SUMMARY

2013/38 The assessment at the date of notice is decisive (DK)

<p>It follows from Danish case law that it is the facts and circumstances known to the employer at the date of notice of termination that are decisive when deciding whether a dismissal is justified. The Danish Eastern High Court has established that this principle applies to the assessment of disability as well.</p>

Summary

It follows from Danish case law that it is the facts and circumstances known to the employer at the date of notice of termination that are decisive when deciding whether a dismissal is justified. The Danish Eastern High Court has established that this principle applies to the assessment of disability as well.

Facts

The case concerned two social and health care workers who were both suffering from back problems and both dismissed from their jobs at a public hospital.

One of the employees – A – had a physical impairment due to a work- related injury and the employer had taken different measures in order to help the employee keep her job. These measures included a reduction in working hours and a change in duties. The employee was, however, incapable of performing a substantial part of the duties related to her job and she had an extensive amount of sickness absence for this reason. Consequently, she was dismissed.

A few years earlier, the other employee – B – had had problems with her back and because of this she had undergone a work ability test. As a result, she had been trained in and assigned new duties that were less of a strain compared to her previous duties. In December 2009, B suffered trauma to her back and had to take sick leave because of the injury. In February 2010,

it was stated in a medical report that she had a good chance of reducing her back impairment, either through physical rehabilitation or an operation.

In April 2010, she slowly started working again but was only able to work a maximum of 15 hours per week. This was incompatible with her duties and, consequently, she was dismissed in June 2010.

In March 2011, the National Board of Industrial Injuries in Denmark determined that she had a degree of permanent injury of 10%.

Both employees argued that their dismissal was in conflict with the prohibition against disability discrimination under the Danish Anti- Discrimination Act.

Judgment

Since December 2004, discrimination on grounds of disability has been prohibited in Denmark. The prohibition of disability discrimination came into force through an amendment to the pre-existing Danish Anti- Discrimination Act, which implements Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (also known as the Anti-Discrimination Directive).

Neither the Danish Anti-Discrimination Act nor the Anti-Discrimination Directive includes a definition of disability. Moreover, they do not determine when the assessment of whether an employee suffers from an illness or a disability must be made.

In relation to employee A, the Court held that at the date of notice of termination she had a back impairment which constituted a disability. As she was dismissed because of her sickness absence, she had established an assumption of indirect discrimination and it was therefore for the employer to prove that it had not unlawfully discriminated against her.

However, the Court held that because employee A was unable to perform a major part of her duties and the employer had taken appropriate measures to help the employee maintain her employment, the employer had proved that the differential treatment was objectively justified.

As regards employee B, the Court found that even though it had been established after the dismissal that she had a degree of permanent injury of 10%, this was not known at the date of notice. On the contrary, she had a medical report stating that she had a good chance of recovering her health through physical rehabilitation or an operation.

For this reason, employee B was not deemed to have had a disability at the date of notice and, accordingly, protection under the Danish Anti- Discrimination Act did not apply to her. The

fact that it had later been established that she had a degree of permanent injury of 10% did not change this.

The Court therefore found in favour of the employer in both cases.

Commentary

Employee B has applied for leave to appeal the judgment to the Danish Supreme Court, but whether she will obtain this is not yet known.

It is important to note that the Court's finding that what is known at the date of notice of termination is crucial, is in accordance with existing case law. This means that employers are entitled to base their assessment of the employee on the information available at the date of notice. The fact that it is subsequently established that the employee has a disability does not enable the employee to claim protection under the Danish Anti- Discrimination Act.

Further, the judgment emphasizes that an employee who is unable to perform a significant part of his or her job may be dismissed even though the incapability is a consequence of a disability.

Comments from other jurisdictions

Germany (Klaus Thönißen): From a German perspective it is important to distinguish between formal and substantive requirements in relation to the termination of disabled employees.

