



EU Employment Practice Group

December 2009 – January 2010

ECJ Developments

European Court clarifies the circumstances in which 'ageism' in employment may be allowed

This month the Grand Chamber of the European Court of Justice ("ECJ") has handed down three judgments clarifying the principle of non-discrimination on grounds of age, contained in Directive 2000/78 on equal treatment in employment and occupation ("the Equal Treatment Directive").

The Directive obliges Member States to ensure that employers do not discriminate on grounds of religion or belief, disability, age or sexual orientation. It permits differences in treatment as long as they can be justified for public policy reasons (Article 2(5)), because of a "genuine occupational requirement" pursuing a legitimate objective (Article 4(1)), or where necessary for the attainment of a legitimate aim (Article 6(1)). These cases illustrate how these exceptions can apply in practice.

In the first two cases, on maximum recruitment ages, arose from disputes brought in national employment tribunals, in which questions on the interpretation of EU law were referred to the ECJ under the preliminary rulings procedure.

The case of **Colin Wolf v Stadt Frankfurt am Main** (Case C-229/08) arose from the refusal of the City of Frankfurt to employ Mr Wolf as a fireman since he had passed the age of 30. The City of Frankfurt had applied regional legislation providing that recruitment to intermediate fireman posts was only open to persons under 30 years old. The question was whether this law was compatible with the Equal Treatment Directive. The ECJ held that it was: the age requirement was indeed a "genuine occupational requirement" in view of the exceptionally high physical demands of the job. The "concern to ensure the operational capacity and proper functioning of the professional fire service" constituted a legitimate objective.

In **Petersen v the Dentists Admissions Board of Westphalia and Lippe** (Case C-341/08), the German regulation at issue laid down a maximum age – 68 years – for practising as a panel dentist within the statutory insurance scheme. The ECJ applied the public health derogation under Article 2(5). It rejected any justification based on the argument that the performance of dentists declined over a certain age, since outside the statutory insurance system dentists could practice at any age. However a measure could be justified as a means to preserve the financial balance of the public healthcare system. It also considered that a measure could be justified under Article 6(1) if it pursued the legitimate objective of sharing out among the generations employment opportunities in the professional of panel dentist.

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This newsletter briefly describes [EU employment developments.

Due to the general nature of its content, this newsletter is not and should be regarded as legal advice.

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The third case **Kücükdeveci v Swedex GmbH & Co** (Case C- 555/07) concerned a slightly different issue. German rules on redundancies provided that periods of employment completed before the employee has reached the age of 25 were not taken into account for calculating notice periods in case of dismissal. The compatibility of this law with the Equal Treatment Directive was challenged Ms Küçükdeveci, who had been employed by Swedex since she was 18 and was dismissed at age 28. Her employer had calculated her notice period on the basis of three years of service, rather than ten. The Higher Labour Court of Düsseldorf referred the question to the ECJ. The ECJ agreed with Ms Küçükdeveci and held that the German employment law was in breach of EU law since it provided less favourable treatment to employees who entered the employer's service before the age of 25. Moreover, the ECJ rejected the attempt to justify this measure by reference to the objective of affording employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility. It held that the legislation was not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal.

The **Kücükdeveci** case is also different from the first two in that the employer was a private company. The ECJ confirmed that, while an EU Directive cannot of itself impose obligations on a private company and therefore cannot be relied upon, in itself, against a private employer (i.e. they have no 'horizontal direct effect'), it is the obligation of Member States, including their Courts, to ensure that the results envisaged by the directive are achieved. Thus, a national court must interpret and apply national law, as far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive. Here, the ECJ held that the national court, hearing a dispute involving the principle of non-discrimination on grounds of age under Directive 2000/78, must to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law. It should disapply if need be any provision of national legislation contrary to that principle, regardless of any national law requiring that the provision in question first be declared unconstitutional by the Bundesverfassungsgericht (German Federal Constitutional Court).

The cases are available on the [ECJ website](#)

EU Labour Law

EU ministers agree on longer parental leave and incentives for fathers

On 30 November 2009, EU Employment ministers agreed a revised legal framework on parental leave to

replace the existing Directive 96/34/EC. This new directive, which implements the revised framework agreement on parental leave concluded by the European social partners on 18 June 2009, introduces the following:

- **Longer leave:** extended by one month to four months. The extra month cannot be transferred to the other parent, which is hoped will encourage fathers to take their leave instead of transferring it to their spouse, as has been the custom.
- **Temporary changes to work schedules:** meaning that employees will have the right to request flexible working arrangements for a limited period.
- **Work contracts:** the new rights will apply to all workers irrespective of their type of contract (fixed term, part time or agency workers).

