SUPREME COURT OF NORWAY

J U D G M E N T

given on 6 December 2020 by the Supreme Court composed of

Justice Henrik Bull
Justice Ingvald Falch
Justice Espen Bergh
Justice Erik Thyness
Justice Kine Steinsvik

HR-2020-2476-A, (case no. 20-027579SIV-HRET) and (case no. 20-027583SIV-HRET)
Appeal against Hålogaland Court of Appeal's judgment 12 December 2019

I.	
A	(Counsel Tina Storsletten Nordstrøm)
Fellesforbundet (third-party intervener)	(Counsel Lars Olav Skårberg)
v.	
B	(Counsel Nicolay Skarning)
II.	
C	(Counsel Hedvig Cecilie Svardal) (Assisting counsel: Counsel Jan-Erik Sverre)
v.	
A	(Counsel Tina Storsletten Nordstrøm)
Fellesforbundet (third-party intervener)	(Counsel Lars Olav Skårberg)

(1) Justice **Steinsvik:**

Issues and background

(2) The cases concern claims for compensation for non-economic loss for alleged breach of the prohibition on sexual harassment, and raises in particular questions regarding the lower threshold for such breach.

(3) A is a trained industrial mechanic. In September 2015, she started as a trainee at X AS in Y, a mechanic workshop providing services to various sectors. She was then 18 years old.

(4) After having passed a qualifying exam, A was permanently employed as an industrial mechanic on 1 July 2017. She was the only female in the production department of the undertaking, which had 15 employees in 2018.

(5) The claims from A are against B and C, who were both connected to X AS as customers during the period concerned in the case.

(6) B worked as an operating technician at Royal Norwegian Seafood AS, one of the largest customers of X AS. He had also previously worked at the undertaking. C was a fisherman and had a vessel on repair several times in 2016 and towards the summer of 2017. Both had access to and were occasionally present in the workshop.

(7) Early summer 2017, A notified the general manager of what she perceived as offensive behaviour by two customers. According to a note in her GP's medical records of 15 September 2017, A had approached her employer, claiming that she felt unsafe at work because of "customers touching her".

(8) B has admitted that he once placed his hands on the lower part of A's back, under her sweater, while she was sitting on the floor working on a tap, leaning forward. The Court of Appeal also found it proven that B on a later occasion ran into A on her way from the undertaking's breakroom, and that he then, standing in front of her, stuck out a hand and pretended to grab her crouch. B has denied this event took place.

(9) C stayed regularly and up to several times a week in the workshop during the periods his boat was on repair. From the evidence submitted, the Court of Appeal could tell that C was concerned with A, that he often stayed closed to her and tried to make contact. On several occasions, he tickled her waist with his fingers. The acts continued despite her repeatedly asking him to stop. On one occasion, when he met A at a supermarket, he smacked her bottom.

(10) Due to the conditions at the workplace, A was initially reported sick from 18 September to 6 October 2017, and again from 15 January to 2 March 2018. In an SMS correspondence with the employer after her first sick leave, A made it clear that she would not come to work as long as she did not know whether the two customers would be present in the workshop, or unless the employer took action.

(11) On 12 February 2018, A terminated her employment as an industrial mechanic in X AS.

The proceedings

(12) On 9 October 2018, A brought action against B, C and X AS, claiming damages and compensation for sexual harassment. The claim against the employer was due to the employer's failure to act with regard to the alleged harassment. Senja District Court joined the cases and ruled as follows on 11 April 2019:

> "In case 18-152424TVI-SENJ:
>
> 1. B is not liable.
>
> 2. A will pay B's costs of NOK 57 765 – fiftyseventhousandsevenhundredandsixtyfive – within two weeks of the service of the judgment.
>
> In case 18-152389TVI-SENJ:
>
> 1. C and X AS are jointly and severally within two weeks to pay damages of NOK 36 387 – thirtysixthousandthreehundredandeightyseven – to A for lost income and holiday allowance, with the addition of statutory default interest from the due date until payment is made.
>
> 2. C is within two weeks to pay compensation for non-economic loss to A of NOK 20 000 – twentythousand – with the addition of statutory default interest from the due date until payment is made.
>
> 3. Each party carries its own costs.
>
> In case 18-152351TVI-SENJ:
>
> 1. X AS and C are jointly and severally within two weeks to pay damages of NOK 36 387 – thirtysixthousandthreehundredandeightyseven – to A for lost income and holiday allowance, with the addition of statutory default interest from the due date until payment is made.
>
> 2. X AS is within two weeks to pay damages to A of NOK 40 000 – fortythousand – with the addition of statutory default interest from the due date until payment is made.
>
> 3. X AS is to pay A's costs of NOK 97 252 – ninetyseventhousandtwohundredandfiftytwo – within two weeks of the service of the judgment."

