



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	Ireland
<b>Title:</b>	<i>Wessel v Aer Lingus Ltd.</i>
<b>Date:</b>	6 January 2017
<b>Expert:</b>	Frances Meenan
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Pregnancy, remuneration and employer pension contributions
<b>Ground of discrimination:</b>	Sex
<b>Source:</b>	National court decision
<b>Field:</b>	Other
<b>Applicable law:</b>	Employment Equality Act 1998 (as amended); Pensions Act (as amended).

### **Content**

**Case development:** The claimant maintained that she was discriminated against by the respondent on the grounds of her family status inter alia contrary to section 80 of the Pensions Acts in relation to conditions of employment. The claimant commenced employment with the respondent in 2006 and is a member of the airline's cabin crew. The background to the claim lies in changes to the company's pension scheme necessitated by a potential actuarial shortfall. The scheme was facing a deficit of EUR 700 million. The company's defined benefit scheme closed in January 2015. Employees were then transferred to a new defined contribution scheme. There was a dispute in relation to the restructuring of the pension scheme culminating in, in addition to a company once-off additional payment, a defined three year period wherein each member of the scheme would receive a payment to their benefit by reference to their variable pay earnings (premium pay etc.) based on their actual earnings (in a defined three year period). The basis for that calculation was to be that the variable pay for the previous three years which was earned by the individual worker divided by total variable pay for the eligible workforce for the three year period, then multiplied by EUR 30.2 million. These proposals were put to a ballot by the Irish Congress of Trade Unions and so accepted. During the said three year period, the claimant was absent on maternity and protective leave. As a consequence, the formula produced an amount of EUR 8,403 or about EUR 8,000 to EUR 9,000 less than she would have got if she had been at work for the entire period of the reckonable period. The duration of her absence was not in dispute.

The claimant maintains that this was a matter of discrimination on the family status ground and that she was less favourably treated than a male or female colleague who did not take maternity leave. If the claimant had not been on maternity leave and protective leave she would have been eligible for the premium payment earnings. In short, the respondent stated that the formula was applied to all employees on the basis of equality and that where they had premium pay earnings, the actual earnings were reckoned according to the formula. Where an employee was absent for any reason due to sick

leave, career breaks etc. and did not have reckonable earnings, their share was reduced accordingly as it had been in the case of the claimant. The respondent submitted that the family status ground could not cover the entire period of the claimant's absence. If her family status changed in the course of her absence she cannot argue that any less favourable treatment was due to her family status. Further, the law does not require payment by the employer to a woman on maternity leave and the claimant is seeking to have what is in effect a payment of wages reckoned for the purposes of her complaint as if it had been paid and thereafter a calculation of her entitlement under the formula but in circumstances where no payment was actually made. In other words, the claimant is seeking to be paid for a period during which she was not eligible for payment of wages and in respect of which the non-payment of such wages is not discriminatory. In addition, the claimant had accepted part of this deal in respect of the so-called stabilisation payment and she was therefore estopped from making any further claim. This is not simply on the grounds of her being bound by the collective agreement but she has accepted the arrangement in contract.

The Equality Officer stated that the burden of proof was on the claimant and that she had set out a prima facie case. The Equality Officer considered the purpose of protective leave is to ensure that a woman who leaves the workplace in order to have her baby is placed at no disadvantage, primarily in respect of her return to work to her own or an acceptable position when she is ready to do so.

Consideration was given to the payment or the non-payment of an employee when she was absent on maternity leave and the Equality Officer confirmed that an employee on maternity leave is not entitled to pay. The Equality Officer referred to *Gillespie v Northern Health and Social Services*, Case C-342/93, where the claimants were paid a proportion of their wages which declined as they went through the course of the pregnancy but which was obviously related to the then current obtaining pay rates. The ECJ reiterated that Directive 92/85/EEC does not require payment of full pay during maternity leave absence, where sick pay rates have been adjusted to reflect pay rises awarded after the commencement of the maternity leave and be reflected in the rates paid to the women involved.

The Equality Officer considered that this case was clear and easily distinguishable from the current complaint where for the disputed period nothing was paid to the claimant but for her case to succeed she would have to succeed in a broader argument that she should have been paid or in some way remunerated for the purposes of calculating her benefit under the deal. Critically for her case, the Equality Officer could not see how it represented less favourable treatment on the grounds of pregnancy or family status. The only possible comparator, in terms of someone who was more favourably treated, would be a person who actually worked for a greater period than she did and was paid for so doing in the normal way. The claim was dismissed.

**Key points of analysis:** This is a useful case as it sets out that employers are not required to pay pension contributions to an employee during her period whilst on maternity leave. Like many other defined benefit pension schemes, the Aer Lingus scheme had significant liabilities and thus ceased.

**Internet link source:**

<https://www.workplacerelations.ie/en/search/?decisions=1&nameofparty=wessel>. Accessed 23 December 2016.