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Liability for not preventing and tackling sexual harassment (DK)

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Summary

An employer has been held liable for not preventing and tackling an employee's sexual harassment of another employee contrary to the employer's obligations under the Danish Equal Treatment Act. Furthermore, the employer had breached the Equal Treatment Act by dismissing the employee when she informed the employer of the sexual harassment.

Legal background

According to Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, sexual harassment is contrary to the principle of equal treatment between men and women and constitutes discrimination on grounds of sex. Article 2 of the Directive provides the following definition of sexual harassment:

> "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

The Directive requires that such discrimination be prevented, prohibited and subjected to penalties.
Furthermore, under Article 24 of the Directive, Member States are required to introduce measures to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking (also known as victimisation).

The Danish Equal Treatment Act contains provisions implementing Directive 2006/54. It is stipulated in the preparatory notes to that Act that the prohibition of sexual harassment also entails a duty for the employer to provide a harassment-free environment and to protect to a reasonable extent the employees against harassment. The employer's duty to provide protection against harassment covers both misconduct by the employer as a person but also misconduct by other employees.

Facts

The case in hand concerned a female administrative assistant at a window cleaning business. As part of her job she helped ensure that all employees provided on a yearly basis proof that they had no criminal record in accordance with the employer's guidelines.
During her employment, she was subjected to sexual harassment on multiple occasions by a coworker, a window cleaner, both verbally, physically and by text messages and phone calls.
The window cleaner was eventually dismissed for poor performance. During the trial, the employee said that when she learned that the employer was considering dismissing the window cleaner she informed the employer of the sexual harassment. Despite this, the employer waited a couple of weeks before dismissing the window cleaner.
After the dismissal, the employee found out that the window cleaner had recently been convicted of assault against a former partner and had been ordered to perform community service once a week. Instead of informing the employer about the situation, the window cleaner had called in sick on the days in question.
The employee reported this to the employer. According to her statement, at this time she also elaborated on the extent of the sexual harassment. However, the employer dismissed her for not fulfilling her duties (i.e. ensuring that no employee had a criminal record). The window cleaner was later convicted of several counts of sexual assault against the employee at her home.
The employee's trade union issued proceedings, claiming that the employee was entitled to compensation under the Equal Treatment Act, partly due to the sexual harassment, which the employer had not prevented, and partly because the employer had dismissed her unfairly when she filed a complaint about the sexual harassment. The union stressed the fact that the employee was dismissed the day after she described the extent of the sexual harassment to the employer.

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The employer submitted that it had taken several measures to prevent sexual harassment, such as creating a clear-cut division between the different departments. The sexual harassment had taken place in the private sphere and was therefore not covered by the Equal Treatment Act. Furthermore, the employer argued that the employee did not inform management of the sexual harassment, so the employer could not be held liable for the sexual harassment.
A part of the proceedings concerned the grounds of the dismissal. The employee's immediate manager explained that the dismissal was based on the employee's omission to inform the employer that the window cleaner was in fact not sick on his sick days and that he had a criminal record, even though it was part of her job to administer the guidelines in this regard. The employee explained that the manager had told her she was being dismissed because she was unable to "say no" in her personal life and professional life.

Judgment

The District Court ruled that the employer could not be held liable for the sexual harassment that had taken place outside of the workplace in the employee's leisure time. However, the sexual harassment that had taken place during working hours, including the text messages and phone calls with a sexual content, constituted sexual harassment as defined in the Equal Treatment Act. The employer had not initiated any measures to prevent sexual harassment such as implementation of a harassment policy. The Court found that the employee had informed the employer about the sexual harassment before the window cleaner's dismissal, but that the employer had still refrained from taking action.
Thus, the employer had breached the Equal Treatment Act and the employee was awarded compensation. The District Court did not find it substantiated that the dismissal was a result of the sexual harassment complaint and, consequently, in violation of the Equal Treatment Act, but ruled that the dismissal was unfair.
In the appeal proceedings, the Eastern High Court confirmed that the employer could not be held liable for the sexual harassment that had taken place outside of the workplace in the employee's leisure time also due to the fact that the window cleaner was not the employee's manager. In relation to the sexual harassment that took place during working hours, the High Court upheld the District Court ruling but increased the compensation.
The High Court took into account that the employer, in any event, heard about the full extent of the sexual harassment before the employee was dismissed and that her explanation about the grounds for the dismissal were credible. The employer had not disproven breach of the principle of equal treatment, and the employee was awarded compensation corresponding to nine months' salary.

