The Interpretation of EC Anti-Discrimination Directives 2000/43 and 2000/78 by the European Court of Justice

By Katrine Sawyer[1]

Introduction

1. The ECJ has now had the opportunity to interpret the anti-discrimination directives on 7 occasions, once in the case of Directive 2000/43, and 6 times in the case of Directive 2000/78; another 6 are cases in the pipeline. The decided cases have concerned discrimination on grounds of race, age, sexual orientation and disability. It is still very early days in the development of the Court's jurisprudence relating to these directives to be confident that the Court has entirely settled its ideas as to how these directives, which have such a wide-ranging impact, must be interpreted. On the other hand, the body of case-law that has so far been established is sufficient to give us some key indicators as to the approach that the ECJ is likely generally to take when called upon to interpret an aspect of the directives.

The Scope of the Directives

2. In the case law to date the ECJ has interpreted the directives as having as broad a scope as possible regarding categories of persons who may bring a claim for discrimination and also as to the scope of the concept of discrimination itself (there is some overlap between the two notions).

3. Regarding the personal scope of Directive 2000/78, the ECJ has already held that a person, who does not himself have one of the attributes listed in Article 1, can still found a successful discrimination claim when adversely treated by an employer because someone he is associated with has one of those attributes. To put it another way, discrimination by association is prohibited by the directive.

[1] Legal Secretary to Judge Borg Barthet, European Court of Justice, Luxembourg.

Case C-303/06, Coleman

4. This was the result in the Coleman case. Ms Coleman, who worked for a firm of solicitors, had a disabled son for whom she was the primary carer. She claimed constructive dismissal and disability discrimination, arguing that her employers had treated her less favourably than employees with non-disabled children and subjected her to conduct that created a hostile environment for her; for example they called her 'lazy' when she took time off to care for her son, refused to give her the same flexibility as regards her working arrangements as those of colleagues with non-disabled children and said that she was using her [quote] 'fucking child' to manipulate her working conditions.

5. The South London employment tribunal hearing Ms Coleman's case referred a question to the ECJ on the preliminary issue before it, which was specifically whether or not the Directive was intended to prohibit discrimination not only against disabled persons themselves, but also against individuals who are victims of discrimination because they are associated with a disabled person.

6. In his opinion in the case, AG Maduro proposed an interpretation in the light of the goals pursued by Article 13 EC, the aim of which, he said is to protect the dignity and personal autonomy of persons "belonging to those 'suspect' classifications"[2] – that is, persons having the attributes listed in Article 13 EC (and reproduced in Directives 2000/78 and 2000/43). He argued that one way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group.

7. The AG argued that the effect of the Directive is that it is impermissible for an employer to rely on religion, age, disability and sexual orientation in order to treat some employees

[2] "People belonging to suspect classifications" is a phrase that AG Maduro has used to refer to people who possess one of the attributes listed in Article 13 EC (see paragraph 15 of his opinion). It amounts to shorthand arising out of the notion that whenever persons are classified according to one of those grounds, that classification is suspect – i.e. it is a ground upon which such classification may be prohibited. In my view, the shorthand is rather unfortunate.

less well than others: to do so would amount to subjecting them to unjust treatment and failing to respect their dignity and autonomy. And, this fact did not change in cases where the employee who was the object of discrimination was not disabled herself. The ground which serves as the basis of the discrimination she suffers continues to be disability, and the Directive operates at the level of "*grounds of discrimination*".

8. AG Maduro therefore came to the view that the scope of the directive was broad enough that a person can claim to be the object of discrimination because of one of the characteristics listed in Article 1 of the directive, even if she does not possess that characteristic herself. It is enough if she was mistreated on account of disability.

9. In its ruling, the Court followed its Advocate General. It is interesting to note that in doing so, it rejected the arguments advanced by the Dutch, Greek, Italian and UK governments that the prohibition of direct discrimination laid down by the directive only protects persons who, in a comparable situation to that of others, are treated less favourably or are placed in a disadvantageous situation because of characteristics which are particular to them. These arguments were supported by reference to Article 5 of the directive which, in order to guarantee compliance with the principle of equal treatment with regard to persons with disabilities, require reasonable accommodation for those disabilities to be provided by employers; and also Article 7, which permits Member States to make provision for safeguarding or promoting the integration of disabled persons into the working environment. Recitals 16, 17 and 20 were also referred which relate directly to the needs of disabled persons and how far employers should be expected to accommodate those needs.

