EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/20 May employees move up the salary ladder more slowly at the start of their career? (AT)

<p>For the fourth time in seven years, an Austrian court has asked the ECJ for guidance on the subject of age discrimination in pay scales. In this latest case, the period required to progress from step 1 to step 2 on the pay scale was longer than the period needed to progress from step 2 to step 3 and beyond. Does that constitute age discrimination? The author argues that it does, and that the arguments advanced to justify it are not valid.</p>

Summary

For the fourth time in seven years, an Austrian court has asked the ECJ for guidance on the subject of age discrimination in pay scales. In this latest case, the period required to progress from step 1 to step 2 on the pay scale was longer than the period needed to progress from step 2 to step 3 and beyond. Does that constitute age discrimination? The author argues that it does, and that the arguments advanced to justify it are not valid.

Background

In order to understand this case it is necessary to recall the ECJ's judgments in the Hütter, Schmitzer and Starjakob cases. Those cases resulted from Austrian law on the pay scales of public sector employees. An example of a pay scale could be:

Step 1
100

Step 2
110

Step 3
120

Step 4
etc.

Let us suppose that a person without relevant experience is hired on step 1 and that the law, or the applicable collective agreement, provides that employees climb the pay scale at a rate of one step every two years. In this example, the employee's salary rises from 100 to 110 after two years of service, to 120 after a further two years, and so on. In reality, the system is more complex, but this example gives the general idea.Austrian law as it stood before it was amended in 2011 (the 'old law') provided, briefly stated, that:

service completed before the age of 18 did not count for the purpose of determining the date from which service was deemed to have started (the 'reference date');
higher education from the age of 18 counted as if the person in question had already been employed.

Thus, for example, a person hired at age 16 and placed on step 1 did not get his first pay raise till age 20, after four years of service. On the other hand, a person who went to university from age 18 till age 23 and was then hired, started on step 3. Clearly, this system favoured people with a higher education over those with a vocational education and it disfavoured employees who started their career before age 18. There were two reasons for this unequal treatment:

- it made young apprentices cheaper, thereby encouraging employers to hire them;

- it encouraged people to pursue higher education, thereby reducing the shortage of qualified staff that existed at the time.

In Hütter, the ECJ found this system to be incompatible with Directive 2000/78. The case concerned two employees with the same professional experience who were hired by the same employer simultaneously and on the same pay scale, but at different ages. Because of their age difference, they were on different steps of the pay scale and therefore earned different salaries.In 2011, in an effort to comply with EU law as interpreted in Hütter, Austria amended the old law retroactively from 1 January 2004. Under the 'new law' (which term here includes collective agreements that followed the legislator's example), all service time, regardless of age, as well as high school attendance from age 15, counted for the purpose of determining the reference date. However, for budgetary reasons, the law extended the period of service required to advance from step 1 to step 2 from two years to five years. Those who had been discriminated against under the old law were given the option to have their reference date recalculated, in which case they were compensated as if the new law had been in force from 2004. In most cases such a recalculation had no practical effect because the moving back of the reference date was neutralised by the extension of the period of service needed to advance from step 1 to step 2 (the 'contested provision'). Those who had been hired after the age of 18 were not impacted by the new law. They simply did not apply for recalculation.The new law was challenged in the 2014 Schmitzer case (C-530/13). In that case, which was reported in EELC 2014-4, page 45, the Grand Chamber of the ECJ held that Directive 2000/78 precludes "national legislation which, with a view to ending age-based discrimination, takes into account periods of training and service prior to the age of 18 but which, at the same time, introduces — only for civil servants who suffered that discrimination — a three-year extension of the period required in order to progress from the first to the second incremental step in each job category and each salary group".In 2015, the ECJ delivered a similar ruling in the Starjakob case (C-417/13), which was reported in EELC 2015-1, page 37.

