



## Reports of Cases

### Case C-174/16

H.  
v  
Land Berlin

(Request for a preliminary ruling from the Verwaltungsgericht Berlin)

(Reference for a preliminary ruling — Social policy — Directive 2010/18/EU — Revised Framework Agreement on parental leave — Clause 5(1) and (2) — Return from parental leave — Right to return to the same job or an equivalent or similar job — Rights acquired or in the process of being acquired to be maintained as they stand — Civil servant of a *Land* promoted to civil servant on probation in a managerial post — Rules of that *Land* providing for the ending of the probationary period by operation of law and with no possibility of extension on expiry of a two-year period, even in the case of absence as a result of parental leave — Incompatibility — Consequences)

Summary — Judgment of the Court (Second Chamber), 7 September 2017

1. *Social policy — Male and female workers — Revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC — Directive 2010/18 — Right to return to the same job or an equivalent or similar job and the end of parental leave — Rights acquired or in the process of being acquired to be maintained as they stand — Rules of national law providing for the ending of a probationary period as a civil servant in a managerial post by operation of law and with no possibility of extension on expiry of a two-year period, even in the case of absence as a result of parental leave — Not permissible — Consequence — Non-application of those rules of national law — Verification a matter for the national court*

*(Council Directive 2010/18, Annex, clause 5, points 1 and 2)*

2. *Social policy — Male and female workers — Revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC — Directive 2010/18 — Worker's rights to return to the same job or, if that is not possible, to an equivalent or similar job, and to retain rights already acquired or in the process of being acquired at the start of his parental leave, at the end of that leave — Direct effect*

*(Council Directive 2010/18, Annex, clause 5, points 1 and 2)*

1. Clause 5(1) and (2) of the revised Framework Agreement on parental leave set out in the Annex to Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC must be interpreted as precluding rules of national law, such as those at issue in the main proceedings, which subject definitive promotion to a managerial post in the civil service to the condition that the candidate selected successfully carries out a prior two-year probationary period in that post, and by virtue of which, in a situation where such a candidate was on parental leave for most of that period and still is, that probationary period ends by operation of law after two years with

no possibility of extending it and the person concerned is consequently, on return from parental leave, reinstated in the post, at a lower level both in status and in terms of remuneration, occupied before that probationary period. The infringements of that clause cannot be justified by the objective pursued by the probationary period, which is to enable the assessment of suitability for the managerial post to be assigned permanently.

It is for the referring court, if necessary by disapplying the rules of national law at issue in the main proceedings, to ascertain, as required by Clause 5(1) of the revised Framework Agreement on parental leave set out in the Annex to Directive 2010/18, whether, in circumstances such as those of the main proceedings, it was not objectively possible for the *Land* concerned, in its capacity as an employer, to enable the person concerned to return to her post at the end of her parental leave and, if so, to ensure that she is assigned to an equivalent or similar post consistent with her employment contract or relationship, without that assignment of a post being made conditional upon holding a new selection procedure beforehand. It is also for that court to ensure that the person concerned may, at the end of parental leave, continue, in the post thus returned to or newly assigned, a probationary period under conditions that are in compliance with the requirements of Clause 5(2) of the revised Framework Agreement.

It is therefore sufficient, for the purposes of applying Clause 5(1) and (2) of the revised Framework Agreement, that, on the date when Ms H. took her parental leave, she had, following a selection procedure and her promotion, already been assigned as a civil servant on probation to the post concerned, therefore also enjoying remuneration corresponding to the higher grade associated with that post. The fact that, at the time when that assignment took place, the person concerned was on sick leave for reasons connected with her pregnancy, on the other hand, does not affect the fact that that new post had, from that moment, become hers, so that it must be held that when, subsequently, she took her parental leave, she already occupied that post and enjoyed any rights acquired or in the process of being acquired relating to it.

As regards, first, the rights conferred on the worker on parental leave in Clause 5(1) of the revised Framework Agreement, namely, to return, at the end of that leave, to the same job or, if that is not possible, to an equivalent or similar job consistent with his employment contract or employment relationship, it is apparent from the order for reference that Paragraph 97 of the LBG has the automatic consequence of precluding a civil servant in the situation of the applicant in the main proceedings from being able, at the end of her parental leave, to return to the post of civil servant on probation she occupied before taking that leave. As she was on parental leave during the authorised duration of the probationary period and, as a result, had neither exercised that post nor, consequently, been able to demonstrate her suitability to be appointed definitively to it, it is common ground that, on her return from leave, she could not return to that post.

That rule of national law also, as is apparent from the order for reference, has the automatic consequence of precluding the person concerned from being offered, at the end of her parental leave, a post of civil servant on probation equivalent or similar to that which she occupied before that leave, since the two-year period during which she was authorised to carry out a probationary period for the purposes of demonstrating her suitability to occupy a managerial post had elapsed and could not be extended.

As regards, secondly, the first sentence of Clause 5(2) of the revised Framework Agreement, providing for the maintenance of 'rights acquired or in the process of being acquired' as they stand, it should be recalled that that concept covers all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts (see, to that effect, judgment of 22 October 2009, *Meerts*, C-116/08, EU:C:2009:645, paragraph 43).

Such rights and benefits include those resulting from the provisions establishing the conditions of access to a higher level of the professional hierarchy, since they are derived from the employment relationship (see, to that effect, judgment of 18 November 2004, *Sass*, C-284/02, EU:C:2004:722, paragraph 31). That is, in the present case, the situation of the right, laid down in Paragraph 97 of the LBG, for a civil servant to obtain potential definitive promotion to a managerial post by carrying out, during the performance of the employment relationship in the service of the *Land* of Berlin and following a prior selection procedure, a probationary period of a certain duration.

(see paras 45, 48, 49, 51, 52, 63, 82, operative part1, 2)

2. Clause 5(1) and (2), first sentence, of the revised Framework Agreement assures, generally and in unequivocal terms, the worker's rights to return to the same job or, if that is not possible, to an equivalent or similar job, and to retain rights already acquired or in the process of being acquired at the start of his parental leave, at the end of that leave. The content of such provisions thus is unconditional and sufficiently precise to be relied on by an individual and applied by courts (see, by analogy, judgment of 16 July 2009, *Gómez-Limón Sánchez-Camacho*, C-537/07, EU:C:2009:462, paragraph 36).

(see para. 69)