

SUMMARY

2015/22 Job applicant may lie when asked about spouse's gender and political activity (FI)

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Facts

The defendant in this case was an independent newspaper company. On 1 September 2008 it

signed an employment contract with the plaintiff for the position of editor-in-chief, to commence in December 2008. On 26 September 2008, the company's managing director received an anonymous text message, stating that the new editor-in-chief's spouse was a candidate in the municipal election and that the spouse was of the same gender as the plaintiff.

The company arranged a meeting with the plaintiff on 29 September 2008. It turned out that the plaintiff had lied about her spouse's political activities in the job interview when asked about it, and that she had not corrected everybody's assumption that her spouse was a man. The plaintiff was told that the company could not continue the employment relationship due to the plaintiff's dishonest conduct. The details regarding the termination - means, timing and compensation - were left open.

In a judgment delivered by the Court of Appeal of Helsinki on 18 March 2010, the termination was held to be unjustified and the company was ordered to pay six months' salary for unjustified dismissal, salary for the notice period and € 5,000 as compensation for discrimination under the Non-Discrimination Act. The Supreme Court did not grant leave to appeal and the Court of Appeal's judgment remained final.

After the Court of Appeal had issued its judgment, the prosecutor filed criminal charges for discrimination at work¹ against the the defendant. The prosecutor claimed that the defendant had terminated the employment when it found out that the plaintiff's spouse was a woman and that the spouse was politically active, and consequently put the employee at a particular disadvantage because of her family relations and sexual orientation without justified and compelling grounds.

Contrary to the civil case, the criminal case was litigated all the way to the Supreme Court.

In its defence the company claimed that the employment was terminated due to significant lack of trust. The employee had announced the news of her appointment prematurely, had lied about her spouse's political activities, had not corrected the mistaken assumption regarding her spouse's gender and had issued a press release concerning her dismissal.

Judgment

The Supreme Court considered firstly what constitutes discrimination based on family relations under the Finnish Criminal Code. The concept of family relations is not clarified either within the wording of the provisions or the Parliamentary history of the Criminal Code. The lower courts had considered that family relations in this context referred to, for example, whether the employee is married and whether he or she has children, and that asking a

candidate about her spouse's political activities is not the same as asking her about her family relations, and is therefore not discriminatory.

The Supreme Court noted that when interpreting the discrimination grounds provided in the Criminal Code, guidance can be drawn from how the principle has been interpreted elsewhere in the legislation. However, it follows from the principle of legality that the provision may not be interpreted in a manner that would be contrary to its purpose or lead to unexpected results.

The Supreme Court evaluated the concept of family relations further by referring to the ECJ's judgment in *Coleman* (C-303/06), which introduced the concept of associative discrimination (i.e. in connection with less favourable treatment of a non-disabled person by the employer, on grounds of her association with a disabled person). The Supreme Court held that the principle of legality does not preclude an interpretation according to which discrimination based on family relations can be held to occur in situations where a family member has a characteristic that is listed in the Criminal Code, or where a family member's activities or opinions are the basis for discrimination.

The Supreme Court found that the employee's spouse's political activities had evidently contributed to the grounds for termination of employment. The Supreme Court further held that the employee's candidacy for a position as editor-in-chief of an independent newspaper did not justify asking questions regarding her spouse's political activity. Consequently, the company had placed the plaintiff at a particular disadvantage based on family relations when it terminated her employment after finding out about her spouse's political activities.

Secondly, the Supreme Court assessed whether the plaintiff had been placed at disadvantage because of her sexual orientation without justified and compelling grounds. The Supreme Court considered that there was no doubt that the employee's spouse's gender had affected the termination of employment. The Supreme Court also found that information regarding the employee's spouse's gender was information that the employer did not have a right to or need to know. If the employee had disclosed her spouse's gender, she would also have disclosed information about her sexual orientation, which she had no obligation to do. The Supreme Court concluded that there was no justified and compelling reason for the employer to demand such information. Contrary to the Court of Appeal, the Supreme Court considered that this was a case of direct discrimination, rather than indirect discrimination.

