

EU Employment Law Practice

European Employment Report March 2009

ECJ developments

European Court rules on national compulsory retirement ages

The European Court of Justice (ECJ) has handed down its long-awaited judgment in a challenge brought by Heyday (a branch of the charity Age Concern) against the UK's Employment Equality (Age Discrimination) Regulations 2006. Heyday had argued in the English High Court that the provisions of the 2006 Regulations – which permit the dismissal for retirement reasons of workers reaching the age of 65 (Regulation 30) or the refusal to recruit persons who are 65, or would be within six months of being recruited (Regulation 7) – were inconsistent with the EU Equal Treatment Framework Directive 2000/78/EC.

The High Court referred the case to the ECJ (Case C-388/07) asking whether such provisions were caught by Directive 2000/78/EC, and if so, whether they could be justified under Article 6(1) of the Directive, which provides that Member States may permit differences of treatment on grounds of age if they are objectively and reasonably justified by a legitimate aim.

In a judgment that has been broadly welcomed by employers, the ECJ held that a retirement age of 65 is, in theory, capable of being justified as being a proportionate means of achieving a legitimate aim.

It did not matter that the legitimate aim was not spelled out in the 2006 Regulations: the Court held that "other elements, taken from the general context of the measure concerned, enable the underlying aim of the measure to be identified for the purpose of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary".

It referred the case back to the High Court to determine this point. It did however suggest that a distinction could be made between

social objectives, which because of their public interest nature could be legitimate aims, and "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness", which by implication could not.

The Court also gave guidance on the apparent difference between the test of justification under Article 2(2) of the Directive (for indirect discrimination) and test under Article 6(1) (for direct discrimination). The former states that differences in treatment must be "objectively justified", while the latter states that such differences must be "objectively and reasonably justified". The ECJ rejected arguments that the use of the word "reasonably" in Article 6(1) implied a stricter test. It was "inconceivable" that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable.

Link to [Judgment](#)

EU Labour law

Working Time Directive – first round of conciliation talks end without agreement

On 17 March, the first round of "Conciliation" talks ended with no breakthrough on the revision of the Working Time Directive. The conciliation is the last chance of the two parties, the European Parliament (EP) and the Council, to agree a deal. The bones of contention remain the opt-out from the maximum 48 hour working week, on-call time (and whether this should count as working time or as inactive time), compensatory rest (when and how should the worker receive this) and the question of multiple contracts (should the 48 hour working week be counted per contract or per person?).

According to the committee's chair, EP Vice-President Mechthild Rothe (PES, Germany), the Council did not put "real" compromises on



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The Weeks Ahead

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the table. *"We are ready to compromise, but they are not,"* she said. The Commission, in its turn, says that it is *"fully engaged in the conciliation process and playing its role as honest broker"*. According to the spokesperson of Employment Commissioner Vladimir Spidla, *"Our position on all aspects of the EP's second reading amendments was set out clearly in our opinion of 4 February. Since then, we've had numerous contacts with all sides, and made further suggestions for compromise amendments. We will continue to play an active role and help both sides move towards a final compromise"*.

At present, both the EP and the Council express reserved optimism that a deal is achievable. The Commission appears to be the most optimistic, stating that it believes that an agreement is possible before May and will continue to do everything we can to make it happen. The Czech EU Presidency is now expected to draft a new compromise text, which would serve as the basis for the second conciliation round. All eyes are now on the next meeting, scheduled for 1 April. Any final agreement will need to be approved or rejected at the EP's plenary session on 4-7 May.

Link to [EP Press Release](#)

Growth and Jobs

Heads of State lower expectations of May Summit meeting

Identifying ways to counter rising unemployment in the EU was the focus of a tripartite social summit held on 19 March in Brussels. The meeting was attended by the European social partners (ETUC, BusinessEurope, CEEP and UEAPME), European Commission President José Manuel Barroso, Employment Commissioner Vladimir Spidla and representatives of the current Czech and the future Swedish and Spanish EU Presidencies. It also served as preparation for the 'crisis job summit', scheduled for 7 May in Prague.

At the meeting the participants agreed on the need to *"modernise the European model,"* to *"preserve its values and to maintain the level of prosperity, social cohesion, environmental protection and the quality of life"*. The participants also

agreed to launch a consultation process before May's 'crisis job summit'. This consultation will entail three seminars (Madrid - 15 April, Stockholm - 20 April and Prague 27 April) to be organised with the participation of social partners and the relevant national authorities on three key issue": mobility, access to employment and skills. According to Commission President Barosso, EU citizens can expect "concrete consensus for concrete results" from the May summit.

