



RECENT CJEU EQUALITY CASE LAW

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CURRENT REFLECTIONS ON EU
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CJEU EQUALITY CASE-LAW* 2018-2019

* primarily based on equality directives and on the Charter of Fundamental Rights

In the period between 2018 and 2019 the CJEU provided interpretation in discrimination cases on the following directives:

- Directive 2006/54/EC
- Directive 2000/78/EC
- Directive 2000/43/EC
- Directive 96/34/EC (Directive 2010/18/EU)
- Directive 92/85/EEC
- Directive 79/7/EEC

Gender, and gender identity		Racial and ethnic origin	Religion	Disability	Age	Sexual orientation
C-41/17 González Castro		C-457/17 Maniero	C-68/17 IR	C-270/16 Ruiz Conejero	C-24/17 Österreichischer Gewerkschafts- bund	C-673/16 Coman
C-161/18 Villar Láziz			C-193/17 Cresco Investigation	C-312/17 Bedi	C- 378/17 Minister for Justice and Equality and the Commissioner of the Garda Síochána	C-258/17 E.B.
C-486/18 Praxair MRC					C-396/17 Leitner	
	C-451/16 MB				C-49/18 Escribano Vindel	
					C-154/18 Horgan and Keegan	

GENDER, AND GENDER IDENTITY

C-41/17 González Castro, 19 September 2018 – SOCIAL POLICY

- Article 19 of Directive 2006/54/EC
- Articles 4, 5, and 7 of Directive 92/85/EEC
- Article 2(4) Directive 2003/88/EC

C-161/18 Villar Láziz, 8 May 2019 – SOCIAL POLICY

- Article 21 of the Charter
- Article 4 of Directive 79/7/EEC

C-486/18 Praxair MRC, 8 May 2019 – SOCIAL POLICY

- Article 157 TFEU
- Clause 2(6) of the Parental Leave Framework Agreement annexed to Directive 96/34/EC

C-451/16 MB, 26 June 2018 - SOCIAL POLICY

- Articles 3(1), 4(1)(a) and 7(1)(a) of Directive 79/7/EEC

C-41/17 GONZÁLEZ CASTRO

Directive 92/85/EEC - the duty of the employer to assess the risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers, decide what measures should be taken, and inform the workers concerned about the results of such risk assessment. The employer shall take all necessary measures to ensure that the exposure of the worker to such risks are avoided (moving to another job or granting a leave). **Member States need to ensure that such workers are not obliged to perform night work.**

- **measures to be taken to avoid risks in respect to breastfeeding**

Directive 2006/54/EC – discrimination based on sex includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85.

burden of proof in cases concerning alleged discrimination of pregnant or breastfeeding workers

Directive 2003/85/EC – definition of ‘night time’ and ‘night worker’

C-41/17 GONZÁLEZ CASTRO

domestic proceedings between Ms Gonzalez, her employer, and the National Social Security Institute, Spain

Spanish law introducing social benefit in respect of risk during breastfeeding and stipulating the duty of the employer to carry out risk assessments, in addition to the General Law on Social Security – defining as a protected situation the situation of suspended employment for breastfeeding workers

Ms Gonzalez was refused a certificate indicating a risk to breastfeeding by a private insurance company, and consequently could not obtain an allowance in respect to risk during breastfeeding

56. (...) „the suspension of the employment contract for risk during breastfeeding and the grant of the related allowance are possible only if it is established, following the assessment of the work of the worker concerned, that it poses such a risk and that it is not feasible to adjust the working conditions of that worker or move her to another job.”

C-41/17 GONZÁLEZ CASTRO

Concept of „night work” in a case regarding shift work

46. (...) „**a worker who, as in the case in the main proceedings, does shift work in the context of which only part of her duties are performed at night must be regarded as performing work during 'night time' and must therefore be classified as a 'night worker'** within the meaning of Directive 2003/88.” – supported by the principle of effectiveness

Burden of proof in a case regarding measures to be taken to avoid risks to breastfeeding

Burden of proof shifts also in proceedings in which a worker challenges a risk assessment of her work (see also judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789) It is on the worker to adduce factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It is then **on the respondent to prove that the risk assessment included a specific assessment taking into account the individual situation of the worker.**

Direct discrimination in a case when the individual situation of the worker concerned is not taken into account

77. (...) „the risk assessment of the work of the worker concerned, carried out under Article 7 of Directive 92/85, must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk. **If there is no such assessment, the situation amounts to less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of that directive, and constitutes direct discrimination on grounds of sex,** within the meaning of Article 2(2)(c) of Directive 2006/54, enabling the application of Article 19(1) of that directive.”

C-161/18 VILLAR LÁIZ

Domestic proceedings between Ms Villar Láiz and the National Social Security Institute, and the General Treasury of Social Security, Spain

The method of calculating the retirement pension

Directive 79/7/EEC – progressive implementation of the principle of equal treatment of men and women in matters of social security; no discrimination on ground of sex, directly or indirectly, as concerns

- the scope of the schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions,
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.’