(13) The judgments in all three cases were appealed to Hålogaland Court of Appeal. The Court of Appeal joined the appeals to one hearing and ruled as follows on 12 December 2019:

> "In the case A v. B:
>
> 1. The appeal against the District Court's judgment – item 1 of its conclusion – is dismissed.
>
> 2. Costs in the District Court are not awarded.

3. A is within two weeks from the service of the judgment to pay B's costs in the Court of Appeal of NOK 89 390 – eightyninethousandthreehundredandninety.

In the case C v. A:

1. The appeal against the District Court's judgment – items 1 and 2 of its conclusion – is dismissed.

2. Costs in the District Court are not awarded.

3. C is within two weeks from the service of the judgment to pay A's costs in the Court of Appeal of NOK 75 000 – seventyfivethousand.

In the case X AS v. A:

1. The appeal against the District Court's judgment – item 1 of its conclusion – is dismissed.

2. X AS is not liable for non-economic loss.

3. Costs are not awarded in any instance."

(14) The Court of Appeal, composed of three professional judges and two lay judges, concluded that B on two occasions had acted offensively towards A, but that his overall conduct could not be considered sexual harassment in breach of section 8 of the Gender Equality Act 2013. The Court of Appeal found that the episode where B placed his hands on A's back could "hardly" be characterised as sexual attention, emphasising that B had not been made aware that A perceived the acts to be offensive until after the situation outside the breakroom.

(15) The Court of Appeal found it "clear" that that C had committed sexual harassment against A, and that he was thus liable for damages and compensation.

(16) X AS was held liable mainly because the general manager in the period after 15 November 2017 had acted "clearly reprehensibly and negligently" by failing to comply with section 25 of the Gender Equality Act 2013 and section 13 of the Equality and Anti-Discrimination Act on the prevention of workplace harassment.

(17) A has appealed against the ruling in the case against B on the grounds of an error of law. C has appealed on the grounds of an error of law and on the findings of fact in the case between him and A. On 17 April 2020, the Supreme Court's Appeals Selection Committee granted leave to appeal to A and C with regard to the application of the law. In addition, there is a derivative appeal from A regarding the size of the compensation from C. The cases have been joined.

(18) X AS did not appeal against the Court of Appeal's judgment and has, prior to the hearing in the Supreme Court, paid the court-ordered damages for economic loss to A.

(19) Because of the undertaking's payment, C requested the Supreme Court in a pleading of 19 November 2020 to dismiss (*heve*) the appeal between him and A as regards the claim for damages for economic loss. In her final pleading, A requested the Supreme Court to uphold the Court of Appeal's judgment on this point.

(20) The labour union Fellesforbundet has declared intervention for A in both cases. The Ombudsman for Equality and Anti-Discrimination has submitted a written statement to the Supreme Court in accordance with section 15-8 of the Dispute Act. Apart from that, the cases stand as they did in the Court of Appeal.

The parties' contentions

(21) *A* contends in both cases:

(22) The acts by both B and C constitute a breach of the prohibition on sexual harassment in section 8 of the Gender Equality Act 2013, currently continued in section 13 of the Equality and Anti-Discrimination Act.

(23) The crucial point is that they both subjected A to unwanted sexual attention that was disturbing to her. When determining the scope of the prohibition, the purpose of the provision is key. It is also significant that the sexual harassment took place while A was at work.

(24) In the alternative, B's acts amounted to gender harassment in breach of the prohibition in section 8 subsection 2 first sentence.

(25) The provision in the Gender Equality Act on shared burden of proof is not incompatible with the right to a fair trial in Article 95 of the Constitution and Article 6 (1) of the European Convention on Human Rights (ECHR). Nor has the Court of Appeal applied the provision on shared burden of proof in the cases at hand.

(26) Due to the sexual harassment, A is entitled to compensation for non-economic loss under section 28 of the Gender Equality Act 2013. A also has a legal interest in obtaining a judgment for damages for economic loss against C as jointly and severally liable, notwithstanding the payment by X AS.

(27) The conditions for compensation are met with regard to both B and C, as they are both to blame. The compensation must reflect the serious consequences the harassment has had for A. The #metoo campaign has drawn attention to sexual harassment, which has amplified the duty of care. The compensation from C must be increased from that awarded in the Court of Appeal.

(28) A requests the Supreme Court to deliver this judgment:

> "In case 20-27579:
>
> 1. B is to pay compensation for non-economic loss to A measured in the Supreme Court's discretion.
>
> 2. A is awarded costs in all instances.
>
> In case 20-27583:
>
> 1. C is to pay compensation for non-economic loss to A measured in the Supreme Court's discretion; otherwise, the Court of Appeal’s judgment is upheld.

