SUMMARY

2014/7 Justified differential treatment of under-18s (DK)

<p>Section 5a(5) of the Danish Anti-Discrimination Act, by which collective bargaining agreements may provide a difference in pay for under-18s compared to adults and an option to dismiss employees when they reach 18, is in accordance with Article 6(1) of Directive 2000/78 on anti-discrimination.</p>

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Section 5a(5) of the Danish Anti-Discrimination Act, by which collective bargaining agreements may provide a difference in pay for under-18s compared to adults and an option to dismiss employees when they reach 18, is in accordance with Article 6(1) of Directive 2000/78 on anti-discrimination.

Facts

The case concerned a young sales assistant who, in accordance with the applicable collective agreement between his employer (a Danish chain of supermarkets) and the trade union HK, was paid less than his adult colleagues because he was under 18. In line with common practice in this sector, he was given notice when he reached 18.

The parties agreed that the employer's actions were in accordance with the collective agreement and that the collective agreement was fully in line with the derogation in section 5a(5) of the Danish Anti-Discrimination Act, which states that the principle of non-discrimination on grounds of age does not apply to under-18s if the employer is covered by a collective agreement containing specific provisions governing under-18s and their pay.

However, the trade union argued that section 5a(5) of the Danish Anti-Discrimination Act was incompatible with the Anti-Discrimination Directive (Directive 2000/78) and brought proceedings against the employer and the Danish Ministry of Employment.

The employer and the Danish Ministry of Employment argued that the derogation in the Danish Anti-Discrimination Act was intended to support young people's integration into the labour market by making it easier for them to gain work experience before the age of 18 and that this was a legitimate aim in accordance with the Anti-Discrimination Directive.

They further argued that the special pay regime for under-18s and the possibility of dismissing them when they turn 18 constituted an appropriate means of achieving the legitimate aim, and that the regime did not go beyond what was necessary to achieve this aim.

Decision

The Danish Supreme Court referred to Article 6(1) of the Anti-Discrimination Directive according to which a difference of treatment on grounds of age may be justified if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Danish Supreme Court then noted that the Anti-Discrimination Directive explicitly mentions the establishment of special conditions for young people for the purpose of supporting their vocational integration as a possible difference in treatment.

With reference to the preparatory notes to the Danish Anti-Discrimination Act and various other factors, the Danish Supreme Court stated that it could be taken as a fact that section 5a(5) of the Act is intended to support young people's integration into the labour market by making it easier for them to gain work experience before the age of 18 and that this is a legitimate aim in accordance with the Act.

The Danish Supreme Court further affirmed that the special pay regime for under-18s and the possibility of dismissing them when they turn 18 must be deemed to be appropriate means of achieving the legitimate aim and it noted that it did not find that the regime went beyond what was necessary to achieve the aim. This was because the Court had regard, among other things, to the fact that the derogation only applied to the extent that the employment was covered by a collective agreement containing special provisions governing under-18s and their pay.

On that basis, the Danish Supreme Court upheld the Danish Eastern High Court's judgment in favour of the employer and the Danish Ministry of Employment.

Commentary

The decisions of the Danish Eastern High Court and the Danish Supreme Court are not surprising, as the Danish approach had previously been specifically mentioned by the ECJ in the *Hütter* case (ECJ 18 June 2009, case C-88/08), as a standard of reference.

In the *Hütter* case, the ECJ had stated that the circumstances differed from the measures described by the Danish government, which sought further vocational integration of under-18s through a reduction in minimum pay compared to the pay level of adult employees.

Further, the Danish Supreme Court found that without the option of differential treatment, including the possibility of dismissing employees as they turn 18, employers would be less inclined to employ under-18s because of their lack of experience and the specific health and safety regulations that apply to this demographic group.

Comments from other jurisdictions

The Czech Republic (Nataša Randlová): There is no rule that would entitle employers to dismiss employees as they turn 18 under Czech law. However, along with the complete recodification of Czech private law provided by the New Civil Code as of 1 January 2014, an entirely new regime for the termination of the employment relationship of minor employees came into the Czech Labour Code. This allows for the immediate termination of the employment relationship of an employee who is under 16 by his parents or those with parental responsibility for the child in law.

The purpose of this is to allow for (principally) parents to terminate the employment relationship of a child who is under 16 years old if this is necessary for educational or health reasons and/or the development of the child. Such a termination, however, is only valid if confirmed by a court order.

And this is where the matter becomes somewhat absurd – within general civil proceedings before the Czech courts, it takes approximately a year simply to schedule the first hearing of the case. Therefore, if a parent wants to terminate his child´s employment relationship immediately, for health reasons for example, this simply cannot be achieved in a timely way. Moreover, there are questions as to who the parties to the proceedings would be. And finally, as this only arises in relation to employees under-16, in practice this means 15 year-olds, as children may only form an employment relationship once they reach 15 or complete their compulsory education.

To summarise – the regime described above is likely to have no practical effect on employment law practice, nor will it serve to protect minor employees.

The Netherlands (Peter Vas Nunes): In The Netherlands, many if not all supermarkets (as well as employers in some other sectors) have a policy of paying young staff (much) less than older staff. This has attracted some criticism over the years, but on the whole the policy meets with understanding, given the low profit margins in the food retail industry. What angers the

unions more than the age-based pay differential is the supermarkets' policy of (i) hiring exclusively young staff for their unskilled jobs (on temporary contracts) and (ii) letting employees go when they get older and replacing them with younger staff, even though this hiring and firing policy is a logical consequence of the need to pay low wages.

The Dutch Minimum Wage Act sets age-dependent minimum wage levels. Employees aged 23 and over are presently entitled to a minimum of € 1,477.80 + 8% = € 1,596 gross per month. Younger employees are entitled to the following percentages of this amount:

age	percentage
22	85.0
21	72.5
20	61.5
19	52.5
18	45.5
17	39.5
16	34.5
15	30.0

In view of this enormous difference in the statutory minimum wage, it is hardly surprising that the vast majority of stock clerks and cashiers in supermarkets are 17-20 year-olds (younger ones being insufficiently employable and older ones being too expensive).

Article 7(1)(a) of the Age Discrimination Act provides that differences of treatment on grounds of age that are based on statute and are aimed at increasing employment opportunities for certain age groups, are deemed to be objectively justified. This provision is generally held to be in line with (Article 6(1) of) Directive 2000/78. Paying young employees less than adults undoubtedly increases youngsters' employment opportunities.

The former Equal Treatment Commission (now the Human Rights Commission) has held that a policy of hiring exclusively young individuals for unskilled jobs is a logical consequence of a legitimate policy of paying young staff less than adult staff, as per the Minimum Wage Act. However, a policy of not extending such young employees' contracts after a few (usually three) years, is not (automatically) objectively justified, according to the Equal Treatment Commission. It reasons that such a policy may increase employment opportunities for young people on a collective basis, but is not in the interests of the individual employees concerned and, more relevantly perhaps, is not based on statute. I find this reasoning somewhat formalistic.

Subject: Age discrimination

Parties: HK (trade union) on behalf of A supported by non-party intervener LO (the Danish Confederation of Trade Unions) – v – employer B and the Danish Ministry of Employment supported by non-party intervener DA (the Confederation of Danish Employers)

Court: The Danish Supreme Court

Date: 14 November 2013

Case number: 185/2010

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