

Sexual orientation discrimination and the Maruko and Römer ECJ cases

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EU law prohibiting discrimination based on sexual orientation

EU primary law

- **New Lisbon Treaty:**

- art. 10 TFEU „In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**. (equality mainstreaming)“

- Art. 6.1 TEU „(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.“

EU law prohibiting discrimination based on sexual orientation

EU primary law

- **New Lisbon Treaty:**

Art. 19.1 Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**. (former art. 13 of Amsterdam Treaty)

EU law prohibiting discrimination based on sexual orientation

EU secondary legislation

Directive 2000/78/EC on of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
-most important and the only Directive which deals with sexual orientation discrimination so far

-Unequal protection against sexual orientation discrimination (comparing to race, ethnicity or gender)

Personal scope:

age, disability, religion or belief

sexual orientation (does sexual orientation concern only LGBT people?)

No definition of sexual orientation)

in both public and private sectors

Key concepts of discrimination

Personal scope

- Persons discriminated against their actual sexual orientation
- Persons discriminated against their assumed sexual orientation
- Persons discriminated by association with someone of specific sexual orientation (Colman case, Sielatycki case - Poland)

EU law prohibiting discrimination based on sexual orientation

Directive 2000/78/EC

Material scope:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Key concepts of discrimination

Direct discrimination

-direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

Sexual orientation direct discrimination:

- asking about candidate's sexual orientation during job interviews
- employment benefits for married/unmarried different sex partners only
- wrongful-termination of employment contracts (Polish experience)
- offering employment on terms less favourable than for other people

Key concepts of discrimination

Indirect discrimination

shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

Key concepts of discrimination

Indirect discrimination

Often, indirect discrimination on the ground of sexual orientation occurs because of the assumption that all workers are heterosexual and so the workplace culture does not take account of people of another sexual orientation.

Most common examples of discrimination

- (in job advertisements) application is restricted to married candidates/conducting stable lives
- leave arrangements, for example bereavement or family emergency leave
- social benefits for marriages only (Polish example)

Key concepts of discrimination

Instruction to discriminate

It is also discriminatory to issue instructions to discriminate on the basis of sexual orientation. This would apply, for example, in the case of an employer issuing instructions to a recruitment agency in relation to the type of candidate sought for a particular position.

Key concepts of discrimination

Genuine occupational requirements

A job may be restricted to people of a certain sexual orientation if this is a 'genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. There are very few jobs where being of a particular sexual orientation is essential to doing that job. Such requirements must be identified at the beginning of the recruitment process and clearly stated in recruitment material. They are always open to challenge and it is up to the employer to prove why it is necessary.

Swedish example

Key concepts of discrimination

Organisations with an ethos based on religion or belief

The primary intent of the exemption for religious organisations relates to their right, as an employer, to discriminate against someone of a different religious belief. The exceptions in European law need to be interpreted narrowly and cannot be used as a *carte blanche* to discriminate. Article 4(2) concerns only the differences of treatment by religious organisations on grounds of religion or belief and not sexual orientation.

The employer would need to show in the individual situation why being heterosexual was a genuine and determining requirement of the job.

Polish example of lesbian teacher in catholic school

ECJ case law on sexual orientation discrimination

Very low number of cases lodged to the ECJ

Few cases on transgender (P.v. S. Cornwall County Council 1996, Grant v. South-West Trains Ltd 1998, K. B. v. National Health Service 2004)

ECJ case law on sexual orientation discrimination

Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen Vd dB (C-267/06)

Facts:

- worked as costume designer
 - > 45 years member of Vd dB
 - > 45 years paid fees to Vd dB as his heterosexual colleagues
 - > 13 years of partnership with Mr. Tadao Maruko
 - > 2001 registered their partnership
 - > died 2005

- Vd dB:
- > survivors benefits only to married partners
 - > no pension to Tadao Maruko

Tadao Maruko: -> legal action

ECJ case law on sexual orientation discrimination

German court's reference:

- Is a compulsory professional pension scheme, such as the scheme at issue, a scheme similar to state schemes as referred to in Article 3(3) of Directive 2000/78/EC?
- Are benefits paid by a compulsory professional pension institution to survivors in the form of widow's/widower's allowance to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78/EC?
- Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78/EC preclude regulations governing a supplementary pension scheme of the kind at issue here under which a registered partner does not receive a survivor's pension after the death of the partner like spouses do, even though he also lives in a caring and committed union formally entered into for life like spouses?
- If the preceding questions are answered in the affirmative: Is discrimination on the grounds of sexual orientation permissible by virtue of recital 22 in the preamble to Directive 2000/78/EC?

