

SUMMARY

ECJ 18 November 2010, case C-356/09 (Pensionsversicherungsanstalt – v – Christine Kleist), Gender discrimination

<p>Directive 76/207 must be interpreted as meaning that national rules that permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women sooner than by men, constitute direct discrimination on the grounds of sex prohibited by that Directive.</p>

Facts

Ms Kleist was a doctor, born in 1948. She had been employed since 1985 by the Pensionversicherungsanstalt, which is a public employer (“the Employer”). She was covered by a collective agreement, which provided that employees with 10 or more years of service cannot be dismissed except on certain grounds (i.e. they have enhanced dismissal protection). However, paragraph 134 of the collective agreement (“Para 134”) exempted from this rule dismissals on account of the employee having attained the normal retirement age as provided in Austrian social security law. This exemption was designed for the benefit of younger persons, the idea being that retiring employees create job vacancies.

In Austria, ever since 1955, the normal retirement age is 65 for men and 60 for women (the retirement age for women will rise in annual steps starting in 2024). The Employer’s policy was to retire all staff upon them reaching this age. Accordingly, Ms Kleist was dismissed in

December 2007, with effect from 1 July 2008, at which time she would be 60.

Ms Kleist challenged her dismissal in court, basing her claim on a provision of Austrian law that a dismissal can, under certain conditions, be unlawful. This is the case where a dismissal has an adverse effect on the employee's fundamental interests and the employer is unable to substantiate the dismissal for good reasons. However, when determining whether a dismissal adversely affects the employee's fundamental interest, account is taken of retirement income. As a result, an unlawful dismissal claim following termination on the ground of age is unlikely to be successful.

National proceedings

The court of first instance found against Ms Kleist. On appeal this judgment was reversed. The Employer appealed to the Supreme Court, which referred questions to the ECJ. These questions related to Directive 76/207 (as amended by Directive 2002/73 and as later replaced by "Recast Directive" 2006/154). Article 3(1) of this Directive prohibits discrimination on the grounds of sex in relation to employment, including dismissals and pay. The Directive does not prohibit sex discrimination in relation to social security, which is governed by Directive 79/7.

The ECJ rephrased the Austrian court's questions as follows: must Directive 76/207 "be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit a public employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women of an age five years younger than the age of which it is acquired by men, constitute discrimination on the grounds of sex prohibited by that Directive"?

In the ECJ proceedings, Ms Kleist argued that Para 134 violated not only Directive 76/207 but also the prohibition of age discrimination under Framework Directive 2000/78. The Employer argued that there was merely indirect sex discrimination, which was objectively justified by the desire to create vacancies for younger persons.

ECJ's ruling

1. The ECJ begins by pointing out that (i) the conditions for payment of a retirement pension and (ii) the conditions governing termination of employment are separate issues (§ 24).

2. Article 3(1)(a) of Directive 76/207 prohibits sex discrimination in relation to dismissal (§ 25).

3. The term “dismissal” must be given a wide meaning. It includes an age limit set for the compulsory dismissal of workers even if the dismissal involves the grant of a retirement pension. Thus, Ms Kleist’s dismissal was a dismissal as provided in the Directive (§ 26-27).

4. A policy to dismiss a female employee because she has attained the qualifying age for a retirement pension constitutes sex discrimination if the retirement age under national legislation is different for men and women (§ 28).

5. The criterion determining the age at which doctors such as Ms Kleist can be dismissed without enhanced dismissal protection is inseparable from their sex. Therefore her dismissal constitutes a difference in treatment that is directly based on sex (§ 29-31).

6. The question to be addressed, therefore, is whether female workers aged 60-65 are in a comparable situation to that of male workers in the same age bracket. Does the fact that they are eligible for a statutory retirement pension, and that their male counterparts are not, make their situation incomparable (“specific”)? The answer depends, inter alia, on the object of the rules establishing the difference in treatment. The objective of Para 134 was to govern the circumstances in which employees can lose their job. Contrary to the situations in the ECJ’s rulings in Roberts (C-151/84) and Hlozek (C-19/02), the advantage accorded by Austrian law to female workers of being able to claim a retirement benefit five years sooner than men, is not directly connected with this objective, men and women being “in identical situations so far as

concerns the conditions governing termination of employment”. The reason Austria has different retirement ages for men and women is “to compensate for the disadvantage suffered by women socially, in relation to the family and economically” (§ 32-38).

Note: Advocate-General Kokott distinguished Ms Kleist’s case from that in Hlozek as follows: “In Hlozek the bridging allowance was specifically aimed at financially cushioning a special risk of long-term unemployment, a risk which was statistically proven to arise for men and women at different ages and was particularly high as the statutory retirement age drew closer. In the present case, however [...] there are no indications of there being such a specific risk.”

7. The ECJ has repeatedly held that, given the fundamental importance of the principle of equal treatment, the exception to the prohibition of sex discrimination in Directive 79/7 (the Directive on equal treatment of men and women in matters of social security) must be interpreted strictly. That exception does not apply in the present case of Ms Kleist, which deals with dismissal, not with social security (§ 39-40).

8. In summary, Ms Kleist was treated differently to her male colleagues directly because of her sex, whilst her male colleagues were in a comparable situation. Given that none of the exceptions to the prohibition of direct sex discrimination apply, Para 134’s objective of promoting employment of younger persons cannot justify the discrimination (§ 41-43).

9. Ms Kleist’s argument in respect of age discrimination was not raised until after the Austrian court referred questions to the ECJ, so there is no need to address this issue (§ 44-45).

Ruling

Directive 76/207 must be interpreted as meaning that national rules that permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women sooner than by men, constitute direct discrimination on the

grounds of sex prohibited by that Directive.

Creator: European Court of Justice (ECJ)

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