SUMMARY

2015/28 Supreme Court follows up on ECJ’s 2013 judgment in Ring and Werge (DK)

<p>On 23 June 2015, the Danish Supreme Court followed up on the judgment delivered by the Court of Justice of the EU (the ‘ECJ’) in joined cases C-335/11 (Ring) and C-337/11 (Werge). The issue was whether section 5(2) of the Danish Salaried Employees Act (‘DSE’) was compatible with Equal Treatment Directive 2000/78 (the ‘Directive’). Section 5(2) DSE allows an employer, in certain cases, to dismiss an employee, who has been absent from work for medical reasons for 120 days within a 12 month period, with a reduced period of notice. Can an employer apply this provision even where the employee’s absence was on account of disability? The ECJ replied affirmatively, but only if section 5(2) is objectively justified, and even then only if the employee’s absence is not attributable to failure by the employer to make reasonable adjustments. The Danish Supreme Court has now, in the national proceedings initiated by Ms Werge, found section 5(2) DSE to be objectively justified. Given that Ms Werge’s employer was unaware that her absence was caused by a disability (given that she proved that it was a disability but the employer was unaware of the relevant facts), it had no reason to make adjustments</p>

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Facts

Under the DSE, employers may dismiss an employee with one to six months' notice, depending on the employee's seniority (provided that the employer and employee have not agreed on a longer notice period), regardless whether the employee is on sick leave. However, the employee may claim compensation for unfair dismissal if the termination is considered to be without just cause. A dismissal is without just cause if it is not reasonably justified by the employee's conduct, for example, poor performance or misconduct, or by the circumstances of the company, for example, restructuring.

Under Section 5(2) DSE, the employer and the salaried employee may agree in writing that if the employee during a period of 12 consecutive months has received full salary during sickness for a total period of 120 days, the employer may terminate the employment giving one month's notice (a 'Reduced Notice Period') regardless of the notice period otherwise provided for in the DSE or agreed between the employer and the employee. Under Danish case law, the employee is not entitled to compensation for unfair dismissal if the employee has been dismissed in accordance with section 5(2) DSE, other than in special circumstances.

The Danish Act on Discrimination on the Labour Market (the 'DLM') prohibits direct and indirect discrimination on grounds of disability. Consequently, the employer may not discriminate on grounds of disability in connection with the dismissal of an employee, and the employer is obliged to take appropriate measures in order to ensure that a disabled employee

can obtain or continue his or her employment, unless such measures impose a disproportionate burden on the employer. The DLM, including the definition of the term disability, is based on the Directive.

Ms Werge, a salaried employee, and her employer had agreed that DSE Section 5(2) would apply to their contract of employment. At the turn of 2003/2004, Ms Werge was absent from work for three weeks for whiplash injuries suffered in a traffic accident. Subsequently, Ms Werge returned to work full-time for about ten months. In the beginning of November 2004, however, Ms Werge was once again absent from work. At first on part-time sick leave, but from the middle of January 2005, on full-time sick leave. On 21 April 2005, Ms Werge was dismissed with reference to section 5(2) DSE. Accordingly, she was dismissed with a Reduced Notice Period.

After the traffic accident and during Ms Werge's sick leave, a number of medical certificates were obtained from GPs and medical specialists, including a certificate issued by a medical specialist on 4 April 2005. However, the employer never received a copy of this certificate.

Ms Werge, who claimed that she had a disability, filed a lawsuit against the employer with the Danish Maritime and Commercial Court (*Sø – og Handelsretten*). She claimed (i) salary for the balance of her normal notice period (four months), including pension and holiday allowance, amounting to DKK 108,371.25 and (ii) compensation equalling to 18 months' salary including pension amounting to DKK 438,553.44. Further, Ms Werge argued that any days of sickness due to her disability should be excluded from the 120 days of sickness provided in section 5(2) DSE. Moreover, Ms Werge argued that she had been discriminated against in that the employer had not taken appropriate measures to ensure that she could continue her employment with the employer, such as allowing her to work part time or on reduced hours.

ECJ Judgment

The Danish Maritime and Commercial Court, as the court of first instance, requested the ECJ to give a preliminary ruling on the concept of disability under the Directive. The ECJ was also requested to establish whether the Directive precludes the application of a provision of national law under which an employer is entitled to dismiss an employee with a reduced notice period where the employee has received full salary during periods of illness for a total of 120 days within a period of 12 consecutive months; where:

a. the absence is caused by the disability, or

b. the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work.

In its judgment of 11 April 2013 in the joined cases C-335/11 and C-337/11 (HK Danmark), the ECJ clarified the concept of disability. In addition, the ECJ held as follows:

"Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess".

Judgment

Based on the ECJ judgment and the facts of the particular case, the Danish Maritime and Commercial Court concluded that Ms Werge had a disability, and that she had been directly discriminated against in connection with the dismissal under section 5(2)DSE, as the employer had not taken the appropriate measures to accommodate her needs. Ms Werge was awarded DKK 400,740.21, corresponding to salary for the balance of her normal notice period and the Reduced Notice Period, (including pension and holiday allowance), as well as a compensation corresponding to 12 months' salary (including pension) based on direct discrimination on grounds of disability. The employer appealed the judgment to the Danish Supreme Court.

On 23 June 2015, the Danish Supreme Court overruled the Danish Maritime and Commercial Court's judgment. It held that it was for Ms Werge to prove that her illness had resulted in a disability at the time of the dismissal. Further, the Supreme Court noted that, based on the ECJ's definition of the concept of disability, for the purpose of determining whether an employee is disabled it is not relevant whether the employer knew or should have known of the disability.

The Supreme Court further ruled that for the employer to be obliged to take appropriate measures, it was a prerequisite that the employer knew or should have known Ms Werge had a disability.

Based on the course of the case, the Supreme Court concluded that the employer at the time of the dismissal did not know and had no reason to have known that Ms Werge's illness had resulted in a disability. Accordingly, the employer had not failed to perform its obligation to take appropriate measures.

As for the compatibility of section 5(2) DSE with the Directive, the Danish Supreme Court noted that one of the purposes of section 5(2) DSE is to protect employees - and it does so in two ways.

First, it encourages employers not to dismiss an employee immediately after he or she calls in sick. In the event the employment contract lacks a provision of the kind permitted under section 5(2) DSE, an employer that dismisses an employee on account of sickness must observe the statutory or (if longer) the contractual notice period. Moreover, there is a risk that the employee will start unfair dismissal proceedings and be awarded compensation. In the event the employment contract includes a provision of the kind permitted under section 5(2) DSE, the employer is more likely to wait before dismissing the employee. The latter may return to work sooner than expected and, if this does not happen within 120 days, the employer is free to dismiss the employee giving no more than one month's notice and without there being a risk of an unfair dismissal case.

Second, the existence of section 5(2) DSE should make employers more likely to hire employees who are at increased risk of sickness. Clearly, this aim of section 5(2) DSE is legitimate. Moreover, the means to achieve the aim are appropriate. In addition, with reference to the way the Danish labour market and social security system are organised, the Danish Supreme Court concluded that section 5(2) DSE does not go beyond what is necessary to achieve that aim. Consequently, the Directive does not preclude section 5(2) DSE, and therefore Ms Werge's days of sickness resulting from her disability could be included in the 120 days of sickness provided by section 5(2) DSE. Consequently, Ms Werge was not entitled to a longer notice period than that given by the employer.

Finally, the Danish Supreme Court ruled that Ms Werge was not entitled to compensation for unfair dismissal.

Commentary

The judgment establishes that the burden of proof that an illness has resulted in a disability lies with the employee. Further, the judgment concludes that the employer is only obliged to take appropriate measures if it knows or should have known that the employee in question has a disability. Finally, and most importantly, regardless of the fact that the ECJ in its judgment significantly narrowed and limited the assessment left to the national court in

relation to section 5(2) DSE, the Danish Supreme Court decided to apply the exemption described by the ECJ when concluding that section 5(2) DSE is not in violation of the Directive and that any sickness leave as a result of a disability may be included in the 120 days of sickness under section 5(2) DSE, provided that the employee's absence from work is not the result of the employer knowing about the disability but failing to take appropriate measures.

This judgment by the Danish Supreme Court seems to contrast with ECJ case law on sick leave due to pregnancy prior to a mother giving birth, which implies that no such sick leave can be included in the grounds for dismissal.

