EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/13 A long-term functional impairment? (DK)

An employee's functional impairment, which at the time of dismissal had had a duration of 11 months and with an uncertain prognosis, was not deemed a long-term one. For that reason, the Danish Western High Court found that the employee was not disabled within the meaning of the Anti-Discrimination Act or Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

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Legal background

The definition of the concept of 'disability' within the meaning of Directive 2000/78 has gradually been developed by the ECJ. Thus, cases such as *Chacón Navas* (C-13/05) and *HK Danmark* (C-335/11 and C-337/11) constitute significant contributions in regard to the national courts' interpretation of the concept of disability under Directive 2000/78 and the national legislation implementing the Directive.
The ECJ has, among other things, decided that the definition of disability requires that an employee's functional impairment must be a 'long-term' one. In the *Dauoidi* case (C-395/15), the ECJ noted that the decision of whether an impairment is long-term is mainly one of the factual circumstances of the case that are for the national courts to decide (para 57).

In the case at hand, the High Court had to decide on the question of what constitutes a long-term impairment.

Facts

The case concerned an employee at a municipal family care centre. In May 2012, the employee was involved in a road accident during working hours. Due to the trauma caused by the accident, the employee was subsequently on full-time sick leave.
The employee was both physically and cognitively affected by the consequences of the accident. Doctors had given the employee different diagnoses, including post-traumatic stress disorder and post-concussion syndrome.
In November 2012, the employee partly resumed work, working 10 hours a week. After that, the plan was for the employee to gradually increase her working hours as far as the circumstances allowed it. In a fit for work certificate dated February 2013, the employee's doctor estimated that the employee would be able to gradually increase her working time over the next 3-4 months. However, in March 2013, the employee's union made a plan according to which the employee after taking one week's holiday would increase her working time to full-time in the following 6 weeks – and, thus, sooner than estimated by the doctor. As a result of the plan, the employee tried to resume work on a full-time basis within 6 weeks. But the employee was not able to handle full-time work and her working hours were therefore, once again, reduced.
Eventually, the employee's reduced functional capacity and sickness absence became a significant operational burden for the employer. Furthermore, it was highly uncertain if, and in such case when, the employee would be able to resume work on a full-time basis. In April 2013, the employee was therefore dismissed.
The employee and her union brought proceedings against the employer, claiming that the dismissal was contrary to the Anti-Discrimination Act. The claim was based on the argument that the employee had a disability within the meaning of the Act and, furthermore, that the employer had not in a sufficient manner fulfilled its duty to adjust the working conditions to the employee's needs to enable her to work.
On the other hand, the employer argued that the employee had not proven that at the time of dismissal she had a disability within the meaning of the Act, as her impairment was not to be considered a long-term one.
The case was initially heard by the Danish Board of Equal Treatment and subsequently by a district court, both finding in favour of the employer. The case was then brought before the High Court.

Judgment

Initially, the High Court stated that the concept of disability – in accordance with the case law of the Danish Supreme Court – must be interpreted in conformity with Directive 2000/78/EC and the ECJ's interpretation of Directive 2000/78/EC.
The High Court also referred to the judgment in the *HK Danmark* case (C-335/11 and C-337/11) in which the ECJ defined the concept of disability as including "*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 of a long-term one*" (para 47).
The High Court then stated that the question of whether an employee has a disability within the meaning of the Act must be based on an overall assessment of all the facts of the specific case.
As regards the assessment of the requirement that the impairment must be 'long-term', the High Court referred to the ECJ's judgment in the *Daouidi* case in which the ECJ noted that Directive 2000/78 does not define what constitutes the required 'long-term' impairment. The assessment of whether an impairment is a long-term one is mainly one of the factual circumstances of the case and it is therefore for the national courts to decide on this issue. In this assessment, the national court "*must base its decision on all of the objective evidence before it, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data*" (para 57 in *Daouidi*).
The High Court noted that at the time of dismissal the employee undoubtedly had an impairment covered by the concept of disability in Directive 2000/78 and, thus, also by the Act.
Based on the facts of the case, however, the High Court found that the impairment – which at the time of dismissal had had a duration of 11 months – had not been a long-term one. The assessment of whether the impairment at this time was long-term therefore depended on the prognosis.
The High Court found that the medical information available at the time of dismissal was characterised by a considerable degree of uncertainty in regard to the duration of the impairment. In this regard, the High Court referred to what the employee's doctor had explained during the proceedings. The doctor had explained that in March 2013 she expected the employee's symptoms to last longer than previously estimated. Furthermore, the doctor explained that it is very individual to the patient as to how long that patient will be affected by a diagnosis such as post-traumatic stress disorder or post-concussion syndrome. Another factor that the High Court took into account was that the employee's union shortly before the dismissal had made a plan involving the employee resuming full-time work within 6 weeks.
Referring to these reasons, the High Court found that the employee had not proven that the impairment at the time of dismissal was expected to be a long-term one. Consequently, the

High Court dismissed the employee's claim for compensation under the Anti-Discrimination Act.
For the sake of completeness, it should be noted that at the time of writing this case report the employee and her union have requested leave to appeal to the Supreme Court. It is however not clear yet whether such leave will be granted.

Commentary

In recent years, we have seen – and are still seeing – a great number of Danish cases regarding the concept of disability within the meaning of the Anti-Discrimination Act. In particular, the question of drawing a line between sickness and disability has been of great interest. As initially stated by the High Court in its reasoning in the case at hand, the concept of disability under the Act must be interpreted in accordance with Directive 2000/78 and the ECJ's interpretation of that Directive.
The Danish cases regarding disability discrimination have concerned different aspects of the concept of disability as set out by the ECJ. And recently, several cases, such as this one, have concerned the question of what constitutes a long-term impairment.
This specific judgment confirms that it is for the employee to prove that he or she has a disability within the meaning of the Anti-Discrimination Act and Directive 2000/78.
Furthermore, the judgment illustrates how the Danish courts assess the duration of an impairment at the time of dismissal. Thus, in this case, a period of 11 months was not sufficient for the court to establish the required long-term limitation. The judgment also shows how the Danish courts, where necessary, subsequently establish the prognosis of an impairment at the time of dismissal.
In regard to establishing whether the employee's impairment is of a long-term nature, the case confirms the approach laid out in the *Daouidi* case: the assessment of whether an impairment is a long-term one must be based on the factual circumstances of the case, particularly information from doctors and other medical professionals.
In a judgment from 2017, the Danish Supreme Court ruled that a medical diagnosis is not required when deciding if a person has a disability within the meaning of the Anti-Discrimination Act and Directive 2000/78. Even though a medical diagnosis is no longer an indispensable requirement in order to decide that an employee's functional impairment constitutes a disability, the medical information of a case, including information on diagnoses, remains essential in cases concerning disability discrimination.
Thus, as illustrated by the case at hand, medical diagnoses, evaluated on the basis of the time element, will be essential in the decision of whether or not the impairment is a long-term one.

Comments from other jurisdictions

United Kingdom (Richard Lister, Lewis Silkin LLP): In order to be covered by the definition of 'disability' in the UK's Equality Act 2010, an impairment must have a substantial adverse effect and this has to be long-term. There is a specific provision defining what 'long-term' means for these purposes. The effect of an impairment is long-term if it: has lasted for at least 12 months; is likely to last for at least 12 months; or is likely to last for the rest of the life of the person concerned. (The third of these options is to ensure that someone who is terminally ill and not expected to live for 12 months will be covered.)

The issue which arises most often is whether the substantial adverse effects of an employee's condition are likely to last for at least 12 months. The word 'likely' was initially interpreted as meaning 'more probable than not', but this was subsequently disapproved by the UK's House of Lords (at the time, the UK's most senior court) in *Boyle – v – SCA Packaging Ltd* [2009] ICR 1056. The House of Lords ruled that 'likely' should be defined as simply meaning 'could well happen' – a significantly lower hurdle for claimants to surmount.

These UK provisions must now be read in light of the ECJ's recent judgment in *Daouidi*, although that does not give much specific guidance as to when a person's incapacity for work will be sufficiently long-term, leaving it to national courts to determine this issue on the evidence. Take for example a situation in the UK where an employee has been incapacitated for six months at the time their claim is heard (as was the case in *Daouidi* itself). The Employment Tribunal would have to decide whether the claimant's incapacity for work would be likely to last at least a further six months. If the medical prognosis is uncertain this could be difficult to show, even applying the 'could well happen' test established in *Boyle*.

As for the case from Denmark reported above, in which the employee's functional impairment had an existing duration of 11 months, one would expect the issue to be decided in the claimant's favour if the case were being decided under UK law. It should be relatively easy to persuade the Employment Tribunal that the effect of the impairment would be likely to continue for a short period, extending beyond the 12-month threshold. The issue is clearly more finely balanced under Danish law (in light of *Daouidi*) – it will be interesting to see whether the case goes to the Danish Supreme Court and, if so, whether it is prepared to overturn the High Court's decision.

