

Supreme Court

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Prohibition of discrimination based on obesity

Diary number: S2015/803

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Background and the issues to be decided

The plaintiff had worked as a bus driver for the defendant company for approximately one and a half years, under three fixed-term contracts. During her employment, A had visited the company's occupational health physician several times, but had not received a certificate of fitness for the job, due to her being overweight. At the end of the third fixed-term contract, the employment had not been extended. According to the action, the company had discriminated against A in recruitment, on the basis of her being overweight and of unfounded doubts about her state of health.

The first issue to be decided was which prohibited ground the alleged discrimination was based on. Next, it was necessary to assess whether A had submitted evidence on the basis of which the presumption could be made that prohibited discrimination had taken place in recruitment. Thirdly, if a prima facie case of discrimination had been established, it was necessary to assess whether the respondent company had been able to demonstrate that there had been no breach of the prohibition. The final issue concerned the amount of the possible compensation.

Which prohibited ground the alleged discrimination was based on

The grounds for discrimination prohibited by section 6, subsection 1 of the Non-Discrimination Act (21/2004), which applies in the case, are inter alia health, disability and other personal characteristics. These grounds for discrimination are contained also in the list of prohibited grounds of discrimination in section 8, subsection 1, of the Non-Discrimination Act (1325/2014) currently in force.

A had claimed that she had been discriminated against on the grounds that she was overweight. In the assessment of the alleged grounds for discrimination, it was necessary to distinguish primarily whether this was a question of health, disability or other personal characteristics. Of these three grounds, disability was covered by Union law.

The Supreme Court noted that at the time that A had been employed by the company, she had been overweight in a way that fulfilled the criteria of diagnosis code E66 of the World Health Organization's International Classification of Diseases (ICD-10 Classification). The fact that A was overweight therefore filled the criteria for illness. However, A had worked as a bus driver for over a year and no health-related impediments had been noted in her work performance at the time. According to her first occupational health certificate, A had been fit to work as a bus driver provided that her health was monitored. After that, according to the statements of the company physician, her occupational fitness had not been evaluated. The Supreme Court held that, in those circumstances, A's overweight could not be deemed to be a disability specified in the case-law of the European Court of Justice, and that for this reason the situation referred to in the action did not fall within the scope of application of Union law. In turn, the conduct of the company alleged by A was to be assessed as a possible case of discrimination on the grounds of health.

Although the case did not fall within the scope of European Union law, the Supreme Court held that Union law and the case-law of the European Court of Justice may have an indirect effect. For example, there are justified grounds to interpret the provision of the Anti-Discrimination Act dealing with the burden of proof in accordance with consistent principles, irrespective of whether it was a question of grounds for discrimination referred to in Union law or grounds for discrimination based solely on national law.

Establishment of a prima facie case of discrimination

A's action had been based on the allegation that the company had not renewed her employment contract because she was overweight, and that she had thus been discriminated against on the basis of her health. The Supreme Court held that in such a situation, it was justified to consider as the point of reference the hypothetical situation in which A would not have been overweight and would have been provided with a certificate attesting that she was fit for the job. In so doing, the prima facie case of discrimination presupposed that, in the light of what had been established in the case, the court would have cause to formulate the presumption that there was a causal link between A's state of health and the unfavourable manner in which A was treated in the recruitment process.

A had submitted evidence in the case that company practice had been to hire on a permanent basis or renew the contracts of drivers who had previously been employed by the company, without the drivers needing to apply separately for the position. Also A's employment contract had been renewed two times previously, without a separate application process. In addition, the company had known that A had been willing to continue to work for the company. Prior to the end of her last contract, A had discussed with her superiors about continuing to work, and it was then that when A had been informed that the company required that every driver seeking a permanent position obtain a certificate attesting to his or her fitness for the position. A had submitted evidence that, in seeking such a certificate, she had made an appointment with the company physician before the end of the last contract. However, the company physician had not agreed to provide such a certificate and had said that an occupational health consultation had to be arranged before her fitness could be assessed. A had submitted evidence that she had requested such an occupational health consultation before the end of her last fixed-term employment contract, but the company had not agreed to this. The company had known that A was overweight as stated above. There had been no allegations that there had been shortcomings in the work performance of A as a bus driver. In addition, A had submitted evidence that several drivers had been hired both before and after the end of her last employment contract. Thus the company had had a need for labour.

The Supreme Court held that A had submitted clear evidence in the case on the basis of which it could be assumed that she had been treated less favourably in recruitment than other persons would have been in a comparable situation, which in turn established the presumption that she had been discriminated against specifically on the basis of her health.

Disproving the prima facie case of discrimination

The Supreme Court held that in principle the employer was entitled to choose the most suitable applicant for a vacant position. However, the employer could not base this decision on discriminatory grounds. The company had to submit evidence that the failure to select A for open positions would have been based solely on objective, non-discriminatory factors.

The Supreme Court noted that an employer is obliged to ensure that the Employment Act and the Non-Discrimination Act are complied with. Since ultimately it was the company itself that bore the responsibility for the non-discriminatory treatment of workers and job applicants, it should not have bypassed A in the recruitment of drivers solely on the grounds that the company physician had not provided her with a certificate stating that she was fit for the position. If the company required a certificate of fitness for the job as a prerequisite for a permanent position, it should to the extent possible have sought to ascertain why such a certificate had not been issued and whether, in view of that reason, the company had legal justification for not renewing the employment contract or for not recruiting the employee for a new position. It is also possible that there were underlying factors on the basis of which the person in question should receive protection against discrimination on the grounds of disability. In such a case, the employer's obligations included, among other things, clarification of the need for reasonable accommodation in accordance with the Non-Discrimination Act. The Supreme Court held that A's treatment had not been based on the nature of the work duties or on the actual and decisive requirements for their performance.

The employer had sought to disprove the presumption of discrimination also by invoking road safety. According to the company, road safety requires that the health of the employee and also the employee more generally should be suitable for work as a bus driver. The Supreme Court held that the mere claim that the health of A would pose a risk to road safety was not sufficient to disprove the prima facie case of discrimination.

The company had further claimed that the employee's state of health plays a very important role also in respect of coping at work and work performance. In the circumstances at hand, treating individuals differently solely on the basis of a suspicion that being overweight might affect an employee's work performance in the future could not be considered proportionate.

For these reasons, the Supreme Court held that the company had not demonstrated that there had been no breach of the prohibition of discrimination. The company therefore was to be deemed to have discriminated against A on the basis of her state of health and was ordered to pay damages to A.

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