2. A is awarded costs in the Supreme Court."

(29) The intervener – *Fellesforbundet* – endorses A's submissions, and contends:

(30) Sexual harassment is a serious problem in society and working life, and women in man-dominated professions are particularly exposed. Sexual harassment counteracts equality in working life and prevents young women from breaking with traditional gender role patterns when choosing careers.

(31) The consequences for both those affected and for the undertakings in the form of sick leave and reduced productivity suggest that the prohibition should be strictly enforced. This is also in line with the legislative intent.

(32) Fellesforbundet requests the Supreme Court to deliver this judgment:

"Fellesforbundet is awarded costs in the Supreme Court."

(33) *B* contends:

(34) B has not subjected A to sexual harassment in breach of section 8 of the Gender Equality Act 2013. The episode where he laid his hands on A's back was not of a sexual nature or serious enough to constitute sexual harassment. The incident outside the breakroom has never taken place, and is in any case not sufficiently serious, either in itself or in combination with the "back episode". When assessing the evidence, it must be emphasised that A did not mention the episode outside the breakroom until during the District Court's hearing, nearly two years after it allegedly took place.

(35) Cases on sexual harassment raise major due process issues. The accusations are serious and have severe consequences for those affected. Article 95 of the Constitution and Article 6 (1) ECHR therefore provide a basis for establishing civil presumption of innocence. The right to a fair trial also implies that the shared burden of proof provision cannot apply in cases between individuals. At the outset, in such cases there is no differences in the relative strength of the parties, and the accused is not more likely to secure evidence. Nor does a shared burden of proof safeguard the right to present one's side of the case. When it is up to the claimant to decide when to present the accusations, the accused stands little chance of defending himself, particularly when the accusations concern events dating back in time.

(36) The level of gravity of the accusations must also be vital in determining the threshold for sexual harassment, by reserving the prohibition to the more serious cases.

(37) There is no basis for finding B liable for compensation for non-economic loss.

(38) B requests the Supreme Court to deliver this judgment:

"1. B is not liable.

2. B is awarded costs in Senja District Court and Hålogaland Court of Appeal.

3. The public authorities are awarded costs in the Supreme Court."

(39) *C* contends:

(40) C endorses B's legal submissions with regard to interpretation of the provisions in the Gender Equality Act.

(41) C has also not subjected A to sexual harassment. The acts that took place in the workshop were not of a sexual nature or sexually accented. The "sexual attention" requirement is thus not met. This is a basic requirement for applying the prohibition in section 8 subsection 1 of the Gender Equality Act 2013, cf. the definition in subsection 2 second sentence. The prohibition on sexual harassment differs from other bases for harassment, which incidentally have a higher threshold.

(42) The episode outside the supermarket did not constitute sexual attention either, and the act was under no circumstances serious enough to be considered sexual harassment.

(43) A has no legal interest in obtaining a judgment for damages as the claim has been settled by X AS, which has been found jointly and severally liable with C. Hence, the appeal must be dismissed as concerns this claim.

(44) There is also no basis for finding C liable for compensation for non-economic loss.

(45) C request the Supreme Court to deliver this judgment:

> "Principally:
> 1. The appeal is dismissed as concerns A's claim for damages for lost income and holiday allowance, see the District Court's judgment item 1.
>
> 2. C is not liable for compensation for non-economic loss, see the District Court's judgment item 2.
>
> In the alternative:
> C is not liable."
>
> In both cases:
> C is awarded costs in the District Court and the Court of Appeal. The public authorities are awarded costs in the Supreme Court."

My opinion

Introduction

(46) The main question in the two cases is whether B and C have subjected A to sexual harassment possibly forming a basis for compensation for non-economic loss.

(47) The issue is to be decided under section 8 subsection 2, cf. section 28, of the Gender Equality Act 2013, which applied at the time of the relevant acts.

(48) Before I elaborate on individual factors, I will give an account of the legal starting points for the assessment of whether the prohibition on sexual harassment has been breached.

Legal starting points

The Act's definition of "sexual harassment"

(49) It is set out in section 8 subsection 1 of the Gender Equality Act 2013 that harassment on the basis of gender and sexual harassment is prohibited. Subsection 2 defines sexual harassment as follows:

> "Sexual harassment means unwanted sexual attention that is troublesome to the person receiving the attention."

(50) The wording expresses that it must first be establish whether "sexual attention" has been given, and whether it is "unwanted" by the person receiving it. As I read the provision, these two conditions are key to the prohibition's area of application. Furthermore, it does not cover any form of unwanted sexual attention; it must also be "troublesome". In my view, this signifies the *threshold* for the prohibition.

(51) I add that the Act's definition of "sexual harassment" gives the term a wider content than what is normally read into "harassment", a term associated with conscious, repeated and more aggravated acts.

