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NEWS REPORT

Country: Denmark
Title: Supreme Court case on dismissal because of disability-related sickness absence
Date: 27 October 2015
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Context

Issue at stake:

1. Definition of disability
2. Reasonable accommodation
3. Conditions for applying a Danish provision entitling dismissals with a shorter notice period because of sickness related absence

Ground of discrimination: Disability

Source: The Supreme Court, 104/2014, judgment delivered on 11 August 2015

Field: Employment

Applicable law: Section 2a and 7 of the Act on Prohibition of Discrimination in the Labour Market etc. and section 5(2) of the Salaried Employees Act

Content

Case: A woman had been employed in a Danish supermarket as a department manager since 1995. In 2008 she was diagnosed with arthritis. Her doctor recommended that she avoided stressful tasks and in September 2008 she was exempted from the checkout operator work. In March 2009, due to increasing sickness absence, the supermarket, the local authorities and the department manager entered into an agreement granting the employer a refund of paid sickness benefit.

In December 2009 the department manager 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:

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 the fact that after the

manager was diagnosed with arthritis, she was using wrist protectors during her work hours. The Court also argued that the illness entailed substantial limitations, which resulted in the manager being exempted from checkout work. Finally, the manager was absent owing to her illness. On that basis the Court concluded that the limitations because of her illness appeared to be long-term and that the illness of arthritis was encompassed by the concept of disability in the Act. It did not change the opinion of the Court that the woman had experienced a temporary period of improvements of her condition during the spring of 2009.

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. When the manager got the diagnosis of arthritis she told her employer and she also informed about the need for modifying her tasks. Furthermore, there was a meeting between the local municipality, the employer and the manager about ways to adjust the tasks of the manager so that she could keep her job. Thus, the Court found that the employer knew about the disability and was obliged to establish reasonable accommodation. In the case the manager had proposed that she could manage the mail department or that she could work part-time or get a flexible job. The employer had not considered a part-time position and the Court thus concluded that the employer had failed to establish reasonable accommodation.

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 C-335/11 and C-337/11, the Court stated that it would be in conflict with Directive 2000/78 to apply this provision if the sickness absence was a result of the fact that the employer has disregarded his or her obligation to establish reasonable accommodation. Thus, the special rule of 120 days cannot be applied by employers – including private employers – in situations where sickness absence is a result of lack of reasonable accommodation. The employer had argued that EU Directive 2000/78 was not directly applicable for private employers. The Court rejected this point of view and argued that the state of the law is a result of the Act on Prohibition of Discrimination in the Labour Market etc., which is both more recent and more specialised than Section 5(2) of the Danish Salaried Employees Act.

The Supreme Court concluded that the conditions for applying Section 5(2) of the Danish Salaried Employees Act were not met and the employer had to pay damage for loss of wages. Furthermore, the employer was sentenced to pay 9 month of salary in compensation for the failure to establish reasonable accommodation.

Key points of analysis:

- 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 cannot be applied by employers in a situation where the sickness absence is a result of lack of reasonable accommodation.
- Private employers are bound by the Act on Prohibition of Discrimination in the Labour Market etc. and the underlying EU Directive 2000/78, which is both more recent and more specialised than Section 5(2) of the Danish Salaried Employees Act.

Internet link source:

<http://domstol.fe1.tangora.com/page31478.aspx?recordid31478=1070> Last accessed 21/10/2015.