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NEWS REPORT

Country:	Germany
Title:	Damages for loss of earnings due to the lack of public childcare
Date:	18 April 2017
Expert:	Ulrike Lembke
<u>Context</u>	
Issue at stake:	The Federal Court of Justice decided upon damages for loss of earnings due to the inability of the responsible local authority to offer sufficient and appropriate public childcare
Ground of discrimination:	Sex
Source:	National court decision
Field:	Employment; parental leave; childcare
Applicable law:	Section 24(2) of the Social Code No. 8

Content

Case: Three full-time working women had taken twelve months of parental leave after giving birth. They had announced, shortly after giving birth, their need for public childcare with regard to the statutory entitlement to public childcare for children under the age of three. But the responsible local authority informed them that too many parents were demanding public childcare, and did not offer them a place at a nursery school or any equivalent alternative. After some research, the three mothers found another solution for their childcare problem, but as this took some time, they could not return to work directly after the end of their parental-leave period of twelve months. Therefore, they demanded damages for loss of earnings from the end of their parental leave until their return to work and they sued the local responsible authority.

Decision of the Court: The Federal Court of Justice decided that parents who cannot return to work after their parental leave due to the lack of sufficient and appropriate public childcare can claim damages for loss of earnings from the local responsible authority. Since August 2013, children under the age of three are entitled to public childcare under Section 24(2) of the Social Code No. 8. The local authorities are obliged to offer sufficient and appropriate public childcare through nurseries, kindergartens or so-called day-care mothers. The court of first instance had found that the obligation of the local authorities to offer childcare was exclusively in favour of the children cared for, and therefore did not produce any legal effects in favour of the parents. The Federal Court of Justice decided that the entitlement to public day care should not only favour the children cared for, but also their parents, especially those wanting to return to work, and that therefore a culpable violation of the obligation to offer public childcare would lead to liability of the local responsible authority for damages for the loss of earnings suffered by any parent. The local authority can exonerate itself by proving that the lack of sufficient public childcare could not be avoided (e.g. if the building contractor for childcare facilities or the operator of a kindergarten or nursery has been declared bankrupt), while the mere referral to lack of capacity does not limit the liability.

Key points of analysis: The Federal Court of Justice profoundly strengthened the effectiveness of measures to further the reconciliation of work and family life by offering sufficient and appropriate public childcare. Local authorities can no longer refer to lack of capacities or financial means when parents, especially mothers, want to make use of the entitlement to childcare with the aim to return to work after one year of parental leave. The Federal level and the states have invested billions in the construction and operation of childcare facilities to guarantee nationwide access to childcare.

Internet link source: Federal Labour Court, judgment of 20 October 2016, III ZR 278/15 (the action was brought before the court by three mothers), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=56b0f500ea62fb565a92815414d26850&nr=76566&pos=7&anz=20>.

Comprehensively on the new entitlement and its enforcement see the contributions by Schettler, A., Meiner-Teubner, C. and Möller, V. 'Ausbau der Kinderbetreuung für Unter-Dreijährige' *Zeitschrift des Deutschen Juristinnenbundes* 4/2016, pp. 155ff, 161ff, 167ff, 171f, accessible for download under <https://www.djb.de/publikationen/zeitschrift/djbZ-2016-4/>.