

**MORAIS BISMARQUE GASPAR Ana Gloria**

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**From:** [REDACTED]  
**Sent:** 10 February 2014 16:14  
**To:** HIRSCH-ZIEMBINSKA Marta  
**Subject:** Additional documents  
**Attachments:** Request for maternity leave answer and appeal.pdf; ReplytoHoM2013.webarchive; HoM'sreply to appeal.pdf

Dear Ms Kirch-Ziembinska,

following my previous communication I am attaching some additional documents for your easy reference and better understanding of my specific case. In the documents enclosed you will find the following:

- 1) my request for maternity leave as per polish labour law - attachment 1
- 2) rejection fo my request by Human Resources - attachment 1
- 3) my appeal to Head of Mission - attachment 1
- 4) reply from Head of Mission denying my rights to maternity entitlements- attachment 2
- 5) my response to Head of Mission's denial

Please be informed that the denial of my maternity leave entitlement and non-contribution to the pension fund are not currently under any legal litigation. Hence I would kindly ask for your opinion on the course of action take by Head of Mission. Should you have them already delivered to your office by Ms Nedea please accept my apology for re-sending them.

Looking forward to hearing from you.

Kind regards,  
[REDACTED]

**From:** [REDACTED]  
**Sent:** 01 August 2013 17:52  
**To:** Bernd Borchardt  
**Cc:** Joelle Vachter; Declan O'Mahony  
**Subject:** RE: Request for re-calculation of my maternity leave

Dear Head of Mission,

In accordance with Article 19 of my employment contract, I hereby submit a formal APPEAL to the decision taken by EULEX Head of Human Resources of non-granting my request for recalculation of my maternity leave.

In this regards, Article 23.3 of the my contract establishes that *"in case of any conflict between the provisions of this contract and its annexes, the order of precedence is established as follows, the Commission Communication, the present contract, OPLAN and Code of Conduct, Annex 1, Annex 2 and the high risk insurance policy"*.

There is a clear conflict between the provions of the OPLAN -SOP and the European Commission Communication which defines the *"International Staff: EU nationals and citizens of third countries who are employed outside of EU by a CFSP Special Adviser through an employment contract, and who are subject to the labour law of their permanent (fiscal) residency and remunerated by expenditure charged under CFSP appropriations "*

By applying the above cited article 23.3, the EC Communication supersedes the OPLAN and relevant SOP and therefore the polish labor law, being Warsaw my permanent residence, has to be applied.

I have indicated in my request to Human Resources that very recently the regulation has changed with regard to the length of maternity leave by the new legislation J.L. No 675; Art 180/1821/1821A

Based on the above, I kindly **REQUEST** that, You grant my appeal and instruct EULEX Human Resources to recalculate and extend it for another 6 weeks with the possibility, under certain circumstances, of further 26 weeks extension.

Kind regards,

[REDACTED]

**From:** Human Resources [REDACTED]  
**Date:** 1 August 2013 13:52:04 CEST  
**To:** [REDACTED]  
**Cc:** Bernd Borchardt [REDACTED], Human Resources  
[REDACTED]  
**Subject:** RE: Request for re-calculation of my maternity leave

Dear Ms. [REDACTED]

EULEX can offer entitlements foreseen by the Annex D of OPLAN (SOP) only. The rule on duration of Maternity Leave is as follows.

„Article 10.15

Maternity leave (ML) The entitlement for Maternity Leave (ML) is sixteen weeks.”

Additionally, Article 15.5 of your employment contract makes reference to the abovementioned entitlement as well.

Consequently, your request cannot be fulfilled.

Thank you for your understanding and cooperation.

Best regards,

**Human Resources**  
**EULEX Kosovo**

**From:** [REDACTED]  
**Sent:** Tuesday, 30 July 2013 21:34  
**To:** Human Resources  
**Cc:** Bernd Borchardt  
**Subject:** Request for re-calculation of my maternity leave

Dear Human Resources,

According to my contract, I am subject to the labour law of my country of permanent residence which in my case is Poland. Since very recently the law has changed with regard to the length of maternity law I would kindly ask you to re-calculate it following the new legislation (J.L. No 675; Art 180/1821/1821A) and extend it for another 6 weeks with the possibility of further 26 weeks extension.

Kind regards,

[REDACTED]

Dear Head of Mission,

I am glad to observe that, honoring my contract and the EC Communication, it is clear to both of us that the Polish labor law is the applicable law to my employment contract and that any dispute has to be, consequently, discussed following its relevant provisions related to the case.

Regrettably, **it becomes apparent that you did not receive the proficient legal opinion in this matter**. In this regard I can only express my frustration. As you can understand, this is extremely important moment of my life, both professionally and personally which can determine my future career and well-being of my just born son. I would, therefore, respectfully ask you to request your services to give more attention to the matter, especially when your decisions are directly affecting my fundamental rights.

