EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/5: Referral to ECJ for clarification of legality of national time-bar rules in relation to discriminatory exclusion from pension scheme (NL)

<p>A pension scheme under which full-time employees were enrolled in the scheme automatically, compulsorily and from the first date of their employment, but part-time staff had to apply in order to participate in the scheme on a voluntary basis, may be sex-discriminatory, depending on how explicitly the part-timers were warned by their employer of the disadvantage of not participating. The ECJ’s case law on the effectiveness of national time-bar rules is not clear, for which reason the ECJ will be asked for clarification.</p>

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Facts

This complicated case is about 19 (former) casual and part-time employees, all female (the "plaintiffs"), of the KBB group of department stores ("KBB"). A casual worker was defined in

the relevant collective agreement as an employee who works for on average less than 12 hours per week or is employed for a fixed period not exceeding eight weeks. A part-time worker was defined as an employee with a contract exceeding eight weeks and with an average work week of more than 12 hours but less than 40 hours. Until 1992, KBB's pension scheme was not fully open to all casual and part-time workers in the same way as it was open to regular full-time employees, who participated in the scheme automatically from the first day of their employment. The exclusion of casual and part-time workers from the pension scheme was relaxed in three steps: - until 1978 all casual and part-time workers were fully excluded; - from 1978 to 1985 casual workers continued to be fully excluded, but part-timers participated in the scheme (i) after five years of service or (ii) sooner in the event they applied for voluntary participation; - from 1986 to 1991 casual workers still continued to be fully excluded, but for part-timers the five-year period was reduced to one year; - as of 1992, all staff, including casual workers and part-timers, participated automatically from their first day of employment and there was no longer any distinction between them and the regular full-timers. In 1990 the ECJ delivered its highly publicised judgment in the Barber case1. The Barber judgment was followed by a number of other ECJ rulings, including the 1994 rulings in the Vroege and Fisscher cases2. These and other rulings created awareness that the exclusion of casual and part-time workers from pension schemes, where those workers were predominantly female, can be in violation of what was then Article 119 of the EC Treaty (later Article 141) and what is now Article 157 of the TFEU. At a certain point in time3, the union of which the plaintiffs were members informed them that KBB had discriminated against them on the basis of their gender and that they could make a claim. How and when the plaintiffs demanded redress is not known. All we know from the published judgments in this case is that on 9 October 2001, they brought a case before the Lower Court of Amsterdam, against KBB as well as its pension fund. They asked the court to (i) order KBB to enrol them retroactively in the pension scheme or (ii) award them compensation for lost accrual of pension rights. KBB's defence consisted mainly of two arguments. First, they disputed that they had discriminated. They argued that giving an employee the option to either participate in a pension scheme or not is not less favourable but, on the contrary, more favourable than giving no choice and simply having him or her participate compulsorily, whether he or she likes it or not. In the second place, KBB invoked Article 3:310(1) of the Dutch Civil Code, which provides that a claim for a tort or breach of contract becomes time-barred five years after the date on which a claimant knows (i) that here has been a tort or breach of contract against him or her and (ii) who is liable for it4. The court of first instance awarded only a small portion of the alternative claim. Both parties appealed to the Amsterdam Court of Appeal. It ruled, inter alia, (i) that KBB had discriminated indirectly and without justification on the basis of gender, (ii) that this discrimination existed not only in the period before 1978, but during the entire period up to 1992, (iii) that KBB's "Barber"

