

Equal Treatment Authority

Case No.: EBH/310/33/2007

Incharge: dr. Annamaria Gombos

(1113 Budapest Bocskai ut 134- In the proceedings initiated by the **Applicant** for the violation of the requirements of equal treatment by **Auchan Hungary Commercial LLC** 136) as the **Respondent**, the Equal Treatment Authority (the "Authority") (1024 , Margit krt. 85.) entered the following

DECISION

The Authority determined that Auchan Hungary LLC violated the requirements of equal treatment by refusing the Applicant's application to be employed as a shop assistant because of her motherhood and other situation – height and build- on 27 March 2007.

The Authority **hereby orders that the above conduct be terminated and the decision be made public for 90 days on the following website: www.egyenlobanasmod.hu**

The Authority also obligates Auchan to pay a fine of **HUF 2,000,000 that is two million Hungarian Forints**, shall be transferred to bank account No. 10032000-00288413- of the Authority within 30 days of the receipt of this decision.

This decision may not be appealed within a public administrative proceeding.

The judicial review of this decision may be requested within 30 days of the receipt of its delivery by a claim addressed to the Metropolitan Court of Budapest but submitted to the Authority.

The Authority determined that HUF 20,641 that is twenty thousand six hundred and forty-one Hungarian Forints procedural fee was incurred during the proceeding, which shall be paid by the Respondent to the above bank account of the Authority within 30 days of the receipt of this decision.

If the Respondent does not pay in due course, Auchan shall be obliged to pay interest on each day on overdue.

JUSTIFICATION

The Applicant submitted her Application. to the Authority claiming the violation of the requirement of equal treatment by the Respondent because her application to fill an advertised job of a shop assistant had been refused because of her motherhood.. Further on the Applicant complained that her physical aptitude, another cause of the refusal was estimated by sight.

The Applicant lodged a written complaint to the Authority on 13 May 2007 that was completed orally at the hearing. Her children are 9 and 6 years old and she was at home on mother care with a 9 months old baby She is a trained commercial labourer after school leaving she used to work at a Kaiser Store where she had to refill the shelves. She applied for a vacancy of a shop assistant at the Respondent 's Recruitment Office that had been advertised in a newspaper in March 2007. The advertised duties were refilling shelves, labelling, keeping the shelves clean and tidy taking orders, informing customers, being punctual and flexible, having a strong build.

The Applicant sat for a written test on 8 March. That was a logical test and filling in a form of personal data. She marked the job of refilling shelves which she wished to do as a part timer or on the night shift. As she had not been advised, she called the Recruitment Office to inquire about her test result when she found out that it had been seen but because her baby was too small, they did not evaluate it, she could not have been employed any way. Although the test was successful it would have been illegal to give her a job until her baby was one, she could try again after that time. On 19 March she applied again. She received the refusal on 20 March saying that after evaluating her test the Respondent was unable to give her a job.

She, however, was called to go there for an interview on 27 March as she said she could work full time as well. The Head of the Vegetable Department Z. interviewed her by himself first he informed

her that there was a chance of working on the night shift but at the end of the interview he said there was only one vacancy at night for a job of the head of a team. He told her that they worked on two shifts (from 6 am to 2.30 pm or from 1.30 pm to 22 pm) while some people work between the two shifts (from 9 am to 5.30 pm) the latter variety is only possible with the agreement of the department head. The Applicant said that she was willing to work on any of these shifts as a full timer.

During the interview they talked about personal matters. The Applicant said she lived 40 kms away from the hypermarket, the timetable was favourable, the time was about 35 minutes. Then Z. asked her about her previous job, her children and husband (where he worked what he had done when his contract expired). The Applicant did not say that her husband had worked at Auchan but his contract had been terminated. She found it offensive that most questions were about her husband and where her children went to school, who collected them, how the children were looked after while she was at work. She was asked about her state of health, if she had a tendency to allergy, her shortness and thinness were also mentioned because filling this job required strength. Z. did not mention that she could not work until the baby was one.

After the interview Z. talked to his colleague and told the Applicant she would not be employed. He said that at the time everybody was only given a three month contract, he asked what the Applicant would do thereafter as she was on child care leave. He said the Applicant could not start work at 5. The Applicant said she could not but during the previous conversation 6 was mentioned.

