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Dismissal after long-term incapacity is not proven to be discriminatory (BE)

CONTRIBUTOR Gautier Busschaert*

Summary

Despite having been on sick leave for six months at the moment of dismissal, the Labour Court of Brussels considered that a claimant did not establish a prima facie case of discrimination which would allow the burden of proof to be reversed.

Facts

On 1 March 2016, the claimant was recruited as a communications officer at a Flemish university on an indefinite employment contract. As from 9 January 2019, she became sick and did not return to work until her dismissal on 2 July 2019. In the certificate of unemployment communicated to her a few days later, her being unfit for the job was put forward as the reason for dismissal.

On 6 February 2019, the claimant was contacted by the well-being at work department of the university which sent an email to her with a link to a mindfulness app helping to fight 'toxic stress'.

On 17 February 2020, the claimant filed a claim before the Labour Tribunal of Brussels asking for the payment of (i) two weeks of remuneration for failure to communicate the concrete reasons for the dismissal, (ii) six months of remuneration because of a discriminatory dismissal based on burnout considered to be a disability, and (iii) alternatively, should the dismissal be deemed non-discriminatory, 17 weeks of remuneration for manifestly unreasonable dismissal.

By judgment of 21 January 2021, the Labour Tribunal of Brussels granted in a very limited manner the request by ordering the defendant to pay arrears interest in relation to the two weeks indemnity which had been paid by the defendant in the meantime.

Judgment

On 23 February 2021, the claimant filed an appeal before the Labour Court of Brussels with a view to being granted the other claims made in first instance.

As regards the claim for discrimination based on disability, in accordance with the rules on the burden of proof in discrimination matters, it was for the claimant to demonstrate facts from which it can be presumed that she had been treated unfavourably based on a protected ground, i.e. disability or at least health status in the present case. The claimant attempted to prove a prima facie case of discrimination in several ways.

First, she referred to the email from the well-being at work department containing a link to an app related to mindfulness and providing in an annex advice and activities to neutralise toxic stress. However, the Labour Court found this email did not prove that the defendant was aware of her burnout.

Secondly, she referred to a report from her psychologist, which showed only that she started taking therapy well after being dismissed and so the Court found that the defendant could not have been aware of that either.

Next, the claimant referred to the defendant's obligations under the well-being at work legislation, in particular as regards the need to undertake a general risk analysis concerning psychosocial risks at work, which the Labour Court deemed irrelevant as it was not related to her specific situation.

She also complained that no proposal for reasonable adjustments was ever communicated to her considering her disability. However, the Court noted that she had never made any request for reasonable adjustments so that she could not place the onus on the employer.

Minutes of a meeting of the committee on prevention and protection at work (committee in charge of well-being matters in the university) were further submitted. During this meeting, statistics were discussed which included figures on the number of employees of the university who resumed work in 2018. 70% did so unassisted, for 44 out of 149 an informal reintegration process was initiated, and for two employees there was a formal reintegration process. With this, the claimant wanted to show that the university offered reintegration pathways to other employees but not to her. According to the Labour Court, one cannot infer this from the limited set of figures which had been provided without any context

* Gautier Busschaert is an attorney at Van Olmen & Wynant, Brussels.

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or explanation. Moreover, the claimant appeared to have been contacted just like any other incapacitated employee after one month of sick leave.
The Labour Court thus concluded that the claimant did not prove facts from which it could be presumed that there had been discrimination on a protected ground so that the burden of proof was not reversed. Her claim for discrimination was therefore dismissed.
As to the claim for manifestly unreasonable dismissal, it is sufficient to note – as this does not pertain to European employment law – that the application was granted because the defendant was not able to show that the claimant was unfit for the job and it was ordered to pay an allowance corresponding to 10 weeks of remuneration.

Commentary

Should burnout be considered a disability? The claimant seemed to think so while the Labour Court did not take a clear stand in that respect, preferring to point out that in any case the claimant had not informed the defendant that she was absent because of burnout. As a consequence, disability or not, the fact that she suffered from burnout did not matter. By doing so, the Labour Court perhaps tried to avoid a difficult issue. Burnout is a multifaceted phenomenon which affects every person differently. In most cases it does not give rise to a very clear medical diagnosis. From this viewpoint, burnout may be more difficult to categorise than other long-term, well-circumscribed, conditions such as cancer or obesity.
From a domestic law perspective, this discussion may in any case seem pointless considering that in Belgium not only is disability a protected ground but also the current state of health. So even if the claimant did not focus her argument on this point, the Labour Court could have shifted the debate towards the state of health of the claimant, however it did not. This may seem odd considering that the anti-discrimination legislation is of public order, which means that any violation thereof should be examined by the judge of its own volition. So if the claimant possessed a protected ground, which she did considering that she had been sick for several months at the moment of the dismissal, the Labour Court should have taken this into consideration.
The Labour Court seemed to think that not only was the claimant unable to prove that she possessed a protected ground but also that she failed to prove that she was treated unfavourably based on that ground. Here as well the Labour Court seems to take a very strict stand by considering that the mere fact of being dismissed while having been on sick leave for a long time is not enough to reverse the burden of proof. This contrasts with well-settled case law, at least in the French-speaking part of Belgium, according to which the longer the sick leave the stronger the presumption that the dismissal notified during that leave is related to the health of the employee. Here the claimant had been sick for six months at the moment of the dismissal. Many judges would have reversed the burden of proof based on that fact only, especially in a case such as this one where the employer claimed without any proof that the employee had become unfit for the job. By refusing to accept long-term sick leave as a sufficient presumption the Labour Court has set the threshold very high and put the claimant in a difficult position. Indeed, as appears from this case, long-term sick employees have by definition been absent from work for a long time so that contact with their employer is limited or non-existent. It is often difficult for them to communicate any other proof of discrimination other than the medical certificates they regularly send to their employers to renew their incapacity.

