EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/23 Negative freedom of association does not preclude employer from paying union members more (DK)

<p>In Denmark, there is freedom of association in the labour market. This principle is laid down in the Danish Freedom of Association Act and in Article 11 of the European Convention on Human Rights. Freedom of association means, among other things, that employers are prevented from deciding not to hire or to dismiss an employee because the employee is, or is not, a member of a trade union. During employment, however, the Danish Freedom of Association Act does not prohibit benefits from being awarded exclusively to members of a trade union that is a party to the applicable collective agreement.</p>

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Facts

Generally, all Danish employees are entitled to statutory sickness benefits from the municipality provided that they fulfil certain conditions. These benefits do not necessarily cover the employees' entire pay. They are calculated on an hourly basis taking into account the employees' hourly wage after deduction of social security contributions. However, there is a cap on the rate of sickness benefits and the maximum amount is often lower than the employees' normal pay.

The majority of Danish employees are entitled to full pay during sickness absence, for example because they are covered by certain collective agreements. In such cases, the employer pays the difference between the statutory sickness benefits and the employee's normal pay. Approximately 70% of Danish employees are member of a union. They pay the membership fees themselves.

This case concerned two employees working at a packaging company. Both of them had had periods of sickness absence in 2011 and 2012. The first time around, the two employees received full pay during their sickness absence, but when the employer found out that they were not members of one of the trade unions that had concluded the applicable collective agreement, their sick pay was reduced to the rate of the statutory sickness benefits. Had they been members, they would have been entitled to full pay during their sickness absence.

The two employees claimed that they had been discriminated against because the employer, when reducing their pay during their sickness absence, had referred directly to the fact that they were not members of the relevant trade union. According to them, this was de facto a 'closed shop', i.e. the employees were effectively forced to join a specific trade union.

Judgment

Like the High Court, the Supreme Court stated that, based on the wording of the Danish Freedom of Association Act and its explanatory notes, the aim of the legislation is to protect freedom of association in recruitment and dismissal. The Act does not prohibit differential treatment in employment.

The Supreme Court made reference to Article 11 of the European Convention on Human Rights, which provides that "Everyone has the right to [...] freedom of association with others, including the right to form and to join trade unions [...]. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society [...]." The Court noted that the case law of the European Court of Human Rights shows that it is not contrary to Article 11 per se to make an employee suffer adverse

effects of non-membership of a trade union other than not being recruited or being dismissed. However, it may constitute discrimination within the meaning of the Convention if the effects of non-membership effectively force an employee to join a trade union – especially if the differential treatment threatens the employee's means of existence or is similarly invasive in nature.

The Supreme Court dismissed the claim that the differential treatment of the two employees had forced them to join one of the trade unions with an applicable collective agreement, as the differential treatment had only meant that they were not entitled to a supplementary payment during their sickness absence. The two employees had not joined one of those trade unions. Accordingly, there was no discrimination, either under the Danish Freedom of Association Act or under Article 11.

Commentary

This judgment establishes that, as a general rule, the Danish Freedom of Association Act and Article 11 of the European Convention on Human Rights – as currently understood in Denmark - only protect against discrimination in recruitment and dismissal.

Accordingly, it is not contrary to the principle of freedom of association for non-membership of a trade union to have certain adverse effects on the employee in employment, as long as it does not effectively force the employee to join the trade union.

This outcome is in line with the legislature's intentions behind the most recent amendment of the Danish Freedom of Association Act. This emphasises that collective agreements exclusively covering members of the trade union that has concluded the collective agreement are still allowed.

This is the first case concerning the scope of the Danish Freedom of Association Act in terms of differential treatment between union members and non-members. Therefore, it is still unknown how far differential treatment can be taken before being considered to force an employee to join a union, thereby rendering it unlawful.

If the employees had joined one of the trade unions that had concluded the applicable collective agreement in order to obtain the right to full pay during sickness absence, there is a possibility that the Danish Supreme Court might have ruled differently, but we think this is unlikely, as a reading of the rest of the court's opinion would suggest otherwise.

Comments from other jurisdictions

United Kingdom (Bethan Carney): It is unlawful in the UK for an employer to subject a worker

to a detriment for the 'sole or main purpose' of preventing or deterring them from joining a trade union or of compelling them to become a member of a trade union. There are similar provisions regarding the dismissal of a worker for these purposes and they also make it unlawful to make an offer to a worker for the sole or main purpose of inducing them to enter or leave trade union membership. The focus in all these provisions is on the employer's purpose in treating the worker in a particular way. Like Denmark, the UK does not outlaw different treatment on grounds of trade union membership. The burden of proof in a tribunal claim is on the employer to show its purpose, however, the individual has to make out a *prima facie* case before the burden shifts to the employer.

Subject: Miscellaneous, freedom of association

Parties: Trade Union Denmark representing A and B - v - Confederation of Danish Industry representing DS Smith Packaging Denmark A/S

Court: *Højesteret* (Danish Supreme Court)

Date: 4 June 2015 Case number: 69/2014

Creator: Højesteret (Danish Supreme Court)
Verdict at: 2015-06-04
Case number: 69/2014