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NEWS REPORT

Country:	Denmark
Title:	Supreme Court ruling on discrimination by association
Date:	25 May 2016
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<u>Context</u>	
Issue at stake:	Did the dismissal of a woman because of long absence from her job constitute indirect discrimination because of her son's disability?
Ground of discrimination:	Disability
Source:	Supreme Court, judgment delivered on 27 April 2016 in Case HR-151/2015
Field:	Employment
Applicable law:	Section 1 and 2a of the Act on Prohibition of Discrimination in the Labour Market etc.

Content

Case:

A woman claimed that she had been discriminated against due to the disability of her son who had Asperger's syndrome. She was dismissed from her job as a child minder at a time when she had been on leave to care for her son for around 14 months. The employer refused that the dismissal was motivated by the illness of the son and argued that it was solely based on necessary budgetary cuts in the local municipality. The employer also argued that the son did not have a disability.

The Board of Equal Treatment had previously found that the son did not have a disability in the meaning of the Act on Prohibition of Discrimination in the Labour Market etc.¹

Decision of the Court:

In April 2016, the Supreme Court concluded that the son "suffered from Asperger's syndrome to such a degree that he was encompassed by the concept of disability" in the Act on Prohibition of Discrimination in the Labour Market etc. The Court stated that the son had a "significant impairment with regard to among other things his social capabilities and the ability to handle changes in everyday life." The Court also stated, that "the impairment hindered a normal school attendance."

The Court, however, argued that the child minder had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability.

The Court then assessed whether the child minder had experienced indirect discrimination. The local municipality had to cut the budget because of a declining

¹ Flash report No. 25: Asperger Syndrome was not a disability (published 26 June 2012).

number of children. According to the Court it was both objective and proportional not to move children to a child minder whom the children did not know because of the fact that she had been away from her work for a long period of time. On that basis the Supreme Court concluded that the dismissal of the child minder in question did not constitute indirect discrimination in violation of the Act on Prohibition of Discrimination in the Labour Market etc.

The Court underlined that it did not need to discuss whether the prohibition of indirect discrimination encompass a situation where an employee does not have a disability herself but is affected by an action because of a disability of her child or another close relative. The Court referred to rulings from the Court of Justice of the European Union in case C-303/06 of 17 July 2006 (*Coleman*) and in case C-83/14 of 16 July 2015 (*CHEZ Razpredelenie Bulgaria*) and argued that the correct understanding of the Employment Directive in this regard is neither clear nor settled. As the question of whether indirect discrimination because of the association of an employee to a child with a disability is encompassed by the non-discrimination legislation was not decisive to the case in question, the Supreme Court concluded that it did not need to ask for a preliminary ruling on the issue from the Court of Justice of the European Union.

On that background the local municipality was acquitted.

Key points of analysis:

The case illustrates that the question of whether indirect discrimination because of the association of an employee to a child with a disability is illegal is unclear and unsettled according to EU non-discrimination law.

Internet link source:

<http://domstol.fe1.tangora.com/New-Søgeside.31488.aspx?recordid31488=1214>.