SUMMARY

2011/41 The inflexible mother (DK)

<p>The employer did not act in a discriminatory way by saying, as one of the reasons for dismissing a single mother, that she was not as flexible as the other employees.</p>

Summary

The employer did not act in a discriminatory way by saying, as one of the reasons for dismissing a single mother, that she was not as flexible as the other employees.

Facts

The Danish Act on Equal Treatment of Men and Women prohibits employers from dismissing employees because of their gender. But is it gender discrimination if an employer dismisses an employee (in part) for being not as flexible about her working hours as the other employees because she is a single mother?

A female call centre employee was dismissed because of a decline in orders and shrinking revenues. She was surprised and asked why she had been singled out. That led to a number of emails between the employee and her employer after the dismissal.

The employer wrote several times to the employee that they needed flexible employees. In the last email the employer wrote that they believed it would be more difficult for her to work odd hours in the weeks when she had to take care of her children. Based on this correspondence, the employee sued the employer for discrimination.

Judgment

In the district court, the employee submitted that she had been dismissed in breach of the Danish Act on Equal Treatment of Men and Women, because of her family status. The employer, on the other hand, argued that the lack of flexibility had nothing to do with her working hours as such, but more with her duties. Her professional qualifications were simply

not as good as those of her colleagues (and this was not only due to her inflexibility in working hours). In addition, the employer argued, the Danish Act on Equal Treatment of Men and Women does not prevent employers weighing flexibility in terms of working hours as well, when deciding whose contract should be terminated in the event of a slump in work.

The district court ruled in favour of the employee. The employer had written to the employee that it would be difficult for her to work odd hours (which was contractually agreed) in the weeks that she had to take care of her children. Therefore, the district court held, the selection criteria constituted indirect discrimination because there are more single mothers than single fathers in general. Accordingly, the employee was awarded 26 weeks' pay in compensation.

On appeal, however, the High Court reversed the district court's judgment and ruled in favour of the employer. The employer's reference to the employee's children in one email was not enough to satisfy the High Court that she had been discriminated against within the meaning of the Danish Act on Equal Treatment of Men and Women. The High Court's ruling was based on the explanation given in the notice of termination, the employer's first three emails, the employer's statement in court and the information about the slump in business.

Commentary

It seems fair that the district court's judgment was reversed by the High Court, partly because the district court did not investigate whether the indirect discrimination was reasonably and objectively justified by legitimate (operational) needs.

The case suggests that it would not be discriminatory for an employer suffering a slump in business to include single parents' reduced flexibility to work odd hours as one of several factors when selecting which employees to let go. From a legal point of view, this must be said to be a correct decision. Flexibility in terms of working hours has been recognised as a lawful selection criterion in Denmark. The employee failed to establish that this criterion - if applied - had a gender basis in her case.

It is noteworthy that the High Court found that the employee had not discharged the burden of proof even though the employer had referred to the employee's reduced flexibility in the email correspondence. In earlier cases, the Court had applied the split burden of proof more leniently in favour of employees.

However, the case does not mean that an employee's family status is not protected by the Danish Act on Equal Treatment of Men and Women, which Act implements Directive 2006/54 EC of 5 July 2006. The outcome of the case seems to have been influenced by the fact that the employee failed to convince the High Court that her reduced flexibility had been the deciding

factor in the employer's decision to terminate her employment.

Finally, it should be noted that the trade union has applied to the Appeals Permission Board with a petition for leave to appeal to the Danish Supreme Court. If such leave of appeal is granted, a decision from the Supreme Court is expected to take at least two or three years.

Comments from other jurisdictions

Austria (Andreas Tinhofer): This is an interesting case. If the employer could establish during proceedings that the reason for selecting the plaintiff for laying-off was mainly related to her qualifications, an Austrian court would have most likely have come to a similar decision. However, in discrimination cases the plaintiff generally enjoys the benefit of the doubt.

Having said that, if the principal reason for the dismissal was her (presumed) inflexibility as a single parent, an Austrian court would have come to a different conclusion. First, single parents (most of them being female) must not be discriminated against because of their family status. Second, it seems strange to make a general assumption that single parents are less flexible in terms of working odd hours than workers that share their 'family burdens' with a partner (who will often also have a job). Third, it may well be the case that Austrian employers tend to be less flexible about adjusting time schedules unilaterally than Danish or certain other employers. It would be interesting to get an ECJ decision on this case.