The new directive will have to be transposed into Member States' national law by early 2012.

The Council also reached agreement on a draft directive aimed at improving the protection of self-employed workers and assisting spouses. The new directive includes two key elements:

- Self-employed women and assisting spouses or life partners are granted a maternity leave allowance enabling them to interrupt their occupational activity for at least 14 weeks.
- Self-employed women and assisting spouses or life partners to receive autonomous social protection rights.

By extending the scope to "life partners" recognised by national law, the Council has gone one step further than the Commission's proposal.

Both directives will now be published in the Official Journal in the coming months, and will enter into force shortly afterwards.

Link to [Council conclusions](#)

EU Developments

Spanish Presidency Priorities

On 1 January 2010, Spain took over the rotating EU Presidency. Spain is the first Presidency to take up office under the new rules established by the Lisbon Treaty, which came into force on 1 December 2009.

The Spanish Presidency is facing a particularly difficult challenge as the European Commission is still in transitional mode following Barroso's reappointment for a second 5-year term in September 2009. The process

for obtaining the European Parliament's approval is presently underway to elect the new Commissioners, but due to the replacement of the Bulgarian candidate, has been set back by about three weeks. The new Commission will probably not be in place until the second half of February 2010.

This delay will have an impact on the Spanish Presidency's programme and will undoubtedly limit what they are able to achieve. It may be left to the Belgian Presidency, due to take office on 1 July 2010, to implement it. The programme of the trio of Spanish, Belgian and Hungarian Presidencies was approved by the General Affairs Council on 7 December 2009.

The main challenges in the field of employment and social affairs are exiting from the current economic crisis, re-launching the European economy and growth and job creation whilst at the same time maintaining a high level of social protection. Spain has every reason to push the trio's priorities through as it has been badly hit itself by the crisis, with unemployment in Spain fast approaching the 20% mark (the average level in the eurozone being 9.8%).

They are also keen to push forward with the **New Growth and Employment Strategy**, for the transformation of the European Union by 2020, launched in November of 2009 and which replaces the Lisbon Strategy first launched in 2000. In February, an informal Council meeting will review the economic situation and examine the new strategy prior to its approval by the spring European Council.

Another priority is **gender equality**. During its Presidency, Spain intends to support the preparation of a Plan for Equal Opportunities for Men and Women for the 2011-2015 period, with particular emphasis on labour issues including full integration of women into the labour market and improving the protection of pregnant or breastfeeding workers.

Although recently the European Commission promised a review of the **Working Time Directive** after an earlier attempt to amend it failed last spring, and a proposal improving the implementation of the **Posted Workers Directive**, inside sources say they are not on the list of priorities of the Spanish Presidency.

Link to [18-month programme](#) and [Interview with Spanish Employment Minister](#)

Commissioner delegate for Employment and Social Affairs puts in a convincing performance during hearing

On 13 January 2010, the Commissioner-delegate for Employment and Social Affairs, the Hungarian László Andor, was questioned by European Parliamentarians ("MEPs") in a 3-hour hearing. Questions ranged from the exit strategy, EU legislation – in particular the revision of the Working Time Directive and the Directive

on the Posting of Workers – and the issue of the EU's ageing population.

Despite numerous attempts to get Andor to open up on innovative ways to tackle the crisis, he disappointed MEPs by simply listing policy tools already in place, stressing the need for more coordination between the EU and Member States and the modernisation of the globalisation fund.

Others were more than satisfied with his performance. Chairwoman of the EMPL Committee, Pervenche Berès, called him a person "fully committed to social Europe but who had on top of that a background in economics". Prior to the hearing, certain groups had questioned whether he would be "passionate" enough to really fight social problems. They wanted to know if he was able to "take on the political fight" since he had an "academic and research kind of background".

Andor remained firm "it is definitely my intention to take all these issues very seriously," adding that "it has always been a complex task to tackle employment and social affairs issues but nowadays it is simply daunting".

