

SUMMARY

2011/58: Automatic termination at age 67 lawful (NO)

<p>Automatic termination of employment at age 67 solely on the basis of a company policy setting an age limit does not infringe Directive 2000/78 as there is a general and historical acceptance under Norwegian law of a 67 year age limit.</p>

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Facts

The case concerned a company policy of automatic termination of employment at the age of 67 and its conformity with the Norwegian legislation implementing Directive 2000/78/EC (the 'Directive'), and ultimately the Directive itself. The employer - an insurance company, Gjensidige Forsikring ASA ('Gjensidige') - enforced an age limit of 67 years. The employee, a female senior advisor, had been employed by Gjensidige since 1982. She turned 67 in October 2009, at which time she received a pension from a 70% defined benefit pension scheme.

When the pensionable age in the Social Insurance Act was reduced from 70 to 67 years in 1972, dismissal protection until the age of 70 was maintained. It was however presupposed in the preparatory works to the amendment legislation that age limits of less than 70 years based, inter alia, on unilateral company schemes, would be permissible. The prevailing view, on which the Court also rested in the present case, was that age limits of 67 years are lawful under Norwegian law, provided that such age limits (i) are consistently applied; (ii) are known to the employees in question; and (iii) coincide with satisfactory pension schemes (the

‘traditional criteria’).

The Directive is not a part of the EEA Agreement since its legal base in EU law has no parallel in that agreement. However, Norway decided unilaterally to adopt the Directive which was accordingly implemented in Norwegian law by the enactment of new provisions in the Working Environment Act in 2004. These provisions have since been included in the superseding Act of 2005. The preparatory works to the Act make clear that it was to be interpreted in line with the Directive. However, no clear statement was made in the Act or in the preparatory works on whether an age limit of 67 years would still be valid if only the traditional criteria were met.

In the Gjensidige case, the employee asked the court to declare that her termination was invalid. She wished to continue working for Gjensidige. She argued that the age limit of 67 years was incompatible with the statutory provisions in the Act, read in conjunction with the Directive. Principally, she argued that the Supreme Court needed to make a concrete assessment of whether the age limit in Gjensidige was applied in pursuance of legitimate aims and submitted that no such aims were present. In the alternative, she argued that the age limit was not appropriate and necessary in order to meet the alleged aims. Gjensidige argued that there was no need to make a concrete assessment of the provisions of the Directive, as the Directive only imposes obligations on the legislator. Further, Gjensidige emphasised the wide margin of discretion that Member States have in this sphere. Gjensidige contended that the age limit of 67 years, which met the traditional criteria established in Norwegian law and accepted by the legislator, was in accordance with the Directive.

Judgment

General comments

The Supreme Court began by stating that an age limit of 67 years constitutes an act of direct discrimination under the Act, thus raising the question whether it could be deemed lawful. The Court noted that pursuant to the Act, employees lose their employment protection at the age of 70. The Supreme Court further noted that company age limits of 67 years are relatively widespread and common in Norway, and that even without a foundation in individual or collective agreements, they have traditionally been deemed lawful under Norwegian law, provided that the traditional criteria are met.

It was not disputed by the employee that Gjensidige’s age limit met these traditional criteria. The crucial issue for the Supreme Court was whether the age limit of 67 years had ceased to be valid as a result of the implementation of the Directive into Norwegian law. The Court

referred to Article 6(1) of the Directive, pursuant to which the legality of age discrimination rests on (i) whether the discrimination is objectively and reasonably justified by a legitimate aim and (ii) whether the discrimination is appropriate and necessary.

The Court pointed to ECJ rulings under Article 6 of the Directive, indicating that Member States have a wide margin when it comes to choosing what kind of social policy and employment aims to pursue, and the measures to be used in pursuance of those aims. On the other hand, the Court, in keeping with prior decisions, stated that domestic law should be construed in such a way as to conform with the Directive. On the question of whether the age limit was objectively and reasonably justified by a legitimate aim, the employee submitted that Gjensidige's pension and age limit scheme rested solely on the employer's individual needs. The Court dismissed this argument as being too narrow. It noted that the Directive is addressed to Member States and focused its attention first of all on the general requirement that a 'legitimate aim' within the meaning of Article 6(1) of the Directive must be of a social policy nature. The Court referred specifically to the ECJ decision in *Age Concern* (C-388/07, paragraph 46) in this regard.

