SUMMARY

2013/5 Discrimination of part-time employees on fixed-term contracts? (DK)

<p>Part-time employees and fixed-term employees are entitled to the same employment conditions as comparable full-time employees and employees on open-ended contracts, respectively. An employer may only provide less favourable employment conditions for a part-time or fixed-termemployee if this is justified on objective grounds.</p>
<p>Eleven teachers claimed unlawful discrimination on this basis, arguing that the terms of employment under a collective agreement for different types of school that they used as a benchmark, were better than their own terms of employment. The Supreme Court did not agree that this constituted discrimination.</p>

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agree that this constituted discrimination.

Facts

The eleven plaintiffs in this case were teachers at a school for socially vulnerable adults. Their employment conditions were regulated by an executive order for principals and teachers employed under the Danish Act on General Education. According to this order, all employees must be employed on fixed-term contracts. The schools then assess the need for teachers each semester. All teachers falling within the scope of the order are paid on an hourly basis.

The Danish Act on Part-Time Employment, which implements Directive 97/81, and the Danish Act on Fixed-Term Employment, which implements Directive 1999/70, provide that, if there is no comparable full-time employee or employee on an open-ended contract within the organisation, and no collective agreement applies, the benchmark for reference is the collective agreement normally applied to the professional area in question. Based on this the teachers argued that, since there were no comparable full-time employees or employees on open-ended contracts at the school, and since no collective agreements were in force in the school, the benchmark for reference had to be the collective agreement covering teachers in day schools for adults ('*daghøjskole*').

The teachers argued that this collective agreement was the relevant benchmark, since the job descriptions, qualifications, type of students and financing in those types of schools were practically identical. When comparing the employment conditions laid down in the executive order and the collective agreement, it appeared that the teachers employed under the collective agreement had better employment conditions regarding pay, sick pay, overtime, paid holiday and protection against dismissal.

On these grounds, the plaintiffs argued that the employer had acted contrary both to the Act on Part-Time Employment and the Act on Fixed-Term Employment, given that the less favourable employment conditions were not justified on objective grounds. They claimed that the sole reason for their less favourable employment conditions was the fact that they were part-time employees on fixed-term contracts. They therefore claimed back pay.

As regards the question on the Act on Part-Time Employment, the employer argued that all the teachers at the school were given the same employment conditions in accordance with the above-mentioned order. The employer also stressed that there were in fact full-time employees at the school, and since the part-time and full-time employees were given the same terms of employment, the school could not be in conflict with the Act on Part-Time Employment.

The employer further argued – in relation to the question concerning the Act on Fixed-Term Employment – that, since the order imposed an obligation on the school only to hire employees on fixed-term contracts, the rule regarding the benchmark for reference did not apply in this particular situation. The employer supported this argument by stressing that if it were possible to hire employees on open-ended contracts under the order, those employees would be given the same terms of employment as the fixed-term employees.

In addition, the employer argued that the collective agreement covering teachers in day schools for adults was not the relevant benchmark in this situation, even if the rule regarding the benchmark had been applicable. According to the employer, there were crucial differences between the area of expertise of its school and that of normal day schools for adults, because the education offered at the school was aimed at socially vulnerable adults, whereas day schools for adults offered education aimed at socially adjusted adults. Educating socially vulnerable adults requires classes that are individually adjusted to suit the students' special needs. By contrast, education at day schools for adults is structured in a far more general way.

Judgment

The district court took the view that this was a test case and transferred it to the Danish Eastern High Court. The Danish Administration of Justice Act states that all cases must be brought before a district court in the first instance, but that if a case involves a 'point of principle', the district court judge can refer it to the high court following an application by one of the parties.

The High Court found in favour of the employer. In terms of the question concerning the Act on Part-Time Employment, the High Court found that at least two of the teachers had been working full-time and that they were comparable to the part-time employees at the school. Since all the employees were paid in accordance with the executive order, i.e. on an hourly basis, the High Court did not find that the employer had acted contrary to any of the provisions of the Act on Part-Time Employment.

