European Anti-Discrimination Law: Balance and Perspectives

Petra Foubert, Hasselt University (Belgium)
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No general prohibition of discrimination in founding treaties

Still 2 specific instances of discrimination were prohibited:
- Discrimination on grounds of nationality (within scope of application of Treaties) – art. 18 TFEU
- Wage discrimination between men and women – art. 157 TFEU

Economic purpose: non-discrimination of employees (work-related)
Overview - Brief history of primary sources

➢ Extra legal basis (Amsterdam)
  • Art. 19(1) TFEU: EU can take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

➢ Charter of Fundamental Rights of the EU
  • Same legal value as the founding Treaties
  • But no extension of the competences of the EU
  • Title III devoted to ‘Equality’
Overview - Secondary EU law

Nationality

- Separate group of measures, apart from other forbidden grounds
- Framework of the internal market
- Many measures of secondary EU law
- Subsumed in wider notion of citizenship of the EU
- Not dealt with here
Non-discrimination on the basis of sex

- Recast Directive (2006/54/EC)
  - Equal opportunities and equal treatment of men and women in matters of employment and occupation
  - Recalls number of older directives
  - Some provisions based on CJEU case law

- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services
  - Scope (beyond employment): provision of goods and services available to the public
Non-discrimination on other grounds

- **Framework Directive (2000/78/EC)**
  - Religion/ belief, disability, age, sexual orientation
  - Proposal (2008) for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (going beyond employment)

  - Scope: employment, but also social protection, education, access to and supply of goods and services (housing)
Overview - Related secondary EU law

- Pregnant Workers Directive (92/85/EEC)
- Parental Leave Directive (2010/18/EU)
- Part-Time Workers Directive (97/81/EC)
- Directive on Fixed-term Employment (199/70/EC)
- Directive on Temporary Agency Work (2008/104/EC)
Overview – Case law

CJEU

- Great influence via preliminary rulings procedure
- Direct effect and supremacy
- Direct and indirect discrimination
- HR flavour?
Sophisticated and exciting recent cases

- Equal pay for equal work:
  - *Leone case* (C-173/13)

- Disability:
  - *Kaltoft case* (C-354/13) - opinion

- Age:
  - *Specht case* (Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12)
Equal pay for equal work

- Case law on equal pay is not abundant
  - Lack of information on pay
  - Problematic scope of comparison
  - Claimants’ lack of resources

- Recent cases:
  - Cases of indirect discrimination
  - Cases re. overtime pay for part-time and full-time workers
  - 1 very recent case re. an early retirement scheme with immediate payment of pension for French civil servants: Leone, 17 July 2014
Equal pay for equal work

Facts of Leone case

• Early retirement for civil servants who have 3 children and who have taken career breaks for each one of them
• Career break = maternity leave, paternity leave, adoption leave, parental leave, ...
• Mr. Leone: 3 children, but no career breaks
• Mr. and Ms. Leone: this is indirect discrimination on grounds of sex (Art. 157 TFEU) – biological mothers are automatically qualified
Reminder: Case C-366/99, *Griesmar*

- French pension scheme crediting an extra year of service to the record of female employees for each of their children
- **CJEU:**
  - i.e. directly discriminatory, inasmuch as it excludes male civil servants who are able to prove that they assumed the task of bringing up their children
  - No justification: this is no positive action, as scheme did nothing to offset disadvantages in women’s careers

French scheme has been changed to meet CJEU’s judgement
AG Jääskinen (*Leone*)

- No indirect discrimination
- As regards maternity leave, male and female workers are not in a comparable situation
- Even if indirectly discriminatory: these measures do offset disadvantages in women’s careers

Equal pay for equal work
CJEU *(Leone)*

- Did not follow AG
- As maternity leave included: much easier for women to meet the criteria than for men
- Justification?
  - Legitimate aim? Providing financial compensation for career-related disadvantages for employees who take time out to bring up their children
  - BUT: is the aim pursued in a consistent and systematic matter? CJEU makes some remarks ...
  - E.g.: service credit is also given to female civil servants who gave birth as a student, prior to recruitment ...
Pending case: *Kaltoft* (C-354/13)

