

LABOUR COURT judgment AD 51/17 Case number A 146/16

Lack of accessibility. The issue in the case was if a university has violated the Discrimination Act by refusing to employ a deaf job seeker as a lecturer (assistant professor), referring to the fact that the accessibility measures needed, primarily interpreting services, were too costly and burdensome to be reasonable.

LABOUR COURT JUDGMENT 2017-10-11 Case number A 146/16

Stockholm

PLAINTIFF Swedish Equality Ombudsman, Box 4057, 169 05 Solna

Representative: litigation lawyers Johanna Nilsson and Anna Rosenmüller Nordlander, same address

DEFENDANT

The Swedish State through Södertörn University, 141 89 Huddinge. Representative: Attorney Christian Olofsson, Wallin Olofsson Advokatbyrå AB, Box 6331, 102 35 Stockholm

CASE Discrimination compensation _____

Background

In the spring of 2015, Södertörn University advertised a position as a lecturer (associate professor) in public law, with a focus on social law. The employment was intended primarily for teaching, but there was also the possibility of research. The position was permanent and full-time.

R. S. applied for the position. R. S. has a doctorate in public law. He was interviewed for the position and also gave a test lecture. R. S. is deaf and teaches in Swedish sign language, which is then translated into Swedish as a spoken language. The university determined that R.S. was the most qualified of the applicants.

Since R.S. is deaf, the university investigated which actions it needed to take so that he could work as a lecturer (associate professor). In light of its inquiry, the college determined that the measures needed, mainly interpreting services, would be too costly and burdensome to be considered reasonable. The university decided on May 17, 2016 to cancel the employment process concerning the lectureship.

The Discrimination Ombudsman (DO) brought an action against the state, asserting that R.S., due to the decision to cancel the appointment of the position, was subjected to discrimination in accordance with Chapter 1, Section 4:3 and Chapter 2, Section 1 of the Discrimination Act (2008: 567). R. S. is not a member of a union and has agreed to have the DO take the case on his behalf.

The issue at hand is if the state violated the Discrimination Act by not taking reasonable accessibility measures so that R.S. would be put in a comparable situation with people without his disability.

Claims etc.

The DO's has asked the Labour Court to require the state to pay R.S. discrimination compensation in the sum of SEK 100,000, together with interest under Section 6 of the Interest Act, from the date of notification of the lawsuit until payment is made.

The State has denied liability without acknowledging any amount as reasonable in itself. The method for calculating interest has been acknowledged.

The parties have claimed compensation for their own costs. The parties, in support of their claims, have in the main asserted the following.

The State

Summary of the basics

The university has not subjected R.S. to discrimination.

The college cancelled the recruitment process and did not offer R.S. employment because he did not fulfil the relevant requirements for the position. In order for R.S. to carry out the duties included in the employment, it would have required the university to undertake accessibility measures, primarily in the form of interpreting services. Taking into account the costs and the burden that the measures would entail, it was not reasonable for the university to take these measures.

Background

The university conducts research and teaching in the humanities, social sciences, technology and natural sciences. The university also has police and teacher education and training. It has 11,000 students studying within 70 programs and 250 courses. The Department of Social Sciences conducts research and education, among other things, in the subjects of public law, social work and sociology.

According to the local collective bargaining agreement on working time for teachers at the university, a teacher's full-time working time is 1700 - 1756 hours. All of the duties of a teacher shall be completed within this time period.

The position of a lecturer (associate professor) in public law, with a focus on social law, was aimed primarily at teaching students. The duties related to the position at issue consisted of 300 lecture hours per year (divided into 150 lessons), with 80 hours per year for administration of completed and upcoming courses and 150 hours per year for communications with the manager, co-workers and meetings. The rest of the time involved among other things preparation of lectures, pedagogical development work and competence development.