With regard to the Act on Fixed-Term Employment, the High Court stated that the deciding factor was whether or not teaching at day schools for adults was a relevant and similar professional area. The High Court did not find this to be the case. In its assessment, the High Court took particular account of the fact that the classes at the school were individually adjusted to suit the students' special needs, whereas classes at day schools for adults are structured in a more general way. For these reasons, the employer had not acted in conflict with the Act on Fixed-Term Employment.

The teachers appealed to the Danish Supreme Court, but it upheld the High Court's decision.

The Supreme Court held – in relation to the Act on Part-Time Employment – that the executive order lays down the same terms of employment for both full-time and part-time employees. The only reason for a difference in pay between them would be that full-time employees work longer hours. This is in accordance with the principle of proportional remuneration and would therefore not constitute discrimination against part-time employees.

Further, as regards the Act on Fixed-Term Employment, the Supreme Court upheld the High Court's assessment and added that the adults who were referred to the school in question would not have qualified to attend classes at day schools for adults. Therefore, the Supreme Court agreed with the High Court's decision that the collective agreement covering day schools for adults was not a relevant benchmark and the employer was not in breach of the Act on Fixed-Term Employment.

Commentary

With regard to the Act on Part-Time Employment, the Supreme Court ruling confirms that there is no unlawful discrimination against part- time employees where all employees within an organisation are paid on an hourly basis and the pay conditions are the same for both part-time and full-time employees.

As regards the Act on Fixed-Term Employment, the ruling emphasises that it will not automatically be correct to apply a collective agreement that covers the same profession as a benchmark. Both the High Court and the Supreme Court addressed the differences in expertise required to teach adults with and without social difficulties and both came to the conclusion that these differences were so significant that the collective agreement covering day schools for adults could not be used as a standard of reference. The ruling shows that in cases like this the employee has a heavy burden of proof when it comes to finding a comparable collective agreement.

It should be mentioned that the Supreme Court did not clarify whether its decision was influenced by the fact that the executive order obliged schools to employ exclusively fixed-term employees. However, there is nothing to indicate that this was the case.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): The situation in Germany is pretty similar to the Danish one. In Germany, the prohibition against discrimination against part-time workers is codified in Section 4(1) of the Act on Part-Time Work and Fixed-Term Employment Contracts (TzBfG). Different treatment of part-time workers in comparison to fulltime workers is only permitted if justified by a viable reason. A justification could therefore lie in different

qualifications, work experience or specific requirements of the workplace. The fact that the requirements of special need adults differ from those of adults attending a regular day school would be valid grounds for differential treatment of teachers. The same rule applies concerning fixed-term and permanent employees.

The Netherlands (Peter Vas Nunes): The High Court in this case noted "*that at least two of the teachers had been working full-time and that they were comparable to the part-time teachers at the school"*. This makes the case simple as far as the alleged discrimination on the basis of part-timeemployment is concerned, given that the full-time and part- time teachers were paid the same hourly rate. In theory at least, if an organisation with one thousand part-timers also employs one full- timer, that is sufficient to prevent the part-timers from comparing themselves "*to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice"* within the meaning of Clause 3(2) of the Framework Agreement on Part-Time Work annexed to Directive 97/81.

Apparently, there were no teachers on a permanent (open-ended) contract at the defendant's school. This raises the question of whether a school can continue hiring employees exclusively for fixed periods, for example a school year, for an unlimited duration, year after year, without contravening (the Danish law implementing) Directive 1999/70. Unfortunately the judgment reported above is silent on this aspect. The judgment does address the interesting question of how to interpret (the Danish law implementing) Clause 3(2) of the Framework Agreement on Fixed-TermWork annexed to Directive 1999/70:

"For the purpose of this agreement, the term 'comparable permanent worker' means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/ skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to [...] collective agreements or practice."

Clearly, the 'establishment' in this case was the school. As there were no teachers at the school with a permanent contract, the teachers with fixed-term contracts compared themselves to teachers with permanent contracts at a different type of school. The court does not accept that this comparison should be made given the differences between the teachers' own school and the schools that they used as a reference. This is the first case I have come across where such a comparison, even though unsuccessful, was made.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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