EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/25 Dismissal of an employee with a reduced-hours job who reached the statutory retirement age did not constitute unlawful discrimination (DK)

In a recent judgment, the Danish Supreme Court has established that it does not constitute unlawful discrimination under the Anti-Discrimination Act when a disabled employee is dismissed. The employee had a publicly funded reduced-hours job, but reached the statutory retirement age for which reason the public funding lapsed, and that was the reason for the dismissal.

Legal background

Under the public reduced-hours working scheme in Denmark, people who have a permanently and substantially reduced capacity for work, and who are not able to maintain or obtain employment on regular terms, may – subject to various conditions – be entitled to a reduced-hours job (in Danish: '*fleksjob*'), cf. the Act on Job Creation.

Under the reduced-hours working scheme, the employee performs a limited number of working hours only for the employer and the local authorities pay a certain amount of the costs of the reduced-hours working arrangement through a wage subsidy. For employees whose reduced-hours job commenced prior to 1 January 2013, the subsidy is paid to the employer, whereas the subsidy is paid directly to employees who took up a reduced-hours job after 1 January 2013.

When an employee with a reduced-hours job reaches the statutory retirement age, the agreement on reduced-hours working with the local authorities lapses, for which reason the public funding also ends.

In the case at hand, the Supreme Court had to decide whether an employer's dismissal of a disabled employee with a reduced-hours job who reached the statutory retirement age was contrary to the prohibition against discrimination on grounds of age or disability laid down in the Anti-Discrimination Act, implementing Directive 2000/78.

Facts

he case concerned an employee who had been employed under the reduced-hours working scheme in a white-collar position since March 2011. The employee's weekly working hours were fixed at 20 hours, but the hours of pay were fixed as a full-time week (i.e. 37 hours). Furthermore, several protective measures applied to the reduced-hours job.

The employer paid the employee's salary but, in accordance with the Act on Job Creation, received public funding equivalent to two-thirds of the costs of the employee's salary from the local authorities.

By the time the employee reached the mandatory retirement age, the employer dismissed the employee with reference to the fact that the reduced-hours working agreement with the local authorities lapsed. The employee did, however, want to continue his employment with the company in a job where the salary and conditions of employment corresponded to his working capacity – i.e. a part-time job with reduced salary.

The employee and his trade union issued proceedings against the employer claiming that the dismissal was contrary to the Anti-Discrimination Act, the Act on Part-Time Employment and the Salaried Employees Act.

Judgment

hen delivering its judgment, the Supreme Court initially established that the public reduced-hours working scheme consists of two required elements: an employment relationship and a public subsidy.

The Anti-Discrimination Act contains a provision specifying that according to statute or other public efforts measures can be taken with a view to improving the employment possibilities for people of a certain age or with a disability. The provision is based on Article 6 of Directive

2000/78. The Supreme Court found that the reduced-hours working scheme must be regarded as a job-creating effort allowed under this provision in the Anti-Discrimination Act.

According to the Supreme Court, the termination of such a positive special measure as a consequence of the employee reaching the statutory retirement age is not to be considered as unlawful discrimination on grounds of age or disability. Consequently, the Supreme Court found that the dismissal of the employee when he reached the statutory retirement age – and the public funding ceased – was not contrary to the Anti-Discrimination Act.

On another note, the Supreme Court stated that it had to be regarded as a clear condition for being employed in a reduced-hours job that the employer receives a wage subsidy from the local authorities. Thus, the Supreme Court found that the basis for continuing the employment had lapsed when the wage subsidy ended.

On these grounds, the Supreme Court found that the dismissal was neither contrary to the Act on Part-Time Employment nor the Salaried Employees Act.

With the judgment, the Supreme Court upheld the judgment previously delivered by the Maritime and Commercial Court.

Commentary

In Denmark, employment under the public reduced-hours working scheme is widely used in both the private and public sectors. Consequently, the fundamental question of whether or not the dismissal of an employee with a reduced-hours job when the public funding lapses constitutes unlawful discrimination is of great importance for Danish employers in general.

In 2011 the Board of Equal Treatment rendered its decision in a case concerning an employee with a reduced-hours job who – due to a decrease in sales – was dismissed two months after she had reached the statutory retirement age and the public funding had ended.

Based on the facts of the case, the Board of Equal Treatment found that the employer had proved that the dismissal was objectively justified by a legitimate aim. For this reason, the Board held that the dismissal did not constitute unlawful discrimination. Additionally, the Board stated that it would not per se constitute unlawful indirect discrimination to dismiss an employee with a publicly funded reduced-hours job when the public funding ends.

In June 2018, the Maritime and Commercial Court decided in the case at hand that the

dismissal of the disabled employee with a publicly funded reduced-hours job when the public funding lapsed did not constitute unlawful discrimination under the Anti-Discrimination Act.