Accessibility measures

The accessibility measures considered necessary by the university have primarily been interpretation assistance during teaching (teaching interpretation) for 300 hours per year and communication with managers, employees and meetings (regular interpretation) for 150 hours

per year. The need for interpretation means, among other things, the cost of interpretation services as well as increased administrative costs related to the use of interpreters.

Teaching interpretation at the university level places high demands concerning preparation of the interpreters. Furthermore, two interpreters are required if the teaching exceeds one hour.

Costs in accordance with the framework public procurement contract

According to a framework contract for teaching interpretation and other interpretation agreed to by Stockholm University, which Södertörn University is entitled to use, the cost of interpretation between Swedish and Swedish sign language is SEK 1 100 per hour (daytime) for teaching interpretation and SEK 800 (daytime) for other interpretation. The prices are exclusive of VAT.

The cost of interpretation support in connection with teaching would amount to SEK 660,000 per year (SEK 1,100 x two interpreters x 300 class hours).

Of the 150 hours per year for communication with the manager, co-workers and meetings that the university determined would be needed for interpretation support, the university estimates that no public funding is available for 100 hours per year divided into 100 different occasions. For the other 50 hours per year, the university calculates that interpretation support can be provided by Tolkkentrum's support for everyday interpretation, i.e. through the county council.

The cost of interpretation support in connection with communication with the manager, co-workers and meetings would amount to SEK 80,000 per year (SEK 800 x one interpreter x 100 hours).

In total, the cost of interpretation support under the framework contract would amount to SEK 740,000 per year.

However, according to information from the Employment Service, the university could receive a wage subsidy for the employment of R.S. of about SEK 220,000 per year. If the wage subsidy were taken into account, the cost according to the framework agreement would amount to SEK 520,000 annually.

In addition to the cost of purchasing interpretation services, administration of the purchases is an additional cost, if the university itself is to take of the administration. It would be unreasonable to not include this in the calculation of costs. The amount to be taken into account for the calculation of the administrative costs of the university is SEK 435 per hour, which corresponds to the cost under an agreement with Stockholm University as from 2017 (see below). According to the university's calculation, the annual administrative costs would amount to SEK 174,000 (i.e. 400 hours at SEK 435 per hour).

In total, the cost of interpretation support would amount to more than SEK 900,000 per year.

If the wage subsidy were deducted, the accessibility measures would amount to almost SEK 700,000 annually.

The cost of interpretation including administrative costs according to this calculation corresponds to the cost of an additional employee with a monthly salary of almost SEK 39,000.

Costs according to the agreement with Stockholm University

In January 2017, the university made an agreement with Stockholm University in order to make use of the university's section for teaching interpretation. Stockholm University primarily provides interpretation services through its own employees.

According to the agreement, Stockholm University takes the main responsibility for administration of the interpretation services.

Stockholm University gets paid for the services according to the so-called full cost principle, i.e. a price equivalent to the university's cost of providing the services.

Stockholm University has set the 2017 price for interpretation by staff at the university at SEK 1,242 per hour (daytime), excluding value added tax. In addition, the university charges a fee for indirect costs of SEK 435 per interpretation hour regarding the administration of the interpretation services. This means that the university's cost of interpretation under this agreement amounts to SEK 1,677 per interpretation hour.

The agreement with Stockholm University means that the price for teaching interpretation and other interpretation is the same, since the university's cost of providing the services is the same.

The costs for interpretation support in connection with teaching would amount to SEK 1,006,200 per year (SEK 1,677 x two interpreters x 300 class hours).

The costs for interpretation support in connection with communication with the manager, co-workers and meetings would amount to SEK 167,700 per year (SEK 1,677 x one interpreter x 100 hours).

In total, the costs for interpretation support would amount to SEK 1,173,900 per year.

If the wage subsidy were deducted, the costs for accessibility measures would amount to SEK 953,900 per year.

The state argues first of all that it is the costs according to the agreement with Stockholm University that should be the basis for the Labour Court's assessment of whether the necessary measures for accessibility should have been reasonably taken.

