

Case Reports

2021/13

Equal Treatment Authority's decision does not bind the court (HU)

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Summary

This case involved an employee who claimed that her two consecutive employers breached the principle of equal treatment during their employment relationships in relation to her belonging to the Roma minority. The employee built her case on the decision of the Equal Treatment Authority, which declared that she was discriminated against by her employers. The Curia (the highest judicial authority in Hungary) found that the decision of another authority has no binding effect on a court according to Act III of 1952 on Civil Procedure and that in cases concerning equal treatment, the burden of proof lies on the defendant (here the employer) to prove that there is no link between the disadvantage suffered by the plaintiff (here the employee) and her protected characteristic. The Curia and regional courts also found that the defendant fulfils this obligation if it successfully proves that it assessed the applicant's qualifications, professional suitability and attitude towards work when it decided on the question of whom to employ.

Legal background

Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation (the 'Directive') lays down the general framework for combating any direct or indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. The Directive also clarifies, however, that it does not require recruitment, promotion, maintenance in employment or training of an

individual who is not competent, capable and available to perform the essential functions of the role concerned. Section 12 of the Hungarian Labour Code (Act I of 2012) sets out the general principle of equal treatment in connection with employment relationships, with a specific focus on the remuneration of work and the equal value of work. However, the provisions of the Labour Code do not contain detailed rules on the matter; these can be found in Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (the 'Act on Equal Treatment').

The Hungarian legal literature is rich in cases and studies focusing on the issue of equal treatment in the context of terminating employment relationships, as it is possible that a termination notice from the employer fulfils the necessary criteria, so the reason for termination is real, clear and reasonable, yet there is still an underlying breach of the principle of equal treatment.

The individual or group who feels their right to equal treatment has been violated can turn to the Equal Treatment Authority and can also file a lawsuit for a grievance award and damages at a civil court. Since the publication of the case concerned, in January 2021 the Equal Treatment Authority was abolished and its tasks and competences have been transferred to the Office of the Commissioner for Fundamental Rights.

Facts

The employee worked as a member of the administrative staff of two organisational units of the Szabolcs-Szatmár-Bereg County Government Office on two separate and consecutive public employment contracts between 2013 and 2015, both for a fixed period. The employee belonged to the Roma minority and graduated from university as a public administration manager, she also had an intermediate English language qualification. In her claim for a grievance award, the employee stated that her two consecutive employers violated her rights to equal treatment as prescribed by the Labour Code and the Act on Equal Treatment when, during her employment with employer no. 1, she was pushed into the background behind G. E., who was also a public employee but not of Roma origin. She also claimed that during the period under which she was employed by employer no. 2 and when permanent positions were filled, the employer gave preference to non-Roma candidates, had not advertised vacancies and they were filled on the basis of oral agreements for which she had no

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chance to apply, while, in some cases she had better qualifications than the employees who were hired.

Prior to the lawsuit, the employee turned to the Equal Treatment Authority which, in its decision, concluded that she had suffered from discrimination.

In her claim, the employee complained that although there were available positions to which she would have been qualified, during the selection process she was not even considered an option. During the applicant's employment, several non-Roma government officials were appointed to these positions, some who did not have a higher education degree and were in the process of studying.

In the judicial proceedings the employers proved that they made their decision based on education and experience, taking into account the people who wanted to become government officials, and examined which person was the most suitable for the position.

Judgment

The Curia found that the request for the review of the judgment had no basis, and upheld the decision of the lower courts. The Curia agreed with the lower courts that during the evidentiary proceedings, the employers successfully demonstrated that they had complied with the rules on equal treatment and that there was no causal link between the disadvantage suffered and the protected characteristic, so the employee's claim had been denied.

The Curia found that a party may, by a decision of the Equal Treatment Authority finding discrimination, make it probable that he/she has been disadvantaged during the establishment of the employment relationship against applicants who do not have a protected characteristic, but this decision has no binding effect on courts.

In its judgment, the Curia clarified that according to the Hungarian legal regulations implementing the Directive, the injured party must be able to establish that they have been disadvantaged and that they had a protected characteristic at the time of the infringement and must argue that there is a link between the disadvantage and the protected characteristic. The other party bears the burden of proving that the circumstances alleged by the injured party did not exist or that they complied with the requirement of equal treatment or were not required to do so in respect of the legal relationship in question.

