SUMMARY

2017/6 Danish Supreme Court holds there is no duty to reassign an employee during the notice period (DK)

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Facts

Under the Danish Act on Equal Treatment of Men and Women employers are not allowed to base a decision to dismiss an employee on the fact that she is pregnant. If an employee is dismissed during pregnancy, a reversed burden of proof will apply and the employer must prove that the decision to dismiss the employee was not in any way based on her pregnancy.

In this case, a vocational college had dismissed a number of its employees to cut costs, as a consequence of a reduced funds grant under the Danish Finance and Appropriation Act. The employer considered how to reduce costs over more than six months before deciding which job functions and employees it could best do without. The employer decided, amongst other things, to shut down its marketing function.

The selection decision, based on a list naming the employees considered for dismissal, was made on 22 September 2011, and on 6 October 2011 a marketing coordinator appearing on the

list informed the employer that she was pregnant. The employer was not aware that the marketing coordinator had been pregnant when making the selection decision.

On 26 October 2011, an information letter was sent to the affected employees. With the exception of one employee, all the employees who appeared on the list on which the selection decision was based received this letter. The marketing coordinator's trade union responded to the letter, arguing that it would be contrary to the Danish Act on Equal Treatment of Men and Women to dismiss her.

Nevertheless, the employer maintained its decision, and on 28 November 2011 the marketing coordinator was given three months' notice, expiring on the last day of February 2012.

The marketing coordinator argued that the employer had not made a proper effort to reassign her to another position, since all the reassignment options had been explored at the time the selection decision was made – which was before she had informed the employer of her pregnancy.

The marketing coordinator and her trade union argued that the employer's duty to reassign must be more comprehensive if the employee is pregnant, and that the duty must extend to cover the entire notice period.

The employer argued that reasonable efforts were made to reassign the employees appearing on the list and that these efforts continued until the selection decision was made. It further argued that as it had not known about the pregnancy when it made the selection decision, it was clear that the decision was not in any way based on the pregnancy. It contended that the duty to make reasonable efforts to reassign a pregnant employee to another position does not cover the entire notice period. In any event, there were no vacant positions that the marketing coordinator was qualified to be reassigned to – even if the entire notice period had been included in the assessment.

Judgment

Surprisingly, the Danish Western High Court ruled in favour of the marketing coordinator in its judgment of 3 June 2014. Without explaining the reasoning behind this, the High Court found that an employer had a duty to make reasonable efforts to reassign a pregnant employee until the end of the notice period and that this duty had not been discharged by the employer.

On appeal, however, the Danish Supreme Court ruled in favour of the employer. In its reasons, the Supreme Court noted that as a general principle arising from its case law, the fairness of a dismissal must be assessed on the basis of the conditions prevailing at the time of notice. It

found that there was no reason to depart from this principle in connection with the dismissal of a pregnant employee covered by the Danish Act on Equal Treatment of Men and Women. In assessing whether the employer effectively proved that pregnancy was not a factor in its decision to dismiss, the Court found that the question of whether the employee could have been reassigned to a vacant position either leading up to the date of notice or before the end of the notice period, could be taken into account.

On the facts, the Court concluded that the employer had proved that reassignment had not been possible at the date of notice. The only remaining question was whether the employer could have offered a suitable vacancy to the pregnant employee during the notice period. Failure to do so would be a breach of section 2 of the Danish Act on Equal Treatment of Men and Women, which may trigger financial compensation. However, the Supreme Court held that there was no breach, for a number of reasons, one of which was that the employee had not applied for or otherwise expressed an interest in any of the positions that had fallen vacant during the notice period.

Accordingly, the Supreme Court ruled in favour of the employer on all counts.

Commentary

With this decision, the Supreme Court has established that the conditions prevailing at the date of notice are the deciding factor as to whether a dismissal is fair and that this applies equally to cases where the employee is pregnant or on maternity leave. This is a well known principle in dismissal cases in general, but with this decision the Supreme Court has established that it holds good also in cases where the employee is pregnant or absent for maternity or parental leave.

This means that there is no duty to offer employees who are pregnant or on maternity leave and already on notice, any positions falling vacant after the date of notice. The employer must, however, be able to demonstrate (due to the reversed burden of proof) that, at the time of the dismissal, it did not know of any positions that would fall vacant before the notice period ended.

During the proceedings before the Supreme Court the trade union had asked the Supreme Court to refer the case to the ECJ for a preliminary ruling. The trade union acknowledged that in the wording of the Directive on Equal Treatment of Men and Women (2006/54) there is no express duty to reassign a pregnant employee in a redundancy situation. However, the union argued that ECJ case law construes the scope of the Directive widely and it was therefore unclear whether there was a duty to reassign under the Directive. In fact, it was this doubt that had led to the dispute at hand.

The employer did not agree that there was any doubt about the interpretation of the Directive and objected to the idea of referring the case to the ECJ.