Facts:
- Mr. Kaltoft is a childminder who is being made redundant
- He claims this was due to his obesity and advances this is discriminatory
  - I.e. contrary to a general prohibition in EU law covering all forms of discrimination in the labour market
  - I.e. contrary to the principle of non-discrimination on the basis of disability (Framework Directive)
Disability discrimination

➢ AG Jääskinen (*Kaltoft*), 17 July 2014

- General prohibition of discrimination in the labour market does not exist
  - No forbidden grounds (obesity) can be added to grounds of discrimination spelled out in the TFEU
    - *Mangold* cannot be of any use here
- Does obesity amount to disability?
- Definition of disability
  - Previous CJEU case law: *Chacón Navas, Ring and Skoebøe Werge, Coleman, ...*
  - Importance of UN Convention on the rights of persons with disabilities
Definition of disability:

• Long-term
• Physical/mental/psychological impairment
• Which in interaction with various barriers
• May hinder
• Full and effective participation in professional life
• On an equal basis with other workers

AG: severe obesity could probably meet this definition and amount to disability (origin of obesity is irrelevant)
Age discrimination

The CJEU is still seeking its way ... Which test for age discrimination?

Remarkable

- Art. 6 Framework Directive: specific possibility to justify differences of treatment on grounds of age
- General deference applicable to both direct (!) and indirect discrimination
- Differences must be: ‘objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.
Age discrimination

➢ Abundant CJEU case law
  • Art. 6 Framework Directive seems to be given wide interpretation
  • Re. automatic retirement: broad discretion given to MS
  • Intervention of social partners (collective bargaining) causes even greater deference by the CJEU

➢ Specht and others, 19 June 2014
  • Lock-step models of compensation
Age discrimination

➤ Facts of Specht

- Applicants are civil servants
- Recruited under old version of (German) Law on remuneration of civil servants: pay rise calculated on the basis of seniority (determined according to actual age)
- New version of Law on remuneration: pay rise calculated on the basis of experience (i.e. periods of service completed)
- Transitional system for civil servants hired under old system: reclassification based on previous pay
- Applicants claim direct age discrimination
Age discrimination

➢ CJEU

• Old system (step progression system) is based on seniority/age directly

• Justified? (Art. 6 Framework Directive)
  • Legitimate aim? Yes: rewarding experience
  • Are means to reach the aim appropriate? Yes: length of service goes hand in hand with experience
  • But: are the means necessary? No: initial step allocation is only linked to age

• Cfr. Case Hennigs and Mai, Joined Cases C-297/10 and 298/10
Age discrimination

• New system?
  ✓ Related to periods of service completed
  ✓ BUT: transitional system: basic pay determined on basis of previous pay, which depended on seniority
  ✓ So: transitional system perpetuates difference in treatment on the basis of age

• Justification? (Art. 6 Framework Directive)
  ✓ Legitimate aim? Yes: protection of acquired rights
  ✓ Means are appropriate? Yes: it prevented loss of income
  ✓ Means are necessary? CJEU compares costs for government with costs for civil servants to be reclassified. Means are proportionate!
Re. old system that is discriminatory: what should be the compensation?

- Interpretation in conformity with EU law is not possible
- Conflicting national law should be disapplied
- State liability is the only solution (Francovich, Joined Cases C-6/90 and 9/90). Conditions:
  - Infringed law must confer rights on individuals? Yes
  - Sufficiently serious beach? National court
  - Direct causal link between breach and damage? Probably yes
AG Bot in *Specht*?

- Transitional system cannot be justified
- Compensation?

  ✓ Only solution is (cfr. previous case law): allocating to civil servants who suffer discrimination the same step as that allocated to an older civil servant with equivalent professional experience

  ✓ *Francovich* would require to bring new proceedings