

SUMMARY

## **ECJ 7 February 2019, case C-49/18 (Escribano Vindel), Age discrimination**

### ***Carlos Escribano Vindel – v – Ministerio de Justicia, Spanish case***

#### **Legal background**

Directive 2000/78 (Framework Directive) aims to combat discrimination in employment. It forbids both direct and indirect discrimination on grounds of age, although Article 6(1)(b) provides for exceptions in case of legitimate employment policy, labour market and vocational training objectives, provided that the measures are objectively and reasonably justified by that aim, and if the means of achieving are appropriate and necessary.

A Spanish law on the Judiciary classified judges in three different levels: (i) senior judges of the Supreme Court, (ii) senior judges and (iii) ordinary judges. Their salaries consist of a base salary and additional remuneration, the exact division between the two being different for each category.

#### **Facts**

Due to a budget deficit, in 2009, the Spanish government adopted a bill implying a salary cut for judges. This bill reduced all judges' base salary with 9.73%. Also, the additional remuneration was reduced, with 6% per annum for senior judges, and 5% for other judges. However, as the division between base salary and additional remuneration was different for each category, the lower categories were impacted more. Ordinary judges, who are in pay grade 5 saw a total reduction of 7.16% of their previous salary, senior judges in single-judge court (pay grade 4) saw a 6.64% reduction whereas senior judges in pay grade 1, already earning the most, only saw their total salaries reduced by 5.90%.

Mr Escribano Vindel, who was an ordinary judge in pay grade 4 claimed that these measures constituted different treatment on grounds of age. The referring court had asked the Spanish Constitutional Court whether this law breached the principle of equality. The Constitutional

Court declared that question inadmissible, as the members of the Spanish judiciary are not in an objectively comparable situation since they are grouped into separate categories and occupy different posts.

During the subsequent proceedings, Mr Escribano Vindel claimed that the measures amounted to indirect discrimination on grounds of age and/or length of service, as the judges in pay grade 5 – which is the entry point and contains the youngest judges with the shortest length of service – were impacted most. Accordingly, an apparently neutral provision would have a more negative impact on those who are younger and/or have a shorter length of service. The referring court was unsure about the interpretation of both the Framework Directive and the European Charter on the statute of judges and asked preliminary questions.

### **Questions**

Must Article 21 of the Charter and Article 2(1) and (2)(b) of Directive 2000/78 be interpreted as precluding national legislation, such as that at issue in the main proceedings, which established, in the context of general salary-reduction measures linked to the requirements of eliminating an excessive budget deficit, different percentage reductions for the basic salary and the additional remuneration of members of the judiciary, which, according to the referring court, has entailed greater percentage reductions for those members of the judiciary on the two lower pay grades than for those on a higher pay grade, when the former receive a lower salary, are generally younger and generally have a shorter length of service than the latter? Must the second subparagraph of Article 19(1) TEU be interpreted as meaning that the principle of judicial independence precludes the application to the applicant in the main proceedings of national legislation, such as that at issue in the main proceedings, which established, without regard to the nature of the duties performed, length of service or the importance of the tasks performed, in the context of general salary-reduction measures linked to the requirements of eliminating an excessive budget deficit, different percentage reductions for the basic salary and the additional remuneration of members of the judiciary, which, according to the referring court, has entailed greater percentage salary reductions for those members of the judiciary on two lower pay grades than those on a higher pay grade, when the former are paid less than the latter?

### **Consideration**

#### **First question**

The prohibition of discrimination based on, inter alia, age is incorporated in Article 21 of the Charter, which has the same legal status as the treaties. That prohibition has been given

specific expression by Directive 2000/78 in the field of employment and occupation. Pay conditions for civil servants, including judges, fall within the scope of that directive.

