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No discrimination of reduced hours employees (DK)

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Summary

In four recent cases, the Danish Eastern High Court addressed the question of whether it was indirect disability discrimination to dismiss four reduced hours employees (*fleksjobbere*) as part of a cost-saving process because they lacked essential core skills. The High Court ruled in favour of the employer, stating that the employer was not required to maintain the employees' employment as it would be incompatible with the new demands for qualifications caused by the cutbacks. Consequently, the dismissals did not constitute indirect disability discrimination.

Legal background

The Danish Anti-Discrimination Act contains provisions implementing the Equality Framework Directive 2000/78/EC. According to the Directive, the employer must provide reasonable accommodation for persons with a disability to enable them to have access to and participate in employment unless such measures would impose a disproportionate burden on the employer. The burden will not be considered disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned (Article 5).

The case at hand concerned reduced hours employees who, due to reduced working capacity, were employed in a special type of employment taking into consideration their special needs, e.g. reduced hours employment. The concept is that the employer only remunerates the employees for the work actually performed, e.g. 15 hours a week, and the municipality then pays the difference in pay, meaning that the employees receive pay for a full-time position despite only working reduced hours. As the employees' reduced working capacity is caused by physical or mental illness, many employees in reduced hours jobs (*fleksjob*) will also be considered as having a disability within the meaning of Directive 2000/78. This was also the situation in these four High Court cases.

The key issue in all of the cases was whether it was too burdensome for the employer to maintain the employment of the four reduced hours employees.

Facts

The employees worked as bioanalysts and had been selected for dismissal on the basis of criteria determined by the main cooperation and consultation committee (*MED-Hovedudvalg*) at the employer, one of the five regions in Denmark. The dismissal was part of a cost-saving process and resulted in a large number of dismissals across different groups of employees.

The bioanalysts' trade union issued proceedings against the employer claiming compensation for discrimination on grounds of disability.

The trade union argued that there was a significant overrepresentation of reduced hours employees among the dismissed employees, as six out of 14 dismissed employees were bioanalysts holding reduced hours positions. In itself, this created a presumption of discrimination. In addition, the employees had been assessed on the basis of factors such as flexibility and physique and, according to the trade union, these factors were connected to the employees' disability and therefore constituted indirect discrimination.

Finally, the trade union claimed that the employees' employment was not a disproportionate burden for the employer and, in the trade union's view, this claim was supported by the fact that the employees had been employed for between six to 16 years without having caused any issues.

The employer submitted that the dismissals were objectively justified by operational needs. The employees had been selected for dismissal based on an individual assessment, because they were unable to carry out essential functions in their position and the employer's requirement that all employees should help perform the most essential functions in the position was necessitated by the cutbacks.

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Judgment

The court of first instance, i.e. the district court, noted the trade union's submission that the cutbacks had resulted in the dismissal of 191 employees including 14 bioanalysts among whom six were employed in reduced hours positions and this could give rise to a presumption of disability discrimination.
However, the court found that even though the statistical data might raise a presumption of discrimination, after the employer's cost-saving measures there was a large representation of reduced hours employees or employees working under special agreements for individuals suffering from long-term or chronic illness (also known as 'section 56 agreements'). Accordingly, the statistical data was not sufficient to prove a presumption of discrimination.
The court further found that the inclusion of physique and flexibility as sub-criteria in the employer's internal assessment process did not in itself constitute facts establishing a presumption of discrimination. In contrast, the court took into account that the dismissals were a consequence of the employees not having several of the core skills required to carry out the position of bioanalyst.
Finally, the court did not find reason to set aside the employer's assessment that it was impossible to maintain a position adjusted to the employees' limited portfolio of tasks. It was essential to the employer that all employees working the same shift were able to perform all tasks and that all employees had the possibility of switching to less demanding tasks, which, for this reason, could not be reserved for specific employees.
On that basis, the court found in favour of the employer in all four cases.
The cases were subsequently appealed to the High Court which, by majority judgment, upheld the rulings of the district court.