An employer cannot terminate the employment relationship of a severely disabled employee in the absence of a permit issued by the competent authority. This is considered a formal requirement for terminating an employment relationship. Terminations made without permits will be deemed unlawful. Any employee who, at the time of the termination, was officially classified as severely disabled (meaning that the degree of disability reaches at least 50% or equivalent) or had filed an application to obtain classification, enjoys this protection.

Based on the facts of this case, it is not easy to determine whether a German court would have found the terminations unlawful, given that, as I understand it, neither employee was officially classified as severely disabled. However, the dismissal could constitute a violation of the GeneralEqualTreatmentAct(theAllgemeinesGleichbehandlungsgesetz, 'AGG'). To fall within the scope of the AGG, a dismissal needs to be discriminatory as to the employee's disability - regardless the degree of disability. If it did violate the AGG, the termination would be unlafwul. Since the employees were basically dismissed for being frequently absent from work and not for being disabled, I doubt either of them could have established a discrimination case. Therefore, the terminations would have been considered as dismissals by reason of

illness under German employment law.

As in other jurisdictions, the termination of an employment relationship in Germany should always be considered as a last resort. Therefore, the Federal Labour Court requires an employer – amongst other factors – to provide a negative health forecast in relation to an employee it wishes to dismiss by reason for illness.

Having said that, I do not think that the dismissal of employee B would be lawful under German law. This employee provided a medical statement saying there was a good chance of a complete recovery from her back trauma. Therefore, an employer in Germany would be unlikely to be able to establish a negative health prognosis.

Regarding employee A (and assuming that the employer actually did anything possible to keep the employee), a German court might consider this termination lawful.

The Netherlands (Peter Vas Nunes): Dutch law prohibits dismissal in the absence of a permit. There are guidelines that set out the grounds on which an application for a dismissal permit may be granted. One of the grounds is that the employee calls in sick with excessive frequency. In such a case, a permit may be granted if the employer provides evidence that the following conditions have been satisfied:

the sickness absences, measured over a period of, in principle, no less than three years, are frequent in comparison with the other staff;

there is no reason to expect the frequency to decline in the near future (26 weeks);

it is not reasonably possible to transfer the employee to another position or to adjust his or her duties in the near future or, if it is possible, such a transfer is not likely to reduce the frequency of absences;

the frequency is so excessive that it disrupts the normal operation of the organisation and creates a disproportionate burden on other employees;

the effect of the frequent absences have been discussed with the employee;

all ways of reducing the absences to a normal level have been explored and exhausted;

the absences have not been caused by poor working conditions.

As this list shows, obtaining a dismissal permit on the ground of frequent absences is no easy matter. Where the employee is disabled (a fact that the application must mention), it is even harder, in particular due to the (more stringent) duty to provide reasonable accommodation.

However, it is not impossible, given that a dismissal on account of frequent absences is not directly but only (at most) indirectly discriminatory on the ground of disability, and is therefore objectively justified.

Another ground on which a dismissal permit may be granted is that the employee has been unable to perform his or her (own) work for at least two years and cannot reasonably be expected to recover sufficiently within 26 weeks to perform (i) work at his or her own job, either on a full or part-time basis, with or without restrictions (e.g. low stress, no deadlines) or (ii) work in a reasonably available alternative position. Obtaining a dismissal permit on this ground is also not simple, but it does occur quite frequently. Again, where the employee is disabled, the employer faces additional hurdles, even though dismissal on the ground of long-term sickness absence is only indirectly discriminatory and hence objectively justifiable.

Although, in the absence of more detailed facts, I cannot be certain what a Dutch court would have done in the cases reported above, I doubt whether they would have been as lenient on the employer as the Danish Eastern High Court was. In the case of employee A, who was impaired as a result of a work-related injury, the chances are that a Dutch court would have found the employer to be liable for the employee's (potential) loss of income. In the case of employee B, who was capable of working for 15 hours per week and was anticipated to recover fully or almost fully, a Dutch court would be unlikely to have accepted termination.

