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Fixed-term singers not comparable to permanent singers at the Royal Danish Theatre (DK)

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Summary

In a recent case, the Danish Supreme Court addressed the question of what constitutes a comparable permanent employee in relation to discrimination against fixed-term employees. The Supreme Court ruled that even though the two groups of fixed-term and permanent singers at the Royal Opera Chorus of the Royal Danish Theatre performed almost the same tasks, their positions were not comparable as the singers' qualifications and skills were different and, for this reason, the difference in terms and conditions was not discriminatory.

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 on 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.

In the case at hand, the Supreme Court had to decide whether it constituted discrimination against the fixed-term singers, also called assistants, that they – as opposed to the permanent singers – were not under the applicable collective agreement entitled to, among other things, pay during sickness and pension.

Facts

The Royal Opera Chorus has 40 permanent singers and a large number of assistants who are admitted on an 'assistant list' and are hired to supplement the chorus when needed.

The assistants are employed per production or, occasionally, for approximately one-year periods as substitutes when the permanent singers are on leave, or if it has not been possible to employ permanent singers through auditions.

To become a permanent singer at the Royal Opera Chorus, candidates must pass a pre-screening round, where the candidates are evaluated via video or a recording, and then they must audition before a panel, performing arias, choral passages and demonstrating that they are capable of reading music.

Assistant positions are generally offered to those who do not qualify for a permanent position or to retired singers who have reached the age threshold for holding a permanent position in the Chorus. Furthermore, auditions before smaller panels are occasionally held specifically for assistant positions where the candidates perform an aria of their own choice.

The assistants' union brought an action against their employer, the Royal Danish Theatre, claiming that the terms and conditions laid down in the addendum to the applicable collective agreement were in conflict with the Act on Fixed-Term Employment.

The union argued that the assistants participated in the production of operas on an equal footing with the permanent singers but on quite different terms and conditions. The union further submitted that the two employee groups had the same educational background and were employed based on auditions. Once employed, the assistants took part in the same rehearsals and performances as the permanent singers and performed the same music. Consequently, the two types of position were comparable and the difference in terms and conditions was only related to the assistants' fixed-term status, for which there was no justified reason.

The Royal Danish Theatre argued that the difference in terms and conditions was not a violation of the Act on Fixed-Term Employment as the two employee groups were not comparable because, among other things, the auditions – and thereby the required qualifications and

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skills – were significantly different. Furthermore, some of the assistants were singers who had not passed the audition for a permanent position or singers who due to age-related deterioration of their voices had left a permanent position. Therefore, the qualifications and competences were not comparable.
Also, the permanent singers' duties included participation in meetings and committees as well as taking on soloist parts, whereas the assistants' positions were characterised by a large degree of flexibility.

Judgment

The Danish Eastern High Court agreed that there were considerable differences in the requirements for the candidates at the two types of audition and that the purpose of auditions for permanent positions is to attract singers capable of singing all opera genres at the highest level. Thus, the candidates audition in different genres and the permanent positions are advertised internationally; on the other hand, auditions for assistants are less demanding and the positions are only advertised locally.
In relation to qualifications and skills, the High Court attached importance to the fact that an age threshold was fixed for the permanent singers to ensure that their voices are at the highest standard. Based on testimony, the High Court also emphasised that the permanent singers – based on the high requirements and regular practice sessions as a group – had achieved a certain sound and a special dynamic.
Despite the fact that the permanent singers and the assistants may have the same educational background and that some assistants might qualify for positions as permanent singers, the High Court ruled that, as a group, the permanent singers' voices enabled them to perform on a higher level than the group of assistants. Thus, there was such a difference in qualifications and skills between the assistants and permanent singers that the two employee groups did not perform the same or similar work.
The High Court noted that this was the case even though the two employee groups participated in the same rehearsals and performances and, in this context, performed almost the same tasks.
The case was appealed to the Supreme Court which, in its judgment, stated that it was a crucial element in the assessment that the case concerned artistic work where the employees' qualifications and skills are of great significance.
The Supreme Court found that the assistants did not have the same qualifications and skills as the permanent singers. This was demonstrated by the statements presented in court describing the permanent singers as "the elite", "the backbone of the choir" and the fact that all of the permanent singers could perform all opera genres. This was further supported by the fact that the permanent singers had been selected through auditions with high requirements for their skills.
Accordingly, the Supreme Court upheld the judgment from the High Court, ruling in favour of the Royal Danish Theatre.

Commentary

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 of 'the same or similar work'. However, it follows from the Directive and the legislative material to the Act that the assessment of 'same or similar work' should be made with due regard to qualifications and skills.
On a general note, the judgment confirms Danish discrimination case law on fixed-term workers with regard to the assessment of what constitutes a comparable permanent employee. However, the case at hand is interesting as it illustrates how important the difference in qualifications and skills may be in this assessment.
Even though many employees in both groups had the same educational background and they all took part in the same performances, prepared for the performances in the same manner, performed the same music, and thereby essentially performed the same work, the difference in qualifications and skills was essential in the ruling.
Furthermore, it is relevant to note that the case might have had a different outcome if the claim had concerned specific individual assistants and not the group as a whole. As the High Court stated, some of the assistants might have qualified for a permanent position but, as a group, the permanent singers performed on a higher level than the group of assistants. Depending on the circumstances, this might be a relevant strategic consideration when dealing with cases concerning discrimination against fixed-term employees.
Consequently, the assessment of what constitutes the same or similar work cannot be entirely based on the actual work performed or even the employees' educational background. Even though the work might be very similar, the result also may rely heavily on the employees' qualifications and skills. According to the Supreme Court, this is especially the case when dealing with artistic work.

Comments from other jurisdictions

Germany (Chantal Käthner and Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The requirements of Directive 1999/70/EC were transposed into national law in Germany by the introduction of the Part-Time Work and Fixed-Term Employment Act (*Teilzeitbefristungsgesetz*, 'TzBfG'). Section 4 paragraph 2 TzBfG

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contains the prohibition of discrimination against fixed-term employees. According to this Section, a fixed-term employee cannot be treated less favourably than a comparable permanent employee because of the fixed-term nature of his or her employment contract. Different treatment is exceptionally permissible if it is justified by objective reasons.

Section 3 paragraph 2 TzBfG defines the requirements for comparability with a permanent employee. Fixed-term employees are comparable to permanent employees if they perform the same or similar work. The same work is performed if the fixed-term employee could replace the permanent employee. Comparability also exists if the fixed-term employee could be employed in the comparable person's job after a short training period.

The respective job descriptions are indicative for the assessment of comparability. Furthermore, the fact that certain activities are assigned to the same pay group under the collective agreement can also be taken into account as an indication. Therefore, the standard of comparison is purely activity-related.

However, Section 3 no. 2 of Directive 1999/70 states that qualifications and skills also have to be taken into account for the determination of comparability between the employees. For this reason, in addition to the purely activity-related criteria, these two characteristics, qualifications and skills, are also included in the determination of comparability if they are decisive for the job performed. Significant differences in the professional qualification required for the respective activity can speak against comparability.

Considering this, it can be assumed that the Danish case would have been assessed in the same way under German law because the question of comparability is largely subject to the same criteria in Germany and Denmark. This means: based on the statement of the Royal Danish Theatre that only the permanent employees are able to fill the soloist parts due to their certain sound, the employees are probably not interchangeable and thus not comparable under German law. This case illustrates well how the skills acquired, especially in artistic activities, can be decisive for comparability and moreover how the European guidelines unify our national law.

United Kingdom (Richard Lister, Lewis Silkin LLP): The question of what constitutes a comparable permanent employee for the purposes of the EU Fixed-term Work Directive seems to be one of topical importance in Denmark. The Danish Supreme Court gave a previous judgment on this issue as recently as December 2019 (see Christian's report at EELC 2020/6).

This latest ruling is not surprising, given that the Directive and the relevant Danish legislation both require due regard to be given to qualifications and skills in deciding whether the permanent employment is comparable. The UK regulations implementing the Directive similarly require the fixed-term employee and permanent comparator to be engaged in the same or broadly similar work "having regard, where relevant, to whether they have a similar level of qualification and skills". A case on similar facts in the UK would therefore most likely have been decided in the same way.

This type of approach is arguably overly restrictive, given that establishing a comparable permanent comparator is merely an initial hurdle that fixed-term employees must get over in order to pursue a claim. The employer can always contend that any difference in treatment is justified on objective grounds. Some might argue that it would be more appropriate for differences in qualifications and skills to be brought into the equation at this stage, rather than on the earlier threshold question of whether the permanent employment is comparable.

Subject: Fixed-Term Work, Other Forms of Discrimination

Parties: The Danish confederation of public employees of 2010 (CO10 – *Centralorganisationen af* 2010) acting for the union of assistants at the Royal Opera Chorus (*Foreningen af Assistenter ved Det Kongelige Operakor*) – v – the Royal Danish Theatre

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