SUMMARY

2022/3 Liability for late implementation of EU law following ruling from the ECJ (DK)

The Danish Ministry of Employment has been held liable for a protracted legislative process following the ECJ's ruling in the Ole Andersen case (C-499/08), which concluded that the Salaried Employees Act was not compliant with Directive 2000/78/EC concerning equal treatment in employment and occupation (prohibition of discrimination on grounds of age).

Summary

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Legal background

p style="margin-right:-29px">Under the former Section 2a(3) of the Salaried Employees Act, salaried employees (white-collar workers) were not entitled to redundancy pay (which was regulated in Section 2a) if they were entitled to old age pension from the employer on the effective date of termination regardless of whether they did in fact decide to retire.

p style="margin-right:-29px">In *Ole Andersen* (C-499/08), however, the ECJ held that this provision was incompatible with the principle in Directive 2000/78 regarding non-discrimination on grounds of age in situations where the employee did not intend to retire. The ruling from the ECJ was made on 12 October 2010.

p style="margin-right:-29px">Following the ruling, the Ministry of Employment made a tentative assessment that it would not be necessary to amend Section 2a(3) of the Salaried Employees Act; an interpretation in line with EU law would be sufficient. Thus, the Ministry decided to await the outcome of cases pending before the courts.

p style="margin-right:-29px">In 2014, the Supreme Court held that employers at public institutions or authorities were obligated to interpret the Salaried Employees Act in accordance with the ECJ's ruling and that employees who met the relevant criteria were therefore entitled to redundancy pay if they could prove that they did not intend to retire. The Supreme Court noted that this would depend on a concrete assessment of the facts in each case as neither national law nor EU law provided any guidelines in this regard. Even though the Supreme Court made a decision in these cases, it hinted quite strongly that it would be most natural for the legislature to lay down such guidelines (*Ufr.2014.1119H)*.

p style="margin-right:-29px">In the meantime, private sector employers were still not required under national law to pay redundancy pay if an employee was entitled to old age pension from the employer on the effective date of termination.

p style="margin-right:-29px">As a result of the 2014 ruling, the Ministry of Employment adopted an amendment to Section 2a of the Salaried Employees Act, which entered into force on 1 February 2015.

Facts

p style="margin-right:-29px">In the case at hand, four salaried employees in the private sector were dismissed and entered into severance agreements with their employers in the period from June 2013 to September 2014. They all met the relevant seniority requirements and would have been entitled to redundancy pay according to the *Ole Andersen* case but the employers refused to make such payments, citing Section 2a(3) of the Salaried Employees Act applicable at the time.

p style="margin-right:-29px">The employees and their union brought proceedings against the Ministry of Employment, claiming damages corresponding to redundancy pay. The claim was based on the argument that the plaintiffs would have been entitled to redundancy pay from their employers if Directive 2000/78 had been implemented correctly, which should have taken place even before the ECJ's ruling in the *Ole Andersen* case.

p style="margin-right:-29px">Despite the Ministry's assesment, the plaintiffs had been prevented from making a claim against their employer because in 2016 the Supreme Court ruled that it would not have been possible to interpret Section 2a(3) of the Salaried Employees

Act in conformity with Directive 2000/78. The case was referred to the ECJ for a preliminary ruling (*Rasmussen,* C-441/14), and the ECJ stated that in such a situation the national court would be required to refrain from applying a provision at odds with EU law.

p style="margin-right:-29px">Despite this, the Supreme Court found that it would be acting *ultra vires* if it were to refrain from applying the provision of the Salaried Employees Act. The reason was that with regard to a dispute between two private parties, the Act on the Accession of Denmark to the European Union provides no authority for allowing the general principle prohibiting discrimination on grounds of age to override the former provision in Section 2a(3) of the Salaried Employees Act (*Ufr.2017.824H*).

p style="margin-right:-29px">As this situation had not been remedied in a timely manner, the plaintiffs argued that the Ministry of Employment was liable.

p style="margin-right:-29px">On the other hand, the Ministry of Employment argued that the breach was not sufficiently serious to cause liability, neither before nor after the *Ole Andersen* ruling. After the ECJ's ruling in 2010, the Ministry had – in a timely manner – carried out the necessary research and legal assessment concluding that Section 2a(3) could be interpreted in conformity with EU law, which was supported by case law. Once it became clear on the basis of new case law from the Supreme Court in 2014 that the situation required amendment of the law, the Ministry introduced the new legislation within 10 months.

