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Dismissal after childbirth-related leave (DK)

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Summary

The Danish Western High Court has ruled that the dismissal of an employee shortly after returning from childbirth-related leave did not constitute discrimination within the meaning of the Danish Act on Equal Treatment of Men and Women.

Legal background

In Denmark, Directive 92/85/EEC and Directive 2006/54/EC have been implemented into Danish law by the Act on Equal Treatment of Men and Women that, for example, regulates the protection of employees who are pregnant or on childbirth-related leave.

According to the Act, if an employee is dismissed during pregnancy or childbirth-related leave, a reversed burden of proof will apply. Thus, in such cases it is for the employer to prove that the employee has not been dismissed wholly or partly on the grounds of pregnancy or childbirth-related leave.

If, on the other hand, an employee is dismissed after childbirth-related leave, a shared burden of proof will apply, meaning that if the employee establishes facts based on which it may be presumed that direct or indirect discrimination has occurred, the burden of proving that no discrimination has taken place rests on the employer.

In the case at hand, the Danish Western High Court had to decide whether or not an employee had discharged the burden of proof by establishing facts indicating that her childbirth-related leave had been a factor in the employer's decision to terminate the employment.

Facts

The case concerned a production worker at a company that sold products to restaurants and caterers. The employee's job involved preparing and packing vegetables.

In the fall of 2014, the employee fell pregnant. On 18 November 2014, the employee called in sick and was on long-term sick leave until May 2015 when her childbirth-related leave began. The employee's absence until the childbirth-related leave was not caused by pregnancy-related illness.

After the childbirth-related leave, the plan was for the employee to take holiday and then return to work on 6 April 2016. However, on the day of her scheduled return, the employee called in sick. Two days later the employee was dismissed by the employer, allegedly because of a drop in orders.

The employee and her union issued proceedings against the employer, claiming compensation of nine months' pay for gender discrimination. The case was initially brought before a district court and later ended up in the High Court.

The employee and her union argued that the close temporal connection between the end of the childbirth-related leave and the dismissal indicated that the leave had been a factor in the decision to terminate the employment. In addition, the employee and her union argued that the employer had not proven that it had in fact experienced a drop in orders.

It should be noted that the employee and her union – in the district court – had also argued that the dismissal decision had de facto been made during the employee's childbirth-related leave when the burden of proof would have been reversed rather than shared.

On the other hand, the employer argued that the burden of proof was shared. The employer claimed that the fact that the dismissal was effected a few days after the end of the childbirth-related leave did not in itself establish facts suggesting that the employee's leave had been a factor in the dismissal decision, and the same applied to the fact that the employer had taken into account the employee's considerable sickness absence. Finally, the employer noted that it had been necessary to dismiss three other employees due to the drop in orders and that the dismissal decision had been based on criteria such as qualifications and stability of attendance. The employee in question had been selected for dismissal due to her sickness absence rate (not pregnancy-related) that was significantly higher than that of the other employees.

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Judgment

Based on the date of the dismissal letter – which was drawn up one day after the employee called in sick after her childbirth-related leave – the district court found that the dismissal decision had been made after the employee's leave ended. For this reason, the question of whether the dismissal was inconsistent with the Act on Equal Treatment of Men and Women should be decided in accordance with the rule regarding the shared burden of proof.

In addition, the district court took into account that at the time of dismissal the employee's sickness absence rate was considerable and that prior to the dismissal the employee had – once again – called in sick, which incurred costs for the employer. The district court concluded that the employee had not presented facts establishing a presumption of discrimination. Consequently, the district court ruled in favour of the employer.

When delivering its judgment in the case, the High Court took into account the fact that the employee had had a considerably higher sickness absence rate (not pregnancy-related) than the other employees. Furthermore, the High Court found that the employer had shown that the inflow of orders had dropped significantly in the period of time leading up to the dismissal, and it had therefore been necessary for the employer to lay off staff. Based on the evidence presented in the case, the High Court found that the employer had based the dismissal decision on objective criteria such as the employees' qualifications and stability of attendance. The High Court noted that stability of attendance was especially important considering the nature of the company. In that regard, it should be noted that the company primarily hired unskilled workers and had to deliver large orders at short notice.

Thus, the High Court upheld the decision of the district court, stating that the employee had not proved that she was dismissed wholly or partly on grounds of childbirth-related leave.

Commentary

The judgment by the High Court generally confirms Danish case law on dismissals effected after childbirth-related leave. Thus, the judgment exemplifies that a close temporal connection between the dismissal and the employee's return from childbirth-related leave – in this case just two days – does not in itself raise a presumption of discrimination.

