Reduced Working Hours: Employer's Duty to Accommodate Cases of Disability[1]

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Abstract

The consequence of an employer not adequately accommodating cases of disability can be significant. In many cases, employees are terminated because the employer claims an incapacity to provide such accommodations. While the regulations explicitly state that employers are obligated to provide accommodations for disability, the practical scope of this duty remains uncertain.

In this article, I delve into the parameters of the employer's duty to provide accommodations, particularly when the employer is obliged to adjust working hours for an employee with a disability. Whether an employer must accommodate is a case-by-case assessment. Therefore, it is challenging to establish clear limits for the duty to accom-

1 This article is based on the author's master's thesis, which was awarded the Norwegian Labour Law Association's (NARF) Annual Master's Thesis Award in 2023.

modate. In this article, I attempt to systematize, with the help of legal precedents, various types of situations in which an employer must provide accommodations. For some situations, it must be assumed that the employer has a broader duty to accommodate than for others.

An example of such a case can be found in the ruling from the Norwegian Supreme Court in HR-2022-390-A (*Widerøe*). The decision has sparked discussions, and there is little general guidance that can be drawn from the ruling with applicability to other cases involving accommodation. Additionally, the ruling lacks a foundation in international law. In this article, I delve into this issue, evaluating how Norwegian accommodation rules compare with provisions in, among others, Directive 2000/78/EC and the UN Convention on the Rights of Persons with Disabilities (CRPD). Based on this analysis, I criticize the Supreme Court's decision on the basis that they should have considered the case in light of international law.

1 Introduction

1.1 Topic

The duty to accommodate an employee with reduced work capacity entails recognizing that the individual has a disability and, therefore, requires specific adjustments to ensure that the individual, to the best extent possible, has the same opportunities as an able-bodied employee. The duty to provide accommodations is rooted in various international conventions, including the United Nations Convention on the Rights of Persons with Disabilities (hereafter CRPD) Article 4 and the European Convention on Human Rights (hereafter ECHR) Article 14.[2] This, in turn, has influenced the EU legislative framework, particularly through the Employment Equality Directive (hereafter Directive 2000/78/EC) Article 5, which stipulates that:

2 See also the United Nations Covenant on Civil and Political Rights (CCPR), Article 2, paragraph 1, and Article 26, alongside the United Nations Covenant on Economic, Social, and Cultural Rights (CESCR), Article 2.

> "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

Although Directive 2000/78/EC is not incorporated into the Annexes of the EEA Agreement, Norway has, nonetheless, chosen to implement the Directive through anti-discrimination legislation[3] within the Equality and Anti-Discrimination Act[4], Section 22. In addition to being bound by international conventions, acts, and directives, employers also have an extensive duty to provide accommodations through the Norwegian Working Environment Act[5] (hereafter aml.), particularly through the provision in Section 4-6.

In 2022, the Norwegian Supreme Court assessed the scope of the employer's duty to provide accommodations for an employee with reduced work capacity, in the case HR-2022-390-A (*Widerøe*). This marked the first time in 27 years that the court evaluated the accommodation duty. The specific accommodation measure in the case was a permanent adjustment of working hours, involving a reduced position for an employee. Prior to the judgment, there was considerable anticipation regarding whether the Supreme Court would establish general principles for assessing the employer's duty – and, if so, what they would be. The topic of this article is the scope of the employer's duty to offer reduced working hours as an accommodation measure, based on the Supreme Court's judgment in conjunction with other national and international legal sources.

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3 Prop. 81 L (2016–2017) p. 47.

4 Lov 16. Juni 2017 nr. 51 om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven).

5 Lov 17. Juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven).

The research question I intend to investigate is under what circumstances the employer is obliged to provide accommodations for reduced working hours, according to the Norwegian Working Environment Act, Section 4-6.

The question of whether the employer must accommodate depends on the extent to which the accommodation obligation applies in individual cases. Consequently, this article also explores the scope of the employer's duty to provide accommodations. As we will discover, several relevant considerations come into play when accommodating employees with reduced work capacity. In the context of accommodating working hours, organizational considerations and the specific needs of the individual employee both play a pivotal role. Consequently, this article delves into the interplay between an employer's accommodation duty under AML Section 4-6 and the employer's management rights over employees and the business.

Regarding the accommodation of working hours, there are various and sometimes overlapping legal provisions in Norwegian law.[6] In the Working Environment Act, one can interpret the adjustment of working hours as a protective and welfare measure, since work should be "organized and arranged concerning the individual employee's capacity for work, proficiency, age and other conditions," as stipulated in Section 4-2, paragraph b. Furthermore, Chapter 10 contains more specific provisions on working hours adjustments based on employees' health conditions. For instance, AML Section 10-6, paragraph ten, grants employees the right to be exempted from overtime work if they request it due to "health reasons or compelling social reasons." AML Section 10-2, paragraph four, allows employees to reduce working hours due to age or "health, social or other weighty reasons", while additionally, the National Insurance Act[7] indirectly provides grounds for leave or reduced working hours through the

6 Eidsvaag, Tine, Handlaus gjæte – Vern mot utstøting og diskriminering av arbeidstakere med helseproblemer eller funksjonsnedsettelse. Bergen 2008, p. 389.

7 Lov 28. februar 1997 nr. 19 om folketrygd (folketrygdloven).

rules on full or partial sick leave. However, one provision stands out as particularly significant – AML Section 4-6, paragraph one, which essentially encompasses the other provisions.[8] Consequently, I will primarily focus on Section 4-6, while also assessing its relationship with other accommodation provisions.

1.2 Relevance

For employees, the Working Environment Act functions as a protective law, aiming to ensure safe working conditions, contribute to an inclusive work environment, and facilitate individual adaptations according to an employee's prerequisites and life situation, as stated in AML Section 1-1.

An employee who is completely or partially absent from work due to an accident or illness is safeguarded against termination during the first twelve months after the onset of work disability, as per AML Section 15-8. Simultaneously, the employer must accommodate the sick-listed employee under AML Section 4-6. At the end of the statutory protection period, the employer can justify a termination based on the general termination regulations in AML Section 15-7. The sickness absence can at this point form the basis for a justifiable termination. Whether a termination complies with the requirements of reasonableness stipulated by the Act depends on whether the employer has fulfilled its accommodation duty under AML Section 4-6. In practice, this is the situation where the courts assess the extent of the employer's duty. If the court determines that the employer has acted in line with the requirements for accommodation, the ultimate consequence is that the termination is considered reasonable, based on the balancing of interests required under Section 15-7. As a result, the employee may exit the workforce. Conversely, if a court believes that the employer has failed to meet its duty under AML Section 4-6, it will be difficult to conclude that the termination of the employee is justified.

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8 Eidsvaag, Tine, Handlaus gjæte – Vern mot utstøting og diskriminering av arbeidstakere med helseproblemer eller funksjonsnedsettelse. Bergen 2008, p. 389.

The extent to which the employer has fulfilled its accommodation duty can, therefore, have significant repercussions for the affected employee. Clarity about the scope of the employer's accommodation duty is essential for the further development of employee protection in Norwegian law for employees with reduced work capacity. By clarifying certain general principles regarding the extent of the employer's duty, it is then easier to identify what changes are needed in order to maintain or strengthen employee protection in the future. Conversely, an assessment of the scope of the employer's accommodation duty can also shed light on whether the current regulations are overly burdensome, potentially excessively affecting a company's operations or other employees.

With the recent pronouncement by the Supreme Court on the scope of the employer's accommodation duty under AML Section 4-6 in 2022, such pronouncement being the first since 1995, it is natural to scrutinize this judgment and assess whether it is possible to deduce certain general principles that could have transferable value in future cases related to accommodation.

1.3 Limitations and Specific Methodological Challenges

The duty to provide accommodations under AML Section 4-6 is extensive in the sense that it aims to be applicable in various situations, considering the employee's health and the conditions within the workplace. The provision does not set limits on the number of different measures that it may be relevant to implement for an employee. Therefore, I find it necessary to narrow down the presentation of the scope of the accommodation duty to cases where the assessment under Section 4-6 is related to reduced working hours as a potential accommodation measure. By "reduced working hours," I mean either a reduction in working hours as a temporary measure, or a more permanent reduction in working hours in the form of a reduced position. Throughout this article, I will primarily refer to both forms of reduced working hours under the collective term "reduced work-

ing hours." This approach is taken because the Supreme Court in the Widerøe judgment does not differentiate between reduced working hours and a position reduction. For cases where it is necessary to distinguish between temporary and permanent measures, the context will make it clear.

As there is now a recent judgment from the Supreme Court, the Widerøe judgment serves as a natural starting point throughout this article. A Supreme Court judgment generally holds significant legal weight.[9] However, the precedential value of a judgment may vary and needs to be assessed for each decision.[10] The specific judgment we are dealing with has not yet been extensively considered in recent legal sources. Therefore, it is uncertain how far-reaching the precedential value of the decision will be. Given that the Supreme Court has now, for the first time in several decades, pronounced its views on the employer's duty to provide accommodations, and it is expected that the judgment will become important in the future, this poses certain methodological challenges.

Although there is limited Supreme Court case law in this area, there is a considerable amount of case law on the scope of the employer's accommodation duty in lower court decisions and decisions made by, among others, the Anti-Discrimination Tribunal, and the Dispute Resolution Board. In general, case law from lower courts, the Tribunal, etc., has limited legal value.[11] However, since there are few Supreme Court decisions available, such case law can thus become more significant. Therefore, I will refer to several lower court decisions, primarily from the Courts of Appeal, as they have a stronger legal basis than decisions from the District Courts. I will also refer to some decisions made by the Dispute Resolution Board and the Anti-Discrimination Tribunal. The latter have specialized knowledge in this area from a discrimination law perspective. By referring to the Tribunal's decisions, I aim to shed light on the scope of the

9 Torstein, Rettskildelære, ved Helgesen, Jan E. Oslo 2001, p. 159.

10 ibid, pp. 164–171.

11 ibid, p. 162.

employer's duty, considering anti-discrimination legislation. For all practical purposes, I will attempt to anchor the relevant case law I refer to in other legal sources, such as relevant legislative materials or relevant considerations. This approach will, I believe, provide sufficient legal material for evaluating the issue raised in this article.

Since every illness or health condition is different for each employee, the scope of the employer's duty to provide accommodations will also vary based on the specific situation in which the legal practitioner finds themselves. The fact that the accommodation duty must be assessed on a case-by-case basis means it is not possible to set absolute limits on the employer's duty under AML Section 4-6. Therefore, when considering the employer's obligation to offer reduced working hours, I try to establish some general considerations based on the specific situation the legal practitioner is in, with the caveat that it is not possible to further categorize the specific situations. Different scenarios will be presented and exemplified through references to specific cases considered by the Courts of Appeal and the Tribunal. The attempt to identify different types of situations is solely intended to make the specific assessment under Section 4-6 more manageable, in the sense that one can refer to a certain situation as a factor in favour of whether or not the employer must provide accommodations.

