



Recent CJEU case-law on gender equality (& more)

with emphasis on the Kelly and Meister rulings

“CURRENT REFLECTIONS ON EU GENDER EQUALITY LAW”
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Discrimination on grounds of age

- C-447/09 Prigge (13 September 2011) age limit of 60 for airline pilots;
- C-141/11 Hornfeldt (5 July 2012) automatic termination of employment relationship at the age of 67;
- C-132/11 Tyrolean Airways (7 June 2012) failure to take into account professional experience acquired with another airline;
- C-286/12 Commission/Hungary (6 November 2012) compulsory retirement of judges, prosecutors and notaries at the age of 62.

C-286/12 Commission/Hungary

- ECJ: the provisions at issue in the main proceedings give rise to a difference in treatment based directly on age within the meaning of Directive 2000/78 (§ 54 of the judgment)
- Objectively and reasonably justified by a legitimate aim ?
- Hungary's defense: two objectives, namely, first, the standardisation, in the context of professions in the public sector, of the age-limit for compulsory retirement, and, secondly, the establishment of a 'more balanced age structure' facilitating access for young lawyers to the professions of judge, prosecutor and notary and guaranteeing them an accelerated career (§ 58)

C-286/12 Commission/Hungary

- ECJ: as regards the aim of standardisation, in the context of professions in the public sector, in so far as such an aim ensures observance of the principle of equal treatment for all persons in a specific sector and relates to an essential element of their employment relationship, such as the time of retirement, that aim can constitute a legitimate employment policy objective (§ 61)

As regards the aim of establishing a more balanced age structure facilitating access for young lawyers, such an aim can constitute a legitimate aim of employment and labour market policy, in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service (§ 62)

- Appropriate and necessary means of achieving the two aims ?

C-286/12 Commission/Hungary

ECJ:

“67 It should be observed, in this regard, that the categories of persons concerned by those provisions benefited, until their entry into force, from a derogation allowing them to remain in office until the age of 70, which gave rise, in those persons, to a well-founded expectation that they would be able to remain in office until that age.

68 However, the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned.

...

70 In those circumstances, the persons concerned are obliged to leave the labour market automatically and definitively without having had the time to take the measures, in particular measures of an economic and financial nature, that such a situation calls for, in light of the fact that, firstly, their retirement pension will be, as was stated during the hearing, at least 30% lower than their remuneration and, secondly, the cessation of functions does not take into account contribution periods, which does not therefore guarantee the right to a pension at the full rate.”

C-394/11 Belov (judgment of 31 January 2013)

- Preliminary reference from the Komisia za zashtita ot diskriminatsia, Bulgaria (Commission for protection against discrimination)
- Main issue: whether the measure, consisting in placing meters to measure electricity consumption at a height of seven metres on posts situated outside houses connected to the electricity network in two areas of the City of Montana mainly inhabited by members of the Roma community, constitutes discrimination based on ethnic origin / Interpretation of Directive 2000/43
- ECJ: KZD's decisions are not of judicial nature, therefore it is not a "court or tribunal" within the meaning of article 267 TFEU and the Court has no jurisdiction to rule on the question referred to it.
- BUT ! AG's Kokott's Opinion

C-394/11 Belov – AG's Opinion

- Opinion of AG Kokott of 20 September 2012
- Preliminary reference from KZD is admissible
- The existence of direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/43 does not require an infringement of rights or interests defined in law. Rather, any form of behaviour is sufficient in which one person is treated less favourably on grounds of racial or ethnic origin or which could put persons of a racial or ethnic origin at a particular disadvantage compared with other persons. National rules which make the existence of discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43. The national court must interpret domestic law in this regard in conformity with EU law and, if that is not possible, it is obliged not to apply national legislation which is contrary to the prohibition of discrimination established as a fundamental right (§ 83 of the Opinion).
- The practice of attaching electricity meters at a height of 7 m is liable, in principle, to affect members of that ethnic group in a particular way and to put them at a disadvantage, since it makes it virtually impossible or at least excessively difficult for them to make visual checks of the relevant electricity meters. Under these circumstances, there is a prima facie case of indirect discrimination based on ethnic origin (§ 99).

C-394/11 Belov – AG’s Opinion

- Legitimate aim?

The measure of installing electricity meters at a height of 7 m was taken because of a large number of unpaid electricity bills and in response to numerous cases of illegal interference with electricity supply infrastructure and manipulation and illegal electricity extraction in the districts concerned. The measure is intended to prevent future fraud and abuse and to help to ensure the quality of a financially reasonable electricity supply in the interest of all consumers (§ 101 of the Opinion).

- Suitable and necessary measures ?

Placing electricity meters at a height of 7 m is a relatively drastic measure, which affects all inhabitants of the two districts in question, even if they have not been guilty of any illegal interference with the electricity supply and have not accumulated any arrears. The impression may therefore be created that all or at least many of the inhabitants of the districts concerned are embroiled in fraudulent practices, manipulation or other irregularities in relation to their electricity supply, which may ultimately encourage a stigmatisation of the population in those areas (§ 118)

Ultimately, it is for the KZD, in the light of all the circumstances of the present case, to assess carefully whether there is a risk of an ethnic group in the two districts concerned being stigmatised and whether the interests of the electricity consumers affected are taken duly into account (§ 123)

C-236/09 Test-Achats (judgment of 1 March 2011)

Article 5 of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services:

- “ 1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission. (...)”

C-236/09 Test-Achats

ECJ:

“It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. (...) Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.” (§ 30)

“Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.

Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.” (§ 31-32)

C-236/09 Test-Achats

- Article 5(2) of Directive 2004/113 allowing derogations from the rule that gender must not be considered in the calculation of individuals' insurance premiums and benefits became invalid from 21 December 2012.
- Article 5(1) of the Directive (the “unisex rule”) must be applied to new contracts without exception across the European Union.
- Commission’s Guidelines of 22 December 2011 on the application of Directive 2004/113 to insurance, in the light of the Test-Achats judgment

Pending case: C-167/12 C.D. v. S.T.

- Preliminary reference from the Newcastle-upon-Tyne Employment Tribunal (UK)
- Should an intended mother who has a child through surrogacy arrangement be treated in the same way as a woman who gives birth to a child?
- According to the order for reference, there are approximately 40-70 surrogate births in the UK each year
- Mrs C.D. benefited from a career break, unpaid leave and an extended holiday BUT was denied ordinary maternity leave. She alleged unlawful sex and/or pregnancy and maternity discrimination.
- The Pregnant Workers Directive 92/85 and the Recast Equal Treatment Directive 2006/54
- AG Kokott's Opinion out on 30 May 2013

Pending case: C-363/12 Z

- Preliminary reference from the Equality Tribunal (Ireland)
- Alleged discrimination on grounds of sex, family status and disability as a consequence of a failure to provide a paid leave equivalent to adoptive leave in circumstances where the child was born through a surrogate mother under the law of California
- Validity of Directive 2000/78
- Application of the UN Convention on the Rights of Persons with Disabilities

- Hearing on 28 May 2013

Burden of proof in discrimination cases

“Discrimination has the reputation of being particularly hard to substantiate. This is even truer in respect of discrimination in employment. Aware of this problem, the European Union legislature has adopted measures to assist applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has thus provided for a shift in the burden of proof, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers to recruit the people of their choice must not be completely disregarded .”

(Opinion of Advocate General Mengozzi of 12 January 2012 in C-415/10 Meister)



Burden of proof: history and legislative background

- ECJ ruling in 109/88 *Danfoss*
- Council Directive 97/80 on the burden of proof in cases of discrimination based on sex, Article 4(1): “when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”.

Burden of proof

- Article 8(1) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Article 10(1) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation
- Article 19(1) of the Recast Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

The Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of that principle.

C-104/10 Kelly (judgment of 21 July 2011)

- Preliminary reference from the High Court (Ireland) on the interpretation of Article 4(1) of Directive 97/80
- A measure of balance: it is the person who considers himself to have been wronged because the principle of equal treatment has not been applied to him who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination (§ 30)
- Article 4(1) of Directive 97/80 does not specifically entitle Mr Kelly to information held by a course provider on the qualifications of the other applicants in order that he may establish “facts from which it may be presumed that there has been direct or indirect discrimination” in accordance with that provision (§ 38)
- **Nevertheless**, it cannot be excluded that a refusal to disclose could risk compromising the achievement of the objective pursued by that Directive and thus depriving Article 4(1) of its effectiveness (§ 39)
- It is for the national court to ascertain whether that is the case in the main proceedings (§ 39)
- Entitlement to access to information can be affected by the rules of EU relating to confidentiality (§ 56)

C-415/10 Meister (judgment of 19 April 2012)

- Reference from the Federal Labour Court (Germany) on the interpretation of the relevant provisions of Directives 2000/43, 2000/78 and 2006/54 on the burden of proof
- In line with *Kelly*: no right to information

AG Mengozzi: the wording of the relevant provisions of the Directives in question does not once expressly refer to a right to information held by the person “suspected” of discrimination. The absence of an express reference to a right of information must be interpreted not as an oversight on the part of the legislature but, on the contrary, as the manifestation of its intention not to affirm such a right (§ 21 of the Opinion)

- In the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54 (§ 40 of the judgment).

C-415/10 Meister

- It is for the referring court to ensure that the refusal of disclosure by Speech Design is not liable to compromise the achievement of the objectives of those Directives. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been discrimination have been established (§ 42).
- Indirect discrimination may be established by any means, including on the basis of statistical evidence (§ 43).
- Account may be taken of the refusal of any access to information + it's not disputed that Mrs Meister's level of expertise matches that referred in the job ad + she was not invited to a job interview (§ 45).

New ruling: C-81/12 ACCEPT (judgment of 25 April 2013)

- Preliminary reference from the Curtea de Apel Bucuresti (Romania) on the interpretation of Directive 2000/78
- To what extent may the public statements in question be regarded as “facts from which it may be presumed that there has been direct or indirect discrimination” within the meaning of Article 10(1) of Directive 2000/78?

ECJ: the assessment of such facts is a matter for national judicial or other competent bodies (§ 42 of the judgment) BUT the mere fact that public statements at issue might not emanate directly from a given defendant is not necessarily a bar to establishing the existence of facts from which it may be presumed that there has been discrimination (§ 48)

C-81/12 ACCEPT

- Whether the requirement for a professional football club to prove the absence of discrimination on grounds of sexual orientation might be impossible to satisfy in practice, since proving that such a club hired players without taking into account of their sexual orientation might, according to that court, interfere with the right to privacy ?

ECJ: it is unnecessary for the defendant to prove that persons of particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy. A prima facie case of discrimination may be refuted with a body of consistent evidence including, for example, a reaction by the defendant clearly distancing itself from public statements at issue, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment (§ 57-58)