C-161/18 VILLAR LÁIZ

Spanish law (General Law on Social Security)

the basic amount for calculation of the retirement pension shall be the quotient given by dividing by 350 the contribution bases of the interested party during the 300 months immediately before the month preceding the event giving rise to the entitlement ...

the amount of the retirement pension shall be determined by applying to the basic amount, the following percentages:

(a) 50% for the first 15 years of contributions;

(b) From the 16th year onwards, each additional month of contributions shall give rise to the application of a percentage which shall amount, between the 1st and 248th month, to 0.19% and, for each month following the 248th, 0.18%, but the percentage applicable to the basic amount must not exceed 100% ...

Special rules fo part-time work : periods of part-time work not taken into account in the same way as periods of full-time work

It is apparent that they put part-time workers at a disadvantage as compared with full-time workers, while statistical evidence indicates that 75% of part-time workers were women. More specifically, **the workers on short part-time contracts are placed at a disadvantage because of the application of a lower reduction factor than applicable in case of full-time workers.**

C-161/18 VILLAR LÁIZ

Ms Villar Láiz's pension calculated by multiplying the basic amount by **a reduction factor** of 53%, that factor taking account of the fact that Ms Villar Láiz had worked part-time for a significant part of her working life.

In her case the basic amount was derived from the average of the contribution bases, calculated according to the wages actually received for the hours worked and for which contributions were made over a number of years preceding retirement.

She requested that, for the calculation of the amount of her retirement pension, a factor of 80.04% should be applied, so that her periods of part-time work should be taken into consideration in the same way as periods of full-time work.

C-161/18 VILLAR LÁIZ

C-385/11 *Elbal Moreno* (2012) – the Spanish CC declares unconstitutional a system that took account of periods of part-time work in proportion to the time of full-time work, by applying however a multiplication factor of 1.5. Under this system, if the time did not exceed 15 years, the worker had no access to a retirement pension.

Under the new system, periods of part-time work are taken into account not in their entirety, but in proportion to the extent to which the work is part time, by the application of the reduction factor corresponding to the percentage represented by the ratio of the time of the worker engaged in part-time work to that of a comparable worker who is employed full time.

In other words, „the amount of the contributory retirement pension of a part-time worker is to be calculated by multiplying a basic amount, established on the basis of remuneration actually received and contributions actually paid, by a percentage which is related to the length of the contribution period, that period being modified, by a reduction factor equal to the ratio of the duration of the part-time work actually carried out to the duration of the work carried out by a comparable full-time worker, and increased by the application of a factor of 1.5.” (CJEU, para. 34)

C-161/18 VILLAR LÁIZ

(1) Must a rule of national law which reduces the number of qualifying years for the purpose of applying the percentage in the case of periods of part-time work, be considered contrary to Article 4(1) of [Directive 79/7]? Does Article 4(1) of Directive [79/7] require that the number of years of contributions that are taken into account in order to determine the percentage to be applied in calculating the retirement pension be determined in the same way for full-time workers and part-time workers?

YES, to the extent that legislation places at a particular disadvantage workers who are women as compared with workers who are men (which is the role of the national court to ascertain – if the national court confirms that such disadvantage exist, it needs to examine whether indirect discrimination is justified.)

and this makes the answer to the second question unnecessary...(para. 57).

(2) Must a rule of national law such as that in dispute in the present proceedings be interpreted as also being contrary to Article 21 of [the Charter], thus requiring the national court to give full effect to the Charter and to refrain from applying the disputed provisions of national law, without requesting or awaiting the prior setting aside of the provisions by legislative or other constitutional means?

C-161/18 VILLAR LÁIZ

Indirect discrimination

Two elements of the scheme reducing the retirement pension of part-time workers: (1) the basic amount of the retirement pension and (2) the reduction factor corresponding to the ratio of the time of part-time work actually carried out by the worker concerned

- objective aim: protection of the social security system

justified?

- yes, with regard to the first element (1)

- no, with regard to the second element (2) because a reduction in the amount of the retirement pension is greater than that which would result from merely taking account the proportion *pro rata temporis* of their time worked

C-486/18 PRAXAIR MRC

Directive 96/34/EC and the framework agreement on parental leave setting out minimum requirements on parental leave and time off from work on grounds of *force majeure* to reconcile work and family life, and promote equal opportunities between men and women

Directive 97/81/EC concerning the framework agreement on part-time work - part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

C-486/18 PRAXAIR MRC

RE was employed full-time and for an indefinite duration. She was dismissed, while on part-time parental leave

She received a compensation payment for dismissal and a redeployment leave allowance determined in part on the basis of the reduced salary which she received when the dismissal took place

The concept of „pay” within the meaning of Article 157 TFUE includes the compensation granted by an employer to a worker when he is made redundant

71. (...) „such compensation is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him on termination of the employment relationship with a view to enabling him to adjust to the new circumstances arising from such a termination (judgments of 17 May 1990, *Barber*, C-262/88, EU:C:1990:209, paragraph 13, and of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 35).”

