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NEW DANISH SUPREME COURT DECISION ON PROTECTION OF FEMALE EMPLOYEES PRIOR TO FERTILITY TREATMENT

By Michael Møller Nielsen and Liw Christensen



In Denmark, the Equal Treatment Act provides protection for both female and male employees against unjustified discrimination based on gender. These rules are based on underlying EU law, specifically several directives now consolidated into EU Directive 2006/54/EC on equal treatment of men and women in matters of employment and occupation (the "Recast Directive").

The Recast Directive is complemented by Directive 92/85/EEC on the introduction of measures to improve safety and health at work for pregnant workers, workers who have recently given birth, or who are breastfeeding (the "Pregnancy Directive"). Together, these directives constitute a comprehensive EU legal framework implemented in Danish legislation through the Equal Treatment Act.

In parallel with the directive-based protection, the Danish Equal Treatment Act provides both general protection and special protection against discrimination relating to pregnancy, maternity leave, and adoption. Although the Danish Equal Treatment Act builds upon these directives, EU directive protections constitute minimum standards, allowing member states, including Denmark, to offer employees more extensive protections than those required by the directives.

Neither the Pregnancy Directive nor the Recast Directive explicitly address whether protection



related to pregnancy, maternity leave, and adoption should also cover individuals undergoing fertility treatments. However, the Danish Supreme Court has previously addressed this issue. The most recent ruling was issued on 15 April 2025.

Danish case law establishes broad protection for women either undergoing fertility treatment or having concrete plans to initiate such treatment – a level of protection exceeding the scope provided by the Pregnancy Directive and the Recast Directive. In employment relationships the protection is under all circumstances contingent on the employer knowing that the employee is pregnant, is undergoing treatment or similar.

EU minimum protection and the Mayr case

One of the landmark cases clarifying EU-level protection against dismissal related to fertility treatments is *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* (C-506/06).

Sabine Mayr was employed at a bakery in Austria when she was dismissed by telephone during sick leave due to fertility treatment. At the time of dismissal, she had undergone egg retrieval, and the eggs had been fertilised, but implantation in the womb had not yet occurred. Mayr argued against her employer that she should already benefit from the special protection against dismissal afforded to pregnant employees, even though she was not objectively pregnant at the time of dismissal.

The European Court of Justice ruled that protection under the Pregnancy Directive commences only when pregnancy can be objectively confirmed, which means, in this case, that pregnancy objectively exists only upon implantation of the fertilised eggs in the womb.

Consequently, the Court determined that Mayr was not protected under the Pregnancy Directive at the time of her dismissal. However, the Court emphasised that dismissing women undergoing fertility treatment could constitute gender discrimination under the Equal Treatment Directive (subsequently consolidated with other directives into the Recast Directive).

The Mayr case, therefore, is fundamental in determining when protection against dismissal under EU directives applies in relation to fertility treatments, highlighting a significant threshold at which female employees obtain pregnancy-related dismissal protection under EU law.

An actualised possibility of becoming pregnant

Danish courts have for long recognised the close correlation between protections for pregnancy and fertility treatment.

Already in 2003, the Danish Supreme Court established that the protection under Section 9 of the Equal Treatment Act regarding pregnancy, maternity leave, and adoption also includes women attempting to get pregnant through fertility treatment, if such provided an actualised possibility of becoming pregnant.

The Danish Supreme Court thus adopted a broad interpretation of pregnancy-related protections. Thus, fertility treatment must involve an actualised possibility of pregnancy, clearly distinguishing Danish case law from protections available during preliminary medical evaluations preceding fertility treatment. Such preliminary assessments are generally not covered under this specific protection but may be protected by Section 4 of the Equal Treatment Act, which prohibits gender-based discrimination in employment conditions.





The recent Supreme Court ruling exemplifies how Section 4 protection also safeguards women before the initiation of fertility treatments in a manner like Section 9 protections.

Recent Danish Supreme Court decision of 15 April 2025

In this case (case number BS-28980/2024-HJR), the Supreme Court examined whether an employee who had planned fertility treatment but had not yet initiated hormonal stimulation or egg retrieval was protected under Section 9 of the Equal Treatment Act.

The Supreme Court concluded that Section 9, protecting against dismissal due to pregnancy or ongoing fertility treatment, did not apply since the employee's first treatment at the fertility clinic occurred after the dismissal. Instead, Section 4, prohibiting gender discrimination, was applied.

The Supreme Court emphasised that the dismissal occurred without any written justification and immediately after the

employee informed her employer of her impending fertility treatment. Consequently, the burden shifted to the employer to demonstrate the dismissal was not based on the employee's plans to become pregnant and start fertility treatment. As the employer failed to meet this burden of proof, the dismissal was deemed unlawful under Section 4 – discrimination due to gender.

On the item of measuring out compensation, the Supreme Court declared compensation should reflect the severity of the violation. The court specifically noted the compensation levels applicable in cases involving dismissal due to pregnancy or maternity leave under Section 9. Additionally, the Supreme Court majority found the timing of dismissal – before or after initiating fertility treatment – irrelevant in assessing the violation's severity. Since the dismissal occurred shortly after the employee's permanent appointment, compensation was set at six months' salary – which given the short period of time of employment (less than one year), aligns with the level of compensation for pregnancy related discrimination in employment.

This decision illustrates that although Section 9 protections require an actual start of fertility treatments, the general equal treatment principle under Section 4 provides broad protection against dismissals potentially motivated by an employee's personal fertility plans.

Therefore, Danish case law repeatedly affirms broader protection for women undergoing fertility treatments than provided by minimum EU standards. The level of compensation is, however, potentially setting the standard for future cases on direct or indirect gender discrimination.



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