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NEWS REPORT

Country:	Italy
Title:	A case of Indirect discrimination concerning criteria set by a collective agreement
Date:	18 May 2018
Expert:	Simonetta Renga
Context	
Issue at stake:	Gender pay gap
Ground of discrimination:	Sex
Source:	National court decision
Field:	Equal Pay
Applicable law:	Decree N. 196/2008 on The Code for Equal Opportunities between men and women, Decree N.151/2001 on the Sustain of Motherhood and Fatherhood

Content:

This case is one of the few cases in Italy concerning indirect pay discrimination. The Court of Appeal of Turin recently confirmed the judgment of the Tribunal which deemed a clause of a collective agreement at the enterprise level to be discriminatory as it infringed Art 3 and 37 of the Constitution, 25 para 2bis of Decree N. 198/2006 and Art 3 of Decree N. 151/2001. The clause set "real presence at work" as a criterion in order to be eligible to receive additional remuneration as an incentive, without regarding family related leaves including compulsory maternity leave, parental leave and leave for illness. Even though the criterion is formally neutral, it results in indirect pay-discrimination since a higher percentage of female workers than male workers take family-related leaves. Moreover, no permissible justification had been provided regarding the requirement of "real presence at work".

The employer was ordered to (1) cease the discrimination by regarding such leaves as actual work with the aim of providing remuneration as an incentive, (2) to pay the additional remuneration incentive to the plaintiffs, (3) and to enhance a plan to remove the discrimination where the change of the criteria mentioned above had to be included in future collective bargaining at the enterprise level. The latter was promoted by the intervention of the Regional Equality Adviser as it was a case of collective discrimination.

Key points of analysis: This judgment is important because previous cases mainly concerned the negative effects of parental leave on wage progression.

It actually regards both direct and indirect discrimination, as the exclusion of the compulsory maternity leave involves a differential treatment which is directly grounded on gender, but the reasoning of the Court concerns mainly indirect discrimination.

In particular, the enforcement and the effectiveness of the partial reversal of the burden of proof is evident in this judgement. In fact, the plaintiff claimed that the clause of the collective agreement was discriminatory by showing data on the proportionally disadvantageous effect of the criteria which excluded maternity and parental leave. The company tried to justify the criterion of real presence at work by referring to the link between the productivity objectives and the concrete and profitable work performed by employees. Nevertheless, the judge rejected this justification as the collective agreement included similar leaves/time off (such as those for assistance to disabled persons which are more equally used by workers of both sexes) among days to be reckoned for this purpose, meaning the link is not proven.

The Court of Appeal also underlined that the discrimination is not excluded by the fact that it rises from the enforcement of a collective agreement, because the employer (and also trade unions) must pursue a working organization which aims to mitigate or remove unequal treatment between male and female workers.

Internet link source: Court of Appeal of Turin 10 January 2018, published in https://www.wikilabour.it/public/Segnalazioni/58bb7d01-7ef7-4ef8-916a-6e9d9cf27608/20180110_CdA-Torino.pdf, accessed on 18 May 2018.