



## Rozhodnutia vo veci 343/2010/MHZ - Údajná diskriminácia počas postupu verejného obstarávania

Rozhodnutie

**Prípad** 343/2010/MHZ - **Otvorené dňa** 15/02/2010 - **Rozhodnutie z dňa** 20/12/2010 -

**Dotknutý orgán** Súdny dvor Európskej únie ( Nezistil sa žiadny nesprávny úradný postup ) |

Sťažovateľka pracovala počas štúdia práva ako prekladateľka právnych textov. Po získaní vysokoškolského titulu však pracovať prestala, pretože sa stala matkou. Neskôr sa zúčastnila na postupe verejného obstarávania, ktorý vyhlásil Súdny dvor na účely uzatvorenia rámcových zmlúv na preklady právnych textov Súdneho dvora. Jej ponuka bola zamietnutá pretože nemala po ukončení štúdia dva roky praxe v oblasti prekladov právnych textov, čím nespĺnila jednu z podmienok. Sťažovateľka sa obrátila na ombudsmana s tvrdením, že formalistický výklad uvedenej podmienky vedie k nepriamej diskriminácii žien. Podľa jej názoru je v tejto súvislosti omnoho pravdepodobnejšie, že ženy sa po skončení štúdia na určitý čas prestanú venovať budovaniu svojej kariéry. Je teda pravdepodobnejšie, že viac žien bude mať príliš krátku prax na to, aby mohlo pracovať pre Súdny dvor.

Súdny dvor vo svojom stanovisku vysvetlil, že uvedená podmienka by sa mala bez rozdielu vzťahovať na mužov aj ženy, pretože preklad právnych textov si vyžaduje odbornú prax nadobudnutú po získaní vysokoškolského titulu.

Ombudsman s týmto odôvodnením súhlasil. Súdny dvor preukázal, že aj keď v skutočnosti existuje rozdiel medzi mužmi a ženami, na ktorý sťažovateľka poukázala, je odôvodnený objektívnymi faktormi, ktoré nemajú súvislosť s diskrimináciou na základe pohlavia. Ombudsman nezistil nesprávny úradný postup a prípad uzavrel.

The background to the complaint

1. The complainant submitted her request to participate in the Call for tenders ('the Call'), published by the Court of Justice (CJ), for the conclusion of framework contracts to translate legal texts from certain official languages of the European Union into Polish.
2. The complainant's request to participate was rejected on the grounds that she did not possess at least two years of experience as a translator of legal texts after having obtained a university degree in the field of law. This requirement was provided for in point III.2.3 of the Call.
3. The complainant sent a letter to the CJ in which she challenged the decision in question. She argued that, in her case, the CJ should not interpret the relevant tender condition in a formalistic way, but rather look at its *ratio legis*, which, according to her, is to select professional translators. She subsequently described her academic background (a degree in



law and in German philology with a specialisation in the translation of legal texts). She explained that she acquired two years of professional experience in the course of her studies, by translating legal texts for the Centre of Banking Law at the X University. Moreover, she argued that it was not possible for her to obtain two years of professional experience subsequent to her studies. This was because, at that point in time, she decided to postpone her professional career to become a mother. She requested the CJ to take into consideration the professional experience she obtained during her university studies and to accept her request to participate in the tender.

**4.** In its reply, the CJ explained that: (i) it must apply the same criteria for all applications, and pointed out that these were clearly spelled out in the Call; (ii) the provision on two years of post-university professional experience is clear and cannot be subject to interpretation; (iii) in the future, the complainant can, after having obtained the necessary professional experience, submit her request to participate in similar tenders.

**5.** Subsequently, the complainant sent another letter to the CJ, in which she expanded on the points previously made. In particular, she argued that she could not have obtained professional experience in the field of translation after finishing her studies because she went on maternity leave during this time and did not therefore work. In her view, the CJ's rigid interpretation of the eligibility criteria concerning professional experience discriminates against women.

**6.** Given that she did not receive a reply to her last, on 11 August 2009, she turned to the European Ombudsman for the first time (complaint 2033/2009/MW). In her complaint, she alleged that the CJ's formalistic interpretation of the eligibility criteria concerning professional experience (point III.2.3. of the Call for tenders) leads to the indirect discrimination of women. She claimed that she should be accepted to the tender. On 21 September 2009, the Ombudsman informed the complainant by letter that he considered that the CJ had not had enough time to reply to her letter (the CJ was on its summer break at that time) before she complained to him. Pursuant to Article 2.4 of the Ombudsman's Statute, her complaint was therefore inadmissible at that stage because prior administrative approaches to the institution had not been completed. The complainant was advised that, if the CJ failed to respond within a reasonable time, she could consider renewing her complaint to the Ombudsman.