10. The Court reasoned, however, that just because the Directive included provisions designed to accommodate specifically the needs of disabled persons did not lead to the conclusion that the principle of equal treatment had to be interpreted strictly, that is as prohibiting only direct discrimination on grounds of disability and relating exclusively to disabled people.

11. The Court examined the issue in the light of objectives of the directive and asked itself which interpretation was most likely to achieve those objectives. It reasoned that Directive 2000/78 sought to combat all forms of discrimination on grounds of disability in the field of employment and occupation; and that as such it applies not to a particular category of persons but by reference to the grounds mentioned in Article 1. The Court observed that although the person who was subject to direct discrimination on grounds of disability was not herself disabled, the fact remained that it was disability which was alleged by Ms Coleman to have been the ground for the less favourable treatment she claimed to have suffered. And the Court considered that where it is established that an employee suffers direct discrimination on grounds of disability, an interpretation of the directive limiting its application only to people who are themselves disabled was liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

12. On this basis the Court rejected the arguments inviting a narrow interpretation of the personal scope of the protection afforded by the directive, and concluded that it must be interpreted as meaning that the prohibition of direct discrimination was not limited only to people who were themselves disabled; someone in Ms Coleman's position was covered by the directive.

Case C-Firma Feryn

13. In the case of Firma Feryn, there was no specifically identifiable victim at all. In this case the Belgian body charged with promoting equal treatment alleged that Feryn, which specialised in the sale and installation of 'up and over' and sectional doors, applied a discriminatory recruitment policy given that one of the firms directors had made statements that the firm was looking to recruit fitters but that it could not recruit "immigrants" because its customers were reluctant to give them access to their private residences for the period of the works.

14. The labour court in Brussels referred questions of interpretation of Directive 2000/43 to the ECJ, relating to the scope of the concept of discrimination, burden of proof and appropriate penalties.

15. As in the Coleman judgment, the Court looked at the objectives of the Directive in order to interpret it in the way most likely to achieve those objectives. It observed that the aim of directive 2000/43, as stated in recital 8 of its preamble, was "to foster conditions for a socially inclusive labour market", and that for that purpose, Article 3(1) (a) provided that the directive covered selection criteria and recruitment conditions.

16. The Court rejected arguments made by the Irish and UK governments that the lack of an identifiable complainant claiming to have been a victim of a discriminatory recruitment policy means that there is no direct discrimination within the meaning of Directive 2000/43. It reasoned that the objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited only to those cases where an unsuccessful candidate for a post, considering himself to be a victim of direct discrimination brought legal proceedings against the employer.

17. The Court held that that an employer who declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their applications, and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination was not dependant on the identification of a complainant who claims to have been the victim.

18. So far then, the Court gave the directive a broad interpretation, as regards the concept of discrimination. However, as the court went on to point out, there was a distinction to be drawn between what constituted direct discrimination within the meaning of Directive 2000/43 and the legal procedures that Article 7 of the directive required Member States to

introduce. That article provides at paragraph 1 that Member States shall ensure that judicial procedures are available "to all persons who consider themselves wronged by failure to apply the principle of equal treatment" and at paragraph 2 that organisations which have a legitimate interest in ensuring that the provisions of the directive are complied with may engage, "either on behalf or in support of the complainant" in any judicial or administrative procedure.

19. The Court held that this article did not preclude Member States from laying down the right for associations with a legitimate interest in ensuring the compliance with the directive to bring legal proceedings to enforce the obligations without acting in the name of a specific complainant or in the absence of an identifiable complainant.

