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FLASH REPORT

Country:	Denmark
Title:	Supreme Court ruling on age and disability discrimination
Date:	22 May 2019
Expert:	Pia Justesen
<u>Context</u>	
Issue at stake:	Supreme Court ruling on dismissal of office worker in flex-job and possible discrimination based on age and disability
Grounds of discrimination:	Age and Disability
Field of application:	Employment
Source:	National court decision
Applicable law:	Section 9(2) of the Act on Prohibition of Discrimination in the Labour Market etc.

Content

Case: The case dealt with an office worker who had a flex-job with reduced working hours and whose employer received a subsidy from the local municipality according to the flex-job legislation. The office worker was paid for 37 hours of work per week but in reality, worked 20 hours per week. According to the agreement, he could only do certain kinds of jobs due to his reduced ability to work. The local municipality paid the employer 2/3 of the salary according to the flex-job arrangement.

The office worker was dismissed from his position when he reached the state pension age. The reason for the dismissal was the fact that the employer stopped receiving the subsidy from the local municipality. This happens automatically according to the flex-job legislation at the time when an employee turns 65 years of age.

The office worker had been interested in continued employment in the company after the automatic termination of the flex-job, but in a position where salary and working hours were in accordance with his ability to work. In other words, the office worker was interested in a part time position with reduced salary.

Among other things, the office worker argued that the dismissal constituted discrimination based on his age and disability.

Decision of the Court: The Supreme Court made clear that a flex-job arrangement contains two elements – certain conditions of employment and a subsidy from the municipality. The Court also stated that a flex-job must be considered to be an employment-creating arrangement (a positive action), which is allowed according to section 9(2) of the Act on Prohibition of Discrimination in the Labour Market etc. Section 9(2) allows for positive action with regard to older employees and persons with disabilities. The Court referred to Article 6(1) and article 7 of Directive 2000/78/EC in regard to the positive action argument. The Court argued that the termination of such

positive action when a person reaches the state pension age and the subsidy stops could not be considered discrimination because of neither age nor disability.¹

Referring to the employment contract between the office worker and the employer, the Supreme Court noted that it was an obvious condition for the employment in question that the employer had received a flex-job subsidy from the municipality. The basis for the employment therefore lapsed when the office worker reached the state pension age and the subsidy was discontinued.

On that basis, the Court did not find that the dismissal constituted discrimination because of age or disability in violation of the Act on Prohibition of Discrimination in the Labour Market etc.

The Maritime and Commercial Court had reached the same conclusion.²

Internet link source:

[http://domstol.fe1.tangora.com/Domsoversigt-\(Højesteretten\).31478.aspx?recordid31478=1745](http://domstol.fe1.tangora.com/Domsoversigt-(Højesteretten).31478.aspx?recordid31478=1745).

¹ Supreme Court, judgment in Case No. BS-25958/2018-HJR of 17 April 2019.

² Maritime and Commercial Court, judgment in case No. F-5-17 of 28 June 2018.