SUMMARY

2017/31 Lawful positive discrimination in favour of women (FR)

<p>Company agreement provisions granting a half-day of leave to female employees on International Women's Day constitute lawful positive discrimination in favour of women.</p>

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Facts

Mr X, hired as a bus driver on 3 November 2008 by the ST2N Company and candidate at employee representatives' elections in April 2012, was dismissed on 26 October 2012. Amongst various claims, he alleged that he was a victim of unjustified differential treatment with respect to the half-day of leave granted by the company to his female colleagues on 8 March of each year on International Women's Day. Mr X lodged a claim for damages against the Company for breach of the principle of equal pay between the genders, as provided in Article L.3221-2

Article L.3221-2: "Every employer shall ensure equal remuneration between men and women for the same work or for work of equal value."

Judgment

The Court of Appeal of Aix-en-Provence rejected his claim in its decision of 1 September 2015 for breach of the principle of equal treatment. Mr X lodged an appeal before the Supreme Court.

The Supreme Court, in a decision of 12 July 2017, upheld the Court of Appeal's decision, holding that "pursuant to Articles L.1142-4, L.1143-1

Article L.1143-1: “In order to ensure professional equality between men and women, the measures to establish equal opportunities provided for in Article L. 1142-4 may be provided in a professional equality plan negotiated in the company.”

Article L.1143-2: “If by the end of the negotiations, no agreement has been reached, the employer may unilaterally implement the professional equality plan.”

Commentary

In its decision, the Supreme Court rejected the employee’s argument that men should not be excluded from the fight against gender inequality. By adopting this position, the Supreme Court has taken into account developments in EU law and case law, upholding the principle of positive discrimination in favour of women.

The ECJ did not used to allow for positive discrimination in favour of women unless it was justified by their biological condition, meaning pregnancy or maternity. France was criticised precisely because of collective agreements that granted specific rights to women, such as a day off on Mother’s Day (ECJ 25 October 1988, C-321/86).This restrictive approach was again reflected in another ECJ decision on hiring priority given to female candidates where women were underrepresented (ECJ 17 October 1995, C-450/93), although the ECJ judges have subsequently softened their position with respect to women’s priority of access to employment (C-409/95, Marschall of 11 November 1997 and C-158/97, Badeck of 28 March 2000).

The decisive step was taken by the Member States themselves by inserting in the Treaty on the functioning of the EU the following provisions: "with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented gender to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers” (Article 157 § 4).

In order to justify its position, the Supreme Court relies on both the principle of equality of opportunity arising from French law

Even though the ECJ has a broad conception of remuneration, under French law the granting of a half-day of leave falls under working conditions and consequently the Supreme Court applies Article L.1142-4 of the Labour Code on equal opportunities.

Even though any discrimination on grounds of gender is prohibited under French law, in order

to ensure effective professional equality between the genders, the Labour Code allows measures taken solely for the benefit of female employees to remedy de facto inequalities which affect their opportunities. Article L.1142-4

Article L.1142-4 “temporary measures for the sole benefit of women aimed at establishing equal opportunities for women and men, in particular by addressing de facto inequalities affecting women’s opportunities. These measures originate from:

- Regulatory provisions

- Provisions of extended branch conventions or extended collective agreements;

- Provisions of the plan on professional gender equality.”

A question one could ask is how granting a half-day of leave on International Women’s Day could contribute to improving equal opportunities between the genders. And as this measure is not “temporary” as required by Article L.1142-4 of French labour Code, it could be viewed as maintaining a stereotype that feminism is only a women’s issue (which is false, as many women are not feminists and many men are).

To this question, the Supreme Court responds in its explanatory note that “inequalities in the workplace between men and women are still significant, whether in terms of wages or the quality of jobs. Symbolic demonstrations of whatever kind on 8 of March will help to stimulate reflection on the situation of women in the workplace and on ways of improving it”. The Supreme Court considers that there is a direct link "between this day and working conditions, legitimising this measure in favour of equal opportunities, provided by a company agreement”. One could ask whether this would still be justified if most women simply took half a day off. In any event, employers cannot check how each female employee uses the time.