C-486/18 PRAXAIR MRC

According to clause 2.6 of the framework agreement on parental leave, **rights acquired or in the process of being acquired** by the worker on the date on which parental leave starts **are to be maintained as they stand until the end of parental leave and, at the end of parental leave, these rights**, including any changes arising from national law, collective agreements or practice, **are to apply**

– ensuring that at the end of the parental leave a worker will find himself at the same position he was before the leave

the unilateral termination by the employer must be regarded as relating to a full-time employment contract (see C-116/08 *Meerts*)

the compensation payment for dismissal must be determined entirely on the basis of the full-time salary of that worker.

In case of a worker who worked both on full-time and part-time basis for the same undertaking the compensation payment for dismissal may not be calculated in proportion to the periods of each of those types of employment completed since the worker joined the undertaking.

C-486/18 PRAXAIR MRC

Indirect discrimination regarding equal pay

indirect discrimination on grounds of sex arises where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage than the other. Such a measure is compatible with the principle of equal pay only if the difference in treatment between the two categories of workers to which it gives rise is justified by objective factors unrelated to any sex discrimination (see C-173/13 *Leone*)

Comparison – a worker who is made redundant (even if on part-time parental leave) to be compared to a worker who works full-time (see C-116/08 *Meerts*)

The case concerns **rights of a worker employed under a full-time contract** on part-time parental leave who was made redundant in pursuance to the unilateral termination by the employer **must be regarded as relating to a full-time employment contract.**

According to national statistics a far greater number of women than men choose to take part-time parental leave

A difference in treatment in this regard must be objectively justified by factors unrelated to sex discrimination.

C-486/18 PRAXAIR MRC

Clause 2.6 of the framework agreement on parental leave concluded on 14 December 1995, which is annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, **must be interpreted as precluding**, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker being determined at least in part on the basis of the reduced salary which he receives when the dismissal takes place.

Article 157 TFEU must be interpreted as precluding legislation such as that in the main proceedings which provides that, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, that worker receives a compensation payment for dismissal and a redeployment leave allowance determined at least in part on the basis of the reduced salary being received when the dismissal takes place, in circumstances when a far greater number of women than men choose to take part-time parental leave and when that difference in treatment which results therefrom cannot be explained by objective factors unrelated to any sex discrimination.

C-451/16 MB

National legislation making recognition of gender identity conditional on the annulment of any marriage entered before change of gender.

National legislation treats less favourably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married.

Q: „Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?“

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in particular the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a) thereof, must be interpreted as **precluding national legislation which requires a person who has changed gender not only to fulfill physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.**

RACIAL AND ETHNIC ORIGIN

C-457/17 *Maniero*, 15 November 2018

Discrimination with regard to racial and ethnic origin applies both if a measure concerns persons belonging to a particular ethnic group or not who are less favourably treated because of such measure (see C-83/12 *CHEZ Razpredelenie Bulgaria*)

Qs:

(1) Is the award by a registered association of scholarships intended to promote projects for research and studies abroad covered by the concept of "education" within the meaning of Article 3(1)(g) of Directive 2000/43?

(2) If Question 1 is to be answered in the affirmative:

In the case of the award of scholarships referred to in Question 1, does the participation requirement relating to the passing of the First State Law Examination in Germany constitute indirect discrimination against an applicant within the meaning of Article 2(2)(b) of Directive 2000/43 where the applicant, who is a Union citizen, has indeed acquired a comparable qualification in a State which does not belong to the European Union, without the choice of this place of qualification being related to the ethnic origin of the applicant, but, on account of his residence in national territory and fluent command of German, had, in the same way as a national, the possibility of taking the First State Law Examination after studying law in national territory?

Is any difference made by the fact that the objective pursued by the scholarship programme is, without being linked to any discriminatory characteristics, to provide law graduates in Germany with knowledge of foreign legal systems, experience of being abroad and knowledge of languages by promoting a project for research and studies abroad?

C-457/17 MANIERO

Mr Maniero is an Italian national born and residing in Germany. In 2013, he obtained a Bachelor of Laws from a university in Armenia.

Studienstiftung des deutschen Volkes eV (German Academic Scholarship Foundation, 'the Foundation') informed him that to apply for a law program (Bucerius Jura) the applicant has to pass the First State Law Examination.

He did not apply but claimed that this condition amounts to discrimination on ethnic and social grounds.

In an action before the Landgericht (Regional Court, Germany) he requested the Foundation to be ordered to cease and refrain from discrimination on the grounds of his age or origin and to pay him EUR 18 734.60 in damages and compensation for travel costs.

