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FLASH REPORT

Country:	France
Title:	Court of Cassation, Social chamber 14 November 2019 n°18-15682
Date:	07 April 2020
Expert:	Marie Mercat-Bruns
<u>Context</u>	
Issue at stake:	Indirect discrimination upon returning from parental leave
Grounds of discrimination:	Gender
Field of application:	Employment
Source:	National court decision
Applicable law:	L 1132-1 Labour Code (reference to the former Article L 122-45), Article L. 1225-55 et L. 1225-71 of the Labour Code, reference to former Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC before 2010 and 2019 revision; CJEU 22 October 2009, Meerts C-116/08; CJEU 27 February 2014, Lyreco Belgium C-588/12; CJEU 8 May 2019, Praxair C-486/18

Content

Case: The claimant is a woman who was employed as an accountant since 1997. Upon returning from her parental leave, her employer did not offer her to return to her previous position (the only existing job as accountant), with the person replacing her during the leave retaining the position instead. The claimant was given administrative and secretarial work in no way related to her employment contract. Later, she refused a job transfer to another location and was laid off for what her employer claims were economic reasons. She subsequently introduced a claim before the Labour Court for moral harassment. In 2004, the Labour Court of Besançon rejected her claim. Over the following 13 years, the claim was heard and rejected by several Courts of Appeal, despite the fact that the Court of Cassation reversed these decisions on two occasions, in 2012 (4 July 2012, no 11-17.986) and 2015 (14 October 2015, no 14-25.773). The Court of Cassation had argued in 2012 that insufficient consideration had been given to the shift of burden of proof in favour of the claimant and of all the possible evidence of moral harassment. Moreover, in its decision in 2015, the Court of Cassation criticised that the Court deciding in this matter (at this moment the Court of Appeal of Dijon) had not acknowledged the medical evidence on the consequences of harassment and had ignored the imposed unfavourable changes to the claimant's employment contract, which led to the presumption that harassment had taken place. In 2017, the Court of Appeal of Lyon, once again rejected the claimant's claim of moral harassment. It also rejected a new allegation of pregnancy discrimination based on insufficient facts. However, the Court awarded damages due to the employer's violation of his obligation to reemploy the worker in the position she held before her parental leave and for the subsequent breach of the employer's contractual obligation of loyalty (according

to Articles L. 1225-55 and L. 1225-71 of the Labour Code). In 2019, the case made its way before the Court de Cassation once again.

Decision of the court: In its decision on 14 November 2019, the Court of Cassation confirmed the Court of Appeal of Lyon's rejection of the moral harassment claim, based on insufficient facts, but partially quashed the Court of Appeal's finding that no sufficiently precise and consistent facts were produced to presume pregnancy discrimination. It first cited the framework agreement annexed to Directive 96/34/EC of 3 June 1996, former Article L 122-45 of the Labour Code banning discrimination, and relevant EU case law (CJEU 22 Oct. 2009, *Meerts*, C-116/08, § 35, 37; CJEU 27 Feb. 2014, *Lyreco Belgium*, C-588/12, § 30 et 32; CJEU 8 May 2019, *Praxair*, C-486/18, § 41). According to the Court of Cassation, the Court of Appeal of Lyon should have considered whether, since a considerably higher number of women than men take parental leave, the employer's decision in violation of the Labour Code to refuse to reemploy the worker in her initial position after her parental leave, giving her administrative tasks, constituted indirect discrimination based on sex and if so, if it could be objectively justified. Focusing on the sex discrimination claim alone, the Court of Cassation therefore declared the Court of Appeals decision null and void and remanded the case to the Court of Appeal of Nancy, which will have to award extra damages to the claimant in addition to the damages already awarded for contractual breach upon refusal to reemploy the worker in her initial job.

Key points of analysis: The decision is of interest for three reasons. First, it refers explicitly to EU law (e.g. relevant case law, including the recent CJEU *Praxair* decision, as well as Directive 96/34/EC on parental leave, which was recently replaced by Directive 2019/1158 on work life balance). The Court recalls that EU case law recognises that the framework agreement linked to the Directive on parental leave reflects the social partners' commitment to measures which promote equal opportunity and equal treatment between men and women, improve their working and living conditions and provide adequate social protection when they request parental leave. Secondly, the Court's decision enhances the role of indirect discrimination to smoke out discriminatory practices embedded in recurring practices which violate Labour Code rules to protect workers - mostly women who choose to go on parental leave - without requiring specific statistics on the number of women affected. Thirdly, the decision adds a layer of sanctions in the form of additional damages for sex discrimination when employers violate their obligation to offer reemployment in the same or equivalent position to female workers back from parental leave, outside of damages for a breach of the employer's contractual obligation of loyalty disrespecting articles L. 1225-55 et L. 1225-71 of the Labour Code. The focus on 'sex' discrimination rather than 'pregnancy' discrimination, which was the employee's allegation, is a clear signal to dissuade employers from perpetuating more subtle systemic sex discrimination by creating apparently neutral barriers to the career advancement of women after parental leave.

Internet link source:

https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2019_9139/novembre_9548/1567_14_43913.html.