Commentary

The High Court judgments confirm that even though the employer is required to take reasonable accommodation measures, the employer is not required to create or maintain a position if the employee is not competent, capable and available to perform the essential functions of the post. In other words, if the employee does not have the essential core skills required to perform the job, this could constitute a disproportionate burden based on the employer's operational situation.
The operational situation may change for the employer, so the weight of the burden of an employee with special needs may change too, which these decisions reflect. Even though the employees had been employed for up to 16 years, the changed operational situation justified the change in demands for the employees' skills.
The decisions also confirm the position in previous Danish case law that statistical data in itself might establish a presumption of discrimination, but it would require that such data is sufficiently significant in relation to all the employer's employees. Since the employer continued to employ a large number of reduced hours employees or employees working under special agreements after the cutbacks, the data was not sufficiently significant in these cases.

Comments from other jurisdictions

Germany (Pia Schweers, Luther Rechtsanwaltsgesellschaft mbH):
In Germany, the Directive 2000/78/EC has been implemented by the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG). In addition, special regulations for the participation of people with disabilities can be found in the Social Code IX (Sozialgesetzbuch IX – SGB IX). The Directive was also implemented in this law. The legal situation in Germany is, therefore, comparable to the one in Denmark.
German jurisdiction provides the claiming employee asserting indirect discrimination with evidentiary facilities within a system establishing a two-stage burden of proof (Sec. 22 AGG). In the first stage, the claiming employee must present and prove the facts that give rise to the assumption of a disadvantage. If the claiming employee succeeds in this proof, the defending employer would have the burden of proving in the second stage that there is no discrimination or that there are grounds for justification.
When considering the facts presented in the four decisions of the Danish Eastern High Court, a German court would, therefore, presumably also have come to the conclusion in the first step that indirect discrimination could exist. The German Federal Labour Court (Bundesarbeitsgericht "BAG") stated in a gender-based discrimination case that evaluating data can be used as suitable evidence at the first stage (BAG, July 22, 2010, 8 AZR 1012/08). It seems obvious that a German labour court would transfer this jurisdiction as well to a disability case.
However, possible discrimination must always be put into relation in Germany as well. Thus, discrimination does not exist if there is an objective reason for the different treatment of two groups. Such an objective reason may be, for example, a lack of qualification.
In Germany, it is at the employer's discretion which qualification profile is set for a job. If the employer makes changes to its organization that result in the loss of a previous job held by an employee with a disability, this may also justify the dismissal of this employee in Germany. The organizational decision would not withstand a judicial control only if the severely disabled

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employee can prove that it was taken in order to avoid the burdens resulting from the special rights of severely disabled persons. (BAG, May 16, 2019, 6 AZR 329/18). A decision similar to that in Denmark would therefore also be conceivable in Germany.

United Kingdom (Bethan Carney, Lewis Silkin LLP): This case raises the question of exactly how the 'essential functions of the post' are determined and whether what is regarded as 'essential' could be different in different circumstances. This case report implies that the court could look behind an employer's assertion that certain functions are 'essential' and make its own determination; suggesting that here 'the court did not find reason to set aside the employer's assessment'. There have been various cases in the UK about whether an employer is obliged to create what are essentially new posts for disabled employees by reallocating duties to other employees, as part of its obligation to make reasonable adjustments (accomodation). Whether or not it is reasonable for an employer to be required to provide a 'cut down' job for a disabled employee is determined principally by the size and resources of the employer. The costs of any step (financial and otherwise) are relevant and any detrimental effect on other employees is a legitimate consideration under this head. In *Parker – v – Oak Cash And Carry Ltd ET case no. 2700974/07* a shop assistant who suffered from problems with her neck and back wanted to be given a job working only on the tills. The employer refused because till operators were expected to do other work and it did not believe it was realistic for her to work only on the tills. The tribunal dismissed the claim on the grounds that the employer was a small business with a small number of staff and it needed employees who worked on the tills to do other duties during quiet periods. It would have increased the employer's costs and caused problems with other employees (who would have had less varied duties) if the employer had agreed. Ultimately what is 'reasonable' is a question for the employment tribunal and different tribunals will reach different decisions on the facts before them. Tribunals have considerable leeway and the scope to challenge them on appeal is limited.

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