Preliminary questions by the Federal Court of Justice

C-457/17 MANIERO

The concept of „education” within the meaning of Article 3(1)(g) of Directive 200/43/EC includes the award of scholarships intended to promote projects for research and studies abroad

– so Maniero, the European Commission, AG Sharpston, and the CJEU

interpreted in the light of the purpose of Directive and the legislative history (see AG opinion, paras. 41-48).

education includes access to education and financing by means of scholarship provided that there is a genuine link between the financing and education (CJEU, para. 44)

(...) „A scholarship has such a link to education when it covers, for instance, enrolment and tuition fees, travel costs associated with courses that take place in another State, or maintenance costs, when the objective is to permit students to follow their courses. It is for the national court to verify those aspects” (AG opinion, para. 48).

C-457/17 MANIERO

AG Sharpston:

32. Indeed, for the purposes of combating discrimination, if access to education were omitted, what would be left in the concept of 'education'? In a classroom (to take the very classic view of education), everyone can sit in the front and everyone can ask questions. It would be nowadays unimaginable that a certain ethnic group has to sit at the back and is not allowed to address the teacher. Equally self-evidently, all students should be graded according to the same criteria, according to their merits and not their race or ethnic origin; and all students should obtain the same diploma after successfully following the same classes. (22) But the possibility to be admitted under the same conditions to all schools and to all classes corresponds to access to education. Without that access, there can be no education. To be clear, the word 'education' necessarily implies the words 'access to' education; they are co-existent and co-dependent and to divorce them would denude the directive of its purpose to combat discrimination related to education.

33. Of course, access to education has many component parts. It could be physical access to a building; imposing a *numerus clausus* system to keep student numbers controlled; the ability to borrow or purchase books; the ability to pay for living expenses (amongst many others). Accordingly, schools, universities and other institutions frequently award scholarships to cover the fees of educational programmes, travel costs incurred in studying abroad or maintenance costs (whether in money or in kind, such as the provision of free accommodation or meals).

34. Financing is an essential aspect of access to education. Excluding a certain ethnic group from that finance means, especially for educational programmes for which the fees are very high, excluding that group from education. That perpetuates any existing discrimination against the group in question. As the Commission stated in its proposal for the directive, high quality education is a prerequisite for successful integration into society and equal treatment in selection procedures (that is to say, in access to education) should not be neglected. (23) A teleological interpretation of 'education' pleads clearly in favour of including aspects of access to education within the scope of the directive.

35. An analysis of the term 'education' in the more general context of EU law points to the same conclusion. The right to education (and access to vocational training) as well as protection from discrimination on grounds of race or ethnic origin are fundamental rights recognised by Articles 14 and 21 of the Charter respectively. When deciding how to interpret 'education' within the context of Directive 2000/43, it is important to bear in mind that the question is situated at the crossroads of two fundamental rights.

C-457/17 MANIERO

Indirect discrimination

occurs only if there is an „disparate impact” on a particular protected category – persons of a particular ethnic origin are in a less favourable situation, this impact cannot be determined in an abstract and general way.

(...) „for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question” (*Jyske Finans*, para. 32).

no information about a particular disadvantage for persons of a particular ethnic origin resulting from a neutral condition of passing the First State Examination .

This condition does not amount to indirect discrimination.

RELIGION

C-68/17 IR v JQ, 11 September 2018 – SOCIAL POLICY

- Dismissal of an employee of the Catholic faith performing managerial duties due to a second, civil marriage entered into after a divorce - justified by an alleged infringement of the duty of good faith and loyalty to the employer's ethos.
- Article 4(2) Directive 2000/78/EC applicable to a private company owned by the Church (see C-414/16 Egerberger)
- Different treatment of employees in managerial positions / genuine and determining occupational requirements
- The duty of a national court to interpret national law in a manner that is consistent with EU law

C-193/17 Cresco Investigation, 22 January 2019 – SOCIAL POLICY

- Denial of paid holiday leave for work done on Good Friday for a worker who is not a member of the churches covered by the Austrian law on public holidays
- Article 21 of the Charter
- Articles 1, 2(2)(a), 2(5), and 7(1) of Directive 2000/78/EC

DISABILITY

C-270/16 Ruiz Conejero, 18 January 2018 – PRINCIPLES, OBJECTIVES AND TASKS OF THE EU

- Article 2(2)(b)(i) Directive 2000/78/EC

C-312/17 Bedi, 19 September 2018 – SOCIAL POLICY

- Article 2(2)(b) Directive 2000/78/EC

C-270/16 RUIZ CONEJERO

National legislation permitting, subject to certain conditions, the dismissal of an employee by reason of intermittent absences, even where justified

Worker's absences resulting from illnesses linked to his disability

Article 2(2)(b)(i) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as **precluding** national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, **unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess.**

C-270/16 RUIZ CONEJERO

Article 52 of the Workers' Statute, which concerns termination of the contract on objective grounds provides in paragraph (d):

'The contract may be terminated:

...