However, on 20 March, France, the United Kingdom, Germany, Italy and Belgium voiced their doubt that such a summit was necessary at all, and subsequently EU Heads of State decided not to attend the planned meeting, reluctant to set *"too high expectations"* on the eve of this summer's European elections. The alternative now being discussed is a meeting with the participation of the European social partners (ETUC, BusinessEurope, CEEP and UEAPME) and representatives of the current Czech and the future Swedish and Spanish EU Presidencies.

The move has sparked widespread disenchantment in Brussels. MEPs also expressed their dismay, with Swedish Socialist MEP Jan Andersson, chairman of the European Parliament's Employment Committee saying that he was *"very critical of this development"*. *"The big question this year in the EU is increasing unemployment, and for European leaders to decide that this is not an EU question, that this is something we need to address at Member State level, is madness."* *"As we face the biggest unemployment crisis in decades, they are abandoning their responsibility,"* Andersson added. *"This is not leadership."*

Link to [Press release and issues paper](#)

Broadening the scope of the European Globalisation Fund

On 31 March, the European Parliament's Employment and Social Affairs committee approved in a first reading without amendments a regulation aimed at broadening the scope of the European Globalisation Fund to enable it to react more effectively to the current economic and social crisis.

The purpose of the European Globalisation Adjustment Fund (EGF) is to provide effective support for workers made redundant as a result of globalisation. The Fund's maximum annual budget is 500 million euros and is used to support active labour market measures.

The proposed regulation advocates a 50% reduction, to 500, in the number of redundancies required to trigger intervention of the Fund. The EGF may intervene in situations which results in:

- at least 500 redundancies over a period of 4 months in an enterprise in a Member State;
- at least 500 redundancies over a period of 9 months, in small or medium-sized enterprises;
- small labour markets or in exceptional circumstances, where duly substantiated by the Member State concerned, an application for a contribution from the EGF may also be considered.

Link to [Steune Report](#)

Poland frets over foreign workers as economy slows

Trade unions in Poland are calling for restrictions on some foreign workers, partly to make room for thousands of Polish workers expected to lose their jobs in other parts of the European Union. Tens of thousands of workers from nearby former Soviet republics flocked to Poland during the boom years, which are now ending as the global economic crisis takes hold. Demand was particularly strong after Poland joined the EU in 2004, triggering an exodus of at least a million Poles to Western Europe, mostly to Britain and Ireland, in search of better-paid jobs.

"The Polish government should consider limiting the inflow of foreigners because there cannot be wage and employment 'dumping,'" said Jan Guz, head of the OPZZ union, which has over a million members. The union's concerns mirror those of other countries. In Britain, protesters demanding 'British jobs for British workers' have complained about

foreigners undercutting local workforces by accepting lower wages. Poland's labour ministry says up to 10,000 Ukrainians and Belarussians are employed legally in the country at present, but says it does not know how many more may be working on the black market. Though Poland's economy remains more robust than many amid the global recession, foreign workers say they have started to feel the change of climate. *"We need to find more jobs here in Poland because many Poles will be coming home [from Western Europe],"* said Guz.

An FT/Harris survey published on 16 March revealed that 79% of Italians, 78% of Britons, 71% of Spaniards, 67% of Germans and 51% of French people would back proposals to ask jobless immigrants to leave the country.

Link to [FT Poll](#)

International

Employment and decent work: bilateral relations and international cooperation

On 20 March, the European Commission published a study looking at EU Member States' bilateral cooperation concerning employment and decent work. The study identified and analysed 620 recent projects with India, China, Brazil, Mexico, Chile, Russia, Indonesia, Ukraine, Morocco and South Africa. The study was financed by and prepared for the use of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities.

Link to [Report](#)

Gender Equality

EU-wide campaign seeks to eliminate gender pay gap

On 3 March, the European Commission launched an EU-wide campaign to help narrow the pay gap between women and men and boost gender equality. Currently, 58.3% of women are employed compared with 72.5% of men. The report found that women still work part-time more often than men (31.2% of women and 7.7% of men), and they remain

trapped in low-wage sectors, like health, education and public administration. The gloomy situation is worsened by the fact that women represent the majority (59%) of all new university graduates. *"The gender pay gap has multiple causes and needs multiple solutions. Tackling it requires action at all levels and a commitment from everyone concerned, from employers and trade unions to national authorities and every citizen,"* said European Commissioner Vladimir Špidla.