Of particular interest was Andor's response to questions pertaining to the revision of the **Working Time Directive** and the **Posting of Workers Directive**. He promised to make social impact assessments of the problems stemming from the current directives, saying that he wanted to develop a new approach but reiterated that it was important to be realistic about expectations. One MEP remarked that "the fact he is willing to look into solving the issue of the Working Time Directive in a sectoral way and that for him the use of the opt-out is not a structural solution convinces me that we have entered a new era for social policy".

Link to [Summary of hearing](#)

Jobs and Growth EU's new strategy outlined

On 15 December 2009, the European Commission published the Joint Employment Report (JER) for 2009. The report will be discussed by the Employment and Social Affairs Ministers in the Council on 8-9 March 2010 and upon adoption will become a joint report by the Commission and Member States. The recommendations in the report will then be presented to the Spring Council on 25 March 2010. The report will also help shape the EU's new strategy for jobs and growth, more commonly known as "EU2020".

The JER presents an analysis of action taken throughout the EU to preserve jobs and help those facing difficulties as well as setting out the challenges that lie ahead.

According to the report, unemployment is set to rise in 2010 potentially reaching 10.3% this year and remaining at around 10.2% in 2011. A gradual economic recovery

is expected to over the next two years, however, it is predicted that labour markets will take longer to respond.

The main actions taken by Member States to mitigate the crisis have been to:

- Improve work incentives and make work pay by reducing taxes or raising work benefits, particularly in respect of low income earners, measures particularly important to keep people in jobs and to promote employment.
- Developing the Flexicurity approach by making temporary adjustments through flexible work arrangements such as “short term working” to avoid dismissals and the loss of human capital.
- Developing new skills strategies better developed to meet labour market needs such as on the job training, improved cooperation between social partners in identifying future needs, forecasting and anticipating skills needs as well as increasing funding on lifelong learning for the low-skilled and unemployed.

However, plenty of challenges lie ahead. In the report, the Commission outlines 3 challenges for employment policies:

- *The need to reinforce existing crisis measures:* in particular continuing the short-time working arrangements for sustainable jobs while unemployment is still increasing but that the eligibility criteria be much stricter than in 2009; providing a more personalised approach in pre-redundancy job search assistance, as well improving the efficiency and effectiveness of specific labour market institutions;
- *The need to orientate crisis measures:* by tackling labour segmentation and improving the situation of people on non-standard contracts;
- *The need to phase-out crisis measures:* by promoting Flexicurity inspired reforms including balancing employment protection and security on the market, bridging the gap between emerging demands and skills currently available in the labour market and promoting labour mobility across regions and between occupations.

With regards to skills, the Commission has recently published 18 sectoral studies to identify emerging competences and future skills needs per sector and provide alternatives for anticipating and adjusting to future changes.

Link to [Joint Employment Report \(JER\)](#) and [Sectoral Studies](#)

Unemployment on the increase with young workers particularly hard hit

According to the latest statistics, unemployment in the Euro area hit 10% in November, while in the EU27 the rate was 9.5%. For the Euro area this is the highest rate since August 1998 and for the EU27 since January 2000. Among the Member States, the Netherlands had the lowest unemployment rate at 3.9% with the highest rate recorded in Latvia at 22.3% who also recorded the largest increase (up from 10.2%). This translates into around 22.899 million unemployed workers in the EU27. A worrying statistic is the number of young people out of work which currently stands at 21.4% in the EU27. Again the lowest rate was recorded in the Netherlands at 7.5% and the highest in Spain with a staggering 43.8%.

Link to [Eurostat Statistics](#)

EU Employment and Social Outlook: focus on chemical and construction sectors

Meanwhile, in December the European Commission published the latest edition of its EU Employment and Social Outlook monitoring report. The report covers labour market trends, restructuring trends, economic context outlook and sectoral trends.

The report highlights that, despite a sharper economic downturn and stronger falls in business confidence compared to the US, the impact on the labour market in the EU has been less dramatic than in the US, where unemployment has doubled since mid-2007 and where it currently stands at around 10.2%.

According to the report, EU consumers' fears of unemployment remained unchanged and while employment expectations improved, firms still expect to reduce their staff levels. Generally, showing an upward trend for the past 8-9 months now, expectations improved in industry and construction but worsened in the retail trade.

The job vacancy rate has remained stable although compared to 2008 still remains low. Similarly, demand for temporary work dropped in 2009, but there are signs of improvement as the year-on-year declines are much lower than in the spring of 2009.

