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NEWS REPORT

Country:	Cyprus
Title:	The Supreme Court rules that age seniority as a criterion for promotion is a “fair and objective regulation”.
Date:	28 May 2015
Expert:	Corina Demetriou
Context	
Issue at stake:	The Supreme Court rejects an appeal against a trial court decision which had found that age seniority as a criterion for promotion amounts to discrimination
Ground of discrimination:	Age
Source:	Decision of the Supreme Court in its appeal jurisdiction (Charis Christodoulidou v Republic of Cyprus through the Public Service Committee, Case No. 12/10, 3 April 2015)
Field:	Employment
Applicable law:	Law on Equal Treatment in Employment and Occupation N. 58(I)/2004; Law on Civil Service N.1/1990.

Content

Case: The appellant, a public servant, had applied for a promotion position but the Public Service Committee selected another candidate who was more senior in age. She appealed against this decision claiming that to the extent that it relied exclusively or primarily on age seniority it violated the Employment Equality Directive and the law transposing it.¹ The trial Court rejected the first instance application, on the ground that the Public Service Committee’s reference to age seniority does not appear to be the determining factor in selecting another candidate for promotion. The trial court added that taking age seniority into account is not only lawful but also sanctioned by the public service law² which provides that where two employees have the same date of appointment, seniority is determined on the basis of the employees’ age. The appellant appealed against the trial court’s decision, on the ground that the consideration of an employee’s biological age to determine selection for promotion between employees with the same date of appointment amounts to age discrimination which violates the Directive. Citing article 267 of the Treaty for the Functioning of the European Union, the appellant requested a preliminary referral to the CJEU of the following two questions:

- Can articles 1 and 2(2), 3 and 6(1) of the Directive be interpreted as permitting national legislation providing that promotion applications are examined on the basis of inter alia seniority and where this is the same amongst competing appellants then to be assessed on the basis of age?
- If the answer to the above question is affirmative, does the non promotion of a person who meets all requirements and has all qualifications exclusively on the ground of age amount to unlawful discrimination?

¹ Law on Equal Treatment in Employment and Occupation, N. 58(I)/2004.

² Law on Public Service No. 1/1990, Article 49.

The appellant relied on articles 1, 2, 3, 6 and 16 of the Directive which, combined with article 10 of the Treaty and article 21 of the EU Charter, prohibit all forms of discrimination, including discrimination in employment and occupation. The appeal further pointed out that given that the decision of the Supreme Court will be of the final instance, article 267 of the Treaty imposes a duty on the Court to refer these questions to the CJEU. The respondents contested the referral to the CJEU, on the ground that the issue is *acte claire* and does not require interpretation, because the opinion of the CJEU is not necessary for the Supreme Court to issue its decision and because the issue for referral is not clear, given the fact that it does not concern an interpretation of Union law but rather an examination of the compatibility of the Civil Service Law (N. 1/90, article 49) with the Directive, which is beyond the remit of the CJEU. In her appeal, the appellant relied on the Directive and on the CJEU rulings in *Kücükdeveci*, *Mangold*, *Palacios de la Villa* and *Age Concern England* to argue that:

- The first instance Court decision failed to examine whether the criterion of seniority in the sense of biological age which is foreseen by the Civil Service Law amounts to discrimination on the ground of age in violation of the Directive;
- The trial Court's conclusion that seniority in the sense of age was not the determining factor in the decision was wrong.

Decision of the Court: The Supreme Court rejected the appellant's request for referral to the CJEU, endorsing the respondents' arguments against such referral. On the merits of the appeal, the Court rejected both arguments of the appellant on the ground that the Directive permits member states a wide margin of appreciation regarding the measures to be adopted in the field of "social policy", provided the measures do not violate the principle of non-discrimination, citing the CJEU rulings in *Mangold*, *Palacios de la Villa* and *Age Concern England*. The Court concluded that the regulation of the issue of seniority by the Civil Service Law cannot be deemed as violating the principle of non-discrimination, since it does not place any particular civil servant or a group of civil servants to a disadvantageous position. The provision in the Civil Service Law is, according to the Court, a fair and objective regulation of the issue of seniority, applied to all cases of employees in the same position and in no way does it result in discrimination against the appellant.

Key points of analysis: Age seniority and promotions in the public service form the subject of several court decisions but this is the first case where the problem was identified as one of age discrimination. The decision leaves no room for any further appeal and legitimises a practice in the civil service that is of doubtful compatibility with the Directive.

Internet link source: The Court's decision is available at:

http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2015/3-201504-12-10.htm&qstring=%E4%E9%E1%EA%F1%E9%F3*%20and%202015