Ankenævnet for Forsikring

Den 7. oktober 2015 blev i sag nr. 87596:

xxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxx

mod

Alpha Insurance A/S
Sundkrogsgade 21
2100 København Ø

afsagt

k e n d e l s e :

_____

Forsikringstageren har tegnet arbejdsløshedsforsikring i Alpha Insurance A/S. Han klager over selskabets afslag på at yde dækning i forbindelse med, at han er blevet arbejdsløs.

Selskabet har i sin afgørelse henvist til, at klagerens arbejdsløshed skyldes manglende evner til at udføre arbejdet.

Klageren blev i brev af 12/4 2012 opsagt af sin arbejdsgiver. I brevet er det bl.a. anført:

"**Reference:** Termination of your Employment.

I refer to your disciplinary meeting on 2 April 2012 at which you chose not to be accompanied.

The purpose of the disciplinary meeting was to:

(a) discuss … email in which he raised serious concerns about your workmanship and completion times and stated he could no longer continue to work with you; and

(b) give you the opportunity to put forward your case

I have now had the opportunity to consider the matter at some length.

I agreed with you that you could furnish me with further information which you wanted me to consider by close of play on 5 April 2012 but I have not received anything from you.

You accepted during the disciplinary hearing that your workmanship had been poor and that you failed to meet completion times. I spoke with … following the disciplinary hearing and he has confirmed that at no time did you inform him that you would not be able to finish the 6 units in 16 hours.

As you are aware, [firma] is our biggest client and they have expressed serious concerns about your standard of work and confirmed they no longer want you working with them. I have endeavoured to persuade them to allow you to continue working with them but they have refused due to concerns about your standard of work which places us in a very difficult position. I have considered redeployment and possible alternatives within the Company but unfortunately, no such positions exist at present and there is no other work which can be offered to you. Regrettably, [firmas] refusal to allow you to work with them means I have no alternative but to terminate your employment with us.

I therefore regret to inform you that your employment will terminate on Friday 13th April 2012. You will be paid in lieu of your notice and any accrued holiday pay owing to you. Please contact … to arrange the return of the company van and mobile phone within 24 hours of receiving this letter.

You have the right to appeal the Company's decision to terminate your employment, in writing to … within five working days from the date of this letter, explaining clearly the grounds on which you wish to appeal."

I et forlig mellem klageren og arbejdsgiveren af oktober 2013 hedder det bl.a.:

"**Advisory, Conciliation and Arbitration Service**
Agreement in respect of an Actual or Potential Claim to the Employment Tribunal
…
Settlement reached on 10/12/12 as a result of conciliation action.

We the undersigned have agreed:

1. Without admission of liability, the Respondent will pay £1,800 in full and final settlement of all claims arising out of the Claimant's employment with the Respondent or its termination. The settlement payment will be paid within 10 days of the Respondent's representative receiving this agreement signed by or on behalf of the Claimant. The payment of £1,800: is in full and final settlement of all claims that either party may have in relation to the claimant's contract of employment save for any personal injury claims which the claimant could not reasonably have known about at the date of signing this agreement and any accrued pension rights.

2. The Respondent will provide the following reference for the Claimant: '[klageren] was employed by us from 6 August 2007 until 13 April 2012. He was employed to carry out general building maintenance for our client …. He had a good attendance record and we had no reason to question his integrity.'

3. The parties agree that the attached Schedule is a fair statement of the events which resulted in the Claimant's dismissal.
…
Schedule

1. The Claimant was asked to build three cabinets to house meters.

2. He gave a quote for carrying out the work including a timescale to carry out the work.

3. Immediately before the job was to be carried out he was informed that he required to complete six cabinets and the representative from … gave different specification that was required for the cabinets. The Claimant indicated to, … and … that he would see what he could do to build the six cabinets of a different specification within the original time limit.

4. The Claimant understood that the work required to be completed in the same timetable.

5. The Claimant spoke to … on 10 February 2012 just as the Claimant had started the work. … stated on several occasions that he had quoted to do the cabinets in the time he had given on the quote. The Claimant felt that he required to do so. In attempting to do so errors were made with the finish of the cabinets. The original drawings were for single doors whereas the new specification required double door cabinets which were of a completely different design and which required a greater degree of skill and time. The mistakes arose as a result of the Claimant's genuine belief that the aforesaid cabinets required to be completed within the same timescale given in his quote for the three cabinets. Any errors arose due to the unrealistic timescale for completion the Claimant genuinely believed he required to work to.

