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NEWS REPORT

Country:	Denmark
Title:	Supreme Court ruling on reduced work hours as reasonable accommodation
Date:	12 December 2017
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Update of news report:	Denmark - High Court ruling on dismissal and disability discrimination (PDF 129 kB)
Issue at stake:	The extent of the employer's obligation to provide reduced working hours as a reasonable accommodation
Ground of discrimination:	Disability
Source:	The Supreme Court, ruling in Case No. 305/2016 delivered on 22 November 2017
Field:	Employment
Applicable law:	Section 2a and 7 of the Act on Prohibition of Discrimination in the Labour Market etc.

Content

Case: The claimant had undergone a serious brain surgery. After the surgery, she experienced abnormal tiredness and was on sick leave for about 2 months. Thereafter she was on partial sick leave for 8 months. She wanted to go back to her full-time position in the bank where she had been employed for 18 years. However, the extreme fatigue meant that she could not work for more than 12-18 hours a week. The hospital had recommended a "flexible job" with reduced working hours (for people with a reduced ability to work) but the employer rejected this. After this rejection the claimant called in sick again. She was dismissed 3 weeks after.

The claimant argued that her tiredness constituted a disability and that her dismissal was discriminatory. The employer argued that due to the massive sickness absence since the surgery, the employee could not be expected to perform the job she was appointed to do and thus had to be dismissed.

Decision of the Court: In its argument, the Supreme Court referred to case law from the Court of Justice of the European Union (CJEU).¹ Based on CJEU case law, the Supreme Court ruled that, to establish a disability within the meaning of the Directive, it is not a condition that the impairment is due to a disease, which has been diagnosed with a medical record. Instead, an assessment of all the circumstances of the case must take place, in particular information from doctors and other healthcare professionals. Thus, it is a comprehensive assessment that determines whether an employee at the time of an alleged discrimination is to be regarded as having a disability, in the meaning of the

¹ Paragraphs 38, 39 and 42 of C-225/11 and C-337/11 (Ring and Werge). Paragraph 47 of C-13/05 (Navas). Paragraph 36 of C-406/15 (Milkova). Paragraph 48-59 of C-395/15 (Daoudi).

Directive and hence in the meaning of the Act on Prohibition of Discrimination in the Labour Market etc.

Regarding the issue of duration or permanence, the Supreme Court stated that the impairment has to be longterm and that it has been left with the national courts to assess whether an impairment is longterm or not. The Court again referred to case law from the CJEU and stated that all objective elements of evidence must be taken into account in this evaluation, in particular documents about the person in question that are based on medical and scientific information.

Furthermore, the Supreme Court stated that in general, it is the employee who has the burden of proving that, at the time of the alleged discrimination, he or she had a disability, including that the impairment was of a long-term nature.

In the case in question, the Supreme Court referred to the reasoning of the High Court. Based on the medical records of the claimant there were no prospects for her getting back to a full-time position in the bank as she was suffering from a "diagnosed disabling fatigue". The Supreme Court thus concluded that the impairment at the time of the dismissal constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. and that the bank had been aware of the disability. The Supreme Court also stated that the bank had failed to fulfil its obligation to establish reasonable accommodation. This was based on the reasoning by the High Court that the employer had refused the claimant a "flexible job" without examining the options more closely.

In conclusion, the dismissal constituted discrimination based on disability and the claimant was awarded a compensation of DKK 503.000 constituting 12 months of salary (€ 67.550). Determining the amount of compensation, the Supreme Court referred to the reasoning of the High Court and thus to the long employment of the claimant as well as the "coarseness" in the meaning of seriousness of the discrimination.

Key points of analysis: The case illustrates that if an employee needs reduced working hours because of her disability, the employer must show a willingness to look into possible accommodations like flexible jobs, part-time jobs etc. If the employer refuses such accommodations, the courts might conclude that the obligation to provide reasonable accommodation has been violated.

Internet link source:

[http://domstol.fe1.tangora.com/Domsoversigt-\(Højesteretten\).31478.aspx?recordid31478=1487](http://domstol.fe1.tangora.com/Domsoversigt-(Højesteretten).31478.aspx?recordid31478=1487) [accessed 4 December 2017].