EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/29 Daughter’s disorder not “force majeure” (DE)

<p>Long-term sickness of an employee’s family member, however serious, does not qualify as force majeure in the meaning of the Danish law implementing the Framework Agreement on Parental Leave.</p>

Summary

Long-term sickness of an employee’s family member, however serious, does not qualify as force majeure in the meaning of the Danish law implementing the Framework Agreement on Parental Leave.

Facts

As a general rule, employees must attend work Ð even if their children are sick and need looking after. If a family member is suddenly seriously ill or severely injured, however, the employee may take time off. This is laid down in the Danish Act on Employees’ Entitlement to Absence for Special Family-Related Reasons, which provides amongst other things that employees are entitled to paid absence from work where this is necessary for compelling family reasons in the case of illness and accidents where the employee’s immediate presence is urgently required (force majeure). The entitlement is for unpaid leave, although some employees are entitled to paid leave under a collective agreement or their individual contracts.

The Act implements Directive 96/34/EC[1] and puts into effect the Framework Agreement on Parental Leave concluded on 14 December 1995 between the general cross-industry organisations (Unice, CEEP and the ETUC). It states in clause 3:

1. Member States and/or management and labour shall take the necessary measures to entitle workers to time off work, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident

making the immediate presence of the worker indispensable.

2. Member States and/or management and labour may specify the conditions of access and detailed rules for applying clause 3.1 and limiting this entitlement to a certain amount of time per year and/or per case.

Neither the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons nor the framework agreement on parental leave defines what a force majeure situation is.

A warehouse employee had a daughter who had just started school. After a short while, she began acting in an unusual way and it turned out that she could be suffering from OCD (obsessive compulsive disorder). Initially, the father's employer was sympathetic to the employee's difficult situation and gave him several days off in the autumn and half of December 2006 plus January and February 2007. The father did not receive pay while staying at home with his daughter, but instead claimed benefits from the local authority in accordance with Danish social law.

Then, in late February, the father informed his employer that he would not be able to return to work until May at the earliest. At that point, the employer had had enough. The father was dismissed with three months' notice and required to work the notice period. When he did not turn up for work, he was summarily dismissed.

The father's trade union could not tolerate this and the parties ended up in the High Court, where the union relied on the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons. The High Court ruled entirely in favour of the employer.

Judgment

On appeal, the Supreme Court held that the Act did not apply because the daughter's condition had lasted several months and therefore no longer qualified as a force majeure situation. It seems that the Supreme Court in its judgment focuses exclusively on the Danish understanding of force majeure without drawing on any EU law definition of the concept. On this basis, the Supreme Court held that a dismissal would have been fair, but that summary dismissal was unfair. Accordingly, the father was entitled to notice pay.

In overturning the High Court's judgment, the Supreme Court took into account, amongst other things, that the employer had accepted the father's absence for quite some time and that the employer had failed to prove that the father had been warned that he would be summarily dismissed if he did not turn up. On those grounds, the Supreme Court held that the summary

dismissal was too harsh a measure in the circumstances.

Commentary

The judgment shows that the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons applies only in force majeure situations such as traffic accidents or acute illness.

Whether the Directive and the Framework Agreement are quite as narrow is debatable and they might be interpreted differently in other jurisdictions.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, employees are entitled to one week of continuous paid leave in order to care for a sick child (or other close relative) living in the same household if this is necessary. If the child's sickness Ð or rather, the need for care Ð lasts for a longer period of time, the employee can use his annual leave entitlement, without the employer's approval. Alternatively, or after the annual leave entitlement has been exhausted, the employee can claim unpaid leave. There is no statutory provision limiting the length of unpaid leave. However, the employee's duty to look for alternative care arrangements will become more compelling the longer the situation lasts.

During the period of absence the employee does not enjoy any special protection against dismissal. On the other hand, the absence is not a valid reason for a summary dismissal. If a child is seriously ill, each of the parents may ask for unpaid leave or for a reduction or adjustment to working hours for an initial period of up to five months. This term may then be prolonged to nine months in total. During that time the employee may be given notice only with the prior approval by the employment court.

Cyprus (Natasa Aplikiotou): The definition of "force majeure" is broadly similar both in the Danish Act and the relevant Cypriot legislation. A force majeure situation arises where there are compelling family reasons in the case of illness or accident directly necessitating the presence of the employee.