Consequently, in cases such as this one, the decisive factor is whether the employee is able to discharge the burden of proof by establishing facts indicating that the childbirth-related leave was a decisive factor in the employer's decision to terminate the employment. In the assessment of whether or not the employee has discharged the burden of proof, the Danish courts have previously taken into account, for instance, whether the employee's replacement during childbirth-related leave has become permanently employed.

The fact remains that if the employer due to circumstances such as a decline in orders finds it necessary to lay off staff, the dismissal of an employee who has just returned from childbirth-related leave may be justified provided that the employer has only taken into account objective criteria, meaning that the childbirth-related leave has not in any way been a factor in the dismissal decision. It should be noted that in this case the High Court took into consideration the nature of the company when assessing the objectivity of the criteria taken into account by the employer. This indicates that the assessment of whether or not the criteria applied by the employer will be considered objective may be different depending on a case-by-case assessment.

On a concluding note, even though a close temporal connection between the dismissal and the employee's return from childbirth-related leave does not in itself raise a presumption of discrimination, it is recommended that employers ensure written proof of the criteria taken into account is obtained as there is always a risk that the dismissal of an employee who has just returned from childbirth-related leave may subsequently be challenged.

Comments from other jurisdictions

Germany (Fabian Huber, Luther Rechtsanwaltsgesellschaft mbH): The judgment of the Danish court is effectively in line with the legal situation in Germany. The German General Equal Treatment Act that implemented Directive 2006/54/EC provides, in favour of the claimant, a shared burden of proof for all claims based on the Act (following Article 19 of Directive 2006/54/EC). Therefore the situation regarding the burden of proof for a discrimination claim is unchanged no matter at what point the dismissal is declared. However employees in Germany profit from a special dismissal protection during pregnancy and parental leave. As in Denmark, this special protection ends on the last day of the childbirth-related leave, resulting in a less favourable position of the returning employee.

In a German court the employee would have faced the same difficulties in establishing facts that indicated a discrimination based on her gender. The mere close temporal connection between the end of the childbirth-related leave and the dismissal would likely not suffice to establish reasonable grounds to believe that the unequal treatment was based on gender under German law. While it is generally accepted that more women than men take childbirth-related leave and women generally take longer childbirth-related leave than men, a dismissal after the leave period does not necessarily indicate a gender discrimination. Moreover, in the case

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at hand the employer could establish that they dismissed three other employees (which presumably were not all women or had recently returned from childbirth-related leave), which would serve as an argument to establish that the dismissal was not based on the employee's gender.

It should be noted that in Germany the day of returning to work would be the first day on which the employer could terminate the employment contract without permission by the authorities. Since in Germany employees profit from special dismissal protection during pregnancy and parental leave, an employer has often no choice other than to wait until after the special dismissal protection ends before terminating the employment contract.

Greece (Effie Mitsopoulou, KG Law Firm): In accordance with Greek labour law, dismissal of an employee is prohibited for a time period of 18 months (protection period against dismissal) counting from the date of birth. Existence of a serious cause could justify the dismissal. Likewise in a case where the employer proceeds to a complete and definite closure of its business. In such a case the protected employee will be the last one to be made redundant.

Greek law provides as an additional condition for the lawful dismissal during the above time period that the 'serious cause' should be explicitly mentioned in the termination form so that the employee may be aware of the reasons which led to the termination of her employment agreement. If such requirements (i.e. the serious cause and the employee's notification about it) – in addition to the payment of the statutory severance – are not met, the dismissal of the employee will be considered null and void and the employer will remain liable for any obligations arising from the employment agreement towards the employee, in particular salaries in arrears. The employee is also entitled to file a recourse to the Greek Ombudsman and raise claims of unequal treatment, according to Directives 2000/43/EC and 2000/78/EC, which have been implemented into Greek law.

Greek case law approaches consistently dismissals during the above-mentioned protection period, having ruled that any dismissal during the protection period is permitted only for specific reasons, which must not be related to the childbirth and/or the physical consequences of the same.

Italy (Caterina Rucci, Katariina's Guild): Under Italian law, there is a general prohibition of termination – which starts with (even if unknown) pregnancy and ends only once the child is one year old. As a consequence, there is no question of burden of proof related to termination.

All the employee is supposed to give evidence of is:

– the pregnancy status by the time of termination (including if either the employee or the employer where aware of such status); or
– that the child was younger than one year by the time of termination.

