

SUMMARY

2018/23 Labour Court treats the consequences of cancer as a disability (BE)

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Facts

The employee (the 'Claimant') had been employed as a saleswoman in an art shop since 6 April 2006 by the employer (the 'Respondent'). The Respondent has about 14 similar stores.

On 19 November 2012 the Claimant was diagnosed with lymph node cancer. When she notified the Respondent of this, he expressed his best wishes and said that she should take the time she needed to make a full recovery. She was incapacitated for more than 21 months. On 6 December 2012 a new saleswoman was hired for the store where the Claimant worked.

Following a positive assessment by her doctors, the Claimant contacted the Respondent on 14 August 2014 with a view to a progressive reinstatement as of 1 September 2014 through an adapted work schedule. The Respondent notified the Claimant by registered letter on 26 August 2014 that her employment contract was being terminated because of a lack of appropriate work for her.

The Claimant asked the Respondent to elaborate on the reasons for the dismissal. The Respondent replied that a new saleswoman had been hired and that it was not financially sustainable to have two employees for the same job. Besides, the work package had evolved and further training would have been necessary.

The Claimant filed a claim on 21 August 2015 against the Respondent before the Labour Tribunal of Leuven with a view to obtaining a lump sum indemnity for violation of anti-discrimination legislation. By judgment of 27 July 2016 the Tribunal rejected the Claimant's claim. The Tribunal considered the dismissal justified based on the need for efficient functioning of the business. There was no discrimination based on the Claimant's present or future medical condition. The Tribunal did not accept the existence of a disability, because the Claimant could not show sufficiently well that she had raised the issue of adjustments to her workstation or work schedule for her progressive reinstatement. The Claimant appealed the decision before the Labour Court of Brussels, asking payment of a lump sum indemnity equal to six months' pay for violation of anti-discrimination law.

Judgment

The Labour Court based its interpretation of the concept of 'disability' on the case law of the ECJ. For the ECJ, the concept of 'disability' within the meaning of Directive 2000/78 must be understood as referring to "a limitation which results in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (citing, e.g., case C-395/15, Daoudi, paragraph 42).

According to the Labour Court, with this interpretation the ECJ had deliberately chosen not to equate the concepts of 'disability' and 'illness', but it had not ruled out the possibility that an illness could be seen as a disability to the extent that the restriction it imposes is of a long-term nature. Indeed, the Labour Court found that: "if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78" (citing Case C-335/11 and C-337/11, Ring and Werge, paragraph 41).

Since the Claimant would only resume her work partially and would remain part time until 31

October 2015, her cancer could be considered a long-term physical - and even a psychological illness, as she was also in need of counselling. This long-term condition prevented her from participating fully, effectively and on an equal basis with other employees. This reasoning was confirmed within the reasoning for termination put forward by the Respondent, because he did have suitable work, but just not for the Claimant. The fact that she could only work following a progressive reinstatement and that, after her dismissal she needed counselling to cope with her limitation in the labour market, only served to confirm the existence of a disability.

The fact that the Claimant had been dismissed before the competent employment agency could recognize her as disabled was irrelevant, as such recognition, made upon request of the employer to benefit from financial support, is based on criteria which are different from the ones set out by the ECJ. The summary dismissal of the Claimant had prevented the application of the legislation on well-being at work, which allows for sick employees to meet with the company doctor before returning to work to see if any adaptations to the work station or schedule are needed. The Respondent had argued that he was not aware of the request for progressive reinstatement, but the Labour Court found this was not supported by evidence and, even if it were the case, discrimination based on disability is not dependent on a request for progressive reinstatement. It can even occur without any intent to discriminate.

The Labour Court also referred to the lack of evidence that reasonable adjustments in the form of the requested progressive reinstatement and appropriate practical training would have created an unreasonable burden on the Respondent. By dismissing a disabled Claimant without even considering adapting her job, the Respondent violated the duty of reasonable accommodation.

Therefore, the Labour Court ruled in favour of the Claimant, stating that the Respondent had discriminated against her based on her disability and medical condition. A lump sum indemnity of six months' pay was awarded for violation of the anti-discrimination legislation.

Commentary

This ruling is interesting as it is the first time Belgian court has recognized that the long-term consequences of cancer may qualify as a disability within the scope of anti-discrimination law.

This ruling was to be expected, given the well-settled case law of the ECJ on the subject of diseases with long term effects, yet it is important from a symbolic perspective, as cancer is a widespread ailment afflicting a growing proportion of the working population.

Belgian employers are now on notice that they must think about reasonable adjustments before dismissing an employee returning from a long period of sick leave owing to cancer, if they want to avoid having to pay a lump sum indemnity for violation of anti-discrimination law.

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier Attorneys Ltd.): In Finland, the Employment Contracts Act states that the employer may not terminate an employment contract without 'appropriate and weighty grounds'. According to the preparatory works of that Act, appropriate and weighty grounds means, for example, that the grounds must never be discriminatory. The Non-Discrimination Act, in turn, specifically includes health as a category based on which discrimination is prohibited. The Non-Discrimination Act also says that an employee subjected to discriminatory behaviour is entitled to compensation in addition to any compensation payable for, for example, unlawful termination of an employment contract.

However, if the employee's ability to cope with his or her work goes through a significant change, this can be considered appropriate and weighty grounds for termination attributable to the employee or related to the employee personally. The employer's and employee's overall circumstances must be taken into account when assessing a reason based on appropriate and weighty grounds. Even in this context, an illness, disability or accident affecting an employee can only be considered an appropriate and weighty reason, if the employee's capacity for work is substantially reduced for such a long term that it is unreasonable to require the employer to continue the contractual relationship.

If a Finnish court were presented with a similar case, the employer's argument that the grounds for termination were financial would probably be rejected and the court would have to assess whether there would have been appropriate and weighty grounds for dismissal attributable to the employee or related to the employee personally. As the employee would have been able to return to work after some training, the court would probably have found that it would not have been unreasonable to require the employer to continue the contractual relationship. Thus, the employee would have been awarded compensation for unlawful termination.

The long-term consequences of cancer as a disability has not been the subject of any Finnish case law. In a recent case, the Finnish Supreme Court turned down an argument that obesity and its long-term consequences were a 'disability' under EU law. However, obesity was found

to be a health condition, and health is protected against discrimination under the Non-Discrimination Act. Thus, although a Finnish court in a similar case might not regard the long-term consequences of cancer as a disability, it might award compensation for a breach of the Non-Discrimination Act, in addition to any compensation for unlawful termination of the employment contract.

Subject: Disability discrimination

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