The issue then, as the Court saw it, was whether the Norwegian authorities accept unilateral company schemes imposing the application of an age limit of 67 years. Discussing the legislative history from 1972 up to the present Act, the Court concluded that there was nothing to indicate that such company-based schemes were not acceptable. Invoking inter-generational considerations and citing the ECJ case of *Rosenbladt* (C-45/09), the Court held such company schemes to be 'objectively and reasonably' based on general social policy considerations. It seemed to be implied that this applied also to the contested company scheme.

On the question of whether the limit was appropriate and necessary, the Court was rather cursory. It again found support in the ECJ's ruling in *Rosenbladt*, seeing no reason to distinguish the present case from *Rosenbladt* on the basis that it was a collective agreement that was at issue in that case. The Supreme Court focused instead on the existence of a right to financial compensation, emphasising that in the present case the age limit was combined with a favourable pension scheme. On this basis the Court concluded that the contested age limit was not in conflict with the relevant provision of the Act.

Commentary

The *Gjensidige* case is the first Supreme Court ruling in Norway to consider the legality of age limits of 67 years since the implementation of the Directive.

The ruling is that age limits of 67 years which meet the traditional criteria are generally

compatible with the Directive. However, the Court emphasised that Gjensidige's pension scheme was 'very generous', whereas it had previously been sufficient that a pension scheme was 'satisfactory' under the traditional criteria. Therefore, whether this aspect of the traditional criteria has been changed is unclear. It appears that what the Court considered decisive in finding that the age limit of 67 years was justified by a legitimate aim was that the Norwegian authorities had accepted such age limits and in so doing had considered them to be justified by national social policy objectives, in this case, the distribution of work between the generations. Four comments could be made:

Firstly, the Norwegian labour market has in recent years been characterised by lack of labour supply, rather than lack of job opportunities. In its ruling in *Age Concern*, the ECJ stated that mere generalisations indicating that a measure is likely to contribute to social policy objectives are not enough to show that the aim of the measure is capable of derogating from the principle of non-discrimination. Thus, it is notable that the Supreme Court does not consider the need for age limits of 67 years in the light of today's national employment policy and labour market conditions. The Supreme Court only emphasised the legislator's historic assessment, despite initially stating that it could not base its judgment on the legislator's assessment alone.

Secondly, in its assessment of whether the age limit of 67 years was justified by a legitimate aim, the Court found support in the *Rosenbladt* case (paragraph 40-43). In *Rosenbladt*, the ECJ stated that legislation allowing age limits in collective agreements does not imply that clauses of collective agreements are exempt from review by the courts. However, in the *Gjensidige* case, the Court did not fully assess Gjensidige's 67 years age limit, but merely reviewed the legislator's assessment of such a limit in general terms. Inasmuch as only general social policy objectives are legitimate under the Directive, as opposed to individual considerations particular to the employer, it is arguable that the courts need to assess the employer's underlying reasons for imposing its age limit. In holding the national authorities' reasons for accepting age limits of 67 years to be decisive, the Court's decision suggests that employers do not have to prove the legitimacy of the aim pursued by adopting an age limit of 67 years, provided that the traditional criteria are met. This seems difficult to reconcile with the emphasis given in the *Rosenbladt* case to having an effective review.

Thirdly, in assessing whether the age limit was proportionate the Court did not address the matter of necessity. This is a part of the proportionality test required by Article 6(1) and is replicated, in principle, in the relevant domestic provision. According to this test, the age limit of 67 years must be appropriate to achieve the pursued aim and no alternative means would be equally effective. The Court thus side-stepped an important aspect of the proportionality test. As a closing observation, in the *Palacios de la Villa* case (C-411/05) and in *Rosenbladt* the

age limits concerned were based on collective or individual agreements. In the present case, the Court declined to distinguish between an age limit established unilaterally by the employer and one established by an individual or collective agreement, even though a unilateral age limit would, by definition, not have been mutually negotiated and would not necessarily balance both the employer's and the employees' interests.

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