Facts

The plaintiff in the case reported here was Daniel Bowman. He was born in 1961 and hired in 1988 by the defendant, a public sector employer, at age 16 or 17. Following the ECJ's ruling in Hütter, he applied for recalculation of his reference date. He was successful in that his reference date was moved back by three years. However, this did not result in a pay raise, because of the contested provision. He brought a claim on the basis that he earned less than he would have earned if the period required for advancing from step 1 to step 2 had remained two years rather than five years. He took the view that the extension of this period caused age discrimination due to the fact that mainly young employees were adversely affected by it. The defendant refused to disapply the contested provision, stating that it was not discriminatory.The court of first instance ruled in Bowman's favour. The judgment, however, was overturned on appeal. Bowman appealed to the Supreme Court (Oberste Gerichthof).

Judgment

Initially, the Supreme Court stayed the proceedings in order to wait for the outcome of the Starjakob case, that was pending in the ECJ.As noted above, the ECJ ruled in Starjakob that national legislation which, in order to bring discrimination based on age to an end, takes periods of service prior to the age of 18 into account, but simultaneously adopts a rule on a longer first period of advancement, maintains a difference in treatment based on age where in reality only employees who were subject to the earlier discrimination are impacted by the extension. In other words, the ECJ compared the situation of two employees with identical periods for advancement, one acquired before the age of 18, the other after the age of 18. For this reason, the ECJ did not have to take a closer look at the issue of whether the contested provision as such was age discriminatory.After the delivery of the Starjakob judgment, the Supreme Court reopened the case of Daniel Bowman. However, it could not apply the ECJ's ruling because in the case of Daniel Bowman there was no continuing difference in treatment based on age. Unlike in the Starjakob case, Bowman could not get his high school time taken into account before the provision regarding the advancement had been amended. Therefore, there was no possibility to have Daniel Bowman's situation after the amendment compared to another employee who had been better placed under the old provision regarding the very same periods of time for the purpose of determining their reference date. That is because a comparator was missing, due to the fact that high school attendance was not relevant under the 'old law'. Thus, the Supreme Court could not find the maintenance of a difference in treatment based on age..The Supreme Court therefore asked the ECJ for a preliminary ruling on whether Article 21 of the Charter of Fundamental Rights of the EU, in conjunction with Article 2(1) and (2) and Article 6 of Directive 2000/78/EC, and also having regard to Article 28 of the Charter of Fundamental Rights, is to be interpreted as meaning that:

- a provision in a collective agreement which provides for a longer period for incremental advancement for employment at the start of a career, thereby making it more difficult to advance to the next salary step, constitutes an indirect difference in treatment based on age; and

- if that is the case, that such a rule is appropriate and necessary in light of the limited professional experience an employee has at the start of a career?

Commentary

The ECJ delivered its judgment in Hütter in 2009. Following that judgment, no less than four requests for further clarification were submitted to the ECJ by the Austrian courts alone: Pohl (C-429/12) in 2012 and Starjakob, Schmitzer and Felber (C-529/13) in 2013. In none of these cases did the ECJ address the basic issue of whether providing for a longer period for advancement to the next step on a pay scale (a 'longer first step') at the start of one's career is in itself age-discriminatory.Austrian scholars are divided. Some argue that a longer first step is not discriminatory at all. Other believe that it is, but that it is justified. Yet others hold the view that a longer first step cannot be justified. The uncertainty on this issue has obligated the Austrian Supreme Court to seek the ECJ's guidance. In its reference for a preliminary ruling, the Supreme Court presented the ECJ with arguments as to (i) why it favoured the view that a longer first step constitutes indirect age discrimination and (ii) on which grounds such discrimination might be justified.My personal analysis of this issue is the following:Requiring a longer period of service to advance from step 1 to step 2 than to advance beyond step 2 is something that detriments considerably more young people than older people. In fact, few people aged over, say, 30 start their career on step 1 whereas almost everyone on step 1 is (considerably) under 30. I cannot see how one can deny that this gives rise to unequal treatment on the basis of age.This brings us to the issue of justification. According to Article 2(2) and Article 6 of Directive 2000/78/EC, a difference in treatment shall not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In its reference to the ECJ summarised above, the Austrian Supreme Court listed five arguments why the unequal treatment in question might be justified:

- necessity of training time and/or slow increase in experience at the start of one's career;

- incentive for loyalty to the company;

- compromise between the social partners;

- promotion of young people into the labour market;

- cost neutrality.