The report also focuses on certain sectors: this edition covers the **chemical industry** and **construction**.

The chemicals industry currently employs around 3.75 million workers. Growth began to decline in early 2007. The industry has been affected by restricted access to credit through demand from other industries and by falling consumer spending, as people have less disposable income and are uncertain about their economic prospects. On the positive side, the European chemicals industry, which has undergone radical restructuring in the past, should be able to take advantage of the economic recovery led by Asia, whose

emerging industries are heavily dependent on chemicals. There is also strong growth potential on the European market with its ageing but wealthy consumers and States committed to investing in health policies. However, the industry is also faced with combating an equally ageing skilled workforce, the replacement of which is exacerbated by the negative image of the industry in Europe.

Meanwhile the construction sector continues to be badly affected by the crisis with a total drop in activity of 17% over 21 months. The building sub-sector the worst hit with production plummeting by 13.6%. The crisis has now hit Romania and Slovakia which had escaped the 2008 recession. Other countries badly hit are Ireland, Spain, the Baltic States, Denmark, Finland and Slovenia. The sector is heavily dependent on access to finance, which was the main reason for decline in a number of countries. The easing of monetary policy has been addressing this issue and in countries that did not experience a house price bubble before the crisis should recover quickly. However in countries where house prices increased rapidly for a number of years, recovery is only likely when prices hit a floor which might take several years.

Link to [Commission Report](#)

Eurofound publishes results of survey on Flexicurity strategies

In the Spring of 2009, Eurofound launched a survey “the European Company Survey 2009 – Flexibility practices and Social dialogue” the results of which have recently been published. The survey documents flexibility strategies of firms and forms a comprehensive source of comparative information on social dialogue in the workplace.

The survey focuses on working time arrangements (i.e. flexi-time arrangements [56% of firms offer this type of arrangement], part-time work [67% of firms offer this type of work], work at unusual hours and overtime hours); human resources practices; contractual flexibility (fixed term contracts, temporary agency workers and freelancers); functional flexibility; variable pay (performance related pay, financial participation) and workplace social dialogue.

Link to [Survey results](#)

Gender Equality

European Commission publishes annual report on equality and new institute for Gender Equality opens

On 18 December 2009, the European Commission published its annual report on equality between men and women. The report highlights that despite a positive trend towards a more equal EU labour market, progress in eliminating gender equalities is slow. According to the report, gender gaps persist in employment rates, pay, working hours and share of responsibility. The report

will form part of the jobs and growth package to be presented to EU leaders at the European Council on 25 March 2010.

Meanwhile, on 16 December 2009, the European Institute for Gender Equality (EIGE) opened. The EIGE is an EU agency which has been created to “support the EU in their efforts to promote gender equality, to fight gender discrimination and to raise awareness about gender issues”. Its tasks include collecting and analysing data on gender issues, developing methodological tools, facilitating the exchange of best practice and dialogue among stakeholders as well as raising awareness among EU citizens.

Link to [Commission Gender Equality Report](#) and [EIGE](#)

National developments

United Kingdom

Agency Workers Regulations laid before Parliament

Following a public consultation, the UK has adopted the Agency Workers Regulations 2010 SI 2010/93 which will enter force on 1 October 2011. These Regulations implement EU Directive 2008/104/EC of 19 November 2008 on temporary agency work, which sets out a general framework for protection of temporary agency workers. The Regulations establish in detail a number of rights for temporary agency workers concerning their basic working and employment conditions. Among the key provisions are:

- **Regulation 5** - provides the fundamental right that the agency worker (“A”) “*shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer*” – in connection with pay, the duration of working time, night work, rest periods, rest breaks and annual leave (Regulation 6);
- **Regulation 7** – provides for a qualifying period, in the same role with the same hirer, of 12 weeks in order to be entitled to the right set out in Regulation 5;
- **Regulation 10** – as regards pay, Regulation 5 will not apply where a permanent contract of employment is entered into between a temporary work agency and the agency worker. Certain conditions must be fulfilled regarding the form and terms of the permanent contract, and for a minimum amount of pay, to be paid to the agency worker between assignments;
- **Regulation 14** – concerns liability, noting that agency workers are involved in a triangular relationship involving the temporary work agency and hirer. Crucially, the temporary work agency and hirer can **both** be liable to the extent that they are responsible for a breach of Regulation 5, although in some circumstances

the temporary work agency will not be held responsible;

- **Regulation 15** – deals with restrictions on contracting out (Employment Rights Act 1996 sec 203 applies);
- **Regulation 17** – sets out the right not to be unfairly dismissed, or subjected to a detriment for a reason relating to these Regulations;
- **Regulation 18** – remedies for individuals, including compensation, by way of proceedings in employment tribunals.

