Globalisation, Fragmentation, Labour and Employment Law

– A Swedish Perspective

Editors

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Addressing Unlawful Discrimination: The Swedish Journey

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This chapter traces the journey of unlawful discrimination perceived of as a non-issue in Sweden to the current parliamentary understanding of protection against unlawful discrimination as a fundamental human right now buttressed by legal regulation. This journey has been to the greatest extent influenced by events outside of Sweden, namely the Europeanisation and internationalisation of human rights that has successively been gaining ground since World War II. Arriving at the current Swedish parliamentary perception – that protection against unlawful discrimination on the basis of sex, transgender identity and expression, ethnicity, religion or other belief, disability, sexual orientation or age, is a fundamental human right – has been neither a self-evident, nor a linear, path in Swedish law. The Swedish courts, however, cannot yet be seen as embracing this same development, rather instead invoking a more liberal analysis when deciding such claims as seen below. As evidenced by these examples, we now have the law in the books, but arguably not yet the law in action when it comes to unlawful discrimination protections. The gap between the intent of the legislator and the application of the discrimination law by the Swedish courts is the focus of this chapter, with particular attention paid to access to justice issues as one way of reducing this distance.

To understand the stance as taken by the Swedish courts, an overview of the legislative development is first given. The starting point of

this journey – morphing soft to hard law and ultimately human rights – can be seen as the period from approximately the end of World War II, when several international instruments were drafted, up to 1974 when the new Instrument of Government was adopted. During this initial phase, discrimination in general was not unlawful, and the few protections in place in Sweden consisted mainly of those agreed upon between the social partners. The second phase begins in 1975 and covers the almost twenty years prior to the Swedish legislative preparations for becoming a member of the EU (then the EC) in 1995. The first significant Swedish employment discrimination statutes came into effect during this second phase and initially served as gap-filling legislation, with the social partners free to contract out of them without providing for any equivalent protections. The third phase begins in 1994 and traces the developments in the law for a period of fifteen years, up to 2007. During this third phase, discrimination on bases other than sex or ethnic origins, and in contexts other than employment, came to be statutorily prohibited in different acts. The fourth and current phase commences with the coming into force in 2009 of the present Discrimination Act (2008:567). The Act ultimately combined the majority of Swedish discrimination legislation into one universal act and can be seen, at least from the perspective of the Swedish legislator, as the nascent perception of protection against unlawful discrimination as now being a human right protected under law.

Several cases are discussed after the presentation of the legislation history; these examples underscore some of the lingering legal hurdles in giving the new “hard” law effect as human rights protections with respect to unlawful discrimination – basically the very liberal judging by the courts with respect to such claims, resulting in a passive sort of judicial activism. Remaining access to justice issues are then taken up, with the last section of this article exploring some discourses in the Swedish law as seen from the historical perspectives discussed below.

1. The First Stage: From Post-World War II to 1974

The first stage is defined here as the post-World War II period up to the 1974 adoption of the new Swedish Instrument of Government.

The majority of activity with respect to discrimination issues occurred, however, primarily on the international and regional levels; below, these are addressed first.

1.1 International Instruments

The United Nations Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948. Under it, Sweden and all other member countries (except six) declared in its Article 2 that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 prescribes that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Equal pay for equal work is protected in its Article 23(2), stating that “[e]veryone, without any discrimination, has the right to equal pay for equal work.” Three more instruments addressing discrimination were issued by the UN in 1966. The UN Convention on the Elimination of All Forms of Racial Discrimination was signed by Sweden in 1966 and ratified in 1971. The UN Universal Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights were both signed by Sweden in 1967 and also ratified in 1971.

The European Convention for the Protection of Human Rights and Fundamental Freedoms¹ was one of the first concrete European human rights conventions adopted in the wake of World War II. Sweden ratified the ECHR in 1952 but it did not become effective as Swedish law until 1998. Under Article 14 ECHR, the signatories committed to that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,

¹ For more on the ECHR and Sweden, see Iain Cameron, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (7th ed. Iustus 2014).

property, birth or other status.” The inception of today’s European Union can also be found during this first stage with the principle of equal pay between men and women drafted into Article 119 of the Treaty establishing the European Economic Community.

The adoption of ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 came three years after the UN Declaration. ILO Convention No. 111 on discrimination (employment and occupation) followed seven years later, with its adoption in 1958. Sweden’s ratification of these conventions was raised in the 1950s. As to any guarantee of equal wages, different wage tariffs for men and women had existed in Swedish collective agreements since the beginning of the 1900s. Both the Swedish Government and Parliament opposed ratification; they did not wish to depart from the Swedish labour law model under which the social partners in the labour market have the right to enter into agreements through free contract negotiations as to wage conditions, without interference or influence of the state in the form of legislation. The central labour market organisations, the employers’ organisation, SAF, and the blue-collar labour organisation, LO, entered into an agreement that all such different wage tariffs would be phased out over a period of five years, by 1965.² Based on this agreement, the Government found that the conditions required to adopt the conventions already existed in 1962, and Parliament ratified the conventions that same year despite continued opposition by LO and SAF.

