

SUMMARY

2019/17 Non-discrimination based on gender in the employment relationship (RO)

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Legal background

According to Law no. 188/1999 regarding the status of civil servants, reaching the standard retirement age results in the employment relationship being terminated by operation of law. Law no. 188/1999 is supplemented by Law no. 263/2010 regarding the unitary public pension system and Law no. 53/2003 regarding the Labour Code (the 'Labour Code'). The standard retirement age for women is 63 years of age and for men it is 65 years of age, as per the provisions of Law no. 263/2010. At the time, the applicable legislation did not allow the employment contract previously concluded upon retirement to be maintained, although it was possible to enter into a new employment contract. The retirement age for men and women is thus different.

Facts

B.L. was a female civil servant employed in the General Regional Directorate of Public Finances of Iași (the 'Employer'). When she reached the age of 63, and on fulfilling the legal requirements for retirement (i.e. meeting the minimum contribution period), the Employer issued a decision regarding termination by operation of law of the employment relationship.

B.L. asserted that she was discriminated against on the basis of gender and thus asked the Iași Tribunal for annulment of the employment termination decision issued by the Employer, reinstatement into the previously public position and payment of salaries from the termination date until the effective reinstatement.

The Tribunal ruled in favour of B.L. and, among other matters, ordered the Employer to reinstate her into her previous position and to continue the employment relationship until she reached the age of 65 (the standard retirement age for men). The Tribunal identified a discrimination issue in the national legislation.

Following the Tribunal's ruling, the Employer appealed the judgment before the Court of Appeal of Iași – Department of Administrative and Fiscal Disputes (the 'Court of Appeal'), criticising its illegality.

Judgment

The Court of Appeal dismissed the appeal as being groundless and upheld the decision of the Tribunal. Although the Employer's decision (concerning retirement) was in accordance with the national applicable legal provisions (at the time of its issuance), it did not respect the European Union's provisions.

In substantiating its judgment, the Court of Appeal made reference to Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the 'Directive') which provides that direct or indirect discrimination is prohibited on grounds of gender in the public or private sectors in relation to employment and working conditions. The direct effect of the Directive is applicable to vertical relationships (citizen vs. state) and, thus, it is applicable in the case at hand.

For interpreting the provisions of the Directive, the Court of Appeal referred to the ECJ's rulings in similar cases, respectively:

Case C-356/09 (Kleist) which provides that national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitutes direct discrimination on the grounds of gender prohibited by that Directive.

Case C-614/11 (Kuso) which provides that termination by retirement of employment relationships differently depending on the gender of the worker constitutes direct discrimination prohibited by the Directive.

Case C-271/91 (Marshall) which provides that the Directive's provisions may also be invoked against a state authority acting as an employer. In addition, a general dismissal policy involving the dismissal of women on the basis only that they have reached the age entitling them to exercise their right to old-age pension and which is different for men under national law, constitutes discrimination on gender prohibited by the Directive.

Joined cases C-231/06 to C-233/06 (Jonkman) which provide that whenever national legislation is incompatible with Community law, the national court is required to take appropriate measures to restore the equal treatment without having to request or await its prior removal by the legislature. The national court must also apply the same arrangements to members of the disadvantaged group as those enjoyed by persons in the other category.

Conclusion: The Court of Appeal held that the decision to annul the employment termination decision was based on a violation of the Directive and ECJ jurisprudence. It held that the Tribunal correctly applied the principle of primacy of European Union law.

Commentary

The Court of Appeal has correctly identified discrimination on grounds of gender provided for by the national legal provisions. It is important to highlight that, in the context of discrimination on grounds of gender, the pieces of legislation listed above under 'Legal background' have subsequently been amended. Thereby:

Law no. 188/1999 was amended by introducing the possibility for the civil servant to address an application to the manager of the public institution/authority before fulfilling the conditions of old-age pension to continue the employment relationship. This amendment entered into force on 6 July 2018. However, the issue regarding discrimination on the basis of gender in the context of employment relationships of civil servants was not expressly addressed by these amendments.

The syntagma "standard retirement age" provided by article 56 align (1) letter c) of the Labour Code was interpreted by the Constitutional Court of Romania as being constitutional as long as it allows women to opt for terminating or continuing the employment contract until the standard retirement age set for men at that date in the legislation. The interpretation given by the Constitutional Court entered into force on 24 July 2018. Consequently, the Romanian Labour Code was amended by a Government Emergency Ordinance which entered into force on 14 November 2018, in order for the Labour Code to respect the Constitutional Court's interpretation as follows:

"The employment relationship terminates as: [...] on cumulative fulfilment of the conditions of

standard age and the minimum contribution period for retirement or, exceptionally, at the age of 65, for [n.n. women] employees who opt in writing to continue the execution of the employment contract within 60 calendar days prior to the fulfilment of the standard age and the minimum retirement contribution; [...] [emphasis added].

Comments from other jurisdictions

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The decision of the Court of Appeal is not surprising, even though the German jurisdiction has not directly dealt with gender discrimination due to different retirement ages for women and men in recent years. In Germany, the legislator already established an equal retirement age for men and women in 1992. In the recent past, the German courts only had to decide whether different age limits are permissible in relation to occupational pension schemes and thereby for drawing a company pension.

Nevertheless, the German courts have already ruled that different retirement ages for men and women in occupational pension schemes also lead to direct discrimination and is therefore illegal. This is not based on 2006/54/EC, but on Article 157 TFEU.

Hungary (Gabriella Ormai, György Bálint and Gergely Torma, Ormai és Társai CMS Cameron McKenna Nabarro Olswang LLP): It is an interesting case from the Hungarian employment law aspect as well. There is almost the same situation in Hungary with respect to direct discrimination based on gender and also in connection with the 'minimum contribution period'.

However, we can generally observe a slight difference concerning the means of legislation. According to the relevant Hungarian law, the age limit of the so-called old age pension is defined uniformly as 65 years of age. However, the relevant law enables women to retire before the age of 65, if the woman in question has at least 40 years of service, i.e. in practical terms: 40 years of employment. This rule clearly sets out a substantial difference based on gender relating to the eligibility to old age pension. The question arises whether the mentioned Hungarian legislation is in line with the relevant EU law.

Following amendments to the legislation, it is now possible to continue the employment relationship.

The cases mentioned in the Court of Appeal's judgment are pronounced by the ECJ in

interpretation of Directive 76/207/EEC, repealed by Directive 2006/54 applicable in the case. Taking into consideration that the article provided by Directive 76/207/EEC has corresponding provisions in Directive 2006/54, the ECJ's interpretation is maintained and may be applicable.

Subject: Gender Discrimination

Parties: B.L. – v – the General Regional Directorate of Public Finances of Iași in the name and on behalf of Finance County Administration of V

Court: Curtea de Apel Iași – Secția de Contencios Administrativ și Fiscal (Court of Appeal of Iași – Department of Administrative and Fiscal Disputes)

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