(52) After the incidents in this case took place, the prohibition on sexual harassment has been included in section 13 subsection 1, cf. subsection 3, of the Equality and Anti-Discrimination Act. Proposition to the Storting 81 (2016–2017) sets out on page 185 that the definition in the new Act is amended "to be more objective that it currently is". This is done to clarify that it is not only "the aggrieved party's perception of the situation that determines" whether sexual harassment has been committed, but that "more objective factors" are also relevant in the assessment. The Ministry mentions that this was also stated in the preparatory works to section 8 of the Gender Equality Act 2013, but that it should also be directly reflected in the wording, for due process considerations. The amendment was implemented by removing the words "for the person receiving the attention". Apart from that, the wording was adjusted to correspond better with the definition of sexual harassment in the EU Equal Treatment Directive (2006/54/EC), see the Proposition page 186.

(53) Although the wording is amended, there is nothing to suggest that the new provision in the section 13 subsection 1, cf. subsection 3, contains substantive changes.

The legislative background and the application of the EU Equal Treatment Directive

(54) The prohibition on sexual harassment was adopted in Norwegian law in 2002 by an amendment in the Gender Equality Act of 1978. The amendment was a result of the negative consequences for each person affected and the environment in which the sexual harassment occurs, as well as the legal development in the EU and in other Nordic countries, see Proposition to the Odelsting no. 77 (2000–2001) page 72.

(55) The EU Equal Treatment Directive (2006/54/EC), whose objective is to secure equal treatment of men and women "in matters of employment and occupation", contains in Article 2 (d) a definition of sexual harassment, which is prohibited within the Directive's area of application. It reads:

> "[…] any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment"

(56) The Directive is a minimum directive and does thus not preclude stronger protection against sexual harassment under national law, see Article 27. The definition of sexual harassment in the section 8 subsection 2 of the Gender Equality Act 2013 implies that the Norwegian prohibition has a broader area of application than the prohibition in the Directive. This appears both from the description of the threshold, which according to section 8 is that the unwanted sexual attention is "troublesome" and from the Norwegian prohibition being applicable "in all areas of society", see section 2 subsection 1, while the EU Directive only applies to working life. Case law from the European Court of Justice is therefore of lesser relevance to the issues raised at hand, which deal with the lower end of the prohibition. In addition, the Directive contains provisions on shared burden of proof, to which I will return.

The requirements of the Act – when has sexual harassment been committed?

(57) I will now turn to the individual requirements in section 8 of the Gender Equality Act 2013, and start with the *"sexual attention"* requirement.

(58) According to Proposition to the Odelsting no. 77 (2000–2001) page 72, this requirement implies that the attention "must be sexually accented or of a sexual nature". Types of attention that will be covered are listed as follows:

> "Sexual harassment may take place through a physical act, involving anything from unnecessary touching and 'nudging' to assault such as rape or attempted rape. Sexual harassment may also be verbal, for instance through intimate comments on the recipient's body, clothes or privacy. Other examples are sexual advances, proposals and insinuations. The harassment may also be non-verbal, such as sharing of pornographic photos, whistling and body movements with sexual undertones."

(59) According to Proposition to the Storting 81 (2016–2017) page 320, with reference to the current provision, it is not a requirement that "the conduct is motivated by sexual desire".

(60) From what I have cited, it appears that the requirement is relatively wide reaching. Nonetheless, it is not sufficient that a person receives troublesome and unwanted attention, it must be substantiated that the attention – after an objective assessment – is sexually accented or of a sexual nature. The circumstances of the attention are crucial, and may imply that acts and conduct of the same nature must be assessed differently, depending on the situation.

(61) Moreover, the sexual the attention must be "unwanted" by the recipient. What is unwanted will vary from person to person. Whether or not the requirement is met, therefore depends on an individual and subjective assessment. However, the requirement implies that the person giving the attention must be made aware that it is unwanted. The following is stated in this regard in Proposition to the Odelsting no. 77 (2000–2001) page 72:

> "The person giving the attention must in any case be made aware that the act is unwanted. Sexual attention will therefore become sexual harassment if the person giving it continues despite the recipient having made it clear that sexual the attention unwanted."

(62) However, the requirement that the person receiving the attention must express that it is unwanted is not absolute. According to the Proposition, individual incidences may also amount to sexual harassment "if the conduct is sufficiently aggravated". The threshold for establishing sexual harassment in the more serious cases is low, because "in such cases, it will normally correspond to what one might say after an objective assessment that the person acting should have understood was unwanted", see page 72.

(63) As I read the preparatory works, if the recipient of the sexual attention does not make it clear that the attention is unwanted, it is crucial for determining whether the condition is met that the nature and gravity of the attention suggest that a reasonably alert person after an overall assessment should understand that it is unwanted.

(64) Factors in assessment of due care will – apart from the very nature of the conduct – typically be whether there is an uneven relative strength between the parties, and whether the party should understand that the person receiving the attention, fears that rejection may have negative consequences, see Proposition to the Storting 81 (2016–2017) page 186. It must also have significance if the person at whom the attention is directed is in a particularly vulnerable situation.

