the birth or adoption, the father's parental benefit is reduced corresponding to the reduction in maternal working hours. If the mother's work percentage amounts to at least 75 pct. of full working hours, the father's parental benefit is calculated in accordance with his work percentage.»

If the mother receives a partial parental benefit, see § 14-16, the father's parental benefit corresponding to first paragraph letter a) cannot constitute a larger part of the full benefit than the mother's percentage.»

12. Finally, according to Section 14-14, first paragraph of the National Insurance Act, the father loses the 10 weeks of paid parental leave designated to him if only the father has obtained the right to paid parental leave (while the mother does not have a right to paid parental leave). However, the mother does not lose her 10 weeks if the father has not obtained the right to paid parental leave⁹:

“Section 14-14 Specific rules where only the father has the right to parental benefits.

If only the father has the right to parental benefits, the benefit period is limited to the benefit period after the birth or the taking into care (adoption), ref. § 14-9. Both at birth and adoption deduction shall be made for the part of the benefit period are reserved for the mother after birth, ref. § 14-9 fifth paragraph. It is a prerequisite that the conditions of § 14-13 are fulfilled during the period and within the benefit period after the birth or adoption, see § 14-9 first and second paragraph. The father's benefit period is reduced continuously when the conditions of § 14-13 are not met.”

4 Relevant EEA law

13. Directive 2006/54/EC implements the fundamental principle of equal treatment and equal opportunities for men and women in matters of employment and occupation.
14. According to recital 11 of its preamble, EEA States should “*continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market*”. They could do this inter alia, by adopting “*appropriate parental leave arrangements which could be taken up by either parent*” to enable both men and women to combine family and work commitments more successfully.
15. Article 2(1)a) of Directive 2006/54/EC holds a definition of “*direct discrimination*”:

“direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;”

16. Article 6 of Directive 2006/54/EC holds the personal scope of application:

“This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity,

⁹ Unofficial translation by the Authority.

accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.”

17. Article 14(1)c) of Directive 2006/54/EC forbids direct and indirect discrimination on the grounds of sex in relation to employment and working conditions:

“1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

[...]

c) employment and working conditions [...]”

18. According to Article 28(2) of Directive 2006/54/EC, the directive is without prejudice to the provisions of Directive 96/34/EC (the current Directive 2010/18/EU).

19. Directive 2010/18/EU puts into effect the revised Framework Agreement of 18 June 2009 on parental leave concluded by the main organisations representing confederations of European employers’ and employees representatives and lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities or working parents.

20. Recital 8 of the Preamble of Directive 2010/18/EU explicitly mentions *“the equality between men and women with regard to labour market opportunities and treatment at work”* as one of the objectives, next to improving the reconciliation of work, private and family life for working parents.

21. Recital 12 of the Preamble to the Framework Agreement (Annex of Directive 2010/18/EU) States that more measures are necessary to encourage a more equal sharing of family responsibilities between men and women.

22. Clause 1.2 and 1.3 of the Framework Agreement define the personal scope of application:

“This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State.”

“Member States and/or social partners shall not exclude from the scope and application of this agreement workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.”

23. Clause 2.1 of the Framework Agreement grants an *“individual right”* to parental leave to men and women workers:

“This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.”

24. Recital 16 of the Preamble to the Framework Agreement states that experience has shown that making the leave non-transferable can act as a positive incentive for the take up by fathers. By consequence, clause 2.2 of the Framework Agreement states that the right to parental leave shall be granted for at least four months and, in order to promote equal opportunities and equal treatment between men and women, this leave “*should, in principle, be provided on a non-transferable basis*”. Specifically, to encourage a more equal take up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis:

“The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.”

