



Legal Seminar 26 November 2012 Equality Law for Everyone: Challenges Ahead

SUMMARY - WORKSHOP 1

Recent Court of Justice of the European Union Case Law

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Extract from the upcoming thematic report “The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC” written by Colm O’Cinneide, published by the European Network of Legal Experts in the Non-Discrimination Field.

Directive 2000/43/EC prohibits discrimination on the grounds of racial or ethnic origin in the spheres of employment and occupation, social protection, social advantages, education and access to and supply of goods and services, while Directive 2000/78/EC prohibits discrimination on the grounds of age, disability, religion or belief and sexual orientation in the sphere of employment and occupation.

States were required to implement Directive 2000/43/EC by 19 July 2003 and Directive 2000/78/EC by 2 December 2003, with the exception of the provisions of Directive 2000/78/EC relating to age and disability which states were obliged to implement by 2 December 2006 at the latest. Since then, an ever-growing number of cases have been referred to the Court of Justice of the European Union (the ‘CJEU’) from national courts via the preliminary reference procedure, whereby national courts can refer questions of EU law to the Court before resolving disputes which involve issues relating to the interpretation of European Union law or to the validity of European Union secondary law. In response, the Court has delivered a series of important judgments which have clarified how many of the key provisions of the Directives should be interpreted and applied. This report analyses the evolution and impact of this case-law, up to 30th August 2012.

The Court’s case-law has established that the 2000 Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment. This principle is derived from the well-established human right to equality and non-discrimination that exists in international human rights law and the constitutional traditions of European Union member states. It is also set out in Article 21 of the EU Charter of Fundamental Rights, which since December 2009 has the same legal status as the EU treaties. This is the lens through which the CJEU interprets the specific provisions of both Directives, which have been given a purposive interpretation in line with this approach.

This interpretative approach was set out initially in the Court’s very first judgment that concerned the 2000 Directives, *Mangold v Helm*. In this case, the Court ruled that

Directive 2000/78/EC should be read as setting out a 'general framework' of rules which gave specific expression to a general principle of equal treatment. In its subsequent cases of *Bartsch* and *Kücükdeveci*, the Court clarified and reaffirmed the approach it had adopted in *Mangold*. In *Kücükdeveci*, the Court confirmed that the principle of equal treatment should be the 'basis' for interpreting the provisions of the 2000 Directives, along with the fundamental right to non-discrimination set out in Article 21 of the Charter of Fundamental Rights. It reiterated this important point in its subsequent judgments in the cases of *Runevič-Vardyn* and *Hennings*.

Furthermore, the Court has made it clear that the Directives should not be read in a narrow or excessively formalistic manner. In the case of *Coleman*, the Court expressly rejected arguments that the provisions of Directive 2000/78/EC should be read as setting minimum standards. Instead, it interpreted the Directive as intended to provide effective and substantive protection against discrimination. The Court adopted a similar approach in the cases of *Firma Feryn* and *Meister*, while in the cases of *Petersen* and *Prigge* it concluded that exceptions to the principle of equal treatment set out in the 2000 Directives must be given a strict and narrow interpretation.

It also appears as if the provisions of the Directives also need to be interpreted with reference to the values of human dignity and personal autonomy. As Maduro AG stated in his opinion in the *Coleman* case, these are the values which animate the enabling provisions of Article 13 TEC (now Article 19 TFEU) which provide the legal basis for the 2000 Directives. Furthermore, the full range of rights protected by the EU Charter of Fundamental Rights must be taken into account in interpreting the Directives, as the Court confirmed in *Fuchs* and *Hennigs* where it took into account the right to engage in work set out in Article 15(1) of the Charter and the right to engage in collective bargaining set out in Article 28 respectively.

The other secondary objectives set out in the Recitals of the Directives are also relevant: in the case of *Fuchs*, the Court took account of the aim to promote diversity in the workforce as set out in Recital 25 of Directive 2000/78/EC. In addition, the case-law of the Court in the field of gender equality will also be a very significant point of reference: the *Mangold* and *Kücükdeveci* judgments have confirmed that the 2000 Directives and EU gender equality law share a common goal, namely to give expression to the general principle of equal treatment.

