Inngrep i deltidsansattes rett til likebehandling og reell likelønn

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Working paper 1-3

«Objektive grunner»
Deltidsdirektivet klausul 4

1. In respect of employment conditions, part-time workers shall **not be treated in a less favourable manner** than comparable full-time workers solely because they work part time unless different treatment is **justified on objective grounds**.

2. Where appropriate, the principle of pro rata temporis shall apply.

opplegg

1. Formålsbestemmelsen i deltidsdirektivet klausul 1

- Budskap: Likebehandling er forutsetning for fleksibilitet

2. Tilnærmingsmåter: må kjenne og velge

- Budskap: *allmenne hensyn* eller *nødvendig i arbeidsforholdet*

3. Om tid: Særlig uavhengig stilling?

- Budskap: jobbe på forespørsel = særlig *avhengig* stilling

1. formålsbestemmelsen i klausul 1

The purpose of this Framework Agreement is:

(a) to provide for the **removal of discrimination** against part-time workers and **to improve the quality of part-time work**;

(b) to **facilitate** the development of part-time work on a voluntary basis and to **contribute to the flexible organization of working time** in a manner which takes into account the needs of employers and workers.

tolkningen

- 1(b) er ikke en unntakshjemmel, men mer en konstatering

  = ikke-diskriminering **vil** bidra til fleksibilitet

- fortalen refererer til «forms of flexible work»

  = det fleksible er selve tilknytningsformen

- altså: gitt at ikke-diskrimineringsprinsippet respekteres har man fleksibilitet til å velge fritt mellom heltid og deltid

  = ikke-diskriminering er en forutsetning for fleksibilitet

annerledes direktivet om midlertidig ansettelse

The purpose of this framework agreement is to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to **prevent abuse** arising from the use of successive fixed-term employment contracts or relationships.

finner ikke formålet om fleksibilitet

- fordi artikkel 5 legger begrensninger på bruken av den atypiske tilknytningsformen
- fordi midlertidig-direktivets formål derfor ikke er full fleksibilitet, men å innføre «balance between flexibility and security»
- se WP (3/2026) avsnitt 7.2.
- underbygger at deltidsdirektivets ikke-diskrimineringsprinsipp må praktiseres strengt

2. tilnærmingsmåter

- enten: konkrete forhold knyttet til arbeidsforholdet og arbeidets art

  = det var ikke forskjellsbehandling likevel

eller: allmenne hensyn / saklige formål

= forskjellsbehandlingen består, andre hensyn veier tyngre

Problem med siste: bidrar ikke til removal of discrimination / fjernelse af forskelsbehandling – bare til at forskjellsbehandling må begrunnes

unntak: arbeidsmiljøloven § 13-3

- (1) Forskjellsbehandling som har et saklig formål, ikke er uforholdsmessig inngripende overfor den eller de som forskjellsbehandles **og som er nødvendig for utøvelse av arbeid eller yrke**, anses ikke som diskriminering etter loven her.
- (2) Forskjellsbehandling som er nødvendig for å oppnå **et saklig formål** og som ikke er uforholdsmessig inngripende overfor den eller de som forskjellsbehandles er ikke i strid med forbudet mot indirekte diskriminering, diskriminering på grunn av **alder** eller diskriminering av arbeidstaker som arbeider **deltid** eller er **midlertidig** ansatt.

Rammedirektivet 2000/78/EC

- Hoved-unntaksregel i artikkel 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the **particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement**, provided that the objective is legitimate and the requirement is proportionate.

Spesial-unntaksregel om alder

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a **legitimate aim, including legitimate employment policy, labour market** and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

unntak: arbeidsmiljøloven § 13-3

- (1) Forskjellsbehandling som har et saklig formål, ikke er uforholdsmessig inngripende overfor den eller de som forskjellsbehandles og som er nødvendig for utøvelse av arbeid eller yrke, **anses ikke som diskriminering** etter loven her.
- (2) Forskjellsbehandling som er nødvendig for å oppnå et saklig formål og som ikke er uforholdsmessig inngripende overfor den eller de som forskjellsbehandles **er ikke i strid med forbudet** mot indirekte diskriminering, diskriminering på grunn av **alder** eller diskriminering av arbeidstaker som arbeider **deltid** eller er **midlertidig** ansatt.

hvilken tilnærming?

