

SUMMARY

## **ECJ 15 January 2019, C-258/17 (EB), Discrimination, Sexual orientation**

### ***E.B. – v – Versicherungsanstalt öffentlich Bediensteter BVA, Austrian case***

#### **Summary**

Article 2 of Council Directive 2000/78/EC applies after the expiry of the ultimate transposition date to the future effects of a final disciplinary decision, adopted before the entry into force of that Directive. In such a situation, the national court must review, with respect to the period starting on 3 December 2003, not the final disciplinary decision ordering the early retirement of the civil servant concerned, but the reduction in his pension entitlement, in order to calculate the amount he would have received in the absence of any discrimination on the grounds of sexual orientation.

#### **Legal background**

Framework Directive 2000/78/EC aims to combat discrimination as regards employment. According to Article 1, this includes discrimination on grounds of sexual orientation. Article 2 stipulates that direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation. Article 3 describes the scope of the Directive. It applies to both the public and private sectors in relation to *inter alia* employment and working conditions, including dismissals and pay. It does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes. The ultimate transposition date of the Directive was 2 December 2003.

#### **Facts**

In 1974, Mr B who was a police officer was sentenced to a suspended custodial sentence with a three-year probation period, for an attempted offence of same-sex indecency committed on

two minors. At the time, this form of homosexual indecency was a criminal offence, while comparable heterosexual or lesbian indecencies were not. In 1975, his employer put him on compulsory permanent retirement on a reduced pension, the deduction being set at 25%. This decision was not changed after proceedings and thus became final, effective from 1 April 1976.

In 2008, Mr B brought an action for the disciplinary sanctions to be discontinued. The subsequent proceedings went up to the *Verwaltungsgerichtshof* (Upper Administrative Court). To the extent relevant here, this Court noted that there could be an issue with the interpretation of the Framework Directive. When the disciplinary sanction had become final, it had not entered into force. However, after this had been the case, a comparable disciplinary sanction could no longer be imposed in Austria. It would no longer be possible to differentiate between homosexual indecency and heterosexual or lesbian indecency for the purposes of criminal law. While non-homosexual indecency probably still would have been punishable by a disciplinary sanction, this would have been significantly less severe.

The Court was uncertain what to do with the original disciplinary sanction and asked preliminary questions.

## **Questions**

Must Article 2 of Directive 2000/78 be interpreted as applying to the legal effects of a final disciplinary decision, adopted before the entry into force of that Directive, ordering the compulsory early retirement of a civil servant, accompanied by a reduction in his pension entitlement?

Must, in the light of the answer to the first question, and to what extent, Directive 2000/78 be interpreted as obliging the national court to review the legal effects of the final disciplinary decision ordering the early retirement of a civil servant, accompanied by a reduction in his pension entitlement?

## **Consideration**

### **First question**

First, it must be established whether the situation falls within the material scope of the Directive. As the pension is due by reason of the employment relationship between Mr B and his employer, it falls within the scope of employment and working conditions and, hence, comes within the material scope of Article 2.

Regarding the temporal scope, it is settled case law that a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become final under the old law, it does apply to their future effects, and to new legal situations. This is only different if the new rule is accompanied by transitional provisions. The decision at issue was made in 1975, which was long before 3 December 2003. The Directive therefore does not apply to payments made before that date. Only from that date, does the Directive bring the effects of the decision within the scope of EU law. As the Austrian Government continued payments after that date, the Directive applies to these payments (after 3 December 2003).

### **Second question**

The Austrian Government maintains that the ethical rules applicable to Mr B, which oblige civil servants to uphold the reputation of their profession within and outside their service, sanctioned in the same way homosexual and heterosexual persons who committed offences. Consequently, those rules did not result in any direct discrimination.

However, the referring court has stated that the disciplinary sanction in 1975 was essentially based on the fact that the misconduct was, at that time, a criminal offence which was punishable in case of homosexual indecency, while similar acts of heterosexual or lesbian indecency were not. The referring court also pointed out that, for that very reason, a sanction imposed for non-homosexual indecency would have been considerably less severe. This gives rise to direct discrimination for the purposes of Article 2(2)(a) of the Directive.

As the sanction became final before the entry into force of the Directive, it cannot be called into question by the Directive. Mr B therefore cannot rely on the Directive in order to have the courts take into account the professional career which he would have had if the sanction had not been imposed.

However, the pension payments continued after 3 December 2003. The Directive requires a review of the reduction of Mr B's pension entitlement from that date in order to end discrimination. The calculation must be made on the basis of the amount of the pension to which Mr B would have been entitled on account of his compulsory retirement from 1 April 1976.

In that regard, the referring court must examine the extent to which a civil servant who, at that time, infringed his ethical obligations in a way comparable to Mr B's infringement would have been subject to a disciplinary sanction if the male homosexual nature of that infringement had

been disregarded. Now the sanction imposed to non-homosexuals would have been significantly less severe in the absence of the elements constituting an offence, the court must determine if and what the sanction would be without discrimination on the grounds of sexual orientation, on the understanding that such reduction must, by definition, be less than 25%. The court must therefore assess the pension to be paid to Mr B from 3 December 2003.

### **Ruling**

Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as applying, after the expiry of the time limit for transposing that Directive, namely from 3 December 2003, to the future effects of a final disciplinary decision, adopted before the entry into force of that Directive, ordering the early retirement of a civil servant, accompanied by a reduction in his pension entitlement.

Directive 2000/78 must be interpreted as meaning that, in a situation such as that referred to in point 1 of the operative part of the present judgment, it obliges the national court to review, with respect to the period starting on 3 December 2003, not the final disciplinary decision ordering the early retirement of the civil servant concerned, but the reduction in his pension entitlement, in order to calculate the amount he would have received in the absence of any discrimination on the grounds of sexual orientation.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2019-01-15

**Case number:** C-258/17