(d) for absences from work, albeit justified but intermittent, that amount to 20% of working hours in two consecutive months provided that total absences in the previous 12 months amount to 5% of working hours or 25% of working hours in four non-continuous months within a 12-month period.

The following shall not be counted as absences from work for the purposes of the previous paragraph: absences due to industrial action for the duration of that action, acting as a workers' representative, industrial accident, maternity, pregnancy and breastfeeding, illnesses caused by pregnancy, birth or breastfeeding, paternity, leave and holidays, non-industrial illness or accident where absence has been agreed by the official health services and is for more than 20 consecutive days or where absence is caused by the physical or psychological situation resulting from gender-based violence, certified by the social care services or health services, as appropriate.

Nor shall absences for medical treatment for cancer or serious illness be counted.'

C-270/16 RUIZ CONEJERO

The rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78 (see C-335/11 and C-337/11 *HK Danmark*, para. 76).

objectively justified? – prevention of absenteeism

appropriate and necessary to achieve that aim?

– for the referring court to examine whether the Spanish legislature omitted to take account of relevant factors relating, in particular, to workers with disabilities (see C-335/11 and C-337/11 *Danmark*, para. 90).

proportionate?

- certain absences may not be considered repeated absences from work on the basis of which the contract may be terminated, absences from work based on a worker's illness do not cover all the cases of 'disability' within the meaning of Directive 2000/78.

C-312/17 *BEDI*

Termination of the payment of a bridging assistance when the recipient becomes entitled to early payment of a retirement pension for disabled persons under the statutory pension scheme

Article 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted, in a case such as that in the main proceedings, as **precluding** a provision in a collective agreement under which the payment of bridging assistance — granted with the aim of ensuring a reasonable means of subsistence to a worker who has lost his job until he is entitled to a retirement pension under the statutory pension scheme — must cease once that worker is entitled to early payment of a retirement pension for severely disabled persons under that scheme.

C-312/17 *BEDI*

12. Mr Bedi, born in 1954, was classified as a severely disabled person, with a 50% disability rating.

13. He was engaged in Germany by the United Kingdom armed forces in 1978 as a civilian employee, latterly as a security guard at the station in Münster (Germany). Pursuant to the terms of his employment contract, the collective agreements on social security for persons employed by armed forces stationed in the Federal Republic of Germany, including the TV SozSich, were applicable to his employment relationship.

redundant => eligible for bridging assistance - granted with the aim of ensuring a reasonable means of subsistence to a worker who has lost his job => consecutively employed full-time for 2 years => eligible for an early pension for persons with severe disabilities => **automatic loss** of the right to bridging assistance

C-312/17 *BEDI*

bridging assistance, such as that payable under the TV SozSich, can be classified as 'pay' within the meaning of Article 157 TFEU

35. (...) „the compensation granted by an employer to a worker when he is made redundant is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him on termination of the employment relationship with a view to enabling him to adjust to the new circumstances arising from such termination” (see C-262/88 Barber, para 13 and C-19/02 Hlozek)

Other specificities apply...paid by Germany, on behalf of the UK, part of collective agreement for the military, calculated on the basis of the last salary

the termination of payments of bridging assistance concerns all who acquire early or invalidity pensions, not only the severely disabled

52. (...) „ in the light of the reduction of the amount of a retirement pension, if drawn early, and of the thresholds of additional income that a worker can receive in addition to that pension, **the aggregate income of a disabled person in Mr Bedi's situation is lower than the aggregate income — made up of the amount of bridging assistance to which the remuneration paid in the context of a new employment relationship could be added — that a non-disabled person in the same situation could receive.**”

53. (...) „ the effect of Paragraph 8(1)(c) of the TV SozSich is that the income of a severely disabled worker, for the period during which he receives early payment of a retirement pension, is lower than that of a non-disabled worker.”

C-312/17 *BEDI*

Comparator –

severely disabled workers (receiving an early pension) and non-disabled workers (receiving bridging assistance)

paras. 54-57

workers in age brackets approaching retirement are in a situation comparable to that of other workers concerned by a redundancy since their employment relationship with their employer ends for the same reason and in the same circumstances (see C-152/11 *Ordar*, para. 61).

the advantage granted to severely disabled workers consisting in entitlement to claim a retirement pension as from a younger age than non-disabled workers does not place them in a different situation in relation to those workers

severely disabled workers are in a situation comparable to that of non-disabled workers in the same age bracket in the light of Article 2(2)(b) of Directive 2000/78.

C-312/17 *BEDI*

Indirect discrimination

- objective aim? **YES**
- appropriate and necessary? **YES** (broad discretion, it does not appear manifestly inappropriate...)
- proportionate? **NO** (it is going beyond what is necessary...)
 - * a provision must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered (see C- 12/11 *Ordar*, para. 65)
 - * the same standard applies to social partners (para. 69-70)
 - * **the social partners**, in pursuing the legitimate aims of providing compensation for the future of workers who have been made redundant and facilitating their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources, **failed to have regard to relevant elements that concern severely disabled workers specifically** (para. 76)
 - * Paragraph 8(1)(c) of the TV SozSich has an excessive adverse effect on the legitimate interests of severely disabled workers and therefore **goes beyond what is necessary** to achieve the social policy aims pursued by the German social partners (para. 77).

