SUMMARY

2012/18 Retirement scheme that formerly yielded nothing for employees resigning before age 35 is neither unconstitutional nor sex-discriminatory (GE)

<p>A nurse was employed in a public hospital in the 1960s and 1970s. Until 1974 the law provided that, in order to qualify for retirement benefits, an employee needed to have been employed by the same employer without interruption for more than 20 years. This requirement was relaxed slightly in 1974, but even then an employee who resigned before the age of 35 remained empty-handed: no income following retirement and no vested interest.
The <i>Bundesarbeitsgericht </i>found the service/age requirement to be constitutional and non-discriminatory.</p>

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discriminatory.

Facts

The plaintiff was born in 1945. She was a nurse employed by the defendant in a public hospital. She was employed by the same hospital twice:

| first, from 1966 (age 21) to March 1971 (age 26), i.e. for a period of five years;

| then, from October 1972 (age 27) to 1979 (age 34), i.e. for a period of seven years.

The plaintiff's first contract ended when she resigned following the expiry of her maternity leave. Her second contract ended when she resigned for personal reasons.

During both periods of employment, the plaintiff was enrolled in the defendant's pension scheme. This provided old-age retirement benefits (as well as survivors' benefits) on top of the federal German State retirement benefits. The pension scheme was governed by statutory terms. Until 1974 these terms were set out in a provincial law called *Ruhegeldgesetz*. From 1974 onwards, they were governed by the federal *Betrieblichen Alterversorgungsgesetz* (the German Company Pensions Act, or 'BetrAVG') as it stood in the period 1974-1979. Both of these laws contained requirements that a former employee must satisfy in order to be eligible for retirement benefits. Until 1974 these requirements were that the retiree was employed without interruption by the same (public) employer for no less than 20 years and that the employment terminated on account of retirement or disability. From 1974 the requirements were that the employment terminated after the age of 35 (the 'age requirement') and that the retiree was either enrolled in the pension scheme for at least ten years or was employed for at least 12 years and enrolled in the pension scheme for at least three years (the 'service requirement').

Clearly, the plaintiff did not satisfy the requirements that were in force before 1974. As for the requirements that applied between 1974 and 1979, (i) the plaintiff did not satisfy the age requirement, given that her second contract ended when she was 34, and (ii) she would only satisfy the service requirement if her two periods of employment were added together.

On 1 May 2007, when the plaintiff turned 62, she was granted federal State retirement benefits to which every German is, in principle, entitled, but not additional benefits based on her employment with the defendant. She claimed € 37.39 per month from the defendant, arguing (i) that the age requirement was unconstitutional and sex- discriminatory and (ii) that her two periods of employment should be added together, both as a matter of principle and, in particular, because her first contract ended following maternity leave.

The courts of first and second instance ruled in favour of the defendant. The plaintiff appealed to the highest German court in employment matters, the *Bundesarbeitsgericht* (the Federal Labour Court, or 'BAG').

Judgment

In line with its settled case law, the BAG held that the plaintiff's first period of employment could not, as a matter of principle, be taken into account for the purpose of determining her entitlement under her second contract. The fact that the plaintiff's first contract ended following her maternity leave did not alter this conclusion. It is true that the Maternity Protection Act, which was already in force in 1974, provides that two or more periods of employment can be added together, but this is only the case where an employee resigns upon expiry of her 'maternity protection' period and is re-employed within one year. Given that the period between the plaintiff's two contracts exceeded one year (it was 19 months), the plaintiff did not satisfy this requirement.

As for the legality of the age requirement, the BAG examined it in the light of the German Constitution, which outlaws gender discrimination (and other forms of discrimination), and in the light of what is now Article 157 TFEU (formerly Article 119, then Article 141 EC). This involved analysing whether the age requirement was indirectly sex- discriminatory, as the plaintiff alleged. The court was willing to accept, by way of hypothesis, that the age requirement impacted women significantly more than men. The issue, therefore, was whether the requirement was objectively justified. The justification test involved, first of all, establishing the objective of the age requirement.

Historically, company retirement schemes only paid out to employees who worked for the company until retirement age (or until disability caused the employment to terminate). Anyone who left the company before that age was not eligible for any benefits and had no vested interest. The introduction of pension legislation marked a first step in increasing labour mobility. Initially, this mobility was limited to employees who had worked 20 years for the company. Later, this was reduced to ten years. The idea behind these requirements was partly to encourage and reward loyalty, but also that an employee who quits a company at an early age is likely to find another job with another pension scheme and is therefore less in need of protection. These aims were not related to gender and therefore passed the legitimacy test.

Given the Member States' wide margin of appreciation when deciding how to achieve a legitimate aim, the BAG found the age requirement to be objectively justified.

The BAG had already ruled in 2005 that the age and service requirements were not

unconstitutional.

Commentary

This decision is based on formerly applicable law. However, in practice, this judgment is relevant to all pension commitments given to employees before 1 January 2001. According to transitional law, section 1 of the German Company Pensions Act (BetrAVG, old version) remains applicable to these employees.

With the introduction of the Act on Equal Treatment (the German transposition of Directive 2000/78, the 'AGG') this judgment in itself might not be applicable for future claims, although the argumentation remains relevant to current cases. At the moment, there are at least three cases dealing with company pension entitlement based on discrimination on grounds of age pending with the BAG. The judgment at hand shows that not every requirement as to length of service in relation to the vesting of an employee´s entitlement necessarily also constitutes indirect discrimination on grounds of sex. The court did not need to answer the question of whether or not the provision in question had also to be considered age discriminatory, because service periods before and after reaching age 35 were treated differently. The plaintiff simply did not work for ten years continuously before or after the age of 35.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): In these times, when the notion of solidarity has gone out of fashion, the idea of paying pension premiums (even if only by way of employer contributions) and not getting any pension or claim upon retirement, is difficult to accept. Since 1952 Dutch law has provided that an employee never loses the value of his or her accrued pension (vested interest).

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