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Medical diagnosis in disability discrimination cases not necessary (DK)

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Legal background

It is well-known that disabled persons are protected from discrimination in the labour market pursuant to EU law – in particular under Directive 2000/78 – but also the ILO and UN conventions. The ECJ has defined the concept of 'disability' in several cases, including *Chacón Navas* (C-13/05) and *HK Danmark* case (C-335/11 and C-337/11). In the latter case, the ECJ held that the concept of disability includes conditions caused by a *medically diagnosed* illness. The *HK Danmark* case, which was referred to the ECJ by the Danish Maritime and Commercial Court, led to established case law in the Danish courts that a condition only qualifies as disability if it is medically diagnosed.

In the Supreme Court case described in this report, there was no medical diagnosis at the time of dismissal and the question was therefore whether the employee could still be considered disabled within the meaning of the Danish implementation of Directive 2000/78.

Facts

A bank employee had brain surgery in 2012. Subsequently, she was on full-time sick leave for approximately two months. Afterwards, she gradually returned to work, originally for 2-3 hours a week.

During the spring and summer of 2013, the employee's working hours had increased to approximately 18 hours a week. The employee and employer had regular follow-up talks. According to the notes of their meeting on 1 May 2013, the employee had informed the employer that her specialists could not tell when she would fully recover. Later, the management of the bank received a note dated 22 May 2013 from the Danish Centre for Brain Injury stating that the employee suffered from severe fatigue, which is a common side effect of brain surgery. The note also stated that it was not possible to provide a timeframe for increasing the employee's working hours to full-time work.

According to a status report dated 3 July 2013 from one of Denmark's top hospitals, at best, the employee's illness was non-progressive and, at worst, progressive. The employee was dismissed on 28 August 2013 as a result of her sickness absence.

On 13 September 2013, a specialist diagnosed the employee with disabling fatigue resulting from her operation. He considered that it was unlikely that the employee would be able to resume work on a full-time basis. This diagnosis was not available at the time of the dismissal.

The employee and her union brought proceedings against the employer, claiming that she was disabled and that this was the reason for the dismissal. She argued that the condition was medically well-described both before and after the dismissal decision and should therefore have been considered to be a disability already existing at the time of dismissal. As the employer had failed to make reasonable adjustments to accommodate this, the dismissal should be considered in breach of the Danish Anti-Discrimination Act, entitling the employee to compensation.

The employer referred to existing case law, arguing that at the time of the dismissal decision, the employee's condition had not been medically diagnosed. Based on the information presented to the employer, the condition itself did not constitute a disability.

Judgment

The employee and her union won the case before the district court and the high court. Both courts found that the employer had the necessary information to determine that the employee had a disability and that it had failed to accommodate the employee sufficiently.

The main question before the Supreme Court was whether the employee was in fact disabled within the meaning of the Directive, as there had been no medical diagnosis at the time of the dismissal.

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The Supreme Court held that ECJ case law does not require an illness to be medically diagnosed in order to constitute a disability. It stressed that in the *HK Danmark* case, the employee's limitation was caused by a medically diagnosed illness and the judgment had to be seen in that light. To decide whether a condition constitutes disability within the meaning of the Directive, one must make an overall assessment of all factual circumstances available at the time of dismissal, particularly taking into account information from doctors and other medical professionals.

The Supreme Court continued by referring to the definition of a disability in the ECJ's judgment in the *HK Danmark* case (paragraph 38): "*the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers*". The Supreme Court noted, as it had done in earlier case law, that an illness in itself is insufficient to consider a condition as a disability and the condition must be one of long-term impairment (*HK Danmark*, paragraph 39).

In terms of 'long-term' impairment, the Supreme Court referred to the ECJ's judgment in the *Daoudi* case (C-395/15), noting that that decision was dependent on the national court making certain factual determinations. In deciding whether an impairment is long-term, the ECJ explained that the national court must take into account all "*of the objective evidence before it, in particular documents and certificates relating to the person's condition, established on the basis of current medical and scientific knowledge and data*" (*Daoudi*, paragraph 57). Last but not least, the Supreme Court held that the employee must prove that s/he had a disability within the meaning of the Directive.

In the case at hand, the Supreme Court confirmed the reasoning of both the district court and the high court that the employee's condition was a disability within the meaning of the Directive and that the employer had failed to make reasonable adjustments to accommodate this. It awarded 12 months' pay in compensation for the unlawful dismissal of the employee.

Commentary

This judgment has been awaited with great interest – and several cases were suspended pending the outcome – as it is the first time the Danish Supreme Court has considered the need for a medical diagnosis of a condition in order for it to constitute a disability.

It is now clear that having a medically diagnosed condition is not a formal requirement in disability discrimination cases. A person can be considered disabled under the Directive if the information available at the time of dismissal is sufficient to support the conclusion that the person was disabled. In making this assessment, the employer – and ultimately the courts – must consider all facts, in particular, information from doctors and other medical professionals.

But the judgment by no means excludes medical evidence in these cases. Medical information remains essential, and the Supreme Court stressed this in its judgment by referring to the *Daoudi* case. A medical 'judgment' in the form of a diagnosis, however, is not an indispensable requirement. When assessing whether a condition is long-term, however, a medical diagnosis will often be essential and necessary to establish the prognosis of the impairment. Nevertheless, in some situations it will still be possible to do this without a medical diagnosis.

The Supreme Court's judgment was delivered on the same day as another judgment, which also concerned disability discrimination. Even though the Supreme Court adopted the same reasoning in that case, the facts led to a different outcome, as in that case it emerged that the employer had properly considered the employee's disability in its dismissal decision.

Comments from other jurisdictions

Italy (Caterina Rucci, Fieldfisher): Despite the fact that disability requires specific medical certification in order for an employee to be protected as a disabled person in Italy, in a similar case, it is likely that the employee would have won – but on different grounds.

The court in Italy might have questioned whether and for how long after brain surgery the employee could be considered ill and whether s/he would be considered disabled, given that the employer was fully aware of the surgery and its effects on the employee.

Nevertheless, it is possible that in a similar situation, although a termination by reason of sickness following brain surgery might not automatically be considered a disability, the sickness itself might be sufficient to justify termination of the employment.

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