defence (no retroactivity beyond 17 May 1990) failed and (iv) that the time-bar period did not commence until the plaintiffs had been informed by their union of their rights under ECJ case law. Part (i) of the ruling, inasmuch as it related to the period in which part-timers could enrol in the pension scheme on a voluntary basis, was based on the reasoning that the plaintiffs were all either young and/or married women and that their situation was not comparable to that of their full-time colleagues. Whereas those colleagues were automatically enrolled in the pension scheme (they did not need to take any action), the plaintiffs needed to take individual initiative in order to enrol. This entailed the risk that they might not apply for enrolment on account of ignorance of their rights, inexperience, forgetfulness or carelessness. This risk was borne out by the fact that only a small percentage of the part-timers who were eligible to apply for voluntary enrolment actually did so. Supreme Court judgment 2007 By this time, KBB had accepted that it had discriminated in respect of the casual workers before 1992 and in respect of the part-time workers before 1978. Thus, the Supreme Court case was limited to the parttimers in the period from 1978 to 1992, during which time they were not enrolled in the pension scheme automatically from their first day of employment, but could enrol voluntarily during their initial five years or one year of employment. The Supreme Court found as follows5: 1. The mere fact that the plaintiffs, contrary to their full-time colleagues, needed to take action in order to enrol in the pension scheme, did not constitute such an impediment that it amounted to de facto exclusion from the scheme as prohibited by (the ECJ's case law on) Article 119 of the EC Treaty. 2. The Court of Appeal was in error by holding that the time-bar period did not commence until the plaintiffs had been informed by their union of their rights under ECJ case law. The period commenced when they became aware that KBB had treated them differently as compared to their full-time colleagues and were therefore realistically capable of claiming compensation, even if they were unaware of the legal merits of the situation. The case was remanded to the Court of Appeal of The Hague to determine when this was. Before continuing, two points should be noted. The first is, that Dutch case law holds that if an individual is unaware of his or her right because of a circumstance for which the other party to the relevant contract bears responsibility, the time-bar in respect of that right does not commence as long as that circumstance remains in effect. The second point to note is, the Supreme Court did not (need to) address a question that was raised in the proceedings, namely whether KBB could invoke the time-bar rules against the plaintiffs, that would influence only their entitlement to pension payments already due or also the period of accrual of rights to future payments. This issue was left open.

Judgment

7 December 2010 The Court of Appeal of The Hague needed to decide on an argument that the plaintiffs had raised but that the Court of Appeal of Amsterdam had left undecided,

namely that KBB had failed to comply with its duty to inform its part-time staff adequately of their right to apply for voluntary participation in the company's pension scheme. All KBB had done was to provide collective information in staff meetings, by way of a brochure and through an inconspicuous notice in its in-house magazine, none of which contained a very explicit warning that failure to apply for voluntary participation would harm their interests. For this reason, the court found that KBB had discriminated against the plaintiffs on the grounds of gender within the meaning of Article 119 of the EC Treaty. As for the time-bar issue, the court observed that the ECJ's case law on this issue is not clear and that it is therefore necessary to refer questions to the ECJ for a preliminary ruling. However, before doing so, the court asked the parties to express their views on certain points of domestic law.

Commentary

The Advocate-General with the Dutch Supreme Court, inter alia, gave a historical overview of the ECJ's case law regarding genderdiscriminatory pension schemes. One of the reasons he did this was to investigate whether the Dutch law on time-barring claims is compatible with EU law, which he concluded it is. The overview, which some readers may find useful, can be summarised briefly as follows:

- ECJ 8 April 1976 case 43/75 (Defrenne II): Article 119 of the EC Treaty has horizontal direct effect, but rights based thereon lack retroactive effect beyond 8 April 1976;

- ECJ 31 March 1981 case 96/80 (Jenkins): treating part-timers less favourably than full-timers, where the part-timers are relatively more often female, constitutes discrimination within the meaning of Article 119;

- ECJ 13 May 1986 case 170/84 (Bilka): payments under a contractual (i.e. not State) pension scheme constitute a benefit from employer to employee within the meaning of Article 119;

- ECJ 17 May 1990 case 262/88 (Barber): a pension scheme that starts paying out to women at an earlier age than to men is in breach of Article 119 (even if this advantage is offset by other advantages for men). However, the discriminated group cannot claim the same benefits as the dominant group retroactively in respect of periods of service predating 17 May 1990, because the Member States, employers and pension funds understandably relied on Directives 79/7 and 86/378 (now Directive 2006/54), allowing different retirement ages for men and women;

- ECJ 6 October 1993 case C-109/91 (Ten Oever) (as confirmed in the "Barber Protocol"6): Barber-type claims can relate only to periods of work performed from 17 May 1990, not to

earlier periods, even if the retirement date is after 17 May 1990;