² An example of sex-based tariffs as explicitly included in collective agreements can be seen in the collective agreement, *Verkstadsavtalet*, 1960 in Sten Edlund, *TVISTEFÖRHANDLINGAR PÅ ARBETSMARKNADEN – EN RÄTTSLIG STUDIE AV TVÅ RIKSAVTAL I TILLÄMPNING* (Norstedts 1967) at 363. Minimum wages in the agreement are based on sex, which then is broken down by age, with the age of 19 being the point of peak wages for women, and the age of 24 for men. Male wages are further categorised by length of experience. For employees of at least the age of 24, with at least seven years of experience, a man was entitled to a minimum wage of SEK 3.08 per hour, a woman SEK 2.43, 79% of the male wages. *Id.* at 364.

1.2 Sweden's Constitutional Starting Point

This first phase is marked more by action with respect to discrimination issues on the international and regional levels than on the Swedish national level. Much of this international activity was fallout from World War II and the racism exhibited as a result of this conflict, as well as the fact that women in continental Europe were forced to work to replace the men absent from the workplace due to military service. The latter was not as significant a factor in Sweden due to its neutrality during World War II and the fact that soldiers were not sent to war; consequently, women did not enter the Swedish workforce in any significant new numbers during this period.

The 1809 Instrument of Government was still in effect until the 1970s, covering the period under which many of the international instruments were being signed by Sweden. Individual rights, as such, were generally addressed in its Article 16, stating that the King was to:

[M]aintain and further justice and truth,
[P]revent and forbid inequity and injustice,
[N]ot deprive nor allow any person to be deprived of life, honor, personal liberty or well-being without a lawful trial or sentence, and
[That] no person [should] be deprived of property, whether chattels or real, without a warrant and judgment in the manner as prescribed by Swedish law,
[T]hat no person's peace should be disturbed in his home,
[T]hat no person should be extradited from one place to another,
[T]hat no person should be forced to act in violation of his conscience but rather be protected and able to freely exercise his religion as long as he did not disturb the public peace or cause public disturbance.

The King was also to ensure that only courts having jurisdiction over an individual could sentence that person. Article 16, and the rights contained therein, had roots extending back to Magnus Eriksson's letter of proclamation in 1319. Individual rights outside those in Article 16 were granted in the Freedom of the Press Act with respect to access to public documents and freedom of the press and speech. The 1809 Instrument of Government espoused a separation of power, in line with Montesquieu's political theory, between the King, Parliament, Supreme Court and National Bank. However, a shift in political power

from the King to the Parliament had been occurring successively during the twentieth century, without any parallel amendments being made to the Constitution reflecting such.

The 1974 Instrument of Government was to embody the successive constitutional changes that had occurred during the twentieth century. The failure of the 1809 Instrument of Government to reflect the political reality, and its subsequent marginalisation, is seen as giving rise to a type of anti-constitutionalism. Under this view of majoritarianism, the constitution (as well as the courts) did not and should not reign in popular sovereignty. The balance of political power was changed from separation of power to separation of function. Parliament is to be the sole legislator – as seen from the portal paragraph of the 1974 Instrument of Government: “All public power in Sweden proceeds from the people.” As a result, a comparatively weak court system was created with only limited powers and no true power of judicial review. This separation of function is also clear from the perception that the third branch of political power, after the legislative and executive branches, is seen as the press.

Only five articles in the second chapter of the newly adopted 1974 Instrument of Government concerned individual rights: freedom of speech, expression, assembly, demonstration, association, religion and movement, as well as the right to information, protection from forced disclosures as to associations or religion, protection from unlawful searches of person, home or correspondence, access to public documents and the right for the social partners to take lawful industrial actions. The role of the Chapter 2 rights, however, was still greatly debated. Certain legal scholars in favour of a weak judicial system argued that Chapter 2 rights should not serve as a legal basis for a claim by an individual. Instead, they were to be more of a policy declaration, serving as guidelines for the Parliament in its legislative work, giving precedence to the principles of parliamentary rule and majoritarianism.

1.3 The Swedish Labour Law Model

The Swedish labour law model, based on self-regulation by the social partners, reached its zenith during this first phase after its inception

with the *Saltsjöbaden* Agreement in 1938. Under this labour law model the State is to be neutral with respect to the labour market and disputes between the social partners, the employers and labour unions. This neutrality assumes the guise of the absence of legislation. Legislation passed during this first period in many cases amounted to a secondary source of law – gap-filling legislation. The social partners historically have been granted significant leeway to opt out of legislation through collective agreements (but not through individual employment agreements). The terms and conditions of work are to be regulated by collective agreement, which also explains why certain areas, such as minimum wages and redundancy benefits, today are still not regulated by statute.