Since the Widerøe judgment was delivered, it has been the subject of extensive discussion.[12] Therefore, I will also discuss and provide criticism of the Supreme Court's assessments throughout this article. Where I find support for my thoughts and reflections, I will refer to the relevant sources. These will primarily be legal articles published in the time following the judgment. Such legal articles generally

12 Due, Anne Marie and Vang, Håvard Nybakk, Kommentar til Widerøe-dommen HR-2022-390-A. *Juridika*, 2022. See also Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, pp. 135–162. and Eidsvaag Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2, 2022, pp. 3–5.

have limited legal value. However, these articles are the only sources currently available that directly discuss the Supreme Court's judgment. Therefore, given the lack of other sources with a stronger legal grounding, these articles have a greater significance in this article than their nature as sources would suggest.

This article will navigate through several pivotal areas to understand the employer's obligation to accommodate, in light of the Widerøe case. First, the analysis will commence by reviewing the Widerøe judgment and its implications. Section 2 will focus specifically on the employer's duty to provide reduced working hours, delving into the Supreme Court's assessment of this obligation within the Widerøe case in Section 2.2. Subsequently, a deeper exploration of other grounds for accommodation will be examined in Section 2.3. The article will further investigate the scenarios where the employer is obligated to offer reduced working hours as an accommodation measure in Section 2.4. Finally, the article will conclude in Section 3 by presenting closing remarks and a comprehensive assessment of the scope and implications of the Widerøe judgment.

1.4 HR-2022-390-A (*Widerøe*)

In this case, the Supreme Court assessed the employment relationship of a worker who was employed in a position as a multimedia producer within the airline company Widerøe. This role involved creating instructional videos and other e-learning materials for internal employee training at Widerøe. Before obtaining the multimedia producer position in 2014, the employee had previously tried out various other positions, after initially joining the company in 2001.

In 2009, the employee developed health issues, experiencing burnout and depression, leading to him being wholly or partially on sick leave for extended periods. From November 2012, for approximately one and a half years, the employee was 100% sick-listed, before commencing the multimedia producer position in 2014.

From 2014 until 2016, the employee worked at full capacity before becoming 100% sick-listed again until January 2018. In consulta-

tion with the Norwegian Labour and Welfare Administration (NAV), an activity plan was developed to gradually increase the employee's work capacity. From January 2018 until April 2019, the employee transitioned from being 100% sick-listed to occupying a 50% position. In discussions with the physician, the employee made it clear to the employer that he was not able to increase his work hours further at that time. Therefore, his work capacity was regarded as permanently reduced. The subsequent question was whether the employee could continue working permanently in a part-time position as a multimedia producer.

The employer contended that permanent accommodation in the form of offering a fixed part-time position to the employee went beyond the employer's accommodation duty under the Working Environment Act, Section 4-6. Consequently, the employee was terminated. The employee initiated legal proceedings, claiming that the dismissal was invalid and seeking compensation. Both the district court[13] and the court of appeal[14] concluded that the termination was valid. Consequently, the employee was not entitled to compensation. The case was then appealed to the Norwegian Supreme Court.

The Norwegian Supreme Court primarily addressed two main issues: firstly, whether the employer's accommodation duty under the Working Environment Act, Section 4-6, granted the employee the right to continue permanently in a reduced position, and secondly, whether the dismissal was invalid due to deficient handling of the case. The focus of this article primarily pertains to the Supreme Court's assessment of the first main issue.

The Supreme Court ruled that the employer was not obligated to provide accommodation for the employee to continue permanently in a part-time position. As such, the employer had fulfilled its accommodation duty under Section 4-6. In the second primary issue, the Supreme Court reviewed the employer's case handling as proper. Considering the employer's compliance with the accommodation

13 TSALT-2019-178996.

14 LH-2021-45977-2.

duty, the court determined that the dismissal was valid under Section 15-7 of the Working Environment Act.

The employee argued that the employer did not meet its accommodation duty. However, both parties agreed that Widerøe had met the requirements of Section 4-6 if the employer accommodated to allow the employee to return to a full-time position. The dispute regarding the extent of the employer's duty only arose when the employee was incapable of increasing his work capacity any further. Therefore, the Supreme Court's assessment focused solely on the scope of the employer's accommodation duty in situations where both parties acknowledged that the employee had permanently reduced work capacity and would probably never be able to return to the initial position percentage.

2 When does the employer have a duty to offer reduced working hours?

2.1 Introduction

According to the Norwegian Working Environment Act, Section 4-6, the employer must, "as far as possible, implement the necessary measures to enable the employee to retain or be given suitable work." Adjusting working hours can be a very suitable means of keeping an employee with reduced work capacity in employment, as stated by the Norwegian Ministry of Labour.[15] However, the use of working hours as part of these adjustments has been relatively limited.[16] To address this, the Ministry of Labour decided to explicitly mention working time adjustments as a potential measure under the provision.[17]

There are several ways to adjust working hours. One approach may involve altering the timing of work, such as avoiding evening or weekend shifts or starting work at 10 am instead of 8 am. Alternatively, employees can work reduced hours, either through shorter

15 Ot.prp. nr. 18 (2002–2003) p. 8 (p. 2.5.2.2).

16 Ot.prp. nr. 18 (2002–2003) p. 8 (p. 2.5.2.2).

17 Ot.prp. nr. 18 (2002–2003) p. 8 (p. 2.5.2.2).

workdays or fewer days per week. In the following, I will focus on reduced working hours as an adjustment measure.

2.2 The Supreme Court's assessment of the duty to offer reduced working hours in the case of Widerøe

2.2.1 *Introductory remarks*

As mentioned, the Supreme Court limited its assessment of the validity of the termination to two main questions, based on the employee's claims[18]: whether the employer's duty to accommodate gave the employee the right to continue in a reduced position permanently, and whether the termination was invalid due to deficient procedural handling. The delineation of these two main questions meant that there were many interesting aspects that the Supreme Court did not consider.[19] It is important to be aware of this delineation in order to understand the Supreme Court's further rationale, and why the scope of the judgment is therefore considered to be limited.[20] It is also natural to evaluate the Supreme Court's judgment, because the employer had accommodated the employee for many years, and the position the employee held at the time of the termination was a role he had been reassigned to due to accommodation.

The Court begins its assessment by referring to the assessment criteria and presenting the requirement of justifiability for termination as outlined in the Working Environment Act, Section 15-7.[21] The

18 HR-2022-390-A (Widerøe) paragraph 18.

19 Engan Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp. 135-162, p. 147 which, among other things, highlights whether a reduction in position could be characterized as the creation of a new position and whether the need to hire a new employee to cover the remaining work amounts to the creation of a new position. See also Eidsvaag Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2, 2022, pp. 3–5.

20 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 141.

21 HR-2022-390-A (Widerøe) paragraph 34–39.

Supreme Court states that the question of whether the employer has fulfilled its duty to accommodate under Section 4-6 will be central to the assessment under Section 15-7 and that it is difficult to imagine that termination should still be considered justified if the duty has not been fulfilled.[22] According to both Section 15-7 and 4-6, a concrete overall assessment must be made. Although these statements can be related to clear statements in the preparatory work and have support in legal practice,[23] the Supreme Court should have emphasized that an employer does not necessarily need to make accommodations for the duty under Section 4-6 to be considered fulfilled.[24] There will be cases where it is highly likely that the employee will not be able to return to or retain his job, and where the employer does not need to carry out accommodations, for the duty under Section 4-6 to be nonetheless fulfilled.

2.2.2 *The Supreme Court's formulation of the general content of Section 4-6 of the Working Environment Act*

In the Widerøe case, the Supreme Court begins its assessment of the duty to provide accommodation by referring to Section 4-6. The court states that the primary purpose of the provision is to facilitate the return of the employee to their original job before their reduced work capacity becomes evident, but the employer may also be obligated to implement other, more permanent accommodation measures.[25] In the specific case, the question was whether the duty under the provision also implied an obligation on the employer to allow the employee to continue permanently in a half-time position, especially after it became clear that they would not return as a full-time employee in the same position.[26] The Court further acknowledges

22 HR-2022-390-A (Widerøe) paragraph 35.

23 NOU 2004: 5, p. 315. See, e.g. Rt-1995-227 (Renovatør), LB-2016-70178-A (Norgesbuss) and LA-2017-95878 (Brannmann).

24 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp. 135–162, p. 142.

25 HR-2022-390-A (Widerøe) paragraph 41.

26 HR-2022-390-A (Widerøe) paragraph 38.

that accommodation of working hours can be treated as such an appropriate measure, with reference to the preparatory work of the Act.[27] The Court also clarifies that accommodation of working hours includes both changes in the timing of work and reduced working hours, which is the issue at hand.[28]

With this, the Supreme Court initially established that the duty to accommodate, in certain cases, involves the obligation of the employer to implement permanent measures and that such a measure may include accommodating working hours. In paragraph 44, the Court states that the mention of reduced working hours as a suitable measure further implies an implicit acceptance from the legislator's side that the employer may be directed to procure alternative manpower to fill the remaining part of the position. If it had been intended to restrict this, one would be left with cases where the remaining work time could be eliminated or filled by existing manpower. Such a significant reservation should, in that case, have been stated in the preparatory works, according to the Court.

So far, the Supreme Court seems to clarify the general content of the duty to make accommodations under the heading "Generelt om arbeidsmiljøloven § 4-6".[29] However, the Court quickly incorporates into this the specific issue of assessing the duty to offer reduced working hours. The Court could have profitably considered the general content of Section 4-6 of the Working Environment Act first, before subsequently assessing the duty to offer reduced working hours under a separate heading. When the Supreme Court blends the general and specific assessment themes, it becomes challenging to follow the court's evaluation, and it consequently becomes difficult to extract general principles that may have applicability to other similar cases

27 HR-2022-390-A (Widerøe) paragraph 42, with further reference to Ot.prp. nr. 18 (2002–2003) p. 8.

28 HR-2022-390-A (Widerøe) paragraph 42.

29 HR-2022-390-A (Widerøe) paragraph 40–52.

involving the duty under Section 4-6.[30] This is evident in the references to various statements in different preparatory works. The Court indicates that the duty imposes a broad responsibility on the employer and, with support from Proposition 89 L (2010–2011), states that the provision should be interpreted strictly.[31] Simultaneously, the court recognizes that the scope of the duty is not unlimited.[32] There may be situations where the employer encounters significant difficulties in finding others to take over the remaining hours of work,[33] and the duty does not go so far as to create a new position.[34]

It is unclear whether the Supreme Court clarifies the content of the duty to provide reasonable accommodations more generally through these references or whether the interpretation focuses solely on the duty to offer reduced working hours.[35] By first describing the duty to make accommodations as a broad responsibility for the employer it suggests a general interpretation, but when the Court introduces significant problems in filling the remaining working hours, it indicates that the Supreme Court is formulating its perspective more directly on reduced working hours as an accommodation measure. Additionally, the Supreme Court's choice to extract individual words from the preparatory works is problematic, as it causes these statements to lose their context.[36] Describing the obligation to make accommodations as a broad responsibility is a good example of this, as it is based on a statement from the preparatory works, emphasizing that a comprehensive

30 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 143.