20. In so doing the Court has given a wide interpretation to the concept of discrimination – namely that discrimination can be said to arise even if there is no identifiable complainant. It has also held that the provisions relating to enforcement of the directive, which do appear to depend on there being a complainant, nevertheless leave Member States the option of going further and providing that bodies with a legitimate interest in promoting equal treatment under national rules may – although they are not required to do so by the directive - take judicial action to enforce the prohibition on direct discrimination.

21. It's a curious result. On the one hand the Court is saying that there is direct discrimination within the meaning of the directive even when there is no identifiable complainant and yet the Court is prepared to hold that there is no requirement for Member States to establish systems of enforcement to tackle that category of discrimination. This is understandable given the wording of Article 7, which depends on there being an identifiable complainant, however, the result is that certain types of discrimination, which the Court recognises as being covered by the directive, will be the subject of enforcement in some Member States but not in others, depending on how the directive is implemented in each Member State. The result is even more interesting when you consider the next part of the judgment in

this case which addressed the question of what would be the appropriate sanctions in the event that there was a finding of direct discrimination on the facts of this case.

22. Not withstanding that Member States would not be required to have enforcement procedures in place to combat discrimination in circumstances where no identifiable complainant was available, should they exercise the possibility of doing so, the sanctions that the member state would have to apply would need to satisfy the criteria set out at Article 15 of the directive, and must be effective, dissuasive and proportionate.

23. Of course, this is entirely in keeping with the rule that when implementing a directive Member States must observe the general principles of community law, but it does rather go to highlight the oddity of the decision – namely that in some Member States there need be no sanction at all for this type of discrimination, because the national rules do not provide for it, but that if Member States have set up a system that permits judicial proceedings to be brought by associations in the absence of identifiable victims, then they must still adhere to community law rules governing the nature of those sanctions.

Scope of the categories listed in Article 13 EC

24. One point that might have arisen (but did not) in both Coleman and Firma Feryn was whether or not Ms Coleman's son or the persons that Firma Feryn wished not to recruit actually fell within one of the categories set out in Article 13. The definition of the scope of these categories is also one which determines the scope of application of the directives; and is not necessarily easily defined especially in the case of disability.

Case C-13/05 Chacon Navas

25. In the case of Chacón Navas, the Court was asked to rule on the scope of the concept of disability. Ms Chacón Navas was dismissed by her employer after an eight month period of long term sick leave. The Spanish referring court observed that sickness is often capable of causing disability and that workers must be protected in a timely manner under

the prohibition of discrimination on grounds of disability, otherwise the protection afforded by the legislature would be nullified. The Madrid court referred two questions asking whether Directive 2000/78 included sickness within the concept of disability and if not, whether sickness could be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination.

26. This was the Court's first opportunity to rule on the concept of disability. I'll wager that it won't be its last. This is a fairly safe bet because the first thing the Court decided as regards the concept of 'disability' within the meaning of Directive 2000/78, - a concept for which there is no definition in the directive itself – was that the concept must be given an autonomous and uniform definition in Community law. That means that the ECJ should be the final arbiter whenever there is an issue as to whether something is or is not a disability.

27. If anything does not lend itself to being 'acte claire' it is surely this. As the Advocate General observed at paragraphs 57 of his opinion "the concept of disability is an indeterminate legal concept which is susceptible to many different interpretations in its application." He went on at paragraph 58 to observe that the concept of disability is undergoing fairly rapid evolution and that it cannot be excluded that "certain physical or mental shortcomings are in the nature of a disability in one social context but not in another". And yet, while the Advocate General acknowledged the difficulties in defining the concept and noted that the combination of dynamic changes and variation in the scientific perception and social treatment of the phenomenon of disability "calls for caution in any efforts to achieve uniformity" (paragraph 59), he nevertheless proposed that there must be a uniform community definition of disability so that there is uniformity in the substantial scope of the prohibition of discrimination. The persons to be protected must not vary, otherwise the protection afforded by that prohibition of discrimination would vary within the Community.

28. In the circumstances of the Chacón Navas case, in which the nature of the sickness that Ms Chacón Navas was suffering was not disclosed in the facts at all, the Court did not

have the opportunity to paint the notion of disability in anything more than very broad brush strokes. It held at paragraph 43 that "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life." It went on to say that in order for the limitation to fall within the concept of disability it must be probable that it will last for a long time.

