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FLASH REPORT

Country:	The Netherlands
Title:	Two judgments on pregnancy discrimination
Date:	05 March 2019
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<u>Context</u>	
Issue at stake:	District Court the Hague grants compensation for pregnancy discrimination; District Court East-Brabant ('Oost-Brabant') rejects discrimination claim
Grounds of discrimination:	Sex
Source:	National court decisions
Field of application:	Pregnancy and maternity; employment
Applicable law:	Art. 7:646 Dutch Civil Code, art. 7:686a(4) Dutch Civil Code

Content

Decision of District Court Den Haag (the Hague): On 24 January 2019, the District Court The Hague ruled that an employer acted in breach of the law by rejecting the application of a woman because of her pregnancy. During her second job interview the woman informed the employer about her pregnancy. A week later she received the message that she would not be hired. The woman had secretly recorded the conversation and in that way could prove that the interviewer had at first said she was enthusiastic about the female applicant and wanted to offer her a job, but that, after the applicant informed her about the pregnancy, she had said that this information "made things different". The court ruled that without the discrimination the woman would have been given a contract for a year. Therefore the court awarded compensation of a year's salary (EUR 37 077,21). No non-pecuniary damages were granted, because it was not established that the woman had suffered mental injury due to the discrimination.

Decision of District Court Oost-Brabant (East-Brabant): Another judgment on pregnancy discrimination was given by the District Court of East-Brabant. This court ruled that the employee involved had not established sufficient facts from which it could be presumed that her contract had not been extended because of her pregnancy. The court took the opinion that the employer had made it sufficiently clear that he had doubts about the employee's performance and that he did not expect that she would be able to meet the – changing – demands of her role. What is relevant is that the employer had also stated that the employee's claim was inadmissible, because she had not filed it within two months after the end of her contract. The court ruled that the time limit of two months was not applicable in this case, because its application would have made it impossible for the employee to first present her case to the Equality Body and in that way try to obtain sufficient evidence.

Key points of analysis: The judgment by the The Hague Court is relevant because of the extent of the compensation granted. It happens too often that the compensation in this type of case is rather low, because a court rules that the contract of the pregnant woman



would not have been extended anyway, for other reasons than the pregnancy, or that she would have been given a contract for only a short duration. Therefore judgments in which more substantial amounts are granted as a compensation are very welcome. Less welcome is the opinion the court took with respect to the non-pecuniary damage. Some courts are of the opinion – rightly so in the author’s opinion – that the right to be free of discrimination is a fundamental human right and that infringement of this right always gives an entitlement to non-pecuniary damages. However, some courts refer to the Dutch article on non-pecuniary damage which stipulates that a right to compensation only exists in case of infringement of a personal right and to case law of the Supreme Court stating that such an infringement can only be accepted in case of mental injury. This matter has not been solved so far.

The judgment by the court of East-Brabant is especially relevant because of the aspect of the time limit. As of 1 July 2015, the Dutch law on dismissal changed. Most claims relating to dismissal now have to be filed with the court within two months. This is not the case, however, if the claim concerns an act by the employer that is unlawful in itself, apart from the dismissal. In the author’s view pregnancy discrimination is such an act, also if there is some relation to the dismissal in the sense that the dismissal is discriminatory. Also, protection against pregnancy discrimination would be seriously harmed if a pregnant woman would be required to file a claim within two months after the end of her contract, as this period will usually fall within her maternity leave and/or around the period of giving birth. The court of East-Brabant did not address these matters, but merely based its decision on the opportunity that had to be given to the woman to bring her case before the Equality Body. It would have been helpful if a more elaborate judgment on the principles of this matter would have been rendered.

Internet link source:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:584> (Court The Hague)

There is no internet link yet of the judgment by the District Court of East-Brabant.