EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 19 June 2014, joined cases C-501 to 506/12 and C-540 and 541/12 (Thomas Specht and others - v - Land Berlin and Rena Schmeel and another - v - Bundesrepublik Deutschland), Age discrimination

Facts

Mr Specht was a civil servant employed by the provincial Berlin government. Although the cases of the other civil servants dealt with in this judgment were slightly different, the issues are identical. This summary is therefore limited to the case of Mr Specht.

Until 1 August 2011, Mr Specht's remuneration was determined on the basis of the version of the Federal Law on remuneration of civil servants as it stood before that date (the "old law"). Under that law, civil servants were paid according to a pay scale which had a number of steps within each scale. Upon hiring, a civil servant was placed on a certain step, depending primarily on his age, and subsequently, he progressed up the pay scale depending primarily on seniority. This system was replaced on 1 August 2011 by an amended version of said Federal Law (the "new law"), under which age no longer plays a role in determining pay. Under the transitional rules governing the transfer of civil servants from the old to the new system, civil servants who had already been employed before 1 August 2011 were placed on the step of their pay scale corresponding to the step that reflected their existing salary (rounded up to the next step).

National proceedings

Mr Specht challenged the method for calculating his pay on the basis that it was age

discriminatory. Following an unsuccessful complaint, he brought the case before the Verwaltungsgericht Berlin. It referred eight questions to the ECJ for a preliminary ruling on the interpretation of Directive 2000/78 (the "Directive").

Question 1 was whether the treatment of civil servants falls within the scope of the Directive.

Questions 2 and 3 were whether the Directive precludes a pay system such as that under the old law.

Questions 6 and 7 were whether the effect of the transitional rules is to perpetuate age discrimination and, if so, whether those rules are objectively justified.

Question 4 relates to the legal implications of a discriminatory practice such as that of the old law.

Question 5 relates to German law that requires a civil servant to assert a claim for back pay within a certain short period of time.

ECJ's findings

Question 1

1.The Directive applies to all persons, including civil servants, as regards employment and working conditions. How does this relate to Article 153(5) TFEU, which prohibits the EU from intervening in matters of pay? The answer is that that provision merely deals with the level of pay but not the system for determining that level. Therefore, the answer to this question is affirmative (§ 30-37).

Questions 2 and 3

2.Under the old law, the basic pay awarded to two civil servants appointed on the same day of the same grade, whose professional experience is equivalent but whose ages are different, differed according to their age at the time of appointment. It follows that these two civil servants are in a comparable situation and that there is direct age discrimination (§ 38-43).

3.Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the choice of measures capable of achieving that aim. The old law's aim of rewarding previous professional experience in a standard manner is legitimate. However, at the time of appointment, the sole criterion on the basis of which a particular step is initially allocated to a person without professional experience is age. That goes beyond what is necessary for achieving said aim. Hence, the age discrimination under the old law is not justified (§ 44-52).

Questions 6 and 7

4.The scheme put in place by the transitional provisions perpetuated a discriminatory system, given that some civil servants hired before 1 August 2011 ("established civil servants") received lower pay than others after that date, even though they were in comparable situations, solely on account of their age at the time of appointment. The issue is whether this difference in treatment on grounds of age was justified (§ 53-61).

5.The transitional system aims to protect the acquired rights and the legitimate expectations of civil servants as to the future progression of their remuneration. The unions argued for the preservation of acquired rights. A draft law that had ensured the preservation of those rights would have met with opposition, which would have seriously compromised its prospects of adoption (§ 62-63).

6.Protection of the acquired rights of a category of persons constitutes an overriding reason in the public interest; see Commission - v - Germany (C-456/05) and Hennigs and Mai (C:2011:560) (§ 64).

7.For most established civil servants, the old law was more favourable than the new law. Accordingly, placing established civil servants directly within the scheme under the new law would have caused many of them to lose salary. On average, this loss would have amounted to € 80 - € 150 per month. The transitional scheme therefore appears suited to achieving the said aim. The question is whether it goes beyond what is necessary to achieve that aim (§ 65-69).

8.The referring court notes that it would have been preferable either (i) to apply the new law retroactively to all established civil servants or (ii) to apply a transitional scheme guaranteeing an established civil servant, whose salaries would be lower under the new law, their old salaries until such time as their experience qualifies them for higher pay under the new scheme. However, the German legislature had to take into account the following obstacles to such a solution:

-in view of budgetary constraints, the reform of the pay system in the civil service had to be made at neutral cost;

-the transition to the new system had to take place without excessive use of administrative resources, that is to say, as far as possible, without requiring case-by-case consideration;

-it would have been necessary to examine over 65,000 individual case in order to determine the appropriate "experience step" under the new law, a process that would have taken approximately 360,000 hours to complete;

-for many civil servants it was no longer possible to determine the periods of activity before they became civil servants that they could validly claim; it would therefore have been necessary, depending on the circumstances, either wholly to discount such periods or to recognise them without proof (§ 70-76).