Comments from other jurisdictions

Austria (Shima Babanzadeh, Daniela Krömer, CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH): Whether the Austrian courts would have concluded that the termination was unjustified due to the long sick leave cannot be inferred from the presented facts. In Austria, an employee's sick leave can justify his or her termination if it occurs with unusually high frequency or lasts for an unusually long period of time. In case law, this is justified primarily by the 'employee's inability to be deployed' and by the 'loss of performance that can no longer be managed'. In previous cases, sick leave to the extent of around 27% of the possible working time, or 126 days, half a year and to the extent of 282 days within five years with an upward trend were sufficient. However, since a decision on the justification of a termination can only be made after weighing the interests involved, these periods of absence can only serve as indications of the existence of a reason for termination. The decisive factor is whether further sick leave of this intensity is to be expected in the future. Only a 'negative' prognosis may justify a termination. As any prognosis on the future is difficult, specifically when employers do not know about the medical history, nor are medical experts, they take a risk when issuing a termination due to long-term sick leave. In court, the focus is therefore often on the – supposed – positive prognosis of the employee.
That said, there is of course the issue that sickness/prolonged sick leave can be qualified as disability. According to national law, a disability exists if there is a functional impairment of more than six months, which makes it difficult for the individual to participate in working life. However, (limited) case law states that illness and disability cannot be equated with each other without further ado. As most employees with serious long-term health issues apply for the official disability status, which then prevails over all other claims, there is

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little case law on when long-term sickness is considered a disability too. Theoretically, as a functional impairment may also arise because of a (mental) illness, it is possible that a long-time burnout may be considered a disability by Austrian courts, but there is no case law yet to support this understanding of disability.

Germany (Leif Born, Luther Rechtsanwaltsgesellschaft mbH): Unlike in Belgium, the current state of health is not a protected ground on which discrimination can be claimed in Germany. On the contrary, it is recognised in Germany that an employer is entitled to give notice of dismissal if an employee is frequently absent due to illness and it can be assumed that the employee will also frequently be absent due to illness in the future. This is justified by the fact that an employee who is constantly absent due to illness can no longer properly fulfil his or her work duties.
However, dismissal due to illness may constitute unlawful discrimination if the employee's absences are due to a disability. In this case, the employer is obliged to take all reasonable measures to enable the disabled employee to perform his or her job before giving notice of dismissal. Reasonable measures include all operational arrangements, e.g. a reduction of working hours, the provision of assistance tools or an assignment to other work tasks. If the employer does not consider such measures before giving notice, not only is the dismissal invalid but the disabled employee may also be entitled to compensation.
The term disability is legally defined in German law. The German labour courts interpret this term in conformity with Union law. Thus, a disability exists if a person's physical function, mental ability or mental health is impaired in the long term and as a result his or her participation in society, which includes participation in working life, may be substantially impaired. Whether burnout can count as a disability has not yet been decided by the German labour courts. In principle, mental illnesses can constitute a disability. However, as with physical illnesses, the condition is that a long-term illness is associated with it.

The Netherlands (Peter Vas Nunes, retired lawyer and former editor-in-chief of EELC): A case such as this, where the employee has a permanent contract, could not have arisen in the Netherlands for several reasons. First, such an employee cannot be dismissed without the consent of a court. Second, dismissal is usually not possible for reason of sickness absence that has not lasted at least two years. Third, the law requires that the employer and the employee have frequent, quite comprehensive contact during sickness; sending in medical certificates is not sufficient.
However, a similar case could arise, and most likely does sometimes arise, where the employee has a temporary contract which the employer does not renew for reasons (allegedly) related to a disability or 'chronic ailment'. Thus, the question this case report addresses, whether a burnout qualifies as a disability within the meaning of Directive 2000/78 and the Dutch law implementing that Directive, is a relevant one for Dutch practitioners. Clearly, the answer depends on a number of factors, in particular the anticipated duration of the burnout. Unfortunately, ECJ case law does not (yet) give us much useful guidance. To my knowledge, we still need to work with the 2016 ruling in *Daouidi* (C-395/15), in which the ECJ merely ruled in general, abstract terms:

"– the fact that the person concerned finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time […], does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by that directive, read in the light of the UN Convention;
– the evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and
– in the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data."

United Kingdom (Bethan Carney, Lewis Silkin LLP): The claimant in this case complained that no proposal for reasonable adjustments had ever been communicated to her and the Labour Court held that she had not made a request for adjustments and could not place the onus on the employer. However, she might have been able to win a reasonable adjustments claim in the United Kingdom. In this country, the claimant must first establish that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred (absent an explanation) that the duty has been breached. Once that has been established, the tribunal will consider what adjustments should have been made and again the onus falls on the claimant to identify in broad terms an adjustment that could have mended the disadvantage he or she experienced. However, the claimant would not necessarily have to have identified the adjustment during employment, he or she can sometimes raise it at the tribunal. The claimant would have to show at tribunal that the employer knew about the disability (or ought to have known) and that the employer knew or ought to have known that the claimant would be placed at a substantial disadvantage by its provision, criterion or practice (or by a physical feature of the premises or lack of an auxiliary aid). In the Employment Appeal Tribunal case of *Project Management Institute – v – Latif* [2007] IRLR 579 the judge said that in some cases the proposed adjustment may not be identified until after the alleged failure to implement it, or, in exceptional cases, not until the tribunal hearing.

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So, for example, if the employer was on notice about facts that meant it should have known that the claimant was suffering burnout and that a requirement to work full-time was putting her at a substantial disadvantage, the claimant might be able to show that had the employer consulted with her during employment it could have identified a reasonable adjustment, such as part-time work or a staged return.

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