**7.** On 4 February 2010, the complainant sent an e-mail informing the Ombudsman that she had not received a reply from the CJ. The above-mentioned e-mail was registered under the present complaint reference (343/2010/MHZ). The complainant alleged that the CJ failed to reply to her letter. She also maintained her earlier allegation and claim contained in complaint 2033/2009/MW.

**8.** On 15 March 2010, following the Ombudsman's intervention through a telephone procedure, the CJ sent a reply to the complainant's letter. In that reply, the CJ first apologised for not replying to the complainant earlier. Then, the CJ recalled what "*had already been said to the complainant*", namely, that the wording of point III.2.3 of the Call is clear and unequivocal. It provides that, to be accepted, applicants must have a minimum of two years



of professional experience after having completed their university studies relating to the subject of contracts for which the call was launched. The CJ added that the complainant is free to submit her application again as soon as she complies with the above condition. Since this reply dealt only with the complainant's allegation of failure to reply and not with her remaining allegation and claim, the Ombudsman decided to open an inquiry.

The subject matter of the inquiry

**9.** The Ombudsman decided to open the present inquiry into the complainant's following allegation and claim:

**Allegation:**

The CJ's formalistic interpretation of the eligibility criteria concerning professional experience (point III.2.3. of the Call), leads to the indirect discrimination of women.

**Claim:**

The complainant should be accepted to the tender.

The inquiry

**10.** The complaint was sent to the Ombudsman on 3 February 2010. On 7 April 2010, the Ombudsman opened an inquiry and sent the complaint to the CJ with a request for an opinion by 31 July 2010. On 30 July 2010, the CJ sent its opinion. Subsequently, it sent the translation of the opinion into Polish, which was forwarded to the complainant with an invitation to submit observations by 31 October 2010. The complainant did not submit observations.

The Ombudsman's analysis and conclusions

## **A. Alleged indirect discrimination of women**

### Arguments presented to the Ombudsman

**11.** The complainant argued that the requirement of having two years of professional experience after completing university studies results in an indirect disadvantage for women who have to take care of their children born at this point of time and who cannot therefore acquire work experience. In contrast, men normally do not have such a constraint and can start working directly after their studies. In the complainant's view, the CJ should have taken her maternity leave into account when deciding whether she complied with the condition concerning professional experience.

**12.** The complainant admitted that she never worked after obtaining her university diploma, but argued that she obtained two years of professional experience in the course of her studies. In her view, this experience should be treated as equivalent to experience gained after completing university studies. In her view, the CJ should not apply a formalistic approach to the requirement in question, but look for the Call's "*ratio legis*", namely, to recruit professional translators.



**13.** In its opinion, the CJ argued that point III.2.3 of the Call clearly provides that applicants must have a minimum of two years of professional experience " *after a university education in law* ". [1] This requirement was established in order to ensure an appropriate level of translations into Polish of the complex legal texts produced by the CJ. It is evident that translations by translators who have not yet completed university legal training are not of a sufficiently high quality and cannot be considered " *equivalent* " to translations made by a translator who has completed his/her university studies in law.

**14.** Given that the requirement in question was clear, the contracting authority had no margin of discretion when applying it to the complainant's case. Doing otherwise would have resulted in an infringement of the Call and of the principle of equal treatment of tenderers.

**15.** Against this background, and taking into account the complainant's arguments, the CJ verified whether the requirement in question is contrary to the principle of non-discrimination on grounds of sex. In other words, whether the contracting authority did or did not respect this principle when establishing the said requirement in the Call for tender.

**16.** Pursuant to Article 135 paragraph 1 of Commission Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2] (the 'Implementing Provisions'), the contracting authority shall draw up clear and non-discriminatory selection criteria.

**17.** It is well established case-law that the principle of non-discrimination, which constitutes a fundamental principle of law, prohibits comparable situations being from treated differently and different situations from being treated in the same way, unless such treatment is objectively justified [3] .

**18.** The minimal requirement of technical skills applies without distinction to all candidates regardless of their sex. It does not imply any difference in treatment on grounds of sex.

**19.** As far as the complainant's argument could be understood to allude that, by establishing the requirement in question, the contracting authority treated two different situations equally, namely, the situations of male and female candidates because only the latter may encounter constraints in obtaining professional experience due to maternity leave, this argument cannot be sustained. It seems evident that the equal treatment of candidates of different sex, as implied by the requirement in question, is objectively justified.

