SUMMARY

2013/26 What happened to Georgiev following the ECJ’s ruling? (BU)

<p>Bulgarian law allows for employment agreements with university professors who have reached the retirement age of 65 to be prolonged, subject to certain decisions of the academic authority, for a term between one and three years. Thus, in practice university professors may work up to the age of 68.</p><p>In 2010, the ECJ ruled that this statutory provision could be regarded as age discriminatory, but could be justifiable if the law pursues a legitimate aim and makes it possible to achieve that aim by appropriate and necessary means. The ECJ further noted that the Bulgarian courts have to determine whether those conditions are satisfied. In particular, the courts needed to address Mr Georgiev’s argument that there are insufficient young academics to replace retiring professors.</p>

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Facts

Readers may recall that in 2010 the ECJ delivered a ruling in the case of Vasil Georgiev.

Georgiev was a lecturer, later a professor in Engineering Technology, at Sofia Technical University. In 2006, when he reached the age of 65, his contract of employment was terminated by mutual consent. Following this termination Georgiev entered into a one-year employment contract, which was further extended twice for additional one year periods until Georgiev reached the age of 68. In 2009 Georgiev brought two actions before the regional court in the city of Plovdiv. One action sought to reclassify his fixed-term contract as a contract of indefinite duration, the other challenged the decision to terminate his employment contract at the age of 68.

In rulings dated June and July 2009, the court referred three questions to the ECJ. Among other matters, the regional court in the city of Plovdiv inquired whether Framework Directive 2000/78 (the 'Directive') precludes application of national legislation under which university professors who have reached the age of 68 should retire. The other question posed was whether the Directive precludes application of national law requirements providing that university professors who have reached the age of 65 are prohibited to enter into indefinite employment contracts, and, if so, whether such national legislation could be disregarded.

The ECJ delivered its judgment on 18 November 2010 (joined cases 250 and 268/09). It established that compulsory retirement at the age of 68 and the imposition of a fixed-term contract beyond the age of 65 both cause employees to be treated less favourably on the grounds of age, as defined in Article 2 of the Directive. The question to be addressed, therefore, was whether that differential treatment was objectively justified as allowed by Article 6 of the Directive. That question broke down into two sub-questions: (i) did the difference of treatment have a legitimate aim and, if so, (ii) were the means of achieving that aim appropriate and necessary?

It was not clear from the facts at the ECJ's disposal what the Bulgarian legislator's aim was at the time it introduced the provisions regarding compulsory retirement of professors at the age of 68 or the special treatment of their employment beyond the age of 65 (Paragraph 11 of the transitional and concluding provisions of the Law on Higher Education, hereafter 'Paragraph 11'). The ECJ stated that it was up to the Bulgarian courts to determine the legislator's aim. However, the ECJ did state that if the aim was to allocate the posts for professors in the best

possible way between the generations, in particular by appointing young professors, or if it was to achieve a mix of generations to promote an exchange of experiences and innovation with a view to enhancing the quality of teaching and research, then that was a legitimate aim. On the other hand, if it was true, as submitted by Georgiev, that the average age of university professors in Bulgaria was 58 because young people were not interested in pursuing careers as professors, then such aims would not be aligned to the reality of the job market.

The ECJ held:

"Directive 2000/78 must be interpreted as meaning that it does not preclude national legislation […] under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked *inter alia* to employment and job market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it **possible to achieve that aim** by appropriate and necessary means, it is for the national court to determine whether those conditions are satisfied." [emphasis added]

Judgment

Following the ECJ's ruling, the court in Plovdiv resumed its hearing of the case. One of the issues it addressed was related to Georgiev's argument that there was a lack of interest from young academics in careers as professors and that, therefore, the aim of creating professorships for young academics could not be achieved by forcing older professors to retire. This argument was diminished by the fact that there were four lecturers in Georgiev's department, all aged around 40, who were being groomed for a professorship. The court further elaborated that the acquisition of a professorship should not be confused with the employment relationships with professors. While academic rank and knowledge are for life, the working abilities of an individual must be measured against the requirements of the labour market and as well as with the promotion of young researchers. Next, the court established that nobody had been appointed to replace Mr Georgiev. After his employment relationship with the university terminated, the university decided to reduce the number of personnel in the department, which reflected the needs of the university in its capacity as an employer. In addition, the court found that within Bulgaria there was currently no one who had reached the age of 68 and held the academic rank of a professor who was continuing to work on the basis of either a fixed or indefinite term employment contract.

In consideration of these arguments, the court concluded that the aim pursued by Paragraph 11 was legitimate and that the means to achieve that aim were proportionate. The court therefore

dismissed Georgiev's claim. Georgiev brought appeal proceedings that are currently pending.

Comments from other jurisdictions

United Kingdom (Hazel Oliver): In the UK, we have recently had a similar situation, where an important age discrimination case was sent back to the original Employment Tribunal to consider justification of a particular retirement age. Under the Equality Act 2010, direct age discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

The long-running case of Seldon v Clarkson Wright and Jakes concerned a partner in a law firm who was compulsorily retired at the age of 65 under the firm's partnership deed. The firm accepted that this was direct age discrimination but argued that it could be justified as a proportionate means of achieving various legitimate aims. The aims accepted as legitimate by the employment tribunal were:

| ensuring associates were given the opportunity of partnership after a reasonable period;

| facilitating planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies would arise; and

| limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm.

The case was then appealed by Mr Seldon all the way to the Supreme Court, which ultimately concluded that Mr Seldon's appeal should be dismissed. It agreed with the decisions of the tribunal and the lower appeal courts that the law firm had identified legitimate aims which were capable of justifying compulsory retirement for partners. However, the case was then sent back to the original tribunal for it to consider whether a fixed age of 65 was a proportionate means of achieving these aims.

The tribunal has now reached its decision, and determined on the facts that a fixed retirement age of 65 was a proportionate means of achieving the aims of retention (by ensuring that associates had the opportunity of partnership), and facilitating planning. The firm had dropped the third aim of collegiality by this point.

In relation to retention, the tribunal noted that there was evidence that solicitors would not join firms if older partners had no definite retirement date, ambitious associates would see no retirement provision for partners as limiting their opportunities for advancement, and it was unlikely that associates simply threatening to leave would improve their prospects of promotion if there was no partner retirement age. These arguments are quite similar to those in the above case, where the issues relate to prospects for younger academics. The tribunal

also accepted that the retirement age was needed to enable the firm to plan when and where vacancies would arise.

The *Seldon* case is an interesting example of an organisation being able to justify a directly discriminatory retirement age. However, it does turn on its own facts. It also arose at a time when it was lawful to have a mandatory default retirement age of 65 for employees (which did not apply to partners). This default retirement age of 65 has now been abolished, and retirement of employees as well as partners at any age will be direct age discrimination. This may well make it more difficult for all organisations to show that retirement at a fixed age is proportionate, because the government no longer thinks it appropriate to set a default retirement age.

Subject: Age discrimination, justification

Parties: Vasil Ivanov Georgiev - v - Technicheski universitet, Sofia, filial Plovdiv

Court: Rayonen sad Plovdiv (District Court of Plovdiv)

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