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labour and employment lawflash

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ECJ Expands Meaning of "Disability" Under Equal Treatment Directive

Court confirms that "disability" should be interpreted broadly and places onus on employers to explore a reduction in working hours as a potential adjustment.

On 11 April, in *HK Danmark v Dansk almennyttigt Boligselskab*,[1] the Court of Justice of the European Union (ECJ) responded to questions referred to it by the Danish National Court and concluded that the concept of "disability" must be interpreted widely to include a condition that "may hinder the full and effective participation of the person concerned in professional life". The ECJ also clarified that a condition does not need to make it impossible for an employee to work to be considered a "disability". Further, the ECJ ruled that a reduction in working hours could be a reasonable accommodation (or a reasonable adjustment under UK law) unless it places a disproportionate burden on an employer. As such, employers may now be under a positive obligation to explore such an accommodation, even where the disabled employee in question has not specifically requested it.

Judgment

The ECJ, without ruling on the facts of the joined cases before it, gave guidance as to the meaning of "disability" and "reasonable accommodation" under the Equal Treatment Framework Directive (No. 2000/78/EC) (the Directive). The court concluded the following:

- A disability is a long-term limitation that "hinders the participation of the person concerned in professional life." Although a disability is distinct from an illness, "a disability does not necessarily imply complete exclusion from work or professional life." The ECJ emphasised that a disability can be caused by curable or incurable ailments; the decisive factor as to whether or not a disability exists is the long-term impact of that disability.
- The "finding that there is a disability does not depend on the nature of the accommodation measures". The ECJ emphasised that a reduction in working hours may be a reasonable accommodation under the Directive but that it is for the national courts to assess whether such a measure places a disproportionate burden on the employer.
- National legislation, Danish law in this case, that allows an employer to reduce an employee's notice period after a prolonged period of absence where that absence was caused by "the employer's failure to take the appropriate measures" is unlawful unless that legislation is necessary to pursue a legitimate aim.

Impact on UK Employers

The UK's Equality Act 2010 defines "disability" as an impairment that has a substantial and long-term adverse effect on the employee's ability to carry out "normal day-to-day activities." UK tribunals have generally excluded the duties associated with specialist roles, such as watchmakers, from the definition of "normal day-to-day activities." The ECJ's emphasis on a disability being a hindrance to an employee's participation in professional life may now require the UK tribunals to take a broader approach to this issue, with the result that conditions that previously fell outside the scope of the legislation may now be caught.

1. Joined cases C-335/11 & C-337/11, *HK Danmark v. Dansk almennyttigt Boligselskab* (Apr. 11, 2013), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=818636.

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In light of this judgment, employers should be more sympathetic to a disabled employee's request for a reduction in working hours as a possible, reasonable adjustment. In addition, given the duty on employers to fully consider what reasonable adjustments may assist their disabled employees, employers should, in appropriate cases, consider suggesting a reduction in working hours, even where this has not been specifically requested by a disabled employee.

Ideally, any flexible working arrangement (including a reduction in hours) should be tested for a trial period, as this will give an employer the opportunity to ensure that the new arrangements are workable. If they are not, after having run a trial period, the employer will be able to demonstrate more easily that the new arrangement had a disproportionate impact on its business and could not be continued. Having evidence that a potential adjustment has been tried and found to be unworkable will be far more persuasive to a tribunal than if an employer has concluded that a flexible working arrangement would not be a reasonable adjustment without first trying it out in practice.

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