



ROYAL NORWEGIAN MINISTRY
OF CHILDREN AND EQUALITY

EFTA surveillance authority
Rue Belliard 35
B-1040 BRUSSELS

Your ref
78118/807544

Our ref
15/3660

Date:
10.10.2016

The right to parental leave in Norway

Reference is made to letter from the EFTA Surveillance Authority (the Authority) dated 13 July 2016, informing the Norwegian Government that the Authority has opened a formal investigation in relation to the Norwegian provisions concerning the right to parental leave. Reference is further made to previous correspondence in this matter, in particular letter from the Ministry of Children and Equality (the Ministry) dated 15 December 2015, informing the Authority that the Ministry finds the Norwegian provisions on parental leave compatible with EEA law.

In the letter of formal notice the Authority refers to three provisions in Norwegian legislation on parental benefits that are less advantageous for fathers than for mothers. The Authority's preliminary conclusion is that this constitutes an unequal treatment of men and women in breach of the EEA Agreement, as the provisions in the Norwegian legislation do not seem to comply with Directive 2010/18/EU (Parental Leave Directive) and Directive 2006/54/EC (Equal Treatment Directive). The Norwegian Government is invited to submit its observations within 13 October 2015.

The Ministry considers Norwegian law regarding the right to parental leave to be compatible with EEA law. The reasons for our view will be elaborated below. As background we have provided a brief summary of Norwegian law regarding the rights to parental leave and parental benefits.

Postal address
PO Box 8036 Dep
NO-0030 Oslo
postmottak@bld.dep.no

Office address
Akersgt. 59
<http://www.bld.dep.no/>

Telephone*
+47 22 24 90 90
Vat no.
972 417 793

Department of Consumer
Affairs

Our officer
Hanne Buch
+47 22242537

Norwegian law

According to the Working Environment Act, both parents have a right to parental leave until the child is 12 months old¹. In addition, each parent is entitled to parental leave for 12 more months. These months are not transferable to the other parent². In total, parents are thus entitled to three years parental leave in Norway.

The parental benefits period under the National Insurance Act is 49 weeks with 100 percent pay or 59 weeks with 80 percent pay. The benefits period is divided into three parts: 10 weeks are reserved for the mother, 10 weeks are reserved for the father, and the rest of the parental leave can be divided between the parents ("the shared period")³.

The Ministry's observations

1) Section 14-13 first paragraph of the National Insurance Act

According to Section 14-13 first paragraph of the National Insurance Act, the father is entitled to parental benefits in the "shared period" only if the mother engages in certain activities (work, studies etc.) whilst this is reciprocally not the case.

Parental Leave Directive

It is the Ministry's opinion that Norwegian law fulfils the requirements in the Parental Leave Directive (Directive 2010/18/EU).

The Parental Leave Directive lays down minimum requirements the states has to fulfil, to facilitate the reconciliation of parental and professional responsibilities for working parents. The Directive gives a worker an individual right to parental *leave* when he or she becomes a parent. According to the Directive, the leave shall be granted for at least a period of four months, and at least one month of the leave should be provided on a non-transferable basis.

In Norwegian Law the right to parental leave (of absence) is regulated in the Working Environment Act Chapter 12. As explained above, both parents have an individual right to parental leave, and – in total – parents are entitled to three years parental leave. The right to parental leave applies to all employees, regardless of their right to parental benefits. A father's right to parental leave is not dependant on the mother's situation. This means that a father has the right to parental leave, even when the mother stays at home. Both parents can also take parental leave at the same time. Accordingly, it is the Ministry's opinion that Norwegian law more than fulfils the minimum requirements in the Parental Leave Directive.

The Ministry would also like to emphasise that the Parental Leave Directive does not require the Member States to offer *paid* parental leave. This is in contrast to the Maternity Leave Directive, where the right for mothers to get an adequate allowance is regulated specifically, cf. Article 11 of Council Directive 92/85/EEC. It follows from Recital 19 of the Preamble to

¹ The Working Environment Act of 17 June 2005 No 62 Chapter 12 Section 12-5 first paragraph.

