

SUMMARY

ECJ 26 September 2013, case C-476/11 (HK Danmark on behalf of Glennie Kristensen - v - Experian A/S with Beskaeftigelsesministeriet intervening), Age discrimination

Facts

Ms Kristensen was employed by Experian in 2007 at age 29. Her fixed salary was DK 21,500 per month. She joined Experian's compulsory pension scheme under which Experian paid 2/3 and the employee paid 1/3 of the pension premium. For employees aged under 35 this premium amounted to 6% (Experian) + 3% (employee) = 9% of salary. For employees aged 35-44 the premium amounted to 8 + 4 = 12%. For employees aged 45 and over the premium was 10 + 5 = 15%. As Ms Kristensen resigned in 2008, before age 35, her total remuneration during all of her employment had amounted to DK 21,500 + 6% = DK 22,790 per month. Had she been aged 35-44, her total monthly remuneration would have been DK 23,220 and had she been aged 45 or over, her total remuneration would have been DK 23,650 per month.

National proceedings

Following her resignation, Ms Kristensen brought proceedings against her former employer. Among other things, she claimed the balance of DK 23,650 and DK 22,790 per month, arguing that the premium differential was age discriminatory. The court referred questions to the ECJ on the interpretation of Directive 2000/78.

ECJ's findings

1. Experian and Ms Kristensen are private parties. Therefore, Directive 2000/78 lacks direct effect. However, the principle of non-discrimination on the grounds of age is a general

principle of EU law (see case C-555/07 *Kücükdeveci*) enshrined in Article 31 of the Charter (§17-19).

2. Experian’s contributions to the pension scheme constitute “pay” within the meaning of Article 157 TFEU and fall within the scope of Directive 2000/78 (§ 20-31).

3. The premium differential at issue establishes a difference in treatment based directly on the criterion of age. The question is whether it is covered by the exception of Article 6(2) of the Directive or is otherwise objectively justified (§ 34-39).

4. Article 6(2) of the Directive provides that “the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex”. [Note: *the Danish version mistakenly lacks the words “retirement or invalidity benefits”*]. It needs to be examined whether the age-related increase in pension benefits in a pension scheme such as that at issue falls within the cases referred to in this provision, namely (i) “the fixing of ages for admission or entitlement” or (ii) “the use of age criteria in actuarial calculations” (§ 40-49).

5. Experian’s pension scheme does not set any age for admission and is therefore not covered by (i). The ECJ rejects the argument that “the fixing of ages for admission” must be interpreted as applying not only to the fixing of ages for admission as such but, *a fortiori*, to less severe forms of age discrimination, such as that at issue (§ 50-52).

6. Experian’s pension scheme cannot be assimilated to a “use of age criteria in actuarial calculations” (§ 53).

7. It follows that the age-related increases in pension contributions do not fall within the scope of the exception set out in Article 6(2) of the Directive. It must therefore be examined whether they can be objectively justified under Article 6(1) of the Directive (§ 54-56).

8. The aims of the age differential at issue are (1) to enable older workers who enter the service of Experian at a later stage in their working life, to build up reasonable retirement savings over a relatively short contribution period and to include young workers at an early stage while making it possible to have at their disposal a larger proportion of their wages and (2) to cover the risks of death, incapacity and serious illness, the cost of which increases with age. These aims are legitimate (§ 58-62).

9. It does not appear unreasonable to regard the age-related increases in contributions as enabling those aims to be achieved (§ 63-66).

10. It is for the national court to establish whether those increases genuinely reflect a concern to attain said aims in a consistent and systematic manner. In particular, that court will need to weigh the lower employer contributions that Ms Kristensen received against the benefit of her own lower contributions (§ 67-68).

Ruling

The principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Council Directive 2000/78/EC [...], and, in particular, Articles 2 and 6(1) of that Directive, must be interpreted as not precluding an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age, provided that the difference in treatment on grounds of age that arises therefrom is appropriate and necessary to achieve a legitimate aim, which it is for the national court to establish.

Creator: European Court of Justice (ECJ)

Verdict at: 2013-09-26

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