31 HR-2022-390-A (Widerøe) paragraph 43, with further reference to Prop. 89 L (2010–2011).

32 HR-2022-390-A (Widerøe) paragraph 45.

33 HR-2022-390-A (Widerøe) paragraph 45, with further reference to Ot.prp. nr. 18 (2002–2003) p. 8 og Ot.prp. nr. 49 (2004-2005) p. 104.

34 HR-2022-390-A (Widerøe) paragraph 45, with further reference to Ot.prp. nr. 49 (2004–2005) p. 105.

35 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp 135–162, p. 143.

36 ibid.

assessment must be made, and taking into account the nature of the company, including its size, finances, and the employee's circumstances.[37] The Supreme Court does not emphasize that the scope of the duty to provide reasonable accommodations depends on a comprehensive, discretionary overall assessment of the circumstances of each party involved, but instead the court focuses exclusively on the notion that the duty, in itself, entails a broad responsibility for the employer. Even though the Supreme Court specifies in paragraph 48 that a concrete, discretionary, overall assessment must be conducted, this is not emphasized as being the key aspect of the evaluation under Section 4-6.[38] The Supreme Court's formulation of the general content of the duty to provide reasonable accommodations is, therefore, incomplete, and to some extent, limits the value that can be extracted by legal practitioners from this part of the judgment.[39]

2.2.3 *Further details on the Supreme Court's assessment of the duty to offer reduced working hours*

After referring to the preparatory works that stated that the duty to make accommodations does not go so far as to establish a new position[40] for the employee, the Supreme Court argues that the statement indicates another limitation on the extent of employer's obligations under § 4-6 than what follows from the outer limit of the direct economic burdens that the employer must bear, namely the limitation that must be made for the employer's need to manage the enterprise.[41] With this, the Supreme Court considers the possibility that the employer's right to manage the enterprise may influence the assessment of the extent of the duty to make accommodations. The

37 Ot.prp. nr. 18 (2002–2003) p. 4.

38 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 144.

39 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 145.

40 HR-2022-390-A (Widerøe) paragraph 45 with further reference to Ot.prp. nr. 49 (2004–2005) p. 105.

41 HR-2022-390-A (Widerøe) paragraph 46.

Court points out that the employer's right to manage the enterprise is indeed limited and that it is clear that Section 4-6 also involves an interference with the right to manage the enterprise where the provision, for example, can entail a duty to accommodate part-time work for an employee, but that this does not prevent Section 4-6 from being interpreted in light of the employer's need to determine the organization and position structure.[42]

Concerning the right to manage, the employer has the right to organize, lead, control, and distribute the work.[43] This was stated by the Supreme Court in Rt-2000-1602 (*Nøkk*). The statement has been repeated in subsequent rulings.[44] The right to manage is independent of the right for the employer to unilaterally make decisions that can affect both the enterprise and the individual employee.[45] However, the right to manage is largely limited by laws, collective agreements, and the individual employment relationship –and is therefore often referred to as a residual competence.[46] The employer's duty to make accommodations under the Working Environment Act § 4-6 will thus limit the right to manage, as also assumed by the Court in paragraph 46. Nonetheless, the provision does not prevent the employer's need to determine the organization structure from also having relevance to the extent of the employer's duty to make accommodations.[47]

Hence, the Supreme Court seems to use elements of the right to manage, especially the employer's right to organize work, as an interpretative factor in its assessment of the scope of the employer's

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42 HR-2022-390-A (Widerøe) paragraph 46.

43 Rt-2000-1602 (Nøkk) p. 1609.

44 HR-2016-2286-A (Rygge kommune) paragraph 26, Rt-2011-841 paragraph 49, Rt-2009-1465 (Senvakt) paragraph 35, Rt-2008-856 (Theatercafeen) paragraph 34 og 35, og Rt-2001-418 (Kårstø) p. 427.

45 Skjønberg A., Hognestad E., & Hotvedt, M., Individuell arbeidsrett, Gyldendal juridisk 2017, p. 96–99.

46 Skjønberg et al. 2017, p. 100. For a critique of this designation, see Thorkildsen, Tarjei and Drevland, Tonje H, Arbeidsgivers styringsrett – en restkompetanse? *Arbeidsrett*, Volume. 7, nr. 1-2, 2010.

47 HR-2022-390 (Widerøe) paragraph 47.

obligations under Section 4-6. When the Supreme Court later found that the employer had fulfilled its obligations under Section 4-6, the same elements also indicated a significant limitation on the duty to make accommodations. The emphasis on the right to manage as a factor in assessing the scope of the duty to make accommodations may be related to the fact that, despite being a highly restricted competence given to the employer, the right is considered as having an independent legal basis.[48] As an independent legal basis, the employer not only has a right to manage but is also *obliged* to manage.[49] The duty to manage implies that the employer, among other things, is responsible for responsibly organizing the enterprise to prevent injuries and illnesses for all employees.[50] The fact that the employer has both a general duty and that this can also trigger an individual duty towards a single employee creates an interplay that is central to the assessment of the extent of the employer's obligations under Section 4-6.[51] When the Widerøe case required changes to the organization structure, which would directly interfere with the employer's right and duty to organize, lead, control, and distribute work[52] within the enterprise and towards its employees, it is not surprising that the Supreme Court incorporates elements of the right to manage in its assessment of the duty to make accommodations. However, the way the Supreme Court brings in the right to manage, by linking it to the

48 Skjønberg et al., 2017 p. 96–99.

49 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 146.

50 Arbeidsmiljøloven §§ 4-1 to 4-5, kapittel 4 «krav til arbeidsmiljøet».

51 Prop. 89 L (2010–2011) p. 14, where it states that the obligations of the employer in the Working Environment Act Chapter 4, regarding preventive measures and workplace organization for all employees, will serve as a limit to the employer's management rights and determine how far the duty under the Working Environment Act Section 4-6 can be extended to accommodate a single employee. See also Rt-1995-227 (Renovatør) which asserts that consideration for the employer's other obligations will be relevant in assessing the extent of the duty to accommodate.

52 Rt-2000-1602 (Nøkk) p. 1609.

legislative statement that the duty to make accommodations does not go so far as to create a new position, is cumbersome and confusing – given that it is relatively clear that parts of the right to manage, in certain cases, may be relevant as an interpretative factor.[53] After all, the right to manage is an independent legal basis that can be invoked by the employer at any time – although the competence is admittedly subject to extensive limitations.

In Widerøe, the relevant department consisted of four full-time positions, with a substitute appointed to cover the remaining part of the position for the employee in question. The department structure did not already involve the use of part-time positions and would need to be changed if so required. The question for the Supreme Court was whether the duty under Section 4-6 extended so far that the arrangement with two part-time employees had to become a permanent solution. For such permanent changes in organizational structure, it was clear to the Supreme Court that there had to be *compelling reasons* before Section 4-6 imposes a duty on the employer to do so.[54] With this, the Supreme Court attempts to construct a threshold and outer limit for the extent of the duty to make accommodations.

The Supreme Court's formulation of 'compelling reasons' is not derived from any explicit written sources. It is therefore unclear what exactly is meant by this term. However, 'compelling reasons' implies that not every circumstance on the employee's side is sufficient to require the employer to implement permanent changes to the enterprise. For such permanent – and probably burdensome –measures for the employer, there must be a compelling need on the part of the employee for the measure to be implemented, beyond just having a reason in the form of reduced work capacity that can benefit from the measure. No other possibilities for accommodation, combined with old age and difficulties in finding other work, may constitute such compelling reasons.

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53 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 149.

54 HR-2022-390-A (Widerøe) paragraph 48.

In assessing whether the employer must accommodate working hours, the Supreme Court further points out that it may matter whether it involves short-term or long-term accommodation measures, whether the position structure already involves the use of part-time positions, and whether the company, in any case, needs a new position that may fit with the required accommodations.[55] The Court then proceeds to evaluate the specific case in question.

In Widerøe, it was a question of a permanent accommodation measure. The department structure had to be changed to also include part-time positions, even though the company did not desire such a permanent solution. In the context of the appellate court's assessment of evidence, where this would cause significant inconvenience for the employer to accommodate the employee to continue in a half-time position, the Supreme Court found the appellate court's assessment justified and an expression of correct legal application.[56] The conclusion was therefore that the specific weighing that the employer had done was not contrary to Section 4-6. The employer was thus not obliged to accommodate the employee to continue permanently in a half-time position by reference to the Working Environment Act Section 4-6.

The conclusion might have differed if the employee had cited an alternative basis for accommodation. Moving forward, I will delve into the extent of two alternative grounds to Section 4-6, both of which could have been claimed by the employee.

2.3 The connection to other provisions on accommodation

2.3.1 *Overview*

As mentioned, several legal provisions impose a duty on the employer to make accommodations for an employee with reduced work capacity. In addition to the Working Environment Act Section 4-6, Section 10-2, fourth paragraph, introduces the concept of reduced working

55 HR-2022-390-A (Widerøe) paragraph 48.

56 HR-2022-390-A (Widerøe) paragraph 70.

hours as an accommodation measure. The employer also has an extensive obligation towards employees with reduced functional capacity under the Norwegian Equality and Anti-Discrimination Act[57] (hereafter ldl.) Section 22. The scope of the provisions partially overlaps, but they all have different purposes and areas of application.[58]

2.3.2 *The Working Environment Act § 10-2, fourth paragraph*

Section 10-2, fourth paragraph, grants an employee who has reached the age of 62, or who, for health, social, or other significant welfare reasons, needs it, the right to have their working hours reduced if the reduction can be implemented without significant inconvenience to the enterprise. Section 10-2 of the Working Environment Act generally applies to working hour arrangements, and the fourth paragraph must be read in conjunction with the first paragraph, which states that working hour arrangements should be such that employees are not exposed to adverse physical or mental stress and be such that safety considerations can be taken care of. The reservation must be seen in connection with the Working Environment Act's provisions on HSE work in Section 3-1 and 3-2, and the requirement that the employer shall ensure a fully satisfactory working environment according to Section 4-1.

The provision in Section 10-2, fourth paragraph, sets no limits on how much working hours can be reduced or how the reduction can be organized. In preparatory works, it is stated that a reduction in working hours can, for example, be taken in the form of shorter daily working hours, fewer working days per week, or accumulated into longer periods without work. The provision thus does not prevent the establishing of a long-term arrangement with reduced working hours, and the period does not necessarily have to be time-limited.[59]

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57 Lov 16. juni 2017 nr. 51 om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven).