Judgment

p style="margin-right:-29px">The Eastern High Court noted that in order for a breach of EU law to be considered sufficiently serious to cause liability, the member state must manifestly and gravely have disregarded the limits on its power (see *Larsy*, C-118/00). In any event, a breach of EU law will be sufficiently serious if it has persisted despite a preliminary ruling from the ECJ from which it is clear that the conduct in question constituted an infringement.

p style="margin-right:-29px">Following such a preliminary ruling from the ECJ, the authorities must ensure that national law is brought into compliance with EU law as quickly as possible (see *Jonkman*, Joined Cases C-231/06 to C-233/06).

p style="margin-right:-29px">The High Court found that it did not constitute a sufficiently serious breach that Section 2a of the Salaried Employees Act had not been amended before the *Ole Andersen* ruling as the state of the law had not been sufficiently clear. However, after the ruling, the Ministry of Employment was obligated to ensure that Danish legislation was brought into compliance with EU law as quickly as possible.

p style="margin-right:-29px">In such a situation, the authorities must be given a fair deadline to consider if and how the legislation should be amended, including organising and conducting inquiries as well as involving the social partners.

p style="margin-right:-29px">However, once it became clear that the task force of the Ministry of Employment was unable to arrive at a common solution, the Ministry should have made a decision on how to ensure compliance instead of remaining passive and awaiting ongoing cases. The fact that the Ministry at the time was in ignorance of the law and believed that the Act could be interpreted in conformity with EU law did not change its duty to act.

p style="margin-right:-29px">The High Court ruled that the Ministry of Employment had not justified the protracted legislative process and that the Ministry should have been able to carry out the necessary changes before June 2013 at the time when the first plaintiff could have raised a claim against the employer.

p style="margin-right:-29px">Consequently, the Ministry of Employment was liable to pay the redundancy pay that the plaintiffs had been unable to claim from their employers.

Commentary

p style="margin-right:-29px">The ruling is another ramification of the *Ole Andersen* case and, later, the *Rasmussen* case that have led to a discussion in Danish legal theory about the legal system and the jurisdictional line between the ECJ and the Danish courts.

p style="margin-right:-29px">The ruling confirms that public authorities may be liable for wrongful or late implementation of EU law if citizens have suffered loss as a result. This may be the case even if the authority is under the impression that the law in question may be interpreted in conformity with EU law.

p style="margin-right:-29px">Under normal circumstances, the prescriptive period would have passed, but the parties had entered into an agreement on suspension of the three-year prescriptive period. This is also the situation in other cases pending before the courts.

p style="margin-right:-29px">The direct effect of the judgment is therefore limited to a number of ongoing cases, but on a broader scale the ruling contributes to illustrating what is to be considered a suitable timeframe for a member state to ensure that national legislation is brought into compliance with EU law following a ruling from the ECJ.

Comments from other jurisdictions

p style="margin-right:-80px">*Germany (Hannah Vierk, Luther Rechtsanwaltsgesellschaft mbH)*:

In Germany, Directive 2000/78/EC was transposed into national law by the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). The AGG also regulates protection against unlawful discrimination on the basis of age. However, different treatment on the grounds of age can be justified under Section 10 AGG. Section 10 sentences 1, 2 AGG states:

p style="margin-right:-80px">

p style="margin-left:47px; margin-right:-80px">Notwithstanding Section 8, different treatment on the grounds of age is also permissible if it is objective and reasonable and justified by a legitimate aim. The means to achieve this objective must be reasonable and necessary.