29. This is a very opaque definition. If the types of impairments mentioned are only those which 'in particular' hinder the participation of the person in professional life, what are the other categories of impairments that might amount to disability? And how long is a long time? What about relapsing and remitting conditions such as MS? A more pertinent question, given the facts of the Chacón Navas case itself, is what is the distinction to be drawn between disability and sickness (for example, would an AIDs sufferer, who may well be discriminated against for his condition, be considered disabled or merely suffering from a disease?) The Court simply ruled that "by using the concept of disability the legislature deliberately chose a term which differs from sickness" and that "the two concepts cannot therefore simply be treated as being the same". The court failed to give any guidance as to the distinction between the two concepts. It did say that "there is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness". However that does leave open the possibility that chronic sickness might qualify as a disability if it has been going on long enough and looks like being 'long term', whatever that means.

30. It is easy to be derisive of the Courts judgment in this regard. However, the Court is perhaps rather ill placed to set out a comprehensive definition of what is or is not a disability. It is unfortunate that the directive has not sought to tackle a definition of disability. Certainly in the UK there have been considerable efforts made in the drafting of the legislation and in related guidance notes to explain what is meant by a disability. The experience of the UK in so doing, along with the experience of other member states, could have been used to evolve a more practicable definition of disability than that which

the Court will be able to develop on a case by case basis and which will be affected by the nature of the facts arising in each (random) case coming before it for decision. This is, I think, a missed opportunity by the legislature, and a lacuna that it would be well that the Commission should bring forward proposals to fill if a uniform definition of disability throughout the Community is to be achieved without numerous references to the ECJ.

31. The other important ruling in the Chacón Navas was the Court's finding that the list of grounds upon which discrimination was prohibited by Article 13 of the Treaty and hence in the directives 2000/78, and, by analogy, 2000/43, was exhaustive. Therefore, sickness could not be an additional ground upon which discrimination would be prohibited.

C-267/06 Tadao Maruko

32. Finally in this section I'd like to mention the case of Tadao Maruko, which concerned discrimination on grounds of sexual orientation. Mr Maruko and another man had entered into a registered same-sex partnership under German law in November 2001. The German law created, for people of the same sex, a family law institution which resembled marriage; it expressly provided that for social security purposes registered partnerships were placed on an equal footing with marriage. Mr Maruko's life partner, who had been a theatrical costume designer, died in January 2005. Since 1959 he had contributed continuously to a legislative pension scheme associated with his profession. The question arose whether Mr Maruko was entitled to a widower's pension under that scheme, as he would have been if he were Mr Maruko's wife rather than same sex life partner.

33. The Court first decided, by applying case law relating to Article 141 EC that the scheme into which Mr Maruko's partner had been paying was in fact pay within the meaning of the Directive and not a social security benefit.

34. The Court then went on to address the question of whether Articles 1 and 2 of Directive 2000/78 precluded such legislation that left the same sex life partner without a widower's pension in circumstances where a spouse would have received such a pension.

35. The Court held that the Directive precluded legislation which, after the death of his life partner the surviving partner would 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. The Court held that it was for the national 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 in question.

36. It seems to me that the Court has not been very bold in its concept of discrimination on grounds of sexual orientation. The decision does not require Member States to treat person in same sex life partnerships as being in relationships that are equivalent to marriage for the purpose of pay within the meaning of Directive 2000/78. Rather, it has left it open for there to be different levels of protection for same sex couples in different Member States. Those Member States that do recognise an institution for same-sex partners as equivalent to marriage will be required by the Directive to extend any employment benefits that apply to spouses also to same sex partners. But those Members States that do not recognise the possibility of same sex partnerships being equivalent to marriage will escape such a rule. This is hardly uniform application in the European Union of a prohibition on discrimination on grounds of sexual orientation. Some homosexual people will find themselves to be more equal than others in the European Union, depending on how progressive the law in their own country is.

