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NEWS REPORT

Country:	Cyprus
Title:	The appeal court finds that the payment of different lump sums to persons retiring at different ages is legitimate
Date:	10 November 2017
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<u>Context</u>	
Issue at stake:	Whether a provision in the pensions law which provides for lower amounts to be paid to persons retiring at 61, compared to persons retiring at 63 falls within the scope of Directive 2000/78 and whether it can be justified by a legitimate aim
Ground of discrimination:	Age
Source:	Supreme Court of Cyprus, Appeal Jurisdiction, Michael Raftopoulos v. Republic of Cyprus, Appeal no. 3/2012, 10 October 2017
Field:	Employment, other (social provision)
Applicable law:	The Pensions Law 97(I)/2007, article 8(1); Law on equal treatment in employment and occupation N. 58(I)/2004; Council Directive 2000/78

Content

Case: The claimant had worked as a public servant from 1966 until 2007, whereupon he retired at the age of 61. He received a retirement lump sum calculated on the basis of a formula that included the age of retirement: the older the retiree, the larger the resulting amount. The multiplier for those retiring at the age of 63 was 15,5 whilst the multiplier for those retiring at 61 was 14,5.¹ He applied to the Court claiming that his retirement lump sum ought to have been calculated using the same formula as used for those retiring at 63, which would have yielded a higher amount. He argued that the legislative provision which set out the formula for calculating the lump sum was unconstitutional and contrary to Directive 2000/78 because it discriminated between persons on account of their age. The trial court rejected his claim stating that the scope of Directive 2000/78 did not extend to social insurance or social provision systems and did not apply to national provisions determining the age of retirement; and in order to satisfy his claim the Court would have to 'add' a new text in the law which it was not entitled to do, as that would infringe the principle of separation of powers. The trial court further found that the lump sum did not form part of the employee's insured remuneration because it related only to the period of service and the remuneration of the employee upon retirement and did not depend on contributions during service. The trial court rejected the unconstitutionality claim presented by the claimant, on the ground that declaring the

¹ Cyprus, Law on pensions (*Ο περί Συντάξεων Νόμος* N.97(I)/1997), article 8(1), available at www.cylaw.org/nomoi/enop/ind/1997_1_97/section-sc5bc6ff78-d3d3-4b41-adb3-cadfa594b8c6.html.

law unconstitutional would not deliver a positive result for the applicant because it was this very law which had created the right to the lump sum in the first place.

The claimant appealed the trial court decision arguing that the trial court had erred in its finding as regards the constitutionality of the law and that his claim did not refer to the entirety of the law but only to the formula for calculating the lump sum based on the age of retirement; and therefore deleting the references to age would not affect the entire law.

Decision of the Court: The appeal court rejected the claimant's argument, concluding that the deletion of the references to age in the legislative provision would amount to an amendment of the law on the part of the Court which would infringe the principle of separation of powers. The appeal court explained the rationale behind the differential treatment of persons retiring at 61 and at 62, with references to a state policy from 2005 when the low levels of unemployment at the time dictated that incentives should be given to public servants in order to remain in the public service past their retirement age so as to utilise to the maximum possible degree their experience and knowledge for the purpose of serving public interest. In order to justify the different treatment of civil servants retiring at different ages, the court cited a 1998 judicial precedent which established that differential treatment of dissimilar subjects does not amount to discrimination prohibited by law. Given that the claimant belonged to a different category than the civil servants retiring at 63, the differential treatment afforded to him was permissible.

The appeal court upheld the finding of the trial court as regards the applicability of Directive 2000/78. To this end, the Court relied on the Directive's preamble (paras. 13 and 14) which states that the Directive does not apply to social security and social protection schemes whose benefits are not treated as income or to national provisions laying down retirement ages. Reference was also made to article 6(2) of the Directive which entitles member states to use the criterion of age in order to calculate retirement benefits. Finally, the Court concluded that even if the claimant's case was found to fall within the scope of the Directive, it would fall within the exception of article 6(1) as being objectively and reasonably justified by a legitimate aim. It did not clarify what the legitimate aim was which was served by this differential treatment, although one may presume it is the 2005 policy of offering incentives to civil servants in order to remain in the service past their retirement.

Key points of analysis: Although the retirement lump sum may indeed be seen as falling under article 6(2) of the Directive, the Court's argument as regards the applicability of article 6(1) appears to be flawed for a number of reasons: first, the Court itself does not clarify what is the legitimate aim which is served by this provision. If one is to presume that the legitimate aim pursued through this provision is the encouragement of public servants to work past their retirement, perhaps a valid policy goal in 2005, this is at odds with the contemporary realities of high youth unemployed and the recent changes in the retirement ages of public servants. This type of legitimisation does not meet the standard set by the CJEU in the case of *Age Concern England* where it was clarified that:

Mere generalisations concerning the capacity of a specific measure to contribute to employment policy...objectives are not enough to show that the aim of that measure is capable of justifying derogation from the [non-discrimination] principle...The provision [of article 6(1)] is addressed to the Member States and imposes on them, notwithstanding their broad discretion in matters of social

*policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued.*²

The Court's position on differential treatment being lawful when the subjects are different infringes the very concept of equality and the need to protect vulnerable persons bearing one or more of the characteristics protected by law.

Finally, the reluctance of the Court to challenge a discriminatory law and the invocation of the principle of separation of powers highlights the inadequacy of the national provision transposing article 16 of the Directive which involves a referral from the Equality Body to the Attorney General, a further referral from the Attorney General to the competent Minister and then the compilation of a draft law to go through parliament.³

Internet link source:

http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2017/3-201710-3-123.htm&qstring=%EC%E9%F7%E1%EB%E1%EA%2A%20and%20%F1%E1%F6%F4%EF%F0%EF%F5%EB%EF%2A.

² CJEU Case C-388/07, The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=77505&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=148887>.

³ Cyprus, The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law [Ο Περί Καταπολέμησης Φυλετικών και άλλων μορφών Διακρίσεων Νόμος (Επίτροπος) Νόμος] No. 42(I)/ 2004, Article 39. Available at www.cylaw.org/nomoi/enop/non-ind/2004_1_42/full.html.