The Supreme Court raised the fines imposed on the defendant from 15 'daily fines' to 40, which in Euros meant an increase from € 6,750 to € 18,040.

Commentary

This is the first time that the Supreme Court has ruled on an employee's dishonest conduct in a situation where the employer had asked unnecessary questions in a job interview. The Parliamentary history states that in such cases the employee is entitled to give 'insufficient' answers, and legal scholars have different interpretations as to what this means. This case confirms that employees may even lie if employers require unnecessary information from them.

This is also the first time that the Supreme Court has addressed the issue of what constitutes discrimination based on family relations. The Supreme Court followed the principle of associative discrimination established in *Coleman* and related it to discrimination based on family relations.

Comments from other jurisdictions

Austria (Daniela Krömer): The general notion under Austrian dismissal law is that concealing facts that have no implications for the employment relationship does not constitute grounds for immediate dismissal. This concerns information about previous employers, criminal records and pregnancies. Even information about disability – which the employee is generally required to give so that the employer can accommodate his or her needs – can be withheld if the disability does not impact on the employment relationship (Austrian Supreme Court 9 ObA 240/02p). The general consensus is that summary dismissal on grounds that information regarding sexual orientation or a person's spouse has been withheld, is unlawful. This would entitle the employee to compensation for failure to give notice and may be a basis for a claim for reinstatement.

Belgium (Isabel Plets): Belgian case law accepts that an employee:

has the right to lie when an employer or recruitment agency asks private questions, but has an obligation to speak if the questions are relevant to the job applied for.

The latter is rare, but could occur, for example, if an employer recruiting window cleaners for skyscrapers asks a candidate if he or she suffers from epilepsy. Not revealing this could be a reason to nullify the employment agreement or to dismiss the employee for serious cause.

Germany (Dagmar Hellenkemper): The same applies in Germany. It is unlawful to ask questions about pregnancies, sexual or political orientation unless the employer has a legitimate interest in asking those questions (e.g. when recruiting people to work in a laboratory in which pregnant women should not work for health reasons). Even so, employers often pose irrelevant questions in job interviews, sometimes simply to see how a

candidate will react. The difficulty for candidates is that if they say “you are not supposed to ask me that”, it can look as though they have something to hide. German jurisprudence therefore allows applicants to lie. Terminations based on lies of this kind in job interviews are deemed invalid.

The Netherlands (Peter Vas Nunes):

1. As I read this judgment, the employee was dismissed for two reasons:

she lied about her spouse’s political activity;
she misrepresented her spouse’s gender.

This led to prosecution for discrimination on the ground of family relations. If I had been the prosecutor I would have considered three types of discrimination:

- a. family relations: by asking about the candidate’s spouse’s activities, the employer effectively asked whether the candidate was married;
- b. political opinion: applying the doctrine of associative discrimination (Coleman), one could argue that the employee was effectively dismissed on this ground;
- c. sexual orientation: requiring a candidate to disclose his or her spouse’s gender is relatively more detrimental for a gay person than for a straight person and, therefore, indirectly discriminatory and this may be how the lower courts reasoned in this Finnish case, whereas the Supreme Court seems to have found direct discrimination, perhaps reasoning that the candidate was effectively dismissed for being a lesbian.

2. An employer may not ask a job applicant unlawful questions, such as, “Are you married?” or “Do you have a disability?” Easier said than done. What happens if the employer poses such questions anyway? Of course the candidate may reply, “I need not answer” or, “You should not be asking me these questions”. However, such a reply is not likely to be helpful from the applicant’s perspective, given that the prospective employer may be tempted to turn down the application, either (if it is careless) on a ground related to the unlawful question, or on a fabricated “neutral” ground, or without giving a reason. The only effective way for a job applicant to counter an unlawful question is to lie. Dutch case-law accepts this remedy.

Subject: discrimination – family status, political and sexual orientation

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