Link to [Commission Press release and campaign website](#), [Q&A](#) and [Commission report](#)

Corporate Social Responsibility

European Commission Study on the Interaction between Local Employment Development and Corporate Social Responsibility

The European Commission's Employment DG recently published a study on the links between local development and corporate social responsibility carried out by the Austrian Institute for SME Research in co-operation with the European Association for Information on Local Development (AEIDL) and the European Network for Social and Economic Research. The study covers the 27 EU Member States as well as Australia and Canada. The study focuses on the activities of companies aimed at achieving a benefit for the enterprises' employees, the market (i.e. clients, suppliers, business partners etc.) and/or the physical environment in local communities.

The study aims at:

- Describing and illustrating how the CSR activities of enterprises can contribute to local employment development initiatives in the European Union, Australia and Canada;
- Analysing which types of practices/initiatives exist at local level;
- Assessing the relevance and

effectiveness of current practices/initiatives;

- Assessing what can be done to foster the development and effectiveness of CSR activities in local employment development.

The report summarises the findings of the national analyses as well as the more specific issues covered in the 25 case studies. On this basis, it draws a series of conclusions and puts forward policy recommendations.

Link to [Executive Summary and Final Report](#)

National Developments

Estonia – Czech President decides not promulgate Gender Equality Act

On 3 March, Estonian President Toomas Hendrik Ilves refused to sign a number of laws including the Gender Equality Act and the Equal Treatment Act, because, according to him, parliamentary procedures were breached when the acts were passed. These Acts contain a number of key amendments such as the establishment of a definition of harassment on grounds of gender, a new procedure for resolving complaints concerning discrimination and a provision making it unlawful to ask for information about gender during the recruitment process. The Act will be discussed again by the Estonian Parliament.

Link to [Official Press Release](#)

Sweden – Innovative agreement on short-time work concluded

On 2 March, the Swedish MET industry's employer organisation Teknikföretagen and trade union IF Metall concluded a national short-time agreement allowing local companies to reduce the workweek of full-time employees to two days, provided that a further day is provided for skills training to increase the competence of employees and that employees are guaranteed 80% of their normal weekly pay. Such one-year deal is unusual in Sweden, where trade unions have traditionally opposed all temporary lay-off arrangements. Both parties have agreed to monitor its

outcome and determine what impact it has in redundancy levels.

The agreement is effective until 31 March 2010. Should either party wish to terminate the agreement, three months' notice should be given. The aim is to facilitate local companies to reach agreements so as to guarantee operations and avoid further layoffs. In order to strengthen the future competitiveness of the companies and the competence of their employees, the local parties can wherever possible agree on internal training or other activities which can take place when there is no work in progress. The agreement allows companies to act swiftly and offensively once the labour markets recover.

Link to [Press release](#)

Greece – Government backtracks on collective agreement reached last December for hospital doctors

In response to pressure from the European Commission, the Greek government has decided to reduce its 2009 spending plans. These include a unilateral revision of a collective agreement concluded at the end of last year with unions representing hospital doctors. Doctors in state hospitals and emergency clinics launched a two-day strike when they discovered that the revised bill would offer doctors smaller pay raises than had been agreed to by their trade union and the ministry. They insist that the collective agreement they signed in December belongs in the bill submitted to the Greek Parliament.

Link to [Press release](#)

Czech Republic – Czech government restricts employment agencies' work

The Czech government has introduced new regulations to reduce the spheres in which agencies can offer work to selected professions and to the jobs requiring at least secondary education. The measure aims to settle the situation of foreign workers mostly employed in manual and low-skilled professions in the Czech Republic. Labour agencies may still continue to operate within a limited range of jobs such as bricklayers, carpenters, plumbers, pipe fitters and electricians but all jobs offered must

require at least secondary education. According to the Czech Interior Ministry, due to the current recession some 68,000 foreigners could lose their jobs before the end of the year. As a result, many of them will be without work and money in the Czech Republic. In January, the Czech government decided to pay the return air ticket and give 500 Euros to the 2000 foreigners who decided to return home. So far about 400 foreigners have accepted the offer. The first stage will last eight months. Czech unemployment rate rose to 6.8 percent in January, the record high over the past 21 months. Experts agree that the figure is likely to keep rising.

Link to [Press release](#)

The Weeks Ahead

Commission

3 April – Debate on Employment (Nürnberg)

Council

22-23 April – Czech Presidency – Conference on Social Services – A Tool for Mobilising the Workforce and Strengthening Social Cohesion (Prague)

8-10 April – Jobdays 2009 (Prague)

8-9 June – Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) meeting (Luxembourg)

European Parliament

16 April 2009 – EMPL Committee meeting

2 September 2009 – EMPL Committee meeting

EUROPEAN EMPLOYMENT REPORT is a White & Case LLP Newsletter produced by the Brussels Employment Team. Due to the general nature of its content, this report is not and should not be regarded as legal advice. For further information please contact:

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