On 11 August 2015, the Danish Supreme Court made reference in a new case to the case law derived from the Werge case, including its own judgment of 23 June 2015. In this most recent judgment, the Danish Supreme Court was faced with the question of whether section 5(2) DSE was in breach of the Directive where: 1) the employer was informed about the employee's disability and 2) the employer had failed to make reasonable adjustments that would most likely would have reduced the absence from work.

The Supreme Court ruled in favour of the employee and accorded her compensation equivalent to nine months' salary after almost 14 years of service, in addition to salary for her normal notice period. This seems to indicate that the Danish Supreme Court acknowledges that section 5(2) DSE may be applied in cases involving disability in light of the ECJ's judgment in joined cases C-335/11 and C-337/11 (HK Danmark) - provided that the employee's absence from work is not fully or partly as a result of a failure by the employer to make reasonable adjustments.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Spiegl): Austrian case law deems it possible and justified to terminate an employee due to excessive sick leave, either in compliance with the mandatory notice period and termination date or with immediate effect. If the employee is sick for 27% of days within one year, the Austrian Supreme Court allows termination of the employment for that reason. Further, an employer can dismiss an employee if his or her sick leave exceeds 126 days, though not with a shortened notice period.

Disabled employees enjoy special protection against dismissal in Austria and this must be taken into account. The employer cannot dismiss a disabled employee without prior approval of the Disability Committee in the Federal Social Office, which will only be given in rare cases involving the employee becoming unable to fulfil his or her work duties. This could happen if the employee has a very high number of sick days. In addition, the employer must put in place appropriate measures to enable the employee to work if possible. It does not matter if the sick

leave was caused by 'normal' illness or disability. Note that the employer must take into account whatever level of sick leave is typical for the employee´s particular disability. Only sick leave caused by disability that significantly affects the internal organisation and operational arrangements of the employer and exceeds the 'typical' number of sick days can be used to justify termination on grounds of illness.

Further, whether the employer had any knowledge of the disability is not decisive. The protection for disabled employees is regulated in statute.

Germany (Dagmar Hellenkemper): Section 5(2) DSE is interesting from a German point of view, as Germany does not have any similar provisions. In fact, dismissals on the grounds of illness are very difficult in Germany altogether. The employer has to show that the employee was ill and therefore not able to perform services for a considerate amount of time. There is however no legislation specifying how long the employee must be ill before dismissal can be effective. Generally, the courts find such dismissals invalid where the employee had been ill for less than six weeks per year over the course of three years, but this is determined case-by-case and there is no easy rule of thumb. Where disability comes into the mix, there is even more uncertainty. The employer is required, before dismissing the employee, to conduct an 'operational integration management' procedure (*Betriebliches Eingliederungsmanagement*) for the employee. The goal of this is mainly to find a job the employee is able to carry out despite his or her disability. If this fails, the employer can dismiss the employee on grounds of illness, while showing that there is no job available that the employee could do, given his or her specific limitations.

The Netherlands (Peter Vas Nunes): My interpretation of this judgment is that in Denmark an employer may dismiss an employee with a section 5(2) DSE clause in his contract, giving no more than one month's notice, following 120 of sickness for no other reason than his or her absence from work, even if, for example (i) the employee has been employed for a long time, (ii) he or she has no hope of finding new work, (iii) the absence is on account of a disability and (iv) the employer is aware of that fact. This is compatible with the principle of non-discrimination because section 5(2) DSE is actually designed, *inter alia*, to protect employees. If my interpretation is correct, how does this relate to, for example, the ECJ's ruling in *Mangold*? In that case, German law allowing easy dismissal of employees hired after age 52 was designed to benefit those employees, the idea being that if it is easy to dismiss someone he or she is more likely to be hired (a well-known paradox in areas of social law such as employment). The ECJ did not go along with this reasoning.

This Danish judgment establishes that the burden of proof that an illness has resulted in a disability lies with the employee. While this finding is hardly surprising, I wonder how

relevant it is in practice, seeing that proof of disability, surely, is available through doctors.

Creator: Højesteret (Danish Supreme Court)
Verdict at: 2015-06-23
Case number: 25/2014