

WORKPLACE DISCRIMINATION IN NORWAY

Stručni članak

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PhD Glen Falch STARR*
PhD Petter SOLTVEDT**

* Assistant professor at the the University of South-Eastern Norway, e-mail: Glen.K.Starr@usn.no

** Associate Professor at the University of South-Eastern Norway, e-mail: Lars.P.Soltvedt@usn.no



Abstract: The main subject of the paper is workplace discrimination in Norway, a topic of high relevance for employers and employees alike. In this paper the authors strive to present an overview of the relevant legal framework regarding workplace discrimination. In addition, the authors present the prior and current topicality of the issue. They also strive to present examples on the use of the legal framework to deepen ones understanding. The paper is written in English to make the information readily available for academic professionals as well as non-professional groups such as foreign based HR-representatives, business owners or representatives from Non-Governmental Organizations (NGOs).

Keywords: Norwegian law, labor law, discrimination, workplace.

Introduction

This paper is based on a Power Point presentation I held at the University of South-Eastern Norway (USN) in the spring of 2022. The topic was workplace discrimination, and after consultations with my colleague and later co-author, we concluded this topic could be of interest to other groups, such as foreign based HR-representatives, business owners or representatives from Non-Governmental Organizations (NGOs).

After doing research and finding to my surprise that over one third of the employees in the private sector in Norway work in a business controlled by foreign owners (NOU 2021: 9, Den norske modellen og fremtidens arbeidsliv – Utredning om tilknytningsformer og virksomhetsorganisering: 14), I was convinced that such an important subject as discrimination should be written about again and again, and in different languages as well as in varying degrees of depth. Material on the matter should be easily accessible, and this paper is meant to be a minor contribution to this important task.

Prior and current topicality

Unfortunately, discrimination is neither something new nor something that is merely of historical interest. It has been, is and will be a topical issue.

For instance, when preparing my lectures, I easily found a vast well of examples of discrimination. One, that caught my eye, was a newspaper clipping from 1973 (Tromsø, 1973), that tells the tale of Pakistani workers not being wanted nor hired in the fishing industry in Tromsø in Northern Norway even though the same industry was struggling to keep afloat due to severe understaffing.

A more recent example is a survey on discrimination among members of the Norwegian Association of Lawyers. The respondents, all having a legal education and background, and thus being in an exceptional position to actually tell unlawful

discrimination from lawful differential treatment, responded that one out of four had experienced discrimination in the workplace (Norwegian Association of Lawyers, 2020).

Another recent example, from December 2020, is the so called #Me Too case, where The Supreme Court of Norway (HR-2020-2476-A) found that a young female industrial mechanic had been sexually harassed by two of her employer's customers.¹

Legal backdrop

This paper will focus on two legal acts in Norway: The Equality and Anti-Discrimination Act (Act relating to equality and a prohibition against discrimination) and the Working Environment Act (Act relating to working environment, working hours and employment protection, etc.). These are the most central acts regarding anti-discrimination, and the most important ones for the every-day practitioner to be aware of.

This does not, however, mean these acts are the only relevant legal documents regarding discrimination.

One should also be aware of the Constitution of the Kingdom of Norway, specifically article 98 which states as follows: "No human being must be subject to unfair or disproportionate differential treatment."

Norway is furthermore bound by several relevant international conventions,² some of which have the force of Norwegian law insofar as they are binding for Norway (Act relating to the strengthening of the status of human rights in Norwegian law (hereinafter: the Human Rights Act) section 2), and also take precedence over any other legislative provisions that conflict with them (the Human Rights Act section 3).

In addition, one should also be aware of the Penal Code section 186, which states:

"A penalty of a fine or imprisonment for a term not exceeding six months shall

1 The following is written in the judgment's summary: "A young female industrial worker, who was the only female among 15 workshop employees, had experienced that one of the workshop's customers on one occasion had placed his hands under her sweater on the lower part of her back. On a later occasion, he had pretended to grab her crotch. Another customer had over time approached the woman, repeatedly tickled her waist and on one occasion smacked her bottom over her trousers...Both customers' conduct was of a sexual nature, unwanted and troublesome to the woman. They were ordered to pay NOK 15 000 and NOK 20 000 respectively in compensation for non-economic loss." NOK 15 000 was 1 414 Euro and NOK 20 000 was 1 885 Euro in December 2020.

2 Inter alia: UN Covenant on Civil and Political Rights, UN Covenant on Economic, Social and Cultural Rights, The European Convention on Human Rights, Revised European Social Charter, Convention on the Elimination of All Forms of Discrimination Against Women, UN Convention on the Elimination of all forms of Racial Discrimination, UN Convention on the Rights of Persons with Disabilities and ILO Convention No. 111 on Discrimination (Employment and Occupation).

be applied to any person who in a commercial or similar activity refuses a person goods or services based on the person's

a) skin color or national or ethnic origin;

b) religion or life stance;

c) homosexual orientation;

d) reduced functional capacity, provided that the refusal is not due to a lack of physical accommodation.

The same penalty applies to any person who for such a reason refuses a person access to a public performance, display or other gathering on the terms that apply to other persons."

