SUMMARY

2018/10 Liability for not reacting in time to ECJ decision regarding holiday pay (DK)

<p>The Danish Supreme Court has ruled that the Danish authorities may have incurred liability by failing to act sufficiently quickly to amend the Danish Holiday Act to align it with EU law.</p>

Summary

The Danish Supreme Court has ruled that the Danish authorities may have incurred liability by failing to act quickly enough to amend the Danish Holiday Act to align it with EU law.

Legal background

If a citizen suffers a loss because an EU member state fails to implement EU law correctly, the member state may incur liability under certain circumstances. In this case, the question before the Supreme Court was whether the Danish Ministry of Employment was liable to pay compensation to a Danish citizen because the Holiday Act had not been adapted in time to align it with an ECJ judgment on the Working Time Directive.

Facts

The case concerned an employee who became sick during his summer holiday in 2010. When he returned to work, he asked for 11 days of paid replacement leave. His employer refused this request. The employer stated that, pursuant to the Holiday Act in force at the time, employees bear the risk of becoming sick during their annual leave.

Already by that time, the ECJ had ruled in Pereda (C-277/08) in September 2009 that under the Working Time Directive (2003/88/EC) employees are entitled to replacement leave if they

become sick during any holiday that they are entitled to take under the Directive. In that case, the ECJ took a broader approach to the issue than requested by the referring court, since the question put to the ECJ was about an employee who had fallen ill before the scheduled holiday had commenced. However, the ECJ drew no distinction between illness beginning before or during leave.

Soon after the Pereda judgment, the Danish Ministry of Employment asked a sub-commission under the Danish Parliamentary Implementation Committee to look into possible amendments to the Holiday Act in light of Pereda. The sub-commission was composed of government officials and representatives of the industrial partners and its function was to examine EU employment law and discuss implementation. The sub-commission finalised its work in September 2010, concluding that the Danish provisions under which the risk of sickness during holiday transfers from the employer to the employee at the time a scheduled holiday begins would be likely to be deemed contrary to the Working Time Directive if the issue were ever to be put before the ECJ. The Danish Parliament adopted new legislation to reflect those findings, but only did so in April 2012.

The employee in the case at hand issued proceedings against the Ministry of Employment, claiming that it should have brought the Holiday Act into line with the Working Time Directive in the summer of 2010. He argued that he would have been entitled to replacement leave if the Ministry had done so and that he should therefore be compensated for the value of the holiday he would have been entitled to had the amendment been implemented then.

Judgment

The High Court decided that, at the time of the illness, there was not sufficient basis for finding that the Danish authorities should have implemented new legislation in response to Pereda. The Supreme Court, however, took a broader approach.

The Supreme Court noted with reference to case law from the ECJ – mainly Brasserie du pêcheur (C-46/93 and C-48/93) and Jonkman (C-231/06 and C-233/06) – that in order for an EU member state to incur liability for violating EU law, the violation must be found to qualify as such. The test for this is whether the Member State has manifestly and grossly exceeded the boundaries of its discretionary powers.

The Supreme Court also noted that the ECJ's judgment in Pereda cast such doubt on the compatibility of Danish law with EU law that whether and how the law should be changed needed to be looked into as quickly as possible. The Supreme Court believed the decision to pass the matter to the sub-commission of the Parliamentary Implementation Committee for study and analysis before deciding how to proceed was a good one. The Committee issued its

report in September 2010. The report suggested that only a limited and relatively simple amendment of the Holiday Act was needed and so the Supreme Court held that the amendment should have been implemented and brought into force by 1 January 2011.

However, a hearing on the draft bill to amend the Holiday Act was not launched until a year later, in January 2012, and the amendment did not take effect until April 2012. On that basis, the Supreme Court held that the Danish authorities had incurred liability by not having aligned the Holiday Act with EU law with effect from 1 January 2011.

With regard to the plaintiff in the case at hand, however, the employee's sickness occurred in the summer of 2010 – thus before the Danish authorities became liable for late implementation – and therefore the employee was not entitled to compensation.

Commentary

Holiday regulation is a hot topic in Denmark for more than one reason. Last year, a Commission presided over by the former Supreme Court President delivered a white paper report on a new Holiday Act. The Commission was set up in response to a letter of formal notice from the EU Commission stating that Danish holiday regulation was contrary to the Working Time Directive. The main objection voiced by the EU Commission was that the Danish way of accruing holiday – i.e. the period in which holiday accrues is not the same as the period in which holiday can be taken – was preventing people new to the labour market from having four weeks of paid leave, as required by the Working Time Directive. The new legislation proposed by the Commission will gradually be introduced from 2019.