The Applicant mentioned that day three men were interviewed and two of them were also refused.

The Authority held a hearing in the case, the legal representative of the Respondent said the principle of equal treatment was not violated when the Applicant was refused, the reason for it was not her motherhood, if it had been, she would not have been asked for an interview. It turned out, however, that the Applicant lived 40 km away from the hypermarket, it would have taken her an hour and a half. To economize with the costs the hypermarket tries to employ people who lived nearer because according to the law they had to pay the travel costs. The advertised jobs are continually made public on the internet. When the Applicant applied there was a vacancy at the beverages and vegetable departments, both places were physically quite demanding. At these departments the employees worked in 2 shifts: from 5 or 5.30 am to 1.30 pm and the afternoon shift from 1.30 pm to 10 pm.

When the Applicant applied she might have worked on the night shift, however, based on Section 121) of Labour Act XXII of 1992 a pregnant woman or a mother with a baby under one cannot be employed on the night shift, even the start of the morning shift could have started during this time. The Applicant originally applied for a part time job, but the hypermarket wanted a full timer. It was also problematic that the Applicant said that none of her family worked for Auchan when her husband had been dismissed from the supermarket. This statement caused distrust.

The legal representative of the Respondent said that based on Section 22) of Equal Treatment Act of 2003 the employer is exempt from observing the Act if the obstacles are essential and reason by the nature of the work. Having 3 children involves a lot of problems. The work along with the travel would have taken 10-11 hours of the day of the Applicant. The employer is not obliged to reason for its decision. He thought the Applicant was not apt enough to fill the job. The personal questions asked at the interview do not base the charge of discrimination, she was not discriminated against other applicants. None of the 4 applicants was admitted, there were also men among the refused applicants. The legal representative denied that the Applicant was refused because she was a mother of 3 children.

The legal representative of the Respondent attached the employment statistics of Budaörs hypermarket Auchan as of March 2007 (412 women out of 642 employees): 74 women had children under 3, 25 women had children under 1 and 11 women worked there while on child care leave. 1 woman had a baby under one, she worked as a part timer.

Interviewer Z., head of the vegetables department recognized having asked the objected questions which he found problematic when reading the filled form of the Applicant but he thought they were based. When it turned out that The Applicant had a baby under one he said he would hesitate to go out to work. He said the employment procedure is always inspected by a senior department head, this time it was jumble-sale department head M., he made the decision.. Every applicant learns at which

department the vacancy is after the interview. At the time of the Applicant's interview there were vacancies at the beverages and gardening departments with weekly 40 hours work. The Applicant said at the interview that she could be a full-timer. The witness told the Applicant that the working hours do not start with the opening of the hypermarket, but half an hour before when the shelves have to be filled that is actually the end of the night shift, sometimes the afternoon shift finishes at 10.15 pm. Everybody works on two shifts, at the department of the vacancy there is a night shift as well. He had not been instructed to inform the Applicant about the legal working hours of mothers on child care leave. The witness thought the main reasons for the Applicant's refusal were the ban on employing her on the night shift, the distance between her home and the hypermarket and the work to be done needed a strong build but the Applicant did not look strong enough.

He asked the Applicant if she had ever had any relationship with an Auchan employee, the answer was a definite 'no'. The meaning of this question is that family members cannot work at the same department and they cannot be subordinates to each other for reliability.. He only learned it from the Personnel Department that the Applicant's husband had worked for the hypermarket so the denial of the truth was not the reason for the refusal.

Witness H. informed the Authority about the procedure of the employment. The recruitment office has several employees who all call the attention of the applicants on childcare leave that they cannot work before their baby is one. After it mothers are allowed to work and they can also get child care benefit.. The reason of the refusal was that it is illegal for young mothers to work on the night shift and that time part-timers were not wanted. However, the Applicant applied again, she said she could work full time, this is why she was asked for the interview. that time they did not know exactly where there were vacancies. The refusals are not justified. and the written tests and data of the applicants are annulled.. That time there were four applicants for the advertised vacancies but noone was admitted.

The witness said they had employees who commuted to the hypermarket from neighbouring settlements, it was important, however to recruit people from as near as possible partly because they pay the travel costs partly because punctuality was important.. The earliest time to begin the morning shift was 5 am, the latest time to finish the afternoon shift was 10.30 pm.

