

New case law on age discrimination from the Swedish Labour Court

Sofie Haggård Larsson / Associate

Introduction

The Swedish Labour Court decided in a ruling this autumn that a bus and taxi company had discriminated against three drivers who lost their temporary employment when they reached the age of 70. The company had an age policy that meant that the temporary employment for drivers and others with a job involving risk would end no later than the date on which the employee reached the age of 70.

The Swedish Labour Court found that the real purpose of the age limit was to increase road traffic safety. However, the employer had not shown that such a general age limit was suitable and necessary to attain this purpose and nor were other legal exemptions found to be met. The conclusion was thus that the age limit could not be justified and the three drivers were entitled to compensation for discrimination of SEK 40 000 each. The judgment in Swedish can be read [here](#).

Age discrimination in brief

The Discrimination Act covers various areas in society and seven different grounds for discrimination, of which age is one. The scope of age discrimination has gradually been broadened and now comprises all areas of society. Certain exemptions apply, however, for example to military service, insurance services and the providing of alcohol.

An employer is prohibited to discriminate on the ground of age against anyone who is employed by the employer; requests or applies for work; applies for or completes a traineeship; or is available to work or carries out work on a staffing contract. The prohibition does not,

however, prevent discriminatory treatment due to age if this treatment has a justifiable purpose and the measures taken are suitable and necessary to attain the purpose. Age limits prescribed in law are generally not seen as discriminating.

Summary of the judgment

The Equality Ombudsman ("DO"), who represented the three drivers, brought an action against The Swedish Road Transport Employers' Association, The Swedish Bus and Coach Federation and the bus company in question (the "Company") and claimed that the Company should pay compensation to each of the drivers in an amount of SEK 100 000 and interest thereon. The grounds for the claim were, in brief, that the Company applied a policy that meant that temporary employment as a driver could not be renewed after the employee had reached the age of 70. The policy had been applied to the three drivers who had been notified that their temporary employment would not be renewed because they had reached the age of 70. The Company had disadvantaged the three drivers by treating them worse than others in a comparable situation and this disadvantage was connected to their age. This meant that the Company had exposed them to direct age discrimination in contravention of item 1, section 4 chapter 1 and item 2, section 1, chapter 2 of the Discrimination Act. The exemption in section 2, chapter 2 of the Discrimination Act was not applicable. The Company should, therefore, in accordance with section 1, chapter 5 of the Discrimination Act pay compensation for the offence that the discrimination had caused the three. There were no grounds to reduce the compensation.

The employers' parties contested DO's claim. The ground for the defence was in short that the Company had not exposed the three drivers to discrimination by denying them renewed temporary employment at the age of 70. The exemption from the prohibition on discrimination in both the first and fourth item in chapter 2 of the Discrimination Act was applicable. Traffic and transport safety constituted a justifiable purpose pursuant to both exemptions. Consideration should also be taken to the effect of the Company's policy namely that younger drivers could be offered employment to a greater extent and that humiliating termination of older drivers' employment could be avoided. The Company's policy was suitable and necessary to attain the invoked purpose.

The Swedish Labour Court noted that the parties were in agreement that the Company's application of the age policy had comprised a disadvantage that was covered by the prohibition on discrimination. The question was whether this discriminatory treatment could still be deemed, as the Company alleged, permitted under any of the exemptions in the Discrimination Act.

The Swedish Labour Court held that an employee was entitled to retain his or her employment until the age of 67 under the Employment Protection Act ("EPA"). The EPA also stipulated that agreements on temporary employment could be entered into when, amongst other things, an employee has reached the age of 67. The discriminatory treatment in this case consisted of the three drivers being denied, under the Company's age policy, extension of their temporary employment with the Company after they had reached the age of 70. The policy was worded as follows (our underlining).

All permanent employment shall cease at the end of the month in which an employee reaches the age of 67. The employee may, if there is a need, be offered continued employment after s/he has retired. The employment shall then be temporary employment. The employment will be renewed thereafter at a maximum of twelve months at a time. For drivers and others with a job involving risk, employment shall however cease no later than the date on which the employee reaches the age of 70. All extension of the employment of drivers shall be preceded by a medical examination for road traffic purposes. This examination shall be conducted by the in-house medical staff.

The Swedish Labour Court further stated that under the exemption from the prohibition on discrimination,

discriminatory treatment may occur if it is "caused by a characteristic that is connected to one of the discrimination grounds, for example upon decision of employment, if the characteristic due to the nature of the work or the context in which the work is carried out constitutes a real and decisive vocational requirement that has a justifiable purpose and the requirement is suitable and necessary to attain the purpose". In the case of discrimination on the grounds of age, there is a special exemption which stipulates that the prohibition of discrimination does not prevent discrimination, "if it has a justifiable purpose and the means used are suitable and necessary to attain that purpose." In the case at hand, the parties had different views on which of the purposes invoked by the employer parties could constitute grounds for the Swedish Labour Court's trial. DO alleged that only the Company's real purpose could be tried whilst the employers' side alleged that also other reasons could constitute justifiable purposes which could be tried. The Swedish Labour Court stated that the policy at hand contained no special reasons but that the wording, that the age limit only applied to "drivers and others with a job involving risk" together with the Company's information that there were other temporary employees older than 70, suggested that an intention to offer employment opportunities to younger persons and to avoid the humiliating termination of employment due to age were not a part of the purpose or application of the policy. The Company's representatives had also only referred to road traffic safety in its examination in chief. The Swedish Labour Court therefore concluded that the real purpose of the age limit had been to increase road traffic safety. The other reasons submitted by the Company, such as giving younger drivers the opportunity to enter the labour market, could not be taken into consideration when assessing the matter.

