

SUMMARY

2011/59: Employer must consider employee's personal circumstances (SP)

<p>An employer's refusal to grant an employee's request for a change in his working hours in order to achieve a better work-life balance must take into account the decision's impact on the employee's family. Failure to do so may amount to discrimination.</p>

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Facts

Mr X worked as an educator for the Education Board of Castilla y Leon in a centre for children with special needs. He worked in shifts (morning, afternoon and night). Mr X requested to be assigned to the night shift for the duration of one school year in order to balance his working and family life more effectively. The employer refused to assign him to the requested shift, and the employee subsequently sued the Education Board. The action was dismissed twice, in the first and the second instance courts. The courts found the employer's decision to comply with s36.3 (i.e. work in shifts) and s34.8 (i.e. the right to adjust the length and distribution of working time to suit the employee's work-life balance needs) of the Workers Statute. Those courts dismissed the claim, disregarding the constitutional relevance of the case. The employee appealed the decision to the Constitutional Court, alleging violation of Article 14 of the Spanish Constitution, which provides that 'Spaniards are equal before the law and may not be discriminated against on account of birth, race, sex, religion, opinion or any other personal

or social condition or circumstance'. Mr X based this allegation on the argument that the rejection of his request for a changed shift schedule discriminated directly or, alternatively, indirectly against his wife, who found herself having to reduce her working time because her husband's employer denied him the opportunity to work only at night.

The Constitutional Court ruled that there was no gender discrimination, since the employer's denial was not based on Mr X's gender. However, the Court did examine whether there was discrimination on the grounds of personal and social circumstances as provided in Article 39 of the Constitution, which enjoins the public authorities to ensure, inter alia, 'legal protection of the family' and 'full protection of children'.

Although the Constitutional Court did not address directly the alleged discrimination against Mr X's wife, it did consider factors such as his wife's working situation and the impact of the employer's decision, which had been disregarded by the ordinary courts. The Constitutional Court therefore analysed the claim as a potential case of discrimination based on family reasons. In doing so, the ordinary courts had erred in that they had failed to balance the employee's desire to work at night for family reasons against any difficulties that such shift work would create for the employer. The measures adopted with the aim of balancing work and family must take into consideration all the circumstances and the interests of both parties.

Failure to consider the effects on an employee's work-life balance and the consequent denial of the opportunity to work night shifts was, in the Court's reasoning, tantamount to failure to adequately consider the constitutional dimension of Articles 14 (prohibition of discrimination) and 39 (protection of family and children) of the Constitution. The problem in the case was not only that the ordinary courts had failed to interpret the law in such a manner as to protect a fundamental right, but that they did not even realize that a fundamental right was at stake.

The constitutional policies aimed at reconciling work and family life, both from the perspective of the prohibition based on gender discrimination and personal circumstances (Article 14 of the Constitution), as well as the mandate to protect family and children (Article 39), must take priority. This case is helpful in clarifying the interpretation and application of these Articles of the Constitution. Spanish law aims to solidify such fundamental rights in the form of an assumption of shared family responsibilities and this is underpinned by a recognition that the traditional roles historically assigned to women have been at the root of gender discrimination in the past.

Though there was no gender discrimination in this case, discrimination was found based on family circumstances. The Constitutional Court granted these circumstances the same

protection as it would have done gender discrimination. It is worth mentioning that the case included a dissenting opinion. The dissenting judge considered that 1) having two children (family circumstances) does not equate to factors such as gender, which historically put women in positions below the level of human dignity, and that it therefore does not require equal protection, and 2) the ordinary courts had taken the employee's personal circumstances into consideration.

Commentary

Which personal circumstances should have been taken into account? According to the judgment, the number of the employee's children, their age and school year, the employment situation and the impact of the refusal to grant the night shift on Mr X's family and the employer should all have been considered. One might wonder, however, whether (or to what extent) employers are entitled to ask about such circumstances and whether those queries constitute a violation of the employees' right to privacy in themselves, so further complicating matters. In addition, does this ruling mean that employees are entitled to choose a fixed working shift when balancing work and family life, even if they have not requested working time reduction? If the answer is yes, it could complicate the organisation of companies, as a fixed working shift necessarily affects other employees.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Although a Dutch court might well also have found in favour of Mr X, I doubt whether the concept of discrimination would have been applied. There is discrimination, briefly speaking, where (i) individuals in a similar situation are treated differently or (ii) individuals in relevantly different situations are treated in the same way. There is nothing in the case reported above to indicate that Mr X's employer discriminated within meaning (i), i.e. that any of Mr X's colleagues had been or would have been treated more favourably under similar circumstances. Maybe Mr X's situation was different from that of his colleagues in that none of them had a working wife and two children, in which case there might have been discrimination within meaning (ii), but there is no indication that this was the case.

Mr X alleged that his employer discriminated against his wife, but it is not clear on what argument this allegation (of associative discrimination?) rested.

The Constitutional Court found that Mr X's employer had discriminated (against Mr X himself?) on the grounds of 'family circumstances'. Perhaps his contention was that refusing a change of shift tends to impact married employees with children more than unmarried and/or childless employees? Dutch law has for many years granted employees, subject to certain

conditions being met, the right to reduce (or increase) almost unilaterally the number of hours of they work per week (the employer being able to object, but only on hard-to-satisfy conditions). Although there is not (yet) a statutory right to a change of working times without a simultaneous increase or reduction of working hours, the Working Hours Act does contain an obligation on employers to take into account, to the extent reasonably possible, each employee's personal circumstances, including, in particular, his family care duties and social responsibilities.

Subject: working time

Parties: Employee D v D Consejería de Educaci'n Junta de Castilla y Leon (Board of Education).

Court: Tribunal Constitucional (Constitutional Court).

Date: 14 March 2011.

Case number: Recurso 9145/2009.

Internet publication:

<http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10086>

Creator: Tribunal Constitucional (Constitutional Court)

Verdict at: 2011-03-14

Case number: Recurso 9145/2009