

Ordonnance no. 39/06

1) Reference Details

Jurisdiction: Employment Tribunal, Brussels

Date of Decision: 30 November 2006

2) Facts

The defendant employed Mrs X as a part time occupational therapist in a care home by a contract which commenced on the 1 November 2003, for the replacement of another nurse during the latter's absence. The contract ended on the 15 August 2005 following the resignation of the absent nurse. Mrs X applied to fill the vacancy, however she was not employed.

The Centre for Equal Opportunity and the Fight against Racism sent a letter to the employer enquiring as to the reasons for the refusal to employ Mrs X. In the letter the Centre recalled that during the interview the employer had clearly signalled that the reason Mrs X was not employed was due to her state of health. (Mrs X was epileptic) However, both the occupational doctor and her own doctor consider Mrs X fit to work.

The care home replied that Mrs X was mistaken in assuming that her health was the reason for the choice of another candidate. They claimed that she did not fulfil the hopes of the employer with respect to the approach to her job, in that she lacked initiative, and had proven ill prepared for several of her tasks. Furthermore, Mrs X did not inform the care home of her condition even following three attacks she experienced in the workplace.

3) Law

- Law of 25 February 2003 articles 2 and 3

4) Legal Arguments

The Centre argued that the refusal to re-employ Mrs X was due entirely to her state of health, and that this constituted discrimination prohibited under the Law of 25 February 2003. The refusal to employ Mrs X constituted direct discrimination as a difference in treatment, without objective and reasonable justification, based on her state of health.

5) Decision

The Court found that one of the reasons for the decision not to employ Mrs X permanently was her failure, despite three attacks at work, to inform the care home of her condition. On the one hand, under the Law of 3 July 1978, the employer has an obligation towards their employee to ensure the best help and care for them in cases of accidents at work. On the other, the employee has the obligation to take care of their own health and security, and that of others in the work place.

Additionally, under the law of 8 December 1992, relative to the protection of private life and personal data, the transfer of data relative to health is prohibited except in cases where it is necessary to carry out specific employer obligations. It should be solely the concern of health professionals. Mrs X was considered fit to work by her own doctor and the occupational doctor.

It appears that Mrs X had informed the occupational doctor, and therefore had fulfilled her obligations towards the employer.

The court ordered the care home to cease their discriminatory attitude towards Mrs X based on her state of health, whether during recruitment, renewal of a contract or promotion, in the definition of conditions of work or termination of a contract.