

Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist Case C-407/98

1) Reference Details

Jurisdiction: European Court of Justice (ECJ), reference for a preliminary ruling from Sweden

Date of Decision: 6 July 2000

Link to full case:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0407:EN:HTML>

2) Facts

The University of Gotheburg announced a vacancy for the position of Professor of Hydrospheric Sciences on 3 June 1996. The announcement also stated that positive discrimination might be exercised (in accordance with Regulation 1995:936) to help aid the promotion sex equality. In total eight candidates applied for the post, including Ms Abrahamsson, Ms Destoni, Ms Fogelqvist and Mr Anderson.

The selection board took two votes. The first time limiting their selection criteria to academic qualification, Mr Anderson came first with five votes and Ms Destouni second with three. A second vote was then taken, considering both scientific merit and the Regulation, here Ms Destouni came first with six votes and Mr Anderson second with two. The selection board then recommended to the University that Ms Destouni to offered the position (with Mr Anderson coming second and Ms Fogelqvist third).

Ms Destouni withdrew her application, consequently the University referred the matter back to the selection board to decide on the matter in light of the University's drive for equality between men and women and Regulation 1995:936. The selection board refused to re-examine the case, as they had already considered the applications in light of the Regulation and issues of equality. Further the board was of the view that there was a significant difference in qualification between Mr Anderson and Ms Fogelqvist, and that interpretation of the Regulation had not been easy.

On 18 November 1997 the University decided to appoint Ms Fogelqvist. Mr Anderson and Ms Abrahamsson appealed to the *Överklagandenämnden*, a specialised appeals committee dealing with appeals from certain decisions made by higher education authorities, against the decision. Mr Anderson appealed on the grounds that the decision was contrary to Article 3 of the Regulation and ECJ jurisprudence. Ms Abrahamsson, whilst recognizing the superior qualifications of Mr Anderson, contended that her qualifications were superior to that of Ms Fogelqvist.

The appeals committee decided that Mr Anderson and Ms Fogelqvist were the most qualified candidates, with Mr Anderson being found upon enquiries to be clearly more competent in the scientific field than Ms Fogelqvist.

3) Law

European Community Law

- Council Directive 76/207 - Equal Treatment Directive

European Case Law

- C-158/97 *Badeck and Others* [2000] IRLR 432

4) Legal questions referred to ECJ

1. Do Articles 2(1) and 2(4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions preclude national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected ("positive special treatment") if there is a need for an applicant of the under-represented sex to be selected and under which positive special treatment is not to be applied only where the difference between the applicants' qualifications is so great that such treatment would be contrary to the requirement of objectivity in the making of appointments?
2. If the answer to Question 1 is in the affirmative, is positive special treatment impermissible in such a case even where application of the national legislation is restricted to appointments to either a number of posts limited in advance (as under Regulation 1995:936) or posts created as part of a special programme adopted by an individual university under which positive special treatment may be applied (as under Article 15a of Chapter 4 of *Högskoleförordningen*)?
3. If the answer to Question 2 means that treatment like positive special treatment is in some respect unlawful, can the rule, based on Swedish administrative practice and the second paragraph of Article 15 of Chapter 4 of *Högskoleförordningen* - approved by the Appeals Board - that an applicant belonging to the under-represented sex must be given priority over a fellow applicant of the opposite sex, provided that the applicants can be regarded as equal or nearly equal in terms of merit, be regarded as being in some respect contrary to Directive 76/207/EEC?
4. Does it make any difference in determining the questions set out above whether the legislation concerns lower-grade recruitment posts in an authority's sphere of activity or the highest posts in that sphere?

5) Decision

The ECJ held in respect of the questions submitted that Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Article 141(4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments."

Similarly, Article 2(1) and (4) of Directive 76/207 and Article 141(4) EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.

Moreover, Article 2(1) and (4) of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidates are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

Finally, the question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled.