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NEWS REPORT

Country:	France
Title:	Consequences of the Leone Judgment
Date:	11 June 2015
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<u>Context</u>	
Issue at stake:	Indirect Discrimination in pension scheme
Ground of discrimination:	Sex
Source:	Decision of the <i>Conseil d'Etat</i> (French Council of State), 27 March 2015, Quintanel, no. 372426
Field:	Employment; equal pay; pension
Applicable law:	Article 157 TFEU, Case C-173/13 <i>Leone and Leone</i>

Content

Case development: The claimant in this case concerns a male professor, Mr Quitanel, who applied for early retirement with immediate payment of his pension as a father of three children (like in the case of *Leone*, C-173/13). His application was first refused by his administration (the Rector of the Academy of Limoges) by the decision of 20 December 2010, because he had not taken a career break to care for each of his children. The claimant brought legal proceedings against that decision, claiming that he had been the victim of discrimination on ground of sex, also requesting that the Administrative Tribunal refer the case to the CJEU.. His action was dismissed by the judgment of the Administrative Tribunal of Limoges on 4 July 2013. The case was then brought before the *Conseil d'Etat*.

The Leone Judgment

Following a reference for a preliminary ruling by the Administrative Court of Appeal of Lyon, the CJEU in July 2014 ruled that the French regulations on certain pension-related advantages granted to civil servants amount to indirect discrimination on the ground of sex (Case C-173/13 *Leone and Leone*).

Under French law, a civil servant who is the parent of at least three children may opt for early retirement with immediate payment of pension. This is subject to certain conditions, for instance the parent must have taken a career break of at least two consecutive months to care for each child. That career break may take the form of maternity leave, paternity leave, parental leave, or adoption leave. French law further provides for a service credit for pension purposes to be granted for each child in respect of whom such a career break has been taken. Those rules were adopted following the CJEU's judgment in *Griesmar*, in which the Court held that earlier French rules were directly discriminatory, as they granted the service credit only to female civil servants. They excluded male servants who were able to prove that they had brought up a child/children.

The decision of the Administrative Appeal Court of Lyon was expected after the CJEU *Leone* judgment, and it seems that the CJEU did not leave much space for the Appeal Court to *not* make a finding of indirect sex discrimination. However, until now the Appeal Court has remained silent. Other similar cases were also pending in front of the *Conseil d'Etat* and so the Appeal Court in *Leone* might have preferred to wait for the decision of the *Conseil d'Etat*.

Decision of the Court: The decision of the *Conseil d'Etat* does not strictly contradict the CJEU. In the *Leone* case, the CJEU states that 'it is ultimately for the national court, which has the sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent the legislative provision in question is justified by such an objective reason' (Paragraph 56 of the decision). The *Conseil d'Etat* uses the same terms and states that if the CJEU could provide guidance to enable the national court to give a judgment, it is exclusively for the national judge to determine whether and to what extent the national provisions could be justified by a legitimate social policy.

The *Conseil d'Etat* then proceeded to analyse the justification and the proportionality of the measure at stake. The French Government considers that the scheme reflects a legitimate aim as the purpose of the service credit in question is to compensate for the career-related disadvantages resulting from career breaks for reasons of birth, arrival in the home of an adoptive child, or the raising of children. The CJEU rejected this argument notably because maternity and adoption leave are accompanied by the maintenance of acquired pension and promotion rights. However, according to the *Conseil d'Etat*, even if women maintained their pension and promotion rights during maternity leave, the fact remains that women with one or more children progress slower in their careers than men, and their pensions are lower. Statistics are used in the decision to support the argument: without the service credit for pension the difference of the level of pensions between men and women will increase from 9.8 % to 12.7 % for one child; from 11.5 % to 17.3 % for two children; from 13.3 % to 19.3 % for three children; and from 23 % to 30 % for 4 children. The measure does not aim to prevent unequal treatment but to partially compensate the damage and harm to the careers of women.

Another important element in the decision is the fact that the measure at stake is temporary as it is applied in consideration of children born, adopted, or taken into the home before 1 January 2004. Thus the service credit scheme for pensions can be objectively justified by a legitimate social policy aim, and it is both appropriate and necessary to achieve that aim. The *Conseil d'Etat* then analysed the scheme for early retirement with immediate payment of pension. Following exactly the same reasoning, the *Conseil d'Etat* came to the same conclusions for the early retirement scheme.

Key points of analysis: Until now, the *Conseil d'Etat* generally avoided considering or referring to the applicability of indirect discrimination. In this regard, this decision is important as the *Conseil d'Etat* directly refers to this concept, and analyses it using the same terms as the CJEU. The decision does not formally contradict the decision of the CJEU, and it stays within the limits the CJEU defined.

Internet link source:

<http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&text=discrimination+indirecte&Page=1&querytype=simple&NbEltPerPage=4&Pluriels=True>