² The Working Environment Act Section 12-5 second paragraph

³ The National Insurance Act of 28 February No 19 Chapter 14 Section 14-9.

the Framework Agreement of Parental Leave that the Member States may choose whether they want to provide parental benefits, taking into account the budgetary situation. In our view the Parental Leave Directive does not apply to national provisions regarding the right to parental *benefits*.

To our knowledge, the Court of Justice of the European Union (the Court) or the EFTA Court has not considered whether a parental benefit scheme falls within the scope of the Parental Leave Directive. With regard to the Maïstrellis-judgement (C-222/14), the Court's preliminary ruling concerned the right to parental leave, and not the right to parental benefits. It follows from the wording of the questions referred to the Court, and the Court's ruling, that the case was limited to the question of parental *leave*. The Maïstrellis-case is therefore not relevant to the question of parental *benefits*, such as the provisions in Chapter 14 of the National Insurance Act. As stated above, the Working Environment Act gives both parents an individual right to parental leave, and the father's right to parental leave is unrelated to the mother's situation.

In the event that the Parental Leave Directive should apply to national provisions on parental benefits, it is the Ministry's opinion that it is within the Member States' discretion to decide the conditions of eligibility for the benefits, as long as the minimum requirements in the Directive are fulfilled. One of the reasons for this is that the conditions of eligibility will have a budgetary effect. It follows from the Maternity Directive Article 11 number 4, that the Member States may set up the conditions of eligibility under national law. This is a general principle that should also be applied with regard to parental benefits.

The Equal Treatment Directive

It is the Ministry's opinion that Norwegian law regarding parental leave is not in breach of the Equal Treatment Directive (Directive 2006/54/EC).

First of all, there is no discrimination on grounds of sex in the Working Environment Act. As explained above, both parents have an individual right to parental leave and a father's right to parental leave is unrelated to the mother's situation.

Secondly, rules regarding parental *benefits* under the National Insurance Act do not fall within the scope of the Equal Treatment Directive. In relation to Article 14 of the Directive, the Court has stated that a scheme will only fall within the scope of the Directive if "*its subject-matter is access to employment, including vocational training and promotion, or working conditions*", see Joined Cases C-63/91 and C 64/91 (Jackson and Cresswell) paragraph 28.

In the Jackson and Cresswell case, the Court concluded that the benefit was not within the scope of the Directive. The benefit was paid regardless of whether the person was employed or not and the purpose of the benefit was to support people in receipt of low incomes. The Court stated that the fact that a benefit *might affect* the ability to take up employment, is not sufficient for the Directive to be applicable (paragraph 30). The Directive does not apply to a social security scheme "*simply because the conditions of entitlement for receipt for the benefits may be such as to affect the ability of a single parent to take up access to vocational*

training or part-time employment" (paragraph 31). In other words, the fact that a benefit indirectly might affect employment does not mean it falls within the scope of the directive.

To our knowledge, the Court has not considered whether a parental benefit scheme falls within the scope of the Equal Treatment Directive. We would however like to comment on another case from the Court, C-116/94 (*Meyers*). In the *Meyers*-case the Court stated that an income related benefit given to low-paid workers who have responsibility for a child, was covered by the Equal treatment Directive. The benefit was a supplement to the income, and given poorly paid workers to keep them in employment. The benefit was awarded only when the claimant *was engaged in remunerative work*, although the entitlement was not effected by loss of employment or increase in salary during the benefit period of 26 weeks.

