

Labour Court clarifies freedoms of religion and conscience in healthcare sector

13 February 2019 | Contributed by [Wistrand](#)

[Introduction](#)

[Facts](#)

[District court decision](#)

[Labour Court decision](#)

[Comment](#)

Introduction

Sweden is one of the most secular countries in the world with full freedom of religion. Further, freedom of conscience is a right protected by the European Convention on Human Rights (ECHR). However, domestic law recognises no right to conscientious objection. In this respect, Sweden differs from most other European countries.

In 2017 the Labour Court clarified from an employment law perspective whether freedom of conscience gives healthcare professionals a right to conscientious objection.

Facts

A midwife expressed that her religious beliefs forbid her from performing abortion services. When she expressed her opinion, three different healthcare regions in Sweden refused to employ her. The midwife brought the case to the Equality Ombudsman, which found that her refusal to perform abortion services was a manifestation of her religious beliefs and was thus protected by Article 9 of the ECHR. The Equality Ombudsman also found that the healthcare regions' requirement that the midwife perform abortion services was reasonable and motivated by social interests in order to secure women's effective access to abortion services. Therefore, the midwife's freedom of religion had not been violated.

The midwife brought a civil claim against the healthcare regions in a district court for general damages under the assertion that her religious and conscientious rights had been violated.

District court decision

The district court first stated that the Discrimination Act forbids direct discrimination. This applies where someone is disadvantaged by being treated less favourably than someone else has or would have been treated in a comparable situation on the basis of:

- sex;
- transgender identity or expression;
- ethnicity;
- religion or other belief;
- disability;
- sexual orientation; or
- age.

Further, the court held that the Discrimination Act also forbids indirect discrimination. This applies where someone is disadvantaged by the application of a provision, criterion or procedure that

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...discrimination on grounds of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.

The Discrimination Act does not prevent differential treatment based on a characteristic associated with one of the grounds of discrimination if – when a decision is made regarding employment, promotion or education or training for promotion – by reason of the nature of the work or the context in which the work is carried out, the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose.

The district court found that the midwife's rights had not been violated. It stated that it is not generally accepted that people with religious beliefs publicly take a stand against abortion more frequently than non-religious people (ie, on grounds other than purely religious grounds). Therefore, the refusal to perform abortion services did not have a direct connection to any violation of the freedom of religion. The district court held that it could not be concluded that the midwife had been discriminated against based on her religion and therefore dismissed her claim for damages.

The midwife appealed the district court's judgment in the Labour Court (Case B 10/16).

Labour Court decision

The Labour Court drew the same conclusions as the district court, albeit on different grounds. The Labour Court found that the midwife's refusal to perform abortion services had been based on religious beliefs and was thus protected by the ECHR. It further stated that any limitations of religious freedom must be:

- necessary and reasonable in a democratic society; and
- proportionate and within a reasonable margin of appreciation.

If abortions are permitted by national law, the state must ensure that women have access to abortion services (ECHR cases *RR v Poland* (27617/04) and *P and S v Poland* (57375/08)).

After an overall assessment, the Labour Court found that the healthcare regions' criteria for employment regarding participation in abortion services was both adequate and necessary in order to fulfill the regions' obligation to provide good healthcare. To enforce such criteria when recruiting midwives does not amount to discrimination or a violation of the ECHR. Therefore, the Labour Court dismissed the midwife's claim for damages and she was requested to pay the healthcare regions' litigation costs in both courts, totalling €150,000.

The midwife and one of her colleagues have initiated proceedings against the Swedish state in the European Court of Human Rights. It remains to be seen whether their complaint will be tried.

Comment

Having no right of conscientious objection recognised in domestic law, Sweden differs from most other European countries. The Labour Court's decision clearly states that the stance under Swedish employment law remains the same even where religious beliefs are asserted as objective grounds.

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