The two acts and their respective scopes

The Equality and Anti-Discrimination Act applies to all sectors of society (the Equality and Anti-Discrimination Act section 2). It applies to one's working life, in the housing sector, the school and educational sector as well as in trade, industry and other sectors (Prop.81 L (2016-2017) page 310).

The Working Environment Act, and more specifically its chapter 13 which regulates discrimination, only applies to working life (section 13-2).

The consequence of this is that one has a general protection against discrimination in all sectors of society due to the Equality and Anti-Discrimination Act, and an additional protection on the job thanks to the Working Environment Act.

Protection against discrimination

Both acts prohibit discrimination, yet on the basis of different discriminatory grounds.

The Equality and Anti-Discrimination Act prohibits: "Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors...«Ethnicity» includes national origin, descent, skin color and language (section 6)." The Working Environment Act, on the other hand, prohibits discrimination on the basis: "of political views, membership of a trade union, or age... [as well as] ...discrimination of an employee who works part-time or on a temporary basis (section 13-1)."

As one can see, due to both acts being applicable in working life, there are more prohibited grounds of discrimination in this sector than in other sectors. It is factual, although may sometimes seem unreasonable, that one has a stronger protection against discrimination at work as compared to other areas of life.

An illustrative example occurred in 2018 and was written about by the National Human Rights Institution in Norway (National Human Rights Institution in Norway, 2018). At a café in Oslo the management made it abundantly clear that people who planned to vote for the Swedish political party "*Sverige demokraterna*"

were not welcome (Nettavisen, 2018). The owners of the café were in other words treating certain people worse than others based on their political opinion. This would certainly have been unlawful discrimination *if it had occurred in working life*, but since this was not the case,³ the differential treatment was lawful.

Direct and indirect discrimination

Both acts prohibit direct as well as indirect discrimination (section 13-1 in the Working Environment Act and section 6 in the Equality and Anti-Discrimination Act).

Direct discrimination is, somewhat simplified, when a person is treated worse than others,⁴ and the negative, differential treatment is due to one or several grounds of discrimination.⁵ An example of direct discrimination would be if Jane Doe were not to be offered a job she applied for due to her gender. If the reason for her not getting the job were not her gender, but that she was not qualified, then that would not qualify as being unlawful discrimination. It would instead be considered to be lawful differential treatment (Rt-2014-402).

Indirect discrimination means any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others on the basis of one or several grounds of discrimination (section 8 in the Equality and Anti-Discrimination Act, and Prop.81 L (2016-2017) page 110 regarding the Working Environment Act). An example of indirect discrimination would be the prohibition of the use of Hijab at one's place of work. In 2018 one such case was brought before The Norwegian Anti-Discrimination Tribunal and the following is stated in its decision (DIN-2018-30): "However, in the tribunal's assessment, the application of such a neutrally designed uniform regulation will in practice mean that persons, who on the basis of religious beliefs, wish to wear religious garments are put in a worse position than other employees. This is therefore indirect discrimination."

Grounds of discrimination

One should further note that the prohibition against discrimination includes discrimination on the basis of actual, assumed, former or future grounds of discrimination (section 6 in the Equality and Anti-Discrimination Act). For instance, if a bouncer with prejudices were to deny a person access to a club, because he

³ One was not within the scope of the Working Environment Act, which prohibits discrimination on the basis of political views, but simply "left" with the Equality and Anti-Discrimination Act which does not prohibit differential treatment on the basis of political views.

⁴ A comparison must be done, though it can be done with an (or several) actual person(s) or with a hypothetical person.

⁵ See section 7 in the Equality and Anti-Discrimination Act, and Prop.81 L (2016-2017) page 110 regarding the Working Environment Act.

wrongly assumes that this person is homosexual, then it would be without legal relevance if this assumption later turns out to be wrong (Prop.81 L (2016-2017) page 104 and 105).

The prohibition also applies if a person is discriminated against on the basis of his or her connection with another person, when such discrimination is based on a ground of discrimination (section 6 in the Equality and Anti-Discrimination Act). This would be if the same bouncer were to deny another person access to the same club, but this time because that person is related to a homosexual person. This too would be considered discriminatory.

Lawful differential treatment

Both acts have exception provisions (the Equality and Anti-Discrimination Act section 9 and 10, and the Working Environment Act section 13-3). If the respective provision's conditions are met, then that which would otherwise have been discrimination, is viewed as simply being lawful differential treatment.

In the *Working Environment Act*, this is regulated in the first paragraph of section 13-3. There the Act states that discrimination that has a "just cause", that is not "disproportionate" and which is "necessary for the performance of work or profession" is lawful differential treatment.

All three⁶ of these conditions must be fulfilled, and the provision is interpreted restrictively as to not undermine the protection against discrimination (Ot. prp. nr. 104 (2002-2003) page 40).

An example on the use of this section can be found in the Supreme Court of Norway's judgment in the so-called Helicopter Judgment (Rt-2012-219). In this judgment the Supreme Court ruled that it was in violation of the prohibition on age discrimination when in 2008, an employer required, in accordance with the collective agreement, that ten helicopter pilots should retire on turning 60 (HR-2017-219-A.).

