

Legal Seminar 2012 – “Equality for everyone: challenges ahead”

Recent case law of the CJEU

Thank you very much for inviting me to address this seminar. I am really sorry not to be able to be here in person but my recent eye surgery has made this impossible.

I want to examine **two things**. The **first** is the anti-discrimination cases which have come before the CJEU in recent times. To be more specific, I thought that I'd have a very quick look at those which have been decided since the beginning of 2011 – in other words, over just about the last 2 years. By my reckoning, there have been fourteen such cases – broadly speaking, there have been allegations of age discrimination in six of them, and allegations of sex discrimination in four; one case has been about sexual orientation discrimination, and allegations of racial or ethnic discrimination were made in three. It is noteworthy that, in the period under review, there have been no cases on religion or disability. As always, some of these decisions are of more interest and significance than others.

The first, Case C-236/09 *Test-Achats*, is an extremely important one about which much has been said and written. You probably know all about it so I won't spent too long on it. A Grand Chamber of the Court struck down Article 5(2) of the Directive forbidding sex discrimination in the provision of goods and services; the article appeared to permit the continued use of sex-specific actuarial factors in insurance. The action had been brought by a consumer protection body in Belgium which challenged the national law transposing Article 5(2) of the Directive. The Court held that the situation of men and women in relation to insurance is comparable and it repeated its often-quoted statement that the principle of equal treatment requires that comparable situations must not be treated differently. It went on to hold that Article 5(2), because it countenanced an indefinite permission to use sex-specific actuarial tables, breached the principle of equality, in particular as it is expressed in Articles 21 and 23 of the Charter of Fundamental Rights. This was notwithstanding that the Charter was not actually in legal force at the time the Directive was enacted, although the Court did point out that the Directive's Preamble expressly refers to these articles of the Charter. In a sense, this is no more than an application of the familiar rule that the institutions, in making EU legislation, may not breach the general principles of EU law. However, the real significance of the decision lies in the emphasis placed by the Court on the Charter and in its boldness in squaring up to the powerful insurance lobby.

Next came Case C-147/08 *Römer*. This concerned the exclusion of a gay registered partner from a supplementary pension payment which was available to married persons. A Grand Chamber of the Court followed its earlier judgment in Case C-267/06 *Maruko* and equated the meaning of “pay” for the purposes of the Framework Directive to its meaning for the purposes of Article 157 of the Treaty on equal pay; it added – unsurprisingly – that it made no difference that the payment was made under a public scheme, nor that recital 22 of the Preamble to the Directive preserves national laws on marital status.

Case C-391/09 *Runevic-Vardyn* was one of the very few cases to refer to the provisions of the Race Directive. The claim concerned the refusal by the Lithuanian authorities to use a person's national language of origin (in this case Polish) in documents of civil status. Was this discrimination on the

ground of racial or ethnic origin which was forbidden by the Directive? The Court held that the Directive is an expression of the principle of equality, recognised by the Charter, and that its scope therefore cannot be defined restrictively. Nevertheless, the recording of names on documents of civil status did not fall within the compass of the Directive because it did not constitute a “service”. Furthermore, the Court noted that the *travaux* to the Directive record that the Council refused to take into account an amendment proposed by the European Parliament whereby “the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions” would fall within the scope of the Directive. This decision of course reduces the impact of the Race Directive in an important way.

Case C-310/10 *Agafiei* did not get very far. It concerned discrimination under Romanian law on the basis of the socio-professional category to which a person belonged or on the basis of their place of work. The Court explained that these grounds are not covered by either the Race or the Framework Directives. And it repeated what it had said in Case C-303/06 *Coleman*, namely that the grounds enumerated in the Directives are listed “exhaustively”.

In Case C-177/10 *Rosado Santana* the Court held that the Directive on Fixed-Term Work applies to a state’s civil servants and it reiterated a number of technical points it had established in earlier cases about the meaning and effect of various provisions of this Directive.

