EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/14 Sickness absence related to employee's disability (DK)

Recently, the Danish Eastern High Court found that an employee's sickness absence was a result of the employer's failure to comply with its obligation to offer reasonable accommodation for the employee's disability. For that reason the employee, who was dismissed in pursuance of the Danish "120-day rule", was entitled to compensation for unfair dismissal under the Danish Anti-Discrimination Act.

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p style="margin-right:-51px">Recently, the Danish Eastern High Court found that an employee's sickness absence was a result of the employer's failure to comply with its obligation to offer reasonable accommodation for the employee's disability. For that reason the employee, who was dismissed in pursuance of the Danish "120-day rule", was entitled to compensation for unfair dismissal under the Danish Anti-Discrimination Act.

Legal background

p style="margin-right:-51px">The Danish Salaried Employees Act lays down a specific rule according to which it can be agreed that employees may be dismissed with a shortened notice if an employee has been on sick leave for a total of 120 days within the past 12 months (the "120-day rule").

p style="margin-right:-51px">If, however, the employee has a disability within the meaning of the Anti-Discrimination Act implementing Directive 2000/78, and the employee's sickness absence is a result of the employer's non-compliance with its obligation to accommodate the employee's disability, a dismissal of the employee with reference to the 120-day rule will constitute a violation of the Anti-Discrimination Act. According to Danish case law, the 120-day rule will in such case not be applicable.

Facts

p style="margin-right:-51px">The case at hand concerned a store manager who – as a consequence of a concussion – suffered from headaches and exhaustion, in particular at the end of the day. Due to this functional impairment, the employee was assigned a personal assistant to assist her with work functions that she was no longer able to perform herself. It should be noted that the salary costs of the employee's personal assistant were reimbursed by the municipality.

p style="margin-right:-51px">Due to the functional impairment, the employee needed to rest during the work day. For that reason, the employee and the local job centre had made an agreement according to which the employee could go home and rest for some of the hours during which the personal assistant was assigned if the employee was still available by phone or email when she was at home.

p style="margin-right:-51px">The employee arranged her work day in such a way that she would work from home at the beginning of the day performing some administrative tasks, and then she would go to the store to be present and perform work there. Normally, she would leave the store late in the afternoon, whereas the personal assistant would stay in the store.

p style="margin-right:-51px">However, after the arrangement had been in force for more than four years according to which the employee was – to some extent – able to work from home, the employer claimed that it could no longer accept the arrangement. Accordingly, the employer required that the employee be present in the store the entire day and, further, that the employee take closing shifts in the store.

p style="margin-right:-51px">After the change to the arrangement, the employee went on sick leave due to work-related stress and anxiety. During the period when the employee was on sick leave, three sickness absence interviews were held between her and the employer. However, the parties did not find any solution as to how the employee would somehow be able to resume her work in the store.

p style="margin-right:-51px">When the employee had been sick for a total of 120 days, the employer decided to dismiss the employee citing the 120-day rule.

p style="margin-right:-51px">The employee and her union claimed that the dismissal was in breach of the Anti-Discrimination Act for which reason proceedings were issued.

Judgment

p style="margin-right:-51px">Initially, the case was heard by a district court. During these

proceedings, the employee and her union argued that whilst the employer had in fact accommodated the employee's disability for the first four years after she suffered a concussion, the employer had not met the obligation to offer reasonable accommodation for the employee's disability in the time leading up to and during the employee's sickness absence.

p style="margin-right:-51px">The employer, on the other hand, contested that the sickness absence was based on the employee's disability, and even if this was the case the employer should not have known that the absence was caused by the employee's disability. In addition, the employer argued that the obligation to offer reasonable accommodation had – in any event – been fulfilled.

p style="margin-right:-51px">The district court held that even though the sickness absence was based on the employee's work-related stress and anxiety, the sickness absence was in fact related to her disability. The reason was that the employee's sickness had been triggered by the employer's focus on the employee's work arrangement and the requirement for her to be present in the store.

p style="margin-right:-51px">Based on the facts of the case, the court found that the employer had not satisfied the burden of proving that appropriate measures to accommodate the employee's impairment had been taken so that she would be able to retain her employment – or that the employer had offered or investigated such measures, for example through a so-called 'fit for work certificate'. In addition, the court took into account that the employer's costs of the assistant's salary were reimbursed by the municipality.

p style="margin-right:-51px">Further, the court noted that the employer had not proven that it would have imposed a disproportionate burden on the employer if the employee was not required to be present in the store throughout the working hours or, for instance, to provide access to a quiet room in the store where she could rest.

p style="margin-right:-51px">Finally, the court expressly stated that the fact that the employee herself had not expressed any specific wishes or needs did not affect this assessment.

p style="margin-right:-51px">Consequently, the court found that the conditions for applying the 120-day rule were not satisfied at the time of dismissal. Thus, the employee was awarded compensation equivalent to 12 months' salary. When assessing the amount of compensation, the court took into account that the breach had resulted in long-term sickness absence and subsequently dismissal of the employee who had worked in the store for nearly 12 years.

p style="margin-right:-51px">The decision by the district court was appealed to the Danish

Eastern High Court. The High Court upheld the reasoning and judgment delivered by the district court.

Commentary

p style="margin-right:-51px">The case at hand is one of many recent cases in Denmark that have dealt with the issue of a possible connection between an employee's sickness absence and protection against discrimination on grounds of disability. On that note, the judgment illustrates some of the general difficulties that may occur in cases where an employer must assess whether an employee's sickness absence may be related to the employee's disability.

p style="margin-right:-51px">The judgment specifically shows that regardless of the immediate reason for an employee's sickness absence, the employer must always consider the other circumstances in order to assess if the sickness absence could in fact be connected to the employee's disability in such a way that the employer will be obliged to take reasonable accommodation measures.

p style="margin-right:-51px">If an employer is in doubt about whether an employee's sickness absence may have such a connection with a functional impairment that may constitute a disability with the result that reasonable measures must be taken, it is – from a Danish perspective – advisable to request further information from the employee, for example via a 'fit for work certificate', as also suggested by the court in the case. Such a certificate contains a description of the employer's and the employee's proposals for adaption of work functions that may accommodate the employee's functional impairment. Consequently, the certificate may constitute proof of the measures that have been considered should a dispute subsequently arise.

p style="margin-right:-51px">Even though the court states that the fact that the employee herself did not express any specific wishes or needs, it is also advisable to expressly ask the employee if they have any suggestions for measures that may be taken in order for the employee to retain their employment.

p style="margin-right:-51px">In regard to the obligation to offer reasonable accommodation, the case illustrates that if an employer has previously taken specific measures throughout an extended period in order to accommodate the employee's functional impairment, the employer may experience evidential challenges when trying to satisfy the burden of proving that reasonable measures have in fact been taken.

p style="margin-right:-51px">From a Danish standpoint, the judgment confirms that the 120-day rule is not applicable in cases where an employer fails to meet the obligation to offer

reasonable accommodation for an employee's disability.

p style="margin-right:-51px">Overall, the judgment illustrates the importance of employers always ensuring they obtain written proof of the considerations, offers and measures made or taken in regard to employees with a functional impairment that may be regarded as a disability within the meaning of the Anti-Discrimination Act. Further, caution is required with assessing the potential connection between an employee's sickness absence and functional impairment.

Comments from other jurisdictions

p style="margin-right:-13px">*The Netherlands (Peter Vas Nunes):* 1. An employer stops providing a disabled (concussion) employee with the reasonable accommodation she needs. Unsurprisingly, this makes her sick (stress, anxiety). She is dismissed on account of her sickness absence. Is the dismissal because ('on the ground') of her sick leave or 'because of' her disability? This question of causality comes up time and again in Dutch cases on discriminatory dismissal (in all strands, not just disability). Unfortunately, there is no hard and fast guidance on how (in)direct the link between the provision, criterion or practice (PCP) in question and the protected characteristic must/may be for a court, or the Human Rights Commission, to determine disparate treatment on the ground of that characteristic. There is not much Dutch case law on this point, perhaps due to the extreme protection against dismissal that Dutch law confers on employees who are unfit for work on account of 'sickness' (a broad concept). Given that the majority of dismissal cases involving disability also involve sickness, the employees in question tend to rely on the prohibition of dismissal during sickness rather than on the less strong and more complicated anti-discrimination rules. Moreover, what case law there is, tends to be case-specific.

p style="margin-right:-13px">2. Under Dutch law, a disabled employee who is adversely affected by a PCP can challenge that PCP if it discriminates on the ground of disability either directly or indirectly. As shown by this Danish case, such a challenge can lead to a debate on *proxima causa*. The UK Equality Act gives employees a third option. They can base a disability claim on the argument that their employer treated them unequally "because of something arising in consequence of" their disability. The case of *City of York Council – v – Gosset*, reported in EELC 2018/24 is a fine example. A teacher committed a serious mistake, for which he was dismissed. In itself, the mistake had nothing to do with his disability. However, the disability, and the employer's failure to take it into account, caused the teacher to be mentally unstable, which in turn contributed to the mistake. This enabled the court to find that the dismissal was because of something "arising in consequence of" the disability.

p style="margin-right:-51px">*Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH):* According to German law, an employee may also be entitled to compensation against the employer in case of an unjustified discrimination. Section 15 (1) and (2) of the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, "AGG") states that:

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p style="margin-right:-51px">*„In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. […]*

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p style="margin-right:-51px">*Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. […]"*

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p style="margin-right:-51px">A termination of employment that occurs in connection with or as a result of a disability may also justify a claim for compensation under this provision. However, not every dismissal of a severely disabled employee leads to a discrimination on grounds of disability. In conclusion, disabled employees can also be dismissed due to sickness. But the requirements for a termination of a disabled employee are high. The notice of termination must be the last resort Thus, a dismissal on grounds of illness can only be considered if the employer is not able to recover the employee's inability to perform by taking appropriate measures.

p style="margin-right:-51px">Having said this, the German law does not contain any provision similar to the Danish "120-day rule". But it is settled case law that a dismissal due to sickness is possible if the following three requirements are met:

The existence of a negative health prognosis. This is the case if it is to be expected that the employee will not be able, or will not be sufficiently able, to fulfil his or her contractual obligations due to illness in the future;
the existence of a significant impairment of business interests and
the impairment must result in a burden which is no longer reasonable for the employer.

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p style="margin-right:-51px">**Subject:** Disability Discrimination, Unfair Dismissal

p style="margin-right:-51px">**Parties**: The Danish Chamber of Commerce (Dansk Erhverv)

acting for Company A A/S – v – Business Denmark acting for B

p style="margin-right:-51px">**Court:** *Østre Landsret* (Danish Eastern High Court)

p style="margin-right:-51px">**Date**: 4 November 2019

p style="margin-right:-51px">**Case number**: BS-37426-2018

p style="margin-right:-51px">**Hard copy publication:** Not yet available

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