A major reform of labour and employment law occurred during the 1970s, but in essence this was a codification of many of the solutions found in the collective agreements. During the 1950s and 1960s, Sweden was one of the wealthiest countries per capita in the world, partly because it capitalised on an infrastructure left untouched by two world wars and neutrality. Europe was rebuilding, and Sweden provided the engineers, materials and tools. As such, labour had the upper hand at the beginning of the 1970s and was able to push through this legislative package in 1974, including the Act on Employment Protection, the Trade Union Representatives (Status at the Workplace) Act, a right to a leave of employment for educational purposes, and the Labour Disputes (Judicial Procedure) Act.

In the specific area of employment discrimination, an act had been passed already in 1945, prohibiting employment termination on the basis of marital status or pregnancy. A government regulation mandating equal pay for equal work in the Swedish state public sector was promulgated in 1948 after the UN Universal Declaration of Human Rights. A government regulation was adopted in 1973 prohibiting discrimination on the basis of sex or age in state employment. Otherwise, the work of women generally was instead restricted by statute as to certain aspects during this period – particularly with respect to night work and forced maternity leave for industrial workers – resulting in lawful discrimination on the basis of sex in certain areas of employment.

The issue of whether legislation should be used as a means to promote equality between women and men had been the object of general debate throughout the 1970s. Certain legislative motions also included prohibitions against unlawful discrimination on other grounds, such as race, based on the American federal Civil Rights Act of 1964. An Equality Delegation presented its report in 1975, concluding that legislation could easily freeze the current injustices in the system and impede more active equality measures between men and women. The delegation found overwhelming reasons against adopting legislation similar to that in the United States. Statutory regulation of discrimination in the private sector had long been opposed by both employer and employee organizations. The social partners argued that discrimination did not and should not differ in any aspect from any other employment issues as already regulated by them under the Swedish labour law model.

2. The Second Stage: 1975 to 1993

This second stage is delineated by activity on the Swedish national level, again as a response to international activity. Swedish action occurred with respect to both the Swedish Instrument of Government and the enactment of Swedish legislation prohibiting unlawful discrimination in employment, initially on the basis of parental leave, later on the basis of sex and then eventually – less vigorously – on the basis of ethnic origins.

2.1 International Instruments

Sweden participated in the first UN World Conference of Women in 1975, resulting in another international push. Sweden signed the 1979 UN Convention as to the Elimination of All Forms of Discrimination Against Women (“CEDAW”) in 1980. CEDAW is seen as the first international treaty to address fundamental rights for women in politics, health care, education, economics, employment, law, property, marriage and family relations.

Although Sweden was still not yet a member of the EU, the Swedish Parliament closely followed the developments in Union law. Almost

twenty years after the adoption of the equal-pay provision in Article 119, a triad of directives was issued by the Council addressing issues of sex discrimination: the 1975 Equal Pay Directive mandating equal pay between men and women, the 1976 Equal Treatment Directive mandating equal treatment in employment between men and women and the 1979 Social Security Directive prohibiting different treatment with respect to social security schemes on the basis of sex.

2.2 Swedish Discrimination Legislation

The Chapter 2 rights in the Instrument of Government were expanded in 1976 to finally include discrimination protections in Articles 15 and 16. Article 15³ prescribes that no law or other legal provision can entail that a citizen is treated less favourably on the basis of race, colour or ethnic origin. Article 16⁴ forbids the state from discriminating against any person by law or regulation due to sex, unless the legal instrument constitutes a step in the endeavour to achieve equality between men and women or relates to compulsory military service or other similar official duties.

As part of the abovementioned legislative package, the Employment (Co-determination in the Workplace) Act was passed in 1976. At the tail end of this reform was the discrimination legislation: unlawful employment discrimination on the basis of sex, race or exercising parental leave.

2.2.1 Unlawful Sex Discrimination

A second Equality Committee was appointed in 1976 and given the task of investigating and drafting legislation prohibiting unlawful sex discrimination in employment. This new mandate was based on the conviction that legislation prohibiting sex discrimination was significant as one of several societal mechanisms for bringing about change. In response, the social partners entered into an Equality Agreement in 1977 covering large segments of the private sector, in an effort to prevent legislation. The Equality Committee issued its report in 1978 and

³ As of 2010 Article 12.