I would like to bring to your attention that Good Administration as a right of European Union Citizens is enshrined in the EU Charter of Fundamental Rights (CFR), which, after the entry into force of the Treaty of Lisbon, has the same legal value as the Treaties. *According to Article 41 par 1 (CFR) "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union".*

I have been working in EULEX from the very beginning for 5 years, making significant contribution to positive image of the Mission. I have conducted my duties always with high commitment and loyalty towards the Mission, facing many challenges with an enthusiasm and positive attitude. The office itself was organized by me from scratch with very limited guidance and assistance. This effort and determination resulted in many successful visits and events which were highly appreciated by the VIP visitors and recognized by your predecessors. I strongly believe, considering the above, that I deserve better treatment in handling my matter.

Allow me to kindly share an excerpt from the extensive legal analysis issued by a reputable Polish lawyer, Ms Alicja Swiczewska, Legal Counsel No. WA — 8458, expert in European Union Labor Law who I have recently hired to handle my case:

*"...5. Detailed legal analysis and possible claims under Polish labor law having drawn the preliminary conclusions on the law applicable to both contractual and non-contractual obligations, it is now necessary to outline the detailed legal analysis and possible claims under Polish labor law.*

*There are two key acts of Polish labor law that shall apply in the Client's case in question. The first one is the Labor Code enacted on June 26, 1974 (consolidated text published in Journal of Laws as of 1998, No. 21, item 94, as amended; hereinafter referred to as LC"). The second one is the act on specific terms and conditions for terminating employment relationships with employees for reasons not related to the employees, enacted on March 13<sup>th</sup>, 2000 (Journal of Laws No. 90, item 844, as amended; hereinafter referred to as the 2000 Act")*

*“...General rule prohibiting exercising one’s rights contrary to their socio economic objective principles of community co-existence.*

*Art.8LC*

*No one is allowed to exercise any rights in the manner that would be contrary to their socio economic objective or the principles of community co-existence. Any such act or omission by a person exercising their right is not considered an exercise of that right and is not protected.*

*The Polish Supreme Court in its decision as of January 12th, 2011 (No. II PK 89/10 highlighted that the disposition of art. 8 LC enables a court to apprise an extent to which in a certain examined case, at issues where an act or omission by a person exercising their right is not considered as an exercise of that right and is not protected.*

*An application of this regulation is inseparably connected to the whole plot of circumstances in the case in question.*

*General rule providing that in an event that the provisions of the employment contract are less favorable for the employee than the provisions of labor law, the latter shall prevail.*

*Art. 18LC*

*1. The provisions of employment contracts and other acts on the basis of which an employment relationship is established may not disadvantage an employee more than the provisions of labor law.*

*2. Any provisions of the contracts and acts defined in that are less favorable to an employee than the provisions of labor law are invalid; the appropriate provisions of labour Law shall apply instead.*

*3. The provisions of employment contracts and other acts on the basis of which an employment relationship is established and which violate the principle of equal treatment in employment are null and void; the appropriate provisions of labor law shall apply instead, and if there are no such provisions, then the appropriate provisions of a non-discriminator character shall apply instead.*

*According to art. 18 LC, an article 23.3 of the employment contract (which provides that in case of any conflict between the provisions of this contract and its annexes, the order of precedence is established as follows: the Commission Communication, the present contract, OPLAN and Code of Conduct, Annex 1 [Job description], Annex 2 [Beneficiary form] and the high risk insurance policy”) should be interpreted by taking into account that Polish labor law shall prevail over every other provision binding parties, resulting out of their will, including OPLAN...”*

*“...B. Consequences of conclusion of a third contract for a definite period of time*

*According to Polish labor law, conclusion of a third contract for a definite period of time implies certain legal consequences, that are determined upon art. 251 LC, as follows:*

*Art. 251 LC*

*1. The conclusion of a subsequent employment contract for a definite period of time has the equivalent legal effects as the conclusion of an employment contract for an indefinite period*

*of time, if the parties had previously concluded two employment contracts for a definite period of time in succession, where the interval between the termination of the preceding and the establishment of the subsequent employment contract was no longer than 1 month.*

**Please be informed, that the conditions set forth in art. 251 1 LC are met in the Client's case in question. Since the third consecutive contract was concluded on 15<sup>th</sup> June, 2010, from that moment on, the employment relationship for an indefinite period of time between the Client and the HoM has arisen..."**