6. The customer was unhappy with the finish and indicated to the Respondents that they did not wish the Claimant to work on their sites again.

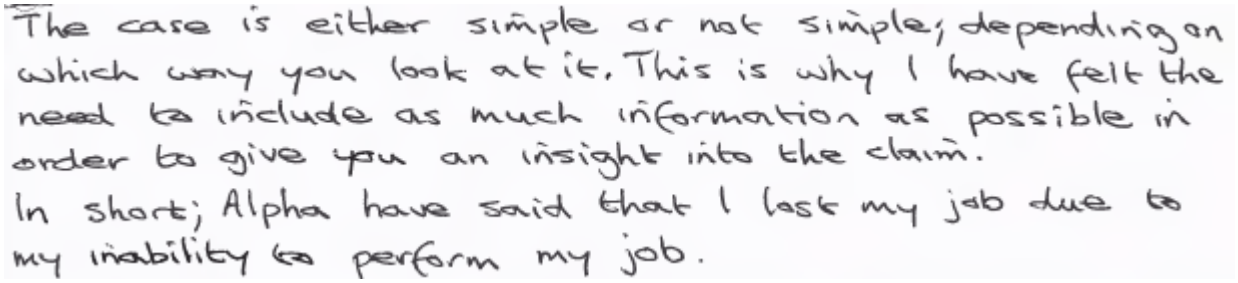
6a At a disciplinary hearing it was agreed that I [klageren] could have built these cabinets more satisfactorily given extra time.

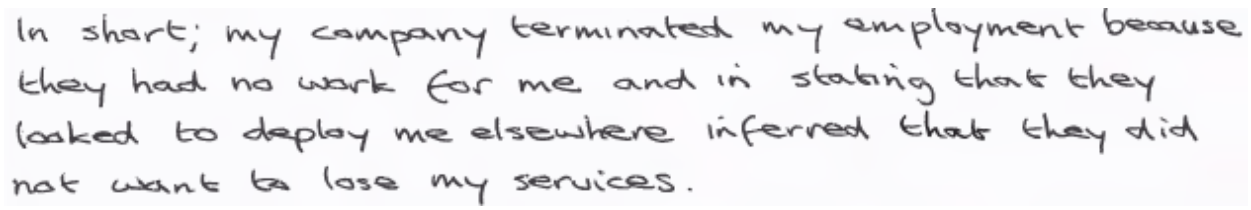
7. The Respondents had no option but to comply with the customer's request.

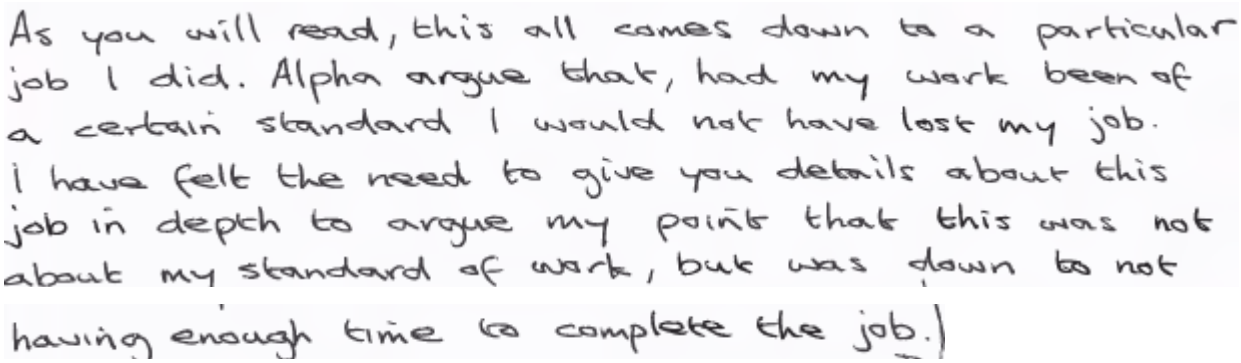
8. The Respondents thereafter sought to find alternative work placement for the Claimant. None could be found.

