

SUMMARY

ECJ 12 December 2013, case C-267/12 (Frédéric Hay - v - Crédit agricole mutuel de Charente-Maritime et des Deux- Sèvres), Gender discrimination

Facts

In 2007, Mr Hay concluded a civil solidarity pact ('PACS') with another man. A PACS is a contract entered into by two persons, of different sex or of the same sex, to organise their life together. It is often used in same-sex relationships because French law limits marriage to persons of different sex.

Following the execution of his PACS, Mr Hay applied to his employer for 10 days of special leave and for a marriage bonus equal (in his case) to ¼ of a month's salary. Had his partner been a woman, he would have been entitled to these benefits under the relevant collective agreement. His employer refused him these benefits because, under the terms of the collective agreement, they were only granted upon marriage.

National proceedings

Mr Hay brought an action before the *Conseil de prud' hommes de Saintes*. It denied his claim. The judgment was upheld on appeal, whereupon Mr Hay appealed to the *Cour de cassation*. It stayed the proceedings and asked the ECJ whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement applies that restricts an advantage in respect of pay and working conditions to employees who marry,

thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a PACS.

ECJ's findings

Although legislation on marital status falls within the competence of the Member States, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the grounds of sexual orientation. Thus, the directive is applicable to a situation such as that of Mr Hay (§ 26-29).

The existence of direct discrimination presupposes that the situations being weighed up are comparable. The comparability assessment must be carried out in a specific and concrete manner in the light of the benefit concerned. Applied to the present case, it must be noted that, although a PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and PACS, the latter was, at the time of the facts at issue, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties. Thus, as regards benefits such as marriage leave and marriage bonuses, persons of the same sex who cannot marry and therefore conclude a PACS are in a situation which is comparable to that of couples who marry (§ 30-37).

The fact that in 2011, the Conseil constitutionnel held that married couples and couples in a PACS arrangement were not in a comparable situation for the purposes of a survivor's pension, does not rule out the comparability of married employees and homosexual employees in a PACS arrangement for the purposes of marriage leave and marriage bonuses. Similarly, the differences between marriage and the PACS noted by the Court of Appeal in the main proceedings, are irrelevant to the assessment of an employee's right to benefits such as those at issue (§ 38-39).

The fact that the difference in treatment at issue is based on the employees' marital status and not expressly on their sexual orientation does not make the discrimination indirect. It is direct discrimination, because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed (§ 40-44).

Direct discrimination on the grounds of sexual orientation cannot be justified except on the grounds of public security, maintenance of public order and prevention of criminal offences, protection of health and protection of the rights and freedoms of others. None of these grounds have been relied on in the dispute at issue (§ 45- 46).

Ruling

Article 2(2)(a) of Council Directive 2000/78 [...] must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees upon marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry and given the objective of and the conditions relating to those benefits, the employee is in a comparable situation to an employee who marries.

Creator: European Court of Justice (ECJ)

Verdict at: 2013-12-12

Case number: C-267/12