SUMMARY

2010/81: Employee compensated for religious harassment because his manager referred to his church as a “sect” (DE)

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Facts

Employers must provide a harassment-free working environment for their employees. Therefore, it is important that employers and managers set a good example, as shown in this case.

A security guard at a supermarket was a minister in the Apostolic Church in his spare time. This led to a number of remarks from his manager, who on several occasions referred to the church as a “sect”. The guard did not like people speaking disparagingly about his church, although he did not say so openly. After being dismissed for an unrelated reason, he sued his employer for, among other things, discrimination on the basis of belief.

Judgment

Based on oral evidence, the Court held that the manager had on three occasions referred to the apostolic community as a “sect” and that on at least one of these occasions his remarks could not be held to have been made in fun.

The Court said that the term "sect" is usually used in a derogatory sense and that the manager could be assumed to have known that the term would be offensive to the security guard, not least because the remarks came from him as the security guard's manager. On these grounds, the Court held that the remarks constituted harassment on the basis of belief. Accordingly, the Court ordered the employer to pay approximately € 3,350 in compensation.

It is not yet known whether the case will be appealed.

Commentary

This case shows that, when applying the test of harassment, the courts will consider the defendant's conduct in detail and will take into account the claimant's subjective perception of the defendant's conduct.

The case also shows that an employee is not always required to say openly that he or she finds a remark offensive in order for such a remark to be held to constitute harassment within the meaning of the Danish Anti-Discrimination Act.

Comments from other jurisdictions

Germany (Paul Schreiner and Heidi Banse): In Germany the case would presumably also have been considered to constitute harassment on the basis of belief, namely as unwanted conduct which has the purpose or effect of violating an employee's dignity under Article 3(3) of the Anti-Discrimination Act. German law does not require the employee to have warned the harasser that he or she feels being harassed. On the contrary, a previously existing statutory requirement for the victim actively to identify the conduct to which he or she objects was declared to be undesirable and was therefore repealed and not transferred into the Anti-Discrimination Act. The conduct must be harassing, not in the employee's subjective perception, but from the point of view of a neutral third party. Though the term "sect" may be technically correct with regards to the Apostolic Church, in the sense of a schism from another religious community, in this case (according to the information at hand) there is little doubt that the manager used the word "sect" in a derogatory sense with the purpose or with the reasonable effect of hurting the employee's dignity by putting down his belief and respectively the religious community of which he was a member.

The Anti-Discrimination Act requires the unwanted conduct to violate the employee's dignity and to create an environment that is characterised by intimidation, hostility, degradation, humiliation or offence. Therefore, a German employment court would have examined whether, in addition to the one remark clearly not made in fun, the other two occasions characterised the environment as being intimidating, hostile, etc. A German court would have

had to evaluate the overall picture, e.g. whether the employer/manager had taken into consideration the employee's belief on other occasions (e.g. religious holidays and Sunday services). The fact that the remarks came from the manager and not just a colleague would also be factored in.

In German law the compensation would not have been awarded solely on the basis of the Anti-Discrimination Act, but also as damages for the violation of secondary obligations under the employment contract and for violation of the employee's personal rights. It should, however, be noted that German courts do not award high amounts in damages.

The Netherlands (Peter Vas Nunes): Is subjective perception relevant when determining whether behaviour qualifies as harassment? Last year in the Dutch *Hoge Raad* case, the Supreme Court ruled on this question (10 July 2009 JAR 2009/24). The judgment concerned the Dutch transposition of Article 2(1)(d) of Directive 2006/54/EC (equal opportunities for men and women in employment), which defines sexual harassment as "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment". Dutch law includes an identical definition except that "unwanted" has been omitted, because this word introduces a subjective element, which the legislator wished to avoid.

The Supreme Court case involved a 59 year old PR Manager and his boss, the Managing Director. They had collaborated closely for 17 years and had a habit of making fun, which included exchanging frequent "male" jokes. At a Christmas party in 2002, while the Managing Director was in a light-hearted mood, he jokingly slapped the PR Manager on his bottom, pinched it and mentioned the words "dark room". The PR Manager laughed and said nothing of the incident.

Five days later, however, the Managing Director found a formal note in his pigeon hole, written by the PR Manager, in which the latter accused the Managing Director of sexual harassment. The Managing Director was shocked and went to see the PR Manager. In the course of the conversation that ensued, the PR Manager mentioned that he had been sexually molested by a priest as a twelve year old, which had caused him to be more sensitive than average to such matters. Upon hearing this, the Managing Director offered an apology and explained that he had absolutely not intended to have any sexual contact.

The PR Manager did not accept the apology and instead – following dismissal proceedings in

which he was awarded severance compensation in the amount of € 63,500 – sued both his employer and the Managing Director personally, claiming damages of over € 270,000 (mostly for loss of early retirement benefits, but also partly for emotional suffering). Both the court of first instance and the Court of Appeal dismissed the claim inasmuch as it was directed against the Managing Director, ruling that his behaviour did not qualify as sexual harassment because (1) he had no sexual intention; (2) his behaviour was part of a pattern of mutually jocular interaction (dirty jokes, etc.); (3) the PR Manager did not belong to one of the groups of people who are more than normally vulnerable to sexual harassment and (4) the PR Manager's dignity was not violated and no intimidating, hostile, degrading, humiliating or offensive environment had been created, the seriousness of the behaviour merely being rooted in the PR Manager's childhood experience. The fact that he had perceived the incident as being sexually motivated was not considered to be relevant.

The Supreme Court upheld the Court of Appeal's judgment, reasoning, *inter alia*, that the Managing Director's lack of sexual interest was a relevant factor. This reasoning has met with criticism. If the PR Manager's perception was irrelevant (rightly so), why was the Managing Director's intention not equally irrelevant?

United Kingdom (Tom Heys): The UK provisions protecting employees from discriminatory harassment are now contained in the Equality Act 2010. In order for conduct to amount to unlawful harassment, the conduct must have the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her. Where it is claimed that the conduct had this effect (although this was not the perpetrator's purpose), the Employment Tribunal must consider whether the conduct should reasonably be considered as having that effect. Reasonableness is assessed subjectively for these purposes, by reference to the employee's "perception". Given this legal framework and the same set of facts, a UK Tribunal would most likely have reached the same result as the Danish court. Clearly, disparaging remarks about someone's religion could reasonably be regarded as creating an "offensive environment" for them.

Subject: Religious discrimination

Parties: The Danish Christian Trade Union acting for A – v – B

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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