Re a):

The ECJ has on numerous occasions held that a difference in treatment can be justified by the need for training time and the need to gain professional experience. Examples are the judgments in Hennigs (C-297-298/10), Cadman (C-17/05), Nikoloudi (C-196/02) and Danfoss (109/88). In Danfoss, the ECJ held that an employer may differentiate on the basis of service time without needing to justify this at all. In Cadman, the ECJ qualified this somewhat by accepting that such differentiation may not be justified, but that it is up to the employee to provide evidence "capable of giving rise to serious doubts" that increased experience within a certain position does not increase added value.

See Hiessl, Basics on European Social Law (2012), page 52.

Moreover, before the law changed in 2011 the period required for someone who was hired at age 18 to advance to step 2 was two years. What has changed since 2011 to invalidate the logic behind that arrangement?

Re b):

The faster advancement of senior employees could be seen as an incentive to stay loyal to the company. However, in this case the contested provision seems to be neither appropriate nor necessary. A uniform advancement (e.g. every three years) would rather fulfil the aim of binding employees to the company. Even the Supreme Court acknowledged that new employees who have to wait five years for their first wage increase are more likely to change their occupation in order to be 'transferred' to a collective agreement which allows for faster advancement. Ultimately, this drastic prolongation (from two to five years) does not seem to be appropriate.

Re c):

The ECJ has consistently held that if a provision, custom or practice is the outcome of negotiations between social partners (employers' and employees representatives), that fact lends weight to the justification argument. See for example, Hennigs, Palacios de la Villa (C-411/05) and Rosenbladt (C-45/09). However social partners cannot do more than the Member States themselves can

See Prof. Pfeil, Das Recht der Arbeit 2013/20, 231 [236].

Re d):

According to Article 6(1)(a) of Directive 2000/78, a difference in treatment can be justified by the promotion of young peoples' integration into the labour market. With respect to the contested provision, this may be worthy of consideration, because mainly young employees are affected by the longer first period for advancement. Therefore, one might argue that the prolongation of the first period for advancement serves as an incentive to employ younger people. This point of view also matches the ECJ's ruling in Hütter. Nevertheless, to my mind, the means of achieving this legitimate aim are not appropriate or necessary. From an economic point of view, a uniform advancement (3, 3, 3 years) would have fewer negative consequences than the contested irregular advancement (5, 2, 2 years).

Re e):

Last but not least, the Supreme Court examined the possible justification of cost neutrality of the amended provision. Bearing in mind the ECJ's case law, especially in the Starjakob, Schmitzer, Specht (C-501/12) and Steinicke (C-77/02) cases, it is doubtful whether the ECJ will accept cost neutrality as a justification this time, given that the ECJ has repeatedly held that budgetary considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. This reason could be added to the justification mentioned above, namely the integration of young people into the labour market. All the same, the irregular advancement (5, 2, 2 years) is less favourable than an alternative uniform advancement (3, 3, 3 years), as demonstrated by the following example:

Step 1:

5 years × 100:
500
3 years × 100:
300

Step 2:

2 years × 110:
220
3 years × 110:
330

Step 3:

2 years × 120:
240
3 years × 120:
360

Total cost:
960

990

Conclusion

In my view, the difference in treatment caused by prolongation of the first period for advancement in this case cannot be justified. The first three justifications (necessity of training time and/or slow increase in professional experience at the start of the career, incentive for loyalty to the company and compromise between social partners) fail because they cannot be considered legitimate, appropriate or necessary. In principle, the contested provision could be justified by the need to promote young peoples' vocational integration and by the need for cost neutrality when amending the law in 2011. However, the contested provision cannot be considered adequate because the alternative of a uniform advancement (3, 3, 3 years) would have had less negative consequences for pay.

Subject: Age discrimination

Parties: Daniel Bowman – v – Pensionsversicherungsanstalt

Court: Oberster Gerichtshof (Supreme Court)

Date: 24 September 2015

Case number: 9 Ob A 20/15d

Publication: www.ris.bka.gv.at/Jus/ | OGH | type case number in "Geschäftszahl"

Creator: Oberster Gerichtshof (Supreme Court)
Verdict at: 2015-09-24
Case number: 9 Ob A 20/15d