



Update on CJEU Equality Case Law

(December 2015-November 2016)

Brussels – 25 November 2016

Mathias Möschel – moschelm@ceu.edu

(Central European University - Budapest)

CJEU Judgments (1)

- Case C-407/14 of 17 December 2015 (Directive 2006/54/EC)
 - **Punitive damages**
 - 39. [A]lthough Article 18 of Directive 2006/54 seeks to impose compensation or reparation for the loss and damage sustained by the person injured, it follows from the wording of Article 25 of that directive that that article **grants Member States the option of adopting measures which seek to penalise discrimination on grounds of sex** in the form of compensation paid to the victim.
 - 40. Thus, Article 25 of Directive 2006/54 **allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex.**
 - 41. Likewise, Article 27(1) of Directive 2006/54 states that Member States **may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive.**

CJEU Judgments (2)

- **Case C-441/14 [GC] of 19 April 2016 (Directive 2000/78/EC)**
 - **Horizontal application of general principle of non-discrimination on the grounds of age**
- 1. The general principle prohibiting discrimination on grounds of age, as given concrete expression by Council Directive 2000/78/EC [...], must be interpreted as precluding, including in disputes between private persons, national legislation [...] which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.
- 2. EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.

CJEU Judgments (3)

- **Case C-122/15 of 2 June 2016 (Directive 2000/78/EC)**
 - **Age discrimination**
- **Article 3(1)(c) of Council Directive 2000/78/EC must be interpreted as meaning that national legislation [...] relating to a supplementary tax on pension income, does not fall within the substantive scope of that directive nor, therefore, is it covered by Article 21(1) of the Charter of Fundamental Rights of the European Union.**

CJEU Judgments (4)

- Case C-159/15 of 16 June 2016 (Directive 2000/78/EC)
 - Age discrimination
 - Articles 2(1), 2(2)(a) and 6(2) of Council Directive 2000/78/EC must be interpreted as not precluding national legislation [...] which excludes the taking into account of periods of apprenticeship and of employment completed by a civil servant before reaching the age of 18 for the purpose of granting a pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation seeks to guarantee, within a civil service retirement scheme, a uniform age for admission to that scheme and a uniform age for entitlement to the retirement benefits provided under that scheme.

CJEU Judgments (5)

- **C-335/15 of 14 July 2016 (Article 119/141 EC Treaty Case)
Directive 75/117/EEC + Directive 92/85/EEC)**
 - **Equal pay for equal work**

34. When a worker is absent from work because she is on maternity leave, the **minimum protection** required by Article 11(2) and (3) of Directive 92/85 does not [...] require that the person concerned should continue to receive full pay

41. [T]he mere fact that an ordinary magistrate was not entitled to the special judicial allowance during a period of compulsory maternity leave, unlike her male colleagues who were working, does not constitute discrimination on the grounds of sex [...]

=> No preclusion of national legislation, **provided that worker received during that period an income in an amount at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on the grounds connected with her state of health [...]**

CJEU Judgments (6)

- Case C-423/15 of 28 July 2016 (Directive 2000/78/EC + 2006/54/EC)
 - Abuse of rights

Article 3(1)(a) of Council Directive 2000/78/EC [...] and Article 14(1)(a) of Directive 2006/54/EC [...], must be interpreted as meaning that a situation in which a person who in making an application for a post does not seek to obtain that post but only seeks the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of ‘access to employment, to self-employment or to occupation’, within the meaning of those provisions, and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights.

CJEU Judgments (7)

- Case C-548/15 of 10 November 2016 (Directive 2000/78/EC)
 - Age discrimination
- 1. Article 3(1)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a taxation scheme, such as that at issue in the main proceedings, which provides that the tax treatment of vocational training costs incurred by a person differs depending on his age, comes within the material scope of that directive to the extent to which the scheme is designed to improve access to training for young people.
- 2. Article 6(1) of Directive 2000/78 must be interpreted as not precluding a taxation scheme, such as that at issue in the main proceedings, which allows persons who have not yet reached the age of 30 to deduct in full, under certain conditions, vocational training costs from their taxable income, whereas that right to deduct is restricted in the case of persons who have reached that age, in so far as, first, that scheme is objectively and reasonably justified by a legitimate objective relating to employment and labour market policy and, second, the means of attaining that objective are appropriate and necessary. It is for the national court to determine whether that is the case in the main proceedings.

CJEU Judgments (8)

- **Case C-258/15 [GC] of 15 November 2016 (Directive 2000/78/EC)**
 - **Age discrimination**
- **Maximum age limit for entry into regional police force in Basque country**
 - **Article 2(2) of Council Directive 2000/78/EC, read together with Article 4(1) of that directive, must be interpreted as not precluding legislation, such as that at issue in the main proceedings, which provides that candidates for posts as police officers who are to perform all the operational duties incumbent on police officers must be under 35 years of age.**

CJEU Judgments (9)

- **Case C-443/15 of 24 November 2016 (Directive 2000/78)**
 - **Age/sexual orientation discrimination**
 - AG Kokott had found indirect sexual orientation discrimination because it does not pass proportionality *strictu sensu* test and direct age discrimination which is not justified by Article 6(1) of Dir. 2000/78 + added details on intersectionality analysis
- CJEU found no discrimination mainly because Recital 22 on marital status held to apply for sexual orientation thus leaving issue under states' competence and because Article 6(2) exception applies to the issue of age discrimination

CJEU Judgments – « Honorable mention »

- **Case C-233/14 of 2 June 2016 (Artt. 18/20/21 TFEU + Directive 2004/38)**
 - **Nationality discrimination**
- Restriction of access to fares at preferential rate on public transport to resident NL students, if less than 30 years old and enrolled in full time accredited course (i.e. not to ERASMUS students or similar from other MS)
- BUT financial support for travel costs of students before they have acquired the rights of permanent residence falls within scope of derogation from principle of equal treatment under Art. 24(2) of Dir. 2004/38

Pending cases: AG Opinions (1) – « Honorable mention »

- **Case C-182/15 of 10 May 2016 (AG Bot – Artt. 18+ 21 TFEU)**
 - **Nationality Discrimination (Extradition case)**
 - Falls within scope of EU law because exercise of freedom of movement
- Treat same things same and different things differently except if different treatment justified by pursuit of legitimate objective
 - Here difference justified because of aim to prevent impunity because plaintiff would not be prosecuted in Latvia if no extradition to Russia
- Judicial authority needs to verify guarantees of Art. 19(2) of Charter

Pending cases: AG Opinions (2)

- **Case C -395/15 of 26 May 2016 (AG Bot – Directive 2000/78)**
 - **Disability discrimination**
- Whether work accident of kitchen aid which left him injured and his subsequent dismissal are discrimination on grounds of disability
- AG suggests broad interpretation of disability which might extend to situations that have been characterized as temporary at the national level

Pending cases: AG Opinions (3)

- **Case C-157/15 of 31 May 2016 (AG Kokott – Directive 2000/78)**
 - **Religious discrimination (Belgium)**

- A) Scope of Directive – case concerns private sector; national identity (Art. 4(2) TFEU)
« **does not limit the scope of Directive, but must be duly taken into account in the interpretation of the principle of equal treatment [...] and of the grounds of justification for any differences of treatment** » (para. 32)
- B) Concept of discrimination
- 1) Religion => YES
 - 2) Direct or **indirect discrimination**
- Seems to be direct discrimination and CJEU has adopted a broad understanding of this concept (paras. 42-44) but all those cases were dealing with immutable characteristics (para. 45).
 - Direct discrimination if such a ban proved to be based on stereotypes or prejudice in relation to one or more specific religions — or even simply in relation to religious beliefs generally (para. 55)
 - => **Indirect discrimination** because nothing indicates that an individual was treated less favourably on account of religion and mainly because the ban at issue applies to all visible religious symbols without distinction » (paras. 48-49)

