SUMMARY

2016/36 Lower pay for employees under the age of 25 not discriminatory (DK)

<p>The Danish Supreme Court has ruled that a provision in a collective agreement allowing employers to pay reduced allowances for working in the evenings, on nights and at weekends to employees under the age of 25 in full-time education and working no more than 15 hours a week was not in conflict with the Danish Anti-Discrimination Act since it was justified by a legitimate aim.</p>

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Facts

This case deals with a provision in a collective agreement for the service station sector, concluded between the Union of Commercial and Clerical Employees in Denmark on the one hand and an employers' organisation on the other. This provision allows employers to pay certain young employees lower allowances than the regular rate. The young employees in question are those who are under the age of 25, work no more than 15 hours a week and are enrolled in a full-time education programme which is eligible for national study grants.

An employee under the age of 25 at a service station had been employed under this provision in the applicable collective agreement and had thus received the reduced allowances. The basic hourly pay was the same for all employees: the pay only differed with regard to allowances for working in the evenings, on nights and at weekends. The minimum difference

in pay was approximately 15% but could be higher depending on the amount of work performed at those times.

After termination, the employee issued proceedings against his former employer via his trade union, arguing that the special pay for this group of employees under the age of 25 was in conflict with the Danish Anti-Discrimination Act. He claimed back-payment of allowances as well as compensation under the Danish Anti-Discrimination Act.

The Danish Anti-Discrimination Act prohibits employers from discriminating against employees on grounds of age. However, there are some exceptions to the general prohibition. One is that age limits in collective agreements are valid and enforceable if they were implemented in the agreement before 28 December 2004 (when Denmark transposed Directive 2000/78) and if they are objectively and reasonably justified by a legitimate aim provided in that Directive and the ECJ's case law, and the means of achieving that aim are appropriate and necessary.

The provision in question was included in the collective agreement in 2000 and originated from a similar provision in the nationwide collective agreement for the retail area. In 2004, the general prohibition against discrimination was extended to also include age and disability, and in that connection the trade union reserved its right at a general level during the collective bargaining process in 2007 to argue that maintaining the age limits in the collective agreement was in conflict with the Danish Anti-Discrimination Act. A similar reservation was made during the collective bargaining processes in 2010 and 2012.

In the spring of 2013, the trade union commenced proceedings against the employers' organisation and the member employer on behalf of the young employee. The trade union argued that the provision in the collective agreement allowing the employer to pay reduced allowances to students under the age of 25 was not justified by a legitimate aim and that the means of achieving the aim were not appropriate and necessary as provided for in the Danish Anti-Discrimination Act.

The employers' organisation argued, amongst other things, that the provision allowing for reduced allowances is intended to make it attractive for employers to employ students on a part-time basis resulting in making it easier for young employees to have a job while also studying full-time and thus help them into the labour market. The reduced allowances also serve to compensate the employer for the fact that this group of employees is less reliable because their availability to the employer is reduced as a result of their full-time studies.

In connection with the collective bargaining process the union did, however, require the implementation of an age limit of 25 years in order to limit the number of persons impacted by

the provision and the employers' organisation accepted this request, recognising that there is a challenge with regard to loyalty and reliability with young employees in full-time education and that employees aged 25 or older will often have a more settled life with a need for a steady income. The employers' organisation argued that the impact of the provision had already been limited as far as possible because of the collective bargaining process which led to the implementation of the age limit, since the outcome of such a process presumably strikes a fair balance between the requirements of both parties participating.

Finally, the employers' organisation argued that the fact the employees were paid reduced allowances for unsociable working hours made sense because this group of employees tends to prefer working in the evenings and during weekends because of their full-time studies.

Decision

The Supreme Court ruled in favour of the employer, referring to the reasoning of the Maritime and Commercial High Court. That Court had held that an age limit of 25 years constitutes direct discrimination on grounds of age, but that this was justified by a legitimate aim.

The Court noted that age was not the only decisive factor when considering whether the provision applied. The fact that the employee was in full-time education and worked less than 15 hours per week was also decisive.

The Court noted that according to witness statements from the employers' organisation, the aim of the provision was, for example, to promote the integration of people under 25 in full time education into the workforce by making it easier for them to obtain work at times when they were not studying. Given that there was a similar provision in the nationwide collective agreement and that it follows from established ECJ case law that Member States and the social partners have a wide margin of discretion in relation to the social and occupational aims they wish to pursue and how to achieve them, the Court found that the provision was objectively justified by a legitimate aim in accordance with Directive 2000/78/EC on equal treatment in employment and occupation.

The question then was whether the provision could be considered necessary and appropriate to achieve the aim.

As there is a high turnover amongst employees under 25 in full time education and various witness statements attested to this, the Court accepted that this group of employees forms a less stable category of workers, resulting in higher training expenses for the employer. Consequently, the Court found that paying these employees a lower amount was an appropriate measure to compensate the employer for the disadvantages it suffered and to

motivate employers to hire people in this group despite those disadvantages – thus promoting their integration into the workforce.

In terms of the margin of discretion afforded to Member States and social partners to promote occupational integration, the Court found that the provision was appropriate to achieve that aim.

Finally, since the provision solely related to lower pay at times when employees under 25 in full-time education were actually able to work, the Court did not find a basis for concluding that the provision went beyond what was necessary to achieve the aim.