Commentary

This is one of few rulings in Danish case law that deal with discrimination on grounds of sex in relation to sexual harassment and an almost unique case about the aspect of victimisation. The case illustrates a slow but clear trend of an increasing number of sexual harassment claims that find their way into the Danish courts.
One of several challenges in discrimination cases is that the evidence often comes down to one person's word against another's. In respect of sexual harassment, some evidence may be produced, such as written communication, witnesses to the incidents or the victim's reaction to the incidents. Victimisation cases are different, because many seemingly objective dismissal reasons may be given and often there is no documentation of the underlying reason. As is often the case in sex discrimination claims based on pregnancy or parental leave, the time connection is a crucial factor.
In the case at hand, the employee's union succeeded in discharging the burden of proof due to a combination of factors, including the time-related connection between the employee informing the employer about the sexual harassment and her dismissal, the employee's statement about the actual grounds along with the fact that members of management confirmed during the proceedings that they had been informed of the sexual harassment just before the dismissal.
Another interesting aspect of the ruling is that the courts attach importance to the fact that the employer had not taken any preventive measures, such as establishing guidelines for preventing sexual harassment, and bring this into the assessment of liability. This confirms the employer's duty to take preventive measures and the significance of such measures in possible discrimination cases.

Comments from other jurisdictions

Germany (Frank Schmaus, Luther Rechtsanwaltsgesellschaft mbH): If a German court had to decide the case under the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'), it would probably reject the harassed employee's motion for compensation payments but would at the same time hold the dismissal invalid.
Employee compensation claims against their employer on the grounds of sexual harassment under the AGG can only be considered if the violating conduct is attributable to the employer. In the case hand, insofar as the employer is concerned, the harassing actions of the window cleaner cannot be deemed to be attributable to the employer.
Attribution to the detriment of the employer can either result from the actions of an employer's legal representative (e.g. the CEO) or a person engaged by the

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employer to fulfil the employer's contractual duties, a so-called vicarious agent. Such a vicarious person is very often the employee's line manager but, in principle, not a colleague who is working on the same or lower level as the employee as it is the case at hand with the stalking window cleaner (see Federal Labour Court, 16 May 2007, ref: 8 AZR 709/06).
The employer's initial lack of action in tracking and countering the window washer's misconduct is a violation of Section 12 paragraph 3 of the AGG which obliges the employer to take counter actions against the discriminator. But this omission does not result in any compensation claims under Section 15 paragraphs 1, 2 of the AGG as the omission of preventing further harassment is not tantamount to the (sexual) harassment itself (see Local Labour Court of Frankfurt am Main, 19 November 2019, 24 Ca 5275/19).
Moreover, the employer's retaliatory measure in dismissing the harassed employee for disclosing the harassment to the employer is also not a suitable act – even though the retaliation itself is in breach of the ban on measures laid down in Section 16 paragraph 1 of the AGG – to trigger any compensation claims under the AGG (see Federal Labour Court, 18 May 2017, ref: 8 AZR 74/16). The dismissal cannot be equated with the discrimination itself.
Nevertheless, the unlawful reprimand would result in invalidity of the dismissal.