- Deltidsdirektivet operasjonaliserer det grunnleggende ikke-diskrimineringsprinsippet (Bruno and others; Impact)
- EU-domstolen: hovedregelen må ikke tolkes snevert

  = hoved-unntaksregelen (rammedirektivet art 4) gjelder
- fortalen avsnitt 23: Whereas the Community Charter of the Fundamental Social Rights of Workers recognizes the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinion and creed;

= må sammenlikne med de diskrimineringsgrunnlagene som nevnes – ikke med det eneste som ikke nevnes (alder)

Charteret artikkel 52.1:

- «Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the **essence** of those rights and freedoms.»

= kan ikke fortsette å diskriminere

- Lenaerts: «both EU and national courts should apply the "respect-for-the-essence test" before undertaking a proportionality assessment»

= styrer selve valget av test

= testen må sikre "removal of discrimination" – ikke begrunnelse for diskriminering

Selection of Major Judgments

- Sak C-715/20 KL v X:

forsvar: «According to the Polish Government, the distinction drawn in Polish law as regards the requirement to state reasons, depending on whether the termination concerns a contract of indefinite duration or a fixed-term contract, is part of the pursuit **of the legitimate objective of a 'national social policy aimed at full productive employment'. The pursuit of that objective requires great flexibility on the labour market.** A fixed-term employment contract contributes to that flexibility, first, by giving a greater number of persons employment opportunities while providing the workers concerned with appropriate protection and, second, by allowing employers to meet their needs in the event of an increase in their activity, without, however, being permanently linked to the worker concerned.»

EU-domstolens svar:

«It should be noted that **the factors relied on** by the Polish Government in order to justify the legislation at issue in the main proceedings **are not precise and specific factors, characterising the employment condition to which they relate**, as required by the case-law referred to in paragraphs 58 and 59 of the present judgment **[Lufthansa]**, but rather are similar to a criterion which, in a general and abstract manner, refers exclusively to the duration itself of the employment. Therefore, those factors do not make it possible to ensure that the difference in treatment at issue in the main proceedings responds **to a genuine need**, as provided for by that case-law

3. Særlig uavhengig stilling?

- Fast ansatte: Overtidsreglene gjelder unntatt ved «særlig uavhengig stilling»
- Deltidsansatte – takker ja/nei:

 - har de har en særlig uavhengig stilling?

- hvis ikke = forskjellsbehandling om ikke overtidsreglene gjelder

Høyesteretts rettssetning

- «I denne vurderinga vil det vera sentralt om arbeidstakaren har stor fridom til å bestemme omfanget av og tidspunkta for arbeidet.»
- Samme i arbeidsvilkårsdirektivet artikkel 4 (m) jf. 10 og 2 (c)
- work pattern' means the form of organisation of the working time and its distribution according to a **certain pattern determined by the employer.**
- EU-kommisjonens veileder: Reell frihet = kan bestemme å jobbe og hvor mye
- Kun arbeid på forespørsel / rett til å takke nei = særlig sårbar

påstander for debatt:

- snever unntaksadgang etter mønster av rammedirektivet artikkel 4
- deltidsansatte og tilkallingsansatte har ingen reell frihet

tilleggsmateriale

- Lufthansa 58: On the contrary, that concept requires the difference in treatment found to exist to be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that difference in treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such part-time contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social policy objective of a Member State

Lufthansa 58

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- 76 Third, it is necessary to assess whether the employees concerned, **in the context of their part-time fixed-term contracts**, are engaged in the same or similar work, for the purposes of the two framework agreements, to that carried out by persons employed by the same employer on a full-time basis for an indefinite period. In that regard, it is necessary to determine whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those employees can be regarded as being in a comparable situation

tilkallingsansatte er sammenliknbare

- It is apparent from the order for reference that, in the context of the accumulation of a full-time contract of indefinite duration and **a part-time fixed-term contract**, the employees concerned were taking over, through the conclusion of the latter contract, **posts vacated by other teachers, thereby performing duties identical to those performed by those teachers.**