Justification

37. In the case of indirect discrimination and also direct discrimination on grounds of age it is possible for the different treatment not to amount to unlawful discrimination if the different treatment is objectively justified. In cases arising under these directives the Court has ruled on justification on two occasions, and an Advocate General's opinion has recently been pronounced in a third case; all of these relate to age discrimination. The two decided cases are *Mangold* and *Palacios de la Villa*.

C-144/04 Mangold

38. Mangold concerned a rule of national law that provided that fixed term employment contracts shall be authorised for a maximum term of two years and could be renewed three times at most; however in the case of workers who had reached the age of 60 that rule did not apply. The law was subsequently changed so that it did not apply to workers over the age of 52. Mr Mangold was employed on a fixed term contract, for no other reason than the fact that he was over 52 and so fell within this category of workers.

39. Leaving aside for now some of the more controversial aspects of the Mangold decision, which have been much discussed both in the academic literature and in subsequent Advocate Generals' opinions, the Court decided that the law relating to fixed term work as regards workers over the age of 52 was unlawful age discrimination.

40. In this regard, the Court first decided that by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52 a difference of treatment on grounds of age had been introduced. It then went on to consider whether that difference was justified under Article 6(1) of the directive. It noted that the policy had a legitimate aim, namely to promote the vocational integration of unemployed older workers in so far as they encounter considerable difficulties in finding work.

41. The next question was whether the provision was appropriate and necessary in order to achieve that aim. In that respect, the Court noted, that Member States enjoyed a broad discretion in their choice of measures. However, the Court ruled that this measure could not be justified under Article 6(1) because it:

> "Leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever duration of any period of unemployment, may lawfully,

> until they retire, be offered fixed term contracts which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members working life, of being excluded from the benefit of stable employment. ...

42. The Court continued,

> "In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed term contract of employment, when it has not been shown that fixing an age threshold as such regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued."

43. Thus we see the Court examining very carefully whether the difference in treatment on grounds of age could be justified having regard to the aim pursued; and not being reluctant to find that it did not do so. It is interesting to compare the boldness of this decision with the judgment given in Palacios de la Villa.

C-411/05 Palacios de la Villa

44. Mr Palacios de la Villa brought a case challenging his dismissal on the grounds that he had reached the compulsory retirement age of 65.

45. The Court held that retirement ages did fall within the scope of application of the directive, notwithstanding the 14th recital which says that the Directive is to be without prejudice to national provisions laying down retirement ages. It also held that national legislation according to which the fact that a worker had reached the retirement age laid

down by that legislation leads to automatic termination of his employment contract constituted a difference of treatment directly based on age.

46. In its order for reference the national court had expressed doubts as to whether this particular rule could be justified. After all, the measure was not specifically stated to pursue objectives relating to national employment policy, such as increased stability in employment, conversion of temporary into permanent contracts, sustaining employment, the recruitment of new workers or the improvement of the quality of employment.

47. The Court however said that the lack of precision in the national legislation as regards the aim pursued did not automatically exclude the possibility that it could be justified under Article 6(1) of the Directive. The Court examined the general context of the measure to enable its aim to be identified, and found that its aim was to reduce unemployment, which was a legitimate aim.

48. The Court then went on to look at whether the measure was necessary and appropriate to achieve that aim, recalling the statement in *Mangold* that Member States have a broad discretion in determining the measures to achieve legitimate aims of employment policy. In this case, the Court reached the view that the measure was not inappropriate or unnecessary in view of the aim of facilitating access to the labour market. In particular, it seems to have been persuaded by the fact that the workers who were subject to compulsory retirement because they had reached the age limit was not only based on the specific age but also took account of the fact that the persons concerned had to be entitled to financial compensation by way of a retirement pension at the end of their working life, and at a level which could not be regarded as unreasonable. It also noted that the relevant national legislation allows the social partners to opt, by way of collective agreements – and therefore with considerable flexibility – for application of the compulsory retirement mechanism so that due account may be taken not only of the overall situation in the labour market concerned but also of the specific features of the jobs in question.

49. In the light of those considerations, the Court held that the measure in question was indeed justified under article 6(1) of the directive and therefore it was not unlawful age discrimination.