Case C-297 & 298/10 *Hennigs and Mai* concerned complicated rules relating to pay banding established by collective agreement in the Land of Berlin. These bands were linked to age and the claimants alleged that they resulted in discrimination on the ground of age against younger employees, contrary to both the Framework Directive and Article 21 of the Charter. The Court accepted that the system did result in age discrimination because employees in comparable positions received different amounts of pay based simply on the fact of their different ages. The question then became: could such discrimination be justified, pursuant to Article 6(1) of the Framework Directive? And did it make any difference that the rules were contained in a collective agreement? The Court held that of course the social partners were bound by the Directive. Nevertheless, they might utilise the Article 6 defence in the same way as the Member States. In other words, they enjoy what the Court calls “a broad discretion” in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving that aim. It added that as usual, in the context of that discretion, the difference of treatment on grounds of age must be appropriate and necessary for achieving that aim. This element was not found to be satisfied in this case. The employers argued that the banding system was intended to reward professional experience. However, it was not apt to achieve this result, since it also applied to people who were newly appointed at an older age. The Court observed that it would have better fulfilled the stated objective if pay had simply been tied to the number of years of professional experience of the individual employee. In the course of its judgment, the Court also rejected the argument that older workers generally have greater costs to bear than younger ones: younger workers, it pointed out, will often have substantial financial family responsibilities no longer borne by older ones. The Court also interestingly countenanced in this case the continuance of discrimination on a temporary and transitional basis where a discriminatory scheme is being replaced.

Case C-447/09 *Prigge* is an important decision by a Grand Chamber of the Court. It also involved age discrimination and the possible excuses for it. Lufthansa automatically terminated the contracts of its pilots when they reached the age of 60. The reason given for this obviously age discriminatory practice was essentially air traffic safety. The Court examined three defences offered by the Framework Directive. The first was Article 2(5) which permits action necessary for *inter alia* public security and the protection of health. However, both national and international legislation allowed pilots to continue until the age of 65, so the Lufthansa rule could not be said to be “necessary”. Article 4(1) allows discrimination where there is a “genuine and determining occupational requirement”. The Court reiterated that this defence has to be interpreted strictly. It was accepted that airline pilots must possess certain physical capabilities and that these do diminish with age. However, again the defence was being invoked disproportionately; the requirement was not “necessary” if the national and international legislation contemplated pilots as generally being capable until they reached the age of 65. That just left justification pursuant to Article 6(1) of the Framework Directive. Was the maintenance of air traffic safety a legitimate aim within the meaning of Article 6(1)? “No”, said the Court. This was because the legitimate aims listed in Article 6(1) are related to employment policy, the labour market and vocational training; these are social policy objectives. The aim of air traffic safety is not such an objective.

Case C-123/10 *Brachner* is a rare modern example of a case arising under the Directive of 1979 which forbids sex discrimination in social security. It is of interest because in it the Court takes a strong and purposive view of indirect discrimination and its justification.

Case C-32/11 *Tyrolean Airways* illustrates the limits placed upon age discrimination claims. A collective agreement provided that, for grading purposes which governed such things as pay, a person’s years of service with Tyrolean Airways would count, whereas years of service with other airlines would not. The Court held that this did not amount to age discrimination, albeit that it meant that in some individual cases those who had not worked for Tyrolean Airways would progress at a later age than those who had.

Case C-586/10 *Kűcűk* is a fixed-term work case. It contains a number of reflections on the part of the Court, not all of them particularly employee-friendly. Case C-109/09 *Kumpan* involved both fixed-term work and alleged age discrimination; again it concerns the technical details of the Directive on Fixed-Term Work but it takes a tone more sympathetic to the employee than does *Kűcűk*.

