SUMMARY

2010/79: Employers may discriminate against under-18s (DE)

<p>Provisions in a collective labour agreement that allow the practice of paying employees under 18 years less than older employees and that allow termination of employees’ contracts when they turn 18, do not violate the Danish Employment Equality Directive.</p>

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Facts

The case concerned a young service assistant, A, who – in accordance with the applicable collective agreement between his employer, B, and the trade union HK – was paid less than his adult colleagues due to the fact that he was under 18. Further, in line with common practice in this area, the service assistant was given notice just before he turned 18.

HK claimed that the lower pay as well as the termination were in breach of the Employment Equality Directive.

There was agreement on the fact that the employer's actions were fully in line with the particular derogation in section 5a(5) of the Danish Anti-Discrimination Act, under which the prohibition of discrimination on the basis of age does not apply to under-18s if the employer is covered by a collective agreement containing specific provisions on under-18s in relation to recruitment, payment and termination.

Therefore, the issue was whether section 5a(5) of the Anti-Discrimination Act could be

deemed to be in violation of Employment Equality Directive 2000/78/EC. In the light of this, HK took legal action against both B and the Danish Ministry of Employment.

Judgment

The Eastern High Court pointed to the fact that, according to the interpretive notes of the Anti-Discrimination Act, the aim of the derogation in section 5a(5) is to support young people's integration into the labour market by giving them the opportunity to gain work experience. The Court found this to be a legitimate aim.

With reference to, among other things, case law from the European Court of Justice, the Eastern High Court found that section 5a(5) of the Anti-Discrimination Act and the practice of terminating the contract of employees before they reach the age of 18 must be deemed both appropriate and necessary as part of the efforts to achieve the legitimate aim.

On this basis, the Court dismissed the claim against both B and the Ministry of Employment.

During the proceedings, B claimed that the Employment Equality Directive cannot be relied upon in the relations between two private parties. However, in consequence of the Court's ruling that the Directive had not been violated, the Court did not have to take a stand on this issue.

Commentary

Article 6(1) of the Employment Equality Directive 2000/78/EC provides:

"*that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim [...] and if the means of achieving that aim are appropriate and necessary.*

Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment [...], employment [...], including dismissal and remuneration conditions, for young people, older people [...] in order to promote their vocational integration or ensure their protection.

[...]"

The Eastern High Court found that the specific Danish provision in section 5a(5) of the Anti-Discrimination Act fulfils the requirements of this Article 6(1) of the Directive.

The ruling has been appealed to the Danish Supreme Court.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): This Danish case involves two aspects of discrimination against young employees: lower pay and dismissal, both on account of age. In 2006, the Dutch Equal Treatment Commission (the "ET Commission") presented a position paper on two other aspects of the same phenomenon: hiring only youngsters and non-extension of their temporary contracts. The position paper is limited to unskilled work in supermarkets, which openly discriminate for reasons of cost, but is applicable to other sectors as well.

The reason Dutch supermarkets discriminate against persons over a certain age (in respect of unskilled work) has to do with the Dutch legislation on the minimum wage. The statutory minimum wage for an "adult" (which refers to persons aged 23 and over) is currently just over € 18,000 gross per year. The statutory minimum wage for persons aged 15-22 is considerably lower. For 22-year olds it is 85% of said sum, for 15-year olds it is no more than 30% (with intermediate percentages on a sliding scale for 16-22 year olds). This makes it attractive for supermarkets to employ youngsters and to get rid of them before they reach the age of 23 (and usually much sooner than that). The collective labour agreement for supermarkets includes pay scales that are slightly above the level of the statutory minimum wages, but it adopts the same lower percentages for 15-22 year olds.

The reason for the lower statutory minimum wage for youngsters is twofold. First, it aims to combat youthful unemployment by making it attractive for employers to hire young people, who can then gain work experience and so enhance their employability. Secondly, by making it unattractive for youngsters to have a paid job, they are less likely to leave school early and more likely to see paid work as no more than a means to supplement their pocket money and to work exclusively outside of their school hours (mainly in the evenings and on Saturdays).

When the Dutch Parliament debated what was to become of the Age Discrimination Act (in 2001/2002), the question came up as to whether the legislation allowing lower statutory

minimum wages for youngsters is compatible with Directive 2000/78/EC, of which the Age Discrimination Act is a (partial) transposition. Parliament concluded that that legislation is indeed compatible. The ET Commission observes that it lacks the authority to find otherwise (but it cannot resist remarking, as an aside, and citing Mangold in a footnote, that the ECJ could have a different view). Given the fact that lower wages for youngsters must therefore be deemed to be legitimate, hiring youngsters to the detriment of older individuals on account of them costing less, must likewise be deemed to be objectively justified.