The Directive 2008/104/EC is due to be transposed into all Member States' national law by 5 December 2011.

Link to [UK Regulation](#)

Spain

Positive outcome for non-EU workers voluntary return programme

The Spanish government recently presented the results of its Non-EU Foreign Workers' Voluntary Return Programme. The programme provided for the early lump-sum payment of unemployment contributory benefits to non-EU foreign workers returning to their home country. Despite some positive results, the trade unions in Spain have criticised the government for not accepting their proposal for a moratorium under which unemployed non-EU foreign workers can renew their residency card in Spain.

Link to [Voluntary Return Programme](#) (in Spanish)

Sweden

Heated debate among social partners on reform of labour market model

The Swedish employer organisation Almega has found it a necessity to adjust the Swedish labour market model to the conditions and reality of today's industry and private services sectors. The trade unions have responded with strong criticism and reject the need to reform the Swedish collective bargaining system. They have defended the existing model and believe that the challenges the labour market currently faces can well be handled within the existing structures and negotiation model.

Link to [Almega: collective agreements](#)

Government proposes post-Laval legislation

The Swedish government has recently proposed a new law on a reformed labour market that limits the possibility for industrial action against foreign employers. The reforms are seen as necessary in light of the implications of the European Court of Justice ruling in the Laval case. The proposal was preceded by an inquiry and a lengthy period of discussion between stakeholders. Despite this, the government has not

taken criticism into account, and its bill is thus similar to the inquiry.

Link to [Law proposal](#) (in Swedish)

Finland

Employers and trade unions disagree over age of retirement

The Confederation of Finnish Industries (EK) has proposed that the standard age of retirement be raised to 67 years. The proposal has sparked anger among trade unions, which are warning that the country could face a 'pension war' if employers try to raise the retirement age. EK argues that an effective strategy to extend working life should involve a quicker transition from education to the labour market, promote well-being at work and reform the pension scheme.

Link to [EK press release](#)

Bulgaria

Cooperation agreement signed between trade unions and labour inspectorate

On the occasion of the World Day for Decent Work, representatives of the trade union confederations, the Ministry of Labour and Social Policy and the General Labour Inspectorate (GLI-EA) in Bulgaria discussed the new realities posed by the economic crisis. In light of a growing informal economy and continuing violations of labour law, the trade unions and GLI-EA signed a cooperation agreement seeking to better protect, enhance and enforce workers' rights.

Link to [Press release](#)

Germany

Controversial ELENA database goes live

This month employers in Germany must begin submitting all payroll and employee absence data to the new central ELENA database.

Following an intervention by the Federal Data Protection Agency the Labour Minister, Ursula von der Leyen, has agreed that company works councils will have the right to receive a list of data to be submitted to the system and that participation in strike activity will not be specifically identified within the data. However, the minister has also decided to introduce a new section in the system requiring reason(s) for the termination of employment.

Currently German employers produce over 60 million separate income and other employment-related documents each year. A major advantage of the new system will be that from 2012 employers will no longer be required to issue individual monthly pay slips in paper form.

Link to [Press release](#)

France

More time for employers to submit action plans

The French Labour ministry has extended until 1 April 2010 the deadline for meeting new requirements for the employment of older workers. Companies with 50+ employees must have either entered into a collective agreement in favour of employing older workers, or established an approved action plan setting clear employment targets. Failing to submit a valid agreement or plan to the Direction Générale du Travail (DGT) by the revised date may result in a penalty payment equal to 1% of a company's payroll.

Link to [Ministry of Employment press release](#) (in French)

Estonia

Retirement age raised to 65 by 2026

The Estonian Cabinet has approved a new bill raising the retirement age to 65. The retirement age is currently 63 for men and 60.5 for women. According to the proposal the change will take place in two stages, with equalisation of the retirement age at 63 for both men and women by the year 2016. From 2017, it will then be gradually increased by three months a year until 2026.

Link to [Press release](#)

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