⁴ As of 2010 Article 13.

the Government thereafter presented a first legislative bill with respect to prohibiting unlawful sex discrimination in employment. As to the goals of the law, the Minister stated that a “law gives a material and tangible expression for society’s recognition of the principle of equality between men and women”.⁵ A “half-law”, simply the paragraphs containing the general prohibition against discrimination, was passed by the Swedish Parliament by a vote of 155 to 150. The proposed creation and jurisdiction of the Equal Opportunity Ombudsman, *JämO*, as well as the obligation of the employer to carry out active measures, were not adopted. A second legislative bill was submitted already in 1979, to a large extent simply the same as the first proposal. It passed by one vote. After decades of discussion and debate, the first Swedish act prohibiting unequal treatment of women and men in work finally came to pass, effective 1 July 1980.

The 1979 Equal Treatment Act had three parts: active measures to be taken by the employer, the prohibition against discrimination and the enforcement mechanisms and procedures, including the establishment of *JämO*. The objective of the Act was to promote equal rights between women and men regarding employment. Employers were prohibited from disfavouring an employee or job applicant on the basis of sex. Disfavouring existed if an employer, in employment, promotion or training, appointed a person of the opposite sex while overlooking a person with better qualifications. Collective agreements prescribing differences as to employment terms on the basis of sex were to be declared invalid. Damages could be awarded for violations of the Act. A “group rebate” was created for certain harms; in the event that an employer discriminated against more than one person, the damages were to be assessed for one person, to be shared equally by the group.

The results of a ten-year evaluation of the 1979 Equal Treatment Act formed the bases for the new 1991 Act Concerning Equal Treatment between Women and Men at Work (“1991 Equal Treatment Act”). This act kept much of the 1979 Equal Treatment Act, particularly its layout and enforcement mechanisms. A prohibition was added

⁵ Legislative Bill 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet*, *m.m.* at 18.

against harassment based on refusal of sexual advances or for reporting of a sex discrimination claim.

2.2.2 Unlawful Ethnic Discrimination

A first act prohibiting discrimination on the basis of ethnic origins was passed in 1986. Containing only seven paragraphs, it prohibited ethnic discrimination based on race, colour, nationality, ethnic origins or religion. The office of an Ombudsman against Ethnic Discrimination was also created. Although technically legislation, this law included no sanctions; a plaintiff would thus have no right to redress, and no cases were brought under it.

3. The Third Stage: 1994 to 2007

While the first stage discussed above is characterised by the absence of hard law in the field of discrimination, and the second stage by the emergence of such – although still fairly toothless owing to the right of the social partners to contract out of the legislation – this third stage can be seen as a period of both expansion and reconciliation to a more hard-law and human rights model. Expansion meant that the number of protected groups and areas were enlarged, but reconciliation also meant that the demands of Union law in certain aspects forced a confrontation between the Swedish labour law model and the more hard-law model of individual employment rights under EU law.

3.1 International Instruments Addressing Discrimination

On the international level, the UN Convention on the Rights of the Child was ratified in 1989. On the EU level, the Charter of Fundamental Rights of the European Union was issued in 2000, bringing together in a single document the fundamental rights protected by Union law. The EU Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. The EU Charter prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual

orientation. Initially the Charter's status was uncertain, but now the EU Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon in 2009.

Several directives were adopted during this phase to address discrimination issues: the 1992 Pregnant Workers and Breastfeeding Directive, the 1996 Parental Leave Directive, the 1997 Burden of Proof Directive and the 1997 Part-Time Work Directive. This level of activity continued into the new millennium, with directives extending the scope of unlawful discrimination to include discrimination based on race as prohibited by 2000 Racial Equality Directive and based on religion or belief, disability, age or sexual orientation as prohibited by 2000 Employment Framework Directive. The Equal Treatment Directive was significantly amended in 2002. The Equal Treatment in Access to Goods and Services Directive was issued in 2004. Ultimately, seven of the twelve directives issued with respect to sex discrimination, along with certain principles among those established in the case law of the Court of Justice, were codified into one directive, the 2006 Discrimination Directive.

3.2 Swedish Discrimination Law

The ECHR was finally enacted as Swedish law, a requirement under dualism, in 1994, effective 1998. This timing was predominantly due to the pending membership in the EU scheduled for 1995. The ECHR was not enacted as a Swedish constitutional act, but given protection under Article 23 of the second chapter of the Instrument of Government prescribing that “[n]o act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention.”

By the end of this third phase, Sweden had nine legislative acts covering different grounds of discrimination in different settings: the 1991 Equal Treatment Act; the 1995 Parental Leave Act; the 1999 Measures to Counteract Ethnic Discrimination in Working Life Act; the 1999 Prohibition of Discrimination in Working Life of People with Disability Act; the 1999 Act Prohibiting Discrimination in Working Life based on Sexual Orientation; the 2001 Act on Equal Treatment of Students at Universities; the 2002 Act Prohibiting Discrimination on the Basis of Part-Time and Fixed-Time Work; the 2003

Act Prohibiting Discrimination with respect to Goods and Services; and the 2006 Act Prohibiting Discrimination with respect to primary school children. Many of these acts were direct products of the requirements of Union law.

