

THE RECENT EQUALITY AND NON-DISCRIMINATION CASE-LAW OF THE CJEU

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Colm O'Cinneide
Professor of Law, University College London



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OVERVIEW OF DEVELOPMENTS

- The CJEU's case-law during the last year has featured fewer cases relating to the EU non-discrimination directives than used to be the case, reflecting a trend that has emerged over the last few years. (So not just COVID related.) Does this reflect a 'drying up' of this field of law – or a maturation?
- In contrast, the European Court of Human Rights (ECtHR)'s case-law continues to develop in interesting new directions, as will be discussed by Prof Janneke Gerards. A shift in the dynamic of the European courts when it comes to equality issues?
- In what follows, I try to give a brief summary of recent key cases. For previous developments in the EU case-law, see K. Liu and C. O'Cinneide, *The Ongoing Evolution of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (MPG, 2019).
- In particular, I will focus on cases highlighting five areas of recent development in the case-law: 'victimless' discrimination; the right to an adequate remedy and a judicial process; gender stereotyping in the context of family leave and social security policy; inter-generational equity; and the radiating impact of the EU Charter of Fundamental Rights.

Case C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*

- During a TV interview, a senior partner in a law firm stated he would be unwilling to hire a gay employee.
- The scope of Directive 2000/78/EC – ‘access to employment...or to occupation’ in Article 3(1)(a) – was held to cover such a statement even though no recruitment procedure had been initiated, ‘provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical’. Deterrence a key issue, building on *Firma Freyn* and *Asociația Accept*: see [55]-[56] of the judgment.
- EU law also did not preclude a campaigning association having standing under national law to enforce compliance with discrimination law + to obtain damages, even in the absence of a specific injured party. This is a matter left to national law.

Right to a Judicial Remedy/Process

- C-773/18, *TK v Land Sachsen-Anhalt*. The CJEU concluded that the principle of effectiveness precluded Member States from setting a two-month time period for making claims following an initial judgment making a finding of age discrimination, where there is a risk that claimants will not be in a position to determine whether they have been discriminated against. In reaching this conclusion, the CJEU took account of the fact that over 60% of the complaints brought were dismissed for being out of time.
- See also C-585/18, *AK v Sąd Najwyższy* – the very significant Polish rule of law/age discrimination case – ‘exclusive jurisdiction of an independent and impartial tribunal’ is necessary. The ‘objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed’ all relevant to deciding whether ‘legitimate doubts’ exist as to the ‘the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive...’
- See also the important Opinion of AG Saugmandsgaard in Case C-30/19, *Braathens Regional Aviation*, on the right to a judicial determination as to whether discrimination had taken place, irrespective of any settlement offer that may be made.

Gender Roles - Equal Treatment in Social Security for Mothers/Fathers

- Case C-450/18, *WA v Instituto Nacional de la Seguridad Social (INSS)*: Directive 79/7/EEC on equal treatment in social security precluded national legislation which gave mothers with two or more children a supplement to incapacity pensions, when such a supplement was not available for fathers in a similar situation. The justification for the challenged legislation – to redress social advantages faced by mothers – was insufficient to justify the exclusion of fathers in a similar situation. Nor did it qualify as a special measure designed to protect maternity status, or a positive action measure.
- See in contrast Case C-463/19, *Syndicat CFTC de Moselle*: extra post-maternity leave for female workers bringing up children on their own permitted, if intended 'to protect workers in connection with the effects of pregnancy and motherhood'.
- Is there a stable distinction to be made between these judgments?

Age Discrimination Developments

- C-223/19, *YS v NK* – employees of a state-owned organisation whose pension entitlement exceeded a certain threshold were deprived by legislation of a supplementary top-up. Challenged on gender (male employees disproportionately affected) and age grounds. CJEU indicated it could be objectively justified. Maintaining long-term health of pension scheme was deemed to be a legitimate aim; also, the way income levels were taken into account via the threshold requirement was significant for the proportionality analysis.
- C-670/18, *CO v Comune di Gesturi* – a challenge to national legislation prohibiting public administrative authorities from awarding analysis and consultancy roles to retired persons. CJEU concluded that this prohibition could be objectively justified, if it could be shown to enhance the access of younger workers to the labour market. But this would have to be demonstrated: the roles 'must not be isolated, fixed-term jobs offering no possibility of subsequent professional development' ([47]); and the adequacy of pension levels will also be taken into account ([48]).

Application of the EU Charter of Fundamental Rights

- In Case C-32/20, *TJ v Balga Srl*, the CJEU concluded that national unfair dismissal law fell outside of the scope of the EU law and thus Article 21 of the Charter did not apply. (None of the non-discrimination grounds covered by EU law were at issue.) This is an important indicator of the limited scope of Article 21 of the Charter (non-discrimination).
- But see Case C-243/19, *A v Veselības ministrija*, where Latvian health authorities did not grant funding authorisation for A's son to receive healthcare in another Member State, in a situation where A's son could have received the treatment in Latvia but for A's religious beliefs. (A was a Jehovah's Witness, and was thus opposed to blood transfusions.)
- In this case, the CJEU concluded that Directive 2011/24/EU relating to patients' rights in cross-border healthcare, read in the light of Article 21(1) of the Charter, precluded a refusal to reimburse cross-border health care costs in a situation such as A's, unless it could be objectively justified in the interests of maintaining the integrity of the healthcare system or 'medical competence'.

Conclusions/Points for Discussion

- Interesting CJEU jurisprudence on the right to an effective remedy – see *TK, AK v Sąd Najwyższy* and (indirectly) *Lenford*.
- Gender roles remain a developing area of CJE jurisprudence – as exemplified by *WA v Instituto Nacional de la Seguridad Social (INSS)*.
- What about the CJEU's lurking problems in this field – such as its restrictive race equality judgment in Case C-668/15, *Jyske Finans*, or its uncertain case-law on indirect age discrimination?
- Why the relative drying up of cases? How will the Charter case-law develop?
- How will/should continuing evolution of ECHR case-law impact on EU and national law?