SUMMARY

2020/32 Employee barred from claiming compensation under the Anti-Discrimination Act due to agreement in full and final settlement (DK)

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Legal background

Several directives lay down a framework prohibiting discrimination in employment on grounds of different criteria. These directives are implemented into national legislation, such as Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, which has been implemented through the Danish Anti-Discrimination Act.

However, the question is whether employees can waive potential claims under national legislation implementing these directives in termination situations? That was the issue in a recent case heard by the Western High Court.

Facts

The case concerned a job consultant employed at a municipality who, after some years of employment, developed health complications after which she was either fully or partially absent due to sickness for some time. The aim was that the employee should gradually increase her working hours to the number of working hours that she was originally employed to perform (full-time). However, the employee was unable to do so.

As a consequence of the operational strain caused by the employee's sickness absence, the municipality decided to dismiss her. The employee was covered by a collective agreement laying down a provision enabling the professional organisation to request consultation on the dismissal, which the employee's professional organisation did.

During the consultation, the municipality and the employee's professional organisation entered into an agreement that was subject to the employee's subsequent acceptance. According to the agreement, the employee was, among other things, relieved of her duties during the notice period, she was not required to take all of her holiday during the notice period and, in addition, she was offered sessions with a psychologist. According to the summary of the consultation, "there were no outstanding issues in relation to the matter after that". The following day, the employee accepted and signed the agreement.

However, more than two years after the consultation, the employee's professional organisation issued proceedings against the municipality alleging, among other things, that the dismissal was contrary to the Anti-Discrimination Act. The issue of whether the employee could raise such a claim was listed for a separate hearing.

In support of the claim, the professional organisation argued that the wording "there were no outstanding issues in relation to the matter after that" was unclear. According to the professional organisation, the wording could not be deemed to imply that the employee was barred from raising a claim under the protective mandatory Anti-Discrimination Act as such a claim had not been discussed during the consultation. Further, the professional organisation argued that the agreement did not constitute a reasonably balanced solution to the parties' different interests.

On the other hand, the municipality argued that the employee was barred from making a claim under the Anti-Discrimination Act in connection with the dismissal due to the fact that the agreement made was in full and final settlement of any claims against the municipality.

Judgment

Initially, the district court had found that the employee, despite having entered into the agreement, was not barred from claiming compensation under the Anti-Discrimination Act. The High Court then heard the case.

As a starting point, the High Court noted that the relevant provision of the collective agreement according to which the professional organisation had requested consultation concerned the issue of whether a dismissal can be considered as reasonably justified. Based on the evidence presented during the case, the High Court found that the fairness of the dismissal of the employee had in fact not been disputed during the consultation. The consultation had concerned the terms of the employee's dismissal.

Based on the terms of the agreement, the High Court found that the employee had in fact been provided with better rights compared to her statutory rights in a situation where an agreement had not been made.

Taking into account the contents and background of the agreement, the High Court held that the agreement was to be construed as being in full and final settlement of any objections or claims arising out of the termination of the employment. For that reason, the employee was barred from claiming compensation under the Anti-Discrimination Act based on the dismissal and, accordingly, the High Court ruled in favour of the municipality.

Commentary

The Danish courts deal with the issue of validity of severance agreements quite frequently. Based on existing case law, it has been established – also by the Supreme Court – that severance agreements in full and final settlement are valid in the public sector. Further, it has been established that protective mandatory legislation may be derogated from in a situation where a settlement agreement is negotiated.

Several of the cases before the courts have concerned the extent and interpretation of provisions in full and final settlement, settling any possible claims between the employee and employer.

In the judgment by the High Court, the specific claim that was raised after the signing of the severance agreement concerned the Anti-Discrimination Act, implementing Directive 2000/78. Accordingly, the judgment specifically illustrates that employees may waive potential claims following from protective mandatory national legislation regardless of whether the legislation implements EU directives and such provisions can in certain

circumstances therefore be derogated from.

The fact that derogations from protective mandatory legislation, including legislation implementing EU directives, may occur in termination situations should be seen in light of the specific circumstances of the termination situation.

Thus, it must be taken into account that when entering into a severance agreement the actual termination is about to take place. For that reason, employees are generally presumed to be capable of assessing the general and specific consequences of entering into an agreement containing terms regarding the employee's termination – especially if the employee is assisted by his or her professional organisation or another qualified adviser.