There have been two cases on the burden of proof in discrimination claims. Case C-104/10 *Kelly v University College, Dublin* was brought by a teacher who had applied unsuccessfully for a place on a vocational training course. He complained of sex discrimination, saying that he was better qualified than the least-qualified female candidate to be offered a place. The referring court asked the CJEU whether EU law entitles an applicant for vocational training, who believes himself to be the victim of discrimination, to information held by the course provider about the qualifications of the other applicants, in order to establish a *prima facie* case of discrimination. The Court answered this question in the negative; but it added – importantly – that it could not be ruled out that a refusal of disclosure by the defendant could risk compromising the achievement of the objective pursued by the directive and thus depriving the directive of its effectiveness. But this was a question for the national court to answer. The other burden of proof case is Case C-415/10 *Meister*. It concerned discrimination on the grounds of sex, age and ethnic origin which was alleged to have occurred

during a recruitment process. The case arose in Germany. Ms Meister was a 45 year old Russian national who held a Russian degree in systems engineering which was recognised in Germany. The defendant, a company called Speech Design, published a newspaper advertisement seeking an “experienced software developer”. Ms Meister applied on 5th October but was rejected without interview on the 11th. Soon afterwards a second advertisement with the same content as the first was published by Speech Design on the internet. On 19th October, Ms Meister again applied and was again rejected, without being invited for an interview and without being given any information as to why her application had been unsuccessful. There was nothing to suggest that Ms Meister’s qualifications were inadequate so she concluded that she must have been the victim of discrimination. The German court asked the CJEU whether, where an applicant possesses the qualifications for a post, EU law confers a right to know whether the employer has appointed another person and, if so, the criteria on which that appointment was made. The CJEU gave a slightly evasive answer and kicked the ball back into the national court’s court. It held, following *Kelly*, that although the Directives do not entitle people who think they have been discriminated against to information in order to prove a *prima facie* case, it is not “inconceivable” that a refusal of disclosure by the defendant could have the effect of undermining the useful effect of the law. It was therefore for the referring court to ensure that the refusal of disclosure by Speech Design was not liable to compromise the achievement of the objectives of the Directives. It must, in particular, said the Court, take account of all the circumstances in order to determine whether there was sufficient evidence for a finding that there was a *prima facie* case of discrimination. And among the facts which the Court said should be taken into account were that Speech Design had refused Ms Meister any access to the information that she sought. In addition, account could also be taken of the fact that Speech Design did not dispute that Ms Meister had satisfactory qualifications, as well as that they did not invite her for interview.

In Case C-141/11 *Hörnfeldt*, Mr Hörnfeldt was forced to retire from his job as a postal worker at the age of 67. This age limit was set by collective agreement, which made no mention of the reason for it. In addition, unlike in the *Palacios* case, there was no link between this automatic dismissal and any pension rights. This was plainly age discrimination, but could it be justified under Article 6(1) of the Framework Directive? The Court held that it was not fatal that the collective agreement and the surrounding Swedish law did not give a reason for the age limit of 67. The question was whether a legitimate objective for it could be derived from the circumstances. The Swedish government advanced various reasons for the age limit, such as avoiding the humiliation which would be caused to older workers who were individually dismissed and providing a balance in the workforce between older and younger workers. The Court concluded that it did not “appear unreasonable” to seek to achieve these aims and that the means adopted were appropriate and necessary. And it took notice of the fact that Mr Hörnfeldt was in fact entitled to a pension. A rather weak decision, you might think, which leaves a great deal of discretion in the hands of the Member State.

The **second thing** that I have been asked to do is to reflect on is the disproportionately large number of cases to come before the Court on the subject of age discrimination since the entry into force of the 2000 Directives. As we have seen, nearly half of the most recent decisions of the CJEU have been on the subject of age discrimination. And indeed this is generally true of all the case law on the 2000 Directives. Why might this be? It seems to me that this is probably quite a complex issue. First of all, given that these cases come to the CJEU as preliminary rulings, there is a random element in the whole process. Everything depends on what is being litigated in the courts and tribunals of the

Member States, and then on whether the local court feels minded to ask for a preliminary ruling. However, putting that random factor aside, it seems likely that there are two sides to this question. The first is why so many age discrimination cases are arising at all. And the second is why so relatively few cases are emerging on the other grounds.

