

# The relationship between EU law and Danish law in a case concerning a salaried employee

06-12-2016

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## Case no. 15/2014

Judgment delivered on 6 December 2016

DI acting for Ajos A/S

vs.

The estate left by A

### **The relationship between EU law and the then applicable section 2a(3) of the Danish Salaried Employees Act in a dispute between an employee and a private employer on entitlement to severance allowance**

In May 2009, at the age of 60, A was dismissed by Ajos A/S after 25 years of service. Before he turned 50, he had joined a pension scheme which entitled him to old-age pension. A took on a new position with another company without activating his old-age pension. Ajos did not pay severance allowance, as the then applicable section 2a(3) of the Danish Salaried Employees Act (*funktionærloven*) stipulated that no allowance was payable if "the employee will – on termination of the employment relationship – receive an old-age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 years".

In a judgment by the European Court of Justice of 12 October 2010 in case C-499/08 (Ole Andersen) concerning a dispute between an employee and a public employer, the Court held, among other things, that the then applicable section 2a(3) of the Salaried Employees Act was in contravention of the Employment Directive (Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation).

In March 2012, the trade union Dansk Formands Forening (DFF) raised a claim on behalf of A against Ajos for payment of severance allowance. The claim was rejected by Ajos, and the dispute was brought before the courts.

During the hearing of the case, the Supreme Court referred questions for a preliminary ruling to the EU Court of Justice, and they were answered in a judgment of 19 April 2016 (C-441/14).

The issue before the Supreme Court concerned whether Ajos according to the then applicable provision in section 2a(3) of the Salaried Employees Act was not required to pay the severance allowance which A, and now his estate, was, in principle, entitled to according to section 2a(1) of the Act. The decision in this case firstly depended on whether it was possible to interpret the then applicable rules in the Salaried Employees Act in a way that was consistent with the Employment Directive as interpreted by the EU Court of Justice in the Ole Andersen case, perhaps by applying the rules in the Danish Anti-Discrimination Act (*forskelsbehandlingsloven*) implementing the Employment Directive. According to the case law of the EU Court of Justice, if this was not possible, the Supreme Court was to consider whether a principle of EU law prohibiting discrimination on grounds of age may preclude Ajos from relying on the then applicable provision in section 2a(3) of the Salaried Employees Act.

On the issue of whether a so-called interpretation in conformity with EU law was possible, the Supreme Court found that the legal position was clear, and that it would not be possible based on the methods of interpretation recognised in Danish law to arrive at an interpretation of the then applicable section 2a(3) of the Salaried Employees Act that was consistent with the Employment Directive as interpreted by the judgment of the EU Court of Justice in the Ole Andersen case. The Supreme Court noted in this regard that there was no basis for applying section 1 of the Anti-Discrimination Act over section 2a(3) of the Salaried Employees Act to arrive at an interpretation that was in conformity with the directive. This was thus a 'contra legem' situation, where it was not possible to interpret the then applicable section 2a(3) of the Salaried Employees Act in conformity with the Employment Directive.

On the issue of whether a principle of EU law prohibiting discrimination on the grounds of age may preclude Ajos from relying on the then applicable section 2a(3), a majority of the Supreme Court stated, among other things, that the implementing act did not provide for letting the unwritten principle prohibiting discrimination on the grounds of age take precedence over the then applicable section 2a(3) of the Salaried Employees Act in a dispute between private parties. Application of the then applicable section 2a(3) could not be precluded by Danish courts, and Ajos could thus rely on this provision.

Accordingly, the Supreme Court found in favour of the employer.

The Danish Maritime and Commercial Court had come to the opposite conclusion.

