



European network of legal experts in gender equality and non-discrimination

NEWS REPORT

Country:	The Netherlands
Title:	Clothing size as occupational requirement found indirectly discriminatory on grounds of chronic disease, but objectively justified.
Date:	28 May 2015
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Context	
Issue at stake:	Job applicant refused because of her clothing size, requirement found objectively justified.
Ground of discrimination:	Disability/chronic disease.
Source:	National equality body decision
Field:	Employment
Applicable law:	Act on Equal Treatment on the Ground of Disability or Chronic Illness, Article 3(2), Article 4 under (a).

Content

Case: In the case at hand, a woman had sent in an application for a job as junior promotion employee at a marketing company. The job would entail working at various locations, as well as wearing clothing according to different dress codes (depending on the client). This clothing is provided by the marketing company in two sizes, M and L. In response to her application, the applicant received a questionnaire, which contained a question as to her clothing size. After finding out that the clothing size of the applicant was XL, the employer refused to hire her, because there were no work clothes available in her size.

The applicant complained about this decision at the local Anti-Discrimination Bureau. After several emails and telephone conversations between the Anti-Discrimination Bureau and the employer, the latter offered the applicant a job as *senior* promotion employee, which would entail different clothing requirements. The applicant however refused this offer, for she did not possess a driver's license, nor a car. Eventually, she brought the case to the Dutch equality body, the Netherlands Institute for Human Rights (NIHR).

Decision of the equality body: The NIHR, in Decision 2015-18, first reiterates the case law of the CJEU. Referring to joined Cases C-335/11 and C-337/11 (*Skouboe Werge and Ring*), it holds that the concept of 'disability' must be understood as "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers."

Subsequently the equality body finds, in line with Case C-354/13 (*FOA/Kommunernes Lansforening*), that obesity in itself does not constitute a 'disability' within the meaning of Directive 2000/78 and the case-law of the CJEU, as it does not necessarily entail the existence of a limitation. However, if the obesity entails a limitation that may hinder the

full and effective participation of that person in professional life on an equal basis, it can be covered by the concept of 'disability'. Such would be the case, in particular, if the obesity hindered full and effective participation on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.

Based on this case law, the NIHR finds that the Law on Equal Treatment on the Ground of Disability or Chronic Illness, which transposes Directive 2000/78, applies in the case at hand, as the *de facto* requirement of size M/L causes the obesity of the applicant (which was based on her Body Mass Index-score) to entail a limitation that may hinder the full and effective participation in professional life on an equal basis, thus giving rise to indirect discrimination on the ground of chronic disease (obesity).

The defendant argued that the requirement is objectively justified, as the discriminatory measure aims to preserve an efficient business model, which is necessary in a market that is distinguished by a high level of competition. The NIHR finds that this is a legitimate aim. Furthermore, it considers the requirement proportionate and necessary, finding that the proposed reasonable accommodation of providing clothing in larger sizes would impose a disproportionate burden upon the employer. This is remarkable, for the employer is a relatively large company, with more than 200 employees per week engaged in marketing activities. Applicant's proposal to wear men's clothes is also rejected by the NIHR as being unreasonable, for most clothing is unisex, and generally it would not fit in the marketing concept the employer offers.

The NIHR decided that, in balancing the interest of the defendant to preserve low costs against the interest of applicant to be hired, the interests of the defendant in this case are more important, especially since the applicant has been offered a job as *senior* promotion employee instead (which, as it apparently turned out during the hearing, could also be fulfilled without possessing a driver's license). Thus, the NIHR found the indirectly discriminatory requirement objectively justified, and ruled that the employer did not make a forbidden distinction on the ground of chronic disease.

Key points of analysis: Clothing size requirement found indirectly discriminatory on grounds of chronic disease, but objectively justified.

Internet link source:

The NIHR's Decision may be found at:

<http://mensenrechten.nl/publicaties/oordelen/2015-18/detail>

(Last accessed 23 April 2015)