News from the EU

Introduction

This article will explore three recent decisions from the Court of Justice of the European Union (CJEU) which all concern interpretation of different aspects of Framework Directive 2000/78 (“the Directive”).

These cases demonstrate the broad scope of the Directive, which prohibits direct or indirect discrimination on four protected grounds; religion or belief, disability, age and sexual orientation. The Directive extends to employment and occupation and includes recruitment, vocational training and guidance, working conditions including Dismissal and pay as well as membership of workers organisations. The Directive has been transposed into national law through regulations which are now consolidated in the Equality Act 2010.

The decisions explore the interpretation of the directive in relation to three issues;

- the meaning of “long-term” within the definition of disability,
- age restrictions as a genuine occupational requirement, and
- pension rights of people in same-sex unions.

“Long term” impairment

*Mohamed Daouidi v Bootes Plus SL Case C-395/15 (1st December 2016)*

Mr Daouidi was employed as a kitchen assistant. He slipped at work and dislocated his elbow. He was certified as temporarily unable to work because of a workplace accident under Spanish social security law. After around six weeks of absence he was dismissed for failure to perform his duties. The referring Court accepted that the real reason for the dismissal was his inability to work for an indeterminate time. It was unclear how long it would take for Mr Daouidi’s elbow to heal and certainly six months after the accident, at the time of the referral to the CJEU, it was still in plaster.
The story so far…. Regular ebulletin readers¹ will recall that the CJEU has previously approved the definition of “disability” under the UN Convention on the Rights of Persons with Disabilities. Disability is therefore understood to refer to a limitation which results in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

The focus of this preliminary ruling was on the definition of “long term”. The Court concluded that the Indeterminate nature of the incapacity does not preclude it from being classified as “long term.”

Instead, it is a matter for the national court to consider all of the objective evidence including medical reports and certificates on the condition. The evidence which would point to a “long term” prognosis includes, the absence of a “short-term” prognosis, or evidence that incapacity is “likely to be significantly prolonged” before that person has recovered.

**Potential implications in Great Britain**

Whilst the Judgement may have reached unsurprising conclusions it does raise interesting questions about interpretation of “long-term” under the Equality Act 2010. Paragraph 1 of Schedule 1 to the Act states that the effect of an impairment is long-term if it has lasted, or is likely to last, for at least 12 months or the rest of the life of the person affected.

However, within the reasoning of the CJEU² there is a point relevant to how strictly this 12 month rule can be approached. The Directive does not define disability. The UN convention definition which has been adopted, does not clarify the meaning of long term. Importantly, the provision does not expressly require the law of member states to be taken into account when determining its meaning and scope. Under these circumstances there is a need to achieve an autonomous and uniform interpretation throughout the European Union. This interpretation must take into account the context of that provision and the objective pursued by the legislation in question.

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¹ See “obesity in EU law” and “disabled or not disabled?”

² Para 50
In light of this there could potentially be cases where applying too strict an approach to the 12 month rule in Great Britain might not accord with the more flexible approach taken by the CJEU in Daouidi.

Watch this space....Readers with an interest in this issue might want to look out for the forthcoming Court of Appeal decision in *Donelien v Liberata UK Ltd*[^3] which will consider reasonable adjustments and constructive knowledge of a disability.

**Age limit for police recruitment**

*Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias C-258/15 (15th November 2016)*

Mr Salaberria Solondo, who is over 35 years old, challenged a requirement that applicants for recruitment to the police force of the Autonomous Community of the Basque Country (ABCB) should be between 18 and 35. He argued that there is no justification for the age limit imposed, as it restricts access to public service posts without reasonable grounds for doing so. The Court was asked to reach a view as to whether the upper age limit of 35 for selection was compatible with the Directive.

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**The story so far...** The arguments focussed on Article 4 of the Directive which provides that a difference of treatment based on a protected characteristic shall not constitute discrimination where the characteristic constitutes a genuine and determining occupational requirement, as long as there is a legitimate objective and the requirement is proportionate.

Sorondo follows a line of cases on age restrictions in recruitment to emergency services. It has been accepted that the possession of physical capacities is one characteristic relating to age. The nature of the duties of a police officer might require a particular level of physical fitness. Lack of fitness in the exercise of those duties might have significant consequences not only for the police officers themselves and third parties but also for the maintenance of public order.

In 2010 the CJEU held that Article 4 did not preclude national legislation that set the maximum age for recruitment to intermediate career posts in the fire service at 30 years.[^4] However in 2014 the Court had held that the Directive did preclude national legislation that set the maximum age for recruitment of local police officers at 30 years.[^5]

[^3]: EAT 16th December 2014
[^4]: Wolf C229/08
[^5]: Vital Perez C416/13
The Court accepted that Article 4 does not make an age limit of 35, for candidates who are to perform operational duties, unlawful. In doing so, it was relevant that a police officer of the lowest rank in the ACBC does not carry out administrative duties, but performs operational duties, which may require recourse to physical force and the performance of tasks in difficult conditions. Administrative staff are recruited by different means without age limit.

The ACBC submitted that there was evidence that from the age of 40 onwards, the operational performance of ACBC officers tends to decline, and at the age of 55 an officer carries out reduced duties.

The Court accepted that there could be a genuine occupational requirement in the age cap if the national court is satisfied that the evidence is appropriate to the objective of ensuring the operational capacity and proper functioning of the police service concerned and that it does not go beyond what is necessary to achieve that objective.

