

UPDATE ON THE RECENT EQUALITY AND NON-DISCRIMINATION CASE-LAW OF THE CJEU

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OVERVIEW OF DEVELOPMENTS

- The CJEU's case-law during the last year (late 2017-late 2018) has featured fewer cases relating to the core elements of the EU non-discrimination directives than usual (including a merciful decrease in the volume of age discrimination cases coming before the Court).
- Instead, the Court's case-law has struck out into new directions, often involving the intersection of EU discrimination law with other elements of European law.
- In what follows, I try to give a brief summary of key cases.

Core Provisions

- Case C-409/16, *Kalliri* - police height requirements successfully challenged on the basis they indirectly discriminate on grounds of sex – demanding nature of objective justification test affirmed, including the ‘necessary’ standard.
- Case C-270/16, *Ruiz Conejero* - national legislation is precluded if it permits employers to dismiss a worker on the grounds of his intermittent absences from work where such absences are attributable to a disability suffered by that worker - unless the provisions of that legislation can be justified on the basis that they do not go beyond what is necessary to achieve the legitimate aim of combating absenteeism.
- Case C-312/17, *Bedi* – contextual analysis adopted of the situation of severely disabled workers as compared to non-disabled workers also entitled to a pension.

Core Provisions (continued)

- Case C-482/16, Stollwitzer - the CJEU concluded that the Directive did not preclude national legislation which, in order to end previous practices which had been tainted by age discrimination, had abolished a previous age limit of 18 before which experience was not taken into account and replaced it with a provision permitting only experience acquired with other undertakings operating in the same economic sector to be taken into account.
- In Case C-46/17, John, the Court concluded that national legislation was not precluded which made the postponement of the date of termination of employment of workers who have reached the legal qualifying age for a retirement pension subject to the consent of the employer, who was entitled to give such consent only for a (renewable) fixed time period.

‘Religious Ethos’

- Two very important judgments have shed light on the controversial ‘religious ethos’ exception set out in Article 4(2) of Directive 2000/78/EC: C-414/16 *Egenberger*, Judgment of 17 April 2018, and C-68/17 *IR v JQ*, Judgment of 11 September 2018.
- In *Egenberger*, the Court concluded that:
 - (i) organisations seeking to make use of the ‘religious ethos’ exception had to demonstrate such a requirement was necessary and proportionate by virtue of the specific nature of the activity or circumstances at issue and its potential impact on the maintenance of the ethos of the organisation concerned, and
 - (ii) that a subjective belief that this test was satisfied was not enough (contrary to the established German legal position).

Religious Ethos (continued)

- The Court in *Egenberger* went on to decide that this interpretation of Article 4(2) was not precluded by the protection of the right to religious freedom set out in Article 17 of the EU Charter of Fundamental Rights.
- Furthermore, the Court affirmed that the direct horizontal effect of the general principle of equal treatment – as affirmed in *Mangold* – also applied in such ‘religious ethos’ cases, and that the right to effective judicial remedies as recognised by Article 47 of the Charter formed part of this horizontally applicable principle.
- In the *IR* judgment, the Court adopted a similar line of reasoning, this time in relation to ‘religious ethos’ requirements applied in relation to specific management posts within the structure of an organisation with a distinct religious ethos.
- In particular, the Court clarified the application of the proportionality test in this context, emphasising the need to show a clear connection between the employment role in question and the maintenance of the ethos/autonomy of the religious organisation in question.

Case C-451/16, *MB v Secretary of State for Work and Pensions*, Judgment of 26 June 2018 (GC) – Gender Reassignment Requirements

- A refusal to grant a pension to person who has undergone a male-to-female change of gender and reached the retirement age for women, on the basis that the change of gender had not been legally recognised because the person in question had not had their previously existing marriage annulled, constituted direct discrimination on the grounds of sex.
- The Court emphasised that member states retained the authority to regulate the gender reassignment process and to define marital status – but that access to social security was subject to EU non-discrimination requirements.
- UK arguments that its legislation complied with the ECHR, as confirmed by the ECtHR, did not change the situation.
- Paragraphs 41-47 of the judgment have some interesting things to say about identifying relevant comparators.

Coman – Family Unification Rights of Same-Sex Spouses

- In Case C-673/16, *Coman*, Judgment of 5 June 2018, the CJEU concluded that:
 - (i) the provisions of the Citizens' Rights Directive 2004/38/EC must be interpreted as meaning that a same-sex spouse of a Union citizen enjoys the same derived residence rights as those enjoyed by other 'family members', even if the host state does not legally recognise same-sex marriage – and that
 - (ii) any such derived rights must not be subject to stricter conditions than those applied to other family members in line with Article 7 of Directive 2004/38/EC.
- Interesting (and controversial) – if perhaps a relatively straight-forward application of existing case-law?

Pregnant Workers – New Developments

- In Case C 103/16, *Porrás Guisado*, the CJEU concluded that the Pregnant Workers' Directive
 - (i) did not preclude national legislation permitting the dismissal of a pregnant worker as part of a collective redundancy measure;
 - (ii) did not require the provision of additional reasons to justify the redundancy other than those justifying the collective dismissal; and
 - (iii) did not require states to give pregnant or breastfeeding workers and recent parents priority status in relation to being either retained or redeployed before a collective redundancy (even though states were not precluded from introducing such a higher level of employment protection).
- In Case C-41/17, *González Castro*, the CJEU held that a failure to carry out safety assessments in relation to breastfeeding workers could constitute direct sex discrimination – thereby triggering the application of the burden of proof requirements

Future Issues

- See the interesting AG opinions already handed down in Case C-372/16, *Sahyouni*, and Case C-457/17, *Maniero*.
- *Egenberger/IR* and *Coman* were controversial, in different ways. Is the reach of EU law into terrain traditionally governed by national constitutional law and/or established legislative standards reflecting embedded cultural norms becoming too great?
- Note in this regard Bobek AG's Opinion in the forthcoming case of C-193/17, *Cresco Investigation v Achatzi*, which concerns Austrian legislation making Good Friday a paid public holiday for the members of four Christian churches only – and also note his suggestion post-*Egenberger* at [114]-[149] that the 'direct horizontal effect' of the equal treatment principle be reined in as it applies between private individuals/bodies.
- What about the CJEU's lurking problems in this field – such as the (terrible?) judgment in Case C-668/15, *Jyske Finans*, or its uncertain age case-law? Time will tell.