5 The Authority’s assessment

25. Several provisions in Norwegian legislation on paid parental leave are discriminatory on grounds of sex. In particular, the following provisions make paid parental leave for fathers less advantageous than it is for mothers.
26. First, the fact whether or not the father can take up paid parental leave in the common period – the period above 10 weeks – is dependent on the mother’s situation. The father is only entitled to paid parental leave in addition to 10 weeks, if the mother engages in certain activities enumerated in the legislation (Section 14-13, first paragraph of the National Insurance Act). There is no such requirement related to the father’s activities if the mother wants to take up paid parental leave in addition to the 10 weeks.
27. This unequal treatment between men and women is an infringement on the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC, read in conjunction with Article 2(1)(a) of that directive. The prohibition to discriminate on grounds of sex in relation to employment and working conditions covers the national provisions on parental leave as conditions for granting parental leave fall within the scope of employment and working conditions of Article 14(1)(c) of Directive 2006/54/EC¹⁰. This dependency of the father’s paid parental leave on the mother’s situation is moreover not in conformity with clause 2.1 of the Framework Agreement of 18 June 2009 (annex to Directive 2010/18/EU) either, granting an individual right to parental leave to each parent and thus stating that the entitlements to parental leave of each parent should in principle not be interdependent.
28. Second, according to the Norwegian legislation, the father’s paid parental leave in the common period (the period above 10 weeks) is calculated not from his own, but from the mother’s work percentage if her job percentage is less than 75 percent (Section 14-13, second and third paragraph of the National Insurance Act). There is no equivalent provision establishing such a limitation in calculating paid parental leave for the mother.

¹⁰ See case *Maïstrellis*, C-222/14, cited above, paragraph 45.

This provision constitutes an infringement on the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC, read in conjunction with Article 2(1)(a) of that directive and is furthermore not in conformity with clause 2.1 of the Framework Agreement of 18 June 2009 (annex to Directive 2010/18/EU).

29. Third, the father can lose the 10 weeks of paid parental leave designated to him. This is the case if he is the only parent that is entitled to paid parental leave. The mother however can never lose her 10 weeks (Section 14-14, first paragraph of the National Insurance Act). Consequently, in some cases, the father has no entitlement whatsoever to paid parental leave. This provision constitutes an infringement on the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC, read in conjunction with Article 2(1)(a) of that directive as well and it is not in conformity with clause 2.1 of the Framework Agreement of 18 June 2009 (annex to Directive 2010/18/EU) either. Furthermore, it does not comply with clause 2.2 of the Framework Agreement stating that all parental leave should be provided, “*in principle*” on a non-transferable basis whereof “*at least one of the four months*”. The fact that the father can lose his reserved 10 weeks of paid parental leave if the mother is not entitled to paid parental leave – and thus no paid paternal leave whatsoever is granted to the father-, therefore constitutes an infringement of clause 2.2 of the Framework Agreement.
30. Consequently, the father’s paid parental leave is – in the three different ways explained above - dependent upon the mother’s situation. The mother’s paid parental leave is independent of the father’s situation. Mothers are therefore explicitly granted more comprehensive rights to paid parental leave than fathers.
31. Finally, it should be noted that, according to settled case law of the Court of Justice of the European Union, the situation of a male employee parent and that of a female employee are comparable as regards the bringing-up of children¹¹.

6 Conclusion

32. Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force provisions such as Sections 14-13, first, second and third paragraph and Section 14-14, first paragraph of the National Insurance Act, which render the fathers’ entitlement to paid parental leave dependent upon the mother’s situation whilst this is reciprocally not the case, Norway has failed to fulfil its obligation arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*), as adapted to the EEA Agreement by Protocol I thereto and Clauses 2.1 and 2.2 of the Framework Agreement of the Act referred to at point 31a of Annex XVIII to the EEA Agreement (*Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC*), as adapted to the EEA Agreement by Protocol I thereto.

¹¹ See e.g. case *Maïstrellis*, C-222/14, cited above, paragraph 47 and *Commission v Greece*, C-559/07, EU:C:2009:198, paragraph 69.

33. In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter within three months of its receipt.
34. After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel on 13/07/2016