4. The Fourth Stage in Sweden: 2008 and onward

In the first proposal submitted by the committee investigating the Swedish discrimination legislation in 2006, the committee began by establishing the human rights' bases for prohibitions against discrimination, citing all of the abovementioned international and European human rights instruments.⁶ The committee concluded that discrimination constitutes a violation of fundamental human rights and that legislation is one of several means of combating discrimination and thereby supporting these rights. Finding the regulatory situation in Sweden at best piecemeal legislation, the committee proposed a single discrimination act.

Such an act, the 2008 Discrimination Act, was passed two years later coming into effect 1 January 2009. The Act forbids unlawful discrimination on the basis of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Transgender identity or expression as well as age are new protected grounds under the Act. The protection against unlawful discrimination is to encompass employment (both private and public), education, labour market policy, starting a business and profession recognition, membership in organisations such as labour unions, housing, providing goods services both as the provider and as the customer, social benefits, social insurance and military service. The 2008 Discrimination Act prohibits unlawful discrimination, defined as direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate.⁷ In addition, the third paragraph of the new Discrimination Act explicitly

⁶ See SOU 2006:22 *En sammanhållen diskrimineringslagstiftning, del 1* at 45.

⁷ Two of the Swedish discrimination acts were retained, the 2002 Act Prohibiting Discrimination on the Basis of Part-Time and Fixed-Time Work and the 1995 Parental Leave Act.

states that the law is mandatory, and that any agreements in contravention of the rights or obligations as afforded under the act are void.

The Swedish legislator deliberately removed the term “race” from the list of unlawful discrimination grounds. According to the Legislative Bill, this was to demonstrate that a biological concept of race is unacceptable: “[T]here is no scientific basis for dividing human beings into different races and from a biological perspective, consequently is there neither any reason to use the word race with respect to human beings”. The Parliament also directed the Swedish Government to act in the international arena towards avoiding the term “race”, as used with respect to human beings, in official texts. The Government was also to review the extent to which the term “race” occurred in Swedish laws not based on international texts, and as far as possible, suggest a different term. To date, no such alternative term has been proposed, either by the Parliament or the Government.

5. Protection against Unlawful Discrimination as a Human Right – Are We There Yet?

The true test in this journey is whether the Swedish legislator’s expressed intent of discrimination protections as human rights is being effected by the Swedish courts. Two cases are examined here as indicative of the application of these laws as discussed above. As can be clearly seen in both cases, the Swedish Labour Court (acting as the highest instance) and the Swedish Supreme Court assess the application of the laws to parties they treat as having equal bargaining positions; this constitutes a very liberal application of the law.

5.1 Supreme Court Judgment NJA 2008 p. 918

In the first case, NJA 2008 p. 918, plaintiffs had brought claims of unlawful discrimination on the basis of ethnic origins against a restaurant owner. The plaintiffs were law students, frustrated with the fact that the act making discrimination in pubs and restaurants on the basis of ethnic origins unlawful, was never successfully invoked due to the high burden of proof required by the courts. The students divided themselves up into four teams: two teams with blonde hair and blue

eyes, and two teams with black hair and brown eyes. All team members dressed in the same style, with the same hairstyles, etc., so that the differences in essence were simply colours of hair, skin and eyes. Armed with recorders to document the treatment, the first black/brown team was sent in and was refused admittance to the restaurant. The next team, blonde/blue, was sent in and admitted. The third team, brown/black, was sent in to confirm, and was not admitted, with the fourth blonde/blue team being sent in and being admitted. Based in part on the documentation collected by the teams, the trial court found unlawful discrimination and awarded plaintiffs SEK 20,000 (approximately € 2,200) each. This judgment was affirmed by the appellate court.

The restaurant owner appealed to the Supreme Court, which also found that the restaurant had committed unlawful discrimination, but that this:

[M]ust be assessed against the risk that the public's confidence in the legislation could be lowered if the legislation is perceived as a means for allowing individuals to in a planned and systematic manner enrich themselves, a risk which becomes specifically more tangible if the compensation is in an amount that exceeds what can be considered reasonable compensation for the degradation that the violation entailed.

Because the team members alleging unlawful discrimination knew that they would not be admitted to the restaurant, the Court found that the degradation could not be seen to be too great. The Court lowered the damages to the amount of SEK 5,000 (€ 565). In addition, despite the fact that the main rule in Swedish litigation is the English rule with respect to costs and fees – in other words, that the losing party must pay the winning party's legal costs and fees – the Court ordered the parties to bear their own legal costs and fees for the litigation at each instance, in essence wiping out any damages the plaintiffs received.