The Supreme Court rejected the request from the trade union, as it found no particular lack of clarity in the wording of the Directive. The Supreme Court further noted that there is no obligation under EU law to give pregnant employees preferential treatment in a redundancy situation, nor is there any obligation to investigate whether the employee can be reassigned as an alternative to dismissal. However, the Supreme Court did add that if an employer has considered this, it can add weight to the evidence it uses to prove that a dismissal is not based on the employee's pregnancy.

Comments from other jurisdictions

Austria (Magdalena Ziembicka, Barnert Egermann Illigasch Rechtsanwälte GmbH): Austrian labour law provides for stricter protection of pregnant employees against dismissal than Danish labour law. Under the Austrian Maternity Protection Act, a pregnant employee cannot be legally given notice without the prior consent of the court, provided the employer has been informed about the pregnancy. The court may only give its consent to an ordinary dismissal (i) if the employer cannot continue the employment relationship without harming the business because it is downsizing or closing its operations or individual departments in the business; or (ii) if the employee agrees to the dismissal during the court hearing.

Under Austrian law, the employer would need to obtain the court's prior consent to give notice of termination, even if the decision to dismiss the employee had been made before the employer was informed of the pregnancy. Otherwise, the dismissal would be deemed void. In the proceedings, the employer might argue the dismissal is necessary, as the employee's position has ceased to exist owing to a downsizing or the closure of an individual department. However, in order to succeed, the employer would have to prove that there is no other position available for the employee. Case law indicates that the court would not give its consent if there are equivalent employees at the business, who perform the same kind of work, but do not enjoy comparable protection against dismissal.

If a suitable position becomes available after obtaining the court's consent but during the notice period, it is unlikely that this would change the court's decision. However, it might be possible for an employee to file a new claim challenging the dismissal on the basis of breach of social principles. Job opportunities should continue to be considered until the last day of employment and a claim of this kind would need to be filed, usually within two weeks of the notice of termination. Austrian law provides no further redress in such cases.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The decision of the Danish

supreme court is not completely foreign to German law – even though the German labour courts would have decided the matter differently.

First of all, under German law a decision to dismiss must not be based on the fact that an employee is pregnant. That would be in breach of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, the 'AGG') and would entitle the employee to damages. However, the Federal Labour Court ('BAG') ruled on 17 October 2013 in 8 AZR 742/12, that the dismissal of a pregnant woman is not a discriminatory breach of the AGG if the employer is unaware of the pregnancy at the time of the dismissal.

Having said that, under German law the dismissal of a pregnant employee is, to all intents and purposes, prohibited and invalid, even if it does not breach the AGG. This applies regardless of the reason for the dismissal (i.e. whether it was personal, behavioural or operational).

According to German law, pregnant women benefit from special protection against unfair dismissal: By Section 9 of the Maternity Protection Act (Mutterschutzgesetz, the 'MuSchG'), the employer is not allowed to dismiss a pregnant employee and this applies irrespective of whether the employer is aware of the pregnancy. However, if the employer has not been informed, the employee must let the employer know within two weeks of receiving notice of termination. Otherwise, the special protection will not apply.

Exceptions to this may arise with regard to dismissals for misconduct or for operational reasons. An employer can request permission from the competent authority to dismiss the employee in those circumstances even though she is pregnant. However, the approval of the competent authority does not necessarily make the termination valid. The notice requirements must also be fulfilled. In the case of a dismissal for operational reasons (e.g. because part of the business is being closed), there must be urgent operational requirements which are socially justified, meaning that the job no longer exists and there has been a selection procedure which takes account of social criteria. A pregnant employee is not usually part of the selection procedure, because she is protected against dismissal by Section 9 MuSchG, but if the competent authority has given its approval, she can become part of the procedure.

In this context, a decision of the Regional Labour Court of Niedersachsen (Landesarbeitsgericht Niedersachsen, 14 October 2015 – 16 Sa 281/15) should be mentioned. It decided that a dismissal for operational reasons might be socially unjustified and therefore invalid if new employment opportunities arose at the end of parental leave. In such a case, dismissal is not considered reasonable.

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): As regards the

obligation to find alternative work, Finnish and Danish law are fairly similar. Under Finnish law, the first precondition for terminating employment on collective grounds is that the work has reduced substantially and permanently. It is further required that the employee cannot, within reason, be found suitable alternative work within the employer company (or, in certain cases, within the group) or be retrained for other duties. However, under Finnish law this obligation to redeploy the employee remains valid until the expiry of the notice period. If the employer becomes aware during the notice period that a suitable position will become vacant after the notice period has expired, the employer must offer this position to the employee. Further, the redeployment obligation is an active duty, in other words, the employer must actively make offers of suitable, vacant positions to the employee during the notice period.

Also in Finland, an employee who is pregnant or on maternity leave is protected by 'a discrimination presumption', which amounts to a reversed burden of proof. However, an employee on maternity leave can be made redundant only if the employer's operations end completely. With respect to the discrimination presumption, a Finnish court would have likely reached the same conclusion as the Danish Supreme Court, since the pregnancy of the employee was not known by the employer at the time of the decision to terminate the employment. The purpose of the pregnancy protection is to prevent discrimination of pregnant employees but ideally, it should not give the protected employee an unfair advantage over other employees.

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