58 Engan, Anne-Beth Meidell, Tilrettelegginsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp. 151 ff.

59 Ot.prp. nr. 30 (2007–2008) p. 2.

Similarly to Section 4-6 of the Working Environment Act, measures under Section 10-2, fourth paragraph, could therefore be more permanent if the employee's health condition requires it. In the latter provision, this is formulated as a requirement that the employee must refer to 'health' reasons. If the condition is met and the employee needs it, the employee has the right to reduced working hours if it is not a significant inconvenience to the employer. According to the preparatory works, 'health reasons' refers to the employee's illness, and this must be documented with a medical certificate.[60] Another similarity with Section 4-6 is that both provisions share the purpose of making it easier for the employee to retain their position by accommodating reduced working hours.[61] Employees facing health challenges will indeed find it easier to meet the demands of the employer if granted the right to reduced working hours.[62]

Thus, even under Section 10-2, fourth paragraph of the Working Environment Act, the employer has a broad obligation - and there must be shown to exist 'significant inconvenience' for the employer, in order to be exempt from the duty to make accommodations. In practice, this has been interpreted strictly. In a principled decision from the Dispute Resolution Board, it was assumed that the requirement for significant inconvenience implies that it is not enough to demonstrate a general inconvenience, for example, the inconvenience of having to reorganize tasks or hire a substitute. But if a reduction in working hours is deemed to have unreasonably significant practical consequences for the business, the requirement for significant inconvenience will normally be met. In any case, the employer is obligated to try to make conditions conducive to minimizing inconveniences. This includes, for example, that the employer must be able to docu-

60 Ot.prp. nr. 49 (2004–2005) p. 316.

61 Eidsvaag, Tine, Handlaus gjæte – Vern mot utstøting og diskriminering av arbeidstakere med helseproblemer eller funksjonsnedsettelse. Bergen 2008 p. 383.

62 Ot.prp. nr. 3 (1982–1983) p. 20.

ment attempts to hire/bring in a substitute and/or that alternative ways of organizing work have been considered.[63]

This corresponds with previous practice from the Labour Inspection Authority.[64] Since the provisions in Section 10-2, fourth paragraph, and Section 4-6 share such significant similarities, it implies that in cases where health reasons are invoked the employer has a duty under Section 10-2, fourth paragraph, that is somewhat equivalent to the duty under Section 4-6.[65]

2.3.3 *The Equality and Anti-Discrimination Act Section 22*

Under the Equality and Anti-Discrimination Act Section 22, employees and job seekers with disabilities have the right to suitable individual adaptation of the employment process, workplace, and tasks, to ensure that they can obtain or retain employment, access training and other competence development, as well as perform and have the opportunity for advancement in work, on an equal footing with others. The provision has a broader purpose than both Section 4-6 and 10-2 of the Working Environment Act, since individuals with disabilities should not only be able to retain employment but also advance in work, on a par with healthy employees.[66] The Equality and Anti-Discrimination Ombud stated in a report on the right to individual adaptation that Section 22 of the Equality and Anti-Discrimination Act is considered to extend further than Section 4-6 of the Working Environment Act. The report states that if the purpose of development and progress in work is to be fulfilled, the measures will often have to be broader than if the purpose is only to keep employees

63 Tvisteløsningsnemnda Case 21/2006.

64 Eidsvaag, Tine, Handlaus gjæte. Vern mot utstøting og diskriminering av arbeidstakere med helseproblemer eller funksjonsnedsettelse. Bergen 2008, p. 408.

65 Ibid., p. 408.

66 See the purpose provision in ldl. § 1. See also, ldl. § 22 and Prop. no. 81 L (2016–2017) p. 59.

in the labour market.[67] However, the term 'disability' encompasses fewer individuals than the term 'reduced work capacity' in Section 4-6 of the Working Environment Act.[68]

In the preparatory works, the view is expressed that the need for adaptation resulting from the reduced functional capacity must be of a certain strength and duration in order to justify a demand for individual adaptation, and that marginal or transient needs, such as short-term reduced functional capacity, will generally not trigger any obligation for individual adaptation under Section 22.[69] Thus, the provision does not go so far as to cover both short-term and long-term adaptation needs in a manner similar to the provisions in Section 4-6 and 10-2 of the Working Environment Act. In practice, this means that in the case of short-term disabilities, Section 4-6 of the Working Environment Act will determine the employer's duty to accommodate, rather than Section 22 of the Equality and Anti-Discrimination Act.

Section 22 of the Equality and Anti-Discrimination Act is limited, in that the employer does not have a duty to accommodate if they can demonstrate a 'disproportionate burden'. The provision itself lists three factors that should be particularly emphasized in the assessment of whether something constitutes a disproportionate burden: the effect of accommodation in terms of dismantling barriers for persons with disabilities, the costs associated with accommodation, and the resources of the undertaking.[70] These factors can be compared to those set out by the department after the assessment in Section 4-6 of the Working Environment Act, where the nature, size, economy of the business, and the employee's circumstances, must all be weighed

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67 Forbudet mot diskriminering på grunn av nedsatt funksjonsevne. Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne – en oppsummering, *Likestillings- og diskrimineringsombudet* 2014, p. 19.

68 See Skjønberg et al. 2017 at p. 202. See also Engan, Anne-Beth Meidell and Våg, Lasse Gommerud, Oppsigelse ved sykdom og sykefravær. Universitetsforlaget 2020, pp. 119 ff.

69 Ot.prp. nr. 44 (2007–2008) p. 181.

70 See ldl. § 22 second paragraph.

against each other.[71] For both Section 22 of the Equality and Anti-Discrimination Act and Section 4-6 and 10-2, fourth paragraph, of the Working Environment Act, the point is that the employer's duty to accommodate must be assessed based on a concrete discretionary evaluation of each case.

2.3.4 *The Supreme Court's statements in the Widerøe case regarding the relationship between the provisions*

Since the case in Widerøe concerned a request for reduced working hours for a person with a permanently reduced work capacity, the relationship between the three provisions could have been put to the test. The case could indeed have been assessed under all these provisions. However, the parties agreed in a preparatory meeting that the Working Environment Act Section 4-6 'consumes' both the Equality and Anti-Discrimination Act Section 22 and the Working Environment Act Section 10-2.[72] For that reason, the Supreme Court stated that the case did not provide a further basis for determining the relationship between the provisions.[73] On this point, it is reasonable to criticize the Supreme Court, since it is the court that is responsible for the application of the law under the Dispute Act[74] Section 11-3, and it shall, on its initiative, apply the applicable legal rules. This means that the court was not bound by the party's agreement that aml. Section 4-6 consumed both Section § 10-2 fourth paragraph and ldl. Section 22. Considering that the Supreme Court, as a precedent court for the first time in 27 years, was addressing the scope of the employer's duty to accommodate, this is unfortunate. Nonetheless, the Supreme Court examined whether the provisions could contribute to the interpretation of the Working Environment Act 4-6.[75]

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71 Ot.prp. nr.49 (2004–2005) pp. 105, 302 and 309.

72 Extracted from the Supreme Court's court record from the preparatory meeting. See also Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp. 152.

73 HR-2022-390-A (Widerøe) paragraph 49–52.

74 Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven).

75 HR-2022-390-A (Widerøe) paragraph 49.

Referring to the Working Environment Act Section 10-2 fourth paragraph, the Supreme Court stated that the provision regulates a different - and for the employer, initially less burdensome - duty than when offering reduced working hours permanently to an employee with a permanently reduced work capacity.[76]

The Supreme Court does not delve into the preparatory statements that Section 10-2 fourth paragraph could also apply to a permanently reduced work capacity and that it is unnecessary to set a time limit for the accommodation. The court also does not address the dispute resolution board's practice that the employer cannot solely point to general inconveniences,[77] but must instead demonstrate a concrete significant inconvenience in the accommodation work. If the Supreme Court had referred to the board's practice, they could also have highlighted the aspect that the employer is obligated to try to facilitate and arrange conditions such that the inconveniences are minimized as much as possible.[78] In the Widerøe case, the employer had attempted to accommodate part-time work for an extended period, seemingly without causing issues for the employer. Therefore, the Supreme Court could have more thoroughly assessed the alleged inconveniences claimed by the employer, before concluding that the employee needed to show compelling reasons for the employer to be obliged to accommodate permanently reduced working hours.

The established threshold in section 10-2, fourth paragraph of the Working Environment Act, stating that an employee has the right to have their working hours reduced provided the measure can be implemented without significant inconvenience, is not assessed by the Supreme Court in their formulation of "compelling reasons". The fact that the Supreme Court generally describes the obligation under Section 10-2, fourth paragraph, as less burdensome[79] suggests that the Supreme Court may have intentionally formulated a different

76 HR-2022-390-A (Widerøe) paragraph 49.

77 See e.g. Tvisteløsningsnemnda Case 21/2006.

78 ibid.

79 HR-2022-390-A (Widerøe) paragraph 49.

threshold, to distinguish the scope of the accommodation obligation in Section 4-6 from that in Section 10-2, fourth paragraph. Both formulations suggest that there must be some form of inconvenience associated with the accommodation, but they address each party in the employment relationship. The formulation in Section 10-2, fourth paragraph, seems to cover cases where the accommodation is a significant inconvenience for the *employer*, while the one in Section 4-6 indicates that it is the *employee* who must show compelling reasons for the employer to have an obligation to accommodate. Considering that the accommodation obligation under Section 4-6 is considered a far-reaching obligation for the employer, it seems somewhat strange that the Supreme Court appears to have shifted the burden of proof onto the employee in cases where the employer is at risk of having to make permanent changes to the organizational structure. As the formulation stands in the Supreme Court's judgment, it seems that the employee must show compelling reasons, regardless of whether a potential change in the structure is inconvenient for the employer. In that case, there are indications that the Supreme Court, through the formulation of compelling reasons, has narrowed the scope of the accommodation obligation under Section 4-6.

