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NEWS REPORT

Country:	Poland
Title:	Ordinance of the minister on disclosing the cause of disability – found unconstitutional by the Polish Constitutional Tribunal
Date:	16 July 2018
Expert:	Lukasz, Bojarski
<u>Context</u>	
Issue at stake:	Is the obligation to disclose the cause of disability (including mental) when applying for the job justifiable?
Ground of discrimination:	Disability
Source:	Decision of the Constitutional Tribunal; 19 June 2018; SK 19/17
Field:	Employment
Applicable law:	Ordinance of the Minister of Economy, Labour and Social Policy of July 15, 2003 on adjudication about disability and the degree of disability (<i>Rozporządzenie Ministra Gospodarki, Pracy i Polityki Społecznej z 15 lipca 2003 r. w sprawie orzekania o niepełnosprawności i stopniu niepełnosprawności</i>)

Content

The applicant, G.T. obtained a decision (certificate) about his degree of disability. The certificate contains a symbol representing the type of disability (meaning mental illness). He appealed, demanding the removal of this symbol from the decision. He argued that his disability may be classified as a "general developmental disorder", which is less stigmatizing. He indicated that he would not allow the employer to see the symbol, as the employer would know its meaning and obtained sensitive data about his health, which according to the Constitution is protected.

These arguments were rejected by the disability assessment body and courts of two instances. They decided that the symbol is important in order to trigger the rights arising from the Act on Vocational Rehabilitation and does not affect the sphere of privacy.

The complainant and the Ombud filed for the declaration of unconstitutionality of the Ordinance of the Minister of Economy, Labour and Social Policy of July 15, 2003 regarding disability and disability assessment - to the extent that it provides mandatory insertion in the decision a symbol representing the type of disability. Submitting such a decision by a person with a disability to an employer is a prerequisite for exercising the rights under the Vocational Rehabilitation Act.

Ombud has requested that the contested provisions be considered incompatible with art. 47 (right to legal protection of private life) and 51 (which reads, that no one may be obliged to disclose information concerning him/herself other than on the basis of the Act

of Parliament, and the authorities can not obtain, collect and disclose other information about citizens than necessary in a democratic state of law) of the Constitution of the Republic of Poland. He also indicated that interference, if any, with the right to privacy and the information autonomy of an individual cannot be provided in the ministerial ordinance, but only in the Act of Parliament.

In principle, the Ombud does not agree with obligatory disclosure to the employer of information about the illness suffered by the employee. It may cause discrimination of such persons on the labour market. This concern especially people affected by the so-called hidden disabilities that can not be identified at first glance (mental illness, epilepsy, intellectual disability). If the employee does not show the certificate, the employer may not know at all that it employs a person with disability. The employer should draw knowledge about whether an employee can perform a given job from a medical certificate, and not a disability certificate.

Therefore, Ombud argued that the protection of privacy requires the statement of reasons for a disability should not be included in the certificate (as a symbol), and that other tools that would allow to secure both sides of the employment relationship could be used. The Ombud does not therefore neglect the employer's interests, including the possibility of co-financing for the remuneration of an employee with disability. According to the Ombud, an alternative solution could be to indicate in the decisions only the necessary adjustments and facilities to be made at the workplace for a person with disability.

Decision of the Court: The Constitutional Tribunal considered the challenged provision of the Ordinance to be inconsistent with Art. 47 of the Constitution. It is also incompatible with art. 51 par. 1, 2 and 5 of the Constitution of the Republic of Poland. The Tribunal emphasized that the role of the legislator is to choose such means that will provide people with disabilities with support in the labour market, while respecting their right to privacy and taking into account the interests of employers. (CT decision, 19 June 2018, SK 19/17).

Key points of analysis: As a result of the judgment of the Constitutional Tribunal, the bodies deciding on the degree of disability lose the right to insert the symbol "02-P" (mental illness) in the decision. In the Tribunal's opinion, such information may be stigmatizing. However, they still have an obligation to include in the decision the indications referred to in art. 6b par. 3 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of people with disabilities - regarding, for example, appropriate employment taking into account the psychophysical abilities of a given person. Until the legislative amendments, these indications may be the basis for granting a disabled person the appropriate benefits or entitlements.

The Tribunal also admitted that the adequate provisions should be included not in the Ordinance, as it is currently the case, but at the statutory level. At the same time, the Tribunal indicated that it could not comment on the legality of using other symbols referring to other categories of diseases. Nevertheless, in this case the Tribunal also questioned the compliance of the provisions of the Ordinance with the Constitution, which is why it seems necessary to regulate them at the statutory level. The verdict is final.

Internet link source: Information about the case on the website of the Constitutional Tribunal:

<http://trybunal.gov.pl/postepowanie-i-orzeczenia/wokanda/art/10142-ujawnianie-przyczyny-niepelnosprawnosci-w-orzeczeniu-o-stopniu-niepelnosprawnosci/>.

Information about the case on the website of the Ombud, who joined the case:
<https://www.rpo.gov.pl/pl/content/trybunal-konstytucyjny-rozporzadzenie-ministra-o-ujawnianiu-przyczyny-niepelnosprawnosci-niekonstytucyjne>.

Information about the case on the website of CSO, the Helsinki Foundation for Human Rights which tried the case: <http://www.hfhr.pl/ujawnianie-przyczyny-niepelnosprawnosci-na-orzeczeniu-o-stopniu-niepelnosprawnosci-wyrok-tk/>.