EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/24: Supreme Court applies concept of indirect gender discrimination for the first time (FR)

<p>The French Supreme Court has recently held that a national pension institution’s decision to reject an application by social workers to be affiliated with that scheme amounted to indirect discrimination, because social workers in the sector in question were predominantly women while some affiliated workers holding positions with a similar level of responsibilities within that same sector were predominantly men. For the Supreme Court, the need to ensure consistent treatment with social workers in other sectors was not a relevant consideration.</p>

Summary

The French Supreme Court has recently held that a national pension institution's decision to reject an application by social workers to be affiliated with that scheme amounted to indirect discrimination, because social workers in the sector in question were predominantly women while some affiliated workers holding positions with a similar level of responsibilities within that same sector were predominantly men. For the Supreme Court, the need to ensure consistent treatment with social workers in other sectors was not a relevant consideration.

Facts

In France all employees, besides being covered by the State retirement scheme (*retraite de base*), are members of either one of the following mandatory cross-industry retirement schemes:

Association pour le régime de retraite complémentaire des salariés (ARRCO), which is for ordinary employees ("non-cadre") ;
Association générale des institutions de retraite des cadres (AGIRC), which is for senior staff (cadre) and employees with a position that is acknowledged to be similar to cadre, the so-called cadreassimilés or, simply, the “assimilés”;

Both schemes obtain their income from employers and employees jointly and are managed on a 50/50 basis by representatives of industry and trade unions i.e. by the social partners. AGIRC has about 4 million members, ARRCO has about 18 million members.

Whether a certain category of persons is covered by AGIRC, and in particular whether employees qualify as “*assimilés*”, is determined by a committee consisting in equal parts of representatives of employers’ federations and trade unions, the *commission paritaire administrative*.

The plaintiffs in this case were 39 female social workers[1] employed by a social insurance organisation called *Mutualité Sociale Agricole (MSA)*. They were in the ARRCO scheme but wished to benefit from the AGIRC scheme, which provides for higher pension benefits. They applied to the administrative committee of AGIRC to be included in its scheme, pointing out that their profession was at least on the same professional level as, if not higher than, that of several other professions within MSA that had been admitted to AGIRC and were occupied mainly by men. Their application was turned down, whereupon they brought proceedings before the lower labour court (*prud’ hommes*) in Paris. In 2003 that court found their case to be non-receivable (*non-recevable pour défaut de droit d’agir*). On appeal this judgment was overturned in 2006. The Court of Appeal ordered AGIRC and its co-defendant FNEMSA (the relevant employers’ association) to include the plaintiffs in the AGIRC scheme. In 2009 the Supreme Court overturned the Court of Appeal’s judgment and ordered a retrial.

AGIRC’s position was that the plaintiffs should be compared to social workers in other organisations than MSA, namely in organisations belonging to other business sectors, where the social workers did not have the status of *assimilé*. The plaintiffs, on the other hand, compared themselves to their colleagues within MSA who held positions with a similar level of responsibility and did have the status of *assimilé*. The Court of Appeal, in a judgment delivered in 2010, agreed with the plaintiffs’ position on the correct comparator and (again) ordered AGIRC to admit the plaintiffs to its scheme, now on the ground that its decision to include certain predominantly male occupations and to exclude certain predominantly female occupations was indirectly discriminatory on the ground of gender, as provided in Directive 2006/54, and not objectively justified. The Court of Appeal rejected AGIRC’s plea that by including occupations such as those of the plaintiffs, it would be discriminating against the

social workers covered by other collective agreements.

Judgment

AGIRC appealed to the Supreme Court (*Cour de cassation*). It argued that it is not up to the courts to substitute their method of comparing professions to those of the administrative committee and that the criteria used by AGIRC were the only ones to ensure continuity and consistency and hence the sustainability of AGIRC and to avoid discrimination among participants performing the same type of work in different branches.

The Supreme Court upheld the Court of Appeal's judgment, holding that "*indirect discrimination because of sex is made in the case where a provision, criterion or practice apparently neutral would be likely to cause a particular disadvantage for persons of one sex compared to others, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary", and that "such discrimination is characterized when the measure affects a significantly higher proportion of members of one sex*";

It further recalled that the Court of Appeal had found that there was unfavourable treatment, given the refusal by the AGIRC to allow social workers, a position indisputably held predominantly by women, to be members of the AGIRC scheme, whereas controllers, inspectors, technicians and other similar employees covered by the same collective agreement, mainly occupied by men, were admitted to the scheme. According to the Supreme Court, the Court of Appeal had rightly rejected AGIRC's argument that the criterion of comparison with similar functions in all collective agreements was the only one that achieves the objective of stability, consistency and sustainability of regime. That argument did not justify the necessity and appropriateness of the refusal of membership.

Commentary

Although the prohibition against indirect discrimination has been included in the French Labour Code since 2008, to comply with EU legislation, this is the first time that the French Supreme Court applies the concept of indirect sex discrimination.

In this regard, the method used by the Court is very much in line with the ECJ's rulings holding that a practice which would likely lead to a particular disadvantage for persons of one sex compared to persons of the other sex can constitute indirect discrimination, unless it is justified by an objective reason (see the ECJ's rulings in *Netherlands - v - FNV*, C-71/85 and *Nimz*, C-184/89).

That being said, in this decision, the French Supreme Court has taken a strict view, rejecting the AGIRC's argument that the social workers within MSA were treated in a consistent way compared to those covered by other national collective bargaining agreements in similar business sectors. Indeed, coming from an institution covering all business sectors, the argument seemed relevant. Should workers holding the same position in two different sectors be treated differently, one could expect that those treated in an unfavourable way could challenge such a situation.

Here, the Supreme Court simply considered that the refusal by AGIRC to affiliate social workers was not for a "*necessary and relevant reason*". Its ruling appears all the more severe in light of the fact that the Supreme Court did not even explain why the comparison with other workers in the same business sector was more relevant than that with workers holding the same position in other business sectors.

This is another red light for negotiators of collective bargaining agreements, who should keep in mind that when they set up sectorwide job categories, usually to define the corresponding minimum wages, employees are likely to compare their situation with other employees in the same job category, even where those other employees hold different jobs.

ECJ rulings have once again set the scene, allowing for a comparison of rates of pay of two jobs "*of equal value*" to ascertain whether there is indirect gender discrimination (see ECJ's ruling in *Enderby*, C-127/92). However, practitioners may regret that, especially in light of the serious consequences of the decision at stake, the French Supreme Court did not provide the same level of explanation as the ECJ usually does, to support its view that the AGIRC comparison criterion was not a relevant one.

Subject: Gender discrimination, terms of employment

Parties: AGIRC - v - Mme Avignon and 38 others

Court: cour de cassation (Supreme Court), Chambre sociale

Date: 6 June 2012

Case number: 10-21.489

Internet publication: www.legifrance.gouv.fr > jurisprudence judiciaire

Creator: Cour de cassation (French Supreme Court)
Verdict at: 2012-06-06
Case number: 10-21.489