In the Widerøe case, the employer could point to the disadvantages of having to change the department structure and accommodate reduced working hours permanently. Therefore, the Supreme Court did not explicitly need to mention that the measure had to be problematic when formulating the requirement for compelling reasons. In support of this interpretation, I refer to paragraph 67 of the judgment, where the Court states that the problems that the majority of the Court of Appeal found proven in connection with a permanent half-time position, mean that it would be a permanent change in the organization structure. The Supreme Court concluded that it was a permanent change in the organization structure solely because they, like the majority in the Court of Appeal, found it proven that the employer had problems with creating a permanent half-time position for the employee. The fact that the Supreme Court omitted to mention that the change in the structure must be problematic may

be related to the assumption that an employer chooses the organizational structure that best suits the business.[80] A change in this structure will naturally often entail disadvantages, as structural changes can affect the efficiency and profitability of the company. Therefore, it is not surprising that compelling reasons are required in this case, before the consideration for individual accommodation needs can take precedence over the interests of the business.[81]

When comparing the formulation in aml. Section 10-2, fourth paragraph, regarding significant inconveniences to the Supreme Court's formulation of compelling reasons, I believe it is reasonable to understand that the basic principle remains the same: the employer must accommodate reduced working hours if the employee has a confirmed need, and the employer cannot demonstrate significant or substantial problems. However, in cases where accommodation involves making permanent changes to the organization structure, it is not enough for the employee to simply have a confirmed need. In such cases, the employee must also be able to show compelling reasons for the employer to be obligated to accommodate under Section 4-6. The Supreme Court's ruling can be interpreted to mean that permanent changes in the organization structure inherently involve significant inconveniences for the employer. If so, the formulation of compelling reasons could equally be understood as an exception to the *exception*, allowing the employer, despite significant inconveniences, to still be obligated to accommodate, if the employee can demonstrate compelling reasons. This may also explain why the burden of proof appears to have shifted to the employee when comparing the provision in Section 10-2, fourth paragraph, regarding significant inconveniences for the employer against the employee's need to show compelling reasons under Section 4-6. The assumption that the employer's accommodation obligation under Section 4-6 goes further than that in Section 10-2, fourth paragraph, supports such an

80 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 151.

81 ibid.

understanding. The provision in Section 10-2, fourth paragraph, does not have a corresponding exception in favour of the employee, if the employer can first demonstrate significant inconveniences.

The Supreme Court could have delved deeper into the relationship between the Working Environment Act Section 4-6 and 10-2 fourth paragraph, in order to eliminate ambiguity regarding how the formulation of "compelling reasons" should be interpreted in relation to "significant inconvenience" in Section 10-2 fourth paragraph. Exploring interpretative elements from Section 10-2 fourth paragraph could have shed more light on the content of "compelling reasons". However, the Supreme Court is quick to set aside the provision in Section 10-2 fourth paragraph[82] and proceeds to assess ldl. Section 22.

The Court begins by noting that adjustment of working hours may be a relevant measure under the provision, but the relationship between ldl. Section 22 and aml. Section 4-6 in situations involving permanently reduced work capacity is not specifically discussed in the preparatory works.[83] The Supreme Court then states that the obligation to accommodate under ldl. Section 22 only applies to measures that do not constitute a disproportionate burden. The court further comments on the economic burdens that an employer must accept, as detailed in Proposition 81 L (2016-2017).[84] Despite this, the Court believes that one cannot conclude from this that consideration for the employer's need to determine organizational structure should not be a relevant, albeit not always decisive, consideration, similar to what applies under the Working Environment Act Section 4-6. As far as the Court can see, the same considerations apply in this regard as under the Working Environment Act Section 4-6.[85]

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82 See also Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 153 where the Supreme Court's description of aml. § 10-2 fourth paragraph is referred to as too simplistic.

83 HR-2022-390-A (Widerøe) paragraph 50 with further reference to Prop. 81 L (2016–2017) p. 327.

84 HR-2022-390-A (Widerøe) paragraph 51.

85 HR-2022-390-A (Widerøe) paragraph 51.

The Supreme Court could have placed more emphasis on the fact that in the preparatory works for the Equality and Anti-Discrimination Act, it is specified that the accommodation obligation under Section 22 provides for independent rights, regardless of how far the obligation to accommodate may extend under sector-specific legislation.[86] The clarification is probably related to the fact that the purpose of the accommodation obligation under ldl. Section 22 is different from that which formed the basis for the Working Environment Act accommodation provisions: namely, to ensure equal opportunities for employees with a disability.[87] By not emphasizing the specificity of the accommodation obligation under the Anti-Discrimination Act, the Supreme Court risks interpreting ldl. Section 22 restrictively, by too closely equating it with aml. Section 4-6. This is probably what the legislator intended to avoid when they consciously chose to specify the provision's independent significance in the preparatory works.[88] In the preparatory works for the previously applicable aml. 1977 Section 13 no. 2, the relationship to Section 54 F – now continued in ldl. Section 22 – is discussed in more detail. The ministry states that the Working Environment Act Section 13 (now 4-6) and Section 54 F (now ldl. Section 22) are partly overlapping, since employees with a permanently reduced work capacity will be protected by both provisions. However, Section 54 F goes materially further than Section 13 and imposes on the employer a duty to implement measures so that employees with a permanently reduced work capacity can perform and progress in work and have access to training and other competence development.[89]

The fact that the accommodation obligation under ldl. Section 22 also ensures that the employee can progress in work, rather than

86 Prop. 81 L (2016–2017) p. 223.

87 Ot.prp. nr. 49 (2004–2005) p. 327. See also Engan, Anne-Beth Meidell and Våg, Lasse Gommerud, Oppsigelse ved sykdom og sykefravær. Universitetsforlaget 2020, p. 125.

88 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp 135–162, p. 153.

89 Ot.prp. nr. 104 (2002–2003) p. 45.

just obtain, or retain, work, as regulated by aml. Section 4-6, should have been discussed more thoroughly by the Supreme Court. The provision indicates a more extensive duty than aml. Section 4-6.[90] There are therefore weaknesses in the Supreme Court's assessment of ldl. Section 22 when the Court concludes its evaluation by stating that it cannot see that the Working Environment Act Section 10-2 fourth paragraph and the Anti-Discrimination Act Section 22 imply a different limit for the employer's duty to make adjustments under the Working Environment Act Section 4-6, than the limit on which it had already expressed its opinion, when the provision is applied to the issue in the case. Therefore, the Court is of the opinion that compelling reasons are required before Section 4-6 imposes a duty on the employer to make permanent changes to the organizational structure of the company.[91]

It is uncertain whether the conclusion in the case would have been different if the parties had not agreed in advance that aml. Section 4-6 consumed the provisions of both aml. Section 10-2 fourth paragraph and ldl. Section 22. To some extent, it can be considered established practice, and a common understanding in legal theory, that the provisions overlap to some extent and that aml. Section 4-6 stretches the furthest of them all.[92] Therefore, when the Supreme Court concluded that the duty under Section 4-6 had been fulfilled, there was little indication that the employer would still have a duty to accommodate

90 See Forbudet mot diskriminering på grunn av nedsatt funksjonsevne. Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne – en oppsummering, Likestillings- og diskrimineringsombudet 2014, p. 19. and Ot.prp. nr. 104 (2002–2003) p. 45.

91 HR-2022-390-A (Widerøe) paragraph 52.

92 See Engan, Anne-Beth Meidell, Tilrettelegginsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 pp 135–162, p. 151 ff. and Eidsvaag, Tine, Handlaus gjæte – Vern mot utstøting og diskriminering av arbeidstakere med helseproblemer eller funksjonsnedsettelse. Bergen 2008, p. 389.

under either aml. Section 10-2 fourth paragraph or ldl. Section 22.[93] Nevertheless, it is worth criticizing the Supreme Court, because they could have used aml. Section 10-2 fourth paragraph, while ldl. Section 22 has more interpretative elements in assessing whether the duty was fulfilled under aml. Section 4-6. For example, the Supreme Court did not delve into the various criteria listed as mandatory in ldl. Section 22, on the assessment of whether the accommodation measure constitutes a "disproportionate burden" under the provision. The reason for this may be that the parties did not argue and present legal sources on this because of their agreement.

There was also no mention of ldl. Section 22 implementing central international obligations to protect against discrimination and differential treatment.[94] Here, the decision from the Supreme Court differs from previous practice, where the court has clearly stated that the scope of anti-discrimination protection must be interpreted in light of the EU's Directive on equal treatment in employment.[95]

In Rt-2010-202 (*Kystlink*), which concerned a termination based on the employee's age, the Supreme Court assessed whether the termination violated the prohibition on age discrimination in the then-applicable Seafarers Act Section 33, cf. Section 33B, which at that time implemented Article 6 of the Directive on age discrimination.

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93 However, there is no basis for establishing a general requirement for "compelling reasons" in the interpretation of aml. Section 10-2 fourth paragraph and ldl. Section 22. See Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 155.

94 See the Employment Equality Directive (Directive 2000/78/EC) Article 5, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) Article 4, the European Convention on Human Rights (ECHR) Article 14, the United Nations Covenant on Civil and Political Rights (CCPR), Article 2 paragraph 1 and Article 26, alongside the United Nations Covenant on Economic, Social, and Cultural Rights (CESCR), Article 2. See also Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 154.

95 See Rt-2010-202 (Kystlink), Rt-2011-609 paragraph 72, Rt-2011-964 paragraph 44 og Rt-2012-219 paragraph 46–47.

The judge stated that the Supreme Court had to assess the case independently, based on the same legal sources that would apply if the question had been referred to the EU Court.[96] Norway, as an EFTA country, was not obligated to incorporate the Directive, but chose to implement the Directive as ordinary legislation.[97] The starting point that a question of possible age discrimination must be assessed based on the same legal sources that would apply if the question had been referred to the EU Court has subsequently been followed up and accepted in subsequent judgments.[98] In my opinion, it is logical that the same should apply when the question concerns possible discrimination based on disabilities.

According to Article 5 of Directive 2000/78/EC, the employer should "take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer."

The obligation to make reasonable accommodations aligns with what we find in Section 22 of the Equality and Anti-Discrimination Act. Therefore, in its assessment of Section 22, the Supreme Court should have considered the practices of the EU Court in order to gain a comprehensive understanding of the provision[99] before concluding that Section 22 did not contribute to a different interpretation of Section 4-6 of the Working Environment Act.

2.3.5 *The Significance of EU/EEA Law and Human Rights Conventions*

The EU Court of Justice, in cases C-335/11 and C-337/11 *Skouboe Werge and HK v. Denmark*, has established that a measure under Article 5 of Directive 2000/78/EC may include a reduction in working

96 Rt-2010-202 (Kystlink) paragraph 56.

97 Rt-2010-219 (Kystlink) paragraph 46.

98 See, e.g. Rt-2011-609 paragraph 72, Rt-2011-964 paragraph 44 and Rt-2012-219 paragraph 46–47.

99 As assumed, among other cases, in Rt-2011-609, paragraph 72.

hours.[100] In paragraph 55 of the judgment, it is stated that "it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of that directive." The Court assessed the wording of Article 5, emphasizing that the measures should serve the purpose of the accommodation obligation, namely to remove barriers hindering employees with disabilities from participating in the workforce.[101] The measure should also be suitable such that the employee becomes "capable and available to perform the essential functions of the post concerned."[102] However, the measure must not impose "a disproportionate burden on the employers."[103] In summary, the decision from the EU Court of Justice suggests that, as a general rule, a reduction in working hours is a relevant measure under Article 5 of the Directive, as long as it is *suitable* for reintegrating the employee into work.

