SUMMARY

Opinion of Advocate-General Bot of 25 November 2015 in case C-441/14. (Ajos), Age Discrimination

Summary

Mr. Rasmussen was dismissed by Ajos and was, in principle, entitled to a statutory severance allowance equal to three months' salary. Mr. Rasmussen also satisfied the criteria in order to receive an old-age pension payable by Ajos. According to Danish case law, an employee in receipt of old-age pension is not eligible for a severance allowance. Mr. Rasmussen claimed a severance allowance, relying on the ECJ's judgment in Andersen. Ajos argued that any interpretation of Danish law consistent with Andersen would be contra legem. In the opinion of Advocate-General Bot, the existence of national case law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's obligation to interpret national law in conformity with EU law. Moreover, under the circumstances of this case, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.

Facts

Mr Rasmussen was dismissed from Ajos and his employment relationship terminated at the end of June 2009. Having been with the company since 1 June 1984, he was, in principle, entitled to a severance allowance equal to three months' salary, pursuant to Article 2a(1) of the Law on salaried employees. However, since he had reached 60 years of age on the date of his departure and was entitled to an old-age pension payable by the employer under a scheme which he had joined before reaching 50 years of age, Article 2a(3) of the said law, as interpreted in consistent national case-law, barred his entitlement to the severance allowance, even though he remained on the employment market after his departure. Said Article 2a(3) provides: "No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the

employee joined the pension scheme in question before reaching 50 years of age".In March 2012, Mr Rasmussen's union brought an action on his behalf against Ajos claiming payment of a severance allowance equal to three months' salary as provided for in Article 2a(1) of the Law on salaried employees. The union relied on the ECJ's judgment in the Andersen case (C-499/08, officially known as Ingeniørforeningen i Danmark).

National proceedings

On 14 January 2014, the Sø- og Handelsretten (Maritime and Commercial Court) upheld the claim brought by the legal heirs of Mr Rasmussen, since deceased, for payment of the severance allowance. That court held that it was clear from the judgment in Andersen that Article 2a(3) of the Law on salaried employees was contrary to Directive 2000/78 and that the previous national interpretation of that provision was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.Ajos brought an appeal against that judgment before the Højesteret (Supreme Court). In support of its appeal, it argues that any interpretation of Article 2a(3) of the Law on salaried employees that was consistent with the judgment in Andersen would be contra legem. It also argues that the application of a rule as clear and unambiguous as Article 2a(3) of the Law on salaried employees could not be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age without jeopardising the principles of legal certainty and the protection of legitimate expectations.

Opinion

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In the view of the referring court, giving effect to the solution identified in Andersen in disputes between private persons raises certain difficulties, and these difficulties led it to make the present request for a preliminary ruling. According to the referring court, giving effect to that solution poses no problem where the employer is a public-sector body. In such a case, the inconsistency of Article 2a(3) of the Law on salar|ied employees with Directive 2000/78 may, in its view, be resolved by the employee's invoking the directive and relying on its provisions, provided that they appear to be unconditional and sufficiently precise, with the result that the application of Article 2a(3) of the Law on salaried employees may be precluded in specific cases. The national court points out that, in relationships between private persons, on the other hand, the provisions of a directive may not be given direct effect. It states that, in

such a situation, any inconsistency between a provision of national law and a directive may be resolved, in so far as is possible, by interpreting the provision of national law at issue in a manner consistent with the directive concerned, in such a way as to attenuate the apparent contradiction between the two. The national court states, however, that the principle of consistent interpretation is subject to certain limits and, in particular, that it cannot serve as the basis for a contra legem interpretation of national law (§36-38).

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According to the Højesteret, a limitation of that kind presents itself in this case and it is necessary, in accordance with the case-law in Mangold (C-144/04) and Kücükdeveci (C-555/07), to have recourse to the principle prohibiting discrimination on grounds of age in order to resolve the dispute between the two private parties to the main proceedings. Having recourse to that principle would then present the referring court with the problem of weighing the principle of non-discrimination against the principles of legal certainty and the protection of legitimate expectations (§39).

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The requirement to interpret national law in conformity with EU law requires 'national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it'. It is only when it proves impossible for the national courts to give effect to an interpretation of domestic law in conformity with Directive 2000/78 that the principle prohibiting discrimination on grounds of age becomes the rule of reference enabling the court to resolve disputes between individuals by neutralising the application of the domestic law that is inconsistent with EU law. This principle then acts as a palliative for the lack of horizontal direct effect of Directive 2000/78 and for the inability of national courts to interpret national law in conformity with that directive. I would also note that, in the most recent case-law, the Court has clearly emphasised the primary role which it intends to ascribe to the obligation to interpret national provisions in a manner consistent with EU law. Before resorting to the principle prohibiting discrimination on grounds of age as the ultimate solution for resolving inconsistencies between national law and EU law, national courts must, therefore, duly ascertain that their national law is incapable of being interpreted in conformity with Directive 2000/78 (§46-48).