(65) The lower threshold for when unwanted sexual attention is prohibited is specified by the requirement that the attention must be *"troublesome"*. The purpose of the attention is not decisive, as long as it has such an effect for the recipient. What is perceived as troublesome will be subjective, but as mentioned, the assessment of whether the threshold for sexual harassment has been exceeded, must also be based on an objective assessment. Not all unwanted sexual attention is covered – a certain level of gravity is required.

(66) Here, the preparatory works state that whether or not the sexual the attention is troublesome depends on an overall assessment of a number of factors, see Proposition to the Odelsting no. 77 (2000–2001) side 72.

(67) Key factors according to the Proposition are how the attention is perceived, whether it has had negative consequences of a physical, mental or employment-related nature, the nature of the attention and under which circumstances it has been given, time and place and whether it has been going on for a long period of time and caused additional strain. The relationship between the parties is also crucial, including whether the parties are dependent on each other or whether the relative strength between them is uneven.

(68) The Proposition details the demarcation follows on page 73:

> "To provide effective protection against sexual harassment, the Ministry finds that the assessment of whether the attention must be considered troublesome must rely on a 'woman's norm', and not a gender-neutral norm. A guideline may be what a generally sensible woman would have perceived as troublesome. … The norm is to be applied irrespective of whether the person experiencing sexual harassment is a woman or a man, as both sexes have the same legal protection in these matters."

(69) In other words, the Proposition stresses that the assessment of what is troublesome is objective, while at the same time, it must be based on a 'woman's norm'. The argument given in favour of such a norm is that "women generally perceive far more situations as sexual harassment than men", and that, based on relevant research, there "will be more women than men that report sexual harassment". The concrete source for such a norm may be somewhat

unclear, but my overall interpretation is that the aim is to give the recipient of the unwanted sexual attention sufficiently effective protection in the light of the objective of the Act, which is to prevent sexual harassment.

(70) I will now turn to individual assessments in the two cases.

Individual assessment of B's conduct

Standard of proof and burden of proof

(71) B has contended that in cases dealing with sexual harassment between private parties, a civil presumption of evidence must be established, and at the right to a fair trial in Article 95 of the Constitution and Article 6 (1) ECHR precludes the application of rules on shared or reversed burden of proof.

(72) Section 27 of the Gender Equality Act 2013 contained the following provision on the burden of proof, applicable to cases on sexual harassment, among others:

> "Discrimination shall be assumed to have occurred if:
>
> a) circumstances apply that provide grounds for believing that discrimination has occurred, and
>
> b) the person responsible fails to substantiate that discrimination did not in fact occur."

(73) The provision originates from EU law rules on shared burden of proof, see for instance Article 19 of the EU Equal Treatment Directive (2006/54/EC), cf. Proposition to the Storting 81 (2016–2017) page 182. It is continued in section 37 of the current Equality and Anti-Discrimination Act.

(74) First, it is important to establish that the burden of proof rule in section 27 is not an exception from the general *standard of proof* in civil cases. The standard of proof is, here as otherwise, that the most probable fact – after an overall assessment of the evidence – prevails. General bases for the findings of fact, for instance that contemporaneous evidence carries more weight, also apply as usual. A different matter is that the provision imposes a duty on both parties to submit all evidence to which they have access.

(75) If, after such overall findings of fact, the *evidentiary doubt is absolute,* which means that one fact is as probable as the other, the provision sets out this shall be to the detriment of the "person responsible", see section 27 subsection 1 (b). However, such evidentiary doubt rarely occurs in practice.

(76) This understanding of the provision is assumed in Proposition to the Storting 63 (2018–2019) on amendments to the Anti-Discrimination Ombudsman Act and the Equality and Anti-Discrimination Act. Under the presentation for the burden of proof under applicable law, it is set out on page 17 that "[t]he standard of proof in discrimination cases is … general preponderance of the evidence, see Rt-2014-402", and that the reversal of the burden of proof "determines to whom the doubt is detrimental". This is summarised as follows:

> "The person accused of discriminating carries the burden of doubt where there is still doubt after the evidence has been submitted whether discrimination has taken place. The standard of proof remains the same – general preponderance of the evidence. The evaluation of evidence is also the same as in other cases. The general principle of free evaluation of evidence and the starting point that the most probable fact must form the basis for a decision is not changed through the burden of proof rule. However, it will generally have little evidentiary value if the person accused of discriminating insists that he or she has not discriminated."

(77) Apart from these basic principles, I find that the legal significance of the burden of proof rule in section 27 must be established individually, depending on the evidence submitted and questions raised in each case.