The requirement set by the Norwegian Supreme Court in the Widerøe case for "compelling reasons" before the obligation under Section 4-6 of the Working Environment Act necessitates an employer to make permanent changes in the organizational structure, may not necessarily align with the EU Court of Justice's practice.[104] The Norwegian Supreme Court seems to place the burden on the employee, by emphasizing that the crucial factor is whether the employee can demonstrate compelling reasons for the employer to have an obligation to accommodate. This deviates from established practice where an employee who can benefit from adjusted working hours should receive such accommodation, as long as the employer cannot demonstrate significant problems or a disproportionate burden in making the accommodation. Additionally, the Norwegian Supreme Court did not specify that any permanent changes in the

100 Sag C-335/11 og C-337/11 Skouboe Werge og HK vs. Danmark paragraph 55.
101 Sag C-335/11 og C-337/11 Skouboe Werge og HK vs. Danmark paragraph 54.
102 Sag C-335/11 og C-337/11 Skouboe Werge og HK vs. Danmark paragraph 57.
103 Sag C-335/11 og C-337/11 Skouboe Werge og HK vs. Danmark paragraph 59.
104 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 155.

organizational structure must be problematic for the employer in order to negate such obligation, further indicating that the court may not be in line with the EU Court of Justice. Taking the Norwegian Supreme Court's wording literally, "compelling reasons" would be required before an employer is obliged to make permanent changes in the organizational structure, regardless of whether these changes would be detrimental to the employer and even if the employee can document a need for the measure.[105]

In the Working Environment Act, we find provisions that prohibit the discrimination against employees based on political views, membership of workers' organizations, age, as well as employees working part-time or on temporary contracts, see. Section 13-1. The Equality and Anti-Discrimination Act further has provisions that forbid discrimination on other and more general grounds.[106] The right not to be discriminated against is enshrined in the Constitution[107] Section 98 as a fundamental right and is also derived from human rights conventions with precedence in Norwegian law, see the Human Rights Act Section 3, cf. Section 2. Therefore, the duty to accommodate under the Equality and Anti-Discrimination Act Section 22 must be interpreted, not only in line with the EU Council Directive that the provision implements, but also in the light of human rights conventions incorporated into the Human Rights Act. Among them, the European Convention on Human Rights (ECHR) is crucial, along with its related jurisprudence from the European Court of Human Rights (ECtHR).[108] In ECHR Article 14, there is a prohibition of discrimination based on "sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status." The provision is not exhaustive,

105 Ibid, pp. 150 and 155.

106 Engan, Anne-Beth Meidell and Våg, Lasse Gommerud, Oppsigelse ved sykdom og sykefravær. Universitetsforlaget 2020, pp. 113.

107 Kongeriket Norges Grunnlov (Grunnloven).

108 Engan, Anne-Beth Meidell and Våg, Lasse Gommerud, Oppsigelse ved sykdom og sykefravær. Universitetsforlaget 2020, pp. 113-114.

and the ECtHR has, on several occasions, made it clear that "disability" constitutes a ground for discrimination under the article.[109]

In the ECtHR judgment of February 23, 2016, *Çam v. Turkey* – where a woman was denied admission to a music school solely because she was blind - the court established that the rejection amounted to a form of discrimination, because there was no consideration or attempt to accommodate her disability. In paragraph 54, it follows that

> "Article 14 of the Convention does not prohibit a member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article."

The statement highlights a crucial point in discrimination law: differential treatment does not in itself constitute a violation of the convention. An employer, or in this case, the school, may be obligated to accommodate a specific individual – essentially, engage in differential treatment – so that it does not qualify as a breach of the Convention. However, only *unjustified* differential treatment is considered discrimination.

This aligns with the interpretation of the Equality and Anti-Discrimination Act Section 22, in light of the UN Convention on the Rights of Persons with Disabilities (CRPD). In CRPD Article 27, not only is there a prohibition of discrimination, but individuals with disabilities also have an extensive rights to accommodation, both to retain employment and also in other contexts. The Norwegian Discrimination Tribunal, which handles cases related to, among other things, the Equality and Anti-Discrimination Act Section 22, has, on several occasions, held that an employer cannot necessarily reject a job applicant with a disability solely because they can only work

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109 See European Court of Human Rights (13444/04) – Glor v. Switzerland, (51500/08) – Çam v. Turkey and (23/682) - Guberina v. Croatia. See also Engan, Anne-Beth Meidell and Våg, Lasse Gommerud, Oppsigelse ved sykdom og sykefravær. Universitetsforlaget 2020, pp. 113.

part-time.[110] This implies that the employer may have a duty to permanently share a position.[111]

Given that the Supreme Court in the Widerøe case appears to have overlooked the potential relevance of international legal sources in interpreting the Equality and Anti-Discrimination Act Section 22, and consequently the interpretation of the Working Environment Act Section 4-6, the statements regarding the relationship between the accommodation provisions have limited weight.[112] However, this does not diminish the overall significance of the judgment. In the following, I will assess whether the judgment has contributed to clarifying the outer limits of the employer's duty to accommodate in the context of reduced working hours.

2.4 In which cases is the employer obliged to offer reduced working hours as an accommodation measure?

2.4.1 *Overview*

The assessment so far indicates that the employer generally has an individual obligation to accommodate reduced working hours, if the employee has a confirmed need, and the measure is not a significant inconvenience for the employer. If the employer needs to make permanent changes to the organizational structure in order to accommodate, the employee must demonstrate "compelling reasons" for the

110 See LDN-2014-69 and DIN-2018-413, both cases involving the hiring process for a 100% position, where the respective job applicants had a disability, limiting them to filling only a 50 % position. In both cases, the Tribunal found that discrimination had occurred. However, note DIN-2020-244, where it was stated that the Tribunal can only to a limited extent review the assessments that an employer makes of the practical organization of work at the workplace.

111 Eidsvaag Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2, 2022, pp. 3–5.

112 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 156.

employer to be obligated under Section 4-6 of the Working Environment Act, cf. HR-2022-390-A (*Widerøe*).

The formulation of "compelling reasons" is very specific. Firstly, the Supreme Court distinguishes between whether the measure is of a temporary or permanent nature.[113] Secondly, the court seems to formulate the requirement for compelling reasons as applying exclusively to those cases where the reduced working hours depend on changes in the organizational structure.

In the following, I will assess the scope of the employer's duty to accommodate reduced working hours in various scenarios, including whether it involves temporary or permanent reduced working hours, or if there is something specific about the business that allows the employer to demonstrate significant disadvantages.

2.4.2 *The scope of the employer's duty to accommodate reduced working hours*

The scope of the duty to accommodate for reduced working hours will vary depending on the specific situation. The Widerøe case therefore only reflects the scope of the employer's obligations in the particular case at hand and is not directly transferable to other types of situations. However, it is possible to make some general observations about certain aspects of a situation that are likely to influence the scope of the employer's duty to accommodate.

Firstly, the nature of the business can impact the extent of the employer's obligations in accommodating reduced working hours.[114] A business operating in an office environment, where the majority of employees have a considerable degree of control over their daily schedules, is well-positioned to accommodate reduced working hours. In many cases, a reduction in working hours will pose little

113 For comparison, see the court decision in LA-2013-45685 (Barnehageassistent), where the distinction between temporary and permanent accommodation measures is never mentioned.

114 See Ot.prp. nr.49 (2004–2005) pp. 105, 302 and 309 where the nature of the business is presented as a factor in the specific overall assessment that must be made according to aml. Section 4-6.

inconvenience.[115] The fact that one employee works reduced hours will have minimal impact on other staff members, and the reduced working hours can easily be combined with other accommodation measures, such as telecommuting, and allowing the employee to have additional rest and tranquility. To the extent that reduced working hours may affect others in the office, it is primarily in the form of redistributing the remaining workload among other employees. As I will come back to, this adjustment, at least for a period, rarely qualifies as a significant inconvenience for the employer, to justifying a refusal to accommodate reduced working hours.

However, the situation may be different when the company has an established shift schedule that most employees follow. Accommodating reduced working hours for one employee could potentially affect the schedules of other staff members, as the entire shift plan may need to be altered. An example of this can be found in the appellate court's decision in LB-2016-70178-2 (*Norgesbuss*). The case involved a bus driver operating a scheduled bus service, where working hours were determined by a shift plan aligned with the bus routes. The court stated that the employer's actual possibilities for adjustments were limited because the shift plan for all employees would be affected. Therefore, the employer was not obligated to accommodate reduced working hours as a permanent arrangement in the form of a fixed 25% position for the employee.

The ruling in LG-2016-101949 (*Maersk*) is another example of how the nature of the business has influenced the assessment of the scope of the duty to accommodate. Offshore work was physically demanding and characterized by strict routines, which varied from rig to rig. Facilitating part-time work was challenging because substitutes would struggle to familiarize themselves with different routines, and there was no guarantee of having the same substitute for each

115 See Engan, Anne-Beth Meidell and Våg, Lasse Gommerud, Oppsigelse ved sykdom og sykefravær. Universitetsforlaget 2020 pp. 52. Exceptions, however, may be considered when the office employee has a type of work that others in the office are not qualified to take over.

shift. Here, there was a combination of logistical difficulties in planning staffing due to the company's specific need for scheduling and aspects of the company's operations that made it challenging for the employer to accommodate reduced working hours.

The significance of aspects of the business for the scope of the duty to accommodate is partly affirmed in the Widerøe case, where the Supreme Court placed considerable emphasis on the fact that the relevant department was structured in a way that it typically had only one producer per project. If a producer worked part-time, it would take longer from the start to completion, which, in turn, would mean that a part-time employee could not in practice take on urgent assignments, of which there were many, nor indeed larger projects. These projects would have to be taken on by the other multimedia producers. Furthermore, the producers depended on collaborating with clients and content providers, which required a physical presence. It was also pointed out that it was generally challenging to recruit qualified personnel for part-time positions.[116]

The difficulty in filling a position may arise not only when specific qualifications are required, but also when the nature of the position makes it challenging to reduce the hours. This is the case, for example, with managerial positions. In LG-2016-177480, the majority stated that someone in a managerial position must be present at the workplace during working hours to handle their managerial tasks. The court further stated that it is up to the employer to decide how the business should be organized, and the employer must, therefore, be free to return to the organizational structure that has been determined. In that case, the employer had accommodated reduced working hours for a period, but the employer's concerns about having to make this a permanent arrangement were acknowledged.

Throughout legal practice, there is a consistent emphasis on the duration of the accommodation measure, indicating that a permanently reduced working hours arrangement is seen to be more bur-

116 HR-2022-390-A (Widerøe) paragraph 63.

densome for an employer than a temporary reduction.[117] The duration of the measure is also part of the overall assessment underlying the interpretation of the Working Environment Act Section 4-6. It may therefore be useful to consider whether the measure is of a temporary or permanent nature when assessing the extent of the duty to accommodate in each case.