In terms of the case at hand, with this judgment, the Supreme Court has found – for the first time – that the Danish authorities have been liable for failing to implement a piece of EU law correctly. As a result employees who were sick while on holiday for more than five days in the period from 1 January 2011 to 1 May 2012 may claim compensation from the Danish authorities, provided, of course, that the conditions for entitlement to replacement holiday are met and their claims are not time-barred.

This judgment is also a remarkable example of the development that the Supreme Court has undergone over the last 25 years. As has been said by a former president of the Supreme Court, the Court is no longer merely an appellate court but is more aptly characterised as a precedent-setting court. This is clearly demonstrated by this judgment, as by setting the date by which it believes the authorities incurred liability for failure to amend the Holiday Act, it has pre-decided a large number of potential cases.

The judgment in this case was issued only a few months after the Supreme Court's judgment

in Rasmussen (that followed the ECJ's judgment in C-441/14 – examined in EELC 2017/14). In Rasmussen the Supreme Court held that with regard to a dispute between two private parties, the Act on the Accession of Denmark to the European Union provides no authority for allowing the general principle prohibiting discrimination on grounds of age to override the former provision in section 2a(3) of the Salaried Employees Act. Thus, its judgment in the Rasmussen case disregarded the preliminary ruling of the ECJ. By contrast, with this judgment, the Supreme Court sends a strong message that judgments from the ECJ are still to be taken very seriously in Denmark.

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier Ltd): In Finland, the provisions of the Annual Holidays Act regulating employees' right to replacement leave if they fall ill during holiday have been amended several times over the past few years. The old Annual Holidays Act (272/1973, later replaced by the current Annual Holidays Act 162/2005) provided for the possibility of postponing the start of a holiday at the employee's request if the employee was already ill when the holiday was supposed to begin. In addition, if the employee fell ill during the holiday, he or she had the right to have any days of leave over seven days postponed to a later date. The new Annual Holidays Act included similar provisions at the time it entered into force in 2005.

However, in 2013, the Annual Holidays Act was amended and the so-called seven-day waiting period was removed, as it was deemed to be contrary to the Working Time Directive, which guarantees a four-week holiday for employees. The legislator was criticised for its slow reaction to the issue. After the amendment, employees had the right to postpone each vacation day during which they were ill. However, the right to postpone the whole holiday if the employee is ill at the beginning of the holiday was not – and still has not been – changed.

In 2016, the section was amended again, to the effect that if an employee fell ill during a holiday, he or she had the right to have vacation days exceeding six days postponed to a later date. Thus, the previous seven-day waiting period became a six-day waiting period. This time it was added that the waiting period must not, however, decrease the employee's right to a four-week annual holiday. So, in practice, the waiting period only applies to employees who have the right to a holiday longer than four weeks. If an employee who has the right, for example, to a holiday of four weeks and four days falls ill during the holiday, the four days are considered waiting days and cannot be postponed to a later date. If the employee still continues to be ill, the vacation days exceeding four days of illness can be postponed.

The current regulation has been strongly criticised especially by the trade unions. In October

2017, the Labour Court of Finland referred a request for a preliminary ruling to the ECJ on whether Finnish law is contrary to the Working Time Directive or the Charter of Fundamental Rights of the European Union. It remains to be seen whether the section of law in question will need to be amended –once again.

The Netherlands (Jan-Pieter Vos, Erasmus University Rotterdam): The Dutch Supreme Court adopted a different approach in a similar case on wrong implementation of the Working Time Directive (2003/88/EC). It held that the State of the Netherlands was liable as the relevant laws were contrary to the Working Time Directive. The Supreme Court based this on an older judgment in which it had held that, in principle, a government agency acts unlawfully if it issues provisions that are contrary to a higher regulation. The Supreme Court thus did not apply the Francovich test, but a stricter one. This may be in line with the ECJ case of Levez (C-326/96), in which the ECJ held that a more beneficial approach than Francovich must be adopted once a comparable action is available for breaches of higher national legislation (by lower legislation), but it has also been argued (e.g. by the Advocate-General) that, in this case, there would be no comparable action under Dutch law.

Unfortunately, the Supreme Court did not give any further reasoning for its decision. It did however note that the State of the Netherlands may adduce facts and circumstances which validate an exemption from the rule that the Supreme Court applied.

It seems unlikely, however, that the Supreme Court will readily accept that an exception should apply, as the Court has already dismissed the State's defence on the process of implementation of the Working Times Directive in this case – though possibly a little too easily, in my view.

Consequently, the State of the Netherlands seems to be subject more or less to strict liability for incorrect implementation of EU legislation. One could ask whether this is the right approach, given that it is the longstanding position of the EU that too strict an approach to incorrect implementation might result in vague and safe legislation, which would undermine the effectiveness of EU law (HNL, C-83 and 94/76, C-4, C-15 and C-40/77).

Subject: Miscellaneous

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