**Potential implications**

The decision focusses not on the fitness of Mr Solondo or other recruits but on the projected fitness of officers who reach the age of 55 who;

“can no longer be considered to be in full possession of the capabilities necessary for the proper performance of (their) duties, without any risk to himself and to third parties.”

This raises the question of whether a less discriminatory approach might be to avoid stereotyping the over 55’s, and to assess each candidate on their medical history, fitness and likely number of years of active service. The Court said this is not necessary. The objective is to ensure the proper functioning of the police service with a view to establishing a satisfactory age pyramid. Accordingly, physical capacities can be assessed prospectively and dynamically rather than statically at the time of recruitment.

Under the Equality Act less favourable treatment of a person because of their age is not direct discrimination if the employer can show the treatment is a proportionate means of achieving a legitimate aim. This is approached in two stages:

- Is the aim of the rule or practice legal and non-discriminatory and one that represents a real, objective consideration?

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6 S.13
• If the aim is legitimate, is the means of achieving it proportionate eg appropriate and necessary in all the circumstances?7

The Act creates a general exception to the prohibition on direct discrimination in employment for occupational requirements that are genuinely needed. The Act disapplies the age provisions to service in the armed forces.8 There is currently no upper age limit for recruitment to the police in Scotland.9 Employers should generally be wary of age caps in recruitment and Solondo stresses the need for clear evidence to justify a cap.

Watch this space…. Readers with an interest in this issue might want to look out for the forthcoming Court of Appeal decision in Donelien v Liberata UK Ltd10 which will consider whether a compulsory retirement age for police officers can be objectively justified.

Same sex unions and pension rights

Parris v Trinity College Dublin and others Case C-443/15 ECJ (24th November 2016)

Mr Parris has dual Irish and British citizenship. He has been living for over 30 years in a stable relationship with his same-sex partner. They entered into a civil partnership in the UK in 2009, when Mr Parris was aged 63.

Mr Parris was employed as a lecturer at Trinity College, Dublin and had been a member of the pension scheme since 1972. He retired in December 2010. Following a change to Irish law on civil partnerships in January 2011, survivor’s pensions became available to same-sex partners under the scheme in the same terms as spouses. However, this only applied where the civil partnership (or marriage) was entered into before the member turned 60. This meant that Mr Parris’ partner could not benefit from this change in the law and the pension rules as civil partnerships were not legally recognised in Ireland until Mr Parris was 64.

Mr Parris sought a survivor’s pension for his civil partner and when this was refused, he challenged the decision. The Irish Labour Court requested a preliminary ruling from the CJEU. The Court was asked to

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7 Employment code of practice 3.36 – 3.42
8 Schedule 9 see chapter 13 of Employment Code
9 http://www.scotland.police.uk/recruitment/police-officers/police-officer-faqs/
10 EAT 16th December 2014
consider whether or not the survivor rule was discriminatory and contrary to the Directive on the grounds of age or sexual orientation.

**The story so far….**

The Court has previously accepted\(^{11}\) that a survivor's benefit derives from the employment relationship and must be categorised as pay and so falls within the scope of the Directive.

Article 6 (1) of the Directive provides that member states may provide that differences of treatment on the ground of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

Article 6 (2) allows the fixing of age criteria for admission to occupational social security schemes or retirement benefits, as long as this does not result in sex discrimination.

Recital 22 states that the Directive is without prejudice to national laws on marital status and the benefits dependent on them. The Court has previously held\(^{12}\) that marital status and benefits flowing from that status are matters which fall to the competence of Member States. However, in exercising that competence, the states must comply with the non-discrimination principle.

The Court did not follow the opinion of Advocate General Kokott,\(^{13}\) which was favourable to Mr Parris. Instead the Court firstly considered discrimination on the grounds of sexual orientation and found there could be no direct discrimination as surviving civil partners are treated no less favourably than surviving spouses. There could be no indirect discrimination as Member states are not required as a matter of EU law to provide a legal form of same-sex union nor to give retrospective effect to the Civil Partnership Act or benefits which stemmed from it.

Turning to the characteristic of age, the Court accepted that members who marry or enter into a civil partnership after the age of 60 are treated less favourably than those who do so before the age of 60. However in fixing an entitlement age, the pension scheme rules fall within the scope of the differences of treatment permitted by Article 6 (2) of the Directive.

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\(^{11}\) Maruko C-276/06
\(^{12}\) ibid
\(^{13}\) 30\(^{th}\) June 2016
There was therefore no discrimination on the grounds of age. To complete the circle, this conclusion was not changed by the fact that it was not legally possible to enter into a civil partnership when Mr Parris was under 60, as there was no EU requirement to provide a form of legally recognised same-sex union.

Mr Parris was clearly acutely affected by the pension rules because he was both over 60 and in a same-sex relationship. The Court did consider the intersectional angle but concluded that where there was no discrimination on the grounds of sexual orientation or age, there could be no combined discrimination on the basis of these two factors.

**Potential implications**

The Equality Act provides that benefits based on marital status will not be discriminatory on the grounds of sexual orientation as long as the same benefits apply to spouses and civil partners. However there is an exception where the benefit accrued before 5th December 2005, when the Civil Partnership Act 2004 came into force.

**Watch this space**…Similar issues have been considered in the English Courts in the case of Walker v Innospec Ltd, although there is no 60th birthday rule to consider in the Innospec case. So far the Court of Appeal has accepted that the Equality Act is compatible with the Directive due to the “no retroactivity” principle in EU law. The case has been appealed to the Supreme Court and a decision is expected in 2017.

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14 Schedule 9 para 18
15 2014 ICR 645 EAT and 2015 EWCA Civ 100