SUMMARY

# 2020/47 The Danish Supreme Court decides on reversed burden of proof (DK)

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**Legal background**

The Danish Act on Equal Treatment of Men and Women contains provisions implementing Directives 92/85/EEC, 2006/54/EC and 2010/18/EC.

The Act distinguishes between situations where a *shared* burden of proof applies and situations where a *reversed* burden of proof applies.

If an employee is dismissed after childbirth-related leave, a shared burden of proof will apply. This means that if the employee establishes facts based on which it may be presumed that direct or indirect discrimination has occurred, the burden of proving that no discrimination has taken place rests on the employer.

If, on the other hand, an employee is dismissed during pregnancy or childbirth-related leave, a reversed burden of proof will apply. In that case, it is for the employer to prove that the

dismissal is not wholly or partly based on the employee's pregnancy or childbirth-related leave.

However, what does it take for an employer to discharge the reversed burden of proof? That was the question before the Supreme Court in this case.

**Facts**

The case concerned a physiotherapist who went on sick leave during pregnancy and remained on sick leave until her maternity leave started. Ten days after the employee had returned from maternity leave, she was informed that she had been selected for dismissal. The reason given for the dismissal was that the employer, a physiotherapy clinic, needed to reduce its physiotherapist staff due to a drop in the number of patients in order to ensure the continued operation of the clinic.

As the employee and her trade union believed that the dismissal was in conflict with the Act on Equal Treatment of Men and Women, they issued proceedings against the employer.

The case was first heard by a district court that ruled in favour of the employer. In its decision the district court had, among other things, taken into account the drop in the number of patients which required a reduction of the physiotherapist staff and, further, the fact that the physiotherapists at the clinic who were not dismissed had a broader educational background and considerably more experience within the field than the dismissed employee.

The judgment by the district court was then appealed to the Danish Eastern High Court, which found that the employer had not discharged the reversed burden of proof. The High Court took into account, among other things, that the employee was in fact able to handle all kinds of tasks and that she was qualified and generally liked by her colleagues and patients.

Ultimately, the case was heard by the Supreme Court, delivering the final decision in the case.

In the Supreme Court proceedings, the employer argued that the employee had only been dismissed after the employer had thoroughly evaluated all the physiotherapists who might be selected for dismissal, taking into consideration the tasks and work to be performed going forward.

On the other hand, the employee and her trade union argued that, out of the four physiotherapists who might be selected for dismissal, the employee dismissed was the

physiotherapist with the second-longest seniority at the clinic. Further, the employee and her union argued that her work performance had never given cause for criticism. For those reasons, the employee and her union were of the opinion that the employer might as well have dismissed one of the other physiotherapists who had not just returned from childbirth-related leave and, accordingly, that the employer had not discharged the reversed burden of proof.

**Judgment**

In its judgment the Supreme Court took into account that the employer, due to the drop in the number of patients, had no choice but to reduce its physiotherapist staff.

Furthermore, the Supreme Court took into account that the dismissed employee's personal and professional qualifications could not be faulted. In that regard, the Supreme Court noted that the fact that the employee had been unable to expand her work experience or complete further training during her absence due to pregnancy and maternity leave had to be disregarded.

As for the other physiotherapists at the clinic who might have been selected for dismissal, the Supreme Court found that these employees were materially distinct from the dismissed employee in terms of work experience, further training, etc.

On those grounds and based on the evidence presented the Supreme Court held that the employer had discharged the burden of proving that the employee's dismissal was neither wholly nor partly based on pregnancy or childbirth-related leave.

**Commentary**

In general, the reversed burden of proof under the Act on Equal Treatment of Men and Women is considered to be a 'heavy' burden to discharge – especially in cases where the dismissal is based on circumstances for which the employee can be criticised, but also in cases of dismissal caused by operational reasons.

Generally, the Supreme Court decision illustrates that employers can in fact discharge the reversed burden of proof – specifically in a situation where the dismissal is caused by the employer's operational circumstances.

The Supreme Court judgment provides details on what it might take for an employer to succeed in discharging the reversed burden of proof that applies if an employee is dismissed during pregnancy or childbirth-related leave and, accordingly, what considerations an

employer must make when dealing with such cases.

Thus, it is worth noting that in this case the employer's decision to dismiss the employee who had just returned from maternity leave, instead of one of the other physiotherapists, was in fact based on objective criteria. In addition, there was no indication that the employer had attached any weight to the employee's pregnancy or maternity leave when making the dismissal decision. Consequently, the employer was able to discharge the heavy burden of proof that applied in the case.

**Comments from other jurisdictions**

*Germany (Lucas Dahlmeier, Luther Rechtsanwaltsgesellschaft mbH)*: According to Section 17 paragraph 1 of the Maternity Protection Act (*Mutterschutzgesetz*, 'MuSchG'), dismissals during pregnancy and until at least four months after childbirth are generally prohibited. The dismissal is only effective in a few exceptional cases and only with the consent of the highest state authority. In addition, notice during the parental leave is forbidden according to Section 18 of the Parental Benefit Act (*Gesetz zum Elterngeld und zur Elternzeit*, 'BEEG'). After the expiration of this protection period there is no longer any special protection against dismissal for the mother as an employee. However, the employee may invoke the general principle of equal treatment.

