

SUMMARY

2014/19 Eligibility for widow's pension conditional on marriage predating termination of late employee's employment: no age or sex discrimination (GE)

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Facts

The plaintiff was born in 1958. Her husband was born in 1933 and died in 2010. They married

in 1987. The husband had been employed by the defendant and its predecessors for more than 20 years and left the firm in 1979, at age 46. Since 1992 (age 59) he had received pension benefits pursuant to the defendant's company pension scheme.

With regard to widows' pension the company pension scheme provided that widows of pensioners are only entitled to pension benefits under certain conditions:

the pensioner married before reaching the age of 60;
the marriage was concluded before or during the employment relationship;
on 1 June prior to the pensioner's death, the marriage had existed for at least one year.

Following fruitless requests for payment, the plaintiff filed a lawsuit against the defendant, claiming payment of widow's pension benefits under the company pension scheme.

Judgment

The *Bundesarbeitsgericht* found that the plaintiff was not entitled to any widow's pension benefits under the company pension scheme. Her claim failed because the requirement that the marriage was concluded before the employment relationship ended was not fulfilled. The marriage had been concluded in 1987, by which time the employment relationship had already ended.

The plaintiff claimed that the restriction of widows' pension entitlements to cases where the marriage had been concluded before the end of employment was invalid for being discriminatory on grounds of age and sex.

The BAG ruled that the requirement, as set out in the company pension scheme, was valid and in particular, did not breach the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG') which transposes Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

According to the AGG, employees may not be discriminated against on grounds of their race, ethnic origin, sex, religion or beliefs, disability, age or sexual orientation. Both direct and indirect discrimination are prohibited.

The BAG ruled that the case did not represent direct discrimination, since neither age nor sex were addressed or relied on in the way the conditions of eligibility were described. There was no indirect discrimination either, according to the BAG, because, if there was different treatment on grounds of age or sex in the first place, there was good reason for it.

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion, belief, disability, age, or sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The court left open the question of whether the requirement of being married before the employment terminated was indirectly age discriminatory because it went on to find that age discrimination was justified unequal treatment in this case.

In the court's view it is appropriate and justifiable to exclude surviving spouses from pension benefits where the marriage was not concluded until after the pensioner left the firm as a means of limiting the employer's obligation to those risks that stem from the time when the employment relationship existed. This condition does not meet any of the goals set out in Article 6(1) of Directive 2000/78, namely that justification could be based on legitimate employment policy, labour market conditions, and vocational training objectives. However, the court held that it is sufficient if the condition in question is aimed at protecting a legitimate interest recognized by law.

Such a legitimate interest was to be found in the fact that it is a matter for the employer to decide, at its sole discretion, whether or not to establish a company pension scheme. If it decides to do so, it is free to determine the kind of pension benefits it wants to grant, along with the financial structure of the scheme. It is under no obligation in law to offer benefits to surviving spouses. For this reason, the employer is generally entitled to make any such benefits dependent upon additional conditions and to exclude from the company pension scheme those who do not meet the conditions it sets.

Therefore, the BAG held that no indirect discrimination, either on the grounds of sex or age had occurred and it rejected the appeal.

Commentary

This judgment is in line with the BAG's previous case law on the company pension entitlements of surviving spouses. In 2010, the BAG decided in a similar case that an employer was free to make the pension entitlements of surviving spouses dependent on certain conditions, in particular on the condition that the employee had married prior to or during the employment relationship. The reason for this was that the employer needs to have some ability to limit its financial risk exposure. Since the size of a pension scheme is largely dependent on the number of pensioners on its books, the employer's aim of deciding who it will include as a beneficiary is legitimate provided this is reasonable and appropriate.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The pension scheme in this case contained - inasmuch as relevant - three requirements in respect of survivors' benefits:

a.married before 60;

b.married before or during employment;

c.married one year before death.

The dispute was limited to requirement b. As the BAG noted, this requirement does not discriminate directly. The BAG apparently saw no indirect age discrimination either, but I would argue that there is indirect discrimination, as older employees are more likely than their younger colleagues to (re)marry after having left their (former) employer. In my understanding, the BAG reasons as follows. Even if requirement b. discriminates indirectly, it is objectively justified, because the employer was not under an obligation to establish any pension scheme at all and, therefore, had the discretionary right to set conditions. If this is indeed the BAG's reasoning, I do not find it convincing.

Requirement c. is disadvantageous for young employees. They are more likely than older employees to have been married for less than one year upon death. It would have been interesting to see how the BAG had dealt with a dispute on the validity of requirement c.

The most obviously age discriminatory of the three requirements is a. The exclusion from survivors' benefits of widows/widowers who have married an employee aged 60 or over is directly discriminatory on the basis of age. I find it hard to think of an objective justification for this exclusion that is more than purely financial.

Requirement a. brings to mind the case law on provisions in pension regulations that exclude spouses who are over ten years younger than a (former) employee who has died from eligibility for survivors' benefits. Such a provision was at issue in *Bartsch* (ECJ 23 September 2008, case C-427/06). In that case, the ECJ did not pronounce on the compatibility of the provision with Directive 2000/78 because the allegedly discriminatory treatment predated the Directive and was held to have no link to EU law. The Dutch Equal Treatment Commission, as well as several Dutch courts, including two at the appellate level, have ruled on the justifiability of such 'over-ten-years' age difference' provisions. Unfortunately, their opinions and judgments point in different directions.

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