Germany (Ines Gutt, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG') protects against discrimination on the grounds of disability. A disability within the meaning of the AGG exists if there is a long-term physical, mental or sensory impairment which, in interaction with various barriers, can prevent disabled people from full, effective and equal participation in society. This includes a condition caused by a medically diagnosed curable or incurable disease, if that disease has the aforementioned limitations. This interpretation of the concept of disability is consistent with Article 1 of the United Nations Convention on the Rights of Persons with

Disabilities.
This definition requires a distinction between disability and disease as a mere disease does not fall within the scope of protection of the AGG. A disease is considered a temporary functional impairment. This also means that a termination on grounds of sickness-related incapacity to work is not necessarily a discrimination. The longer duration of the limitation must not refer to the disease, nor to a dysfunction, but to the limitation of social participation. The latter is a key indication for a disability according to the German jurisdiction.
According to the German Federal Labour Court the incapacity to work may be 'long-term' if a foreseeable end cannot be determined or the incapacity can extend considerably until the person concerned has recovered. This may be determined based on a (medical) prognosis. In this respect, Sec. 2 SGB IX provides a guideline that the impairment is 'long-term' if it exceeds six months.
In this case the BAG may possibly have ruled in the same way. The distinction between illness and disability is also difficult in the German jurisdiction, as there are no clear criteria for differentiation and a case-by-case assessment is therefore essential. Due to the impairment of at least 11 months and the unclear prognosis, the assumption of a disability does not seem unlikely. In that case the applicant would have fallen within the scope of the AGG and benefit from protection against discrimination.

The Netherlands (Peter Vas Nunes): When dismissing an employee with an injury, the employer should be able to assess whether (1) the injury is likely to limit the employee's full and effective participation in professional life, and (2) that limitation is likely to be long-term in nature. What matters is the assessment at the time of dismissal. Subsequent developments should be irrelevant. This is relevant, because the said assessment may be different by the time the case comes to court. An injury that is of a type that normally heals quickly, such as a dislocated elbow (as was the case in *Daouidi*), can cause long-lasting disability, for instance as a result of unforeseen complications (infection, wrong treatment, premature return to work, etc.). Conversely, a medical situation that at the time of dismissal appears to be very serious, such as a heart attack, may turn out to allow a speedy and full return to work. The court must disregard such knowledge in hindsight, difficult as that may be.
The crucial finding in the ECJ's judgment in *Daouidi* is (at §56):

"The evidence which makes it possible to find that a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or, as the Advocate General has, in essence, noted in point 47 of his Opinion, the fact that the incapacity is likely to be significantly prolonged before that person has recovered".

This sentence seems to embody two different criteria for determining whether an injury

qualifies as 'long-term' within the meaning of (the ECJ's interpretation of) Directive 2000/78:

criterion A: the incapacity does not display a clearly defined prognosis as regards short-term progress;
criterion B: the incapacity is likely to be significantly prolonged.

I interpret criterion A as meaning that, in case of doubt as to the disability's duration, there is disability within the meaning of the Directive. If it is unlikely but not impossible that the limitation is long-lasting, there is disability. I interpret criterion B as requiring a certain level of likelihood. Literally, Advocate General Bot opined:

"If it is clear from this evidence that the limitation suffered by Mr Daouidi is long-term in nature, that is to say that, as a result of possible sequelae, it is likely to last longer than the average time needed for an injury such as the one he suffered to heal, and is likely to last for a significant period, then that limitation may come within the definition of 'disability'; within the meaning of Directive 2000/78".

The 'evidence' to which the Advocate General refers is the evidence brought before the court "*in particular documents and medical certificates assessing the likely duration of the disability in question*". As he remarks, the subjective views of the employer are irrelevant, and the length of time between the injury and the dismissal (in Daouidi's case, six weeks, in the case reported above, eleven months) does not constitute a criterion for assessing the long-term nature of the limitation. This brings me to the issue of burden of proof. Must the employee provide evidence that, at the time of their dismissal, their disability was likely to last longer than average? Or does the employer have to prove that this was not to be foreseen? Article 10 of Directive 2000/78 provides that the employee merely needs to establish "*facts from which it may be presumed that there has been discrimination*". In 2017, both the UK Employment Appeal Tribunal (see EELC 2017/2 nr 15) and the Danish Supreme Court (judgment dated 22 November 2017, case 300/2016, cited in EELR 2018/1 p. 74) held that this reversal of the burden of proof does not come into play until the employee has proved that they are disabled within the meaning of the Directive. In other words, it is up to the employee to prove that their disability is likely to be long-term in nature.

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