

**THE EVOLUTION AND IMPACT OF THE NON-DISCRIMINATION CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) - WITH SPECIFIC REFERENCE TO DIRECTIVES 2000/43/EC AND 2000/78/EC AND THE POTENTIAL IMPACT OF ECHR AND ESC JURISPRUDENCE**

*Colm O’Cinneide*

*Reader in Law, University College London*

*General Rapporteur, European Committee on Social Rights*

# The Overall Interpretative Approach of the CJEU - I

- The Court's case-law has established that the anti-discrimination Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment – *Schnorbus* (gender), now *Mangold v Helm* (age as aspect of a wider principle).
- This principle is also set out in Articles 21 and 23 of the EU Charter of Fundamental Rights – *Kücükdeveci*; *Test-Achats*.
- EU secondary legislation (including directives) must also be interpreted 'as far as possible' to comply with the provisions of the Convention on the Rights of Persons with Disabilities, which is now an 'integral part' of the EU legal order – *Ring*.

# The Overall Interpretative Approach of the CJEU - II

- The Court has furthermore made it clear that the Directives should not be read in a narrow or excessively formalistic manner.
- Thus, e.g., in the case of *Coleman*, the Court expressly rejected arguments that the provisions of Directive 2000/78/EC should be read as setting minimum standards. Instead, it interpreted the Directive as intended to provide effective and substantive protection against discrimination – see also e.g. *Firma Feryn*, *Meister* and *Odar*.
- Furthermore, in the cases of *Petersen*, *Prigge* and *Experian*, the CJEU concluded that exceptions to the principle of equal treatment must be given a strict and narrow interpretation, in line with its well-established gender equality jurisprudence (see e.g. *Barber*, *Johnston*).

# The Overall Interpretative Approach of the CJEU - III

- The full range of rights protected by the EU Charter of Fundamental Rights must be taken into account – see e.g. *Fuchs* and *Hennigs*, where the Court took into account the right to work set out in Article 15(1) of the Charter and the right to engage in collective bargaining set out in Article 28 respectively.
- Secondary objectives set out in the Recitals of the Directives and other EU standards are also relevant - in *Fuchs*, the Court took account of the aim to promote diversity in the workforce as set out in Recital 25 of Directive 2000/78/EC.
- See also both *Odar* and *Ring*, where the Court refers to the 2000 Helsinki employment strategy guidelines relating to persons with disabilities.

# The Overall Interpretative Approach of the CJEU - IV

- Note also the emphasis placed on the ‘animating’ values of human dignity and autonomy by Maduro AG in his Opinion in *Coleman*.
- ‘Read across’ from the gender equality case-law of the Court is common.
- In general, the non-discrimination jurisprudence of the Court is marked by a cross-ground consistency of application both of principles and of legal standards, and also a purposive orientation.

# The Scope of the Anti-Discrimination Directives

- In its judgments, the Court has consistently given the scope of the Directives an expansive and purposive interpretation, as recently illustrated by its decisions in *Palacios de la Villa*, *Maruko*, *Römer*, and *Hennings* (and historically by *Barber*, *Dekker*, *Ten Oever* and other gender equality cases – but also note *Grant v SW Trains*).
- However, in *Runevič-Vardyn*, the Court held that the scope of Directive 2000/43/EC did not extend to cover the performance of public functions'. This is a significant limitation, even if the broad interpretation given to the concept of a 'service' by Kokott AG in *Belov* is adopted in subsequent cases.
- In *Chacón Navas*, the Court confirmed that the scope of the 2000 Directives only extends to cover the grounds set out in Article 19 TFEU: see also the cases of *Agafitei* and *Kamberaj*. This means that discrimination based on 'illness', 'socio-professional status' and 'nationality' is not covered – but see now the broad interpretation of the concept of 'disability' adopted by the Court in *Ring*.

# Direct and Indirect Discrimination

- The prohibition on direct and indirect discrimination contained in the 2000 Directives has been interpreted in a similar manner as the equivalent provisions of the gender equality directives – see e.g. *Maruko* and *Römer*.
- *Firma Feryn* (intent to discriminate) and *Coleman* (discrimination by association) – ‘less favorable treatment’ given a purposive interpretation.
- Distinction between direct and indirect discrimination not always clear – see *Maruko* (parties and AG assume indirect discrimination: CJEU finds direct discrimination) and compare with *Odar*; see also the Opinion of Kokott AG in *Belov*.
- Need for a link to be established between disadvantage and a non-discrimination ground emphasised in *Tyrolean Airways* (following *Seymour-Smith* and other gender cases).