**20.** In this context, the CJ referred to, among others: (i) the principle of sound financial management and Article 27 of the Financial Regulation that " *the resources used by the institution for the pursuit of its activities shall be made available in ... appropriate ... quality* "; (ii) to the second paragraph of Article 135.2 of the Implementing Provisions that " *the contracting authority may lay down minimum capacity levels below which it cannot select candidates:* "; and (iii) to Article 137 of the Implementing Provisions that "[i] n procurement procedures [technical and professional skills of economic operators] *shall be assessed with regard in particular to ...*



experience ... "

**21.** The CJ concluded that the requirement in question served to attain the legitimate goal of ensuring an appropriate level of translations and thus, to make it possible for the Court to be able to carry out its mission. In addition, the requirement in question is proportional and does not go beyond what is necessary in order to attain the above goal.

**22.** The CJ underlined that the requirement concerning two years of professional experience does not imply that such experience necessarily has to be gained immediately after a candidate completes his/her studies. The CJ reiterated that the complainant could, after having gained two years of professional experience, resubmit her offer in the framework of the same tender, which, the Court pointed out, is open for a period of four years.

## The Ombudsman's assessment

**23.** At the outset, the Ombudsman finds it useful to refer by analogy to the CJ's preliminary rulings in which it has consistently held that indirect discrimination arises where a measure, though formulated in neutral terms, works to the disadvantage of far more women than men.

**24.** In this regard, it cannot be excluded that the requirement in question could primarily affect women as regards their access to employment offered by the CJ through the Call. The requirement in question might place at a disadvantage women, who bear children after their degree and postpone their professional careers in order to take care of them, when compared to men who, because they are less likely to go on extended paternal leave, are able to enter into the labour market directly after obtaining their degrees. In other words, a much larger number of young female law graduates may, in the course of a two year period following the completion of their studies, not be able to be selected under the Call and work as a translator of the CJ's.

**25.** In such circumstances however, even if the requirement in question would, in practice, give rise to discrimination against women when compared to men, in its opinion, the CJ clearly demonstrated that, if there a distinction between women and men to which the complainant refers indeed exists, it is justified by objective factors unrelated to any discrimination on grounds of sex [4].

**26.** In its opinion on the present case, the CJ referred to the quality of translations expected from successful tenderers in the Call, and rightly argued why it requires the very best translations of its legal texts. The Ombudsman also agrees with the CJ's view that the translations of legal texts made by students who have not yet graduated in law cannot objectively have the same high quality as translations made by lawyers with a degree. Contrary to the complainant's submission, the translation of legal texts becomes "*professional*" only if the translators complete their studies in law and have a degree. This is an objective factor unrelated to any discrimination on grounds of sex.



**27.** The CJ has thus properly justified why it requires all its translators (men and women) to have two years of professional experience after completing studies in law and not to accept translation experience, even of a high standard, gained in the course of such studies.

**28.** Finally, it is worth pointing out that the complainant had **no** professional experience at all after completing her studies. It is therefore fair that the complainant's maternity leave could not be taken into account.

**29.** In light of the above, the Ombudsman does not find an instance of maladministration and closes the case.

## **B. Conclusions**

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**There has been no instance of maladministration.**

The complainant and the Court of Justice will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 20 December 2010

[1] " *au terme de la formation universitaire en droit* ".

[2] OJ 2002 L 357, p. 38.

[3] The CJ referred to Case C-304/01 *Spain v Commission* [2004] ECR-I-7655, paragraph 31.

[4] In this context, the CJ's preliminary rulings concerning the situation of part-time workers may be referred to: Cases 170/84 *Bilka v Weber von Hartz* [1986] ECR 1607, paragraph 29; C-457/93 *Kuratorium für Dialyse und Nierentransplantation* [1996] ECR-I – 243, paragraph 31 and Case C-184/89 *Nimz* [1991] ECR-I 297, paragraph 14. In *Kuratorium*, the CJ held that " ... *the application of legislative provisions such as those at issue ... in principle causes indirect discrimination against women workers ... It would be otherwise only if the difference of treatment found to exist was justified by objective factors unrelated to any discrimination based on sex.* " In *Nimz*, the CJ took the view that it is impossible to identify objective criteria unrelated to any discrimination on grounds of sex on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. The CJ held, on the other hand, that although experience goes hand in hand with the length of service, and experience enables a worker in principle to improve his/her performance in



tasks allotted to him/her, the objectivity of such a criterion depends on all circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of certain number of working hours.