AGE

C- 378/17 Minister for Justice and Equality and the Commissioner of the Garda Síochána, 4 December 2018 - SOCIAL POLICY

- Competence of an equality tribunal

C-24/17 Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich, 8 May 2019 – SOCIAL POLICY

- New rules for remuneration and advancement of contractual public servants

C-396/17 Leitner, 8 May 2019 – FUNDAMENTAL RIGHTS, CHARTER

- New system of remuneration and advancement

C-49/18 Escrivano Vindel, 7 February 2019 – FUNDAMENTAL RIGHTS, CHARTER

- National legislation does not provide for different treatment on the basis of length of service

C-154/18 Horgan and Keegan, 14 February 2019 – SOCIAL POLICY

- A less advantageous salary scale and classification on that scale applicable to new teachers does not constitute indirect discrimination

C-376/17 WORKPLACE RELATIONS COMMISSION

Ronald Boyle and two other persons were excluded from the procedure for recruitment of new police officers to An Garda Síochána (national police force, Ireland) on the ground that they were above the maximum age for recruitment laid down by the Admissions and Appointments Regulations (para. 11)

as a matter of national law, the Equality Tribunal, now the Workplace Relations Commission, lacks jurisdiction to disapply provisions of national law that it considers to be contrary to EU law. Only the High Court enjoys such jurisdiction and may, on that basis, properly have an action brought before it which, if upheld, would entail disapplying a provision of national law, subject to an appeal before the Court of Appeal (Ireland) or before the referring court. (para. 18)

EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law. (para. 53).

C-24/17 GWB

C-24/17 Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich

- Articles 1, 2 and 6 of Directive 2000/78/EC
- Article 47 of the Charter
- Article 7 of Regulation No 492/2011
- Articles 20 and 21 of the Charter
- Austrian law on contractual public servants as amended (see C-88/08 *Hütter* and C 530/13 *Schmitzer*)
- the transition of active contractual public servants to a new system of remuneration and advancement in the context of which the initial grading of those contractual public servants is calculated according to their last remuneration paid under the previous system
- No possibility of judicial review of the reference date used for calculating their remuneration under national law
- in the determination of the remuneration seniority of a contractual public servant, previous service periods completed in an employment relationship with a local authority or municipal association of a Member State of the European Economic Area, the Republic of Turkey or the Swiss Confederation, or with an organisation of the European Union or an intergovernmental organisation of which Austria is a member, or with any similar body, not taken into account, whereas all other previous service periods are taken into account only up to a maximum of 10 years and in so far as they are relevant.

C-396/17 LEITNER

1. Articles 1, 2 and 6 of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, read in conjunction with Article 21 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding** national legislation, such as that at issue in the main proceedings, which entered into force retroactively, and which, for the purpose of putting a stop to discrimination on grounds of age, provides for the transfer of currently employed civil servants to a new remuneration and advancement system under which the initial classification of those civil servants is determined on the basis of the last salary they received under the previous system.

2. Article 47 of the Charter of Fundamental Rights of the European Union and Article 9 of Directive 2000/78 must be interpreted as **precluding national legislation which, in a situation such as that at issue in the main proceedings, reduces the scope of the review which national courts are entitled to conduct, by excluding questions concerning the basis of the 'transition amount' calculated according to the rules of the previous remuneration and advancement system.**

3. In a situation where national provisions cannot be interpreted in a manner which is consistent with Directive 2000/78, **the national court is obliged, within the scope of its powers, to guarantee the legal protection conferred on individuals by that directive and to guarantee that that protection is fully effective, by disapplying, if need be, any contrary provision of national law.** EU law must be interpreted as meaning that where there has been a finding of discrimination which is contrary to EU law, and for as long as measures reinstating equal treatment have not been adopted, the reinstatement of equal treatment, in a case such as that at issue in the main proceedings, involves granting civil servants disadvantaged by the previous remuneration and advancement system the same benefits as those enjoyed by the civil servants treated more favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale and, accordingly, the award of financial compensation to those civil servants discriminated against in the sum of the difference between the amount of remuneration that the civil servant concerned ought to have received had he not been treated in a discriminatory manner and the remuneration which he in fact received.