In February 2019, the Board of Equal Treatment, once again, heard a complaint concerning an employee who was dismissed from his reduced-hours job approximately four months after he had reached the statutory retirement age.

In that case, the Board found that the employer had not proved that the principle of equal treatment had not been breached. In its reasoning, the Board took into account that the employer had not had any discussions with the employee in this regard, even though the employee had expressed a wish to continue his reduced-hours employment on ordinary employment terms and conditions after the lapse of the public funding. The employee was awarded compensation corresponding to approximately 12 months' pay for reduced-hours employment.

As a consequence of the above decisions, the position of the Supreme Court on this fundamental issue has been awaited with great interest.

The Supreme Court judgment illustrates that the provision in the Anti-Discrimination Act stipulating that measures can be taken with a view to improving the employment possibilities for certain people constitutes a relatively comprehensive exception to the prohibition against discrimination on grounds of age and disability.

Comments from other jurisdictions

Germany (Ines Gutt, Luther Rechtsanwaltsgesellschaft mbH): Also in Germany, people who have a permanently reduced capacity for work due to a disability, and who are not able to work on regular terms, may be entitled to a reduced-hours job. Such a claim may arise from Sec. 164 para. 5 of the Social Code IX ('Sozialgesetzbuch IX') or from non-disability-related provisions, such as Sec. 8 of the Part-time and fixed-term contracts Act ('Teilzeit- und Befristungsgesetz').

However, in Germany – unlike in Denmark – the State does not permanently pay a fixed amount to the employer or employee as a subsidy for hiring the disabled employee. The only subsidy paid by the State to the employer is the so-called integration subsidy ('*Eingliederungszuschuss*'). Employers can receive the integration subsidy as a wage cost subsidy if they hire job-seekers with reduced working capacity. The subsidy may – in most cases – be paid for a period of 24 months and cover up to 70% of the wage.

Nevertheless, it should be noted that in Germany dismissal due to reaching retirement age is generally considered void in accordance with Sec. 41 of the Social Code VI ('Sozialgesetzbuch VI'). This stipulates that reaching a certain age limit (retirement age) does not form a reason for dismissal. The expiry of a disability-related subsidy would not form a reason for dismissal either. Both dismissals would violate the General Equal Treatment Act ('*Allgemeines Gleichbehandlungsgesetz*').

A termination for employees reaching the retirement age – without need of dismissal – requires a prior agreement, e.g. by means of a (fixed term) employment contract.

In summary, it should be noted that the present case study is difficult to transfer to the regulations applicable in Germany. However, it seems likely that the dismissal would be regarded as discrimination on grounds of age regardless of any public subsidies. In this context, the jurisdiction of the German Federal Labour Court contradicts the one in Denmark. The aforementioned regulations should therefore always be kept in mind when a (disabled) employee is dismissed when reaching the standard retirement age.

The Netherlands (Peter Vas Nunes): The dispute in this case was between (a union representing) the employee and their employer. Neither Denmark nor the local authority with which the employer had a funding agreement were a party. Nevertheless, the Supreme Court pronounced on the validity of that agreement, holding that its automatic termination upon the employee reaching retirement age is in line with Directive 2000/78.

The ECJ's case law on termination of employment at retirement age (*Palacios*, *Age Concern*, *Rosenbladt*, etc.) concerns the situation where the employer desires the termination. This case is different in that the employer may have wished to continue the working arrangement, but – effectively, indirectly – an external factor (the cessation of the public funding) caused the termination. Does the said case law apply 1:1 to this situation? In *Rosenbladt*, the automatic termination of employment at age 65 was justified by three aims: (i) sharing employment between generations; (ii) not requiring the employer to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age; and (iii) appropriate and foreseeable planning of personnel and recruitment management. It would have been interesting to know what the aim is of the Danish cessation of public funding upon the employee reaching retirement age and how the Supreme Court assessed that aim, as well as the means to achieve it.

Dutch law provides that an employee may be dismissed (or, as the case may be, that their

contract terminates automatically) upon, and for the sole reason of, their reaching retirement age (being the contractual retirement age or, in the absence of a contractual age, the statutory age). The relevant provision does not apply where the employment continues beyond that age. In that case, the employer will need to justify the termination. Interestingly, the author of this case report references two previous Danish cases where the employee had continued working – respectively, for two months and for four months – after the public funding had stopped. This raises the question of how long an employer may continue to employ a publicly funded person beyond their retirement age without risking having to justify termination on account of the funding's cessation.

Subject: Age discrimination

Parties: Teknisk Landsforbund (TL) (the Danish Association of Professional Technicians) acting for A against X A/S

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