The costs for interpretation including administrative costs according to this calculation correspond to the cost of an additional employee with a monthly salary of 53,500 kr.

Legal argumentation

The rules on inadequate accessibility have their basis in the so-called EU Directive establishing a general framework for equal treatment in employment and occupation (Equal Treatment in Employment Directive), which states that measures should not entail an

unreasonable burden for the employer. An employer who complies with the requirements of the Work Environment Act cannot be considered to be discriminating.

In the assessment of reasonableness, the court should take into account that the necessary accessibility measures would recur annually and that they would only be of use to R.S. The university's other staff and students would thus not be able to utilize these resources, and the university would also probably not be able to count on the introduction of the measures, for example, towards other requirements and efforts regarding accessibility adaptations and similar issues.

The costs should also be examined in relation to the individual employment. The salary for a full-time employee as a lecturer (associate professor) amounts to approximately SEK 42,000 per month, which corresponds to a total cost of approximately SEK 756,000 per year including employers' contributions. The cost of the accessibility measures would thus involve more than double the wage cost and correspond to an additional full-time employee.

Even if the university is a large employer, the university's funding for the subject of public law is not more than SEK 2.9 million per year.

DO (Swedish Equality Ombudsman)

Summary of the basics

R.S., who is deaf, has applied for a job at the university. R. S. has been disadvantaged by the university not taking such reasonable accessibility measures that would have left him in a comparable situation with people without his disability. As a consequence, the employment process was terminated and R.S. was not offered employment.

The university has thus subjected R.S. to discrimination in accordance with Chapter 1, Section 4:3, and Chapter 2, Section 1 of the Discrimination Act. Thus the state, as the responsible principal for the university, is obliged to pay discrimination compensation to R.S. for the infringement that the discrimination has involved.

Accessibility measures

The university initially determined that the accessibility measures would entail an additional cost of approximately SEK 340,000 per year. It was this calculation that formed the basis for the university's decision to cancel the employment process concerning an associate professor. However, it is acknowledged that the calculation, based on the fact that the price of teaching interpretation and other interpretation was the same, was incorrect since the costs for teaching interpretation are higher than for other interpretation. The DO considers it to be reasonable for the Labour Court to take into account the corrected cost of SEK 520,000 as a basis for its judgment.

Furthermore, the university's calculations of costs are acknowledged, both according to the framework contract and the agreement with Stockholm University. However, the fact that, following the decision to cancel the employment process concerning a lecturer (associate professor), the university entered into an agreement which is less advantageous than the purchase of services under the framework contract, should not lead to a disadvantage for R.S.

It is therefore the costs under the framework contract that should be the basis for the Court's judgment.

Regarding administrative costs, a university of this size has an administrative infrastructure that should make it easy to develop cost-effective procedures for purchasing interpretation services. The administration involved should be made as cost-effective as possible.

The university is a large employer with personnel costs that amount to approximately SEK 500 million.

It is acknowledged that the university cannot be expected to receive any other subsidies for the employment of R.S. other than the wage subsidy and the support from the Tolkkentrum reported by the state.

Legal argumentation

Sweden is bound by the UN Convention on the Rights of Persons with Disabilities, under which States Parties shall protect and promote the realization of the right to work, among other things, through the employment of people with disabilities in the public sector. The State should be a role model for the rest of society in terms of accessibility for people with disabilities, which is stated in prop. 1999/2000:79. Furthermore, the regulation (2001: 526) on the responsibility of government agencies for the implementation of the national disability policy states that national agencies under the government shall design and conduct their activities by taking into consideration the national disability policy objectives.

In its assessment of reasonableness, the court should take into account that the university is a state agency and a large and resource-intensive employer, and that the case involves a full-time permanent employment. State agencies have a special responsibility and should be good examples. It can therefore be demanded that the university undertake the major efforts required. The costs are reasonable, which is why the university should have offered the position to R.S.

