

DISCRIMINATION ON THE BASIS OF GENDER REASSIGNMENT (TAS 323/10)

In connection with the reorganisation at the Financial Supervisory Authority in spring 2009, the Heads of Division were appointed first and then the relevant experts for each division. The experts who were employed at the time of the reorganisation were given the opportunity to state their preference as to which division and which manager they wished to be assigned to. One of the newly appointed Heads of Division announced to the workplace community that he would be changing his first name from a man's name to a woman's name and adopting the female gender which he perceived as his gender identity. Following this, the employer extended the application period for experts for the division in question, and some of the experts who had applied withdrew their applications. The Head of Division in question was then transferred from that post to an advisor's post and claims to have experienced discrimination in the workplace thereafter too. Later, in autumn 2009, a new recruitment process for the Head of Division appointment was conducted, and the aforementioned employee was not chosen.

An employee may not be treated so as to put him/her at a disadvantage in the workplace by reason of his/her gender, transsexuality or gender reassignment.

The Ombudsman for Equality considers that the situations described above form a chain of related events starting with the employer's decision to extend the application period for experts after the Head of Division's declaration of transsexuality. What the employer was essentially doing in extending the application period was to offer the experts who had already applied the chance to withdraw their applications in response to the Head of Division's gender reassignment or the timing of the announcement thereof.

The employer claims that the employee's decision to change his name and to correct his gender to match his perceived gender identity had no relevance to the aforementioned events. What was relevant according to the employer was how the employee chose to go about this course of action, i.e. the timing and publication of the announcement. The employer's representatives have stated that the Head of Division's actions led to an obvious loss of confidence between her and the majority of the employees who had applied for the division in question. The employer's stated intent in the situation was to act as transparently as possible towards the experts involved in a situation where the institution was being reorganised and amalgamated, so as to ensure the functionality of the organisation.

The employer could have but did not exercise the managerial prerogative to assign the experts who withdrew their applications to the division in question regardless of said withdrawal, on the basis of non-discrimination legislation or the continued functionality of the organisation. The Ombudsman for Equality considers that in this situation the employer exercised the managerial prerogative in a discriminatory fashion and in violation of the Equality Act, since the negotiations and measures undertaken to resolve the situation only involved the Head of Division and not the experts who had withdrawn their applications.

Also, the employer's decision to extend the application period had exposed the Head of Division to gender-based harassment. A publicly expressed wish to work under a different supervisor or in a different position because of a supervisor's transsexuality or the timing of the announcement thereof is unacceptable gender-based behaviour that violates the mental integrity of the person in question and, at the very least, fosters an atmosphere of contempt, humiliation and oppression.

Under the Equality Act, the employer is obliged to act so as to discontinue any gender-based harassment. In the present case, the employer should have, at the very latest when the

applications were withdrawn, intervened in the aforementioned gender-based harassment pursuant to the Equality Act.

In fact, the employer had initiated negotiations with the Head of Division to resolve the situation, one of the options presented being that the employee step down from the position of Head of Division for a fixed period. The Head of Division herself had requested a 3-month transition period, but after the negotiations was willing to step down for a period of 1 year and 3 months. However, the written agreement thereof presented to her did not guarantee her return to the post of Head of Division. The agreement also did not specify what her duties would be after the transition period or which division she would possibly become head of. At this point, the Head of Division had suggested that she become an advisor instead.

For an employer to transfer one or more employees to other duties on the basis of their gender may be considered discrimination as prohibited in the Equality Act. In view of the circumstances in which the agreement for the Head of Division to transfer to advisor duties was concluded and the employee's position as the weaker party in the negotiations and the agreement, it is the considered opinion of the Ombudsman for Equality that the employee in question had been forced to transfer from the Head of Division post to advisor duties as a result of the employer's actions motivated by her transsexuality.

Concerning the appointment of a new Head of Division, the Ombudsman for Equality notes that a presumption of discrimination arises if an unsuccessful candidate is able to prove that he or she was more qualified for a position than a person of the opposite sex who was ultimately appointed. In case of the suspected basis for discrimination being transsexuality, the person compared may also be of the same sex. To rebut a presumption of discrimination, employers must show that their actions are attributable to a justifiable factor not connected to gender. Unless just cause is presented, the appointment shall be considered to be in violation of the Equality Act.

The Ombudsman for Equality principally issues statements concerning points of law in interpreting the Equality Act and does not, as a rule, conduct comparisons of merit between applicants in cases of suspected discrimination in employment procedures. Comparison of the merits and suitability of applicants and appraisal of whether the employer's selection was objective and acceptable are ultimately the business of an eventual compensation trial at a district court.

However, in the present case the Ombudsman for Equality notes that the reports on the matter seem to indicate that the employer had emphasised different points and areas of expertise in the autumn recruitment than in the spring recruitment. Some three months prior to the autumn recruitment, the employer had proposed that the employee temporarily step down from the post of Head of Division, which makes it highly likely that the employer did not want to appoint her Head of Division in autumn 2009. This may have contributed to how the applicants' merits were weighted and how the appointment decision was made.

The Ombudsman for Equality notes that the unwillingness of co-workers to work under the Head of Division after being informed of her transsexuality (which as a basis for discrimination is prohibited in the Equality Act) is not an acceptable justification for the employer's actions. Gender equality and non-discrimination are such fundamental rights that derogations cannot be justified simply by the employer's aim to be as transparent as possible and to ensure the continued functionality of the organisation.

A lack of confidence may only be considered an acceptable justification as referred to in the Equality Act when it has arisen from some other reason than a basis for discrimination prohibited

in said Act. When and how the employee's transsexuality had come to the attention of her supervisors and the rest of the personnel is irrelevant in appraising this matter, as transsexuality may not have any bearing on an employee's status in the workplace. The employee was thus fully entitled to select the time and manner of informing the workplace community of the gender reassignment.

The Ombudsman for Equality notes that the employer's actions had placed the employee in question at a disadvantage, and it is not sufficient for refuting the presumption of discrimination to state that the employer had no intention of discriminating against her. The Ombudsman for Equality notes in her statement that the justifications given by the employer for this unequal treatment are not acceptable under the Equality Act.

In December 2011, Helsinki District Court ruled that the Financial Supervisory Authority had violated the non-discrimination provision in the case of a transsexual employee. The employee, who had undergone male-to-female gender reassignment, was awarded EUR 15,000 in damages as compensation for the discrimination. The employer's actions in extending the application period for experts was ruled to be wholly in violation of the Equality Act. In all other respects, a presumption of discrimination was ruled not to have arisen in the case.