

SUMMARY

ECJ 7 June 2012, case C-132/11 (Tyroler Luftfahrt Gesellschaft mbH - v - Betriebsrat Bord der Tiroler Luftfahrt Gesellschaft mbH), Age discrimination

Facts

Tyrolean Airways and Lauda Air are wholly owned subsidiaries of Austrian Airlines. Since they merged in 2003, Austrian Airlines and Lauda Air are governed by the same collective agreement and their staff have identical terms of employment. Tyrolean Airways has a separate collective agreement. It provides that flight and cabin crews are graded in categories A and B and that advancement from A to B shall occur three years after the recruitment of the employee as a member of the cabin crew (this provision to be referred to as the “clause at issue”). The collective agreement does not specify whether “recruitment” refers to recruitment by Tyrolean Airways or, more generally, by one of the three companies in that group. The clause at issue was included in the individual employment contract of most of Tyrolean Airways’ cabin crew members.

In 2010 the works council (*Betriebsrat*) of Tyrolean Airways brought an action before the court in Innsbruck, requesting a declaration that the cabin crew members employed by Tyrolean Airways who had acquired a minimum of three years of experience in total as cabin crew members of Tyrolean Airways and/or Austrian Airlines or Lauda Air should be graded in employment category B.

National proceedings

The court found in favour of the works council, whereupon Tyrolean Airways appealed. The appellate court considered that the clause at issue constitutes discrimination on grounds of age, but it was unsure whether this discrimination should lead to the nullity of the clause. It

therefore referred the following questions to the ECJ:

Does EU law, in particular Article 21 of the Charter of Fundamental Rights, the general principle relating to the prohibition against age discrimination and Directive 2000/78, preclude a collective agreement which, for the purpose of determining the level of remuneration, discriminates indirectly against older workers by taking account only of their experience with one airline but not the more or less identical experience which they acquired with another airline within the same group of companies? If so, does this also apply to employment contracts entered into before 1 December 2009?

Can a national court treat as void and disapply a clause in an individual contract that indirectly infringes EU anti-discrimination law on grounds of the horizontal direct effect of the fundamental rights of the EU, in a manner analogous to the ECJ's rulings in the anti-trust cases *Rieser* (C-157/02) and *Béguelin* (C-22/71)?

ECJ's findings

The ECJ examines the first question solely in the light of Directive 2000/78 (§ 22-25). A provision such as the clause at issue, although likely to entail a difference in treatment according to the date of recruitment, is not, directly or indirectly, based on age or even an event linked to age. It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of that person's age at the time of his or her recruitment. The provision is therefore based on a criterion which is neither inextricably (see, a contrario, the ECJ's ruling in *Ingeniørforeningen Danmark*, case C-499/08) nor indirectly linked to the age of the employees, even if it is conceivable that it may, in some individual cases, lead to advancement from A to B at a later age, depending on whether one was recruited first by Tyrolean Airways or by another group company (§ 27-30). There is no need to answer the second question (§ 32).

Ruling

Article 2(2)(b) of Directive 2000/78 [...] must be interpreted as not precluding a provision of a collective agreement which takes into account, for the purposes of grading in the employment categories provided for in that agreement and, therefore, determination of the level of pay, only the professional experience acquired as a cabin crew member of a specific airline, whilst excluding substantively identical experience acquired in the service of another airline belonging to the same group of companies.

Creator: European Court of Justice (ECJ)

Verdict at: 2012-06-07

Case number: C-132/11