(78) In the case at hand, B contends that the episode outside the breakroom cannot be considered substantiated. It all comes down to proving whether or not the act – where B allegedly stuck out his hand pretending to grab A's crouch – took place. In such situations – where the weighing of evidence has two possible outcomes – my opinion is that the burden of proof rule in section 27 of the Equality and Anti-Discrimination Act does not have legal significance beyond the burden of proof being carried by B, i.e. that it would be to his detriment if one possibility does not appear more probable than the other, after an overall findings of fact.

(79) As I will return to, my perception is that the Court of Appeal, too, has based its findings of fact on the same.

(80) I consider it clear that such a standard of proof does not interfere with the right to a fair trial under Article 95 of the Constitution or Article 6 (1) ECHR.

The factual circumstances and the assessment thereof

(81) B has admitted that he on one occasion placed his hands on A's back. The Court of Appeal has described the incident as follows:

> "The first episode took place in the workshop at X AS in 2016 or during the first part of 2017. A was sitting on her knees working on a tap, when B came from behind and placed his hands on her back, on bare skin under her sweater. A startled, got up and left the place without saying a word. The Court of Appeal's findings of fact are based, in addition to the statement from A, on the statement from B, who has confirmed the episode. After the submission of evidence, the Court of Appeal does not find it substantiated that the act took place because B wanted to tell A that she did not use adequate tools, as he claims, but nor does the act appear particularly sexualised. A's perception that B lifted up her sweater and t-shirt to access her bare skin, is not substantiated to such an extent that the court may consider it proven. It is noted that B also did not say anything in the situation, but that he must have understood that A did not find this form of joke very amusing."

(82) I agree with the Court of Appeal that the act in itself does not appear "particularly sexualised", but as I have explained, the requirement of "sexual attention" only means that the act must be of a sexual nature or be sexually accented. It is also not required that act was motivated by sexual desire, and it is irrelevant whether the touching was meant as a joke from B's side.

(83) After an overall assessment, I find that the requirement is met. I emphasise the fact that A was sitting on her knees on the floor in a vulnerable situation, leaning forward while carrying out a

work operation. B came from behind, which gave A chance of escaping, or rejecting, the touching, which was completely unnecessary. He placed his hands on bare skin on the lower part of her back, which in this context must be considered a relatively intimate body part. Overall, I find that the act is sufficiently sexually accented to meet the requirement of sexual attention in section 8 subsection 2 second sentence of the Gender Equality Act 2013.

(84) The fact that A reacted by abruptly getting up and leaving the place, demonstrates that B's attention was unwanted. Her reaction to the touching by B is significant for the assessment of the incident that took place later outside the breakroom, to which I will return.

(85) Based on the Court of Appeal's findings of fact, it appears that the "back episode" was the first time A was subjected to sexual attention from B. A key point in the assessment of whether the act, in itself, was so aggravated that it must be considered "unwanted" within the meaning of the law, is whether he – all factors considered – should have understood that the touching was unwanted, despite A – naturally – failing to give any signals to that effect in advance.

(86) On the one hand, the act was not particularly sexualised. On the other hand, B was a well-grown man who was present in the workshop as a representative for a large customer, while A was much younger and the only female working there.

(87) It seems fair that the "back episode" in itself did not amount to sexual harassment under section 8 of the Gender Equality Act 2013. However, I will not take a clear stand on this issue, as I consider it substantiated that the following incident outside the breakroom took place, and that both episodes must be included in the overall assessment of whether B subjected A to sexual harassment.

(88) The Court of Appeal has described this episode as follows:

> "The second act took place in the enterprise's office space on the first floor, in the area between the breakroom and the dressing room, probably after the first episode. When A was about to leave the breakroom, B was standing in front of her, stuck out a hand and imitated grabbing her in the crouch. A became furious, told B to 'go to hell' or similar, and left the place."

(89) From the Court of Appeal's judgment, it appears that the findings of fact apart from A's statement, were based on the testimony of two witnesses who were present in the area and overheard the incident. It also appears that B's statement on this point was not considered reliable.

(90) To the Supreme Court, B maintains that the episode never took place. He is undoubtedly in his right to say so, although A's appeal is limited to the application of the law. However, he has not submitted any evidence suited to change the Court of Appeal's findings of fact. I therefore have no basis for setting aside these findings, which are based on a direct submission of evidence. Against this background, I consider it substantiated that B most probably acted as described by the Court of Appeal.

(91) There is no doubt that B's act signified that he directed "sexual attention" at A.

(92) I also find that A's reaction to the preceding "back episode", where she got up and left the place despite performing a work operation, signifies that B had been made aware that A did not want any sexual attention from him. The requirement of "unwanted" is therefore also met.

(93) To which extent B, with his conduct on the two occasions, exceeded the threshold for sexual harassment, thus depends on whether the attention after an overall assessment must be considered to have been "troublesome".

