SUMMARY

ECJ 19 July 2017, case C-143/16 (Abercrombie & Fitch Italia Srl), Age discrimination

<p>A provision which authorises an employer to make an on-call contract with a worker of under 25 years of age and to dismiss that worker as soon as he or she reaches 25, pursues a legitimate aim of employment and labour market policy and the means to attain that objective were appropriate and necessary.</p>

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Facts

Mr Bordonaro was employed by Abercrombie from 14 December 2010 as a night warehouseman on an on-call, fixed-term employment contract. The contract provided that he must assist customers and operate a till. Mr Bordonaro worked at night four to five times per week for the first few months of his employment then, from 2011, between three and four times a week. The shifts were worked out for all the staff for each two-month period.

On 16 July 2012 – after realising that his name was no longer included in the work schedule and not having received any requests to carry out work – Mr Bordonaro contacted Abercrombie. By an email of 30 July 2012, the head HR informed him that his employment contract with Abercrombie had terminated on 26 July 2012 – his 25th birthday – and that the reason for his dismissal was that the age requirement was no longer satisfied. Abercrombie

argued that Article 34(2) of Legislative Decree No 276/2003 provided the legal basis for this. It states that: "an on-call employment contract may, in all circumstances, be concluded in respect of services provided by persons under 25 years of age or by workers over 45 years of age, including pensioners."

National proceedings

Mr Bordonaro brought an action before the District Court of Milan (Tribunale di Milano) seeking a ruling that his on-call, fixed-term contract and dismissal were unlawful as a result of age discrimination. The District Court of Milan declared his action inadmissible. Mr Bordonaro then appealed to the Court of Appeal in Milan (Corte d'appello di Milano), which, by judgment of 3 July 2014, held that there was an employment relationship of an unlimited duration and ordered Abercrombie to reinstate him in his post and to compensate him for the loss suffered. Abercrombie appealed on a point of law against this judgment to the Supreme Court of Cassation (Corte suprema di cassazione). Mr Bordonaro lodged a cross-appeal. The Supreme Court of Cassation (Corte suprema di cassazione) had doubts as to the compatibility of Article 34(2) of Legislative Decree No 276/2003 with Directive 2000/78 and the principle of non-discrimination on grounds of age and it therefore referred a question to the ECJ.

Question referred to the ICJ

Is the rule of national law set out in Article 34 of Legislative Decree No 276/2003, according to which an on-call employment contract may be concluded in respect of services provided by persons under 25 years of age, contrary to the principle of non-discrimination on grounds of age referred to in Directive 2000/78 and Article 21(1) of the Charter?

ECJ's findings

The concept of 'worker'

The first question was whether Mr Bordonaro classified as a 'worker' within the meaning of Article 45 TFEU. As he was employed on an on-call fixed-term employment contract and worked at night four to five times per week, and as from 2011, three or four times per week, the Court found it probable that Mr Bordonaro was a 'worker', but this was a matter for the national court to assess on the facts.

Age discrimination

The Court found that the situation of a worker dismissed simply because he has reached 25, creates a difference of treatment on grounds of age and is objectively comparable to that of

workers in other age categories. Therefore, it was necessary to examine whether the difference in treatment was justified.

Article 6(1) of the Directive provides that Member States may determine in which cases differences in treatment on grounds of age do not constitute discrimination, provided the differences are objectively and reasonably justified by a legitimate aim. This can include a legitimate employment policy, labour market or vocational training objective – and the means of achieving the aim are appropriate and necessary. Member States not only enjoy broad discretion in their choice to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (Schmitzer, C-530/13).

Legitimate aim

The Italian Government argued that the aim of the provision in question was to make the employment market more flexible and increase employment levels. According to the Italian Government, the fact that employers can make and terminate on-call contracts when a worker reaches 25 "in all circumstances", is intended to facilitate the entry of young people into the labour market. The aim of the provision is not to give young people stable access to the labour market, but merely to give them an initial opportunity to enter it.The Court noted that by Article 6(1) of the Directive, differences in treatment may include: "the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection."

Further, the encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social and employment policies, in particular where access by young people to a profession is involved (Fuchs and Köhler, C-159/10 and C-160/10). Similarly, the Court has held that the objective of giving access to young people to the labour market in order to promote their integration or ensure their protection can be regarded as legitimate for the purposes of Article 6(1) of the Directive (de Lange, C-548/15).

In view of these precedents, the Court decided that facilitating the recruitment of younger workers by increasing flexibility in staff management constituted a legitimate aim (see also Kücükdeveci, C-555/07).

Appropriate and necessary means

As regards the appropriateness of the Italian provision, the Court found that a measure

enabling employers to make flexible contracts can be considered appropriate, as this supports the overall flexibility of the labour market. Employers will find this less onerous and costly than the usual kind of contract and this should encourage them to respond favourably to job applications from young workers. The court felt that in tough economic times, it was preferable for workers under 25 to have access at some level to the labour market than to be unemployed. Therefore, it was reasonable for the Italian legislature to have adopted a provision such as Article 34(2) of Legislative Decree No 276/2003.

Ruling

Article 21 of the Charter of Fundamental Rights of the EU and Articles 2(1), 2(2)(a) and 6(1) of Council Directive 2000/78/EC must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

Creator: European Court of Justice (ECJ)
Verdict at: 2017-07-19
Case number: C-143/16 (Abercrombie & Fitch Italia Srl)