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NEWS REPORT

Country:	Belgium
Title:	Conditions for paid maternity leave
Date:	27 October 2015
Expert:	Jean Jacqmain
<u>Context</u>	
Issue at stake:	Maternity protection
Ground of discrimination:	Sex
Source:	Labour Court in Nivelles, judgment of 20 December 2013, Rôle général No. 12/947/A and 12/948/A, unreported. Council for Equality of Men and Women, Opinions No. 10 (1996), 37(2000), 80(2004),
Field:	Maternity leave
Applicable law:	Working Conditions Act of 16 March 1971; Consolidated Act of 14 July 1994; Royal Decree of 3 July 1996 and Royal Decree of 28 November 1969

Content

Case law: Ms. Rosselle, a tenured teacher at a school in the Flemish Community, took unpaid furlough (the only form of leave available) in order to answer a call for a native Dutch speaker in a school in the French-speaking Community. As she was considered as being at the beginning of her career, she was engaged as a temporary staff member. Five months later she gave birth to a child and applied for maternity benefits, which are allowed in lieu of remuneration under the social security system for paid workers. Her chosen Sickness Fund (the institution competent to pay such benefits) dismissed her application because, under the Consolidation Act of 14 July 1994 on Healthcare and Sickness Insurance (Article 128(1)) and its ancillary Royal Decree of 3 July 1996 (Article 203), entitlement to maternity benefits requires that the applicant has been subject to the scheme for at least 120 working days within a period of 6 months immediately prior to the application.

The following comments may be useful for a better understanding of the CJEU's decision in case C-65/14 Rosselle.

First, in Belgium education falls within the respective jurisdictions of the three Communities (Flemish, French-speaking and German-speaking). The rules concerning staff management are identical in all three Communities. At the beginning of his/her career, a teacher is employed in a temporary capacity, during renewable maximum periods of one year; as such, he/she is subject to the statutory social security system for paid workers, including the maternity insurance scheme. If and when that teacher becomes tenured, the former social security system ceases to apply; during maternity leave, a female employee is regarded as remaining on active duty, and receives her normal remuneration.

Second, in the French-speaking Community various primary and secondary schools propose 'immersion teaching', i.e. several subjects are taught in another language, which is often Dutch. For that reason, native speakers are an obvious choice.

Decision of the Court: When Ms. Rosselle challenged the Sickness Fund's decision, with the assistance of the Institute for Equality of Women and Men (the Belgian 'gender equality body' under Article 20 of Directive 2006/54/EC), the Labour Court in Nivelles referred the case to the CJEU for a preliminary ruling. In its decision of 21 May 2005 in Case C-65/14, the Court of Justice found that as Ms. Rosselle had been employed without interruption for longer than one year, irrespective of the change of employer and therefore in the legal nature of the working relation,¹ the Belgian social security provisions were not compatible with Article 11(4) of Directive 92/85/EEC concerning the protection of maternity.

Key points of analysis: Considering the direct effect of Article 11(4) of Directive 92/85/EEC, as pointed out by Advocate-General E. Sharpston, the Labour Court of Nivelles will certainly rule that the Sickness Fund must pay the benefits to Ms. Rosselle.

As to the follow-up of the case, the federal Minister of Social Affairs is preparing the draft of a Royal Decree which, based on the powers granted to the Sovereign by Article 128 (2) of the Consolidated Act of 14 July 1994, would waive the condition of prior subjection to the scheme; but only in cases similar to Ms. Rosselle (i.e. a change in the legal nature of employer and therefore of working relation).

Internet link source:

All legal texts available in French and Dutch via: <http://www.juridat.be>, accessed on 27 October 2015.

¹ Ms. Rosselle was first employed by the Flemish Community as a tenured employee and then as a temporary employee by the French-Speaking Community.