SUMMARY

2014/56 Age limit for hiring security guards in detention centres justified (BU)

<p>An army sergeant from the reserve applied for a number of identical positions as a security guard in detention centres in different towns in Bulgaria. His applications were rejected because one of the requirements for the position was that the applicant should be aged under 40. In the course of the appeal against the rejections, the Anti-Discrimination Protection Commission found this requirement to be unlawful, but the courts of law rejected this conclusion, arguing that the initial training and investment required for the position, as well as the retirement age of 60 that applies, justified the limitation.</p>

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Facts

The defendant in this case was the Ministry of Justice. In October 2010, it opened competitive selection procedures for 38 vacant positions for security guards in nine different detention

centres. The competitions were to be held according to *Rules on the Terms and Procedure for Occupation of a Position with the Enforcement of Punishments Chief Directorate, Security Chief Directorate and the Ministry of Justice* (the 'Rules'). Item 2.2 of the Rules included special requirements for positions that require initial professional training. One of these requirements (item 2.2.1) was that candidates should not be more than 40 years of age on the date of announcement of the competition. The reason for this requirement was that successful candidates would be appointed to the position of Sergeant and would be sent to a study facility to undergo initial professional training to prepare for the job. However, item 2.4 provided that the age requirement did not apply to officers and former officers of the Ministry of the Interior, Enforcement of Punishments Chief Directorate and Security Chief Directorate, who had already undergone initial professional training.

The plaintiff was Dragomir Atanasov Peev, an army sergeant from the reserve and graduate from a Secondary Specialised Military School. The published judgments do not reveal his age, but it must have been 40 or over. He applied for several of the vacant positions and was initially admitted to one of the competitions (for a position in Sofia), but for a reason that was not explained, his name was not included in the official notice published on the Ministry of Justice's website.

In January 2012, the plaintiff filed a complaint with the Anti- Discrimination Protection Commission (the 'ADPC'). The complaint stated that he had been discriminated against on two grounds: age and 'personal status'. Because the complaint was based on more than one ground, it was reviewed by a five-member panel.

The ADPC only addressed the first ground and, as this stance was not appealed, the case before the courts was limited to the issue of age discrimination.

ADPC's decision

It was common ground that item 2.2.1 of the Rules introduced a requirement that was age discriminatory. The issue was whether the requirement was objectively justified pursuant to the Bulgarian provision transposing Article 6(1)(c) of Directive 2000/78, i.e. whether its aim was legitimate and the means for achieving that aim were proportionate and necessary. According to the ADPC, the aim of the age requirement was twofold: (i) to allow the State to employ the candidate as a security guard for a sufficiently long period to recoup the investment involved in training him and (ii) to allow the State to employ the candidate for a sufficiently long period before his retirement. As for aim (i), the ADPC accepted that this was a legitimate aim. It further held that, in order for a measure to be proportionate, the following cumulative conditions must be met: (i) the measure is necessary and appropriate to achieve

the aim, in other words, it must be the only means to achieve the aim or, if several means are possible, the means chosen must be the least burdensome for the private parties; (ii) the measure chosen may actually achieve the aim and (iii) the measure must not disproportionately and unnecessarily impact the rights and interests of a given group of people while at the same time protecting the rights and interests of another group.

In a decision dated 12 September 2013, the ADPC ruled that it is beyond doubt that the different treatment on the grounds of age in this case could be justified by the need for successful candidates to undergo initial training. The ADPC gave the example of someone who is hired at the age of 59. After receiving training for a couple of months or perhaps half a year, such a person would have very little time left to make good the investment in his training before retiring at the age of 60. In this particular case, however, the age limit covered all persons over the age of 40 except certain categories of (former) officers. The period of initial professional training lasts six weeks. This period is insignificant when compared to the period of 20 years that a 40 year old candidate can complete before retiring. Thus, the age requirement in this case was excessive as a means of achieving the aim.

As for aim (ii), the ADPC reasoned in a similar manner and, based on the above, ADPC held that the Ministry of Justice had discriminated directly against the plaintiff on the grounds of age and that the discrimination was not objectively justified. The Ministry of Justice was instructed to issue an order amending item 2.2.1 of the Rules, either by removing the age requirement altogether or by replacing it in a way that made it proportionate. The Minister of Justice appealed the ADPC's decision before the Administrative Court of the city of Sofia.