Pending cases: AG Opinions (3) – cont'd

C) Justifications

1. Article 4(1) “Genuine and proportionate occupational requirement”

a) Genuine requirement to impose a certain dress code in company

b) Proportionate

i) Legitimate objective to give a certain image and to respect customer's preferences and wishes

ii) Appropriate to achieve goal of corporate policy of religious neutrality; necessary because no less intrusive way possible; and no undue prejudice to employees => intersectionality claim not even seen because “unlike sex, skin color, ethnic origin, sexual orientation, age or a person's disability, [...] religion is not so much an unalterable fact” (para. 116)

2. Article 2(5) “Rights and freedoms of others”

Possible relevance of freedom to conduct business but generally here inapplicable even though this freedom “may tolerate a derogation from the prohibition on discrimination” (para.135) but not applicable because rule adopted by company policy and not by statutory provision

Pending cases: AG Opinions (4)

- **Case C-188/15 of 13 July 2016 (AG Sharpston – Directive 2000/78)**
 - **Religious discrimination (France)**
- Difference between direct/indirect discrimination under ECHR and EU (paras. 58-67)
 - Limits analysis to private sector (paras. 78-81)
- 88. « Ms Bougnaoui's dismissal [...] amounted to **direct discrimination** against her on the basis of her religion or belief for the purposes of Article 2(2) of Directive 2000/78/EC »
- Analysis of derogations: Article 4(1) must be strictly interpreted just like Art.2(5) => do not apply here

Pending cases: AG Opinions (4) – cont'd

- If CJEU holds **indirect discrimination**, then justification and proportionality analysis
 - i) Legitimate aim: freedom of business vs. religious freedom
 - ii) Proportionality
- 121. “measures must not cause disadvantages which are disproportionate to the aims pursued even if those measures are appropriate and necessary for meeting legitimate objectives” (AG Kokott => ban only OK if proportionate to aim of interests of employer’s business)

Requests for Preliminary Rulings (1)

- **Case C-531/15 (lodged on 8 October 2015 – Directive 2006/54 - gender)**
- Are the rules on the burden of proof laid down in Article 19 of Directive 2006/54 applicable to the situation of risk during breastfeeding referred to in Article 26(4), in conjunction with Article 26(3), of the Law on the Prevention of Occupational Risks, which was adopted to transpose into Spanish law Article 5(3) of Council Directive 92/85?
- If question 1 is answered in the affirmative, can the existence of risks to breastfeeding when working as a nurse in a hospital accident and emergency department, established by means of a report issued by a doctor who is also the director of the accident and emergency department of the hospital where the worker is employed, be considered to be facts from which it may be presumed that there has been direct or indirect discrimination within the meaning of Article 19 of Directive 2006/54/EC?
- If question 2 is answered in the affirmative, can the fact that the job performed by the worker is included in the list of risk-free jobs drawn up by the employer after consulting the workers' representatives and the fact that the preventive medicine/prevention of occupational risks department of the hospital concerned has issued a declaration that the worker is fit for work, without those documents including any further information regarding how those conclusions were reached, be considered to prove, in every case and without possibility of challenge, that there has been no breach of the principle of equal treatment within the meaning of Article 19 of Directive 2006/54/EC?
- If question 2 is answered in the affirmative and question 3 is answered in the negative, which of the parties — the applicant worker or the defendant employer — has, in accordance with Article 19 of Directive 2006/54/EC, the burden of proving, once it has been established that performance of the job creates risks to the mother or the breast-fed child, (1) that the adjustment of working conditions or working hours is not feasible or that, despite such adjustment, the working conditions are liable to have an adverse effect on the health of the pregnant worker or breast-fed child (Article 26(2), in conjunction with Article 26(4), of the Law on the Prevention of Occupational Risks, which transposes Article 5(2) of Directive 92/85/EEC), and (2) that it is not technically or objectively feasible to move the worker to another job or that such a move cannot reasonably be required on substantiated grounds (Article 26(3), in conjunction with Article 26(4), of the Law on the Prevention of Occupational Risks, which transposes Article 5(3) of Directive 92/85/EEC)?

