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FLASH REPORT

Country:	Greece
Title:	Less favourable retirement ages for male public servants constitutes direct discrimination
Date:	29 June 2020
Expert:	Panagiota Petroglou
<u>Context</u>	
Issue at stake:	Less favourable retirement age for male Greek public servants constitutes direct gender discrimination in pay – Levelling up
Grounds of discrimination:	Gender
Field of application:	Equal pay
Source:	National court decision
Applicable law:	Article 56 of the Code of Civil and Military Pensions (Presidential Decree 169/2007, OJ A 210/31.08.2007), as in force before its amendment (as of 01 January 2011) by Article 6(2b) Act 3865/2010 (OJ A 120/21.07.2010)

Content

Case: Article 56 (1),(2) of the Code of Civil and Military Pensions (Presidential Decree 169/2007, OJ A 210/31.08.2007) used to provide for civil servants of a certain category (those appointed within the period 1 January 1983 – 31 December 1992 or those with a minimum retirement service of 25 years until 31 December 2010) a retirement age that varied according to sex: for female civil servants with minor (under 18 years) children this was set at 50 years, and for female civil servants without minor children it was set at 58 years (to be accrued by 6 months for every calendar year until the age of 60 years). Whereas for male civil servants (irrespective of whether they had minor children within their care) the retirement age was set at 60 years (to be accrued by 6 months for every calendar year until the age of 65 years). Following the CJEU judgment *Commission v. Greece* C-559/07,¹ which found that said provisions infringe the principle of equal pay between men and women enshrined in Article 141 TEC, and the subsequent letter of warning of the European Commission of 29 January 2010 regarding the non-timely compliance of Greece with said CJEU judgment, the above provision was amended as of 1 January 2011 by Article 6(1-9) Act 3865/2010, OJ A 120/21.07.2010 with the aim to gradually equalise the retirement age of female and male civil servants (see the Explanatory Report of Act 3865/2010). However, according to the transitional provision of Article 6(11) Act 3865/2010 adopted for reasons of legal safety and the protection of trust, the amended provisions (including retirement age differentiated by sex) continued to apply to civil servants who have established a right to a pension until 31 December 2010.

¹ CJEU Case C-559/07 of 26 March 2009 *Commission of the European Communities v Hellenic Republic*, OJ C 113, 16.5.2009, p. 9–9.

A male civil servant who is a father of a minor child, the complainant, had reached the retirement age provided for women with minor children (50 years) but not the one provided for men (60 years) and satisfied the rest of the conditions of said provision (a minimum retirement service of 25 years until 31 December 2010) retired in 2014. He alleged direct discrimination in pay on the grounds of sex and claimed that the more favourable retirement age provided for female civil servants mothers of minor children should apply in his case as well. The Court of Audit by its judgment 790/2016 upheld the case. The Greek State lodged an appeal on points of law. The case was heard by the Full Session of the Court of Audit on 1 March 2017 and the judgment was issued on 4 March 2020, i.e. three years later(!).

Decision of the court: The Court of Audit by a strong majority (25 out of 32 judges) dismissed the appeal on points of law. It held that the more favourable retirement ages provided for female civil servants mothers of minor children (and the rest of female civil servants as well) compared to that provided for male civil servants constituted direct discrimination in pay on the ground of sex, breaching Article 141(2) TEC (now Article 157(2) TFEU) with regard to the material scope of which the national civil and military retirement pensions regime falls. According to the Court, such discrimination cannot be justified by reasons of general social or public interest or by reasons amounting to a greater need of protection of women in issues related to maternity, marriage or family or to purely biological differences that require the adoption of specific measures. Moreover, the provision in question cannot be considered as a positive action measure according to Article 141(4) TEC (now Article 157(4) TFEU) as it does not facilitate women to continue their professional activity nor does it redress problems faced by women in their professional career.

In view of the above, the Court found the impugned provision to be in breach of the principle of equality, as enshrined in the Greek Constitution and EU law. According to the Court as long as this unfavourable treatment persists to the detriment of male civil servants (i.e. for those who have established a right to pension up until 31 December 2010 -given that as of 1 January 2011 the retirement age of men and women has been equalised), the more favourable provision applying to female civil servants with minor children has to be extended to male civil servants with minor children as well (levelling-up).

A minority of four judges held that, although discriminatory, the impugned provision cannot be extended to men because this would constitute an intrusion of the judiciary in the powers of the legislature.

Three more dissenting judges held that the impugned provision constitutes a positive action measure in favour of women, falling under the scope of Article 116(2) of the Greek Constitution: it aims to counterbalance the disadvantages faced by women regarding their participation in the professional life in the past due to their long-lasting unfavourable socio-economic and legal position. In their opinion, levelling-up is not required by CJEU C-559/07 paragraph 26: the national judge, construing the impugned national provision in the light of EU law, is free to apply it to male civil servants if they are in a comparable situation, e.g. have the sole custody of the children. In any case, a relevant preliminary reference to the CJEU on the issue of levelling-up is deemed necessary. In addition to that, one out of these three dissenting judges found that the *rationae temporis* results of the levelling-up should be limited only to male civil servants with minor children whose cases were pending on 31 December 2010 when the impugned measure in favour of women was abolished. She also proposed that a relevant preliminary reference should be addressed to the CJEU.

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