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NEWS REPORT

Country:	Denmark
Title:	Supreme Court ruling on medical diagnosis and disability
Date:	12 December 2017
Expert:	Pia Justesen
Update of news report:	Denmark - Proof of disability (PDF 125 kB)
Issue at stake:	A medical diagnosis is not necessary to establish that an employee has a disability at the time of dismissal
Ground of discrimination:	Disability
Source:	The Supreme Court, Ruling No. 300/2016 delivered on 22 November 2017
Field:	Employment
Applicable law:	Section 2 of the Act on Prohibition of Discrimination in the Labour Market etc.

Content

Case: The claimant experienced dizziness and visual disorders after a knee surgery where she had an epidural. The specific reasons for her symptoms were unknown but they caused her to call in sick. After six months of partial sickness absence, she was dismissed. The employer argued that she had behaved inappropriately during a meeting dealing with her sickness absence. At the meeting in question, colleagues, representatives from the local municipality as well as her employer had participated.

The claimant argued that she had experienced discrimination because of her disability.

In 2016, the High Court concluded that even though the claimant's symptoms had been mentioned in several medical records, it had not been proven that her condition was caused by a medically diagnosed illness. Thus, it had not been documented that she had a disability at the time of dismissal. On that basis, the High Court acquitted the employer.

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 found that the employer had only received sparse information about the cause of the employee's absence. Furthermore, the employer had tried to meet the employee's special needs when she returned to work. Against this background, the Supreme Court concluded that the dismissal had nothing to do with the employee's illness or her sickness absence. Instead, the dismissal was based on the employee's behavior. Thus, the dismissal did not constitute discrimination, no matter whether the experienced dizziness of the employee had or had not met the legal requirements to be considered a disability.

On that basis, the employer was acquitted.

Key points of analysis: In contrary to the High Court ruling, the Supreme Court clarifies that to have a disability encompassed by the discrimination law, it is not a requirement that the condition in question is caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case. It makes no difference whether e.g. dizziness is an illness or a consequence - as long as the condition involves a long-term impairment. This ruling by the Supreme Court also opens up for the deeming of discrimination based on perceived disability to be illegal according to Danish non-discrimination law.

The ruling establishes that the burden of proof rests with the employee. The employee has to prove that he or she has a disability, including that the impairment is of a long-term nature. However, as stressed above, it is not a requirement that the condition is caused by a medically diagnosed illness existing at the time of dismissal.

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