p style="margin-right:-80px">

p style="margin-right:-80px">According to general opinion Section 10 sentence 3 no. 6 second alternative AGG should also cover the exclusion of older employees from social plan benefits if the employees are economically secure, for example because they are entitled to a pension after receiving unemployment benefits. A social plan is, according to Section 112(1) sentence 2 of the Works Constitution Act (*Betriebsverfassungsgesetz,* 'BetrVG'), the written agreement between the employer and the works council on the compensation or mitigation of the economic disadvantages suffered by the employees of the establishment as a result of a change in operations planned by the employer. The Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') considers Section 10 sentence 3 no. 6 second alternative AGG effective, because the regulation is based on a legitimate social policy objective (BAG, judgment 7 May 2019 – 1 ABR 54/17). The respective structure of the social plan would then still have to be subjected to a proportionality test pursuant to Section 10 sentence 2 AGG.

p style="margin-right:-80px">The BAG did not consider it necessary to initiate preliminary ruling proceedings under Article 267 III TFEU on the question of compatibility of Section 10 sentence 3 no. 6 AGG with Directive 2000/78. The Court was of the opinion that the relevant principles on the understanding and application of Article 6(1) of Directive 2000/78 are to be considered clarified by the case law of the ECJ. The *Ole Andersen* case (ECJ, judgment 12 October 2010 – C-499/08) would not change this either. This is because the facts of the case would concern a legally regulated benefit aimed at enabling the reintegration of employees who have been employed for many years. In contrast, the severance payment under the social plan has an economic safeguarding function aimed at compensating for or mitigating disadvantages. In addition, in the case of a social plan benefit – unlike a statutory benefit – the need for a fair distribution must be taken into account in view of the limited funds available

for this purpose.

p style="margin-right:-80px">Apart from the special provision of Section 10 sentence 3 no. 6 AGG on social plan severance payments, there are no other provisions in German law that regulate a lower severance payment or no severance payment at all on the basis of age.

p style="margin-right:-80px">If the BAG had referred the question of the compatibility of Section 10 sentence 3 no. 6 AGG with Directive 2000/78 to the ECJ and the latter had found the regulation to be contrary to Union law, it can be assumed that the German legislature would also have had to make the necessary changes quickly in order not to be exposed to a claim for state liability under Union law. Thus, in a ruling from 17 January 2019 (III ZR 209/17), the Federal Court of Justice (*Bundesgerichtshof*, 'BGH') stated that all aspects of the individual case must be taken into account for the question of whether there is a sufficiently qualified infringement. These points of view would also include the questions of whether or not the infringement or the damage was committed or inflicted intentionally and whether or not any error of law is excusable. From this perspective, the German legislator would also be obliged to adapt any requirements of the ECJ in a timely manner in order to avoid liability.

Hungary (Gabriela Ormai, CMS Cameron McKenna): From the point of view of Hungarian law, this case is interesting because the Hungarian courts would have reached the same decision, which also violates Directive 2000/78/EC, based on the *Ole Andersen* case (C-499/08).

Although Hungary's Act CXXV of 2003 on Equal Treatment implemented Directive 2000/78 into Hungarian law, Hungary's Act I of 2012 on the Labour Code explicitly provides that an employee who is considered retired at the time of the employer's notice of termination is not entitled to a redundancy payment, regardless of whether or not the employee intends to continue his/her employment relationship.

Based on the above, the relevant Hungarian labour law legislation also needs to be amended in order to be in line with the relevant EU law.

p style="margin-right:-29px">**Subject**: Age Discrimination, Miscellaneous

p style="margin-right:-29px">**Parties**: *Finansforbundet* (acting for four members) – v – the Ministry of Employment

p style="margin-right:-29px">**Court**: *Østre Landsret* (Danish Eastern High Court)

p style="margin-right:-29px">**Date**: 22 October 2021

p style="margin-right:-29px">**Case number**: BS-32796/2020-OLR

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