



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

### FLASH REPORT

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| <b>Country:</b>                   | Norway  |
| <b>Title:</b>                     | EFTA Court Judgement regarding Norway's parental benefits for fathers   |
| <b>Date:</b>                      | 24 April 2020   |
| <b>Expert:</b>                    | Marte Bauge   |
| <b><u>Context</u></b>             |   |
| <b>Issue at stake:</b>            | Employment and working conditions – parental benefits<br>Strengthening the rights of father's parental benefits   |
| <b>Grounds of discrimination:</b> | Sex   |
| <b>Field of application:</b>      | Family leave, Employment  |
| <b>Source:</b>                    | European legislation, National legislation. Case E-1/18 EFTA's Surveillance Authority (ESA) against Norway  |
| <b>Applicable law:</b>            | Agreement on the European Economic Area ("EEA" or EEA Agreement), Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive) Article 14 (1) ( c ) and Norwegian National Insurance Act Article 14-13 and 14-14 |

### Content

**Case:** The EFTA Court dismissed a case brought by the EFTA Surveillance Authority (ESA) regarding Norway's parental benefits for father's on 19 December 2019.

In accordance with the Norwegian Working Environment Act (WEA)<sup>1</sup> parents are entitled to parental leave. The Norwegian National Insurance Act (NIA)<sup>2</sup> covers the benefit parents are entitled to during parental leave in and stipulates that a father's right to parental benefit during the common period of parental leave, depends on whether the mother is 'in activity', i.e. working or studying after giving birth or after taking over care responsibilities for a child<sup>3</sup>

If the mother is not in 'activity', the father is not entitled to parental benefit. According to NIA Article 14-13 second paragraph. the father's parental benefit will also be reduced if the mother works less than 75 percent.

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<sup>1</sup> Act of 2005-06-17-62 article 12-2,12-4 and 12-5; <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>.

<sup>2</sup> Act of 1997-02-28-19, <https://lovdata.no/dokument/NL/lov/1997-02-28-19> (only in Norwegian).

<sup>3</sup> Article 14-13 first paragraph.

Furthermore, NIA Article 14-14 first paragraph states that the mother must work or study throughout the joint period if the father is to take out parental benefit (from week 7 after birth), in which cases only the father has earned the rights to parental benefit.

In contrast, the mother's rights to parental benefits in NIA are independent of the father's activities.

In the case ESA argued that, since mothers and fathers are in a comparable situation when it comes to bringing up children, Norway's different treatment of mothers and fathers in relation to parental benefits, unlawfully discriminates against fathers on grounds of sex, in breach of Article 14(1)(c) of the Recast Directive.

The Norwegian authorities argued that the parental benefit scheme in the NIA is not covered by the Recast Directive because it does not fall under the category of 'employment and working conditions', within the meaning of Article 14(1)(c) of the Recast Directive.

Norway also submitted that the provisions stipulated in NIA do not constitute discrimination, within the meaning of Article 14(1)(c) of the Recast Directive. Even if the relevant provisions in the present case were considered to create a (direct or indirect) difference in treatment between men and women, such a difference could still be justified on the basis of Article 3 on positive action of the Recast Directive. Norway argued that the regulation on this matter in NIA provides a clear advantage to women, both generally and in the long term, and that it has a positive effect on the inequalities between men and women in respect of family obligations and working life. Fathers are more likely to assume a larger share of family obligations if the mother returns to work in the period where the father receives benefits.

**Decision of the EFTA court:** The Court first pointed out that the right to parental leave, in the WEA, is covered in the Recast Directive, as this applies to 'employment and working conditions'. The court further stated that Chapter 14 of the NIA applies to financial benefits granted under parental leave.

The Court also stated that although the right to parental benefits in NIA Chapter 14 clearly affects an employee's ability to take parental leave, the purpose of parental benefits is to provide an income that is not only related to employment.

