

SUMMARY

2018/37 Supreme Court rules on discrimination for being overweight (FI)

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Facts

The employee was a bus driver for the employer between 2011 and 2012. Three separate, fixed-term employment contracts were signed during that period, and they constituted an almost continuous employment relationship. However, at the end of the third contract, the employer decided not to conclude a new one, even though it had hired other bus drivers within the same period.

At the beginning of the first employment contract, the employee was examined by an occupational health physician. The conclusion of the examination was that the employee was fit to work as a bus driver provided his health was kept track of in accordance with the Occupational Health Care Act. In addition, the employee would have to have another examination before he could be employed permanently. The employee was considered overweight under Class E66 of the WHO ICD-10 classification system, which encompasses subclasses such as 'obesity due to excess calories' (E66.o) and 'overweight' (E66.3). It is not clear from the judgment to which subclass the employee belonged.

Before the end of the third fixed-term contract, the employee indicated his willingness to continue working for the employer. He went to see occupational health about a month before the end of his third fixed-term. The doctor suggested he engage in occupational health negotiations with the employer. An occupational health negotiation is a forum for discussing how someone's health may affect their ability to fulfil their duties. The discussions can, for example, concern any rehabilitation needs or possible adjustments to the work. These negotiations are usually held between the employee, the employer's representative, and a representative of occupational health care services. They are optional and may be initiated by any of the parties concerned.

However, the employer did not arrange for the negotiations before the end of his contract. Two weeks before the end of his employment, the employee contacted occupational health again to ask for a statement of his ability to perform his work. It is not clear whether this happened, and to which effect.

After the end of his third contract, the employee was unemployed for about a year, until he was employed again as a bus driver by another company.

Proceedings

The employee claimed compensation at the District Court for the loss of income he suffered during his unemployment. He asserted that the employer had discriminated against him based on unfounded doubts concerning his health, because of which he had not been taken into account when the employer recruited new personnel at the end of his third employment contract. The employee claimed that the fact that he was overweight did not hinder his work performance, and that the employer had promised to give the employee more work once occupational health care considered him able to. He also claimed that the employer had breached its obligation to treat all its employees equally, as it had not arranged the occupational health negotiations for him, even though it had done so for other employees.

The employer denied all the allegations of discrimination and/or breaches of equal treatment. It argued that the reason the employment relationship had ended was because the fixed-term contract had expired. The employer claimed that it had never promised the employee a new employment contract; that it had no need for additional workers at the point the contract ended; and that the employee had not asked the employer for work at the end of the contract. If it had needed more staff, the employer would have had the right to require a medical statement of ability to perform the work.

The District Court held that the employee's state of health did not constitute an obstacle to performance even in the absence of a medical statement. The employee's willingness to continue working for the employer was known by the employer and the employer could have offered the employee another contract. Thus, it could be presumed that the employee had been discriminated against.

The District Court also stated that although being overweight carries a risk of illness, refusing to employ a person for this is unacceptable, as this is discriminatory, both in terms of recruitment and employment. The actions of the employer had led to the employee's unemployment, which was cause for an award of damages under the Employment Contracts Act. In addition, as the employer had not arranged for occupational health negotiations, it had breached the requirement of equal treatment of employees.

The employer appealed the decision. The Court of Appeal quashed the District Court's decision and rejected the employee's claims concerning both discrimination and unequal treatment. The Court of Appeal held that not enough evidence had been presented to establish a presumption of discrimination. According to the Court, a mere claim or suspicion of discrimination is insufficient to establish the presumption and reverse the burden of proof.

The case was then further appealed to the Supreme Court.

Judgment

The Supreme Court held that the situation described fell within recruitment, as defined under the Employment Contracts Act and the Non-Discrimination Act. The Court then proceeded to assess which of the prohibited grounds of discrimination were in question.

The Employment Equality Framework Directive (2000/78/EC) sets out certain prohibited grounds of discrimination and those are protected under EU law. The Finnish Non-Discrimination Act and the Employment Contracts Act implement the Directive as concerns recruitment.

The ECJ found in the *Kaltoft* case (C-354/13, EU:C:2014:2463) that the list of grounds of discrimination prohibited under Article 1 of the Directive is exhaustive. It further defined in *Kaltoft* that obesity can be protected as a disability within the meaning of Article 1 of the Directive, but the Supreme Court held that the employee was not obese within the meaning as defined in *Kaltoft*. As a result, the claim did not fall within the scope of EU law.

Therefore, the Supreme Court held that the employer's actions had to be assessed under national law, as possible discrimination on grounds of a person's health, is prohibited under the Non-Discrimination Act. The Court went on to hold that the evidence presented by the employee was sufficient to establish a presumption of discrimination.

The Supreme Court also found that even though EU law was not directly applicable in this case, it should be taken into account when considering how the burden of proof should be applied under the Non-Discrimination Act. The Court referred to the established case law of the ECJ, which states that once a presumption of discrimination has been established, the burden of proof shifts to the respondent, who must try to prove that the prohibition against discrimination has not been breached (*CHEZ*, C-83/14, EU:C:2015:480 and *ACCEPT*, C-81/12, EU:C:2013:275).

In this regard, the employer argued that the fact the employee was overweight might affect traffic safety and occupational safety, in an attempt to justify its decision. The employer also claimed that there was no reason why it needed to prioritise the employee over other prospective employees and that it had the right to choose other employees without this discriminating against the employee.

The Supreme Court rejected all of these arguments. However, it agreed with the Court of Appeal that there was insufficient evidence to show that the employer had breached its obligation of equal treatment.

The Supreme Court held the employer liable to pay the same amount of compensation for breaching the prohibition against discrimination as the District Court.

Commentary

This is the first time the Supreme Court has discussed whether overweightness might be a disability within the meaning of the Employment Equality Framework Directive, as further defined in the *Kaltoft* decision of the ECJ. The judgment states that obesity can be covered by the concept of 'disability' under EU law if it might hinder the full and effective participation of the person in professional life on an equal basis with other workers.

However, the employee in this case had worked as a bus driver for over a year without his participation in professional life being hindered in any way. The Supreme Court took this, in addition to the ICD-10 classification of the employee's condition, into account when assessing whether the overweightness of the employee was a disability within the meaning defined in

Kaltoft. As such, the distinction between his being overweight, and being obese in a way that could be classified to be a disability, was quite clear. It should be noted that the Supreme Court did not only apply the ICD-10 classification as is, but instead relied on other evidence as well when assessing the legal status of the employee's overweightness.

The Supreme Court also referred to the established case law of the ECJ concerning the allocation of the burden of proof in discrimination cases. The Court held that even though the grounds of discrimination being assessed did not fall within the scope of EU law, the principle established in case law was relevant to the case at hand, because the Non-Discrimination Act implements the Employment Equality Framework Directive. This is an example of the interpretative effect of EU law.

Comment from other jurisdiction

The Netherlands (Peter Vas Nunes, BarentsKrans): The author's commentary focuses on the concepts of obesity and overweight. Interesting as the commentary is, other aspects interest me more.

First, it is instructive to learn that Finnish statute distinguishes between (non-)discrimination and (un-)equal treatment. The Non-Discrimination Act prohibits discriminating between employees on a number of grounds. These include not only handicap but also – gold plating Directive 2000/78 – health. Thus, the employer's failure to offer the bus driver in this case continued employment on account of his (presumed) poor health violated the Non-Discrimination Act. The Finnish Employment Contracts Act prohibits treating employees unequally on any ground. My understanding is that the bus driver invoked this Act in support of his claim that his employer should have invited him to an occupational health meeting, given that the employer – so he alleged – had held such meetings with other employees. This alleged difference of treatment was not based on any ground covered by the Non-Discrimination Act, so the bus driver needed to have recourse to the general equality doctrine. Dutch statute contains the provision that the employer must behave as a 'good employer'. One aspect of this obligation is that the employer should treat its employees equally. However, claims of unequal treatment on this basis are rare, and awards even rarer.

Secondly, the Supreme Court's judgment does not specify what damages were awarded for the failure to offer the employee continued employment. The employee claimed the loss of income he had suffered over the course of about a year. It would have been useful to know whether he was awarded full compensation (presumably: last-earned salary minus unemployment benefits plus loss of pension accrual), including full legal fees. A Dutch court

may not have awarded full compensation, and would certainly not have awarded full legal fees, despite the ECJ's doctrine that an award for damages should cover all loss and should be 'effective, proportionate and dissuasive'.

A third point to note concerns the doctrine of burden of proof shifting. The Finnish District Court and Supreme Court applied this doctrine to a ground – health – not covered by Directive 2000/78. There is logic to this, because it would be confusing for the burden of proof to shift in the event of handicap discrimination but not in the event of health discrimination. Nevertheless, I am not sure whether a Dutch court would have taken a similarly liberal approach. For example, the Dutch Human Rights Commission does not apply the doctrine to claims of discrimination-victimisation.

Finally, what interests me in particular, is that the Supreme Court held that the situation at issue “fell within recruitment”. I take this to mean that the court saw non-renewal (or non-conversion) of a fixed-term contract – as the ECJ did in *Melgar* (C-438/99) – not as a dismissal, but as a “refusal of employment”, i.e. a rejection of an application to be hired. If this is indeed the Finnish Supreme Court's view, how does it align that view with the ECJ's subsequent ruling in *Kuso* (C-614/11)?

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