



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

NEWS REPORT

Country:	Sweden
Title:	Handshake requirement as indirect discrimination in employment
Date:	23 August 2018
Expert:	Paul Lappalainen
<u>Context</u>	
Issue at stake:	Did termination of a recruitment process due to the female applicant's refusal, for religious reasons, to shake hands with the male manager during a job interview constitute indirect discrimination?
Ground of discrimination:	Religion
Source:	Labour Court decision 2018-08-15 (AD 2018 nr 51)
Field:	Employment
Applicable law:	Discrimination Act

Content

Case law: FA took part in a job interview for a position as an internal interpreter. The job meant interpreting by telephone or through a video link. After the portions of the interview concerning her qualifications, she was introduced to KG, the manager. Instead of shaking hands with him she smiled and put her hand on her heart. The applicant indicated that her refusal was due to religious beliefs as a Muslim where shaking hands with a man outside of the family was considered to be a gesture that was too intimate. FA also said that she does not shake hands with both women or men when there are men present, in order to avoid hurting the feelings of the men. The manager ended the interview after the handshake incident and stated that she could not work there. He made clear that his refusal was linked to the applicant's religious beliefs when he stated that, by contrast, a refusal to shake hands due to a fear of germs would not have had an impact on his hiring decision. FA submitted a complaint to the Swedish Equality Ombudsman – (DO), and the DO agreed to become a party to the case on behalf of FA. The employer, in order to promote equality, had a policy requiring employees to shake hands with men and women. However, the policy also indicates that circumstances such as fear of germs are legitimate reasons to refrain from shaking hands. Furthermore, the employer asserted that the refusal to shake hands due to religion was not protected by the European Convention on Human Rights (ECHR) and thus not protected under the Discrimination Act. Both parties agreed that FA had been treated unfavourably due to the policy.

The key issues: Is FA's religiously motivated refusal to shake hands with persons of the opposite sex protected by the prohibition against discrimination due to religion in the Discrimination Act? Did the handshake policy place persons of a specific religion at a particular disadvantage? Since both parties agreed that the policy itself had a legitimate purpose, was the policy necessary and appropriate (proportional) for achieving its purpose?

Decision of the Court: The Labour Court, in a 3 to 2 judgment, held that the employer had violated the prohibition against indirect discrimination.¹ According to the Court, a manifestation of religion concerning shaking hands is protected by Article 9 of the European Convention on Human Rights (ECHR), even if that manifestation is shared only by a minority within the specific religion. This also meant that the company policy particularly disadvantaged persons with a certain religion, which brought it within the prohibition of indirect discrimination in the Discrimination Act. Finally, even though the company policy had a legitimate purpose, the Court held that the policy was not necessary and appropriate for achieving the legitimate purpose, indicating that it would have been enough to require equal treatment in the greeting of men and women. Requiring employees to shake hands was not necessary. FA had testified that she treated men and women the same when men were present. FA was awarded SEK 40 000 (EUR 3800) in discrimination compensation.

It is important to note that two of the five judges on the Labour Court dissented. For them the policy was necessary and appropriate, both concerning colleagues and others in the workplace as well as in relation to the job of being an interpreter, which requires impartiality and neutrality. One of them also pointed out that FA's equal treatment of men and women when they were both present did not change his position.

Key points of analysis: The handshake issue is one of the major areas of legal questions concerning the connection between discrimination and the manifestation of religion, particularly in working life. In this case, the majority of the Court accepted the DO's argument that demanding equal treatment in the workplace in how people greet each other is appropriate since it is less intrusive, but that requiring employees to shake hands is to go too far. An added basis for the Court's reasoning can possibly be found in the exceptions that the policy itself allowed concerning e.g. a fear of germs, exceptions which apply to both men and women. The judgment provides a careful balancing between the employer's interests, the individual's right to physical integrity, and the interests of the state concerning freedom of religion as well as equal treatment between men and women. At the same time, the dissenting opinions are an indication that the majority could shift in a slightly different case.

Internet link source:

Labour court's website

<http://www.arbetsdomstolen.se/pages/page.asp?lngID=4&lngLangID=1>.

The whole case is at

<http://www.arbetsdomstolen.se/upload/pdf/2018/51-18.pdf>.

Press release from the Equality Ombudsman

<http://www.do.se/om-do/pressrum/aktuellt/aktuellt-under-2018/diskriminering-att-krava-halsning-genom-handskakning/>.

BBC article "Sweden Muslim woman who refused handshake at job interview wins case"

<https://www.bbc.com/news/world-europe-45207086>.

¹ Labour Court decision 2018-08-15 (AD 2018 nr 51).