EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/44 An age-discriminatory staff policy? (DK)

<p>According to the Danish Anti-Discrimination Act, which is based on the Employment Equality Framework Directive, if an apparently neutral staff policy works to the disadvantage of employees of a certain age compared with other employees, this constitutes indirect discrimination, unless the policy is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.</p>
<p>In this case, the Danish Eastern High Court had to consider whether a policy providing for six months' notice to all employees in case of redundancies – regardless of their length of service – was in breach of the Danish Anti-Discrimination Act.</p>
<p>The Danish Salaried Employees Act lays down a minimum notice period for all salaried employees. The notice period is extended when an employee has been employed for a certain number of years. The longer an employee stays employed, the longer the notice period. Similar provisions are provided in most Danish collective agreements.</p>

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Facts

The case concerned redundancies affecting 19 employees at the Danish Road Directorate. According to its staff policy, the Directorate would – in the case of redundancies – endeavour to give all employees six months' notice, regardless of their length of service.

The Directorate dismissed all 19 employees at six months' notice – even though seven of them had not served long enough to be entitled to six months' notice under the Danish Salaried Employees Act.

One of the senior employees who was affected by the redundancies was entitled to six months' notice, and she argued that the staff policy and the manner in which it was put into practice amounted to age discrimination because the policy treated her younger colleagues with shorter service more favourably than her. The case ended up before the High Court.

Judgment

In its judgment the High Court made reference to the ECJ's judgment in the Austrian case C-132/11 (Tyrolean Airways), according to which differential treatment with regard to length of service did not constitute direct or indirect discrimination on grounds of age.

The High Court cited paragraph 29 of the judgment, which reads as follows:

"However, while a provision such as that set out in paragraph 21 of this judgment is likely to entail a difference in treatment based on the date of recruitment by the employer concerned, such a difference is not, directly or indirectly, based on age or on an event linked to age. It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the

age of that cabin crew member at the time of his or her recruitment. That provision is therefore based on a criterion which is neither inextricably (see, a contrario, Case C 499/08 Ingeniørforeningen i Danmark [2010] ECR I 9343, paragraph 23) nor indirectly linked to the age of employees, even if it is conceivable that a consequence of the application of the criterion at issue may, in some individual cases, be that the time of advancement of the cabin crew members concerned from employment category A to employment category B is at a later age than the time of advancement of staff members who have acquired equivalent experience with Tyrolean Airways."

The High Court ruled in favour of the Directorate, giving weight to the fact that all of the affected employees had been treated equally, notwithstanding their age and length of service. Accordingly, the senior employee had not been treated less favourably than her colleagues.

Commentary

The judgment shows that it does not constitute direct or indirect age discrimination, and is thus not in breach of the principle of non-discrimination on grounds of age under the Danish Anti-Discrimination Act or the Employment Equality Framework Directive, for a staff policy, provision, feature or practice to provide all employees with six months' notice regardless of their length of service.

According to the judgment, the decisive factor was that in order for discrimination to occur, a person must have been treated – either directly or indirectly – less favourably than others. The High Court stated that the Directorate had made a decision that all employees to be made redundant should be given the same notice period, regardless of their age or length of service. The High Court further stated that there was a 20-year age span between the employees who were provided an extended notice period. All the redundant employees were thus given equal status as a consequence of the Directorate's policy. The High Court pointed out that none of the employees had been treated less favourably than others, since no employees had had their notice period shortened.

Further, the High Court stated that the fact that the Directorate's policy gave several employees equal status in terms of notice periods – regardless of their age or length of service – did not mean that the senior employee had been discriminated against as she had simply been treated equally with her colleagues.

It may seem surprising that the High Court refers to the above-mentioned judgment by the ECJ, since the ECJ appears to base its main argument on the fact that the employer would not count length of service accrued in another company in the same group of companies when calculating the notice period. However, the explanation is probably that the High Court – in

the same way as the ECJ in case C-132/11 – is of the opinion that the decisive criterion applied was neither directly nor indirectly connected to the employees' age.

In this case, the decisive criterion was simply the employees' employment with the Directorate, since all employees were given a six month notice period. And this neither constitutes direct nor indirect age discrimination.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes):

1. I agree with the outcome of this judgment, which at first sight seems obvious. How can giving all employees the same notice period be discriminatory? Nevertheless, there is more to be said.

2. Let me begin with the author's comment that the policy at issue did not disfavour older employees, merely favouring others. This is reminiscent of the parable of the workers in the vineyard. I have always sympathised with the poor labourers who had toiled the whole day, and I suspect that many people find it unfair that the landowner paid their colleagues, who had put in no more than an hour of work, the same wages. Be this as it may, the equal legal treatment doctrine does not follow the reasoning in Matthew 20. On the contrary, it is built on what is often referred to as the Aristotelian concept that equals should be treated equally and unequals should be treated unequally in the measure of their inequality. In its ruling of 6 April 2000 in the Thlimmenos case (No 34369/97), the ECtHR (to quote but one of many similar passages) held that "The right not to be discriminated against [...] is also violated when States [...] fail to treat differently persons whose situations are significantly different". In its ruling of 13 November 1984 in the Racke case (No 283/83) the ECJ (again, to quote but one of many similar passages) held that "as the Court has consistently held, discrimination consists solely in the application of different rules to comparable situations or in the application of the same rule to differing situations".

3. The plaintiff in this case claimed that her younger colleagues were treated more favourably. What she probably meant is that her younger colleagues were not treated less favourably. Would she have had a point had she formulated her claim thus? Surely the situation of an employee who has worked for the same employer for many years (let us say, by way of example, 30 years) is not comparable to that of a recently hired employee, say someone who was hired six months ago. It is not without reason that the ECJ allows senior employees to be paid more than junior employees. See for example Cadman (C-17/05): such a pay differential does not need to be individually justified. I would think that the plaintiff in this Danish case could have successfully argued that her situation was incomparable to that of her

more junior colleagues.

4. In that case, the next step for her would have been to establish that she had been treated equally to those colleagues "on account of", that is to say in connection with, or, more precisely, despite her difference in, age. Admittedly, this sounds strange, but that is the consequence of applying the Aristotelian doctrine. Such an argument would have to be combined with a claim of indirect age discrimination, because seniority in a company is not the same as age. A young employee can have been employed for a relatively long period and an old employee can have been hired recently. However, on average, senior employees tend to be significantly older than recently hired employees.

5. The Danish court referenced the ECJ's Tyrolean Airways case, but I think it could have distinguished from that case. In Tyrolean Airways, the ECJ (merely) held that Directive 2000/78 does not preclude a national provision that takes into account only service with the employee's own employer and not also with his service with associated employers. The ECJ did not rule that differential treatment with regard to length of service never constitutes direct or indirect discrimination on grounds of age. Cannot one argue that observing the same notice period regardless of seniority constitutes differential treatment with regard to length of service? Let me illustrate this with an example. Suppose that the employer's policy in this Danish case had been to observe a shorter notice period for senior employees than for recently hired employees. Surely that could have constituted indirect (and probably not justified) age discrimination.

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