C-49/18 ESCRIBANO VINDEL

Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1) and (2)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted, subject to the verifications to be made by the referring court, **as not precluding** national legislation, such as that at issue in the main proceedings, which established, in the context of general salary-reduction measures linked to the requirements of eliminating an excessive budget deficit, different percentage reductions for the basic salary and additional remuneration of members of the judiciary, which, according to the referring court has entailed **greater percentage reductions for those members of the judiciary on two lower pay grades than those members of the judiciary on a higher pay grade, when the former receive a lower salary, are generally younger and generally have a shorter length of service than the latter.**

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that **the principle of judicial independence does not preclude** the application to the applicant in the main proceedings of national legislation, such as that at issue in the main proceedings, which established, without regard to the nature of the duties performed, length of service or the importance of the tasks performed, in the context of general salary-reduction measures linked to the requirements of eliminating an excessive budget deficit, different percentage reductions for the basic salary and additional remuneration of members of the judiciary, which, according to the referring court has entailed greater percentage salary reductions for those members of the judiciary on two lower pay grades than those members of the judiciary on a higher pay grade, when the former are paid less than the latter, **provided that the level of remuneration received by the applicant in the main proceedings after application of the salary reduction at issue is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment, which is a matter for the referring court to ascertain.**

C-49/18 ESCRIBANO VINDEL

62 (...) it must be borne in mind that the second subparagraph of Article 19(1) TEU provides that Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. Thus, it is for the Member States to provide a system of remedies and procedures to ensure effective judicial review in those fields (judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34).

63 It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, form part of the system providing judicial remedies in the fields covered by EU law, meet the requirements of effective judicial protection (judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 37).

64 The factors to be taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 38).

65 The guarantee of independence, which is inherent in the task of adjudication, is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts (judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 42).

66 The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. Like the protection against removal from office of the members of the body concerned, the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence (judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 44 and 45).

C-154/18 HORGAN AND KEEGAN

Mr Horgan and Ms Keegan qualified as school teachers. As of that autumn, they commenced employment as teachers in an Irish State primary school.

Salary scale and classification on that scale upon recruitment less advantageous than that applicable to teachers already employed as such

23. (...) „the only relevant criterion for the purposes of applying the new rules on the salary scale and classification on that scale is **whether the person concerned is a 'new entrant to the public service as of 1 January 2011', regardless of the age of the public servant at the date at which he or she was recruited.** Accordingly, that criterion, which renders the application of the new rules dependant exclusively on the date of recruitment as an objective and neutral factor, is manifestly unconnected to any taking into account of the age of the persons recruited.” (see C-443/07 *Centeno Mediavilla and Others v Commission*, paras .81 and 83).

a measure such as that at issue in the main proceedings which, as of a specific date, provides for the application on the recruitment of new teachers of a salary scale and classification on that scale which are less advantageous than that applied, under the rules previous to that measure, to teachers recruited before that date **does not constitute indirect discrimination on the grounds of age within the meaning of that provision.**

SEXUAL ORIENTATION

C-673/16 Coman and others, 5 June 2018 – CITIZENSHIP OF THE UNION

Article 21 TFUE

Articles 2(2), Article 3 and Article 7 Directive 2004/38/EC

Right of residence for more than three months of a third country national who is married to the Union citizen of the same sex

C-258/17 E.B., 15 January 2019 – SOCIAL POLICY

Article 2 Directive 2000/78/EC

attempted act of same-sex indecency committed by a civil servant on male minors subject to disciplinary sanction

compulsory early retirement accompanied by a reduction in the pension entitlement

calculation of the retirement pension paid

C-673/16 COMAN

In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as **precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.**

Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, **a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months.** That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

C-673/16 COMAN

39. „To allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist.” (principle of effectiveness).

- limitation of the freedom of movement (right to return).

46.(...) „an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.”

47. (...) „a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter.”

C-258/17 E.B.

attempted act of same-sex indecency committed by a civil servant on male minors subject to criminal and disciplinary sanction => resulting in compulsory early retirement accompanied by a reduction in the pension entitlement

In 1976, Austrian law provided for two separate criminal offences: 'defilement' (sexual acts with persons *under the age of 14*); and 'indecency' (*male homosexual acts with persons under the age of 18*). In 2002, the latter offence was held to amount to unjustified discrimination on the grounds of sexual orientation. It was repealed (Opinion, para. 2).

E.B claims the right to the entirety of his pension, without any reductions.

36. (...) **after the entry into force of Directive 2000/78**, a comparable disciplinary sanction could no longer be imposed in Austria. **It would no longer be permissible to differentiate, even for the purposes of applying disciplinary law, between the incitement of a minor aged between 14 and 18 to perform male homosexual acts, on the one hand, and the incitement to perform heterosexual or lesbian acts, on the other hand.** The disciplinary decision of 10 June 1975 was made on the basis of just such a differentiation, its central foundation having been that the conduct with which E.P. was charged was, at that time, a criminal offence punishable by law due to its male homosexual nature. Even if it could not be excluded that such an incitement to perform heterosexual or lesbian acts would have been interpreted as a violation of decency, punishable at that time by disciplinary action, the disciplinary sanction which would potentially have been imposed on the civil servant found guilty of the indecency, in the absence of the constituent elements provided for in Paragraph 129 I of the StG, would have been significantly less severe. According to the referring court, in particular, **the acts committed by E.B. could not have been such as to justify the disciplinary sanction consisting in compulsory retirement.**

C-258/17 E.B.