(94) A's subjective perception of the attention and the consequences it has had for her, suggest that the threshold for the prohibition has been exceeded. In my view, the more objective factors suggest the same. Considered in isolation, the nature of the acts was not severe, but the first of them nonetheless involved unwanted touching of bare skin while A was in a vulnerable situation. Working in the workshop, she was also exposed being the only female and carrying out work she could not easily terminate. The act outside the breakroom was clearly sexualised and committed after B had been told that A did not want this type of attention. There are also certain differences in the relative strength between B and A.

(95) Against this background, I find that the sexual attention that A received was generally unwanted and troublesome within the meaning of the law, and consequently that B subjected A to sexual harassment in conflict with section 8 subsection 1, cf. subsection 2 second sentence of the Gender Equality Act 2013

The claim for compensation for non-economic loss

(96) A's claim for compensation for non-economic loss is to be decided under section 28 of the Gender Equality Act 2013, which in subsection 1 sets out that a person who has been discriminated against "may claim compensation for non-economic loss and compensation for economic loss". The rule applies to breach of the prohibition on sexual harassment, see subsection 1 second sentence. According to subsection 2, liability exists if the person responsible can be blamed. It is undisputed that a general requirement of due care applies.

(97) I have already concluded that B subjected A to sexual harassment. In my view, it is also clear that B can be blamed for the discrimination, and that the requirement of guilt is thus met. Here, it is sufficient to point out what I have already discussed. Against this background, liability for compensation for non-economic loss exists.

(98) According to section 28 subsection 3 second sentence compensation for non-economic loss "shall be set in an amount that is reasonable in view of the nature and scope of the harm, the relationship between the parties and the circumstances otherwise".

(99) Cases dealing with discrimination, including cases on sexual harassment, are so different in nature and scope that I find it hard to establish a standard measurement.

(100) In the preparatory works to section 38 of the current Act, it is stated that the compensation for non-economic loss "in working relationships are assumed maintained in the range of NOK 20,000–80,000", see Proposition to the Storting 63 (2018–2019) side 28.

(101) In cases outside employment relationships, the Ministry's reference to the level of gravity is not directly guiding, and depending on the situation, it will also be possible to go below the minimum of NOK 20 000.

(102) Considering the gravity of B's acts, the relationship between the parties, the level of guilt and the circumstances in general, I find, particularly since the incident is at the lower end of what is covered by the prohibition on sexual harassment, that an appropriate compensation for non-economic loss is NOK 15 000.

Individual assessment of C's conduct

The factual circumstances and the assessment of them

(103) C's conduct towards A is described as follows by the Court of Appeal:

> "Based on the statements from A, D and E, it is assumed that C regularly and in periods up to several times a week, stayed in the workshop at X AS, either because his vessel was there on repair or because he had other errands as a regular customer. On these occasions, he was often concerned with where A was – without this being relevant to his errand – he searched for her and asked other employees where she was. He followed her, often stayed close to her and tried to contact her while she was working, and on several occasions stuck his fingers into her waist to tickle her. A found this attention highly troublesome, and asked C to stop tickling her. The Court of Appeal found it proven that these acts took place several times after A had asked him to stop. Reference is made to the journal of 18 September 2017, according to which A told her GP about receiving physical attention from a customer, which continued after she repeatedly had asked him to stop. The Court of Appeal trusts that this involves C.
>
> C's conduct towards A had the effect that she often hid when she saw him arrive at the workshop, alternatively that she turned to F who worked in the administration, and waited there until C had left. F confirmed this in his testimony in the Court of Appeal.
>
> The Court of Appeal also finds it proven that C – on one occasion in the summer/autumn of 2017 – smacked A's bottom over her pants, as they passed each other in the doorway of a supermarket in Æ. This is based on the statements from A and her friend G, who was with her and witnessed the act. The incident took place after C had been told not to approach A at the workplace, and joins the ranks of sexually offensive acts, in the Court of Appeal's view."

(104) C has not contested that the attention was unwanted or that A was troubled by it. C's contention is that the attention is not covered by the prohibition on sexual harassment because it was not of a sexual nature or sexually accented. Alternatively, if the supermarket episode alone is considered sexual attention, it is not sufficiently aggravated.

(105) I agree with the Court of Appeal's conclusion that the overall attention from C must be considered sufficiently sexually accented. C's conduct consisted of repeated episodes of unwanted and unnecessary touching of A's waist, also after he had repeatedly been told to stop. On one occasion outside a supermarket, he also smacked her bottom, which is an act of a clear sexual nature. The requirement of sexual attention is therefore met, although I find that C's act, too, are at the lower scale for meeting this requirement.

(106) As mentioned, C has not disputed the other conditions that the sexual the attention had to have been unwanted and troublesome.

(107) C, too, has therefore breached the prohibition on sexual harassment in section 8 of the Gender Equality Act 2013 subsection 1, see subsection 2 second sentence.