Administrative Court's judgment

The Sofia Administrative Court overturned the ADPC's decision. A crucial aspect of the court's judgment relates to the fact that the initial training did not last six weeks, as the ADPC had held, but consisted of two parts: a basic training and a specialised phase. According to the relevant Regulation, after completing initial training, the officers undergo, first, basic training aimed at acquiring the fundamental theoretical and practical knowledge needed to perform the tasks in general and, then, specialised training aimed at acquiring the skills and knowledge needed to perform the tasks required by the particular position assigned to each individual. The duration of each of these training periods is determined on a case by case basis. According to the court, the ADPC had failed to take account of a number of factors, including the duration of the competition itself (4 – 6 months) and the actual cost of the training. In view of this, the age requirement was justified by the necessity for candidates to occupy the position for a reasonable term before retirement.

The plaintiff appealed.

Supreme Administrative Court's judgment

The Supreme Administrative Court, which is the highest court in matters such as this, upheld the judgment of the Administrative Court. It confirmed that the maximum age requirement was related to the maximum age for retirement in the relevant position, namely 60 years of age. It further held that the Minister, in setting a maximum age of 40 in accordance with the Law on Protection against Discrimination, had assessed the need for a reasonable term for occupation of the positions before retirement and for the creation of conditions for career development over time. The Court pointed out that Article 6(1)(c) of Directive 2000/78 supports this understanding, as Member States are free to provide that differences in treatment based on age are not discriminatory if, in the context of national law, they are objectively and reasonably justified by a legitimate aim, including a legitimate policy for employment, the labour market and professional training. The differences may include a maximum age for employment, based on a training requirement for a position or the need to occupy a position for a reasonable term before retirement.

Commentary

This decision sets a test for discrimination on the basis of age. In particular, it appears that it would be objectively justified to provide a maximum age limit in cases where (i) initial professional training for the position is required; (ii) the duration of the training is determined by the authority appointing the individual but not by law and (iii) the duration of the employment of the individual before retirement could be in the order of about 20 years.

Comments from other jurisdictions

Denmark (Mariann Norrbom): In contrast to Bulgarian law, the Danish implementation and interpretation of the prohibition against age discrimination have now resulted in a complete abandonment of mandatory retirement ages in individual employment agreements. As mentioned in the case report, Bulgaria has a 60-year retirement rule in at least some employment areas. Similarly, in Denmark it used to be possible to agree on automatic retirement when an employee turned 70, both in individual and collective agreements.

However, the Danish government has since enacted an amendment to the Danish Anti-Discrimination Act abolishing the 70-year retirement rule. This means that all provisions in individual agreements stating that employees will retire automatically at the age of 70 will become invalid and unenforceable with effect from 1 January 2016. Yet, the Danish Anti-Discrimination Act still provides some exceptions to mandatory retirement in relation to

collective agreements.

Germany (Dagmar Hellenkemper): It is very likely that a German court would have come to the same conclusion as the Bulgarian court. For example, in a similar way to the case at hand, there is a maximum age for applications to certain positions within the police force and positions as public servants. The German Federal Administrative Court (BVerwG) has had to decide several times, most recently in 2011, whether a maximum entry age for certain positions within the police force or public service were valid and non-discriminatory. The court determined in relation to the police that, while the age requirement was an unequal treatment, it was justified by a legitimate aim: to ensure that police officers were physically able and to enable the long-term planning of the service. For public servants, the main argument was the balance between service and pension entitlements. More precisely, the BVerwG argued that there was a need for an appropriate time balance between qualification and training, active service as a public servant and the length of retirement during which the public servant can draw pension and benefits.

In fact, according to the provisions for pension entitlements for the civil service, a public servant would benefit from a disproportionally high pension entitlement if he or she retired during the first 20 years of service (this does not apply for the first five years of service). After 20 years of service this evens out and then stays constant. The BVerwG did not find any infringement of Directive 2000/78/EC. The BVerwG relied on the same guidelines as the Bulgarian courts: the measure is justified if (i) it is necessary and appropriate in order to achieve the aim; (ii) it is capable of achieving the aim; and (iii) it is not a disproportionate way of achieving the aim.

Subject: Age discrimination

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