EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/26 Dismissal of an employee with a disabled child was not discriminatory by association (DK)

<p>It was neither direct nor indirect discrimination when a municipality dismissed a childminder with a disabled child, since the decision to dismiss was based on the interests of safeguarding children in the municipality's childminding services, by not taking them out of their usual environment and placing them with a childminder they did not know.</p>

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Facts

Under the Danish Anti-Discrimination Act, employers are not allowed to discriminate against employees on grounds of disability. With the Coleman decision (C-303/06) from the European Court of Justice (ECJ), the protection against direct discrimination due to disability was expanded to also include discrimination on grounds of a child's disability – if the employee is the main carer for the disabled child.

In this case, the Danish Supreme Court was asked to decide if a childminder's child was disabled within the meaning of the Danish Anti-Discrimination Act and, if so, if the dismissal of the childminder was discrimination within the meaning of the Anti-Discrimination Act.

The case concerned a childminder who worked for a municipality and had a son with

Asperger's syndrome and various other conditions. Due to her son's situation, the childminder applied for leave of absence to care for him. The leave was granted. As a result of declining birth rates, the municipality decided to downscale its childminding services – and the childminder was affected by this, being dismissed 15 months into her leave.

The childminder believed that she had been dismissed because of her son's disability and therefore issued proceedings against her employer, claiming compensation. The employer did not agree with the childminder, arguing that she had been dismissed because she was the most expendable employee based on an objective assessment of operational needs. One element in this assessment was that dismissing a childminder on leave instead of a childminder in active service would have the least adverse effect on the children in the municipality's care. If other action were taken, those children would have to be moved to a childminder they did not know. Further, it was yet to be seen when the childminder would be able to resume work.

Judgment

A unanimous bench ruled in favour of the employer.

The Court held that the son was disabled within the meaning of the Anti-Discrimination Act, because he suffered from Asperger's syndrome and had considerable functional limitations.

The next question before the Court was whether the employer had discriminated directly against the childminder on grounds of the son's disability. The Court held that the dismissal did not constitute direct |discrimination as the reason for the dismissal was not the son's disability, but the childminder's long-term absence.

The last question before the Court was whether the employer had discriminated indirectly against the childminder in its handling of the matter. On this question the employer took the view that indirect discrimination had not taken place – and, in any event, indirect discrimination by association was not protected under the Anti-Discrimination Act. The Court held that the decision to safeguard the children's interests by not taking them out of their usual environment and placing them with a childminder they did not know was reasonable. The decision to select for dismissal a childminder who had been absent from work for a long period of time was an appropriate and necessary decision in order to safeguard the children's interests and provide a secure and stable environment for them.

The Court found reason to note – despite its finding that the childminder had not been directly or indirectly discriminated against – that it is not yet settled under EU law whether an employee can rely on Coleman in matters concerning indirect discrimination and that this

legal question will have to await further case law from the ECJ.

Commentary

The decision by the Supreme Court is mainly interesting because of the reference made to the legal question of whether or not indirect discrimination can be by association. The Court referred to the Chez Razpredelenie decision (C-83/14) (discussed below) when noting that the question is not settled under EU law. Thus, it is at least fair to say that the Court is not convinced that discrimination by association is protected under the Anti-Discrimination Act – and the underlying Directive 2000/78 – when the discrimination in question is indirect.

Some lawyers have argued that Chez Razpredelenie is to be interpreted as protecting indirect discrimination by association. We disagree with this view. In Chez Razpredelenie, the plaintiff suffered less favourable treatment in the same way as the Roma community which mainly populated the area in question. The ECJ reasoned that in such a situation, it is necessary to ensure that a citizen enjoys the same level of protection as people belonging to an ethnic minority – even though the citizen in question did not belong to that ethnic minority.

In Coleman, the employee was the mother of a disabled child and it was this association that acted as the reasoning behind the protection against discrimination. However, the mother and the disabled child are not in the same situation, as only the mother performs work. On that basis, the ECJ's decision in Coleman established that there was no legal ground for expanding the protection to cover indirect discrimination, including any obligation to accommodate a disabled employee.

Therefore, there is a notable difference in the facts in Coleman and Chez Razpredelenie. We are not convinced that Chez Razpredelenie should be construed as offering protection against indirect discrimination by association for an employee due to a child's disability. But we can expect that the question will be referred to the ECJ in a future case. In the case at hand, however, there was no reason to do so, as the Court did not find that the childminder had been discriminated directly or indirectly.

Subject: Associative disability discrimination

Parties: Municipality of Hørsholm – v – FOA representing A

Court: Højesteret (Supreme Court)

Date: 27 April 2016

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