

## SUMMARY

# 2010/80: Supreme Court disapplies statutory mandatory retirement (at age 60) provisions (FR)

***&lt;p&gt;In May 2010, the French Supreme Court ruled in favour of strict judicial control of compulsory retirement provisions, holding that national provisions of law are to be disapplied if differential treatment on grounds of age is not demonstrably justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary.&lt;/p&gt;***

### Summary

In May 2010, the French Supreme Court ruled in favour of strict judicial control of compulsory retirement provisions, holding that national provisions of law are to be disapplied if differential treatment on grounds of age is not demonstrably justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary.

### Facts

The first case<sup>1</sup> concerns the age limit imposed on airline pilots by Article L.421-9 of the Code of Civil Aviation. This article provides that “[...]navigation staff cannot take part in piloting or co-piloting activities in the public air transportation beyond the age of 60”. After 60, pilots must be reallocated to other jobs amongst the ground staff within the airline group.

Here, a pilot of Brit Air Company was terminated because he had reached the age of 60 and could not be reclassified amongst the ground staff within the group. The pilot brought an action before the Industrial Tribunal seeking damages and annulment of his dismissal on the grounds that such a measure was discriminatory and contrary to European Directive 2000/78/EC of 27 November 2000.

The second case<sup>2</sup> involved the special retirement scheme for employees of the Paris Opera. Here, an employee of the Paris Opera was notified of her compulsory retirement at the age of 60 in compliance with executive order No 68-382 of 5 April 1968, which establishes a specific retirement scheme for employees of the Opera and national theatres. The employee brought an action before the Industrial Tribunal against this measure, arguing that under legal provisions which prevail over the executive order, she could only be forced to retire at the age of 65<sup>3</sup>, and that her forced retirement at 60 constituted discrimination on grounds of age, amounting to dismissal without real and serious cause.

### **Court of Appeal**

In the case of the pilot, the Court of Appeal of Paris dismissed the pilot's claim, ruling that the age limit was lawful under Directive 2000/78/EC, on the basis that Article 6 provides that *"Member States may provide that differences of treatment on grounds of age" and that that "shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary"*. Therefore, the age limit imposed on pilots was perfectly legitimate, having as its purpose the smooth functioning of the air navigation and the safety of passengers and crew in a reasonable and proportionate way.

In the Opera case, the Court of Appeal dismissed the employee's claim on the grounds that retirement of Paris Opera employees was exclusively governed by executive order No 68-382 of 5 April 1968 and that the employee met the age and seniority requirements set by the said executive order for such retirement.

### **Supreme Court**

In both cases, the decisions were overruled by the French Supreme Court for violation of Article 6 § 1 of Directive 2000/78/EC.

In the pilot case, the Supreme Court did recognise that the age limit imposed by the Code of Civil Aviation was justified by a legitimate aim, namely that of ensuring the smooth functioning of air travel and the safety of passengers and crew. Even so, the Court of Appeal's decision has been overruled, as the appeal judges had failed to examine, pursuant to Article 6 § 1 of said Directive, whether termination of piloting at 60 was a necessary and appropriate means to achieve such aim.

In the Opera case, the Supreme Court overruled the Court of Appeal's decision on the grounds that the appeal judges had not conducted the twofold control provided by article 6 § 1 of said Directive. In other words, by not verifying whether the difference in treatment based on age was objectively and reasonably justified by a legitimate aim and that the means of achieving such aim was appropriate and necessary, they had disregarded article 6 § 1 of the European Directive.

### **Commentary**

In both cases, the Supreme Court applied Article 6 § 1 of Directive 2000/78/EC directly in order to override, in the first case, an Act of Parliament (the Code of Civil Aviation) and, in the second case, an executive order. The direct application of a European directive by French judges is rather remarkable. As we all know, directives have no direct horizontal effect. Non-transposed directives cannot, by themselves, create any rights or obligations on individuals. Although national courts must interpret their domestic law in the light of European directives, such interpretation may not contradict national statutory provisions. In the cases reported above, differential treatment on grounds of age was specifically allowed under French law (by a statutory provision in the pilot case and by an executive order in the Opera case). Nevertheless, the court subjected that differential treatment to the objective justification test.

However, by ruling as it did, the French Supreme Court is putting into practice the ECJ's case law on differential treatment related to age as promulgated in its *Mangold*<sup>4</sup> and *Kücükdeveci*<sup>5</sup> rulings, by which the ECJ held that the principle of non-discrimination on grounds of age as formulated in Directive 2000/78/EC is a general principle of EU law and that it is the duty of national courts to give full effect to it by declining to apply any incompatible national legislation.

Here, the French Supreme Court has followed the ECJ by acknowledging the principle of non-discrimination on grounds of age as a general principle of the EU law and by directly applying it.

In doing so, the Supreme Court shows a popular pro-European attitude, whilst reinforcing its

powers over the French Parliament and the government.

### **Comments from other jurisdictions**

*United Kingdom (Hester Briant):* UK age discrimination laws currently allow for a default retirement age (DRA) of 65. If an employer requires an employee to retire on or after his or her 65th birthday and correctly follows the UK's statutory retirement procedure, the dismissal will be fair and not unlawfully age discriminatory. The Government has been consulting about the removal of the DRA with effect from October 2011, focusing not on "if" the DRA should be removed but rather the consequences of doing so. Once the DRA has been abolished, employers will need to consider whether to impose company normal retirement ages, in which case they would have to rely on an objective justification to defeat any claim of age discrimination. The alternative would be to consider how to manage without compulsory retirement altogether. We expect that in future, UK courts and tribunals are likely to have to deal with many more cases on whether company normal retirement ages can be objectively justified as a proportionate means of achieving a legitimate aim.

#### **Footnotes**

- 1 Vlimant c/ SA Brit air.
- 2 Crosnier c/ EPIC Opéra national de Paris.
- 3 The compulsory retirement age was raised to 70 in 2010.
- 4 ECJ case C-144/04 (Mangold – v - Helm).
- 5 ECJ case C-555/07 (Kücükdeveci - v - Swedex).

**Subject:** Age discrimination

**Parties:** Vlimant – v – Brit Air and Crosnier – v – OpÉra national de Paris

**Court:** Cour de cassation (Supreme Court)

**Date:** 11 May 2010

**Case numbers** respectively, 08-45.307 and 08-43.681

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**Creator:** Cour de cassation (French Supreme Court)

**Verdict at:** 2010-05-11

**Case number:** 08-45.307 and 08-43.681