HORTEN

EMPLOYMENT LAW NEWS, 2ND HALF OF 2012

Dear reader of Employment Law News

In terms of legislation, the second half of 2012 has not provided us with any exciting news, not even the anticipated bill on the implementation of the directive on temporary agency work. The Ministry of Employment has stated that the bill would be introduced in December. We are keenly awaiting the bill and will issue a newsletter and invite you to a meeting as soon as the bill is adopted.

Fortunately, case law has given us exciting news. In November/December, the Supreme Court delivered two rulings on the Part-Time Act and the Act on Fixed-Term Employment. The high-profile case concerning Restaurant Vejlegården was decided upon by the Industrial Court (but the outcome was predictable), and in September, the Supreme Court found that public servants could be seconded to 100 % privately owned companies. We have informed you about these and many other exciting news on a current basis You can find our newsletters on Horten's website: horten.dk/nyheder.

In this newsletter, we will primarily focus on the Supreme Court rulings on the Part-Time Act and discrimination due to handicap as the Advocate General has recently submitted statements in two Danish cases. We will also describe three decisions from the Board of Equal Treatment showing that an extended concept of wage earner applies in relation to equal treatment and discrimination.

At the same time, we wish you all a Merry Christmas and a Happy New Year.

On behalf of the Employment Law Group

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Om Horten
Horten rådgiver dansk og internationalt erhvervsliv og den offentlige sektor inden for alle juridiske specialer. Med klart klient- og forretningsfokus og et dybt engagement i vores rolle som betroede rådgivere løser vi alle typer juridiske problemstillinger.

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The Part-Time Act and the Act on Fixed-Term Employment

Supreme Court ruling of 14 November 2012

Part-time teachers employed on fixed-term contracts working with adult education were not discriminated against under the Part-Time Act or the Act on Fixed-Term Employment.

Background

The teachers had commenced legal proceedings against the employer claiming payment of salary as their rights had been violated under the Act on Fixed-Term Employment and the Part-Time Act.

The teachers were employed at an institution where the course fee was covered by a grant under the Budget. They were all part-time teachers employed on fixed-term contracts. They were not covered by a collective agreement, and they claimed that their pay and employment terms were less favourable than the terms applicable to comparable permanent and full-time employees.

High Court grounds and ruling

The High Court found that all teachers were employed on equal terms, and that the school had not violated the rules of the Part-Time Act.

The Court further found that the teachers had not been subject to discrimination contrary to the Act. The Court attached importance to the fact that adult education at day schools is not a ”relevant or comparable” professional area compared to the education at the school in question. The Court attached special importance to the organisational form of the school and that the education - as a consequence of the different purposes and targets - took place in individually adjusted and differentiated courses suited for the special needs of the students, whereas the education at day schools takes place in more structured and constant courses in closed classes.

Supreme Court grounds and ruling

The Supreme Court also found that neither the Part-Time Act nor the Act on Fixed-Term Employment had been violated. The Supreme Court found that, as the pay and employment terms of the teachers were identical, no discrimination had taken place between the part-time and full-time teachers.

As regards the Act on Fixed-Term Employment, the Supreme Court determined that, when comparing with permanent employees, qualifications and skills should be taken into account, see section 3 (4) of the Act. If there are no comparable permanent employees in the company, the collective agreements usually applicable to the actual or similar professional area are to apply when making such comparison. The Supreme Court stated that, when deciding whether a collective agreement is considered ”within the actual or similar professional area”, it should be taken into account that the persons in question actually perform the same or similar work considering the qualification and skills. The Supreme Court further stated that an aggregate assessment must be made of a number of matters, including the nature of the work performed, the qualifications required to perform the work and the terms on which the work is performed.

The Supreme Court therefore affirmed the High Court ruling according to which the collective agreement, which the teachers wanted to invoke, could not be applied as a basis of comparison under section 3 (5) of the Act on Fixed-Term Employment, and that the fixed-term teachers were therefore not subject to discrimination.

Supreme Court ruling of 6 December 2012

Part-time employee did not receive pension contribution based on overtime payment for work performed in the interval 30 to 37 hours per week.