Conclusion 1: a policy of preferentially hiring youngsters for unskilled work in supermarkets is objectively justified age discrimination, provided the policy is suitable for meeting Parliament's objectives. This means, for example, that the policy must be such as to encourage the employees concerned to continue attending school.

Does this mean that a policy not to extend young employees' contracts beyond a certain age is also objectively justified? One might be forgiven for thinking that if hiring them preferentially is justified, then firing them "preferentially" is a logical and therefore justifiable consequence. This is not the case, however.

As already noted, the idea behind allowing lower minimum wages for youngsters is to help them find jobs. Dismissing them after a short while runs counter to this objective. Also, both the ECJ (in the Roks case, C-343/92) and the Dutch Supreme Court have held that financial considerations (alone) cannot justify discrimination. Admittedly, the Dutch ET Commission has held (in a case involving an age-discriminatory social plan) that financial considerations can justify discrimination if treating the relevant groups of individuals equally would be disproportionately costly for the employer. However, this situation does not as a rule exist in the supermarket sector.

Conclusion 2: a policy of not extending temporary contracts for reasons of age/cost is not objectively justified, except perhaps in very special circumstances.

What applies to the non-extension of a temporary contract surely applies even more so – to dismissal on the grounds of age/cost. Therefore, I doubt whether a Dutch court would be as lenient with the employer as the Danish court was in the case reported above. In fact, it is questionable whether Article 5a(5) of the Danish Anti-Discrimination Act, which seems to give social partners a blank cheque to discriminate against under-18s regardless of whether that is objectively justified, is compatible with EU law.

On 10 November 2006 the Dutch Supreme Court ruled on the legality of the Dutch Minimum Wage Act inasmuch as employees aged under 15 are not covered by the Act, and can therefore be paid even less than 15 year olds, despite the fact that the law allows 13 and 14 year olds to

perform (very limited types and amounts of) paid work. Two unions challenged the compatibility of the exemption of under 15s with (i) the International Convention on Political and Civil Rights ("BUPO"), (ii) the European Social Charter, (iii) the International Convention on Economic, Social and Cultural Rights ("ECOSOC") and (iv) domestic law. The courts of first and second instance found the age discrimination to be unjustified, but the Supreme Court held that it was objectively justified by a legitimate aim (namely to prevent paid work becoming an attractive alternative to school and other educationally sound activities) and that the means to achieve that aim were effective, in that establishing minimum wage levels for 13 and 14 year olds might create the impression that it is acceptable to integrate them into the regular labour market. The question as to whether the means to achieve the stated aim were necessary remained. One alternative, for example, could have been to outlaw work by 13 and 14 year olds. Another alternative would be to establish lower minimum wage levels for these youngsters, so low as to deter them from taking paid work seriously. The Supreme Court weighed two alternatives, both aimed at protecting 13 and 14 year olds: protecting them against themselves (i.e. not going to school) versus protecting them against underpayment. On balance, the Supreme Court allowed the government sufficient margin of discretion and held the discrimination to be justified.

As of 9 July 2010 Dutch law allows employers to hire under 27s for a maximum of four rather than three fixed terms of one year each, thereby lowering their level of protection against losing their job. The law is a temporary measure aimed at combating youth unemployment. In Parliament there was some, but conspicuously mild, debate on whether this change of law is compatible with the anti-discrimination legislation, including Directive 2000/78. In the light of Mangold, Kücükdeveci, etc. I am not certain that the discrimination of young employees will meet the compatibility test if challenged in court.

United Kingdom (Hester Briant): In the UK, it would be unfair dismissal and age discrimination to dismiss employees under 18 – whether or not a collective agreement applied to their employment – because of their age. With the exception of national minimum wage (NMW) laws, it would also normally be discriminatory to pay employees under the age of 18 less because of their age (although, in practice, they are often paid less than older workers as they have fewer qualifications and less experience). There are specific provisions in the National Minimum Wage Act regarding under-18s (and other younger workers such as those aged 18-21), whereby these groups are entitled to lower NMW rates than employees aged 22 and above. UK age discrimination legislation contains specific exceptions for the NMW as applied to younger workers, which have not yet been the subject of any legal challenge. The UK Government considers that these exceptions can be justified on social policy grounds, to encourage participation and employment of younger employees in the workforce.

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