Taking the first point first, why are there so many age claims arising in the first place? I would suggest that there are several reasons. Age is an easy criterion to prove. Where access to a benefit is explicitly linked to age, many evidentiary problems are averted; for instance, it is not necessary to make any sort of theoretical comparison with other groups of people. Even where the link is not so explicit, age is a quite visible attribute and employers are often quite upfront in their explanations of why they preferred to appoint a younger person. It has traditionally been quite acceptable to prefer the young to the old in the choice of employees. So again it will often not be hard to show that age discrimination has occurred. In addition, in an ageing population, and especially in recessionary times when pensions are frequently insufficient, it seems logical to assume that there are quite a lot of older people seeking to remain in the workforce. So the problem probably arises as a matter of fact relatively frequently. However, of course most of the age discrimination claims which have come before the CJEU have concerned, not simply the fact of discrimination, but rather the Article 6(1) defence of justification on the ground of proportionate labour market objectives. A great deal has been written and said about this notorious defence. Contrary to the usual rule, it is available in cases of direct as well as indirect discrimination. It is therefore the obvious choice for an employer whenever faced with an age discrimination claim. The details of the defence are not elaborated at all fully in the Directive. Although the Article gives examples of the sorts of situations in which it may be invoked, it does not really say very much at all about the substance of the defence. All it provides is that discrimination is negated “if, within the context of national law, [it is] objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”. This formulation leaves a lot to the imagination. What is meant by the word legitimate? And what precisely is a legitimate aim? Who is to judge legitimacy – is it enough if the employer believes it to be legitimate, or must it also be so in some objective sense? What are labour market objectives exactly? And how strict are the tests for “appropriate and necessary”? Arguably, the EU legislature was intellectually extremely lazy in enacting this provision because it does not seem to have thought through the essential matter of where the balance is to be drawn between the interest of the claimant and that of the employer. And of course almost all of the cases on this matter which have confronted the Court have concerned the application of this defence in practical situations. Time precludes a detailed examination of all these cases now. However, it can perhaps be observed that the Court has been relatively indulgent towards employers and Member States in their choice of legitimate labour market objectives; it has often proved content with the formulation that it was “not unreasonable” to behave in the way challenged by the claimant. The Court has however proved more rigorous in applying the test of proportionality – as we have just seen in *Hennigs and Mai* and in *Prigge* – and perhaps most markedly so where the discrimination has been against younger rather than older people. Be this as it may, it nevertheless remains true to say that the Court has had to work out its position *ab initio* in relation to these matters. The Directive does not dictate how it is to decide them and so the law remains inchoate and unclear until such time as it is actually analysed and applied in a specific case. It is therefore not surprising that this has happened relatively frequently.

The other side of the coin is why there are relatively few cases arising on the other grounds. This is probably not true of sex discrimination. There has of course always been a steady stream of sex discrimination claims and this continues to the present day, especially nowadays in relation to pregnancy and related issues. However, there has been only a handful decisions to date on race and ethnic origin, religion, sexual orientation, and disability. Why might this be? One explanation of course would be that there is no discrimination going on on these grounds. However, I strongly doubt that that is true! It seems much more likely that there are widespread instances of such discrimination but, for one reason or another, they are not being litigated; or perhaps they are being litigated but the decisions do not throw up issues of EU law so they are not being referred to the CJEU. Some of these matters might in fact be being better regulated by national law; I am thinking, for example, of race discrimination in the UK where the national law has a long pedigree now and has developed to a high level of sophistication. The relatively sparse provisions of the Race Directive may have little or nothing to add. The same may well be true of disability legislation in many Member States. However, a more sinister explanation could be that there is a general lack of knowledge on the part of the populations of the Member States of the provisions of EU law; this is likely to be most marked in those countries which have the sparsest domestic legislation on the subject and where claimants are therefore likely to be least well protected. All this is obviously little more than a matter of speculation; and perhaps these thoughts can be developed in discussion.