EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/21 The attitude/behaviour of an employer towards an employee who partially resumes work after long-term incapacity can constitute harassment and discrimination (BE)

<p>The Belgian Labour Court decided in this case that the attitude/behaviour of an employer towards an employee constitutes harassment and discrimination, as the behaviour was such that the employee could have had the impression that he could lose his job because of his state of health. The employee resumed work after long-term incapacity owing to heart disease, but only on a part-time basis.<lb/>The Court considered that the successive actions of the employer towards his employee were aimed at ending his employment rather than actively promoting reintegration. Such behaviour, on the facts, could be considered as harassment and discrimination.<lb/>Moreover, the Court specified that the health of the employee, who had partially resumed work after being off sick for heart disease, could be regarded as a disability in accordance with EU Directive 2000/78. The Court explicitly referred to the ECJ HK Danmark case.</p>

Summary

The Belgian Labour Court decided in this case that the attitude/behaviour of an employer towards an employee constitutes harassment and discrimination, as the behaviour was such

that the employee could have had the impression that he could lose his job because of his state of health. The employee resumed work after long-term incapacity owing to heart disease, but only on a part-time basis.

The Court considered that the successive actions of the employer towards his employee were aimed at ending his employment rather than actively promoting reintegration. Such behaviour, on the facts, could be considered as harassment and discrimination.

Moreover, the Court specified that the health of the employee, who had partially resumed work after being off sick for heart disease, could be regarded as a disability in accordance with EU Directive 2000/78. The Court explicitly referred to the ECJ HK Danmark case.

Facts

Aldi is a well-known supermarket chain in Belgium. The plaintiff in this case, Mr V, had been in Aldi's employment since 1990. He worked as a store assistant. His duties included working at the cash desk, which was physically light work, and performing physically more demanding 'general' duties. Although the judgment is not explicit on this point, it would seem that he was originally employed on a full time basis.

In 2006, the plaintiff suffered a heart ailment. After several months of medical leave

Pursuant to Belgian law, the employer continued to pay the employee's full salary for one month, following which the employee received sickness benefits from the Public Health Insurance Authority.

work on two consecutive days; or
do heavy physical work.

Accordingly, the parties agreed that the plaintiff would work on Wednesdays and Saturdays and that his job would be limited to work at the cash desk to avoid heavy physical effort. In 2010, the parties agreed to change the work days to Tuesdays and Thursdays.

In October 2012, the plaintiff's manager informed him that colleagues were complaining about him. In particular, the complaint was that the plaintiff did not have to work on Saturday, the busiest day of the week, as there was not much cashier work on Tuesdays and Thursdays, with the result that his colleagues were doing the heavier physical work plus the Saturday cashier work. This complaint led the plaintiff to call in sick. The company doctor examined him and reported that he was permanently unfit for heavy physical work but that work as a cashier was still a possibility. Hence, the plaintiff was not unable to resume work.

On 4 December 2012, Aldi's management invited the plaintiff to a meeting at its headquarters. Aldi mentioned that it wanted to discuss a 'settlement' with the employee. As Aldi did not mention more details about the proposed settlement, the employee did not go to this meeting. Subsequently, there ensued a correspondence between the parties' lawyers. Aldi suggested a return to work on Saturday.After this, the employee (still employed by Aldi) started proceedings against his employer and stated that the behaviour of Aldi was in violation of the Discrimination Act and the Act on Well-being at Work. In particular, he argued that the successive actions of Aldi during recent months qualified as harassment and direct discrimination.

The employee claimed several sums, including payment of an amount equal to six months' salary, as per the Discrimination Act, which provides that victims of discrimination are eligible for compensation at the fixed rate of six months' salary.

Judgment

The judge in the Labour Tribunal, disregarding the advice of the public prosecutor

In labour law cases, where discrimination or violation of the Act on Well-being is alleged, the public prosecutor is informed and invited to submit his opinion.

the plaintiff's manager had reproached him on account of his work schedule, which caused him to lose self-confidence and social contacts;
the plaintiff's physician had found it necessary to refer him to a psychiatrist;
management had cast doubt on his performance as a store assistant;
Aldi had caused him to worry that he might be asked to do physically demanding work or might even lose his job on account of his impairment.

Based on these factors, the Court was of the opinion that Aldi had harassed the plaintiff because of his medical condition and that, as that condition qualified as a disability within the meaning of Directive 2000/78 (the Court referred explicitly to the HK Danmark case in which the ECJ provided a definition of disability), Aldi had breached the Discrimination Act. Accordingly, the Labour Court ordered Aldi to pay the plaintiff an untaxed indemnity equal to six times his monthly salary of € 1,085.25 = € 6,511.50.

Commentary

This case is unusual for several reasons.

First, the employee was still employed at the time he filed proceedings.

Secondly, it is the first case law in which a Belgian Labour Court has applied the HK Danmark case to another case.

Generally, employers in Belgium are not legally obliged to put together a specific 'return-to-work policy' or to provide any specific reintegration programme for employees with long-term incapacity. Employers sometimes opt for an 'exit-strategy' or settlement scenario for such employees. This judgment shows that employers should pay careful attention to how they deal with the reintegration of employees with long-term incapacity.

Currently, there is a public debate about reform in this area. The intention of the government is to help certain long-term absent employees to resume work sooner. A compulsory reintegration plan for both employer and employee would be part of the reform.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes, BarentsKrans):

- The situation described in this case report will be familiar to most Dutch practitioners of employment law. Put crudely, the problem underlying Dutch law on the "re-integration" of sick or convalescing employees is this. If an excellent key employee calls in sick or sustains an accident, the employer will do all it can to help him or her recover and get back on the job, where necessary allowing the employee to work part time and/or with an easier work schedule and/or in an adjusted position, etc. The employer does this voluntarily, in its own interest. No law is necessary. If an employer does not do all it can to help an employee re-integrate, that is probably because the employer is not keen on keeping the employee on the payroll. Dutch law punishes such employers. Perversely, it obligates employers to make an effort to help individuals, from whom they would prefer to separate (which is impossible during the first two years of sickness), to return to work as fast as possible.

- The employee in this Belgian case was unable to work, not because of any physical or physiological impairment, but because his colleagues and his manager were not nice to him. This is also a situation that every Dutch employment lawyer will recognise. It is often referred to as "situational" disability. Occupational doctors struggle to distinguish between cases where such "situational" disability is to be qualified as a medical impairment and cases where the inability to perform one's job is of a non-medical nature. The distinction may be subtle from a doctor's point of view, the legal consequences of the distinction are sharp. The number of disputes in this area has ballooned in recent years.

Subject: Disability discrimination

Parties: V. – v – Aldi NV

Court: Arbeidshof Brussel (Labour Court of Brussels)

Date: 17 November 2015

Publication: Journal des tribunaux du travail (JTT.), nr. 1240, pages 81-83

Creator: Arbeidshof Brussel (Labour Court of Brussels)
Verdict at: 2015-11-17
Case number: 2016/21