The case concerned an employee, who was employed to work 30 hours a week. The employee was not covered by a collective agreement, which provided her with rights corresponding as a minimum to the provisions of the part-time directive. She was therefore protected against discrimination under the Framework Agreement, see section 1 of the Part-Time Act. The employee commenced legal proceedings claiming discrimination as she did not receive pension contribution for work performed in the interval 30-37 hours a week notwithstanding the fact that full-time employees received pension contribution for such work in accordance with the pension scheme's attachment to the fixed salary. Full-time employees did not receive pension contribution of any overtime payment after having worked 37 hours a week.

Supreme Court ruling and grounds

A majority of the Supreme Court judges found that the comparison was not to take place with full-time employees performing ordinary work in the interval part-time to full-time. According to the Supreme Court, the concept overtime work is a special situation independent of the ordinary working hours, and the Supreme Court therefore found that is was not contrary to the prohibition against unequal treatment of part-time employees of the Part-Time Act that such hours were paid according to the employee's normal hourly pay (minus pension contribution) irrespective of whether the employee was employed part-time or full-time. A minority of the judges found that the employee had been treated less favourably than other comparable full-time employees simply because she was a part-time employee, The minority found that no objective circumstances existed and that the unequal treatment did not fulfil an actual need with the company suitable to pursue the purpose and which was necessary for the scheme in question.

The handicap concept and the 120-days-rule - The European Court of Justice

The Maritime and Commercial Court has submitted a number of prejudicial questions to the European Court of Justice concerning two actions commenced by HK. The Advocate General submitted proposed decisions on 6 December 2012.

Background

An employee had been employed for five years during which he had been absent due to sickness for several periods. The absence totalled more than 120 days. In the doctor's certificates presented in connection with the absence, reference was made primarily to chronic back pains due

to osteoarthritis in the loin showing as constant loin pains. The doctors concluded that there were no further treatment options. No measures had been taken which could perhaps ease the employee's pain when performing work, nor had she got an elevation table or been offered part-time work despite the fact that the employer did offer part-time positions. Due to the accumulating absence, she was dismissed at a reduced notice of termination under section 5 (2) of the Salaried Employees Act. Immediately after the dismissal, she started a new job as a receptionist with another company where she got an elevation table, her weekly working hours were fixed at 20, and the employment was subject to the scheme on jobs on flexible terms, including a wage subsidy of 50 %.

In the other case, the employee was involved in a traffic accident resulting in a whiplash injury, and she was absent due to sickness for three weeks, after which she resumed her full-time job. After approx. six months, it was clear that she still suffered from after-effects of the whiplash injury and, for a period, she was on part-time sick leave ending in full-time sick leave due to permanent pain. Finally, she was dismissed at one month's notice with reference to the 120-days rule under section 5 (2) of the Salaried Employees Act. Subsequently, she was granted early retirement pay based on an evaluation of her working capacity and that she would only be able to work for approx. eight hours a week at slow pace.

The European Court of Justice was requested to decide on (i) the handicap concept, (ii) whether it is part of this concept to assess the compensation that the person in question needs, (iii) whether a reduction of the working hours may be part of the measures required by the Directive against discrimination, and (iv) whether it is contrary to the Anti-Discrimination Act to apply the 120-days rule of the Salaried Employees Act on reduced notice of termination when dismissing a person if sickness days due to a handicap are included in the calculation of the number of sick days.

The Advocate General submitted the following decision:

The handicap concept
In order to assess whether a person is handicapped, it is decisive that the person is subject to a functional impairment resulting in a limitation of the person's participation in the business community. The reason for this limitation is of no importance, including whether the limitation is due to an illness, is inborn or is caused by an injury. The Advocate General states, however, that the decisive factor is whether the limitation is of a long-term duration.

Compensation requirement
The Advocate General suggests that a long-term functional impairment, which does not require special aids, and which is only or solely reflected by the person not being able to work full-time, is to be considered a handicap. The Advocate General therefore rejects that the compensation requirements should be part of the concept "handicap".

Reduction of the working hours
The Advocate General suggest that a reduction of the working hours may be part of the measures that the employer is obligated to offer. But it is for the national courts to decide whether such requirements may result in a disproportionately heavy burden on the employer.

Application of the 120-days-rule
The Advocate General suggests that it is contrary to the Anti-Discrimination Act to apply a reduced notice of termination under section 5 (2) of the Salaried Employees Act if sickness due to a handicap is included in the calculation of the 120 days.