5.2 Labour Court Judgment AD 2009 no. 4

In the second case as decided by the Labour Court, AD 2009 no. 4,⁸ the plaintiff employee, originally from Gambia and resident in Sweden

⁸ This case must also be assessed against the background that, of the approximately

for 22 years, was working as a rehabilitation assistant at a municipal care facility. Plaintiff had worked at this facility since 2002. In 2004 a new head of the facility was appointed, Andersson.

Plaintiff alleged that Andersson made statements such as that plaintiff took such good care of the patients because he used voodoo, and that because he was big and black, these patients did what the plaintiff requested them to do because they were afraid of him. Plaintiff alleged that he made it clear to Andersson that he thought such statements inappropriate. In addition, he alleged that three other employees called him names such as “Blackey”, “Big Black Bastard”, “Black Head”, “The African”, “Kunta Kinte”, “gangsta” and also told him that they did not understand what he said.

At an employee review in the beginning of 2006, Andersson informed plaintiff that none of the employees wanted to work with him, but refused to tell him who had said so or why. The day after, the plaintiff wrote down his reaction to this conversation and had it read by another employee to all the employees in February. Plaintiff continued to work until almost two months later, when he received a warning and written notice in April that he need not come to work. Orally he was informed that the other employees were afraid of him. The municipality had not involved the union in this proceeding as required by the collective agreement. He was not given written notice of the reason for these actions until June after the union became involved. He was forced to stay home for 37 days and then transferred to another workplace. The municipality alleged that it did not know that plaintiff had felt discriminated against, so that it had no duty to investigate. The municipality also alleged that the letter written by plaintiff was threatening and that Andersson knew that something needed to be done at the workplace.

The Labour Court began with the statements made by the unit head, Andersson, finding it strange that if she had made such statements often, that none of the other employees had heard them; thus the Discrimination Ombudsman had not met the burden of proof with

thirty cases brought to the Swedish Labour Court since 2000 when the act was amended to include sanctions for claims of ethnic discrimination, the court has found unlawful ethnic discrimination in two cases.

respect to them. As to the other employees calling plaintiff names such as “Big Black Bastard”, “Black Head”, “The African”, “Kunta Kinte” and “gangsta”, the Labour Court again found that none of the other employees had heard such and thus the behaviour was not proven. However, there was banter at the workplace, including the use of nicknames such as “Blackey”, to which plaintiff responded at times with “Whitey.” The Labour Court found that as plaintiff had participated in this banter, the employer had no reason to believe that it was inappropriate and discriminatory, and as such, had no duty to investigate.⁹

The reasoning by the highest courts in both the cases can be seen as very liberal, with the parties assumed by the courts to have equal bargaining positions and in no need of any type of heightened protection, as is the case in most other legal systems with respect to claims of human rights violations.

5.3 The Burden of Proof as Applied by the Swedish Courts

Under Union law, an individual making a claim of unlawful discrimination is to present facts from which a presumption of discrimination can arise. In other words, the plaintiff has the burden of persuasion. The burden of proof, then, is shifted to the defendant, to prove that unlawful discrimination has not occurred. The recognition of the need for adequate procedural guarantees as well as remedies is expressed strongly in the Race Directive: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment” as well as the Equality Directive: “The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal

⁹ The Labour Court did assess damages due to the employer’s failure to involve the union with respect to the order to stay home from work.

treatment.” Under both directives, the Member States are to provide for effective, proportionate and dissuasive penalties for breaches of the obligation under these directives.¹⁰

When this burden of proof is applied by the Swedish courts, however, instead of being applied as shifting the burden of proof, the courts have perceived it instead as a shared burden of proof. This can be seen most clearly in the Labour Court case above, where the Court found that the plaintiff had not met the burden of proof with respect to discrimination. This despite the fact that according to Union law, the plaintiff only has the burden of persuasion and need only present circumstances upon which a presumption of discrimination can be based.

6. Remedies and Costs

The jurisprudence of the Labour Court displays a very conservative, liberal approach to claims of discrimination. Against this must also be weighed the economic risks of taking a case to the court.

If successful in a case raising issues of unlawful discrimination, a plaintiff can be awarded economic as well as exemplary damages. Equity is not an institution in Swedish law, so the courts have no equitable powers. A decision made by an employer can be voided, but the employer ultimately cannot be forced to take back a former employee, and can never be forced to hire an individual. A heightened form of exemplary damages, “discrimination damages” (*diskrimineringsersättning*), was created by the 2008 Discrimination Act as deterrence to unlawful discrimination. However, the act also explicitly states that the amount of damages awarded can be reduced to zero if such a reduction is deemed fair. The Swedish Labour Court has awarded such heightened discrimination damages in six cases to date, with the average such award being € 7,700.¹¹ Economic compensatory damages can only be

¹⁰ Equality Directive 2006/54/EC at Articles 19 and 18, Race Directive 2000/43/EC Art. 8(1) and para. 1(27), respectively.

¹¹ Discrimination damages (*diskrimineringsersättning*) have been awarded in six cases to date: AD 2015 no. 51, AD 2015 no. 12, AD 2014 no. 19, AD 2013 no. 71, AD 2013 no. 29 and AD 2013 no. 18.

awarded for unlawful conduct in the course of employment; in other words, a decision not to hire falls outside of this parameter because no “course of employment” has commenced. As such, economic compensatory damages have been awarded in even fewer cases than exemplary damages as many of the cases brought regard hiring processes.

Trial costs and fees in Sweden in general are awarded according to the English rule, which means that the non-prevailing party pays the trial costs and fees for both parties. According to § 5(2) of the 1974 Labour Disputes (Judicial Procedure) Act, the Labour Court may order that each party bear its own costs if the losing party had reasonable cause to have the dispute tried, but this option is seldom invoked by the Court.¹²

The amount of trial costs and fees awarded by the Labour Court demonstrates a trend that deviates from the relatively modest increases in the amount of damages awarded in cases raising discrimination claims. The amount of nominal damages per plaintiff awarded since the first passage of the discrimination legislations has been on the average of € 2,046¹³ in the 1980s,¹⁴ € 3,963 in the 1990s,¹⁵ € 5,512 in the

¹² In the over one hundred discrimination cases brought in the period from 1981 to 2015, the Court ordered each party to bear its own costs in seven, of which the plaintiff prevailed in four.

¹³ The currency exchange rate used here is 1 Euro to 9.37 Swedish crowns.

¹⁴ The calculations for the AD for the 1980s are based on the 39 judgments by the Labour Court raising the issue of equality during that decade: AD 1989 no. 40, AD 1989 no. 122, AD 1988 no. 50, AD 1987 no. 98, AD 1987 no. 83, AD 1987 no. 67, AD 1987 no. 51, AD 1987 no. 35, AD 1987 no. 23, AD 1987 no. 152, AD 1987 no. 140, AD 1987 no. 132, AD 1987 no. 101, AD 1987 no. 08, AD 1987 no. 01, AD 1986 no. 87, AD 1986 no. 84, AD 1986 no. 67, AD 1986 no. 103, AD 1985 no. 65, AD 1985 no. 134, AD 1984 no. 22, AD 1984 no. 140, AD 1984 no. 12, AD 1984 no. 100, AD 1984 no. 06, AD 1984 no. 01, AD 1983 no. 83, AD 1983 no. 78, AD 1983 no. 50, AD 1983 no. 104, AD 1983 no. 102, AD 1982 no. 96, AD 1982 no. 56, AD 1982 no. 17, AD 1982 no. 139, AD 1982 no. 102, AD 1981 no. 171 and AD 1981 no. 169.

¹⁵ The calculations for the AD for the 1990s are based on the 14 judgments by the Labour Court raising the issue of equality during that decade: AD 1998 no. 134, AD 1997 no. 68, AD 1997 no. 61, AD 1997 no. 16, AD 1996 no. 79, AD 1996 no. 41, AD 1996 no. 149, AD 1995 no. 74, AD 1995 no. 158, AD 1993 no. 49, AD 1993 no. 30, AD 1991 no. 65, AD 1991 no. 62 and AD 1991 no. 111.

2000s¹⁶ and € 5,602 to-date in the 2010s¹⁷ (including the heightened “discrimination damages” award). The average amount of trial costs and fees awarded during these same decades have been on average € 2,405 during the 1980s, € 10,038 during the 1990s, € 15,542 during the 2000s and € 20,504 to-date during the 2010s (these sums in reality to be multiplied by two – the unsuccessful party will be paying twice the amount of fees, for both the prevailing party and herself). Consequently, during this 45-year time span, the amount of nominal damages per plaintiff has increased by roughly 274%, while the trial costs and fees have risen 852%. This increase is a development favourable to defendants, because the risks a plaintiff takes if unsuccessful have successively increased, not only with respect to the increase in costs and fees, but also to the parallel relative stagnation of damage awards. Based on the averages from 2010–2015, the average damage is € 4,590 while the risk with respect to paying costs and fees for both sides will be € 41,208 – in other words, over seven times the amount of any damages awarded. To this can be added the success rates of the