The schedule of the employees depends on the department and it is always changeable.

Another hearing was held by the Authority when Personnel Department assistant E. that on 12 Mach when the Applicant enquired about her test result she told her that she had been refused. As the Applicant insisted on being told the reason, E, said she could not tell it because she did not know it. Finally, E, looked at the test. She said it might have been the part time employment, because that time full timers were wanted. She told the Applicant that they did not employ mothers on childcare leave on the night shift before their baby was one.

When the Applicant called the Personnel Department for the third time she said she was interested in a full time job, and she would waive her child care benefit. E. informed the department head about the development who instructed her to make an appointment with the Applicant for an interview.

The Applicant said that they did not speak about night shift during the first conversation, the witness had told her she was not allowed to work on the night shift until the child was one. During the third conversation she was informed that there was not a night shift. No information was given that she could not be employed because of her baby.

Witness M. the head of the jumble-sail department, who was a debriefing officer in the employment process said there were 3 shifts at the hypermarket. The morning shift is fro 5 am to 1.30 pm. From 5 to 6 am they get ready for opening the store because sometimes they can only close the hypermarket at 10.30 pm. The afternoon shift is from 1.30 pm to 10 pm, the night shift is fro 10 pm to 6 am. Those people who have worked for the hypermarket for a while and get ready for an exam are allowed to share their working hours between 2 shifts. Everybody is given bonus for the late or early hours that each employee has to do. The Applicant could not have been employed that time but if the interview had been successful, she could have been employed later.

The witness said that they had jointly brought the decision with interviewer Z. The main reason for

the refusal was the working hours, the distance between her home and the hypermarket, most of the employees who quit are among the people who commute from a far distance. It was not likely that the Applicant could have arrived punctually by 5.30 am or gone home after 10 pm.. It is, however, not impossible to be employed at the hypermarket for those who live far away if they are apt and punctual. He said that it was illegal to employ the Applicant, after the admittance, the new employees are to participate in a one week training which becomes useless if the person quits. When the decision was made , it was also taken into consideration that the vacancies were at such departments where heavy loads had to be moved which could have been a problem for the applicant. Neither had the Applicant any experience in working at a hypermarket. The lack of experience, however, is not a reason for exclusion, neither was the fact that the Applicant did not recognize that her husband had worked at the hypermarket.

The witness said that his jungle-sale department employed young mothers, there is a part-timer who had not returned to work until the child was three. There are several young mothers at the cash desks. At the time of the Applicant's interview only full-timers were wanted. There was not any vacancy the Applicant could have filled.

Based on the evidence available the Authority has determined that the claim in the application is founded.

According to Section 70/A(1) of Act XX on the Constitution of Hungary “ each person who stays on the territory of the Republic of Hungary shall enjoy the human rights or the citizenship rights without any regard to race, colour, gender, language, religion, political or other conviction, national or social origin, financial position.” According to Section 2):”Violating Section 1) of the Act is strictly sanctioned by the law.”

The principle of equal treatment is violated if a group of people or an individual is discriminated based on his/her protected characteristic. In this case the Applicant was discriminated because of her motherhood, compared with other people.

Section 5d) of Equal Treatment Act says that the employer shall abide by the employment law. The principle of equal treatment is particularly violated in the case of the following practices: employment policy, vacancy advertisements, admission, terms of employment, the admission procedure.(Section 21) ETPE Act)

The Respondent has to prove that the complaints of the Applicant are baseless, or the principle of equal treatment was complied with or they were not bound to do so.

The protected characteristic of the Applicant is her motherhood, the disadvantage she suffered was that her application was not accepted, she was refused on the phone, in a letter, she attached the relevant documents to her complaints.

The Authority sent a tester with similar characteristics to the hypermarket, she was asked for a written test then she was asked for an interview where she was unable to go. When she inquired on the phone, the officer from the recruitment office told her she would be invited later, but her appointment was made after the time the Authority's procedure had been started so the tester did not go for the interview.

At the hearings E. witness recruitment officer gave contradictory information to the Applicant's problems. The tester was also given contradictory information on the phone that supported the Applicant's complaints. The tester was told not to work until her baby was one, the recruitment officer asked a colleague to inform her about the regulations, finally she recommended the tester to send her cv.