On the basis of the available evidence, particularly testimonies, it was confirmed that the employers assessed the competitive candidates' qualifications, professional aptitude and attitude towards work during the selection process and decided accordingly on the most appropriate person to establish a civil servant relationship.

Commentary

To establish a case on the breach of equal treatment, the Hungarian provisions require it to be probable that the plaintiff, in most cases an employee, had one of the protected characteristics as listed in the Act on Equal Treatment. In a number of cases this is easy to prove as some are obvious, while in other cases it might be difficult to establish that the employee had one of these protected characteristics and the employer was aware of its existence. The employee shall also prove that he/she suffered a disadvantage.

If the employee has successfully proved the protected characteristic and the disadvantage he/she suffered, the employer must prove that, although a protected characteristic was present, the employee was not disadvantaged for those reasons, more usually that his/her employment was not terminated because of that circumstance, i.e., that there is no relationship between the disadvantage and the protected characteristic.

It is clear from the case above that the employer successfully fulfils this burden of proof by proving the real professional considerations behind its decision causing the disadvantage. In this case, the Curia will not consider the violation of equal treatment to be justified, even if another body separate from the judicial system considers the discrimination to be proven.

Comment from other jurisdiction

Denmark (Christian K. Clasen, Norbomm Vinding): The Hungarian case illustrates how the employer may discharge the burden of proof in cases concerning discrimination on grounds of race or ethnic origin.

In this case, the employer was able to prove that the decision to bypass the employee of Roma origin for positions had been based on objective criteria such as qualifications, professional aptitude and attitude towards work, i.e. proving that there was no link between the employee's ethnic origin and any unfavourable treatment suffered by her.

By comparison, a recent decision from the Danish Board of Equal Treatment illustrates how a link may be established between an employee who has been put at a disadvantage and the employee's race or ethnic origin.

The case concerned a bus driver of colour who, while working, was verbally assaulted by another motorist using racial slurs. The bus driver informed his manager of the incident and said that he would report the motorist to the police. Following the incident, the bus driver was called into a meeting with the manager who told him that he might be in the wrong kind of business if he wanted to report the incident, because he had subsequently received an apology from the motorist.

About a week later, the bus driver was dismissed on grounds of not having the qualifications necessary for

the job. The bus driver submitted a complaint to the Board which ruled that he had established facts from which it may be presumed that he had suffered discrimination, especially due to the time-related link between the meeting with the manager and the dismissal.

As the employer had not proven that the bus driver's lack of qualifications had been discussed internally, or that this issue had previously been presented to the bus driver, the Board ruled that the employer had not discharged the burden of proof. Accordingly, the bus driver was awarded compensation for the dismissal.

Since the employer did not elaborate on the reasons for the dismissal or dispute the discussions at the meeting held before the dismissal, the ruling seems well-founded. The case illustrates how a time-related link between an incident, criticism, etc. may be essential when assessing the reason for a dismissal or other kinds of unfavourable treatment. Furthermore, the employer must be able to render probable that the employee lacked qualifications and that the employee had been given a chance to address these challenges. If the unfavourable treatment, such as dismissal, is caused by a lack of qualifications which may be associated with a protected criterion, the employer must prove that the decision to dismiss is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

This has previously been illustrated in cases concerning requirements for certain language skills, most recently in a case before the Board. The case concerned a school-teacher who was of Polish origin and spoke Danish as her second language. The employer received complaints from parents whose children had difficulty understanding the teacher because of her accent. She was given a warning, instructing her to improve her language skills and to make sure that it did not become an obstacle to the students' learning. When no improvement occurred, the teacher was dismissed.

The teacher filed a complaint to the Board, claiming discrimination because of her accent and, thus, her ethnic origin. The Board deemed it established that there was a link between the dismissal and the teacher's ethnic origin. However, the requirements for her language skills were objectively justified by the legitimate aim of ensuring the students' learning and were appropriate and necessary. The Board's decision was supported by the fact that the employer had conducted a survey among the students and had observed the teacher's lessons and, on this basis, had concluded that the teacher's language skills were inadequate.

The case illustrates that if the dismissal is objectively justified by a legitimate aim, such as quality of learning, one way to ensure that the aims are appropriate and necessary is to present the employee with their lack of performance and give them an opportunity to improve. If this is not possible, the dismissal will in many cases be both appropriate and necessary.

Subject: Race, Nationality Discrimination, Discrimination General

Parties: former employee from an ethnic minority as plaintiff, former employers as defendants

Court: Curia (Hungarian Supreme Court)

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