Romania (Teodora Mănăilă, Andreea Suciu, Suciu – Employment and Data Protection Lawyers): Harassment in the workplace is a topic that has been consistently gaining importance in the past few years, either as a consequence of employees going public with such situations or as a consequence of employees starting reporting it more often and filing complaints regarding unprofessional behaviour in working environments.
The details of the Danish case are indeed unusual however they reflect a sensitive topic most employers have difficulties in managing or, in the worst cases, lack the organisational means to properly counteract it.
Based on the provided facts of the case, it appears the employer did not initiate any type of investigation after the first acknowledgement of such behaviour (while both the harasser and the victim were still employed) and not even after the second acknowledgement – when the employee detailed the gravity of the behaviour. Irrespective of the lack of any guidelines for preventing sexual harassment at company level or that the abuser had their employment terminated, the absence of any specific reaction/measure following such disclosure is equivalent to refraining from providing the safe working environment employees are entitled to.
In Romania the specific legislation on the equality of chances and treatment between men and women goes into great detail on what actions employers need to take to prevent, respectively to tackle, harassment in the workplace. For example, every employer has the obligation to implement an internal policy on zero tolerance of workplace harassment with specific content provided by law, as well as to facilitate immediate notification to competent public authorities in the event it is notified of such breaches. Thus, high standards of reaction are set for employers. Consequently, we agree with the solution of the Danish courts and believe the Romanian courts would have acted in a similar way should they have been entrusted with the case.
In relation to the burden of proof, the Romanian legislation provides that the affected party may submit only factual deeds based on which a presumption of discrimination/victimisation can be alleged. Consequently, the employer is obliged to present proof that no breach of law took place. From this point of view, the Romanian legislation is more favourable to the affected employees and thus acknowledges employees' obstacles in providing substantial proof in these types of incidents.
Nevertheless, a case of such a sensitive nature and liability has yet to reach national courts. However, this does not mean that such situations have not been handled in practice by Romanian employers as well.

The Netherlands (Peter Vas Nunes): The employer in this case argued: "The sexual harassment had taken place in the private sphere and was *therefore* not covered by the Equal Treatment Act" (emphasis added, PCVN). The Danish High Court in question seems to accept this argument. At first sight, it may seem obvious that employers are not liable where an employee harasses another employee outside the workplace, for instance by sexually assaulting that other employee in their home, as happened in this case. But is it obvious? I can think of many situations where management knows what is going on between employees privately and should but fails to take action. Even if management is unaware of what is happening, I can see liability arising, for example where the employer has allowed a sexually risky 'culture' to take root in the workplace, or has failed to take the preventive measures prescribed by law (periodic risk assessment, confidential advisors, complaints procedure, etc.).
I know of no Dutch case law specifically in the field of discrimination, but there is quite some case law regarding employer liability for damage (including mental and emotional damage) as a result of an event or situation that occurred outside the workplace. Now that working from home has become routine, more case law is to be expected.

United Kingdom (Bethan Carney, Lewis Silkin LLP): There is an interesting question around how far an employer can be responsible for sexual harassment by an employee which has a connection with work (because it involves two employees) but occurs outside work time and premises. The UK courts have tried to grapple with this issue and there are several cases on it. The Equality Act 2010 imposes liability on an employer for anything which is done by employees "in the course of employment". The question whether harassment occurring outside the workplace was done in the course of employment depends on whether the tribunal finds there was a connection between the employment relationship and

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the event or location at which the harassment occurred. So, harassment committed when colleagues were having a drink at the pub after work was deemed to be in the course of employment, as the event had been effectively an extension of the workplace (*Chief Constable of Lincolnshire Police – v – Stubbs and Others* [1999] ICR 547, EAT). As was harassment perpetrated in a car ride home after a firm's Christmas party held at a hotel. But events occurring at home involving colleagues (as here) have been found not to be within the course of employment (*HM Prison Service and Others – v – Davis* (2000) EAT 1294/98).

The UK government announced in July 2021 that it will extend employer's liability for sexual harassment by introducing a new duty on employers to prevent sexual harassment in the workplace. This is intended to prompt employers to prioritise prevention of harassment. The government also stated that it will extend employer's liability for workplace harassment to acts by third parties (e.g. clients or customers). The government has not yet, however, introduced any legislation to follow through on these intentions and it is unclear when it will do so.

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