The Authority thinks the employers should pay more attention to the suitable information of the applicants. Neither was the Applicant informed about the regulations of doing night shift or getting child care benefit, the advertisement did not give exact information if the applicants would be employed for a definite or indefinite time as part-timers or full-timers.

The legal representative of the Respondent and the witnesses contradicted each other and themselves. They emphasized different reasons for the refusal: the Applicant could not have been punctual for the morning shift, she was not strong enough for the job, she could not have worked on the night shift until her baby was one, she did not answer frankly the question about her husband's employment, she did not have experience in working at a supermarket. The legal representative said that they employed mothers with small children, further on they did refuse male applicants as well and finally they did not employ anybody.

The Respondent should have proved that they had not violated the principle of equal treatment, they did not ask such questions that led to discrimination or the refusal of the Applicant or the denial of the employment was not the asked question or their questions and the following procedure were in conformity with Section 22) of ETPE Act.

According to the rule of exemption at the selection of the applicants, a guideline formed by the nature of the work is natural and cannot be taken for discrimination.

According to the legal representative of the Respondent the questions asked at the interview were essential and necessary the reason for the refusal was the evaluation of all the answers that they were not bound to explain the Applicant. The witness admitted that such questions were asked during the interview that were not necessary to evaluate if the Applicant could meet the requirements of the vacant position. When the Applicant was informed about the result, there were hints about her income after three month work.

The Applicant objected to the fact that her physical fitness was assessed by sight. The Authority regarded her build as it is qualified "other situation" in Section 8 t) of ETPE Act. The fitness of an applicant has to be judged by a doctor based on Section 4 of Ministry of Welfare Decree 33 of 1998 which does not contain any limitation for women under 45, however, according to Point 1.1.2.2. for those who have to lift weights over 10 kg an aptitude test is necessary. According to Point 4.25.2 women over 18 are allowed to lift 20 kg on flat floor and it can be carried on a distance of 60 m. The fitness of the Applicant was assessed by sight. She suffered discrimination because of her build.

The representative of the Respondent witness M. talked about the availability of the Applicant, the distance between her home and the hypermarket played a part in her refusal but the declarations of the witnesses were contradictory. Witness H. said they had employees from further away than the Applicant's home on the other hand, he said that it was their financial interest to recruit from near places. E. recruitment officer said the cause of the refusal was not the distance of the Applicant's home, M. debriefing office said that most of the drop-offs were from those employees who lived far away, but it was not exclusive. The Authority thinks the Applicant only lives 40 km away from the hypermarket, it is not a several hours' travel, neither is it a special financial burden for the company, it cannot be taken for granted either that those who live far away drop off.

The Respondent was unable to prove that every employee who worked in the same job as the Applicant applied for worked on the night shift as well. The enclosed attendance sheet did not support this. The schedule of the employee is given by the hypermarket. If the employer does not have a schedule, it must follow the opening hours of the hypermarket that is from 6 am to 10 pm.

Section 121) of Labour Act of 1992 certain employees listed in Section 6) Labour Act 127 shall not

work on the night shift. It cannot be deviated from. Pregnant women shall not work on the night shift until their baby is one year old. The night shift lasts from 10 pm to 6 am.

The Respondent, however, was unable to prove that this ban was the reason for the refusal, they could not enclose a schedule that included the night shift. The Applicant should immediately have been informed about the ban on doing the night shift. Nevertheless, she was given contradictory information. Witnesses H. and M. said at the time of the interview they did not know where the vacancies were. They knew the Applicant could not work on the night shift, still she was asked for an interview. The reason of the refusal was partly this and that time a part-timer was wanted but this vacancy was not advertised.

The Authority calls the attention on the decision of the European Court in the Habermann – Beltermann case [C-421/92(1994)ECRI-657] when the dismissal of a pregnant woman was judged as discrimination when the reason for it was a German Act that prohibits scheduling pregnant women on the night shift. The ban on a pregnant women working on the night shift has to be included in her contract understanding the fact that her inaptitude for the night shift is temporary.