ECJ case law on sexual orientation discrimination

ECJ answers:

1) A survivor's benefit granted under an occupational pension scheme such as that managed by the Versorgungsanstalt der deutschen Bühnen falls within the scope of Council Directive 2000/78/EC

2) The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the Versorgungsanstalt der deutschen Bühnen.

ECJ case law on sexual orientation discrimination

Jürgen Römer v. Freie und Hansestadt Hamburg

Facts

- From 1950 - 1990 worked as an employee for City of Hamburg
- As of 1969, he has been living with his partner, over 40 years.
- In 1999 they registered their partnership under the City of Hamburg's registration scheme and immediately after the introduction of federal registered partnership they entered „life partnership“ in 2001
- In 2001 he demanded to raise his pension according to the legislation which gives this right to the married pensioners
- He was denied by the City of Hamburg - this provision applies to married beneficiaries only

- 2008 - preliminary reference to the ECJ (German Labour Court)

ECJ case law on sexual orientation discrimination

German court's reference:

- Are additional pension benefits such as the benefits at issue, benefits similar to payments as referred to in Article 3(3) of Directive 2000/78/EC?
- Is this different treatment permissible by virtue of recital 22 in the preamble to Directive 2000/78/EC?
- Does this different treatment constitute direct or indirect discrimination?
- What is the relation between the principle of equal treatment laid down by German Constitution and EU law and the principle of the special protection for the family enshrined in the German Constitution

ECJ case law on sexual orientation discrimination

Answers of the Advocate General of the CJUE (Niilo Jääskinen):

- Additional pension benefits fall under the material scope of the Directive (is related to pay, not to the state schemes)
- Confirmation of exclusive MS competences of regulating civil status (but, in the light of non-discrimination principle)
- Leaving same-sex partners without any kind of legal recognition constitutes discrimination based on sex. orient. (opinion of the Advocate General), but still, it falls under exclusive competence of MS
- MS can not justify any discrimination based on s.o. in the fields regulated by EI law
- Same-sex couples must have access to employment benefits for married couples in all 27 member-states
- When assessing the case, we have to consider comparable (not identical) situations

ECJ case law on sexual orientation discrimination

Answers of The Advocate General of the CJUE (Niilo Jääskinen):

- pension increase based solely on the marriage factor constitutes direct discrimination
- restricting pension increase only to married employees put homosexuals in particularly disadvantaged situation - indirect discrimination
- According to EU equality legislation there is no justification for different treatment of grounds (sexual orientation is equal to age, disability etc)
- Prohibition of discrimination on s.o. should be recognized as a general principle of EU law

ECJ case law on sexual orientation discrimination

ECJ judgment (10 May 2011) C-147/08

- supplementary retirement pensions - such as that at issue in this case - fall within the scope of Directive 2000/78
- in the present case, entitlement to the supplementary retirement pension presupposes not only that the partner is married, but also that he is not permanently separated from his spouse, since that pension aims to provide a replacement income to benefit the recipient and, indirectly, the persons who live with him

ECJ case law on sexual orientation discrimination

ECJ judgment (10 May 2011) C-147/08

- Court emphasised that the German law on registered life partnerships provides that life partners have duties towards each other to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together. Therefore, according to the Court, the same obligations are incumbent on both registered life partners and married spouses. **It follows that the two situations are thus comparable.**

ECJ case law on sexual orientation discrimination

ECJ judgment (10 May 2011) C-147/08

- the Court observed that as regards the criterion of **less favourable treatment on the grounds of sexual orientation**, it is apparent that Mr Römer's pension would have been increased if he had married instead of entering into a registered life partnership with a man.
- a supplementary retirement pension paid to a partner in a civil partnership, which is lower than that granted in a marriage, may constitute discrimination on grounds of sexual orientation
- this is the case if the partnership is reserved to persons of the same gender and if it is in a legal and factual situation comparable to that of marriage

ECJ case law on sexual orientation discrimination

ECJ judgment (10 May 2011) C-147/08

- it should be recalled that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that the **Directive does not itself lay down the principle of equal treatment in the field of employment and occupation**, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a **general framework for combating discrimination on various grounds** (see Mangold, paragraph 74, and Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraph 20), **including sexual orientation**.

ECJ case law on sexual orientation discrimination

Thank you for your attention!

Krzysztof Śmiszek

In my presentation I have included materials of Dr Helmut Graupner' presentation