The inquiry

The case has been decided after the main hearing. The State has referred to certain written evidence.

Grounds for the judgment

The dispute

The parties are in agreement on the following. R. S. cannot, due to his disability, perform essential parts of the work involved in the employment as a lecturer (assistant professor) in public law without the assistance of certain accessibility measures. In order for R.S. to be able to work as a lecturer (assistant professor) at the university, the university needs to provide deaf interpreters when R.S. is teaching and participates in meetings with, among others, colleagues and management. The parties are in agreement concerning the type of deaf interpretation services needed as well as an approximate estimate of the extent of the need for these services. They are also in agreement that a certain part of the interpretation services can

be arranged through the county council's support for everyday interpretation and that the university has the possibility of receiving a wage subsidy from the Employment Service.

Given the terms of the Discrimination Act, the parties are in agreement on which accessibility measures the university would have been required to undertake to ensure that R.S. would come into a comparable situation with people without his disability. However, the parties are in disagreement about the costs of these measures as well as on if it is reasonable to demand that the university should have undertaken these measures.

Some legal starting points

The Discrimination Act prohibits discrimination against a job seeker due to his or her disability (Chapter 2, Section 1). Discrimination under the Discrimination Act refers, among other things, to inadequate accessibility, i.e. that a person with a disability is disadvantaged by the fact that reasonable accessibility measures have not been taken to bring that person into a comparable situation with persons without this disability (Chapter 1, Section 4:3).

When interpreting the provisions of the Discrimination Act on inadequate accessibility, the Labour Court shall take into account, among other things: EU Directive 2000/78 / EC establishing a general framework for equal treatment in working life (Equal Treatment in Employment Directive) and the United Nations Convention on the Rights of Persons with Disabilities of 2006.

According to Article 5 of the Equal Treatment in Employment Directive, the employer shall take the necessary measures in the specific case to enable a person with a disability to, among other things, gain access to, participate in or make a career in working life, as long as the measures do not entail a disproportionate burden for the employer. The recitals for the Directive state that effective and practical measures should be taken to organize the workplace with regard to persons with disabilities, e.g. adaptation of the premises or equipment, patterns of working time, the distribution of tasks, training opportunities or work management (recital 20). In assessing whether the measures will be too burdensome, the Directive states that in particular the financial and other costs entailed by the measures, the size or economic resources of the organization or company and the possibility of obtaining public funds or other support should be taken into account (recital 21). According to the case law of the European Court of Justice, it is up to the national courts to investigate whether a measure imposes a disproportionate burden on the employer (see EU C-HK Denmark, C-335/11 and C-337/11, EU:C:2013:222).

Sweden has acceded to the UN Convention on the Rights of Persons with Disabilities. Through the convention, States Parties recognize the right to work for persons with disabilities on an equal footing with others and undertake to protect and promote the realization of the right to work by taking appropriate measures to ensure, among other things, that reasonable accommodations are offered to people with disabilities (Article 27). Reasonable accommodation refers to necessary and appropriate changes and adjustments which do not result in a disproportionate or unjustified burden when necessary in an individual case to ensure that disabled people are put on an equal level that others enjoy or the exercising of all human rights and fundamental freedoms (Article 2). Compliance with the convention is monitored by the Committee on the Rights of Persons with Disabilities. According to the Committee, the States Parties have a certain margin of appreciation in determining which accommodation measures are proportionate or justified. The Committee

examines whether the national courts have made a thorough and factual assessment of all the facts presented, but the Committee does not question the judgments of the courts in individual cases unless these are obviously arbitrary or mean that the person concerned has been refused legal protection. See, for example, Committee opinions CRPD/C/13/D/9/2012 and CRPD/C/15/D/13/2013.

