

SUMMARY

2015/6 Constitutional Court: compulsory retirement is unlawful sex discrimination (SL)

<p>In reviewing the legality of the law providing for the automatic termination of the employment agreements of public servants, the Constitutional Court concluded that public finance considerations do not, in principle, provide sufficient justification for the unequal treatment of women. It rejected a claim of age discrimination.</p>

Summary

In reviewing the legality of the law providing for the automatic termination of the employment agreements of public servants, the Constitutional Court concluded that public finance considerations do not, in principle, provide sufficient justification for the unequal treatment of women. It rejected a claim of age discrimination.

Background

With the aim of curtailing state spending at the peak of economic crisis, the National Assembly of the Republic of Slovenia (*Državni zbor Republike Slovenije*) adopted the Public Finance Act (*Zakon o uravnoteženju javnih financ*, the 'PFA') in 2012. One of the austerity measures introduced by the PFA was automatic termination of the employment agreements of public servants who were eligible to draw State retirement pension. Under the PFA, this automatic termination could only be circumvented if the public servant and the employer agreed to continue the employment relationship on the basis that this was necessary to ensure work could continue undisturbed.

At the time PFA came into force, the conditions for eligibility for retirement pension were different for men and women, pursuant to the Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju*). The retirement age for women was, as a rule, lower than for men¹. As a result, women employed in the public sector tended to lose their jobs at a younger age than their male colleagues.

Facts

Following implementation of the PFA, the Human Rights Ombudsman of the Republic of Slovenia (*Varuh človekovih pravic*) filed a request to the Constitutional Court (*Ustavno sodišče*, the 'CC') to review the legality both generally and under the Constitution itself (*zahteva za presojo ustavnosti in zakonitosti*) of the automatic termination provisions of the PFA. The initiative for this came from the Rector of the largest Slovenian university, the University of Ljubljana. The request asserted that the measure had seriously adverse consequences for elderly professors and, for the universities themselves, both in the short and long term.

The claim expressed in the request that the rules were unconstitutional was mainly built on two core arguments, both referring to breach of the right to equality before the law, as enshrined in section 14 of the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*).

Firstly, the request claimed that the introduction of automatic termination had exposed elderly employees in the public sector to the risk that their employers would make arbitrary decisions about whether to agree to continuance of their employment relationships and that this unjustifiably placed them in a precarious situation.

The second argument was that automatic termination under the PFA constituted unequal treatment and discrimination against women. As both the statutory retirement age and the employment period were lower for women and these two factors triggered automatic termination, women's contracts were being terminated at an earlier age than those of men. This was putting women in the public sector in an unfavourable position compared to their male colleagues and was an unlawful infringement of their right to equal opportunities and equal treatment.

Judgment

The CC thoroughly examined each of these arguments and came to the following conclusions:

1. Age discrimination

First, the CC established that automatic termination, as provided in the PFA, was in fact unequal treatment. But in order to determine whether this unequal treatment was unconstitutional (and therefore unlawful), the CC considered whether the measure pursued a legitimate aim and, if so, whether the means to achieve that aim were proportionate. This proportionality test consisted of assessing whether automatic termination was adequate and necessary as well as whether it was proportionate in the narrow sense.²

In its assessment, the CC gave particular consideration to the guidance on legitimate aims objectively and reasonably justifying age discrimination provided under Council Directive 2000/78/EC,³ as well as the case law of the European Court of Justice ('ECJ') on that directive. Following the position taken by the ECJ, the CC held that the main objectives of the measures contained in the PFA, which were to curtail state spending and make the public finances sustainable, did not constitute a legitimate aim, sufficiently justifying age discrimination. However, after examining the government's response, the CC decided that sufficient justification for automatic terminations was nonetheless provided for through additional objectives pursued by the PFA – particularly the balancing of the age structure in the public sector, i.e. that the mix of old and young civil servants should be more balanced. It was therefore finally established by the CC that the age discrimination inflicted by means of automatic termination was permissible under Slovenian law.

2. Discrimination against women

The CC applied the proportionality test to the question of sex discrimination, with due consideration to the relevant provisions of Directive 2006/54/ES⁴ as well as the case law of the ECJ, but the CC found no legitimate aims justifying the breach. As a result, the CC concluded that automatic termination was unconstitutional insofar as it affects women, as they would not have met the conditions for drawing the retirement pension that apply to male public servants (i.e. the statutory pension age and the prescribed employment period).

The unconstitutional provisions of the PFA were ordered to be eliminated by law within six months of the CC's judgment. In the interim, the employment agreements of women employed in the public sector could only be terminated automatically if the conditions for the re-retirement pension applicable to men were fulfilled. The judgment was put into effect in December 2014, when an amendment to the PFA came into force.

Commentary

The prohibition against discrimination in employment undoubtedly forms one of the core

pillars of modern employment law and it is safeguarded in national and EU law and under the conventions of the International Labour Organisation. The judgment of the CC addresses the unequal treatment of employees under state austerity measures – something that is at particular risk of arising in turbulent economic times.

The main conclusion to be drawn from the decision of the CC is that measures aimed at curtailing state spending (including automatic termination) do not, in principle, provide sufficient justification either for age discrimination or unequal treatment of women. Either of them might, however, be considered justified if the measures are underpinned by (additional) legitimate objectives (such as balancing of the age structure of the public sector). In our view, as the decision was reached mainly by interpreting EU law, the relevance of findings of the CC far surpass our national boundaries. The conclusions are potentially relevant to any jurisdiction within the EU.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In a country that has slowly increased the pension entry age to 67, such a claim seems surprising. In Germany, a male worker probably would have brought claim in order to have his entry age reduced, on grounds of sex discrimination. In fact, such a claim has been filed in Austria a few years ago. However, the entry age is and has been the same for men and women in Germany.

Footnotes

¹ To start collecting State retirement benefits, an individual must satisfy two conditions: he or she must have reached a certain minimum age and must have been employed for a minimum period. The longer the length of service, the lower the minimum age.

² I.e. an assessment of whether the benefits to the community of automatic termination outweighed the negative consequences to the individual.

³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L303, 2 December 2000, p. 0016 – 0022.

⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204, 26 July 2006, p. 0023 – 0036.

Subject: Gender discrimination, Age discrimination

Parties: -

Court: Ustavno sodišče Republike Slovenije (Constitutional Court of the Republic of Slovenia)

Date: 14 November 2013

Case number: U-I-146/12-35

Internet Publication: go to "http://www.us-rs.si/en/" > go to "advance search" > enter case number under "search query"

Creator: Tribunal Constitucional (Constitutional Court)

Verdict at: 2013-11-14

Case number: U-I-146/12-35