A's claim for damages – the rejection issue

(108) In the District Court's judgment, C and X AS were found jointly and severally liable for economic loss of NOK 36 387 with the addition of default interest. The appeals to the Court of Appeal were dismissed on this point. A, in turn, did not appeal against the measurement in the District Court's judgment.

(109) As I have already accounted for, the undertaking has paid the ordered damages to A after the appeal from C proceeded to the Supreme Court. Against this background, C has requested that the appeal be dismissed as concerns this claim, arguing that the legal interest in obtaining a judgment for damages is lost, see section 1-3 of the Dispute Act. A has maintained that she still has a legal interest in obtaining a judgment upholding the Court of Appeal's conclusion, imposing joint and several liability.

(110) In my view, the undertaking's payment of the damages implies that A no longer has a genuine need to have the claim decided against the defendant, see section 1-3 of the Dispute Act. A has submitted that the compensation – in addition to being a remedy – is to maintain more penal considerations, which suggests that the legal interest is intact. In my view, the considerations A has mentioned, as well as the need to have issues of principle clarified, are fully maintained by A's chance of receiving compensation for non-economic loss from C.

(111) Since the legal interest was lost after C's appeal proceeded to the Supreme Court, the appeal must be dismissed as concerns this part of the claim, see the Supreme Court ruling HR-2019-615-U.

Compensation for non-economic loss

(112) The conditions for compensation for non-economic loss are also met on C's part.

(113) C's acts went on for a longer period and with greater intensity than B's acts. His conduct was therefore more troublesome to A. In addition, he was repeatedly told that his conduct was unwanted, which increases the level of gravity. The compensation must thus be set slightly higher than for B, and after an overall assessment, I have concluded that the Court of Appeal's measurement of NOK 20 000 is appropriate. On this point, therefore, both the appeal from C and the derivative appeal from A are dismissed.

Costs

(114) A is successful in the case against B in the Supreme Court, and is entitled to compensation for costs under the main rule in section 20-2 subsection 1, cf. section 20-5, of the Dispute Act.

(115) A is mainly successful in the case against C, although her appeal is dismissed as concerns damages for economic loss, and her derivative appeal has been dismissed.

(116) Costs in all instances are to be awarded based on the result in the Supreme Court.

(117) In the District Court, A claimed much higher amounts than those awarded. In the light of this, none of the parties has won the case in the District Court, see section 20-2 subsections 1 and 2 of the Dispute Act. There is no reason to award any of the parties' costs in the District Court under section 20-3 of the Dispute Act.

(118) In the Court of Appeal and the Supreme Court, the case has been structured to clarify issues of principle with regard to the threshold for the prohibition on sexual harassment. Against this background, I have concluded that there are weighty reasons for exempting B and C for liability for costs, see section 20-2 subsection 3 of the Dispute Act. Each party is therefore to pay its own costs in the Court of Appeal and in the Supreme Court.

(119) For the same reason, Fellesforbundet is not awarded costs in the Supreme Court.

Conclusions

(120) Against this background, the appeal from A in the case against B has succeeded, and A is to be awarded compensation for non-economic loss of NOK 15 000.

(121) C is supported in his demand that the appeal be dismissed as regards the claim for damages. Otherwise, the appeals are dismissed.

(122) I vote for the following

J U D G M E N T :

In case 20-027579SIV-HRET between A with Fellesforbundet as intervener and B:

1. B is to pay NOK 15 000 – fifteenthousand – in compensation for non-economic loss to A within 2 – two – weeks of the service of the judgment.

2. Costs are not awarded in any instance.

J U D G M E N T A N D O R D E R :

In case 20-027583SIV-HRET between C and A with Fellesforbundet as intervener:

1. The appeal is dismissed as regards A’s claim for damages for economic loss.

2. Otherwise, the appeals against the Court of Appeal’s judgment, item 1 of its conclusion, are dismissed.

3. Costs are not awarded in any instance.

(123) Justice **Thyness:** I agree with Justice Steinsvik in all material respects and with her conclusion.

(124) Justice **Falch:** Likewise.

(125) Justice **Bergh:** Likewise.

(126) Justice **Bull:** Likewise.

(127) Following the voting, the Supreme Court gave this

J U D G M E N T :

In case 20-027579SIV-HRET between A with Fellesforbundet as intervener and B:

1. B is to pay NOK 15 000 – fifteenthousand – in compensation for non-economic loss to A within 2 – two – weeks of the service of the judgment.

2. Costs are not awarded in any instance.

J U D G M E N T A N D O R D E R :

In case 20-027583SIV-HRET between C and A with Fellesforbundet as intervener:

1. The appeal is dismissed as regards A's claim for damages for economic loss.

2. Otherwise, the appeals against the Court of Appeal's judgment, item 1 of its conclusion, are dismissed.

3. Costs are not awarded in any instance.