



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

### NEWS REPORT

<b>Country:</b>	Sweden
<b>Title:</b>	Discrimination of Muslim dentist wanting to cover her under arms
<b>Date:</b>	5 January 2018
<b>Expert:</b>	Per Norberg
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Dental clinic following guidelines from National Health and Welfare Board needing to defend their actions in an indirect discrimination proportionality test
<b>Ground of discrimination:</b>	Religion
<b>Source:</b>	Labour Court Decision <sup>1</sup>
<b>Field:</b>	Employment
<b>Applicable law:</b>	Discrimination Act – prohibition of indirect discrimination Chapter 1 section 4 point 2

### Content

This case must be read together with the case of *Karolinska Institutet*<sup>2</sup> from November 2016, which concerned a Muslim student on the dental program who reached a point in this program when she was placed in a dental clinic.<sup>3</sup> During the clinical work she was required to work with bare under-arms according to work place rules in accordance with guidelines from the National Health and Welfare Board. She asked to wear special disposable underarm protection instead of having bare underarms because she did not want to show this part of her body to strangers, due to her religious convictions. The claimant in that case was a student and the respondent was therefore the education provider. The case was therefore brought before the civil courts, although the facts of the case had appeared in an employment setting during the claimant's clinical work.

The parties to that case agreed that the requirement of having bare underarms was more burdensome for some Muslim women compared to other groups, and the focus was therefore on the proportionality test. The Equality Ombudsman called a British expert, describing the reasons why British authorities believe that there is no hygienic problem with disposable underarm protection. The respondent however called a (Swedish) expert stating that such underarm protection caused genuine hygienic concerns. The Municipal Court decided that both experts' statements seemed scientific and credible and it was not possible to believe one more than the other. However, according to the Municipal Court it

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<sup>1</sup> Labour Court 2017 case 65, *Equality Ombudsman, The People's Dentists of Stockholm County* (Judgement 2017-12-20).

<sup>2</sup> Stockholm Municipal Court, case T 3905-15, *Equality Ombudsman v The Swedish state through Karolinska Institutet* (judgement 2016-11-16).

<sup>3</sup> For further information, please see Norberg, P., *Country report Non-discrimination – Sweden 2017*, European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/4388-sweden-country-report-non-discrimination-2017-pdf-1-59-mb>, p. 99 and p. 106.

was the education provider (alleged discriminator) who had the burden of proof with regard to the objective justification of a possible indirect discrimination. Therefore, the remaining uncertainty should fall on the education provider who lost the case. The woman was awarded 5000 SEK (500 EUR) in discrimination award.

In December 2017, a very similar case was brought before the Labour Court, which reached a very different conclusion.

The People's Dentists of Stockholm County (Folktandvården) is a very important dental care provider owned by the Region of Stockholm. It required all dentists to work with bare underarms regardless of the outcome in the Municipal Court in the *Karolinska Institutet* Case. A Muslim dentist was thus disfavoured, and the Equality Ombudsman took the case to the Labour Court.

The reasoning of the Labour Court is very similar to that of the Municipal Court up to the point when the employer presented the objective justification. Like the Municipal Court in the previous case, it assessed that the experts on both sides were credible. The employer showed reasons why it was genuinely (albeit theoretically) possible that there could be a hygienic problem. The expert for the Equality Ombudsman showed that it was not possible to detect increased infections in Britain connected to permitting disposable underarm protection in that country.

The case was thus decided on the rules on burden of proof just like before the Municipal Court. However, while the Municipal Court placed the burden of proof on the discriminator because it is the discriminator who shall be responsible for proving objective justification, the Labour Court took another road.

The Labour Court said that when the employer had presented the genuinely objective theoretical hygienic reasons, the burden of proof shifted back to the claimant. Since the Equality Ombudsman failed to disprove the employer's expert, the Equality Ombudsman lost the case. The main argument for this outcome was that when patient security is at risk the employer must be allowed a wide security margin when setting hygienic rules (*försiktighetsprincipen* – the duty-of-care principle) and thus any remaining doubt must fall on the claimant.

**Key points of analysis:** Stockholm Municipal Court and the Labour Court had identical cases. The same facts were proven in both cases. The same facts remained unproven in both cases. The sole important difference is where the two courts place the burden of proof for the part that remained unproven. It is placed on the alleged discriminator by the Municipal Court and on the claimant by the Labour Court.

According to the author, the Labour Court should have asked the CJEU for a preliminary ruling on who shall bear the burden of proof in a case like this. It is a text book example of a case where the rules on burden of proof need to be explained further by the CJEU.

**Internet link source:** <http://www.arbetsdomstolen.se/upload/pdf/2017/65-17.pdf> (no information available in English).