

SUMMARY

2015/7 Equal treatment at the hairdresser? (DK)

<p>In Denmark, it is prohibited to discriminate on grounds of gender both within the labour market and in the wider world. Consequently, the freedom of contract of both vendors and suppliers is limited by the fact that they must not discriminate on the basis of gender when selling products, supplying services and entering into contracts. This principle is set out in s2 of the Danish Gender Equality Act, which is based on the Directive on equal treatment of men and women outside the labour market (Directive 2004/113/EC).</p><p>If a person feels discriminated against on grounds of gender, he or she may file a complaint to the Danish Board of Equal Treatment. If the Board finds that the defendant has breached the Danish Gender Equality Act it can award compensation to the complainant. If the defendant disagrees with the decision of the Board and decides not to comply with its ruling, the Board can bring an action against the defendant in the civil courts. The defendant also has the opportunity to take legal action against the Board.</p>

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Facts

Almost two years ago, there was a good deal of media attention given to the Board's decision to allow a complaint against a hairdresser's sign advertising a higher price for "women's haircuts" than for men's haircuts" brought by a woman with short hair. The Board held that there was no objective justification for the difference in price on gender alone. The complainant was awarded approximately € 335 in compensation. Three months later, the Board issued a similar decision on a complaint against another hairdresser.

The two hairdressers brought the decisions before the civil courts. The case was referred from the district court to the Danish High Court, because it was considered to be a test case. The two hairdressers argued that the terms "women's haircut" and "men's haircut" are used for two very different services: the techniques applied, the materials used and the time required all differ considerably.

Decision

Initially, the court stated that the Board had established an assumption of direct discrimination¹ due to the fact that the two hairdressers advertised different prices for a "women's haircut" and a "men's haircut". Yet, the court ruled in favour of the hairdressers, stating that the hairdressing services differed and that the terms "women's haircut" and "men's haircut" used in advertising could not in themselves be deemed to be discriminatory. This meant that the hairdressers had proved that the principle of equal treatment had not been breached.

In its judgment, the court stated that there was no basis for finding discrimination based on the definition of sex discrimination provided in the Danish Gender Equality Act, the preparatory notes to this Act, Directive 2004/113/EC or the case law of the Danish courts and the European Court. The names of the services, the gender of customers normally accessing those services and the types of service themselves (which are well-established in customer's

minds) do not of themselves amount to sex discrimination. Accordingly, the court held that the terms “women’s haircut” and “men’s haircut” could not in themselves be deemed to be gender discriminatory.

The court did, however, note that if a hairdresser were to refuse a shorthaired female customer a “men’s haircut” by reason of her gender, that would constitute direct discrimination. But that was not the case in the two decisions brought before the court, as the two customers had not asked the hairdressers to explain their prices.

Commentary

The judgment illustrates that targeting differently-priced professional services towards either men or women, including haircutting services, does not constitute gender discrimination if the difference is based on objective facts, such as differences in techniques and time required, and as long as the services directed at a certain gender are not exclusively reserved for that gender. In the case in question, the crucial point was that a short-haired woman can ask for a “men’s haircut” - as the price must not be based solely on her gender.

Comments from other jurisdictions

Greece (Harry Karampelis KG Law Firm):

Directive 2004/113

In the EU, the scope of application of the principle of equal treatment of men and women was broadened with the adoption of Directive 2004/113, implementing the principle of equal treatment between men and women in terms of access to and the supply of goods and services. This is the first directive addressing gender equality issues outside the field of employment. The preamble to this Directive recognizes that discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside the labour market and can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life. Directive 2004/113 applies to all those who provide goods and services in both the public and private sectors, but outside the sphere of private and family life (Article 3(1)). The Directive does not apply to the content of media, advertising or education (Article 3(3)). The principle of equal treatment means that there must be no direct or indirect discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity.

However, more favourable provisions for women in relation to pregnancy and maternity are not contrary to the principle of equal treatment. The Directive further prohibits harassment

and sexual harassment and any instruction to discriminate (Article 4). Positive action is permitted under Article 6 of the Directive. However, the Directive allows various exceptions to the principle of equal treatment, even in cases of direct sex discrimination. Article 4(5) stipulates that the Directive shall not preclude differences in treatment if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means chosen to achieve that aim are appropriate and necessary. The Directive thus has no closed system of exceptions in the case of direct discrimination, as the other sex equality directives do, and it therefore offers less protection against direct sex discrimination.

The Directive also contains specific provisions regarding actuarial factors in insurance contracts. Insurance contracts are often offered on different terms to men and women, both as regards the premiums and the benefits, in particular in private pension schemes. These differences are based on the fact that, on average, women live longer than men and that the insurance companies therefore run a higher financial risk in insuring women than men. Article 5(1) therefore stipulates: “Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals’ premiums and benefits. Member States have the possibility to derogate from this provision” (Article 5(2)). However, in all new contracts concluded after 21 December 2007, the use of sex as a factor in the calculation of premiums and benefits may not result in differences in individual premiums and benefits (Article 5(1)). In the *Test-Achats* case (C-236/09), the ECJ considered the derogation to this rule, as provided in Article 5(2), as invalid with effect from 21 December 2012. In any event, costs related to pregnancy and maternity may not result in differences in individual premiums and benefits (Article 5(3)).

Gender equality in access to and supply of goods and services in Greece

The evolution of gender equality legislation and policy in Greece has been formed both by a radical feminist movement in the 1970s and 1980s and a series of steps in terms of EU legislation. The fact that Greece has been a member of the EC has contributed greatly in terms of employment policy, but even so, direct discrimination has not been eradicated, while indirect discrimination has not been adequately addressed by institutions, employers or employees.

According to Article 4(2) of the Greek Constitution “Greek men and women have equal rights and equal obligations”. Further, in Greece, Directive 2004/113 has been transposed by Law 3769/2009 and the principle of equality beyond the workplace has been incorporated. Pursuant to the Directive, Article 4(3) of Greek Law 3769/2009 stipulates that the law shall not preclude differences in treatment if the provision of goods or services exclusively or primarily to members of one sex is justified by a legitimate aim and the means chosen to achieve that

aim are appropriate and necessary. Mirroring the Directive therefore, Greek law has no closed system of exceptions in case of direct discrimination and it therefore offers less protection against direct sex discrimination than the law on gender discrimination in employment.

There are two main institutions responsible for making decisionmakers accountable for upholding their gender equality commitments. The Ombudsman is charged with monitoring equality issues in the public sector, while the Union of Consumers monitors the same in the private sector.

Judgment

of the Danish High Court

The judgment illustrates that pricing professional services differently based on gender is not gender discrimination in itself, if the difference is based on objective facts. The judgment concerned the limitations imposed by EU Directive 2004/113 on freedom of contract.

The right to contract, that is, the right of one person to take on obligations in exchange for another person taking on obligations in return, is a fundamental, though not all-encompassing, right. It is subject to legal protections against one party seeking to impose discriminatory restrictions on the other. Directive 2004/113 enshrines in EU law the principle of equal treatment between men and women in the access to and supply of goods and services.

The crucial factor for the Court was whether the different pricing of the hairdressing services fell within the ambit of permissible differences in treatment. Differences in treatment may be permitted in the provision of goods and services exclusively or primarily to members of one sex if this is justified by a legitimate aim, and if it is appropriate and necessary.

In our view, the Greek courts would have ruled on the above case in the same way as they did in Denmark, as Law 3769/2009 provides for the same exceptions as those found in the Directive.

Germany (Dagmar Hellenkemper): Finally a Court has addressed the ever lingering question “Why does a womans’ haircut cost more than a mans’ haircut. There has not been a similar case in Germany yet, but the reasoning of the Danish court seems convincing.

Footnote

¹ Although the Board of Equal Treatment’s decision does not state this explicitly, its reasoning suggests that it saw the gender discrimination as being indirect and

therefore justifiable. However, in the procedure before the court, the Board, as the defendant, took the primary position that the discrimination was in fact direct but, in the alternative, that it was indirect. It is not uncommon in Denmark to hedge one's bets by claiming both direct and indirect discrimination.

Subject: Sex discrimination

Parties: The Danish organisation for independent hairdressers and cosmeticians representing Cha Cha A/S in bankruptcy and Stender III A/S – v – the Danish Board of Equal Treatment

Court: The Danish Eastern High

Court Date: 10 November 2014

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