9.As a rule, justifications based on increased cost and administrative difficulties cannot justify age discrimination. However, an individual examination of each particular case cannot be insisted on in order to establish, a posteriori and individually, previous periods of activity, since the management of the scheme must remain technically and economically viable. In those circumstances, it must be held that the German legislature did not exceed the limits of its discretion by taking the view that it was neither realistic nor desirable to apply the new classification system retroactively to all civil servants or to apply a “last pay guarantee” system (§ 77-80).

10.The damage that the transitional rules could cause to certain persons is difficult to determine and is possibly, as the German government contends, relatively small and relatively short- term (§ 81-84).

11.In view of the foregoing, it does not appear that, by adopting the transitional rules, the German legislature went beyond what was necessary to achieve the aim pursued (§ 85).

Question 4

12.The referring court states that it is impossible to interpret the old law in conformity with EU law and that German law does not permit levelling up in a case such as this. However, the referring court wonders whether levelling up is truly the only way of ensuring observance of the principle of equal treatment (§ 87-93).

13.In the first place, it is for the national court to determine the legal implications of the finding that its domestic legislation does not comply with the Directive (§ 94).

14.Secondly, in Terhoeve (C:1999:22) and Landtová (C:2011:415), the ECJ essentially held that, where national law, in infringement of EU law, provides for different treatment as between groups of people, observance of the principle of equality can be ensured only by granting to the persons within the disadvantaged category the same advantages as those enjoyed by the persons within the favoured category. In those judgments, the ECJ also stated that the arrangements applicable to members of the favoured group remained, for want of the correct application of EU law, the only valid point of reference. That approach is intended to apply only if there is such a valid point of reference. In the case of Mr Specht, it is not possible to identify a category of favoured civil servants, given that the discriminatory aspects arising

from the transitional rules potentially affect all civil servants. It follows that Terhoeve and Landtová are not applicable to the case before the referring court (§ 95-97).

15.Thirdly, Member States are liable for legislation that violates EU law: see Francovich (C:1991:428), Brasserie du pêcheur (C-46/93) and Transportes Urbanos (C-118/08), provided three conditions have been satisfied: (i) the rule of EU law infringed must be intended to confer rights on the claimant, (ii) the breach of that rule must be sufficiently serious and (iii) there must be a direct causal link between the breach and the loss. In this case, condition (i) is satisfied. In order to determine whether condition (ii) has been satisfied, the national court must take into account that Article 6(1)(first subparagraph) of the Directive allows Member States broad discretion in their choice of aim and measures. That court may need to distinguish the periods before and after 8 September 2011, the date on which the ECJ delivered its judgment in Hennigs. In that judgment, the ECJ clarified the nature and extent of the obligation on Member States under the Directive in respect of national legislation such as the old law at issue in this case. As for condition (iii), it is for the referring court to establish whether this has been satisfied (§ 98-107).

Question 5

16.The question of time-limits for initiating a procedure for the enforcement of an obligation under the Directive is not governed by EU law. However, national rules on such time-limits may not be less favourable than those governing similar domestic situations (principle of equivalence) and may not make it in practice impossible or excessively difficult to exercise rights conferred by the EU legal order (principle of effectiveness).

Ruling

1.Article 3(1)(c) of Council Directive 2000/78 [...] must be interpreted as meaning that pay conditions for civil servants fall within the scope of that directive.

2.Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national measure, such as that at issue in the main proceedings, under which, within each service grade, the step determining basic pay is allocated, at the time of recruitment, on the basis of the civil servant's age.

3.Articles 2 and 6(1) of Directive 2000/78 must be interpreted as not precluding domestic legislation, such as that at issue in the main proceedings, laying down detailed rules governing reclassification within a new remuneration system of civil servants who were in post before that legislation entered into force, under which the pay step that they are now allocated is to be determined solely on the basis of the amount received by way of basic pay under the old

system, notwithstanding the fact that that amount depended on discrimination based on the civil servant's age, and advancement to the next step now to depends exclusively on experience acquired after that legislation entered into force.

4.In circumstances such as those of the cases before the referring court, EU law — and, in particular, Article 17 of Directive 2000/78 — does not require civil servants who have been discriminated against to be retrospectively granted an amount equal to the difference between the pay actually received and that corresponding to the highest step in their grade; it is for the referring court to ascertain whether all the conditions, laid down by the case-law of the Court of Justice of the European Union, are met for the Federal Republic of Germany to have incurred liability under EU law.

5.EU law does not preclude a national rule, such as the rule at issue in the main proceedings, which requires the civil servant to take steps, within relatively narrow time-limits — that is to say, before the end of the financial year then in course — to assert a claim to financial payments that do not arise directly from the law, where that rule does not conflict with the principle of equivalence or the principle of effectiveness. It is for the referring court to determine whether those conditions are satisfied in the main proceedings.

Creator: European Court of Justice (ECJ)
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