Commentary

The judgment from the Danish Supreme Court emphasizes – once again – that the social partners when negotiating collective agreements are given a wide margin of discretion in the assessment and choice of the social and employment policy objectives they wish to pursue in connection with the stipulation of age limits in a collective agreement and the means that may be most appropriate to use to achieve that aim. These important principles follow from established case law from the ECJ, for example, Palacios de la Villa (C-411/05) and Rosenbladt (C-45-09).

None of the parties requested a preliminary ruling from the ECJ and based on previous case law of the Danish Supreme Court it is unlikely that the Court would have allowed such a request. On several previous occasions, the Court has rejected requests for preliminary rulings, stating that the law is clear.

Comments from other jurisdictions

Germany (Paul Schreiner and Jana Hunkemöller, Luther Rechtsanwaltsgesellschaft mbH): In contrast to the case at hand, in Germany, such a salary system would most likely be regarded as unlawful unequal treatment.

An employer must observe the German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, the 'AGG'), which transposes Directive 2000/78/EC. According to section 7(1) AAG, employees must not be put at disadvantage because of their age. Students who receive a lower salary because they are under 25 years old, are full-time students and work less than 15 hours a week, are at disadvantage because of their age.

Any such conduct needs to be justified according to section 10 of the AGG. If the unequal treatment is based on a number of reasons, each reason must comply with the AGG.

The Germany courts would regard students as employees within the meaning of section 6 of the AGG. The fact that an employee may also be a student, does not exclude him or her from being an employee. Therefore, students must not be put at disadvantage because of their age without justification.

Justification requires a legitimate aim and the measure taken needs to be objective and reasonable. There is no justification in the present case. The fact that an employee might prefer to work at the weekends, in the evenings or at night does not give the employer the right to pay him or her a lower salary. Therefore, students must receive the same salary as a comparable employee who works full-time. This includes allowances compensating the employee for working in the evenings, at nights and weekends. However, a different assessment may be possible if a student is employed as an intern or as part of his education for a certain time.

Further, it is not lawful to exclude additional allowances for students just because they only work 15 hours a week. Employees in part-time work must not be put at disadvantage because they do not work full-time. However, a salary system which stipulates that the salary depends on the duration of the employment, may be lawful, even though this is normally indirect age discrimination.

The Netherlands (Peter Vas Nunes, BarentsKrans): A Dutch court may well have arrived at the same outcome as the Danish Supreme Court. However, I expect that it would have devoted consideration to the age limit of 25. Why 25 and not another age?

The employers' organisation in this Danish case (which brings to mind the ECJ's fairly recent ruling in O/Bio Philippe, case 432/14) argued that the disputed provision in the collective agreement had two objectives:

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to make it easier for young people to have a job while studying full-time and thus cause them to be integrated into the labour market (put more crudely: "if our employer-members had to pay young people a full wage, they would not hire them");

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to compensate the employer for the fact that this group of employees is less steady and reliable because their availability to the employer is reduced as a result of their full-time studies.

Argument 1 is an oft-advanced, sometimes cynically abused, but essentially true paradox: the less we protect a group, the more we help them find work. The Mangold and Kücükdeveci cases are well-known examples where the ECJ did not buy the argument. Rather than discussing the argument as such, let me say something about the age limit, in this case 25.

Dutch law has recently seen several examples of similar age limits and similar arguments to justify treating young employees detrimentally. First of all, there is the statutory minimum wage. For decades, employees aged under 23 have been paid lower minimum wages, according to the following sliding scale:

age 22
85% of full minimum ('adult') wage

age 21
72.5%

age 20
61.5%

age 19
52.5%

age 18
45.5%

age 17
39.5%

age 16
34.5%

age 15
30%

To my knowledge the legislator has not provided an explanation for these percentages. In July 2016, the government announced legislation that will gradually abolish the lower minimum wage for young employees.

Another example is that for a brief period (July 2010 – December 2011), by way of experiment, employees under 27 were entitled to less dismissal protection than their older colleagues (they could be hired for a maximum of four rather than three consecutive fixed terms). The idea was that this would increase employers' willingness to hire young staff. The experiment was a failure and the exception to the normal dismissal rules in 'favour' of young people was quietly dropped.

The third example is that since 2015, employees are entitled to a statutory 'transition allowance' upon termination of their contract, unless they are under 18 and are employed for at most, on average, 12 hours per week. The government defended this exception with the argument that part-time under-18s tend to be students with no more than small jobs on the side, and that employers should not be burdened with an obligation to pay them a transition allowance.

There must surely be many other examples. The point of giving these three examples is that they show how arbitrary the legislator seems to be when determining age limits: 23 when it comes to minimum wage, 27 when it comes to dismissal protection, 18 when it comes to transition allowance. It would be helpful if legislators were more consistent and explained

more precisely, not only that there is an age limit but also why they have chosen the age in question.

Subject: Discrimination; age

Parties: Union of Commercial and Clerical Employees in Denmark ('HK')/Denmark acting for A – v – Employers' Association of the Danish Petroleum Industry (BOA) acting for Circle K Denmark A/S (formerly Statoil Fuel & Retail A/S)

Court: Højesteret (Supreme Court)

Date: 16 June 2016

Case number: 154/2015

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Creator: Højesteret (Supreme Court)
Verdict at: 2016-06-16
Case number: 154/2015