9. The Respondent having no work for the Claimant dismissed the Claimant with notice."

Klageren har i indlæg for nævnet af 28/5 2015 bl.a. anført:


The case is either simple or not simple; depending on which way you look at it. This is why I have felt the need to include as much information as possible in order to give you an insight into the claim.
In short; Alpha have said that I lost my job due to my inability to perform my job.


In short; my company terminated my employment because they had no work for me and in stating that they looked to deploy me elsewhere inferred that they did not want to lose my services.


As you will read, this all comes down to a particular job I did. Alpha argue that, had my work been of a certain standard I would not have lost my job. I have felt the need to give you details about this job in depth to argue my point that this was not about my standard of work, but was down to not having enough time to complete the job.)

I selskabets brev af 16/6 2015 til nævnet hedder det bl.a.:

> "[Klagerens] policy commenced on 13th February 2009, but through a different insurer. Alpha Insurance A/S (Alpha) became his insurer on 15th February 2011 until the policy was cancelled on 17th June 2013 and the total premium paid to Alpha was GBP 1,344.28.
> …
> Our rejection of [klagerens] claim is in accordance with Unemployment Benefit Exclusion 9.8 in his policy. It is explained in the letters sent to him by … on 9th and 12th July 2013, as well as the letter terminating his employment from … dated 12th April 2012 and the ACAS Agreement in connection with settlement reached on 10/12/12. (Copies of which have been supplied to Ankenævnet for Forsikring with the complaint).
>
> [Klageren] has been very thorough in putting forward full descriptions of his role at the company … and the task(s) which led to his dismissal. However, [klagerens] version of events is not substantiated by any official documentation other than the ACAS agreement. We as insurers are not in any position to evaluate the description of events leading up to his dismissal and it is outside the scope of our ability to judge whether the actions of his employer were reasonable or not.
>
> We can only deal with the facts as presented to us. Our position has already been explained in reply to a letter from [klagerens] solicitor to Alpha via … dated 28th April 2014 (Attachment 2) that we replied to on 1st May 2014 (Attachment 3):
>
> Fact 1.
> Unemployment benefit is not payable under the insurance policy purchased by [klageren], when dismissal is due to the insured's inability to perform any elements of his job. The original letter of dismissal sent to [klageren] by … dated 12th April 2012 cites 'poor workmanship', 'failure to meet completion times' and 'concerns' about [klagerens] standard of work.
>
> Fact 2.
> The ACAS agreement signed by [klageren], states under point 5 of the Schedule that 'errors were made with the finish of the cabinets' and under point 6 of the Schedule that, 'The customer was unhappy with the finish and indicated to the Respondents that they did not wish the Claimant to work on their sites again.' Unfortunately, we must still conclude that [klagerens] employment was actually terminated due to his inability to perform elements of his job.
>
> On the front page of the ACAS agreement we note that:

1. The payment made to [klageren] by his former employer is in settlement of 'all claims arising out of the Claimant's employment with the Respondent or its termination'.
2. The promised reference to be given to [klageren] seemingly deliberately makes no mention of his workmanship, the standard of his work or completion times.
3. In signing that agreement, [klageren] has agreed that the Schedule provides a fair statement of the events leading to his dismissal.

[Klageren] makes the point in Page 1 of his 'Final Pages' document that he had expected the terms of this ACAS agreement to have been changed from the draft format, before the matter was settled and the document signed. If that is indeed the case and the document is not a true reflection of the intention of the parties thereto, he may well have a claim against his solicitors for negligence and he should look to them for appropriate compensation and not to Alpha. Perhaps he is already pursuing this route in the 'separate matter' he refers to.

Despite [klagerens] arguments to the contrary, we are still of the opinion that his claim has been properly rejected, fully in accordance with the terms and conditions of his insurance policy with our company and we look forward to receiving the decision of Ankenævnet for Forsikring on this matter."

Parterne har herefter haft yderligere indlæg for nævnet.

Nævnet har fået forelagt sagens bilag, herunder klagerens redegørelse for hans ansættelsesforløb hos arbejdsgiver og hans opfattelse af baggrunden for opsigelsen.

