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Supreme Court judgment on the concept of comparable permanent employees (DK)

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Summary

In a recent case on fixed-term employment, the Danish Supreme Court addressed the question of what constitutes a comparable permanent employee. The Supreme Court ruled that four employees, who worked in a government agency, were not comparable with the agency's permanent employees and for this reason they had not been discriminated against on the grounds of their fixed-term contracts.

Legal background

Directive 1999/70/EC concerning the framework agreement on fixed-term work is implemented into Danish law through collective agreements and the Danish Act on Fixed-Term Employment.

According to the Act, fixed-term workers cannot be treated less favourably than comparable permanent employees solely because they have a fixed-term contract or relation, unless the difference in treatment is justified by objective grounds.

The Act defines a comparable permanent employee as a permanent employee in the same establishment who is engaged in the same or similar work or occupation with due regard being given to qualifications and skills. If there is no comparable permanent employee in the same establishment, the comparison must be made on the basis of the collective agreements that usually apply to the industry in question or a similar industry.

In the case at hand, the Supreme Court had to decide whether it constituted discrimination against four fixed-term workers who, in accordance with the applicable collective agreement, were not entitled to, among other things, sick pay and certain holidays as opposed to the employer's permanent employees.

Facts

The four unskilled workers were employed as surveyor assistants on a fixed-term basis at a government agency. Their work was only to be carried out from spring to autumn and, accordingly, the surveyor assistants were employed on fixed-term contracts.

The surveyor assistants' terms and conditions were set out in a collective agreement covering their work area. Pursuant to this agreement, fixed-term workers whose employment had a duration of less than a year were paid as hourly workers. Accordingly – and as opposed to the permanent employees – the fixed-term workers were not entitled to sick pay or certain holidays.

The four surveyor assistants and their union, 3F (the United Federation of Danish Workers), claimed that this setup constituted discrimination in violation of the Act on Fixed-Term Employment, and for this reason they issued proceedings against the employer.

In the Danish Eastern High Court, the surveyor assistants had argued that their fixed-term positions should be compared to the position of a permanently employed metrologist.

The government agency, however, rejected the argument that the surveyor assistants could be compared to other employees at the agency and it elaborated on the educational qualifications and functions of a metrologist and the surveyor assistants, respectively.

Judgment

Based on the differences in the positions as metrologist and surveyor assistant, especially regarding educational qualifications, the High Court found that even though the surveyor assistants to a certain extent had carried out tasks that were also carried out by metrologists, the two positions were not comparable. For this reason, the High Court found that the four fixed-term workers had not been discriminated against.

The case was then appealed to the Supreme Court which delivered its decision in December 2019.

Before the Supreme Court, the fixed-term workers argued that they should not be compared to permanent-

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ly employed metrologists, but to permanently employed unskilled workers in the government agency. According to the employees, such a comparison could be made regardless of the fact that the different unskilled workers carried out different duties and tasks, as the determining factor was that the workers were all covered by the same collective agreement that did not differentiate between, for instance, a warehouse assistant and a surveyor assistant.

In that regard, the fixed-term workers and their union supported this view by stating that the positions of all the unskilled workers – fixed-term and permanent – were characterised by the fact that the workers carried out a variety of functions that did not require an educational background and that the skills for these functions could be acquired through practical training.

Consequently, the fixed-term workers believed that they had been discriminated against, as the permanently employed unskilled workers had more favourable conditions simply due to the fact that they were employed on a permanent basis.

Firstly, the Supreme Court established that the surveyor assistants on fixed-term contracts had been paid in accordance with the applicable collective agreement.

Secondly, the Supreme Court addressed the question of whether the fixed-term workers had been discriminated against. Referring to the relevant provisions of the Act on Fixed-Term Employment and the preparatory works of this Act, the Supreme Court noted that the criterion "the same or similar work" means work that is in line with the work performed by the fixed-term worker. Subsequently, the Supreme Court stated that, according to its opinion, the simple fact that a permanent and fixed-term worker may be covered by the same collective agreement does not in itself sufficiently establish that the two workers perform the same or similar tasks.

The Supreme Court noted that the permanent unskilled workers in the government agency performed tasks involving, for example, distribution of mail, preparation of conference rooms and snow removal. According to the Supreme Court, such work was not the same or similar to the work performed by the surveyor assistants.

Accordingly, the Supreme Court ruled that the fixed-term workers employed as surveyor assistants did not perform the same or similar work as the permanent employees in the government agency, and for this reason no discrimination had occurred.

Commentary

First of all, it is worth noting that neither Directive 1999/70/EC concerning the framework agreement on fixed-term work nor the Act on Fixed-Term Employment defines the concept "the same or similar work". For that reason, the judgment is highly interesting with regard to the question of how the concept is interpreted from a Danish perspective.

On a general note, the Supreme Court judgment confirms Danish discrimination case law on fixed-term workers with regard to the assessment of what constitutes a comparable permanent employee.

Moreover, by its reasoning, the Supreme Court has expressly confirmed that the fact that the work of a fixed-term worker and the work of a permanent employee may be covered by the same collective agreement cannot be the decisive factor in the assessment of what constitutes the same or similar work. It should be noted that the actual wording of the Act on Fixed-Term Employment, according to which qualifications and skills must be taken into account, strongly supports the Supreme Court's approach in this regard.

Consequently, the assessment of what constitutes the same or similar work must rather be based on a number of factors, including qualifications, skills and the actual work performed by the employee, whereas the job title or – as in the case at hand – the applicable collective agreement cannot generally be the determining factor.

Comment from other jurisdiction

United Kingdom (Richard Lister, Lewis Silkin LLP): The issue of who is a comparable permanent employee also arises under the UK legislation implementing the EU Fixed-term Work Directive, as one might expect, although it has not been litigated very much. Under the UK provisions, the claimant fixed-term employee and the permanent comparator must be "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills".

In one case, a UK Employment Tribunal (ET) said there must be broad similarity in the nature and subject matter of the work and approximate equivalence in the level of expertise and responsibility involved. The ET concluded that jobs being compared in the case were broadly similar because their essential function was to provide advice, despite one being more operational and the other having a higher policy content (*Hart – v – Secretary of State for Education and Skills*, ET case no. 2304973/04).

The ET in *Hart* emphasised that the concept of "broadly similar" work should not be interpreted restrictively, which is consistent with the approach of the ECJ Advocate General in *Maria José Regojo Dans – v – Consejo de Estado* (C-177/14). Nonetheless, on the facts of the Danish case reported above, I would expect a UK court or tribunal to have reached the same decision as that of the Supreme Court, on account of the significant difference in the actual content of the job of a surveyor assistant as compared to the tasks performed by the permanent unskilled workers in the government agency.

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