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In the present case, the national court states that it cannot give an interpretation of national law in conformity with Directive 2000/78 other than one which is contra legem. Of course, in accordance with consistent case-law, the interpretation of domestic law is a task that falls exclusively to national courts. It is therefore for that court to decide, ultimately, whether their domestic law can be interpreted in conformity with EU law. Having said that, I take the view that, if it is apparent from the information provided to the Court with a request for a preliminary ruling that the only reason for which it is impossible to interpret a national provision in conformity with EU law is that national case-law exists which conflicts with EU law, it then falls to the Court of Justice to inform the national court whether or not it may take that factor into account. In other words, it falls squarely within the jurisdiction of the Court of Justice, in my opinion, for it to clarify the precise parameters of a limit on the obligation of consistent interpretation which it has itself identified, in this case the limit being the interpretation of national law contra legem. The spirit of cooperation between the Court of Justice and national courts which governs the preliminary ruling mechanism under Article 267 TFEU, the effectiveness of that procedure and the effective application of EU law thus demand that the Court of Justice indicate to the national court how it should proceed, in order to avoid improper reliance on the limit on the obligation of consistent interpretation represented by the contra legem interpretation of national law. It is for that reason that I recommend that the Court should consider very carefully the reasons for which the referring court considers that it cannot give an interpretation of national law in conformity with Directive 2000/78 (§ 51-54)..

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The legal heirs of Mr Rasmussen state that, in the national case-law, Article 2a(3) of the Law on salaried employees has been interpreted in the sense that the words 'will receive' (vil oppebære') in fact mean 'can receive' ('kan oppebære'). Underlying that interpretation is the idea that it cannot depend solely on the decision of the dismissed employee either to activate, if he so wishes, his retirement pension and thus lose his entitlement to a severance allowance or to defer his retirement pension and thus preserve his entitlement to the severance allowance. The courts have therefore taken into consideration the presumed intention of the national legislature to take as an objective criterion the moment when liability to pay the severance allowance falls away as a result of the employee's entitlement to receive a retirement pension on termination of the employment relationship. The legal heirs of Mr Rasmussen dispute the national court's conclusion that an interpretation of Article 2a(3) of the Law on salaried employees according to which that provision might be consistent with Directive 2000/78, as interpreted by the Court in Andersen, would be contra legem(§ 59-60).

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It does not follow from Andersen that the very wording of Article 2a(3) of the Law on salaried employees is inconsistent with Directive 2000/78. On the contrary, in that judgment, the Court acknowledged that the provision, read literally, could be justified by the objective of protecting employment. It was the extension of that rule in the case-law to employees who were merely entitled to receive an old-age pension, without ascertaining whether they actually did, that the Court regarded as being contrary to Directive 2000/78. By implication, the Court's reasoning also called into question the logical coherence of the provision of national law as interpreted by the national courts: why indeed should employees who defer their old-age pension in order to continue their careers be deprived of the benefit of a measure whose very purpose is to help them find employment? Against that background, the implementation by the referring court of an interpretation of its national law that is in conformity with Directive 2000/78 is the most appropriate means of resolving the conflict between its national law and EU law, since it makes it possible to neutralise the meaning given in the national case-law to Article 2a(3) of the Law on salaried employees, which has proved to be inconsistent with the directive, and to give that provision of national law a meaning which not only accords with its wording but is also in conformity with the directive (§ 65-66).

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It is important to circumscribe the situations in which a consistent interpretation is impossible and, more specifically, to define what contra legem interpretation actually means. The Latin expression 'contra legem' literally means 'against the law'. A contra legem interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of contra legem interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that contra legem interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority. The referring court is very clearly not in that sort of situation. Indeed, were it to interpret Article 2a(3) of the Law on salaried employees in conformity with Directive 2000/78, that would in no way compel it to re-write that provision of national law. The national court would not, therefore, be making any incursion into the sphere of competence of the national legislature. The implementation by the national court of an interpretation in conformity with EU law would merely require it to change its case-law so that the interpretation which the Court gave of Directive 2000/78 in Andersen is given full effect in the national legal system, not only in relationships between employers and employees that are governed by public law, but also in

such relationships governed by private law (§ 67-70).

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In a situation such as that in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate interests militates against the national court's giving effect to an interpretation of Article 2a(3) of the Law on salaried employees that is consistent with Directive 2000/78(§ 74).

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In its judgment in Andersen, the Court did not restrict the temporal effects of the interpretation which it gave of Directive 2000/78 in relation to Article 2a(3) of the Law on salaried employees. In the context of the present request for a preliminary ruling, the Court is not called upon to give a fresh ruling on that provision's consistency with Directive 2000/78; it is simply asked to clarify how an inconsistency between EU law and national law is to be resolved in a dispute between individuals. The Court could not therefore, in the context of this request for a preliminary ruling, restrict the temporal effects of its judgment in Andersen even if it had been asked to do so, which it has not (§ 81).

Proposed reply

It is for the national court before which a dispute between individuals falling within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation has been brought, when applying provisions of national law, to interpret those provisions in such a way that they can be applied in a manner which is consistent with the wording and objective of that directive. The existence of national case-law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's fulfilment of its obligation to interpret national law in conformity with EU law. Moreover, in circumstances such as those of the case in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.

Creator: European Court of Justice (ECJ)
Verdict at:
Case number: C-441/14