

SUMMARY

ECJ 6 December 2012, joined cases C-124, 125 and 143/11 (Dittrich, Klinke and Müller - v - Bundes-republik Deutschland), Sexual orientation discrimination

Facts

Dittrich, Klinke and Müller (the ‘applicants’) were public servants in the employment of the German federal government. They had same-sex partners (Eingetragene Lebenspartner) as provided in German law, also known as ‘civil partners’. In the course of 2004-2006, each of them applied with their employer for assistance (in the form of partial - 50 to 80% - reimbursement) for medical expenses incurred by their partners. Had those partners been their spouses, they would have been eligible for the assistance pursuant to the Law on federal public servants (Bundesbeamtengesetz, the ‘BBG’). However, as at that time the BBG limited such assistance to public servants, their spouse and their dependent children, the applicant’s requests were denied. [Note that in 2011 the BBG was amended with retroactive effect from 1 January 2009. Public servants are now eligible for partial reimbursement of their civil partner’s medical expenses.]

National proceedings

The applicants brought proceedings. In the case of Dittrich and Klinke, the Verwaltungsgericht, applying Directive 2000/78 (which prohibits discrimination on the ground of, inter alia, sexual orientation), upheld their claims and the government appealed to the Federal Administrative Court (Bundesverwaltungsgericht) on a point of law. In contrast, Müller’s action was unsuccessful and he appealed to the Bundesverwaltungsgericht. That court acknowledged that, if the assistance at issue is to be

considered to be an element of 'pay' within the meaning of Article 157 TFEU, it comes within the scope of Directive 2000/78, in which case the applicants would be entitled to the assistance claimed. However, the court was in doubt whether assistance for medical expenses as provided by the BBG qualifies as 'pay' or whether it is a social benefit within the meaning of Article 3(3) of Directive 2000/78, which provides that "This Directive does not apply to payments of any kind made by State schemes or similar, including State social security or social protection schemes".

ECJ's findings

1. The scope of Directive 2000/78 must be understood as excluding social security or social protection schemes, the benefits of which are not equivalent to 'pay' within the meaning of Article 157 TFEU (§ 31).
2. The concept of 'pay' within the meaning of Article 157 TFEU must be interpreted broadly. It covers, in particular, any consideration, whether in cash or in kind, whether immediate or future (first element), provided that the worker receives it, albeit indirectly, in respect of his or her employment (second element), from his or her employer (third element), and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (§ 35).
3. Re the first element: A financial benefit such as that at issue comes - from a material point of view - within the said concept of 'pay' (§ 36).
4. Re the second element: The next question is whether the assistance at issue is granted to the public servant by reason of the latter's employment. The criteria previously identified by the ECJ to assess the classification of a retirement benefit as pay (benefit dependent on period of service completed and related to last salary) are irrelevant with regard to the benefit at issue, which seeks, not to provide deferred income after the cessation of the employment relationship, but to cover health expenses during that relationship or after it. What is relevant is that the assistance at issue is granted exclusively to federal public servants pursuant to their employment relationship with the State (§ 38-39).
5. Re the third element: The assistance at issue is financed by the State administration acting as an employer in respect of staff expenditure and not by the social security budget (§ 42).

Ruling

Article 3(1)(c) and 3(3) of Directive 2000/78 must be interpreted as meaning that

assistance granted to public servants in the event of illness such as that at issue falls within the scope of that directive if it is the responsibility of the State, as a public employer, to finance it, this being a matter for the national court to determine.

Creator: European Court of Justice (ECJ)

Verdict at: 2012-12-06

Case number: C-124/11, C-125/11 and C-143/11