This rule, which has existed since the sixties, and notwithstanding any successive Directive, would make things much easier in a case similar to this. The only exceptions to the prohibition are:

– a termination for good cause, what is much more serious than a mere termination 'for cause', since it requires such a serious misconduct that the relationship cannot continue, not even during a notice period; and
– the company's closure (or closure of a department to which the employee belonged).

Such prohibition applies also in case of collective dismissal (which is not a termination for just cause). Basically any pregnant employee and/or female employee with a child younger than one year is protected also against collective dismissal. In fact, although a collective dismissal usually takes quite a time, since the termination prohibition remains for such a long period (from pregnancy to one year of the child) in the large majority of cases no pregnant woman nor any female employee with a child of less than one year will be included in collective dismissal plans, which must be modified if – by chance – the future mother made sure she was pregnant at the time of termination, or when information was provided to trade unions.

The Netherlands (Peter Vas Nunes): In Dutch practice, the temporal proximity between, on the one hand, a maternity-related event (for example, an employee's announcement that she is pregnant) and, on the other hand, a decision to terminate the employment relationship, is a frequent element in plaintiffs' sex discrimination claims. In itself, such proximity is insufficient to establish a presumption of discrimination. However, not much additional 'evidence' is needed to reverse the burden of proof. One such additional piece of 'evidence' is lack of transparency. The Human Rights Commission applies the need for transparency strictly, holding that an employer's decision to dismiss an employee must meet the requirement that it is 'transparent, verifiable and systematically executed'. A combination of temporal proximity and lack of transparency can be sufficient to reverse the burden of proof. Given that employers' decisions more often than not fail to meet the strict transparency criteria, temporal proximity comes close to being a decisive factor.

In this case, the court took into account, in favour of the defending employer, that the employee had a high absence rate. The Dutch Human Rights Commission might have examined whether the employer's policy of dismissing staff on account of having a high absence rate was fully transparent. For example, were there in the recent past no employees with a similarly high absence rate that were not dismissed?

Romania (Andreea Suciu and Teodora Mănăilă, Suciu | The employment law firm): The protection of employees

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returning from childbirth-related leave always represents a sensitive issue especially when dealing with restructuring processes as the employee is considered to be in a vulnerable economic position (given the need to ensure the daily care of a new-born and all of its necessities).

From a Romanian employment law perspective, at first glance, the Danish case represents the situation of an objective dismissal case not related to the employee's persona (i.e. dismissal caused by a drop in orders) and of the selection criteria applied by the employer (i.e. three employees were dismissed in the matter at hand by applying two criteria: (i) the employee's qualifications and (ii) stability of attendance).

In comparison with the Danish transposition of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, the Romanian legislator has determined that in employment discrimination cases the employer bears the entire burden of proof in demonstrating that any decision in connection to the employment agreement was not based on discriminatory criteria (e.g. gender, maternity, etc.).

With regard to one of the criteria applied by the employer, respectively the *stability of attendance,* such criteria has an underlying connection with the aptitude of the employee to perform work, respectively to the employee's health status. Within the given context, where such criteria was linked with the employer's object of activity, it is important to understand if such criteria can be considered objective when the object of activity requires the employer to act swiftly. Nevertheless, it cannot be argued that every employer wishes for their employees to attend work in accordance with the working hours and to have less or no health problems at all, thus a direct link between attendance and the object of activity must receive strict interpretation and scrutiny from the courts.

Moreover, the stability of attendance criteria also has an underlying connection with the employees' age, older employees being generally considered more prone to health problems due to ageing compared to younger employees. Therefore, significant risks of discriminatory treatment follow such type of criteria and it can be argued that their relevance to the activity performed by the employees does not represent a specific condition but more a general condition to the employment relation (i.e. the execution of work in view of receiving a payment).

We can ask ourselves if it would have been better to determine whether the employee was still fit to fulfil her duties after the recent medical history and whether a more appropriate dismissal case would have been better pursued given the indirect health assessment criteria applied. For example, in the case of our jurisdiction, dismissal related to the employee's persona, respectively dismissal based on ascertained physical/mental inaptitude would have been an option for the employer to explore.

Nevertheless, the decision showcases that in each dismissal case the aspects of the situation need to be examined and that to understand the context within which such decision is adopted is mandatory. It also provides employers with the evidence that besides the correct identification of the applicable legal provisions, solid factual arguments represent a strong basis for supporting such decisions in court, irrespective of jurisdiction.

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