The current regulation of inadequate accessibility in the Discrimination Act goes back to the 1999 Act on Prohibition of Discrimination due to Disability in Working Life. That law introduced a rule that employers, among other things, in employing persons, were obliged to take reasonable support and adaptation measures to ensure that a person with a disability was put in a comparable (similar) situation with persons without such a disability. If the employer did not take reasonable support and adaptation measures, this could mean that the employer was in violation of the law's prohibition of discrimination (Prop. 1997/98:179). In 2006, the employer's obligations were extended to taking support and adaptation measures that applied even during an ongoing employment (Prop. 2005/06:207). These regulations were moved into the 2008 Discrimination Act, as far as this is concerned, without any change in the meaning of the rules (Prop. 2007/08:95 p. 149 f.). In 2014, the rules were amended so that inadequate accessibility became a specific form of discrimination. Furthermore, the change in the law meant that the law was extended to cover even areas other than working life. In addition, the term support and adaptation measures was replaced by the term measures for accessibility. No substantive change in the meaning of the term, as regards working life, was intended (Prop. 2013/14:198 p. 67). This means that the legislative preparatory works for the previous laws and the case law regarding these continue to be relevant.

The preparatory works and the case law show, among other things, the following.

If an employer refuses to employ someone because he or she is not in a comparable situation due to a disability, this constitutes discrimination under the condition that the employer could have eliminated or reduced the effects of the disability so that it would no longer be of significance. Accordingly, if an employer knows or ought to know that a job seeker has a disability which means that he or she cannot do the the job, the employer must consider - in order to not risk being required to pay discrimination compensation - what accessibility measures are needed to eliminate or reduce the effects of the disability. One of the most important purposes of the rule on inadequate accessibility can be considered to be inducing employers to carefully consider whether it is possible, for example, to adapt the workplace to enable the employment of a person with a specific disability (prop. 2007/08:95 p. 151 f.).

The employer only needs to take such accessibility measures as are reasonable. The assessment of what is reasonable to demand depends on the circumstances of the individual case and shall, according to Chapter 1, Section 4:3 of the Discrimination Act be based on the accessibility requirements established in laws and other regulations, and with regard to the economic and practical circumstances, the duration and extent of the relationship or the contact between the operator of the activity and the individual, as well as other circumstances of importance.

Regarding accessibility requirements in various laws and other regulations, in the field of working life it is primarily the work environment legislation that is relevant. The starting point is that an employer, who focuses on fulfilling their duties under the Work Environment Act, and succeeds, does not need to consider further measures due to the provisions of the Discrimination Act (Prop. 2013/14:198 p. 65). Beyond this, the employer's finances and other

circumstances, the type and degree of the employee's disability and the duration and form of employment, shall be taken into account (see Prop. 2013/14:198 p. 60 f. and Prop. 2007/08:95 p. 150 ff. and 500 f.). In the preliminary legislative works it was emphasized that it is neither possible nor desirable to set any economic limits as to when it is unreasonable for cost reasons to demand a measure. However, it was stated that a measure could be considered justified only if the operator is able to bear the cost of the measure and it can be financed within the framework of ordinary general and individual activities. It was emphasized that measures that have a major impact on private or public activities otherwise are not reasonable, but that in general it can be considered reasonable to demand more in terms of employment in an employment relationship than may be required in the case of a brief and limited contact between an individual and the operator of an activity, e.g. an inquiry made to a government authority. See Prop. 2013/14:198 p. 67 and p. 128.