United Kingdom (David Coughlan): In the UK, a person is classed as disabled under the Equality Act 2010, if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out normal day-to-dayactivities. 'Long term' means it has lasted 12 months or is likely to last 12 months (or it is likely to last for the rest of the life of the person affected). The Equality Act only protects workers if they have a disability which meets the definition laid down in the Act.

If the employee is disabled, an employer is under a duty to make reasonable adjustments where a provision, criterion or practice of the employer puts the disabled person at a substantial disadvantage compared to someone who is not disabled. The employer must take such steps as would be reasonable in order to avoid the disadvantage. However, the employer is not under a duty to make reasonable adjustments if it does not know and could not be reasonably expected to know that the individual has a disability and is likely to be at a substantial disadvantage (Equality Act 2010, schedule 8, paragraph 20).

This raises the question of what degree of knowledge is required by the employer about an employee's potential disability. The courts in the UK would consider any evidence that the employer *should have* known that the employee had a disability. Employers need to be

proactive and must investigate any potential evidence where an inference of a disability could be drawn. At the same time, they must be aware of the sensitive nature of such enquiries and consider issues of dignity and privacy. Case law in the UK has been mixed and much of it is fact sensitive and depends on the circumstances in each case. However, the EAT has warned employers that they are under a duty to conduct further inquiries and cannot rely on ignorance to protect them.

So, in the case of employee B, there would be an initial question to be determined of whether the employee's condition was 'long term'. If it did not have a long-term effect, it would not amount to a disability. It had not lasted 12 months at the date of the alleged act of discrimination, so the question would be whether it was likely to last 12 months. 'Likely' means 'could well happen' and it falls to be assessed at the date of the act of discrimination. So, the fact that it did actually last 12 months is irrelevant; the court must determine the prognosis at the date of the relevant act. The exact wording of the medical report would be relevant in order to determine whether it deemed that 'it could well happen' that her condition would last at least 12 months.

Assuming that employee B could establish that she had a disability, for her to succeed in a claim for reasonable adjustments the court would have to determine that the employer ought to have known about the disability. It is possible that a UK court would determine that the employer had sufficient knowledge that it ought to have known about it, but this is not certain.

However, in the case of indirect discrimination, no knowledge of disability is required. So, in the UK, employee B could have brought an indirect discrimination claim against her employer, alleging that the employer was applying a provision, criterion or practice that put the employee and other disabled employees at a particular disadvantage compared to non-disabled people. The relevant provision, criterion or practice would be requiring her to work a certain number of hours a week. This claim could be brought irrespective of whether or not the employer knew the employee was disabled.

Indirect discrimination can potentially be objectively justified if the provision, criterion or practice is a proportionate means of achieving a legitimate aim. So, a court would consider whether or not the requirement that an employee work a certain number of hours a week was a legitimate aim (which it probably would be – the aim being to meet the operational needs of the employer). The court would then consider whether the requirement was proportionate or whether there was any less discriminatory way of achieving its aim.

In the case of employee A, the issues to be determined would be more straightforward. It seems that there was no dispute that she had a disability. So, the only questions would be

whether any adjustments required to enable her to continue working were 'reasonable' and therefore whether the employer had failed to make reasonable adjustments. And in a claim for indirect discrimination, the issue would be whether or not the employer was justified in dismissing her (whether it was 'a proportionate means of achieving a legitimate aim').

Subject: Disability discrimination

Parties: FOA on behalf of A and B – v - Employer C.

Court: The Danish Eastern High Court

Date: 5 July 2013

Case number: Joined cases of BS 2-2250/10 and BS 2-2252/10

Hard Copy publication: Not yet available

Internet publication: Available from info@norrbomvinding.com

Creator: Østre Landsret (Danish Eastern High Court)
Verdict at: 2013-07-05
Case number: BS 2-2250/10 and BS 2-2252/10