- ECJ 28 September 1994 cases C-57/93 and C-128/93 (Vroege and Fisscher):

a. it follows from Bilka that the right to participate in a pension scheme is covered by Article 119 and is therefore not limited to the period from 17 May 1990 (but it cannot go back further than 8 April 1976);

b. the Barber Protocol does not stand in the way of that right, because it relates to accrual of pension, which is not the same as the right to participate;

c. not only employers must comply with Article 119 of the EC Treaty, pension funds can also be held directly liable for noncompliance;

d. employees who demand retroactive participation in a pension scheme must pay the contributions they saved by not participating, if any [Note: To my knowledge, the ECJ has not yet ruled on whether such employees may need to pay contributions with interest and with compensation for improved life-expectancy and, if so, how this interest and this compensation are to be calculated];

e. national time-bar rules can be applied provided (i) they are not stricter than the rules applying to other similar types of claim and (ii) they do not make it practically impossible to exercise one's right to (retroactive) participation;

- ECJ 24 October 1996 case C-435/93 (Dietz): the limitation in retroactivity following Barber does not apply to benefits that result (indirectly) from discrimination in respect of the right to participate in a pension scheme;

- ECJ 11 December 1997 case C-246/96 (Magorrian and Cunningham): in the event that a person has been denied the right to participate in a pension scheme in a manner that is gender-discriminatory, all years of service from 8 April 1976 count towards calculating the amount of the benefits, i.e. time-bar rules can relate to pension payments, but not to pension accrual;

- ECJ 16 May 2000 case C-78/98 (Preston): however, a national rule barring claims for pension, if asserted longer than six months after employment has terminated, is valid. I confess to finding the ECJ's case law on national time-bar rules in relation to pension

discrimination claims difficult to grasp.

Comments from other jurisdictions

United Kingdom (Julian Parry): As mentioned by Peter Vas Nunes in his commentary, the case law on claims by part-timers for historical occupational pension scheme benefits is a complex maze and it is unsurprising that the Dutch court decided to make another reference to the ECJ for clarification. The case serves as an uncomfortable reminder that issues of this nature may not surface until many years after discriminatory provisions have disappeared from a pension scheme, when information or documentation issued by the employer from the relevant time may be long lost. Had the employees been working in the UK, they would very probably also have succeeded in their claims of indirect sex discrimination. The Equality Act 2010 now expressly applies a non-discrimination rule to all occupational pension schemes (s.61), although it is substantively the same as the previous legislation, which that Act replaced. There may also have been a potential claim for less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2002. Note that, in cases where employment has ended, UK law requires a pension equality claim to be brought within six months of the date of termination. In the event of a successful claim, following the ruling of the House of Lords in Preston v Wolverhampton Healthcare NHS Trust [2001] IRLR 237, the most likely outcome is that membership of the scheme would be backdated to the later of 8 April 1976 (the date of the Defrenne no 2 judgment) or the date the employment started. However, it is quite possible that on similar facts, a UK court would have decided to refer the matter to the ECJ in light of the confused state of the law.

Footnotes

1 ECJ 17 May 2990 case 262/88 (Barber).

2 ECJ 28 September 1994 cases C-57/93 (Vroege) and C-128/93 (Fisscher).

3 The judgments referred to in this case report are not precise on the date.

4 Before 1994 the time-bar rules were different. Since that time, there are two time-bar rules: the 5-year period referred to above and a period of 20 or 30 years from the date of the tort or breach of contract, regardless of whether the claimant knew about it (with rare exceptions in case law, e.g. in asbestos cases). A claimant can stop the time-bar period from running by serving a written notice on the other party, as the plaintiffs in this case said they had done. In that case, a new period of five years starts running.

5 Supreme Court 5 January 2007, «JAR» 2007/50.

6 OJ 29 July 1992 C191 page 68.

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Subject: Gender discrimination

Parties: Mrs Boersma – v – Magazijn De Bijenkorf et al.

Court: Gerechtshof 's-Gravenhage (Court of Appeal of The Hague)

Date: 7 December 2010

Case number: 105.006.717

Hardcopy publication: «JAR» 2011/39

Internet publication: www.rechtspraak.nl | LJ Number BO 6512

Creator: Gerechtshof Den Haag (Court of Appeal in The Hague)
Verdict at: 2010-12-07
Case number: 105.006.717