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NEWS REPORT

Country:	Denmark
Title:	Supreme Court test case on dismissal because of disability-related sickness absence
Date:	22 July 2015
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Update of flash report nr:	Flash report 1254-DK-49
<u>Context</u>	
Issue at stake:	<ol style="list-style-type: none">1. Definition of disability.2. Obligation to establish reasonable accommodation for persons with disabilities.3. Whether a national provision entitling a dismissal with a shorter notice period because of sickness related absence is in conflict the Directive 2000/78.
Ground of discrimination:	Disability
Source:	The Supreme Court, 25/2014, judgment delivered on 23 June 2015.
Field:	Employment
Applicable law:	Section 2, 2a and 7 of the Act on Prohibition of Discrimination in the Labour Market etc. Section 5(2) of the Salaried Employees Act.

Content

Case: On behalf of two women a Danish union claimed compensation because of disability discrimination. The case was referred for a preliminary ruling and the Court of Justice of the European Union delivered its judgment on 11 April 2013 in the joined cases C-335/11 and C-337/11 (*Skouboe Werge and Ring*). The Danish Maritime and Commercial Court dealt with the two cases and delivered its judgments on 31 January 2014 in F-13-06 and F-19-06 (described in Flash report 1254-DK-49), which were appealed to the Supreme Court.

The judgment of 23 June 2015 is the final decision by the Supreme Court in one of the cases – the Werge case. The case dealt with Mrs. Werge who had been involved in a traffic accident in which she suffered a whiplash injury. More than a year later she still suffered from persistent pains and had several absence periods of sickness. She was dismissed from her job with reference to a special rule – section 5(2) of the Salaried Employees Act entitling the employer to dismiss an employee with a shortened notice period when the employee has been sick for 120 days within a period of 12 consecutive months.

Decision of the Court:

1. Disability

The Supreme Court referred to CJEU C-335/2011 (Ring) and C-377/2011 (Skouboe Werge) and stated that the concept of disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable, if that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other employees, and the limitation is a long term one.

The Court stated that the burden of proof rested with employee; she had to prove that she suffered from an illness causing a disability encompassed by the Act on Prohibition of Discrimination in the Labour Market etc. The Court referred to a doctor's note containing a prognosis for her illness, which stated that the limitation would be long term. On that basis the Court concluded that the employee had a disability at the time of dismissal and that it was immaterial for this assessment whether the employer knew or ought to know that her illness had caused a disability.

2. Reasonable accommodation

The Court observed that it is a precondition for the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability. The parties of the case had been e-mailing each other during the sickness absence of the employee, but the note from the specialist doctor with the long term prognosis was not sent to the employer. On that background the Court did not find that the employer at the time of the dismissal knew or ought to have known about the fact that the illness had caused a disability. In conclusion there was no basis for ascertaining that the employer had failed to establish reasonable accommodation.

3. Dismissal with a shortened notice period

Section 5(2) of the Danish Salaried Employees Act entitles a dismissal with a shortened notice period if an employee has been absent because of illness for 120 days within a period of 12 consecutive months. Referring to paragraphs 69-92 of C-335/11 and C-337/11, the Court stated that this provision would be in conflict with Directive 2000/78 unless as well as pursuing a legitimate aim, it did not go beyond what would be necessary to achieve that aim. In its judgment the Court of Justice of the European Union had stated that it was left for the Danish courts to make this assessment.

The Supreme Court argued that one of the aims of Section 5(2) is to prevent that an employer in the event of an employee's illness right away dismisses the employee and that in reality it is therefore also easier for a person who risks to be absent because of sickness to get a job. The Court did not find that the provision went beyond what is necessary and thus concluded that section 5(2) of the Salaried Employees Act is not in conflict with Directive 2000/78. Accordingly, the sickness absence related to the disability of the employee could be included in the making up of 120 sick days according to Section 5(2) of the Salaried Employees Act. Thus, the Court concluded that it was legal for the employer to dismiss the employee with the shortened notice period.

4. Conclusion

The Supreme Court overruled the judgment by The Danish Maritime and Commercial Court and acquitted the employer.

Key points of analysis:

The judgment illustrates a number of fundamental principles:

- The employee must prove that he or she has as a disability.
- It is a precondition for the employer's obligation to establish reasonable accommodation that the employer knows or ought to know about the disability.
- Section 5(2) of the Salaried Employees Act is not in conflict with Directive 2000/78.
- Sickness absence related to a disability of an employee can be included in the making up of 120 sick days according to Section 5(2) of the Salaried Employees Act

on the precondition that the employer has not disregarded his or her obligation to establish reasonable accommodation.

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<http://domstol.fe1.tangora.com/page31478.aspx?recordid31478=1044>.