Most employers are probably able to accommodate reduced working hours for a limited period. Some companies can easily allow an employee to work reduced hours with a corresponding reduction in tasks, without compromising the overall functioning of the business. Alternatively, the remaining tasks can be redistributed among other employees. By giving the existing staff some extra work, the company avoids the inconvenience of reducing the overall workload as a result of the absent employee. As a third option, the employer can hire a substitute, relieving other employees from taking on additional tasks. Regardless, the company has several alternative solutions to rely on, and it is therefore assumed that employers are generally obliged to accommodate reduced working hours for a temporary period. This aligns with the premise that an employer should facilitate solutions that minimize the inconveniences for the company.[118] Consequently, the employer must choose the alternative that causes the least inconvenience for the company. If the employer has several alternative solutions, the inconveniences are rarely so significant that the consideration of individual accommodation for one employee must give way.

However, problems can arise when the employee's ability to work does not improve sufficiently, and there is a need for more permanent or long-term adjusted working hours. A company that has coped well with an employee in a temporarily reduced position may not be

117 See e.g. LG-2016-177480, LA-2017-95878 (Brannmann), LB-2016-70178-2 (Norgesbuss) and HR-2022-390-A (Widerøe).

118 See e.g. Tvisteløsningsnemndas sak 21/2006, where the board states that under any circumstance, the employer is obligated to try to facilitate the conditions so that the inconveniences are minimized. This entails, for example, that the employer must be able to document attempts to hire/engage a substitute and/or that alternative ways of organizing the work have been considered.

able to make this a permanent arrangement, because they need the employee back in a full-time position. Allowing other employees to work additional hours is not a permanent solution, and a business may struggle to find qualified personnel for a fixed part-time position to cover the remaining workload left by the employee. There are also cases, as in the Widerøe example, where the company does not have an organizational structure that involves fixed part-time employees, and any permanent adjustment would also require changes to the already established structure.

The problems associated with a permanent adjustment to reduced working hours are assumed to be more significant than the inconveniences a company faces when making adjustments for a shorter period. Nevertheless, the inconveniences of permanent adjustment measures are rarely so great that they exempt the employer from their duty to make adjustments under the Working Environment Act Section 4-6. This was seen, among other instances, in case 21/2006[119] from the Dispute Resolution Board, where the board stated that it is not enough to demonstrate a general inconvenience, such as having to reorganize tasks or find a substitute, and that the employer in such a case must be able to document attempts to hire/engage a substitute and/or that alternative ways of organizing the work have been considered. In other words, the employer must demonstrate significant problems or the like.[120] Significant problems may arise when the employer has several factors that, in combination, make the problems substantial. This was evident in the Widerøe case, where the employer had difficulties not only because it was a permanent measure and finding qualified personnel for the remaining part of the position was challenging. In addition, the employer claimed to have problems with having fixed

119 Tvisteløsningsnemnda Case 21/2006.

120 HR-2022-390-A (Widerøe) paragraph 45, with further reference to Ot.prp. nr. 18 (2002–2003) p. 8 and Ot.prp. nr. 49 (2004–2005) p. 104, where the Court mentions, as an example, significant problems in finding others who can take over the work during the remaining time available.

part-time positions, which would further require permanent changes to the organizational and staffing structure.

The question of whether an employer must accommodate reduced working hours permanently and, if so, whether the accommodation depends on permanent changes to the organizational structure, is a significant factor in determining the extent of the employer's obligations. This is related to the fact that the duty to accommodate under aml. Section 4-6 initially limits the employer's management right, while we are in the core area of the employer's right to organize, lead, control, and distribute work.[121] The majority in the Court of Appeal's assessment of the Widerøe case describes the specific situation as being whether a position should be divided permanently into two halves is, in reality, an organizational and work-related question, largely falling under the employer's management right, and It is difficult for outsiders to override an employer's assessment of the advantages and disadvantages of various ways of organizing the business. For this reason, the court should generally be reluctant to set aside this type of assessment.[122]

The Supreme Court later followed up on the Court of Appeal's statement in HR-2022-390-A (Widerøe), stating that the employer's management right is indeed limited, especially in relation to the employment contract, collective agreement, and legislation, and that it is clear that Section 4-6 also entails an intervention in the management right when the provision, for example, can impose a duty to accommodate part-time work for an employee. However, this does not prevent Section 4-6 from being interpreted in light of the employer's need to determine the organizational and position structure. This, in the Court´s view, is fundamental to how the business should solve its tasks.[123]

The Supreme Court emphasizes that while the duty to make accommodations can limit the employer's management rights, it

121 See Rt-2000-1602 (Nøkk) p. 1609.

122 LH-2021-45977-2.

123 HR-2022-390-A (Widerøe) paragraph 46.

also suggests that the employer's need to exercise a certain degree of control can, to some extent, restrict the scope of the duty to make accommodations.[124] The formulation used in the preparatory work of Section 4-6, on which the employer relied in the case, stating that the employer's obligation does not extend to creating a new position for the relevant employee,[125] is, in the view of the Court, a different limitation on the employer's obligation under Section 4-6 than the one imposed by the outer limit of the direct economic burdens that the employer must bear, namely the limitation that must be made in consideration of the employer's need to manage the business.[126]

The fact that the employer has significant problems finding someone to take over the remaining work of the employee and thus risks economic burdens, is not solely decisive – the employer's need to determine the organizational and staffing structure also matters for the extent of the employer's duty to make accommodations.[127] Nevertheless, there is no basis for establishing absolute limits for the duty to make accommodations.[128] The starting point is, therefore, as always, that a concrete, discretionary overall assessment must be made in each case, as outlined in the preparatory work in Proposition No. 18 (2003-2004).[129] However, in cases like this, there must be "compelling reasons" before the employer is obligated to make accommodations.[130]

Comparing the case in Widerøe to the decision in the lower court case LA-2013-45685 (*Barnehageassistent*) can contribute to further

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124 See also Due, Anne Marie and Vang, Håvard Nybakk, Kommentar til Widerøe-dommen HR-2022-390-A. *Juridika*, 2022, Section 4.1 on the scope of the employer's duty to facilitate.

125 HR-2022-390-A (Widerøe) paragraph 45 with further reference to Ot.prp. nr. 49 (2004–2005) p. 105 and p. 309.

126 HR-2022-390-A (Widerøe) paragraph 46.

127 HR-2022-390-A (Widerøe) paragraph 47.

128 HR-2022-390-A (Widerøe) paragraph 48.

129 Ot.prp. nr. 18 (2003-2004).

130 HR-2022-390-A (Widerøe) paragraph 48.

clarification of the scope of the employer's duty to accommodate reduced working hours in a specific case such as this.

In both cases, the assessment focused on whether the employer's duty to facilitate went so far as to require offering the employee permanently adapted working hours, in the form of a fixed part-time position, as part of the accommodation under the Working Environment Act Section 4-6. In contrast to the situation in Widerøe, which only had full-time positions in the department, the relevant daycare center in the Barnehageassistent case had several part-time positions. Although the employer in the Barnehageassistent case wanted to avoid more part-time positions, the fact that there were already several part-time employees indicated that such a position structure was common at this workplace and that reduced working hours for an employee could be reconciled with the practical and economic operation of the daycare center. This differs from the Widerøe case, where no established structure allowed for part-time work, and the employer did not want to change the structure to make use of part-time work as a permanent solution. We can see that the situations in the two described cases are different in the sense that in the Widerøe case, permanent changes to the organizational structure had to be implemented. It is only in this context, where the organization does not already have part-time positions as part of the position structure, that the Supreme Court states that compelling reasons are required before Section 4-6 imposes a duty on the employer to accommodate.[131]

Therefore, it is not surprising that the Court of Appeal in the Barnehageassistent case concluded that the employer had not fulfilled its duty to accommodate, because they had not offered the employee a fixed part-time position. This conclusion aligns with the fact that the situation falls outside that of Widerøe, where a requirement for "compelling reasons" could be established. The employer in the Barnehageassistent case could not demonstrate the additional burdensome disadvantages of having to deviate from the preferred structure. The primary inconvenience for the employer in the case

131 HR-2022-390-A (Widerøe) paragraph 48.

was merely that an additional part-time position was not desirable from the company's perspective.

2.4.3 *Compelling reasons - a clarification rather than a limitation of the employer's accommodation duty?*

Some have argued that the Supreme Court's formulation of "compelling reasons" in HR-2022-390-A (*Widerøe*) implies a limitation on the scope of the employer's accommodation duty under the Working Environment Act Section 4-6.[132] I will briefly comment on why I believe the Supreme Court, instead, clarifies the extent of the accommodation duty – specifically for cases where accommodation for reduced working hours depends on permanent changes in organizational and position structures.

As mentioned above, the *issue* with the Supreme Court's formulation of "compelling reasons" is that the Court does not specify that the permanent changes in organizational and position structures must be a disadvantage for the employer. The way the formulation stands, the employee would have to demonstrate compelling reasons, regardless of whether or not the structural changes are disadvantageous for the employer. If the Supreme Court intended to establish a requirement for compelling reasons for any change in organizational structures – regardless of whether the change is disadvantageous for the employer – the Court would, in that case, have restricted the scope of the employer's obligations under the Working Environment Act Section 4-6. I do not believe the Supreme Court intended to do so.[133]

In the Widerøe case, it was not necessary to specify that the change in structure had to be problematic for the employer, since the problems that the majority of the Court of Appeal found proven imply, in the Supreme Court's view, that it would be a case of a per-

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132 Due, Anne Marie and Vang, Håvard Nybakk, Kommentar til Widerøe-dommen HR-2022-390-A. *Juridika*, 2022.

133 See also Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 150.

manent change in organizational structures.[134] The statement from the Supreme Court indicates, in my opinion, that the Court took it for granted that the changes in structure would be problematic for the employer, since the "problems" were precisely the reason the Court concluded that it was a "permanent change". The fact that, as a clear general rule, an employer chooses the organizational structure that best suits the business, and that it naturally entails disadvantages for the same employer to change this established structure, further supports the understanding that the Supreme Court, by concluding that the accommodation would involve permanent changes, implicitly meant that the same changes would be a disadvantage for the employer. If such an understanding is adopted, it is not surprising that "compelling reasons" are required before an employer is obliged to make these changes.[135] Otherwise, the consideration for the individual employee would come at the expense of the efficiency and economy of the business, since changing to a less advantageous structure could affect the business operations.

Regarding accommodation for reduced working hours specifically, this is something that can particularly affect other employees in the business. The other employees may experience an increased workload in an attempt by the employer to distribute the additional workload resulting from the reduction in working hours of the particular employee. In this context, the Supreme Court's requirement for compelling reasons, safeguarding the interests of other employees, aligns with previous court decisions. In Rt-1995-227 (*Renovatør*), it was established that the accommodation duty does not go so far as to negatively impact other employees arising from the employer's accommodation for one employee.[136] In HR-2022-390-A (*Widerøe*), the Supreme Court chose to formulate this as a requirement for "compelling reasons", which, in my view, is an appropriate clarification of

134 HR-2022-390-A (Widerøe) paragraph 67.

135 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022p. 151.