***"...C. Dismissal of a woman who is pregnant and on sick leave or on maternity leave***

*Please be informed, that Polish law is very clear in respect of dismissal of a woman who is pregnant and on sick leave or on maternity leave. According to Polish law, such acts are contrary to the law. Therefore a woman is entitled to demand reinstatement. Relevant regulation regarding the aforementioned issues are set forth in the art. 45 and art. 177 LC as follows:*

*Art. 45 LC*

*1. If the labor court determines that the termination of an employment contract concluded for an indefinite period of time is unjustified or violates the provisions of law on serving Notice on employees, the labor court at the demand of an employee will declare the notice of termination ineffective, and if the contract has already been terminated - will decide on reinstating the employee in his job on the previous conditions...*

*Art. 177 LC*

**1. An employer may not terminate an employment contract with a female employee during her pregnancy or while on maternity leave, with or without notice, unless there are reasons justifying termination without notice through her fault, and an enterprise trade union representing the employee has consented to the termination of the employment contract. The termination of an employment contract with notice by an employer during pregnancy or while on maternity leave may occur only in the event of the declaration of bankruptcy or the liquidation of the employer..."**

*Furthermore it shall be mentioned, that Labor Code provides appropriate application of the provisions of the Civil Code.*

*Art. 300 LC*

*In cases not regulated by the provisions of labor law, the provisions of the Civil Code apply accordingly to an employment relationship, provided they are not contrary to the principles of labor law.*

*An unlawful act is invalid (null and void) according to art. 58 I of the Civil Code. The same sanction is foreseen when an act is contrary to the principles of community life.*

*Art. 58 of the Civil Code*

**1. A legal act which is contrary to the law or which is designed to circumvent the law is invalid unless a relevant regulation envisages a deferent effect in particular that the invalid**

*provisions of the legal act be replaced with relevant provisions of the law.*

*2. A legal act contrary to the principles of community life is invalid*

*Consequently, an act of terminating a contract with a female employee during her pregnancy or while on maternity leave is to be considered null and void..."*

Based on the above professional analysis it is very difficult for me to understand your statement of "EULEX fulfilled all its obligations under the contract and all its actions are in full compliance with the Polish legislation"

Please be informed that I am registered in ZUS (the polish public social security system as you rightly point out in your letter) with the number 5211178080. Honoring my contract, I have been regularly contributing to the system with my corresponding proportion for the last five years.

As per your suggestion, I am determined to request from the institution the corresponding financial support and entitlements.

In order, therefore, to apply for the above referred financial support and entitlements, **I would kindly ask you to confirm before the end of the week that you have contributed with your mandatory proportion to the polish social security structures or to any other EU public social security institution.**

Finally I would like to reiterate my absolute disposition to find an amicable solution to our dispute. However the result of any discussion has to necessarily respect the fundamental rights that any EU citizen is entitled to and which are extensively regulated in any modern Rule of Law State.

Sincerely





Reference: 2013-OHOM-0109

Pristina, 29 August 2013

Dear Ms [REDACTED]

Reference is made to your timely filed appeal against the decision of the Human Resources Office of EULEX regarding the extension of your maternity leave entitlements in accordance with the Polish legislation.

After individual and combined evaluation of the facts I wish to inform you that your appeal is rejected.

Justification:

You have pointed out in your appeal that pursuant to art 23.2 of your employment contract, in accordance with the Commission Communication the Polish labour law should be applicable to your employment. As per paragraph 4.a. of the Commission Communication the national tax and social security laws govern your employment with EULEX.

It is a well accepted practice and foreseen by the relevant EU Directive that the pregnant women and women on maternity leave enjoy special protection of their employment. However, all these legislative acts – including those one at EU level – only refer to indefinite labour relations, but they do not cover fixed term contracts such as yours which do consequently not require such extra protection of labour, since the parties already agreed that the relation will eventually come to an end at a predefined time. Moreover, there is no obligation on the employer's side to renew any such short term contract even if the position still exists. In your case, during your maternity leave which is granted by the OPLAN and the relevant SOP irrespective of the short term contractual practice, your position – amongst others – was deleted from the organization chart; consequently the position you held no longer exists. Nevertheless EULEX respected the maternity entitlements and notified you that your employment is extended until the foreseen end of your maternity leave and other leave entitlements. Consequently EULEX fulfilled all its obligations under the contract and all its actions are in full compliance with the Polish legislation.

As it is detailed above EULEX never terminated your employment relationship, on the other hand offered a contract with full salary and other entitlements for the period of your maternity leave granted by your contract.

Further I wish to draw your attention to the fact that under the applicable Polish legislation the financial benefits arising from the maternity entitlements are financed by the local state social insurance (ZUS). Therefore if you have fully complied with your obligations towards the Polish social security structures, this should result that you are entitled to receive the financial support from those structures.

Yours Sincerely,

Bernd Borchardt  
Head of Mission  
EULEX Kosovo