Nevertheless, there are some differences in application in Denmark and Cyprus, with the Danish legal framework affording judges wider discretion to assess force majeure on a case by case basis. Though the Danish courts seem to leave open the amount of time allowed for force majeure, in Cyprus, the Law Providing for Paid Annual Leave of 1967 (Law 8/1967) and the Law for Parental Leave and Leave due to "Force Majeure" Reasons of 2002 (Law 69(I)/2002), limit the entitlement to seven days per year. Additionally, article 12 of Law 69(I)/2002

establishes that the leave should be unpaid in all cases, contrary to the exception allowed under Danish Law.

Germany (Simona Markert): Section 616 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) provides that employees are entitled to paid absence from work when necessary for compelling reasons in the case of illness and accidents where the employee`s immediate presence is urgently required and stipulates the following:

“The person obliged to perform services is not deprived of his claim to remuneration by the fact that he is prevented from performing services for a relatively trivial period of time for reasons personal to the employee without fault on his part. However, he must permit to be credited against him the amount he receives under a health or accident insurance policy that exists on the basis of a statutory duty for the period during which he is prevented from performing the services.”

“Reasons personal to the employee” also refers to the unforeseeable illness of family members, where the employee«s immediate presence is urgently required.

The term “relatively trivial period of time” is not defined by law and therefore the circumstances of the case must be considered. If the employee is prevented from rendering his services for more than a trivial period of time, the employee can no longer claim remuneration.

Apart from this possibility for short periods, consideration must also be given to the Pflegezeitgesetz, the ÔPflegeZG’, a law that governs the obligations of employees and employers where the employee needs to act as a carer and is prevented from working. The PfegeZG differentiates between short-time caring for a period of up to ten days and long-time caring for a period of up to six months.

The short-time caring facility is only provided for the unforeseen serious illness of relatives. In general the PflegeZG does not foresee an entitlement to remuneration at such times, but a claim for remuneration can sometimes also be made using, for example, in section 616 of the Civil Code, mentioned above, or in collective bargaining agreements.

The long-time caring facility entitles the employee to care for relatives if the employer employs more than 15 employees. In such cases, the employee must inform his employer no later than ten days before the commencement of the need for care. In such a situation there is, in principle, no obligation on the employer to pay remuneration.

However, the employment relationship may not be terminated by the employer during caring (Section 4 PflegeZG).

United Kingdom (Ailsa Murdoch): The UK provisions implementing the EU Parental Leave Directive give employees a statutory right to unpaid time off work to care for dependants. Employees may take a "reasonable amount" of time off if it is "necessary" in certain circumstances: for example, to assist if a dependant is ill or injured, to make arrangements for a dependant's care, or if a dependant dies, or to deal with an incident involving the employee's child at school. Employees can bring a claim against their employers for failing to permit them to take time off in accordance with this right. In addition, if the employee is dismissed and the reason (or principal reason) relates to taking time off pursuant this right, the dismissal will be unfair.

The question of when time off is "necessary" has not been considered in many cases in the UK. However, the judgments so far suggest that these provisions only enable employees to take time off to deal with an immediate crisis rather than on-going issues. One judgment in particular (Qua v John Morrison Solicitos [2003] IRLR 184) concluded that, in the "vast majority" of cases, it would only be reasonable to take a few hours Ð or possibly up to one or two days Ð to deal with the problem that has arisen.

Depending on the nature of the illness suffered by the dependant and whether it amounts to a disability for the purposes of discrimination legislation, it is possible that an employee could claim disability discrimination by association if they are treated less favourably than other employees making similar requests for time off. Such a case would only succeed if the employer treated the employee less favourably because of the dependant's disability - for example, because the dependant was HIV positive. Cases of this type are likely to be relatively rare, but it is an avenue open to employees to explore under the UK's Equality Act 2010.

Footnote

1 To be replaced, as from 8 March 2012, by Directive 2010/18 implementing the Revised Framework Agreement.

Subject: Maternity and parental leave

Parties: The Danish Union HK acting for A Ð v Ð B

Court: Danish Supreme Court

Date: 17 February 2011

Case number: 233/2008

Internet publication: Please contact info@norrbomvinding.com

Creator: Højesteret (Danish Supreme Court)
Verdict at: 2011-02-17
Case number: 233/2008