Labour Court case AD 2010 No. 13 involved a severely visually impaired person who had sought employment with the Social Insurance Agency but had not been employed because the computer system that she would work with was not adapted to visually impaired people. The measures that would enable the job seeker to carry out the work were either a major reprogramming of the computer system or a minor reprogramming in combination with a work assistant, which in practice would mean that the Social Insurance Agency would have to hire two persons to carry out one person's duties. The Labour Court held that, although the Social Insurance Fund is a large and resource-intensive employer with a particular duty to work for accommodations for persons with disabilities, the measures were too extensive to be considered reasonable. The United Nations Committee on the Rights of Persons with Disabilities has examined whether the judgment was in violation of the UN Convention and found that this was not the case. However, six of the 16 members of the committee dissented. In Labour Court case AD 2011 No. 25, it was not considered reasonable that a trainee should accompany someone else, even taking into account that the company might have been compensated economically for the extra staff that would be required. Both Labour Court cases AD 2010 No. 13 and AD 2011 No. 25 concerned the application of the previous legislation, but as already stated, subsequent changes in the law were not intended to change the legal situation.

The Government Regulation (2001: 526) on the responsibility of the state authorities for the implementation of the National Disability Policy - as specifically referred to by the DO - provides that state agencies under the national government shall work for ensuring that people with disabilities are provided full participation in social life and equality in living conditions. According to the Regulation, if it is not obvious that it is not necessary, the authorities shall carry out inventories and develop action plans for their work with accessibility. The authorities shall also consult the Swedish Agency for Participation as to how actions under the regulation are to be formulated.

Reasonable measures for accessibility?

According to the Labour Court, the university, before deciding to cancel the recruitment process, made a thorough and factual assessment of what measures would be required for R.S. to be able to fulfil the needs of the employment at issue. The university has examined, among other things, how much and what interpretation support would be required as well as taking into account the possibilities for the university to obtain support for interpretation and to employ him.

The state has presented two different calculations concerning the annual cost of these measures, taking account of the fact that the county council would pay for some interpretation and that the university could receive a wage subsidy. According to the first calculation, the cost is estimated at approximately SEK 950,000 and, according to the other, it amounts to almost SEK 700,000 (i.e. SEK 520,000 plus administrative costs). The DO's opinion is that the annual cost can be estimated to be SEK 520,000.

The Labour Court chooses to first start with and test the reasonableness on the basis of the cost of SEK 520,000 asserted by the DO. Only if this expense is considered reasonable will the Labour Court examine the reasonableness of the higher costs and, if it determines the outcome of the case, also examine the cost that will be the basis for the assessment.

The university is a state authority with a large budget for personnel. The employment was intended to be permanent full-time job. This means that greater accessibility measures can be demanded from an employer. Since the position is for a lecturer (assistant professor) with a relatively large number of teaching hours, the university's annual costs for interpretation services would in practice correspond to the pre-tax salary of R.S., excluding employer's fees (cf. Labour Court case AD 2010 No. 13). It is not a one-time expense and the measures would not benefit other workers with disabilities. The Labour Court cannot find that the UN Convention, the EU Equal Treatment in Employment Directive, the Discrimination Act or its preparatory works support finding it reasonable to require an employer, in a situation such as the present one, to take on accessibility measures of the current type at an annual cost about SEK 500,000. The Court has also taken into consideration that the case involves a permanent employment at a government agency with a large personnel budget. Nor does the 2001 regulation support the claim that, according to the Discrimination Act, the university can be required to undertake the measures discussed.

The Labour Court's conclusion is therefore that the accessibility measures that the university would have had to take in order to employ R.S. are not reasonable and therefore the university has not discriminated against R.S. when it cancelled the recruitment process. The DO's lawsuit must therefore be dismissed.

Litigation costs

DO has lost the case and should therefore reimburse the state for its litigation costs. The amount claimed is reasonable.

Judgment

1. The Labour Court dismisses the Equality Ombudsman's lawsuit.
2. The Equality Ombudsman shall reimburse the state through Södertörn University for legal expenses of SEK 116,710, all of which involve remuneration for their attorney, together with interest under section 6 of the Interest Act from the date of this judgment until payment is made.

Members of the Court: Jonas Malmberg, Dag Ekman, Kerstin G Andersson, Staffan Löwenborg and Annette Carnhede. Unanimously.

Court Secretary: Martina Sjölund