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NEWS REPORT

Country:	Norway
Title:	No compensation for age-discriminated helicopter pilots
Date:	17 February 2017
Expert:	Else Leona McClimans
Issue at stake:	Effectiveness of sanctions/ lack of compensation when age-discrimination has been established in a previous Supreme Court judgment
Ground of discrimination:	Age
Source:	National court decision, Supreme court judgment of 30 January, case number HR-2017-219-A
Field:	Employment
Applicable law:	Working Environment Act (WEA) section 13-9

Content

Case development:

Background: In 2012, the Supreme Court had found that 10 helicopter pilots who had been forced to resign when turning 60 years in the years 2006-2011, due to a clause in a collective agreement, had been discriminated against in contravention to the Working Environment Act (WEA) chapter 13.¹ The case was in its content similar to the facts in the ECJ case C-447/09 (*Prigge*), and the Supreme Court ordered that the pilots be allowed to return to their positions. The Supreme Court underlined in para 46 of the judgment that the standards of the Working Environment Act shall be interpreted to be compatible with the Employment Equality Directive.

Current case: The same pilots thus filed a new case before the court, in which they demanded compensation for the time they had been suspended from work because of age discrimination.

Both before the county court (TSTAV-2012-119531) and the appellate court (LG-2013-167255-1), the pilots' economical loss was compensated. The appellate court found that all pilots were entitled to compensation for economic loss, individually assessed, and in the range between € 18.430 up to € 436.577 (NOK 164.035 up to NOK 3.885.532). All pilots were each also entitled to compensation for non-monetary loss of € 1.124. (NOK 10.000.) The Supreme Court revoked these judgments.

Decision of the Court:

The Supreme Court came to the opposite decision. The Supreme court noted initially in the judgment that the terms/conditions to impose liability have to be fulfilled at the time of the occurrence of the actual action, that is in this case, when the claimants were

¹ Supreme Court, decision of 14. February in case Rt 2012-219.

refused to continue in their positions upon turning 60 years. The Court then discussed if it is the legal situation at the time of the judgment or the time of action forming the basis for constituting liability. They found that the starting point of the case was if the pilots had been subject to age discrimination in 2008, arguing that the 2012 judgment only assessed *if* the pilots had been subject to discrimination, not *when* the discrimination had taken place.

The Supreme Court analyses the 2012 judgment in light of the *Prigge* judgment, but concludes that the age-limit in 2008 was justified by security considerations, considerations that the Supreme Court in 2012, as a consequence of the legal development by the ECJ in the *Prigge* judgment had to disregard. The court then goes on to argue that compensation is a different legal result than a right to continue to hold a job, and that the right to compensation must be assessed at the time of the action, that is in 2008, before the *Prigge* judgment. They concluded that in 2008, there were no Supreme court judgments or other judgments that could give guidance on how collective agreements with low mandatory age limits would be interpreted, nor were there any practice from the ECJ that shed light on this. The Court stated that directive 2000/78/EU does not give clear legislative limits, and that as a result, the age limit of 60 years was not discriminatory in 2008. They further found that it is the subsequent legal development that leads the clause in the collective agreement to become discriminatory. Thus, the Supreme Court found that the 60-year limit in the collective agreement in 2008 could not give rise to a compensation claim.

The court was set with 5 supreme court judges. The judgment was a 3-2 decision, in which 3 judges were in favour of the result, 2 judges with dissenting opinions.

One of the dissenting judges found that the conditions for compensation set out in WEA § 13-9 is fulfilled if the pilots had been found to be age-discriminated, as was stated in this case. At the time of the judgment in 2012, compensation for economical loss could be awarded for fault-based liability, and as the dissenting judge found that the employer had not acted negligent, liability was not imposed. Although compensation for non-monetary loss in 2012 did not depend on fault-based liability, the dissenting judges found that the employers' actions were both justified and understandable. None of the judges found that the claimants should have been awarded compensation of any kind.

Key points of analysis:

The case does not discuss the requirement of article 17 of directive 2000/78/EU, which states that "*sanctions, which may comprise payment of compensation to the victim, must be effective, proportionate and dissuasive*". The focus of the judge is mainly on the Norwegian legal sources when arguing that the employer in 2008 did not have clear guideline as to whether the age limit of 60 years was discriminatory or not, as legal clarification was not provided until the Supreme Court judgment of 2012. The wide discretion granted to the member states within the framework of the directive, as provided in the *Rosenbladt* case (ECJ case C-45/09) para 76 is focused.

A point noted by one of the dissenting judges, but which resonates as an underlying thread in other parts of the judgment, is that the age limit of 60 years was negotiated between the trade unions, on demand from the pilot's union. Through their membership in the trade union, the pilots were bound by the agreement, and to a certain extent had also benefitted from it. As colleagues had resigned at age 60, they had an opportunity to advance to higher and better paid positions earlier than they would have been able to with a higher retirement age.

Internet link source:

In Norwegian:

<https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2017-219-a?q=HR-2017-219-A>
(accessed on 15. February 2017. The judgment will after 1 month be removed behind a pay-walled service).