Finally, it should be noted that an employee's waiver of rights following from protective mandatory national legislation is not unconditional. As the case from the High Court further illustrates, the courts make a specific assessment of the facts of each case, taking into account the contents of the settlement agreement and the circumstances under which it was made.

Comments from other jurisdictions

Germany (Ines Gutt, Luther Rechtsanwaltsgesellschaft mbH): In Germany, protection against discrimination is primarily based on the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, "AGG"*). Section 31 AGG states: "*No agreement derogating from the provision of this Act may be made to the disadvantage of the persons protected thereby*". If this provision also includes the waiver of already commenced claims (especially claims for compensation and damages) in a severance agreement, this particular situation has not been decided by a German court yet. According to the literature the waiver of a claim is possible after the termination of the employment contract because in this situation the employee's dependence on the employer no longer exists. In particular Section 27 para. 2 sentence 2 no. 3 AGG can support this opinion. According to this, the Federal Anti-Discrimination Agency shall give assistance to achieve an out-of-court settlement between the involved parties. In this context, it is not excluded by law that claims due to discrimination may also be waived.

Also, the jurisdiction in relation to Section 12 Continued Remuneration Act (*Entgeltfortzahlungsgesetz*, "EGFZ"), which can probably be transferred to the facts of this case, takes a similiar view: the claims according to Section 12 EGFZ cannot be waived during the current employment relationship. However, the courts consider it permissible to waive these claims after or on the occasion of the termination of the employment relationship.

Moreover, there is a similiar consultation procedure (so-called '*Integrationsamtsverfahren*') for severely disabled persons in Germany. Besides, severely disabled persons in Germany can conclude a termination agreement with the employer – both before the initiation of the consultation procedure and during the consultation procedure or as part of a dismissal protection process. This is because the employee is not only free to decide whether they wish to continue an employment relationship, but also whether they wish to waive their special protection against dismissal for severely disabled persons.

Therefore, it is likely that a German court in particular would have also decided that the employee was barred from making a claim under the AGG.

In addition, the legal preclusive period of Section 15 para. 4 AGG must also be observed in this context. Section 15 para. 4 stipulates that claims for compensation and damages must be made within two months from the date of gaining knowledge of the disadvantage. A different regulation only applies if the collective bargaining parties have agreed otherwise. Therefore, in Germany, after two years the enforcement of claims would be excluded for this reason.

United Kingdom (Richard Lister, Lewis Silkin LLP): It is interesting to learn that the validity of severance agreements is litigated quite frequently in Denmark, with the principles largely governed by case law. Danish employers will no doubt be reassured by the High Court's (surely correct) decision to overturn the district judge's finding in this case, but I would think it must be a matter of some concern that agreements supposedly in full and final settlement are apparently open to challenge by employees depending on the individual circumstances.

In the UK, there is a good deal more certainty for employers in this area. While an employer can settle purely contractual claims simply by agreement with the employee, the rules for settlement of statutory claims (for example unfair dismissal or discrimination) are prescribed by legislation. Any such statutory claims can only be validly settled in one of the following ways:

– by entering into a written 'settlement agreement' that meets certain strict statutory criteria; or

– by an agreement reached with the assistance of the Advisory, Conciliation and Arbitration Service (ACAS) – an independent employment relations and reconciliation body.

The first of these routes is the most common. Settlement agreements were introduced by statute in 1993 (then known as 'compromise agreements') and have since become the main

way for employers and employees to settle claims and/or effect a clean break from the employment relationship. Under such an agreement, the employee will usually receive a payment, or other advantage, in return for agreeing not to commence (or to stop pursuing) employment-related claims against the employer.

It is important for the employer to ensure that the conditions for a valid settlement agreement are met, the main ones being that:

– the agreement is in writing and relates to the particular proceedings being settled;

– the employee has received independent legal advice on the agreement;

– the legal adviser is identified in the agreement and has insurance covering the risk of a claim by the employee;

– the agreement states that the conditions regulating settlement agreements have been satisfied.

So far as the second method is concerned, an agreement to settle an employment claim (or potential claim) that has been negotiated with the assistance of an ACAS conciliation officer is as legally binding as a settlement agreement. This is often called a 'COT3 agreement', after the form used to record the terms of the agreement. Unlike a settlement agreement, there are no specific formalities that must be observed in drawing up the agreement. For example, there is no requirement for the employee to have received advice on the terms and effect of the agreement from an independent adviser.

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