In the Ministry's opinion the link to employment is closer in the *Meyer*-case than the parental benefits scheme at hand, hence the parental benefit scheme should be considered differently. Unlike the *Meyers*-case, entitlement to parental benefits according to Norwegian Law does not require the beneficiary to be engaged in remunerative work at the time the benefit is given. It is not necessary that the beneficiary has an employment contract at the beginning of the parental leave, during the leave or after the leave. The National Insurance Act only requires that the beneficiary has been employed at least 6 of the last 10 months prior to the beginning of the leave. It follows from the *Jackson and Cresswell* case that it is not sufficient that a social security scheme *might affect* the ability to be employed. To summarize, the Ministry believes that there is not a sufficient link between the parental benefit scheme and access to employment, hence the Directive does not apply.

In any event, the Directive does not impose an obligation to provide benefits to both parents on equal terms. According to Article 28 Section 2 of the Equal Treatment Directive, the Directive shall be without prejudice to the Parental Leave Directive. It follows that when the Parental Leave Directive does not impose an obligation to provide parental leave *with pay*, nor preclude national authorities to set up conditions for eligibility and how the benefits should be calculated, such obligations cannot be derived from the Equal Treatment Directive. The Court has in several cases stated that the Equal Treatment Directive cannot be used to expand rights in the Maternity Directive or the Parental Leave Directive, see C-342/93 (*Gillespie*) paragraphs 18-20 and C-5/12 (*Montull*) paragraphs 61-64.

Finally, in the event that the Equal Treatment Directive should apply to national provisions on parental benefits, it is the Ministry's opinion that the provisions must be considered as "positive action" according to Article 3 in the Directive, "*to ensuring full equality in practice between men and women in working life*". The generous Norwegian parental leave benefits scheme has been designed to promote shared parenting, to give incentives for women to return to work and fathers to play a more active role at home since children has a need for both parents⁴. The disputed provisions in the National Insurance Act are regarded as important tools to achieve these goals. In our view, it should be within the states discretion to decide which tools to use in order to promote equal treatment of men and women.

As background we would like to mention that when a father's quota of four weeks was introduced in 1993, the contested provision also applied to the fathers quota. A father was

⁴ For the legislative history of the introduction of the father's quota, see Ot.Prp. nr. 13 (1992-93) and St. meld. Nr. 90 (1990-91).

only entitled to the "father's quota" if the mother returned to work or was a full-time student. However, many mothers did not have an option to return to work after the father had taken his parental leave, since it was difficult to get child-care arrangements. Many mothers also wanted to spend more time with their child. It was therefore impractical for mothers to go back to work for only four weeks. Hence the provision was amended in 1994 so that it did not apply to the father's quota, but only for "the shared period"⁵.

To elaborate upon why the provision promotes gender equality, we refer to a report that was published by the Institute for Social Research in 2016, called "Sharing the parental leave: Consequences for work-family dynamics and wellbeing in the Nordic countries ." The report is a literature review examining different studies on whether parents' use and sharing of parental leave has any significance in terms of how mothers and fathers adapt to paid work and child care and the family's well-being. Please find below some paragraphs from the English summary of the report with our underlining:

"Studies from all the Nordic countries show that fathers who take longer leave also contribute more to the family and the household than fathers who take shorter leave, and that more equal sharing of leave results in more equal division of paid work and income after the leave is taken."

"If both parents is on leave together, the family's short term well-being can improve, but the contribution of the "fathers quota" to change the division of work between mothers and fathers can be reduced (..) It's only when fathers are home alone while the other parent is at work that a more equal experience of leave becomes a possibility."

"The 2009-2013 extension of the "fathers' quota" in Norway to 10-14 weeks may have contributed to reducing specialisation of work both outside the home and at home between mothers and fathers, but as yet the long-term consequences has not been the subject of much study. Increased flexibility with the option of sharing leave and using the fathers quota while the mother is at home, can however reduce the potential for change, even during a long "fathers quota". There is reason to believe that the potential of the "fathers quota" to change mothers' and fathers' adjustments to family life and working life has not been fully realised."