Ratione materiae

– the concept of „pay” within the meaning of Article 157 TFEU

45. (...) „only criterion which may prove decisive is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment.”

46. (...) a pension which concerns only a particular category of workers, which is directly related to the period of service completed and whose amount is calculated by reference to the final salary comes within the scope of that article (see C-267/06 *Maruko*, para. 47-48).

48. (...) „a situation such as that created by the disciplinary decision of 10 June 1975 comes within the scope *ratione materiae* of that directive.”

C-258/17 E.B.

Ratione temporis

53. (...) „only from the expiry of the time limit for transposing Directive 2000/78, namely from 3 December 2003, that that directive brought the effects of the decision at issue in the main proceedings within the scope of EU law.”

60. (...) „at that time, a criminal offence punishable in accordance with a provision of Austrian law which criminalised attempted acts of male homosexual indecency committed against a minor, but which did not criminalise attempted acts of heterosexual or female homosexual indecency committed against a minor. The referring court also pointed out that a possible disciplinary sanction imposed in the absence of elements constituting an attempted act of male homosexual indecency provided for by that provision of Austrian criminal law would have been considerably less severe.”

Directive not applicable to the calculation of pension, but to its reduction.

Necessary to review of the reduction of E.B.'s pension entitlement as from the date of its transposition, in order to put an end to the discrimination on the grounds of sexual orientation.

The pension E.B would have been entitled to if the homosexual nature of the offence is to be disregarded.

C-258/17 E.B.

1. **Article 2 of Council Directive 2000/78/EC of 27 November 2000** establishing a general framework for equal treatment in employment and occupation must be interpreted as **applying, after the expiry of the time limit for transposing that directive, namely from 3 December 2003, to the future effects of a final disciplinary decision**, adopted before the entry into force of that directive, ordering the early retirement of a civil servant, accompanied by a reduction in his pension entitlement.

2. Directive 2000/78 must be interpreted as meaning that, in a situation such as that referred to in point 1 of the operative part of the present judgment, **it obliges the national court to review, with respect to the period starting on 3 December 2003, not the final disciplinary decision ordering the early retirement of the civil servant concerned, but the reduction in his pension entitlement, in order to calculate the amount he would have received in the absence of any discrimination on the ground of sexual orientation.**

C-258/17 E.B.

Opinion of AG Bobek

Where an administrative decision, involving discrimination on the grounds of sexual orientation and leading to a reduction in pension rights, became final before such discrimination was prohibited under Directive 2000/78, is the maintenance of that reduction in pension rights precluded now that the directive is in force? - NO

- maintaining the effects of the disciplinary decision ongoing

a new rule of law 'does not apply to legal situations that have arisen and become definitive under the old law [but] it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application'. (Opinion, para. 46).

In *Römer* relevant national law provided for a review of tax treatment in case of a *change in personal circumstances*.

The element distinguishing *P. and Brock* from the present case is that the relevant decisions in those cases concerned the assessment of the *conditions for granting the pension under new rules of law*.

C-258/17 E.B.

Suggested answer of AG Bobek

Article 2 of Directive 2000/78 **does not preclude** the maintenance in effect of the legal position created by an administrative decision that has become final under national law, in the area of law governing disciplinary action in the civil service (disciplinary decision), compulsorily retiring and reducing the pension benefits of a civil servant, where

- that administrative decision was not yet subject to provisions of EU law, in particular the directive, at the time when it was adopted, but
- a (notional) decision to the same effect would infringe the directive if it were adopted within the temporal scope of the directive.

„AGE DISCRIMINATION” - RULE OF LAW BACKSLIDING CASES

C-286/12 *Commission v Hungary*

In Hungary, in 2011, the judicial retirement age of 70 was lowered to the general retirement age of 62. At the time, judges who reasonably expected that they could work until 70 were forced to retire at the age of 62 with immediate effect, and – unlike in other professions – without the discretion of the employer.

the Commission wanted to play safe in terms of legal grounds – the case was misconstrued as an age discrimination case, without any mention of Article 19(1) TEU or Article 47 of the Charter of Fundamental Rights, albeit the controversy was essentially about judicial independence, and thus the rule of law.

C-619/18 *Commission v. Poland*

the Commission alleged that the lowering of the retirement age for Supreme Court judges to 65 without a meaningful transitional period and granting the president of Poland the discretion to extend the active judicial service of Supreme Court judges was a violation of Article 19(1) TFEU and Article 47 of the Charter of Fundamental Rights. Hence, the case was not constructed as a case concerning age discrimination of judges, but addressed violations of fundamental rights of those who are “recipients of justice” delivered by courts.

THANK YOU

FOR YOUR ATTENTION