



Paid parental leave for a judge with unemployed wife?

Facts of the case

On 7 December 2010, Mr Dalares, a judge in Greece, submitted an application seeking paid parental leave of nine months for the purpose of bringing up his child, who was born on 24 October 2010. In his capacity as a judge, Mr. Dalares is subject to the specific provisions concerning that occupation, namely the Code on the Status of Judges.

By a decision of 18 January 2011, the competent authority rejected Mr. Dalares' application on the ground that, in accordance with Article 44(21) of that code, the leave applied for is granted to a mother exercising the profession of judge only.

Mr Dalares brought an action against that decision before the Council of State. By a judgment of 4 July 2011, that court upheld that action noting that, in accordance with its case-law, Article 44(21) of the Code on the Status of Judges, interpreted in the light of Directive 96/34, must apply not only to mothers exercising the profession of judge, but also to fathers exercising the profession of judge. The matter was referred to the administrative authorities.

By a decision of 26 September 2011, the competent authority again rejected Mr Dalares's application on the ground that, pursuant to the third sentence of Article 53(3) of the Civil Service Code, he was not entitled to the leave provided for in Article 44(21) of the Code on the Status of Judges. Accordingly, although a father exercising the profession of judge is entitled, in principle, to parental leave to bring up a child, he could not benefit from it if his wife does not work or exercise any profession. In the present case, Mr. Dalares's wife, as he himself stated, was not in work.

Legal framework – relevant European law

Directive 96/34 on Parental Leave aimed to enable men and women to fulfill their professional and family responsibilities equally

Clause 1 of the Framework Agreement stated:

- '1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.
2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.'

Clause 2 of the Framework Agreement provided:

- '1. This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.
3. The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreement in the Member States, as long as the minimum requirements of this agreement are respected.'



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REPUBLIKA HRVATSKA
Pučki pravobranitelji

Directive 2006/54 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) in its preamble states:

(11) The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements, which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent ...

Article 1 of that Directive provides:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Article 2(1)(a) of that Directive contains the following definition:

‘For the purposes of this Directive, the following definitions shall apply:

- (a) direct discrimination”: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.’

Article 3 of the Directive, entitled ‘Positive action’, provides as follows:

‘Member States may maintain or adopt measures within the meaning of Article 141(4) [EC] with a view to ensuring full equality in practice between men and women in working life.’

Article 14 of Directive 2006/54, entitled ‘Prohibition of discrimination’, provides in paragraph 1(c):

‘There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

- (b) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 [EC].’

Legal framework – relevant national law

According to Greek law, a pregnant judge is entitled to leave before and after confinement in accordance with the provisions applicable to civil servants of the State. She is also granted nine months of paid childcare leave on request.

According to the national case law - in addition to the legislative text addressed to women - a corresponding claim to parental leave should in principle also be entitled to judges if they have become fathers.

The third sentence of Article 53(3) of the Civil Service Code, in the version applicable to the main proceedings (‘the Civil Service Code’), reads as follows:

‘... if the civil servant’s wife does not work or exercise any profession, the male spouse shall not be entitled to use the procedures available under paragraph 2 (including obtaining paid parental leave for childcare), unless it is considered that, due to a serious illness or injury, the wife is unable to meet the needs related to the upbringing of the child, as confirmed by a certificate issued by the Superior Medical Commission having jurisdiction over the particular civil servant’.

Questions

- (1) Do you think the Charter is applicable in this case?
 - a. Which facts are decisive for this question?
- (2) Which articles have to be considered?
 - a. Do you think there is a violation of the Charter?
 - b. If so: Can you think of any reasons for justification?
 - c. Could they be invoked successfully?