The parties agreed that road traffic safety may constitute such a justifiable purpose that makes discrimination permitted. The court concluded, thereafter, that the age of 70 could not constitute a real and decisive vocational requirement but that certain physical capacities can, and that a professional driver must demonstrate cognitive abilities such as concentration and observation. These abilities also generally decline with increasing age. The question was, however, whether a general age limit could be deemed suitable and necessary to attain what was, in itself, a justifiable purpose namely road traffic safety. The Company argued in this respect that increasing age entail an increased risk for illnesses at the same time as cognitive abilities deteriorate. For older persons, such changes can take place quickly and employers find it difficult to monitor

this, particularly because drivers work alone and have little contact with the management. The Company alleged that medical examinations in this respect were not sufficient. DO argued that chronological age was a blunt instrument for assessing an individual's health and functional ability because normal aging does not in itself bring an increased risk of road traffic accidents. There are large differences between individuals of the same age. Application of existing provisions and the Company's current road traffic safety efforts, were sufficient to meet the demands on road traffic safety.

The Swedish Labour Court then reviewed various national and international provisions regarding age limits and professional drivers; research results that the parties had invoked; and what had emerged from examination of two doctors. The Swedish Labour Court held that the employers' parties had not convincingly shown that the Company's general maximum age limit was a suitable and necessary tool to meet the justifiable purpose of increased road traffic safety in accordance with the exemption in item 1, section 2, chapter 2 of the Discrimination Act.

The Swedish Labour Court further held with reference to case law from the European Court of Justice that the second exemption in item 4, section 2, chapter 2 of the Discrimination Act mainly comprises socio-political goals and that, amongst other things, air traffic safety was not covered by the exemption. Therefore, the purpose of increased road traffic safety could not be deemed to be covered by this exemption.

To conclude, the Swedish Labour Court held that the Company by applying an age limit of 70 years in their age policy has undisputedly discriminated against the three drivers. The discrimination could not be justified by any of exemption provision in the Discrimination Act and therefore constituted unlawful discrimination. The drivers were thus entitled to compensation.

In respect of the size of the compensation, the Swedish Labour Court stated the following. Compensation shall be assessed so that, after an overall assessment of the individual case, it provides reasonable compensation to the injured party on the basis of the seriousness of the violation and contributes to counteracting discrimination in society. In this case, the Company's actions were serious because the three drivers had lost an opportunity to continue working. At the same time it was taken into consideration that this was a case concerning temporary employment contracts and that the contracts did not entitle the three drivers to a minimum

amount of hours. The consequences for the drivers were further limited in that they were entitled to make use of their old age pension. The Company also had a legitimate purpose and did not intend to offend the drivers by their policy. The Company also had, on the basis of a previous DO decision concerning another company's corresponding 70 year age limit, assumed that their actions did not constitute discrimination. Against that background and the preventative aspects, the compensation was set at SEK 40 000 to each driver.

Commentary

The judgment of the Swedish Labour Court illustrates that the prohibition on discrimination of a person on the grounds of his or her age in temporary employment applies unless any of the exemptions which make discrimination acceptable exists. The question of whether discrimination is permitted or not shall be tried on the basis of the real purpose of the discrimination, i.e. what the employer wants to achieve with, for example, an age-limit policy. The fact that there may be several justifiable purposes to such a policy is, therefore, of no importance unless the employer can show that these also were part of the real purpose. Also, even if an employer has a justifiable purpose, in this case road traffic safety, the employer must consider whether the age limit is a suitable and necessary tool to achieve this purpose.

In the case at hand, it was not tried whether the Company's age policy could constitute permitted discrimination on the basis of the labour market policy reasons invoked by the Company because the Swedish Labour Court deemed that the Company had not shown that these constituted a real ground for the policy. It is, therefore, unclear if the result of the case would have been different if these reasons had also been tried by the court.

An employer considering a general age policy, for example in the case of temporary employment, should carefully consider the purpose of such a policy. The employer should also consider whether the application of an age limit is, in itself, a suitable and necessary tool to meet this purpose or whether the purpose can be attained by other measures. To avoid a situation in which the employers' reasons for the age policy are called into question, it is advisable to clarify the purpose of the policy, for example by stating the reasons in the policy or otherwise documenting them.