EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 8 September 2011, cases C-297/10 and C-298/10 (Hennings), Age discrimination, collective agreements

<p>The principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Council Directive 2000/78/EC [...] must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee’s age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter of Fundamental Rights of the European Union.</p>

Facts

Until 2004/2005 the employment relationship of ‘contractual’ employees (i.e. not civil servants) in the employment of the German federal government or of a provincial or local government were governed by a collective agreement known as the ‘BAT’ (Bundes-Angestelltentarifvertrag). This collective agreement provided for, inter alia, the following rules regarding pay:

- every employee is paid according to a pay scale with a different scale for each salary group;

- each salary group has steps, one for employees aged 21-23, one for employees aged 23-25, and

so forth, i.e. an employee gets a salary increase once every two years;

- the maximum step in salary group I (the highest group) corresponds to age 47 and over;

- upon hiring, an employee is placed on the step corresponding to his age;

- however, there are two exceptions to this rule; the first is that under certain conditions a person with above-average professional experience can be placed on a higher step than that corresponding to his age;

- the second exception is that someone who is hired at an age exceeding 31 (lower salary groups) or 35 (higher salary groups) is placed on a lower step than corresponds with his age, namely on the step corresponding to his actual age minus one half of the years between 31/35 and that age;

- the salary determined under the BAT was in some cases supplemented by a 'local supplement' that took account of financial burdens associated with family status.

On 1 April 2004 the BAT ceased to apply to contractual employees of the Berlin government. On 1 October 2005 the BAT ceased to apply to contractual employees of the federal government. It was replaced by a new collective agreement, known as the TVöD (Tarifvertrag für den öffentlichen Dienst), which did not differentiate according to age. The transition from the BAT to the TVöD was regulated by a separate, transitional collective agreement. It provided that established rights existing on 30 September 2007 would be preserved.

National proceedings

Mr Mai was hired by the Berlin government in 1998 at age 30. At the time his employment ended in 2009, he was classified in BAT salary group Ia and received a salary corresponding to his age of 41, which was € 3,336 gross per month. He took the view that the gradation of basic pay by age categories was age discriminatory and brought proceedings claiming, for a period of approximately 2 1/2 years, the balance between what he had been paid and what he would have been paid had he been 47 or over.

Ms Hennings was a civil engineer in the employment of the federal government. She was 41 at the time she was appointed in salary group IVa. Because she was over age 31 at that time, she was placed on a step corresponding to a lower age than her real age. On 1 October 2007, when she was reclassified pursuant to the transfer from the BAT to the TVöD, she was 43 but was paid as if she was 37. She demanded to be reclassified according to her actual age, which

would yield her an additional € 435 gross per month.

Both Mr Mai and Ms Hennings litigated all the way to the highest German Court for employment disputes, the BAG. It referred one question re Mai and five questions re Hennings to the ECJ.

ECJ's findings

1. Question 1 in the Hennings case and the single question in the Mai case ask whether the principle of non-discrimination on grounds of age precludes pay being based on age. Following some introductory remarks and general observations, the ECJ examines whether the difference of treatment is justified under Article 6(1) of Directive 2000/78 (§ 46-61).

2. Like the Member States, the parties to a collective agreement enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it. The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter of Fundamental Rights of the EU, have taken care to strike a balance between their respective interests. Nevertheless, the social partners must comply with the Directive (§ 62-68).

3. The referring court and the German government state that the higher pay which an older employee used to get under the BAT was justified by (i) the employee's longer professional experience and (ii) his loyalty to his employer. Some scholars and lower courts mention a third argument, namely that the higher pay for older employees is compensation for their - usually greater - financial needs, but this argument is flawed, given that there is no correlation between age and financial needs (§ 69-70).

4. The German government submits that not paying an employee hired after the age of 31/35 according to his real age is justified by the fact that, after a certain point in time, persons appointed late tend to have professional experience that is not entirely relevant to the activity they will carry out. It follows that the aim of the age criterion in the BAT is to establish a pay scale that takes account of employees' professional experience. That aim is, in principle, legitimate, as held in Cadman (C-17/05) and Hütter (C-88/08) (§ 71-72).

5. As a general rule, recourse to the criterion of length of service is appropriate to achieve that aim, since length of service goes hand in hand with professional experience: see Danfoss (109/88), Cadman and Hütter (§ 73-74).

6. However, the system of appointing employees in a salary group corresponding to their age goes beyond what is necessary and appropriate to achieve said aim. For example, someone without any professional experience who is hired at age 30 will receive the same pay as someone who was hired at age 21 and now has 9 years of experience. This makes the BAT-system unjustified (§ 75-76).

7. Questions 2 and 3 in case C-297/10 ask whether the EU's age discrimination rules preclude the replacement of a discriminatory system (BAT) by a non-discriminatory system (TVöD) while maintaining unequal treatment of existing employees of different ages, if the consequent discrimination is justified by the preservation of established rights, it is progressively reduced and the only other possible solution would be to reduce the pay of older employees (§ 79).

8. The ECJ has previously held that the protection of the established rights of a category of persons constitutes an overriding reason in the public interest which justifies the measure, provided that is does not go beyond what is necessary for such protection (§ 90).

9. The aim of the transitional measure is legitimate and the measure does not go beyond what was necessary (§ 91-99).

Ruling

The principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Council Directive 2000/78/EC [...] must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter of Fundamental Rights of the European Union.

Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a measure in a collective agreement, [...] which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.

Creator: European Court of Justice (ECJ)
Verdict at: 2011-09-08
Case number: C-297/10 and C-298/10