In order to determine whether there has been indirect discrimination, it is necessary to examine whether an employee is treated less favourably than another in a comparable situation. The referring court has not specified Mr Escribano Vindel's age or identified a person in a comparable situation. The referring court has not identified any specific age group that is treated less favourably but merely notes that, on average, the members of the judiciary on pay grade 5 are younger than the members of the judiciary on pay grades 4 and 1. In particular, a specific age gap between those groups has not been established. The Spanish government has put forward that the only age limit in the judiciary is the retirement age and that members can stay in their category (e.g. remain an ordinary judge) if they want. The referring court must verify whether judges on those pay grades are in specific age groups.

As regards the requirement that situations be comparable, they do not have to be identical but must be comparable, which must be determined in a specific and concrete manner in the light of the benefit concerned (C-143/16, *Abercrombie & Fitch Italia*). Such is to be verified by the court.

That being so, it is clear that it is not disputed that the difference in treatment results from (i) the lesser reduction in the additional remuneration of some members of the judiciary, and (ii) the fact that base salary and additional remuneration account for different proportions of the total salary, according to the pay grade. In that context, the Spanish Government and the European Commission state that additional remuneration include a length-of-service bonus, an assignment allowance and special allowances. Since the additional remuneration varies according to objective factors which differentiate between the separate categories of members of the judiciary, those categories are not in comparable situations. Subject to verifications by the referring court, it does therefore not appear that the difference in treatment at issue concerns comparable situations or that it has an indirect link with age.

As regards any discrimination based on length of service, such grounds are absent in Directive 2000/78. If Article 21 of the Charter were to be applied outside Directive 2000/78, there has not been specified a person in a comparable situation. In light of the arguments of the Spanish government and the European Commission, it cannot be presumed that the different pay grades reflect specific categories of length of service.

## **Second question**

Article 19(1) provides that Member States must provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. This must be through courts

established by law, which are permanent, have compulsory jurisdiction, a procedure *inter partes*, apply rules of law and be independent (C-64/16, *Associação Sindical dos Juizes Portugueses*). The concept of independence presupposed that the body exercises its function wholly autonomously and is protected against external interventions or pressure.

In this case, the salary cuts were adopted because of the overriding need to remove the excessive budget deficit of Spain. Moreover, these were not only applied to members of the judiciary, but also to various public office holders and employees performing duties in the public sector. Generally speaking, all members of the national civil service 'contributed' to decrease the deficit.

Secondly, in this case only the situation of Mr Escribano Vindel needs to be taken into account. In the context of the reference to Article 19(1) TEU, specific considerations in the method of establishing the salary reduction do not appear relevant. Last but not least, the order for reference contains no precise information regarding Mr Escribano Vindel's salary. The European Commission maintains that the level of remuneration still must be sufficient to protect his independence. However, this is for the referring court to verify. However, the circumstances do not suggest that the national legislation at issue gives rise to infringement of the principle of judicial independence.

## **Ruling**

Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1) and (2)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted, subject to the verifications to be made by the referring court, as not precluding national legislation, such as that at issue in the main proceedings, which established, in the context of general salary-reduction measures linked to the requirements of eliminating an excessive budget deficit, different percentage reductions for the basic salary and additional remuneration of members of the judiciary, which, according to the referring court has entailed greater percentage reductions for those members of the judiciary on two lower pay grades than those members of the judiciary on a higher pay grade, when the former receive a lower salary, are generally younger and generally have a shorter length of service than the latter.

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude the application to the applicant in the main proceedings of national legislation, such as that at issue in the main proceedings, which established, without regard to the nature of the duties performed, length of service or the importance of the tasks performed, in the context of general salary-reduction measures linked

to the requirements of eliminating an excessive budget deficit, different percentage reductions for the basic salary and additional remuneration of members of the judiciary, which, according to the referring court has entailed greater percentage salary reductions for those members of the judiciary on two lower pay grades than those members of the judiciary on a higher pay grade, when the former are paid less than the latter, provided that the level of remuneration received by the applicant in the main proceedings after application of the salary reduction at issue is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment, which is a matter for the referring court to ascertain.

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

**Verdict at:** 2019-02-07

**Case number:** C-49/18