According to the German jurisdiction this means on the one hand that the employer cannot give negative credit to the employee for the loss of work due to pregnancy. On the other hand, a dismissal for operational reasons of an employee after returning from maternity and parental leave is possible and effective in Germany as well, if the social selection is free of discrimination. The employee bears the burden of proof for the unequal treatment, whereby the employer in turn must provide evidence of the proper social selection in the case of a dismissal for operational reasons. Accordingly, there is also a graded burden of proof under German law.

German courts therefore decide on a similar legal basis. According to a judgment of the labour court of Bochum from 20 April 20 2006 (Az. 4 Ca 3329/05) a notice of dismissal served on an employee who had returned from parental leave was ineffective. The employer had dismissed the employee for operational reasons. In the context of the social selection the employer decided to terminate the employee because other employees participated in further training during the plaintiff's parental leave. According to the judgment, there was an inadmissible discrimination as a result of taking parental leave. The employer had not informed the employee about the fact that during her parental leave further training took place whose

participation was beneficial for the further employment. The employee should not be credited negatively with the fact that she had taken parental leave. In contrast to the present decision from Denmark, the employer could not prove here that the social selection was carried out properly and without discrimination.

*Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Office)*: Under Greek law employees returning from maternity are protected from dismissal for a period of 18 months starting from the date of birth. In a case where the employer dismisses the employee before such deadline, the termination is considered null and void. Therefore, in this case the employer should have kept on the employee protected by the maternity provisions and instead terminated another employee. In cases of restructuring the employer is obliged to apply certain criteria when selecting the employees to go first. In such a selection procedure, the protected employees (trade unionists, employees on maternity and for a period of 18 months from the date of birth) must be excluded and in any case they should be the last employees to go in case of a close down. Greek courts would have ruled that the termination of the physiotherapist was null and void and would have ordered her reinstatement.

*Hungary (Dr. Gabor T. Fodor, Ferencz, Fodor T., Kun & Partners)*: According to Labour College Resolution No. 95, the court cannot examine in the case of a lay off why the particular employee was chosen by the employer. Although there is no clear court practice on this point yet, in my opinion in cases such as the above decades-old practice cannot be maintained, i.e. discrimination law overwrites the above. It is also slightly questionable whether the fact that the employee had been on maternity leave can be an attribute to be discriminated on, since this is not very clear based on the attribute list of the Non-Discrimination Act, but in my opinion the Act should be interpreted this way. So, in the end, the Hungarian court would decide similarly to the Danish court.

*The Netherlands (Peter Vas Nunes)*: The employer won this case because the Supreme Court found that the plaintiff's colleagues were "materially distinct in terms of work experience, further training, etc." The case report does not reveal how distinct those colleagues were. Dutch law contains detailed rules on the required level of distinctness. Where employees need to be selected for redundancy, this is done between employees with 'interchangeable' positions. A position is 'interchangeable' with another position where (a) the positions are comparable as regards job content, required knowledge, skills, competences and permanency of the position; and (b) the level of the position and its place on the salary scale are equivalent. Until a few years ago, the law provided that two different positions can nevertheless be comparable if, on average, an employee in one of the positions needs little time and effort to be able to take up the other position. There is a great deal of case law on the issue of 'interchangeability'. One aspect I would like to highlight is that of transparency. The employer

in this Danish case argued that it had thoroughly evaluated all the physiotherapists who might be selected for dismissal. The case report does not tell us whether this evaluation was performed before the selection and in a transparent manner. I think a Dutch court in a similar case would attach importance to this question, which is central to most discrimination cases.

*United Kingdom (Richard Lister, Lewis Silkin LLP)*: The UK position on the burden of proof in discrimination cases is quite similar to that in Denmark, which is unsurprising given the common background under the relevant EU directives. I would expect that a UK court or tribunal would have made the same decision as the Danish Supreme Court on the facts of this case.

The burden of proof rules under the UK's Equality Act 2010 (EA) apply to all types of discrimination, including direct and indirect discrimination, harassment, victimisation, and pregnancy and maternity discrimination. They do not expressly use the language of a 'shifting' or 'reversed' burden of proof. The key provision under the EA merely states that "if there are facts from which the court or tribunal could decide, in the absence of any other explanation", that the employer committed the discrimination in question, the court must uphold the claim, unless the employer "shows that it did not contravene" the relevant EA provision.

There has been extensive case law since 2010 about whether the EA changed the previous position under UK law by not expressly placing any initial burden on the claimant. The Court of Appeal has now, however, confirmed in two cases that there remains a two-stage approach (*Ayodele – v – Citylink Ltd* [2017] EWCA Civ 1913; *Royal Mail Group Ltd – v – Efobi* [2019] EWCA Civ 18):

(1) Has the employer established sufficient facts which, in the absence of any other explanation, point to a breach having occurred?

(2) If so, the burden shifts to the employer to show that it did not breach the provisions of the EA.

Notwithstanding the recent Court of Appeal decisions, it remains the case that the two-stage approach is not a rigid one. Previous case-law guidance emphasising that the burden of proof rules 'need not be applied in an overly mechanistic or schematic way' continues to be valid.

**Subject**: Gender Discrimination, Discrimination General

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

**Parties**: The Danish Chamber of Commerce (*Dansk Erhverv*) acting for X-Clinic – v – The Danish Association of Physiotherapists (*Danske Fysioterapeuter*) acting for A

**Court**: *Højesteret* (Danish Supreme Court)

**Date**: 31 August 2020

**Case number**: BS-45332/2019-HJR



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**Creator**: Højesteret (Danish Supreme Court)
**Verdict at**: 2020-08-31
**Case number**: BS-45332/2019-HJR