According to Section 1) of Labour Act 118 the schedule of an employee is compiled by the employer. The Respondent had not tried to solve the employment of the Applicant without putting her on the night shift as it turned out of the words of witness M. who said that the Applicant could not have been employed by any means. According to the Authority the Applicant could have been employed in two shifts for a few months, until her baby was one year old. According to Labour Act 83 an employee can be employed on a temporary contract that is different from the ordinary contract of other employees in the same position for a definite time. That concept is agreeable with Directive 76/207/ of the European Economic Community Council which is about the promotion of equal treatment between men and women concerning employment, training and promotion. 84/635 Recommendation of the EEC is about the positive measures to promote the equal treatment of women with the favourable organization of schedule and working conditions because the legal regulation was insufficient if the governments, social partners and organizations do not try to compensate the women for the unequal treatment they suffer.

The Applicant's deficient experience in working at a hypermarket cannot be accepted either because it had not been a job requirement listed in the advertisement. Witness M. spoke about her deficient experience but he added that the lack of experience was not a decisive factor. The Applicant used to refill the shelves at a big store. The requirement of experience could exclude women after child birth and young beginners from working at a hypermarket.

The legal representative of the Respondent said that the Applicant originally wanted to be a part-timer, but later, after having spoken to the officer at the recruitment office she said she could be a full-timer. The witnesses agreed that the Applicant's answer about the employment of her husband at Auchan was not decisive either., it did not play a role in the refusal.

The fact that the Respondent employs mothers with small children but refused the men who applied for the same job as the Applicant does not exclude the violation of equal treatment. The latter statement is supported by the decision of the (C-177/88(1990)ECRI-3941) in Dekker case which said that as pregnancy did not appear in a man's life, it cannot be disadvantageous for him, so disqualifying a woman because of it is taken for discrimination even if she does not have male competitors. It does not have any significance that in the same time as the Applicant men were refused as well because as the witnesses said because advertising vacancies and filling in them was continuous at the hypermarket and it always turned out on the day of the interview which department employed the newcomer, witness M. said that new people had been employed since then.

Based on the above mentioned reasons, the considerations of the legal representative of the Respondent cannot be accepted by the Authority because they were not required by the nature of the work and the probation regulated by Section 81) of the Labour Act gives a chance to both the employer and the employee to meet or refuse each other's expectations, during that time both parties can terminate the employment.

When the Authority brought its decision, it paid attention to the contradictory declarations of the witnesses that cannot be taken seriously and the fact that these days the vacancy advertisements on the website of the hypermarket do contain the duration of the employment and the schedule of the admitted employees.

In light of the above and the questions the Applicant was asked at the interview the Authority came to the conclusion that the Respondent had violated the obligation of equal treatment with direct discrimination when the Applicant's employment " of a shop assistant at a self-service department" was refused due to her motherhood, height and build on 27 March 2007.

Furthermore, as regards the application of sanctions the Authority has found that for preventive purposes it is necessary to impose a fine in this case in addition to the prohibition of the continuation of the unlawful practice and it is also necessary to publish this decision. Thus the Authority applies the sanctions against the Respondent as set forth in Section 16 c)d) of the Equal Treatment Act.

The Authority reminded the legal representative of Auchan to attach the statement of affairs and the yearly accounts of the previous two years and informed him about Section 51 (1) of Act CLX of 2004 on the rules of the administrative procedure and services. If this request of the Authority is declined, the Authority shall base its decision on the available data or according to Section 2) of Act 31 the procedure shall be terminated. The Respondent did not attach the requested data but asked what their significance was on the outcome of the case. They thought these data were irrelevant to the case.

When determining the amount of the fine the Authority took account of the available data about the market position of Auchan in (according to their website they have 10 hypermarkets in) and the fact that the Applicant was discriminated both because of her motherhood and build.

Act CXL of 2004 on the General Rules of Administrative Procedures and Services applies to the proceedings so the costs incurred shall be borne by the Respondent.

Right of appeal against this decision is excluded by Section 17 (1) of nth Equal Treatment Act. According to Section 17 (3) of the Equal Treatment Act and Sections 98 (3) and 109(1) of the Administrative Procedures Act judicial review lies against this decision.

Making this decision I proceeded within the jurisdiction provided in Section 1)a) of the Equal Treatment Act CXXV of 2003.

12 November 2007,

Dr. Judit Demeter
chairwoman