The Court stated that the NIA's 'activity requirement' (such as work or study) for mothers, also includes activities other than work such as participation in the Introductory program for refugees or in the qualification program under the Act on social services in the labour and welfare administration.<sup>4</sup> The amount of parental benefit the parents receive is also calculated on the basis of sources of income that are not necessarily related to an employment, such as income from self-employed activities, support received from a social security system or compensation in connection with military service in the Armed Forces. The Court states that the parental benefit is granted primarily during periods of parental leave and is administrated through the Norwegian social security scheme

The EFTA Court concluded that the parental benefit scheme established in the NIA does not fall under "employment and working conditions", within the meaning of Article 14(1)(c) of the Recast Directive. Although the right to parental benefits clearly affects an employee's ability to use parental leave, the purpose of the scheme is to provide income support that is not in itself related to any employment relationship.

The Court also rejected ESA's claim that parental benefit is directly linked to the right to parental leave, so that parental benefit must be considered as 'employment and working conditions' as in the Recast Directive. The Court recalled that although the EEA States,

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<sup>4</sup> Act of 2009-12-18-131 <https://lovdata.no/dokument/NL/lov/2009-12-18-131?q=sosialtjenesteloven> (only in Norwegian).

with the exception of a defined period of protection for the mother, must give both parents the right to leave on equal terms, it is up to the EEA States to provide additional support schemes.

Finally, the Court pointed out that the concept of 'pay' in the Recast Directive does not include social security schemes as in this case.

Consequently, the Court dismissed ESA's application seeking a declaration that Norway had failed to fulfil its obligations under Article 14(1)(c) of the Recast Directive by maintaining in force provisions such as NIA Article 14-13 and 14-14.

**Key points of analysis:** In the decision the EFTA Court did not consider whether the mentioned provisions of the NIA discriminate fathers on basis of sex according to the Recast Directive. As this was not discussed, it's not a judgment of high relevance when it comes to EU or Norwegian Discrimination Law. However, the fact that the Court considered this case to fall outside the scope of the Recast Directive does not mean that the regulations are not discriminatory according to National legislation in Gender Equality and Anti-Discrimination Act (GEADA).<sup>5</sup>

In case (12/340)<sup>6</sup> the Equality Ombud concluded that the requirement in NIA Article 14-13 on 'activity' for mothers was not in terms with the former Gender Equality Act (GEA).<sup>7</sup> (GEADA has a similar wording) because no corresponding requirements were set for the father's activity for mothers to be entitled to parental benefit.

A father has no right to parental benefit or other leave when the mother chooses to be at home, is unemployed, or for some other reason cannot start work or study. Another reason may be that the mother held a temporary position which was terminated before or during the leave.

The Ombud has been in contact with the Ministry of Culture several times after it's statement and asked if the Ministry intends to change the NIA in this respect. It seems that the Ministry doesn't agree with the Ombud, since it in this EFTA Court case argues that the regulation in NIA is a positive action measure that is an advantage to women because fathers are more likely to assume a larger share of family obligations if the mother returns to work in the period where the father receives benefits.

The Ombud however does not agree, and has reported<sup>8</sup> that it will continue to work for the NIA to be changed on this matter so that fathers are not discriminated against.

**Internet link source:** Link to the Judgment from the EFTA COURT  
<https://eftacourt.int/download/1-18-judgment/?wpdmdl=6387>.

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<sup>5</sup> Act of 2017-06-16-51 <https://lovdata.no/dokument/NLE/lov/2017-06-16-51>.

<sup>6</sup> From the Ombud's website, accessed 17. March 2020; <https://www.ldo.no/en/diskriminert/nyheiter-og-fag/nyheiter/News/Featured-news/--Gi-far-eigen-rett-til-permisjon/>.

<sup>7</sup> Act of 1978—06-09-45 (Only in Norwegian) <https://lovdata.no/pro/#document/NLO/lov/1978-06-09-45>.

<sup>8</sup> Report from the Ombud «Diskrimineringsretten 2019, gjennomgang av året som er gått» (Discrimination Law, summary of 2019), [https://www.ldo.no/globalassets/ldo\\_2019/03\\_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf](https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf).