

SUMMARY

2019/15 Uniform minimum body height standards in the police service do not constitute indirect gender discrimination on grounds of sex (DE)

The Higher Administrative Court of Münster (Oberverwaltungsgericht, the ‘OVG’) has held that a minimum body height of 163 cm for applicants to the police service, irrespective of gender, is lawful. At least, this shall apply if the determination of a minimum body height standard is a suitability criterion for access to the police service. Minimum standards solely serve the purpose of ensuring fitness for service and result from a comprehensive investigation. The investigation in this case established that suitability for the police service can only be guaranteed from a height of 163 cm upwards.

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Facts

The plaintiff was a female job applicant who had applied for a position as a police officer in the higher intermediate police service of North Rhine-Westphalia ('NRW'). The application procedure included a medical examination which contained a measurement of her height. This was deemed necessary because the defendant had determined that police officers be at least 163 cm in height as a precondition for recruitment. This had been based on a scientific study of the necessary height to work as a police officer to ensure fitness for service.

After the plaintiff's height was measured at 162 cm during the examination, the police informed her that her job application for the police service in NRW had been rejected because she didn't meet the height requirement.

The plaintiff brought an action against the decision before the public courts and claimed that her recruitment procedure should be continued. She asserted that the rejection was incorrect because a minimum body height for the police service could only be an appropriate restriction if it were actually necessary. Accordingly, a well-founded and comprehensive investigation would have been necessary. The study relied on by the defendant establishing minimum body height standards would not meet these requirements. This would also be shown by the fact that other federal states in Germany had lower height requirements for police applicants.

The Administrative Court of Düsseldorf (*Verwaltungsgericht*, the 'VG') held that the height requirements of NRW were discriminatory against both women and men and were therefore unlawful and ineffective. It ruled in favour of the plaintiff.

The defendant appealed against the decision of the VG before the OVG.

Judgment

The OVG upheld the defendant's appeal and dismissed the claim.

In the OVG's view, the defendant's rejection was not unlawful. The determination of a uniform minimum height was not objectionable, neither did it constitute indirect discrimination in relation to female applicants. Furthermore, it was not a violation of the general prohibition of discrimination on grounds of sex under Article 3 para. 3 of the German Constitution (*Grundgesetz*), Section 7(1)(1) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), nor a violation of Article 14(1)(a) and (b) of Directive 2006/54/EC.

To substantiate its decision, the OVG first stated, with regard to the determination of a minimum height, that the employer had a margin of discretion. That discretion had been

exercised by the defendant without legal error.

According to Article 33(2) of the German Constitution, every German citizen shall have the same access to a job in the public service depending on his/her aptitude, qualifications and professional achievements. Whether these conditions are met should be left to the discretion of the employer, which is subject to limited judicial control. To this extent, the court would only examine whether the decision violated established legal provisions, was taken arbitrarily or for irrelevant reasons. In this particular case the OVG stated that this could not be assumed.

With regard to the minimum standards the OVG explained that the determination of a uniform minimum height of 163 cm was based on a comprehensive study by a working group of the federal state and an independent study by the German Sports University in Cologne. Both came to the conclusion that only a minimum height of 163 cm could guarantee the fitness and ability to complete most of the police duties. According to the OVG, this constituted a legitimate method for a determination of any admission criteria, also with reference to the judgment of the ECJ of 18 October 2017 – C-409/16 (*Kalliri*).

It did not matter that other federal states used other admission criteria, as arbitrariness or irrelevant considerations within the study were not apparent.

The OVG added that the police would not have to drop the height requirement for tasks which do not depend on height. Article 33(2) of the German Constitution would not grant a claim for the creation of a specific position, but only a claim of equal access. Moreover, Directive 2000/78/EC would not provide otherwise. However, these requirements would have been met. The current police deployment system in NRW would require a flexible and effective deployment of all available personnel. Therefore, all applicants would have to be suitable for all deployment possibilities.

Lastly, the OVG emphasized that the measure could be indirectly discriminatory as it disadvantages a higher number of women than men. However, in the OVG's view, any indirect discrimination would be objectively justified, since it should ensure the proper performance of the police service and the functioning of important state institutions.

Commentary

The problem of the determination of both objective and subjective conditions of employment is not new in case law. In particular, minimum body height as a requirement for employment has been at issue several times before the German courts. So far, most court decisions have

differed and no preference has been observed. However, this decision by the OVG could have considerable influence on future decisions, not so much for the indirect discrimination issue but rather its justification.

The peculiarity of this judgment is that determination of a uniform minimum height of 163 cm had been based on a scientific study. This enabled the court to identify the individual duties which cannot be performed by smaller police officers. It only had to check whether the determination of a minimum body height as a condition of employment based on the scientific study was a legitimate and necessary means.

While the ECJ still had strong doubts in the *Kalliri* case of the general suitability of minimum body height standards, this probably cannot be disputed any longer in the presence of a scientific study. Moreover, the ECJ had also stated that it is up to the national courts to examine the suitability of body height standards. In this regard, the detailed justification given by the OVG should meet the requirements of the ECJ.

Furthermore, the case also deals with the controversial indirect discrimination issue with the use of minimum body height standards. If it is proven that a certain body height is necessary for admission to employment, a rejection of smaller applicants is justified whether they are male or female.

However, it remains to be seen whether the ECJ agrees with the decision of the OVG that it is at the discretion of the state to determine under which conditions applicants shall have access to a job in public service. If, as indicated in the *Kalliri* case, the ECJ actually demands that smaller applicants have to be employed only for duties which they can perform regardless of their height this would conflict with German law, because the State could no longer decide how to structure the public service system. This means, whether they want that every applicant is in general able to complete most of the police duties or only concerning certain working areas. More convincing is the solution that a uniform organization of the police service is lawful if it is justified by an objective reason. This also would be in line with German law, because it allows a flexible and effective use of the police service.

Comments from other jurisdictions

Romania (Andreea Suci and Gabriela Ion, Suci I The Employment Law Firm): The problem of minimum body height standards in the police service was a controversial issue in Romania as well.

As far as our legislation is concerned, the conditions for reaching a minimum height for men (1.70 m and then 1.65 m) and women (1.65 m and then 1.60 m) in the police service existed until 22 November 2017.

On 22 November 2017, the minimum body height condition was abolished by Order of the Minister of Internal Affairs No. 144/2017 (person with competencies in the matter). This amendment was made in accordance with the recommendations of the National Council for Combating Discrimination – an autonomous State authority ('CNCD').

Initially, the CNCD's decisions on this subject were that "*the imposition of the established height condition for women and for men is not a discrimination*" (2006). Then, in 2014, the CNCD argued, based on the decrease in anthropometric indices of Romanian citizens, that minimum body height standards may be seen as indirect discrimination. The CNCD reached this conclusion by analyzing the jurisprudence of the European Court of Human Rights related to Article 14 of the European Convention on Human Rights regarding the prohibition of discrimination.

Thus, the CNCD found that the minimum body height standards condition was not in accordance with Article 14 of the European Convention on Human Rights as interpreted by the European Court of Human Rights. Thereby, it was concluded that this condition represented an indirect discrimination and could not be seen as reasonable and objective, which the European Court of Human Rights permits in certain situations.

However, even if the minimum body height standards condition in the police service has been removed, applicants are still required to pass a series of tough sports trials whose conditions have not been changed after this amendment. The sports trials that the applicants have to pass are created in a manner that the applicant who passes such trials has the necessary training to fulfil their service duties regardless of height.

The Netherlands (Peter Vas Nunes): The State in this case argued – successfully – that, when recruiting police officers, there is no need to distinguish between the various types of positions within the police force. The court accepted that the State may require **all** police officers to be able to perform **all** duties that exist within the entire police force ("*all applicants would have to be suitable for all deployment possibilities*"). Implicitly, when assessing whether the indirect sex discrimination was a suitable and necessary means to achieve the aim of having suitable police officers, the court held that the police force had no obligation to recruit separately for police officers who patrol the streets and make arrests (where height can be a relevant requirement) and for police officers with desk duties, such as investigators and IT

specialists, or with other duties where height is not relevant, such as traffic wardens. How far does this prerogative go? Can, for example, the armed forces require all candidates to be under 30 years of age, even where the position that needs to be filled does not require physical fitness, merely because being under 30 is a genuine and determining occupational requirement for a minority of positions within the armed forces? An argument in favour of an affirmative answer could be that in an emergency every military employee must be able to be mobilized. But how realistic is such an argument? If, as I suspect, the police force in North Rhine-Westphalia is organized in departments, and the majority of police officers remains in the same department permanently or for lengthy periods, would a requirement to recruit separately for each department interfere too deeply with the police force's prerogative to organize itself as it sees fit? The author seems to think so (*"If, as indicated in the Kalliri case, the ECJ actually demands that smaller applicants have to be employed only for duties which they can perform regardless of their height this would conflict with German law, because the State could no longer decide how to structure the public service system"*: see Commentary, above). This issue was not addressed directly in similar cases, such as *Kenny* (C-427/11), *Vital Perez* (C-416/13) and *Salaberria Sorondo* (C-258/15).

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