To further elaborate why the provision constitute positive action, we refer to an official Norwegian report from 1995, NOU 1995:2 *Daddy come home*⁶. The Committee was appointed to give recommendations on how to promote equal treatment between men and women. The Committee discussed whether the contested provisions in the National Insurance law should be amended. The Committee did not recommend that fathers were given a right to parental benefits that was independent of the mothers situation. In the Committee's opinion it was important to make sure that fathers have the sole responsibility for children while they are on leave, as this will improve equality between mothers and fathers. Further, the Committee

⁵ For the legislative history, see Ot.prp. nr. 80 (1993-94).

⁶ NOU 1995:2 *Pappa kom hjem*. See the summary in Section 2.2.1 - 2.2.3:

<https://www.regjeringen.no/contentassets/6d606455c9434e779c217090876dadc5/no/pdfa/nou199519950027000dddpdfa.pdf>

believed it should only be a public responsibility to pay parental benefits if there is a real need to look after the child. The Committee pointed out that if the mothers stays at home, there is no need to pay parental benefits for the father. The Committee also mentioned the effects an amendment would have on the budget and the labour market.

To summarize, the two reports shows that there is a need for incentives to make sure fathers are home alone with the child in order to promote equality between mothers and fathers. The reports further show that experts and researchers find the contested provision to provide incentives in this direction. It is the Ministry's opinion that it should be within the Member States' discretion to decide which tools to use in order to promote more equality between mothers and fathers. In our view the provisions in the National Insurance Act constitutes positive action and are therefore not in breach of the Equality treatment Directive.

2) Section 14-13 second and third paragraph in the National Insurance Act

The Authority refers to Section 14-13 second and third paragraph in the National Insurance Act, laying out rules regarding the calculation of the benefit: A father's paid parental leave in the shared period is calculated on the basis of the mother's work percentage if her job percentage is less than 75 percent. There is no equivalent provision regarding the calculation of the mother's benefit.

The Ministry's Observations

The Ministry refers to the arguments presented above and believes the contested provision is compatible with EEA law, since it is neither in breach of the minimum requirements in the Parental Leave Directive nor the Equal treatment Directive.

The Ministry would like to add that the right to one month non-transferable parental leave according to the Parental Leave Directive should not be interpreted to preclude national provisions that one parent's right to an *economic* benefit could be dependent on the other parent's situation. The conditions of parental benefits should be within the states discretion to decide.

3) Section 14-14 in the National Insurance Act

The Authority refers to Section 14-14 in the National Insurance Act, laying out specific rules where only the father has the right to parental benefits. In this situation a father might lose 10 weeks of parental leave designated to him, while this is reciprocally not the case.

The Ministry's Observations

The Ministry refers to the arguments presented above and believes that the provision is compatible with EEA law, since it is neither in breach of the minimum requirements in the Parental Leave Directive nor the Equal treatment Directive.

We would also like to add that in a situation where only the father has earned a right to parental benefits, it is not accurate to use the term "father's quota" and "mother's quota", since there is no "mother's quota". The 9 weeks that are reserved for the mother before and after birth, primarily to protect the mother's health, are not transferable to the father.

However, the father is entitled to 40 or 50 weeks parental leave with pay, provided that the conditions in the National Insurance Act are fulfilled. The Ministry argues that this more than fulfils the minimum requirements in the Parental Leave Directive, and is not in breach of the Equal treatments Directive.

Summary

It follows from the above that the Ministry believes Norwegian law regarding the right to parental leave is compatible with EEA law. The Norwegian provisions concerning right to parental leave (more than) fulfil the minimum requirements in the Parental Leave Directive, and are not in breach of the Equal Treatment Directive.

Please do not hesitate to contact us should there be any questions related to the arguments above. We are looking forward to discussing the case further with the Authority at the package meeting.

Yours sincerely,

Emma C. Jensen Stenseth
Deputy Director General

Hanne Buch
Senior Adviser

The document is approved electronically, as such no handwritten signatures are required.