Germany (Paul Schreiner): In Germany the decision in this case would largely depend on whether or not the Dismissal Protection Act applied. If it did, the employer would have to justify the termination based on operational reasons, personal reasons or reasons relating to the behaviour of the employee. In this case, the employer apparently tried to terminate the employment for operational reasons. As such, the employer would first need to prove that there was no possibility of employing the employee any more because of lack of work.

If it could be proved that there was a redundancy situation, the employer would then have to select whose employment to terminate. The employer would have to undertake a social selection, i.e. assess which employees are the most worthy of protection. In doing so, it must consider age, disability, length of service and whether or not the employees have dependants that need to be cared for. After weighing these criteria, the employer must also work out which employees would suffer least from the termination of an employment.

In the case at hand therefore, the employer needed to show that the social selection had been handled properly. Assuming it was handled properly the question of flexibility would probably only arise if the plaintiff had been found to have had a virtually equal need for protection as another employee, because only then would any additional requirements for social selection

be considered by the courts.

Assuming the business was too small for the Dismissal Protection Act to apply, the question would be whether or not the termination was discriminatory. If it were, the termination could be declared invalid and void. The court would have assessed whether there was sufficient evidence to suggest that the termination breached the German Equal Treatment Act. Judging from the facts presented, this might have been the case. A German court would have found that in fact there are more single mothers than fathers taking care of their children. The inflexibility is therefore directly caused by gender. To distinguish between employees on the basis of the flexibility would therefore have been indirect discrimination on the grounds of gender. On this basis a termination might well have been declared invalid and void.

The Netherlands (Peter Vas Nunes): The Dutch Equality Commission has ruled repeatedly that dismissal on the grounds of inflexibility can constitute indirect sex discrimination, which is not always easily justifiable. In the case reported above, the court justified its decision to dismiss the plaintiff by stating, 'that it would be more difficult for her to work odd hours in the weeks when she had to take care of her children'. I am not certain that the employer would have won this case had it occurred in The Netherlands.

United Kingdom (Susie Jarrold): As in Denmark, employees in the UK have protection against indirect sex discrimination. This is by virtue of the Equality Act 2010, which implements the EC Equal Treatment Directive. Indirect sex discrimination arises where an apparently neutral provision, criterion or practice ('PCP') puts persons of one sex at a disadvantage, despite applying universally. So, in this case, a requirement for employees to be 'flexible in their working hours' could indirectly discriminate against women who tend to have greater childcare commitments.

The only defence available to an employer where a PCP is discriminatory is to show that it can be justified as a proportionate means of achieving a legitimate aim. The UK Equality and Human Rights Commission's statutory code of practice, which employment tribunals must take into account where relevant, states that reasonable business needs and economic efficiency may be legitimate aims. The ECJ ruling in Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 definitively sets out the approach to be taken in determining whether a PCP can be objectively justified. The PCP must correspond to a real need on the part of the employer, be appropriate with a view to achieving the objectives pursued and be necessary to that end.

In the case of 'the inflexible mother', the Danish High Court ruled that employers are entitled to consider flexibility when deciding whose contract to terminate during a slump in work. The

approach that would be adopted in the UK in respect of this case would be similar. The facts raise the issue of indirect sex discrimination, but the PCP could potentially be justified if it were found that the business needs relied on by the employer outweighed the discriminatory effect of the PCP on women generally and on the claimant in particular. However the tribunal or court would consider carefully whether there was a real need in that particular job to be flexible about hours and whether the same aim could be achieved with less discriminatory impact.

Subject: The Danish Act on Equal Treatment of Men and Women, which implements Directive 2006/54 EC of 5 July 2006.

Parties: The Danish Union HK acting for A - v - B, represented by C

Court: The Danish Eastern High Court (Østre Landsret)

Date: 26 May 2011

Case number: B-2948-10

Hard Copy publication: Not yet available

Internet publication: Please contact info@norrbomvinding.com

Creator: Østre Landsret (Danish Eastern High Court)
Verdict at: 2011-05-26
Case number: B-2948-10