¹⁶ The calculations for AD 2000–AD 2009 are based on the 52 judgments by the Labour Court raising the issue of equality during that decade: AD 2009 no. 87, AD 2009 no. 45, AD 2009 no. 27, AD 2009 no. 16, AD 2009 no. 15, AD 2009 no. 13, AD 2009 no. 11, AD 2009 no. 04, AD 2008 no. 97, AD 2008 no. 47, AD 2008 no. 32, AD 2008 no. 14, AD 2007 no. 45, AD 2007 no. 16, AD 2006 no. 97, AD 2006 no. 96, AD 2006 no. 79, AD 2006 no. 60, AD 2006 no. 126, AD 2006 no. 123, AD 2006 no. 104, AD 2005 no. 98, AD 2005 no. 92, AD 2005 no. 87, AD 2005 no. 69, AD 2005 no. 63, AD 2005 no. 53, AD 2005 no. 47, AD 2005 no. 32, AD 2005 no. 22, AD 2005 no. 21, AD 2005 no. 14, AD 2005 no. 126, AD 2005 no. 03, AD 2004 no. 44, AD 2004 no. 22, AD 2004 no. 102, AD 2004 no. 08, AD 2003 no. 76, AD 2003 no. 73, AD 2003 no. 63, AD 2003 no. 58, AD 2003 no. 55, AD 2003 no. 47, AD 2002 no. 54, AD 2002 no. 128, AD 2002 no. 102, AD 2002 no. 45, AD 2001 no. 76, AD 2001 no. 61, AD 2001 no. 51 and AD 2001 no. 13.

¹⁷ The calculations for AD 2010 to the date of this writing, October AD 2015 are based on the twenty-three judgments by the Labour Court raising the issue of equality during this period: AD 2015 no. 51, AD 2015 no. 44, AD 2015 no. 12, AD 2014 no. 26, AD 2014 no. 19, AD 2013 no. 78, AD 2013 no. 74, AD 2013 no. 71, AD 2013 no. 64, AD 2013 no. 29, AD 2013 no. 18, AD 2012 no. 51, AD 2012 no. 27, AD 2011 no. 37, AD 2011 no. 25, AD 2011 no. 23, AD 2011 no. 22, AD 2011 no. 19, AD 2011 no. 15, AD 2011 no. 13, AD 2011 no. 02, AD 2010 no. 91 and AD 2010 no. 21.

different claims, with the lowest for claims of ethnic discrimination; only two of 30 such cases have been brought successfully by plaintiffs. The trends with respect to damages and attorneys' costs and fees, combined with the success rates, create a significant deterrent for plaintiffs bringing discrimination claims. The Discrimination Ombudsmen as well as labour unions can bring cases on behalf of plaintiffs, and have greater resources than individuals, but there are limits even to their resources.

7. The Discourses within Swedish Discrimination Law: Final Words

The discourse that has most affected the entirety of the discrimination law regime is that of the Swedish Model, where the social partners are to regulate labour market issues and the state is to maintain neutrality by not legislating. This has led to discrimination legislation being introduced at a later stage than in other systems, in an environment characterised by a strong feeling of antipathy – not expressed solely at the subject of the legislation itself, but also at the political interference within a model and structure of power considered by the main actors (at that time and still predominantly men) as well-functioning; remnants of this structure still remain. The discourse has also led to an attitude in Sweden towards legislation that is unique: employment legislation is not really legislation as in the other systems, it is not generally mandatory nor effective or necessary.

Sweden is in the somewhat unenviable position of being perceived of as “first” in the area of equality, a position that arguably has invoked a sort of cognitive dissonance with respect to certain aspects of the legal system as discussed above. The political emphasis has been on complete equality between men and women, by women assuming a larger share of paid work and men a larger share of unpaid work. When this occurs – so goes the hypothesis – women will achieve true equality. The early focus on equality between the sexes based on paid and unpaid work rendered the legal system incapable of dealing with discriminatory behaviour. The failure of women to negotiate equal terms with partners took the employers off the hook for their discriminatory

behaviour. It can be argued that by creating two different words in the Swedish language, equality between sexes (*jämställdhet*) and other types of equality (*jämlikhet*), no attention was paid to the other grounds until the late 1990s, after which almost immediately, the legislator adopted a post-race attitude in the 2008 Act.

Finally, there is the individual plaintiff who has experienced discrimination, facing the very real threat in the legal system of paying costs and fees not only for herself, but if unsuccessful, also for her employer. This is to be weighed against the amount of damages as awarded by the Labour Court, which have been modest in the area of sex discrimination and almost non-existent in claims of ethnic discrimination. The actual odds of winning a case must also be considered, with chances of success radically decreasing with respect to certain claims, such as claims of ethnic discrimination.

The paradox resulting from the intent of the Swedish legislator to give legal protection against unlawful discrimination and the judgments by the Swedish courts not finding unlawful discrimination appears irreconcilable, with the Parliament assuming a protection that the courts are not giving. It is hoped that when the courts come to the same understanding as the legislator, and access to justice issues such as those discussed above are addressed, Sweden will be closer to achieving that which is necessary to convey true protection under the law, with the law on the books then becoming the law in action.