The Advocate General's statement is only to be considered a proposal

It is important to keep in mind that the Advocate General's proposals do not result in a changed legal position as these are only recommendations to the European Court of Justice and are not to be considered rulings. But the rulings of the European Court of Justice very much lean against the proposals of the Advocate General, and dismissals that are contrary to the proposals of the Advocate General should therefore be considered very closely.

It is uncertain when the European Court of Justice will deliver a ruling.

Who is protected against discrimination? The Board of Equal Treatment

The protection against discrimination of the Equal Treatment Act and the Anti-Discrimination Act applies to employed persons. Situations will therefore arise where you will have to decide whether the employee in question is at all protected by the rules. The Board of Equal Treatment has recently decided in three cases whether persons not considered wage earners in the traditional sense may be covered by the protection against discrimination.

Sale of household products

Three homosexual men sold household products through their work as sales consultants. At a meeting with their distributor, two of the co-operation agreements were terminated due to disagreement. In this connection, the two men claimed that the distributor had said that the company did not want "gays like you" in its store. Subsequently, the co-operation agreement with the last consultant was terminated over the phone. The three consultants brought the case before the Board of Equal Treatment claiming that they had been discriminated against due to their sexual orientation.

However, section 2 of the Anti-Discrimination Act contains only a prohibition against discrimination by an employer of an employee. The question was then whether the Anti-Discrimination Act did apply at all to the three sales consultants. In this connection, the consultants claimed that, even if the co-operation agreements stated that they were self-employed businessmen acting in their own names and at their own risk, they were in fact not conducting independent businesses. A majority of the Board found that the concept of wage earner in the Anti-Discrimination Act should be widely construed as the Act is based on an EU directive. The Board attached importance to the fact that the three consultants had been subject to the distributors' guidelines concerning marketing and sales methods, and the Board therefore found that they were covered by the concept of wage earner of the Anti-Discrimination Act.

The physiotherapist

Another case concerned a physiotherapist, who had leased a room at his clinic to another physiotherapist. It appears from the lease agreement that both the owner of the clinic and the lessee were self-employed businessmen. The owner had no instruction powers or financial obligations vis-á-vis the lessee. The rent for the room and other facilities amounted to 30 % of the lessee's turnover, and he was covered by a non-competition clause.

When the lessee returned from maternity leave, the owner had leased the room to another physiotherapist. The owner then terminated the co-operation agreement with the first lessee due to co-operative difficulties. The first lessee contacted the Board claiming that the dismissal was contrary to section 9 of the Equal Treatment Act, according to which an employee cannot be dismissed due to pregnancy or maternity leave.

The Board found that the agreement between the parties could not be compared to an employment under section 9. Both the wording of the agreement and the actual circumstances - the two parties acting as self-employed businessmen - resulted in the Equal Treatment Act not applying. The Board found, however, that the agreement was covered by the Act on Equal Rights as the parties had exchanged goods and services. The first lessee was therefore awarded compensation of DKK 50,000.

Comments

The scope of the Act on Equal Rights is to promote equal status between men and women, including equal integration, equal influence and equal opportunities in relation to all functions of society based on the equal worth of men and women. The concept of equal status of the Act includes all matters, not only matters concerning the controlling bodies of society, the labour market, education and training, but also concerning private and entirely personal matters. The scope of the Act is therefore wider than the scope of the Equal Treatment Act, which is limited to apply in relation to occupation, business education, promotion and employment terms.

Agent with spectacle company

This case concerned discrimination against an agent with a spectacle company due to her pregnancy. A few months prior to her pregnancy, the company rejected to prolong the contract of the agent. The Board found that the agent was covered by the concept of wage earner of the Equal Treatment Act attaching importance, inter alia, to the frequent and close contact with the company through her contract, and the fact that she was subject to specific rules as to how many frames she was to sell and how many customers she had to visit. Further, she had to submit a written sales report each week. The Board found that the relationship was to be considered that of an employer/employed person. The agent was therefore covered by the scope of protection of the Equal Treatment Act and was awarded compensation of DKK 300,000.

The content of this Newsletter is not, and should not replace, legal advice.