Requests for Preliminary Rulings (2)

- **Case C-406/15 (lodged on 24 July 2015 – Directive 2000/78 - disability)**
- Does Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities permit the Member States to provide by law for specific advance protection against dismissal only for persons with disabilities who are employees, and not for civil servants with the same disabilities?
 - Do Article 4 and the further provisions of Council Directive 2000/78/EC permit a national rule providing for specific protection against dismissal for persons with disabilities who are employees, but not for civil servants with the same disabilities?
- Does Article 7 of Directive 2000/78 permit persons with disabilities who are employees, but not civil servants with the same disabilities, to be afforded specific advance protection?
- If the first and third questions are answered in the negative: In light of the foregoing facts and circumstances of the present case, is it necessary in order to comply with the provisions of international and Community law that the specific advance protection against dismissal for persons with disabilities who are employees provided for by the national legislator also be applied to civil servants with the same disabilities?

Requests for Preliminary Rulings (3)

- **Case C-531/15 (lodged on 8 October 2015 – Directive 2006/54 - gender)**
- Are the rules on the burden of proof laid down in Article 19 of Directive 2006/54/EC applicable to the situation of risk during breastfeeding referred to in Article 26(4), in conjunction with Article 26(3), of the Law on the Prevention of Occupational Risks, which was adopted to transpose into Spanish law Article 5(3) of Directive 92/85/EEC?
- If question 1 is answered in the affirmative, can the existence of risks to breastfeeding when working as a nurse in a hospital accident and emergency department, established by means of a report issued by a doctor who is also the director of the accident and emergency department of the hospital where the worker is employed, be considered to be facts from which it may be presumed that there has been direct or indirect discrimination within the meaning of Article 19 of Directive 2006/54/EC?
- If question 2 is answered in the affirmative, can the fact that the job performed by the worker is included in the list of risk-free jobs drawn up by the employer after consulting the workers' representatives and the fact that the preventive medicine/prevention of occupational risks department of the hospital concerned has issued a declaration that the worker is fit for work, without those documents including any further information regarding how those conclusions were reached, be considered to prove, in every case and without possibility of challenge, that there has been no breach of the principle of equal treatment within the meaning of Article 19 of Directive 2006/54/EC?
- If question 2 is answered in the affirmative and question 3 is answered in the negative, which of the parties — the applicant worker or the defendant employer — has, in accordance with Article 19 of Directive 2006/54/EC, the burden of proving, once it has been established that performance of the job creates risks to the mother or the breast-fed child, (1) that the adjustment of working conditions or working hours is not feasible or that, despite such adjustment, the working conditions are liable to have an adverse effect on the health of the pregnant worker or breast-fed child (Article 26(2), in conjunction with Article 26(4), of the Law on the Prevention of Occupational Risks, which transposes Article 5(2) of Directive 92/85/EEC), and (2) that it is not technically or objectively feasible to move the worker to another job or that such a move cannot reasonably be required on substantiated grounds (Article 26(3), in conjunction with Article 26(4), of the Law on the Prevention of Occupational Risks, which transposes Article 5(3) of Directive 92/85/EEC)?

Requests for Preliminary Rulings (4)

- **Case C-668/15 (lodged on 14 December 2015 – Directive 2000/43 - race)**
 - Must the prohibition on direct discrimination on grounds of ethnic origin in Article 2(2)(a) of Dir. 2000/43 be interpreted as precluding a practice such as the one in the present case, by which persons in an equivalent situation who are born outside the Nordic countries, a Member State, Switzerland and Liechtenstein are treated less favourably than persons born in the Nordic countries, a Member State, Switzerland and Liechtenstein?
 - If the first question is answered in the negative: does such a practice thus give rise to indirect discrimination on grounds of ethnic origin within the meaning of Article 2(2)(b) of Dir. 2000/43 — unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary?
 - If the second question is answered in the affirmative, can such a practice in principle be justified as an appropriate and necessary means for safeguarding the enhanced customer due diligence measures provided for in Article 13 of Dir. 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing?