European Employment Law Update

Jurisdiction: Denmark

Date: April 2017

Impact date	Development	Impact
6 December 2016	The Danish Supreme Court has now given judgment in the so-called Ajos case, according to which the Danish Act on Denmark's Accession to the European Communities does not contain the authority to permit the general principle prohibiting discrimination on grounds of age to prevail over section 2a of the Danish Salaried Employees Act in disputes between private individuals. Furthermore, Danish national courts cannot disapply section 2a of the Danish Salaried Employees Act. The ruling of the European Court of Justice was described in the European and GCC Employment Law Update for June 2016.	**Facts** An employer, Ajos, dismissed a Danish employee. According to section 2a of the Danish Salaried Employees Act (the "Act"), employees who have completed at least 17 years of continuous employment are entitled to a severance pay of 3 months' salary if dismissed by the employer. The employee in question had been employed by Ajos for 25 years. However, as the employee was entitled to old-age pension payable by the employer under a pension scheme that the employee had joined before reaching the age of 50, a provision under section 2a of the Act barred the employee from his entitlement to severance pay. This applied even though the employee remained on the labour market after his dismissal from Ajos. **Ruling of the European Court of Justice (C-441/14 Ajos)** The European Court of Justice was asked if the general principle prohibiting discrimination on grounds of age may be relied on by an employee against a private employer in order to compel the employer to pay severance pay, even when, under national law, the employer was not required to make such payment. The European Court of Justice stated that the general principle prohibiting discrimination on grounds of age must be interpreted as

		precluding national legislation, such as section 2a of the Act. This also applied in disputes between private individuals. The European Court of Justice furthermore stated that national courts adjudicating in a dispute between private individuals within the scope of the EU directive establishing a general framework for equal treatment in employment and occupation are required to interpret provisions of national law in such a way that they may be applied in a manner consistent with the EU directive, the so-called principle of interpreting national law in conformity with EU law. If such an interpretation is not possible, the national courts are obliged to disapply, where necessary, national provisions that are contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty nor the protection of legitimate expectations can alter that obligation. However, the European Court of Justice also stated that the principle of interpreting national law in conformity with EU law is limited by general principles of law and thus cannot serve as a basis for an interpretation of national law contra legem. **Ruling of the Danish Supreme Court** The majority of the Danish Supreme Court stated that it would not be possible to interpret section 2a of the Act in such a way that it would be in conformity with the EU directive. Thus, it would have been an interpretation of Danish national law contra legem if section 2a of the Act was to be interpreted in conformity with EU law. The majority of the Danish Supreme Court furthermore stated that the Danish Act on Denmark's Accession to the European Communities does not contain the authority to permit the general principle

		prohibiting discrimination on grounds of age to prevail over section 2a of the Act in disputes between private individuals. If the Danish Supreme Court was obliged to disapply section 2a of the Act because it is contrary to the general principle prohibiting discrimination on grounds of age, the Danish Supreme Court would judge ultra vires. Thus, Danish national courts cannot disapply section 2a of the Act. The Danish Supreme Court found for the Danish employer, Ajos.
19 January 2017	According to the Danish Holiday Act in force at the time, an employee was not entitled to replacement holiday if the employee's sick leave began after the beginning of the employee's holiday. The Danish Supreme Court found in a ruling that the Kingdom of Denmark was obliged to make the Danish Holiday Act consistent with EU law. The judgement paves the way for employees who have been denied replacement holiday in the period 1 January 2011 to 1 May 2012 to raise claims for damages against the Kingdom of Denmark.	**Facts** A Danish employer required an employee to be on holiday during the summer of 2010 because of the employer's holiday closure. The employee was sick for two weeks during the holiday. According to the Danish Holiday Act in force at the time, an employee was entitled to replacement holiday if the sick leave began before the beginning of the holiday. On the other hand, an employee was not entitled to replacement holiday if the employee's sick leave began after the beginning of the holiday. **Ruling of the Danish Supreme Court** Based on a ruling of the European Court of Justice (C-277/08 Pereda), the Danish Supreme Court questioned the compatibility of the then current Danish Holiday Act with the EU Working Time Directive. However, a committee was set up to assess the compatibility and concluded in September 2010 that the then current Danish Holiday Act was likely to be set aside if a case in this regard was referred to the European Court of Justice.

		Therefore, the Kingdom of Denmark was obliged to make the Danish Holiday Act consistent with the EU Directive immediately after publication of the report and no later than 1 January 2011. The EU Directive had not been sufficiently implemented into Danish law on 1 January 2011 and thus Denmark had neglected to implement the EU Directive in due time. In the relevant case, the employee did not have a claim for damages because the incident took place in the summer of 2010 when there was not yet a requirement for an amendment of the Danish Holiday Act to make it compliant with the EU directive. The judgement paves the way for employees who have been denied replacement holiday in the period 1 January 2011 to 1 May 2012 to raise claims for damages against the Kingdom of Denmark.