The case-law of the CJEU has clarified many of these issues relating to the scope of the 2000 Directives. In its judgments, it has consistently given the Directives an expansive and purposive interpretation, as illustrated in particular by its decisions in the important cases of *Palacios de la Villa*, *Maruko* and *Römer*. In *Palacios de la Villa*, the Court held that national rules governing retirement ages came within the scope of Directive 2000/78/EC as they affected the employment relationship between employers and workers. In *Maruko* and *Römer*, the Court concluded that national rules denying same-sex life partners benefits which were paid to spouses came within the scope of Directive 2000/78/EC: states retained full competency to

determine marital status, but had to exercise this competency in a manner that was compatible with their obligation not to discriminate.

However, in *Runevič-Vardyn*, the Court held that the scope of Directive 2000/43/EC did not extend to cover the performance of public functions which could not be construed as involving the provision of a service. This is a significant limitation, which may generate problems in the future as defining what does or does not constitute a 'service' can be difficult. In *Chacón Navas*, the Court has also confirmed that the scope of the 2000 Directives only extends to cover the grounds set out in Article 13 TEU (now Article 19 TFEU): the Directives give effect to the principle of equal treatment within these parameters, but not beyond. This meant that 'sickness' does not constitute a regulated ground of discrimination in EU law.

The Court's case-law has clarified how many of the operative provisions of both the 2000 Directives should be interpreted and applied. In so doing, it has consistently interpreted the text of the Directives as intended to give expression to the principle of equal treatment, in line with its general interpretative approach outlined above.

The prohibition on direct discrimination contained in the 2000 Directives has been interpreted in a similar manner as the equivalent provisions of the gender equality directives. Thus, in *Maruko* and *Römer*, the Court concluded that, if states had established a same-sex life partnership scheme, then a refusal to pay benefits to life partners that would be available to spouses would constitute direct discrimination on the grounds of sexual orientation, if life partners and spouses were in a comparable situation for the purposes of the benefit in question. Its reasoning in these cases followed its approach in pregnancy discrimination cases such as *Dekker*.

In *Firma Feryn*, the Court gave effect to the prohibition on direct discrimination in a manner that ensured it gave effective protection against race discrimination, by concluding that public statements by an employer that he would not hire persons of a particular ethnic origin were directly discriminatory. It adopted a similar approach in *Coleman*, where it held that it would constitute direct discrimination if an employee was subject to less favourable treatment based on their association with another person, in this case their disabled child. This important judgment has established that 'discrimination by association' comes within the scope of the 2000 Directives.

Few preliminary references so far have concerned the indirect discrimination provisions of the 2000 Directives. However, the Court has made clear that it will again adopt a similar approach in applying these provisions as it does in applying the prohibition on indirect discrimination set out in the gender equality directives. In the case of *Tyrolean Airways*, it also clarified that a difference of treatment must clearly differentiate between different categories of person on the basis of a non-discrimination ground before a claim for indirect discrimination could arise.

The Court has not yet had the opportunity to develop a substantial jurisprudence on the question of what will constitute harassment under the 2000 Directives, or to

clarify their provisions which regulate issues such as positive action, victimisation, or social dialogue. Furthermore, its case-load has been dominated by age discrimination cases: it has received few references that relate to the other grounds, and none of as 30 August 2012 that raise issues concerning religious discrimination.

However, the flow of age discrimination references has ensured that the Court's case-law in this field has developed quickly. In its case-law, the CJEU has made it clear that age distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of the Directive. Furthermore, the Court concluded in *Prigge* and *Fuchs* that the use of age distinctions can only be objectively justified under Article 6(1) if they are intended to give effect to social policy objectives: budgetary considerations or cost reduction cannot by themselves qualify as a legitimate aim.

In its judgment in *Age Concern*, the Court also emphasised that 'Article 6(1) imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification'. In the cases of *Wolf* and *Prigge*, the Court also concluded that age limits which are justified on the basis that they are necessary to ensure effective performance of a job or to protect the public must be shown to be clearly appropriate and necessary, in line with the 'genuine occupational requirement' provisions of Article 4(1) of Directive 2000/78/EC.