Af forsikringsbetingelserne fremgår det bl.a.:

"**CETA PAYMENT PROTECTION INSURANCE**
Policy Terms and Conditions

1. Introduction
1.1. This document outlines the details of the CETA Payment Protection Insurance policy. The policy provides cover if **You** become **Incapacitated** (Accident & sickness) or **Unemployed.** However, **You** are only covered as long as **You** meet the conditions of eligibility described below and **You** have paid the required **Monthly Premium** for the level of cover **You** have chosen.
…
5. Definitions
Wherever the following words appear in the document they will have the following meanings:
…
5.32. **Unemployment, Unemployed -** being out of **Work** and registered as **Unemployed** with **Your** local Job Centre Plus office or the Department for Social Development in …. **You** must be available for and actively looking for a **Work** and able to provide third party documentation as requested to support this each month. **We** will not consider **You** as **Unemployed** for any day **You** receive **Payment in Lieu of Notice.**
…
8. Involuntary Unemployment Benefit
Unemployment protection is optional — **You** are only eligible for the **Monthly Benefit** as detailed on **Your** policy schedule providing **You** have met the eligibility requirements and **You** have paid the correct **Monthly Premium.**
…

9. Unemployment Benefit Exclusions
You will not receive **Unemployment** or **Incapacity** benefits in the following circumstances:
...
9.8. dismissal due to the inability to pass a probationary period or perform any elements of **Your** job;"

Nævnet udtaler:

Det fremgår af sagen, at klageren var ansat hos arbejdsgiveren fra 6/8 2007 til 13/4 2012, hvor han blev opsagt. Ifølge arbejdsgiverens brev af 8/4 2012 blev klageren opsagt som følge af, at en stor kunde havde været utilfreds med hans arbejde og frabad sig, at klageren arbejdede yderligere for kunden. I oktober 2013 indgik parterne imidlertid - i forbindelse med en fagretlig behandling af afskedigelsen – et forlig, hvorved arbejdsgiveren forpligtede sig til at betale £ 1.800 til klageren. Til forliget var vedhæftet et bilag, som begge parter anerkendte som den korrekte beskrivelse af det forløb, der førte til klagerens afskedigelse. Det er heri anført, at klageren kunne have lavet arbejdet tilfredsstillende, hvis han havde fået den fornødne tid.

Selskabet har gjort gældende, at klagerens arbejdsløshed er omfattet af undtagelsen i betingelsernes punkt 9.8 vedrørende "dismissal due to the inability to perform any elements of your job".

Klageren har gjort gældende, at de fejl, som kunden klagede over, ikke skyldtes "inability to perform", men en urealistisk tidsramme som følge af, at opdraget blev ændret, og at arbejdsgiveren "had no option but to comply with the customer's request". Videre har klageren gjort gældende, at arbejdsgiveren forsøgte at omplacere klageren, der dog ikke havde arbejde til at beskæftige ham andet steds.

Vilkåret i punkt 9.8 er en undtagelsesbestemmelse, og selskabet har derfor bevisbyrden for, at opsigelsen skyldtes klagerens manglede evner/dygtighed til at udføre sit arbejde.

Efter en gennemgang af sagen og en samlet vurdering finder nævnet, at selskabet ikke har bevist, at klageren blev afskediget på grund af manglede evner/dygtighed til at udføre sit arbejde. Selskabet har derfor ikke været berettiget til at afvise klagerens krav på dækning ved arbejdsløshed med henvisning til betingelsernes punkt. 9.8.

Nævnet har blandt andet lagt vægt på, at der efter klagerens opsigelse blev indledt en sag ved The Employment Tribunal. Dette resulterede i et forlig, hvorved arbejdsgiveren anerkendte, at klageren "could have built these cabinets more satisfactorily given extra time", at arbejdsgiveren "sought to find alternative workplacement for the Claimant. None could be found.", og "having no work for the Claimant dismissed the Claimant with notice.". Arbejdsgiveren skulle endvidere betale £ 1.800 til klageren.

Som følge heraf

b e s t e m m e s :

Selskabet, Alpha Insurance A/S, skal yde dækning i overensstemmelse med betingelserne. Forfaldne ydelser skal forrentes i henhold til forsikringsaftalelovens § 24.

Marianne Højgaard Pedersen
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