Collective bargaining agreements and company agreements signed with trade unions provide for benefits for specific categories of employees only (e.g. a longer notice period for executives compared to non-executivs). Under French law, there is a principle of equal treatment and equal pay for equal work. This means that employees in the same situation should enjoy the same benefits. Any differential treatment amongst employee categories should be justified by objective and verifiable factors. The Supreme Court in the case at hand did not go as far as to apply its ruling to the question of conformity with the principle of equal treatment.

In 2015, the Supreme Court provided new case law according to which, when differential treatment is provided by a collective bargaining agreement or company agreement, it is

presumed to be objectively justified and if any employee considers it unjustified, he or she needed to demonstrate why. Before 2015, the situation was the reverse, meaning that when an employee claimed differential treatment was unlawful, it was for the employer to prove that it was objectively justified.

So, could positive discrimination measures in favour of women provided for in a company agreement also benefit from a presumption of conformity with the principle of equal treatment and non-discrimination? We will keep a close eye on future decisions...

Comments from other jurisdictions

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): The General Equal Treatment Act (the 'AGG') serves to implement two European directives (2000/43 and 2000/78) in Germany. The purpose of the AGG is to provide comprehensive protection against discrimination on grounds of race, ethnic origin, gender, religion, ideology, disability, age and sexual identity. Section 5 AGG allows for positive discrimination to help prevent or eliminate disadvantage, provided the positive discrimination is appropriate and suitable, by objective standards. Therefore, as long as the objective standard required by Section 5 AGG is met, an employer may take positive steps to encourage women, even if there are other disadvantaged groups within the workforce.

However, in this particular case, Mr X might have won his action in Germany, as there may be a breach of Section 5 AGG. The half-day of leave granted by company agreement on 8 March of each year on International Women's Day was intended to help offset existing disadvantages. One of the ways in which positive discrimination could be deemed necessary would be if it somehow helped to increase women's professional skills, as these are essential in competing in the job market. Positive discrimination along these lines would qualify under Section 5 if this could be seen as important for bringing about equal opportunities.

In the case at hand, the differential treatment offered by the employer was, however, probably not justified under Section 5 AGG, as it is not clear from the above that there are in fact disadvantages for female employees at this particular employer – rather than in employment in general. A good indication of real disadvantage would be, for example, that female employees were significantly underrepresented in the company. In this particular case, there seems to be no evidence that this is the case. In terms of other disadvantages that can occur because of gender, those very often do not apply solely to women, but may also affect other groups, for example, the LGBTQ community. In those circumstances, a half-day of leave only for women would discriminate against those others unjustifiably.

United Kingdom (Bethan Carney, Lewis Silkin LLP): Although UK equalities legislation was

amended a few years ago, making it slightly easier to positively discriminate in favour of certain protected groups, it seems unlikely that this case would have been decided in the same way in the UK. When the Equalities Act 2010 was brought into force, it included two new provisions on positive discrimination. Section 158 is a general power to take positive action. It allows the use of positive action to alleviate disadvantage experienced by people who share a protected characteristic, to meet their particular needs or to encourage their participation in an activity if it is disproportionately low. Any such measures must be justified (i.e. must be a proportionate means of achieving the relevant aim). Section 159 entitles an employer to take positive action when recruiting or selecting for promotion; however, it can only be relied upon where the employer is selecting between two equally well-qualified candidates, amongst other conditions. Both sections are rarely relied upon in practice. Clearly Section 159 could not be relied upon to justify giving female employees a half-day holiday on International Women's Day, as it is only relevant to recruitment and promotion situations. It is also highly unlikely that Section 158 could be used either, as that section requires the special disadvantages or needs experienced by the female employees to be identified and for the action of the employer to be a proportionate means of addressing them. Merely referencing the existence of widespread gender inequality in the workplace would not be sufficient. There is no equivalent in UK law to the French Supreme Court decision which said that when differential treatment is set out in a collective bargaining/company agreement, it is presumed to be objectively justified.

Subject: Positive discrimination

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