Key Issues: **Social Policy – Equal Treatment – Preliminary Ruling**

Case: **Hakelbracht, Vandenbon and Others v WTG Retail BVBA**

Reference: **Case C-404/18, CJEU (Third Chamber), 20 June 2019**

Legislation: **Directive 2006/54/EC**

Background

Ms Vandenbon was employed by WTG Retail as a manager of one of the clothes shops operated by that undertaking. In this capacity, Ms Vandenbon, on 24 June 2015, gave Ms Hakelbracht a job interview for a job as a salesperson from 1 August 2015. During that interview, Ms Hakelbracht stated that she was 3 months pregnant.

On 5 July 2015, Ms Vandenbon informed WTG Retail that she had found a suitable candidate in the person of Ms Hakelbracht. However, the human resources manager of that company informed her, by email of 6 July 2015, that it did not want to hire Ms Hakelbracht because of her pregnancy. By email dated 7 July 2015, Ms Vandenbon replied to WTG Retail that such a refusal to hire due to pregnancy was prohibited by law. However, on 12 August 2015, she learned that WTG Retail confirmed the refusal to recruit Ms Hakelbracht for that same reason.

On the same day, Ms Vandenbon informed Ms Hakelbracht that her candidacy had not been accepted because of her pregnancy. Ms Hakelbracht then contacted WTG Retail about her failure to be hired, stating that she was considering lodging a complaint against the company with the Institute for Equality of Men & Women ("the Institute"). As WTG Retail did not subsequently change its position, Ms Hakelbracht lodged such a complaint and informed the company thereof on 26 September 2015.

On 5 October 2015, Ms Vandenbon had a meeting with the head of WTG Retail concerning Ms Hakelbracht's failure to be hired, in which Ms Vandenbon was blamed for being the cause of the complaint lodged by Ms Hakelbracht.

On 12 November 2015, the Institute informed WTG Retail of the receipt of Ms Hakelbracht's complaint. By email sent to the Institute on 11 December 2015, WTG Retail formally challenged that it refused to hire Ms Hakelbracht because of her pregnancy.

On 6 April 2016, WTG Retail terminated Ms Vandenbon's contract of employment. On 13 April 2016, Ms Vandenbon lodged a complaint with the Institute. Having been questioned by Ms Vandenbon on the reasons for her dismissal, WTG Retail

communicated them to her in a detailed manner by letter of 10 June 2016. Those reasons included, in particular, defective performance of assigned duties, lack of respect for safety regulations, inadequate maintenance of the shop and lack of order. The trade union to which Ms Vandenbon was affiliated challenged those reasons.

Both Ms Hakelbracht and Ms Vandenbon gave WTG Retail formal notice, by letter of 10 October 2016, to pay them each a lump sum in damages amounting to 6 months' salary. Failing conclusion of an agreement on that point, they requested the Labour Court of Antwerp, Belgium to order that undertaking to pay those damages.

As is apparent from the order for reference, it is common ground in the main proceedings that Ms Hakelbracht was indeed the victim of direct discrimination on grounds of sex, which is why the referring court awarded her damages on that basis.

With regard to Ms Vandenbon's application, which is only relevant in the context of the present reference, Ms Vandenbon intends to avail herself of the protection against retaliation, guaranteed in Article 22(9) of the Belgian Gender law, claiming that she has appeared as a witness in the investigation of the complaint lodged by Ms Hakelbracht. However, according to the referring court, the requirements for the legal definition to be satisfied to that effect are not met, in the present case, as Ms Vandenbon cannot present any dated and signed documents relating to her witness statement.

The referring court asks, however, whether the protection provided for in Article 22(2) of the Belgian Gender law is not more restricted than that introduced in Article 24 of Directive 2006/54, in so far as such protection should not, in its view, be limited solely to official witnesses, but should also extend to persons who defend or support the person who has lodged a complaint of discrimination on grounds of sex.

In those circumstances, the Labour Court, Antwerp decided to stay the proceedings and refer a question to the Court of Justice of the EU (CJEU) for a preliminary ruling.

Consideration by CJEU

The fact of not hiring a candidate on the ground that she is pregnant must be considered to be less favourable treatment of a woman related to pregnancy, which constitutes, in accordance with Article 2(2)(c) of Directive 2006/54, direct discrimination on grounds of sex, as further supported by recital 23 of that directive.

As regards the protection introduced by the EU legislature in Article 24 of Directive 2006/54, it should be recalled that that provision requires Member States to adopt such measures as are necessary to protect employees, including those who are employees' representatives, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

It follows from the very terms of Article 24 that the category of employees who are entitled to the protection provided by it must be interpreted broadly and include all employees who may be subject to retaliatory measures taken by an employer in response to a complaint of discrimination on grounds of sex, without that category being otherwise delineated. Thus, it follows from the wording of Article 24 of Directive 2006/54 that it does not limit the protection solely to employees who have lodged complaints or their representatives, or to those who comply with certain formal requirements governing the recognition of a certain status, such as that of a witness, such as those provided for by the Belgian Gender law at issue in the main proceedings.

The CJEU held that:

> **Article 24 of Directive 2006/54/EC must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, under which, in a situation where a person who believes to be discriminated against on grounds of sex has lodged a complaint, an employee who has supported that person in that context is protected from retaliatory measures taken by the employer solely if that employee has intervened as a witness in the context of the investigation of that complaint and that that employee's witness statement satisfies formal requirements laid down by that legislation.**

Why is this decision important?

It is well established that a decision not to hire a candidate on the ground that she is pregnant constitutes direct discrimination in contravention of Directive 2006/54/EC. The protection afforded by the Directive to another employee who witnesses the discrimination or supports the affected employee is perhaps less well widely known. As noted in this judgment, the protection of other employees will be interpreted broadly and employers should seek legal advice in all such cases.

CLfE (6/2019)

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