The case-law of the Court has thus ensured that strong protection now exists in EU law against age discrimination in employment and occupation. However, the Court has also taken account of the specific nature of the age ground. It has given member states and employers some room for manoeuvre in cases such as *Palacios de la Villa*, *Age Concern*, *Rosenbladt*, *Georgiev*, *Fuchs* and *Hörnfeldt*, especially when it comes to measures regulating retirement age and other elements of employment policy which are designed to ensure 'inter-generational equity' in the labour market.

The Court's case-law has also provided some useful clarification as to what member states must do to comply with their obligations under Article 15 of 2000/43/EC and Article 17 of Directive 2000/78/EC, which require that sanctions against discrimination must be 'effective, proportionate and dissuasive'. In *Bulicke*, the Court accepted that member states can determine what procedural rules apply in discrimination cases, as long as they complied with the 'principle of equivalence', the 'principle of effectiveness' and the 'principle of non-regression'. In *Coleman*, *Firma Feryn* and *Meister*, the Court also provided clarification as to what type of evidence could establish a presumption of discrimination and thus shift the burden of proof as required by both the 2000 Directives.

The CJEU's case-law on the 2000 Directives has already brought about significant changes in national law across Europe. The manner in which the Court has interpreted the Directives has also begun to influence how national legislatures, courts and equality bodies approach issues relating to equality and non-

discrimination. This is illustrated by a number of case studies, which show how the Court's jurisprudence is influencing the approach of national authorities.

However, it appears that different aspects of the Court's case-law are impacting on national legal systems in different ways. This is illustrated by two detailed case-studies of how the jurisprudence of the Court has influenced legal developments in the UK and Germany. In Germany, the Court's jurisprudence has generated academic and political controversy, encouraged national courts to refer an unusually high volume of age discrimination cases to the CJEU and resulted in substantial revisions being made to legislation and collective agreements. In the UK its impact has been more incremental, and national courts have not felt it necessary to make many references to Luxembourg.

Nevertheless, both these case studies also make it clear that the UK and German courts are closely following and applying the jurisprudence of the CJEU. Both the German and the UK courts now regularly take account of the Court's judgments in resolving discrimination claims. Furthermore, the Court's decisions have resulted in legislative reform and encouraged the expansion of judicial protection against discrimination in both states.

In general, the case-law of the Court has had a considerable impact across Europe. So far, this impact has mainly been felt in those areas where the Court's case-law is most developed, specifically the areas of age discrimination and sexual orientation discrimination linked to partnership benefits. As more cases are referred to the Court and its case-law expands in scope, it is likely that the influence of its jurisprudence will continue to grow.

The pattern of references it has received has meant that the Court's jurisprudence is more developed in some areas than in others. In particular, the high volume of references concerning age discrimination has allowed the Court to develop a substantial case-law in this area. However, the number of age-related references has far outnumbered those received for all the other grounds put together. This means that the Court's case-law in respect of the other grounds is less developed than it is for age.

Age discrimination is a new and complex area of law, which may along with specific national factors explain why so many age cases have reached the CJEU. However, it is perhaps surprising how few cases have been referred to the Court in respect of the other grounds covered by the 2000 Directives. This may reflect the fact that many national legal systems are still assimilating the provisions of the Directives. It may also be attributable to reluctance on the part of national courts to refer issues to the CJEU, which might be based on a variety of different factors.

It remains to be seen whether these trends will change over time. However, evidence exists that national courts across the EU are deciding an ever-growing number of discrimination cases. Many of these cases involve issues related to reasonable

accommodation, positive action, harassment, multiple discrimination and other complex aspects of discrimination law and policy. As a result, it is likely that the CJEU will be called upon in the near future to address a wider range of cases than has been the case so far.

It is difficult to predict when if ever any of these issues will become the subject of further references to the Court. However, it is likely that future cases will be adjudicated in line with the general interpretative approach that the Court was already set out in detail in its case-law on the 2000 Directives.

In conclusion, the Court has delivered a series of important judgments which have clarified how many of the key provisions of the Directives should be interpreted and applied. In particular, the Court has made clear that the Directives are to be interpreted as giving expression to a fundamental principle of EU law. This approach runs through all the Court's case-law thus far that concerns the provisions of the 2000 Directives, and is likely to shape how its jurisprudence develops in the future.