136 Rt-1995-227 (Renovatør) p. 232.

a situation that may fall under an overall assessment, according to the Working Environment Act Section 4-6. I find no evidence that the Supreme Court is attempting to restrict the employer's obligations.

The Supreme Court emphasizes, among other things, as a comment on the employer's argument that a permanent reduction of an employee's hours entails the creation of a new position,[137] that the employer may be obligated to take other and more permanent accommodation measures,[138] and that adjusting working hours can be a relevant measure.[139] Furthermore, the Court argues that the indication of reduced working hours as a suitable measure implies an implicit acceptance by the legislature that the employer may be required to find other labour to fill the remainder of the position.[140] When the Supreme Court in the Widerøe case states that a reduction in working hours, as an accommodation measure, can also be of a more lasting and permanent nature, it implies that one cannot generally claim that a reduction in hours entails the creation of a new position, and therefore falls outside the scope of the accommodation duty.

This is confirmed by the Supreme Court stating that the Working Environment Act Section 4-6 can impose a duty to accommodate part-time work for the employee.[141] An employer cannot therefore argue that a permanently accommodated reduced working hours, in the form of a reduced position, is inherently beyond what the employer may be obligated to provide under the Working Environment Act Section 4-6, by claiming that it involves the creation of a new position. Generally speaking, there is no basis for establishing absolute

137 See Ot.prp. no. 49 (2004-2005) p. 105 and p. 309 where it states that the employer's obligation does not extend to creating a new position for the relevant employee.

138 HR-2022-390-A (Widerøe) paragraph 41.

139 HR-2022-390-A (Widerøe) paragraph 42.

140 HR-2022-390-A (Widerøe) paragraph 44.

141 HR-2022-390-A (Widerøe) paragraph 46. This is also in line with lower court practices – see for example LA-2013-45685 (Barnehageassistent) where the Court of Appeals believed the employer had an obligation to offer the employee a part-time position.

limits on the scope of the employer's accommodation duty.[142] What is possible will depend on a concrete, discretionary, overall assessment in each case.[143] Therefore, Widerøe not being obligated to offer a reduced position does not imply a restriction, but was the result of a specific assessment where the employer's disadvantages were crucial. The requirement for "compelling reasons", in my view, is a natural clarification of the overall assessment that must be made - especially in cases where the accommodation duty directly interferes with the employer's right to manage and control the workplace.

When accommodation under the Norwegian Working Environment Act involves changes in the organization and position structure, we are dealing with a specific situation in assessing the scope of the accommodation obligation. While the employer's management rights are indeed limited by the accommodation obligation under aml. § 4-6,[144] changes in the structure of the organization itself affect the employer's need to determine its own organizational and position structure. The ability to determine one's structure is fundamental to how an employer should operate its business.[145] Therefore, it is logical for the Supreme Court to set a requirement for "compelling reasons" before the duty under aml. Section 4-6 obliges the employer to permanently change the organizational and position structure.

The accommodation obligation is, after all, grounded in the consideration of the individual employee's needs. When the specific accommodation measure is assessed against broader organizational considerations in the company, it is clear that the consideration for the individual must yield,[146] especially considering that these organizational considerations also include the interests of other employees.[147]

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142 HR-2022-390-A (Widerøe) paragraph 48.

143 HR-2022-390-A (Widerøe) paragraph 48 with further reference to Ot.prp. nr. 18 (2002–2003) p. 8.

144 HR-2022-390-A (Widerøe) paragraph 46.

145 HR-2022-390-A (Widerøe) paragraph 46.

146 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022 p. 150.

147 Rt-1995-227 (Renovatør) p. 232.

In the evaluation under aml. Section 4-6, the consideration of organizational factors is not a new concept, since the nature of the enterprise is a significant factor.[148] It is self-evident that the interests of the individual employee will not prevail on every occasion. As we have seen, the nature of the enterprise can have a decisive impact, with the result that the employer is exempt from obligations under Section 4-6.[149] In the specific overall assessment, the Supreme Court's requirement for "compelling reasons" does not imply a limitation of the employer's obligations, but instead emphasizes that the employee, in cases where accommodation depends on permanent changes in organizational and position structure assumed to be a significant disadvantage for the employer, must demonstrate "compelling reasons" before the employer is obliged to make the specific changes.

3 Concluding reflections on the judgment and its scope

The Norwegian Supreme Court had the opportunity, for the first time in 27 years, to establish a precedent regarding the scope of the employer's duty to accommodate under the Norwegian Working Environment Act Section 4-6 and the obligation to offer reduced working hours. However, the court cannot be said to have taken full advantage of this opportunity.

In assessing the duty to offer reduced working hours, two general principles must be considered by the legal interpreter: whether the facilitation involves the creation of a new position, and whether the implementation of reduced working hours for one employee will come at the expense of the company's other responsibilities and obligations.[150]

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148 Ot.prp. nr.49 (2004–2005) pp. 105, 302 and 309.

149 Refer to the court decisions in LB-2016-70178-2 (Norgesbuss), LG-2016-101949 (Maersk), LA-2017-95878 (Firefighter), and HR-2022-390-A (Widerøe).

150 Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1 2022, p. 145.

The Supreme Court did not address whether the specific measure involved the creation of a new position, but spent considerable time explaining whether the employer could also be obliged to take more permanent facilitation measures, such as offering a fixed part-time position to the employee. This assesses the Working Environment Act Section 4-6 as being more complex than it needed to be considered.

The previously applicable provision in the 1977 Working Environment Act Section 13 no. 2 originally applied to occupationally disabled employees – those who were inherently impaired in their profession.[151] It is not a new requirement that an employer may be obligated to take more permanent facilitation measures, and that reduced working hours can be a relevant measure. This is confirmed by the possibility for employees to combine reduced working hours with graded disability benefits, such as permanent benefits like disability pensions.[152]

The limitation that the employer is not obligated to create a new position is therefore not related to the duration of the facilitation measure, but is in practice intended to limit cases where the employer does not need to create a new position.[153] When facilitating reduced working hours, the employer will be left with an uncovered labour need. Therefore, an employer cannot argue that a permanently reduced working time for one employee implies the creation of a new position, thus exempting the employer from obligations under the

151 Eidsvaag Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2, 2022, pp. 3–5.

152 ibid.

153 ibid. See also Engan, Anne-Beth Meidell, Tilretteleggingsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022, p. 148 which states that there is still no basis for implying a presumption that the employer must offer a reduced position if it results in the employer needing to fill the remainder of the position.

Working Environment Act.[154] The fact that the Supreme Court dedicates so much space to something that is relatively clear is not only unnecessary, but also confusing for legal interpreters. It is challenging to draw general conclusions from what the Court states that would be valuable in future cases concerning the facilitation of reduced working hours. This limits the scope of the judgment.

The same must be said about the Supreme Court's further consideration, where the consideration of the employer's need to determine organizational structures is brought in and interpreted, taking into consideration the limitation against creating a new position. The fact that organizational considerations, along with a broad spectrum of factors, can play a role in the specific assessment of the employer's obligations under Section 4-6 of the Working Environment Act, is clear.[155] Furthermore, it is entirely clear that the duty to make adjustments must also be interpreted in light of the employer's managerial rights, such that the employer's obligations to all employees in the company can limit managerial rights and thus how far the employer can go in accommodating a single employee.[156] The Supreme Court could, with advantageous, have expressed itself on this briefly and succinctly, in order to avoid creating uncertainties about the cases for which such considerations would be relevant.

The scope of the judgment is, however, most uncertain concerning the formulation of the requirement for "compelling reasons." The Supreme Court has established a requirement without a convincing legal basis,[157] and there are general questions about whether the Court's attempt to specify the limits of the duty to make adjustments

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154 Eidsvaag Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2, 2022, pp. 3–5.

155 Ot.prp. nr.49 (2004–2005) pp. 105, 302 and 309, and Prop. 89 L (2010–2011) p. 13.

156 Prop. 89 L (2010–2011) p. 14. See also, Rt-1995-227 (Renovatør).

157 See also Eidsvaag Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2, 2022, pp. 3–5.

is successful. When the Supreme Court's consideration is limited, and it is further assumed that a change in the company's structure will be a disadvantage for the employer, and the Supreme Court also then *forgets* to clarify that the change must be problematic, there is a clear limit on the cases where a requirement for "compelling reasons" can be established based on the judgment in HR-2022-390-A (Widerøe). It is generally challenging to extract legal principles from a decision where a concrete overall assessment must be made.[158]

The Widerøe judgment's limited legal weight can also be attributed to the fact that the Supreme Court entirely disregards international conventions and directives, including EU Council Directive 2000/78/EC, which has been implemented in the Norwegian Equality and Anti-Discrimination Act Section 22. In the context of the Widerøe case, which involves a request for reduced working hours due to a disability, the Supreme Court's failure to consider or reference such international standards raises questions about the judgment's completeness and alignment with broader human rights principles.

The Equality and Anti-Discrimination Act in Norway, which incorporates the EU Directive, should be interpreted and applied consistently with the Directive's objectives. The failure to explicitly consider these international standards in the judgment could be seen as a limitation in the court's analysis and may impact its broader legal significance and relevance in other similar cases.

To the extent that something can be extracted from the judgment, it is this: reduced working hours are highlighted, not only in the preparatory works, but also by the Supreme Court, as a possible suitable adjustment measure. The judgment also indicates that the employer's other obligations may be relevant in assessing the scope of the employer's duty to make adjustments under Section 4-6 of the Working Environment Act.

However, too much weight should not be placed on the Supreme Court's statements about the employer's need to determine organi-

158 Engan, Anne-Beth Meidell, Tilrettelegginsplikt og stillingsvern ved redusert arbeidsevne. *Arbeidsrett*, Volume 19, Issue 1, 2022p. 161.

zational structures. In the Supreme Court's assessment of the duty to offer reduced working hours, it appears that the Court emphasizes it as a type of business management that the Court should be hesitant to scrutinize.[159] However, the duty to make adjustments under Section 4-6 of the Working Environment Act involves individually tailored measures for a single employee, suggesting a high level of scrutiny.[160] Therefore, the Court's statements about the employer's need to determine its structure should be read with caution. Consequently, I believe that the overall scope of HR-2022-390-A (Widerøe) is limited, even though judgments from the Supreme Court inherently carry significant legal weight. The reason the judgment should not be given too much weight beyond comparable cases is that the assessment of the employer's duty to make adjustments depends on a concrete discretionary overall evaluation. The Supreme Court had a great opportunity to clarify the position generally - but failed to do so – and that as a result the particular judgment has no greater weight or use than just being an individual judgement.

159 See also Eidsvaag, Tine, Multimedieprodusent: oppsigelse på grunn av redusert arbeidsevne – arbeidsgivers plikt til å tilrettelegge arbeidstid – HR-2022-390-A. *Nytt i privatretten*, Issue 2,2022, pp. 3–5.

160 ibid.