The Supreme Court found that the exception provision was not applicable in this case due to the intervention being *disproportionate in relation to the just cause*. If the age limitation had been set to 65, which is the international age limitation set by international standards regarding piloting licenses, rather than 60, the intervention would have been proportionate, and the case would have, with all probability, turned out differently.

In the *Equality and Anti-Discrimination Act*, a similar provision can be found in section 9, which states the following: "Differential treatment does not breach the prohibition in section 6 if it:

⁶ The protection against indirect discrimination, and direct discrimination on the basis of age as well as of employees who work part-time or on a temporary basis, is somewhat weaker, cf. the Working Environment Act section 13-3, second paragraph, as well as Ot. prp. nr.49 (2004-2005) page 327. The condition "necessary for the performance of work or profession" does not apply in such cases.

- a. has an objective purpose;⁷
- b. is necessary to achieve the purpose,⁸ and
- c. does not have a disproportionate negative impact on the person or persons subject to the differential treatment (Prop.81 L (2016-2017) page 315).”

The section further states that:

“In employment relationships...direct differential treatment on the basis of gender, ethnicity, religion, belief, disability, sexual orientation, gender identity or gender expression is only permitted if the characteristic in question is of decisive significance for the performance of the work or the pursuit of the occupation and the conditions in the first paragraph are met.”

The last paragraph is interpreted restrictively and is meant to cover instances where, for instance, models or actors have to have a specific gender or pilots have to have good eyesight (Prop.81 L (2016-2017) page 316).

In addition, section 10 regulates lawful differential treatment on the basis of pregnancy, childbirth or breastfeeding and leave in connection with childbirth or adoption. Simplified, one may say that the protection against discrimination in these cases is almost absolute, and this section is basically a rarely used safety precaution (Prop.81L (2016–2017) page 317).

Permitted positive differential treatment

Positive differential treatment is characterized by the fact that it promotes equality of treatment. It is also a tool that can be used to promote equality and to fight discrimination.⁹

Positive differential treatment, when based on discriminatory grounds, is permitted when it is suited to promote the purpose of the respective Act, is proportionate in view of the intended purpose and ceases when its purpose has been achieved (the Equality and Anti-Discrimination Act section 11, the Working Environment Act section 13-6 and Ot. prp. nr. 49 (2004-2005) page 328). Examples of permissible positive differential treatment would be gender quotas (DIN-2018-341 and LDN-2014-1 for instance) and scholarships for multicultural journalists (LDN-2014-8).

⁷ The purpose must be factual and worthy of protection, cf. Prop.81 L (2016-2017) page 315.

⁸ If the purpose can be reached in another non-discriminatory matter, which is suitable to achieve the purpose and not disproportionately demanding of resources, then this is a weighty argument against necessity, cf. Prop.81 L (2016-2017) page 315.

⁹ One should however note the word “permitted” is used, not “obligatory”. It is therefore up to the potential wielder to choose if this tool is to be picked up or left in its toolbox. There is a certain element of risk attached to the use of these provisions. If one were, for instance, to continue the permitted positive differential treatment longer than necessary, the provision’s conditions would no longer be met, and one could be found guilty of discrimination.

Compensation and damages

A person who is subject to discrimination may claim compensation and damages (the Equality and Anti-Discrimination Act section 38 and the Working Environment Act section 13-9). Damages cover the economic loss resulting from the unlawful treatment, while compensation for non-economic loss is set to an amount that is reasonable in view of the nature and scope of the harm, the relationship between the parties and other relevant circumstances. An example of the economic consequences of discrimination can be found in LH-2008-99829, where the Court of Appeals sentenced an employer to pay 150 000¹⁰ NOK in compensation for non-economic loss, as well as 83 247¹¹ NOK in damages, to an employee who was dismissed due to her pregnancy.

Summary

To conclude, the legal understanding of discrimination in Norway is: Direct or indirect negative differential treatment, on the basis of one or more grounds of discrimination, which does not fulfill the necessary conditions to be viewed as lawful differential treatment or permitted positive differential treatment.

One could also say that the core of the matter is simply that people should only be treated differently when based on reasonable grounds.

Furthermore, and from a non-legal perspective, we would argue that discrimination, in addition to being illegal, is also bad business and a fruitless endeavor. Differences should not be avoided, but embraced, and it our firm opinion that embracing differences will bring forth positive results.¹²

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¹⁰ 15342 Euro as of April 2022.

¹¹ 8515 Euro as of April 2022.

¹² One such example is when OBOS won the award for the best job advertisement. They won it for an advertisement where a pregnant female employee was placed front and center (OBOS, 2018).

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DISKRIMINACIJA NA RADNOM MJESTU U NORVEŠKOJ

Doc. dr Glen Falch STARR*
Prof. dr Lars Petter SOLTVEDT**

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Ključne riječi: norveško pravo, radno pravo, diskriminacija, radno mjesto.

* Docent na Univerzitetu Jugoslovenske Norveške, e-mail: Glen.K.Starr@usn.no

** Vanredni profesor na Univerzitetu Jugoslovenske Norveške, e-mail: Lars.P.Soltvedt@usn.no