# Additional Elements of the 2000 Directives – I

- Harassment (Articles 2(1) and 2(3) of the 2000 Directives) – in *ACCEPT*, homophobic public statements were held not to qualify as ‘harassment’, as no specific individuals were targeted.
- Reasonable Accommodation (Article 5 of Directive 2000/78/EC) - in *Chacón Navas*, the Court ruled that the dismissal of an employee on the grounds of disability was precluded if the employee was ‘competent, capable and available to perform the essential functions of the post concerned’ after reasonable accommodation was made.
- See also *Ring* - shift to part-time working arrangements may be required as a form of reasonable accommodation; *Commission v Italy* – national legislation must clearly impose an obligation of reasonable accommodation.
- Positive Action – little if any guidance as yet, but note developments in gender equality law, e.g. *Roca Alvarez*.

## Other Elements of the 2000 Directives - II

- Burden of Proof – *Firma Feryn* and *ACCEPT*: public statements of discriminatory views can establish an inference of discrimination, which may be discharged by evidence of the non-discriminatory functioning of the recruitment process, affirmation of a commitment to equal opportunities etc.
- See also *Meister* – decision to re-advertise a post when the claimant was qualified to perform the work, failure to provide information on recruitment process, statistical evidence of disparate outcomes can all play a role in shifting the burden.
- Requirement of Effective Remedies – *Bulicke*: effectiveness judged by reference to national legal context, but principles of ‘equivalence’ with ‘similar domestic actions’ and non-regression must be respected.
- See also *ACCEPT* (excessively short time limits applying to the imposition of financial penalties); *Meister* (no obligation under the Directives on an employer to provide information on their recruitment process, but a failure to provide such information may affect the burden of proof).

# Age Discrimination – An Exceptional Ground?

- The Court's case-law is dominated by age discrimination cases, outnumbering by a distance all the other '2000' grounds taken together.
- Why is this so? Explanatory factors may include the 'newness' of age as a non-discrimination ground, the uncertainty that surrounds the age-related provisions of Article 6 of Directive 2000/78/EC, and specific factors relating to labour market organisation and legal culture in particular states which are generating a high volume of age cases, in particular Germany and to a lesser extent Denmark.
- In addition, there may be a tendency for issues relating to other grounds not to be referred to the CJEU by national courts, for a variety of reasons – the lack of religious discrimination cases is particularly striking in this respect.

# Age Discrimination – Objective Justification

- The Court has stated that Article 6(1) constitutes a very specific derogation from the general principle of equal treatment- see e.g. *Age Concern, Fuchs*.
- States enjoy a margin of discretion in deciding what constitutes a legitimate objective of public policy, or in designing employment and vocational training policies – e.g. *Georgiev, Rosenblatt, Hörnfeldt*.
- However, the Court in has emphasised that ‘Article 6(1) imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification’ – *Age Concern, Prigge*. Furthermore, distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of the ‘appropriate and necessary’ leg of the test – see e.g. *Kücükdeveci, Andersen*.

# Age Discrimination and Genuine Occupational Requirements

- In *Wolf*, the Court concluded that high physical capability was a genuine and determining occupational requirement for the posts in question, and the imposition of a maximum age limit served as an adequate and effective 'proxy' for the required level of physical fitness.
- However, the narrow scope of genuine occupational requirement defence was emphasised in *Prigge*, where the Court did not accept that a requirement in a collective agreement for pilots to retire at the age of 60 could be justified by reference to the GOR defence - no evidence had been presented to show that this age-limit was necessary when it came to ensuring the safety of passengers.
- Note in *Prigge*, the Court also adopted a narrow approach to the 'public safety/health' defence set out in Article 2(5) of Directive 2000/78/EC.

# The Impact of the Case-law of the CJEU relating to the 2000 Directives

- The CJEU's case-law on the 2000 Directives has already brought about significant changes in national law across Europe.
- The Court's jurisprudence is better developed in some areas (age) than others (religion, sexual orientation, race).
- The Court has established a general approach to the interpretation of the 2000 Directives which is consistent, principled and rigorous.
- But a key issue remains: relationship with the ECHR and ESC...

# THE ECHR and EU Law: Overlapping Non-Discrimination Norms

- Article 6(3) TEU – ECHR part of ‘general principles of EU law, originally affirmed in *Nold*. See also Art. 53 of the EU Charter.
- Developing ECHR jurisprudence on non-discrimination therefore very relevant – *Stec v UK*, *DH v Czech Republic*, *Redfearn v UK*, *Eweida v UK* – but it remains a work in progress.
- Article 6(2) TEU – accession of the EU to ECHR in train.

# The European Social Charter (ESC) and EU Law – An Uncertain Relationship

- Original or revised ESC ratified by all EU member states, point of reference for CJEU in its case-law.
- The equality jurisprudence of the European Committee on Social Rights is rapidly expanding, especially in the race/age/disability discrimination fields and in particular in relation to housing/health care/social services.
- Tension exists between EC and EU standards (esp. in field of trade union rights) and also no EU accession to ESC is contemplated
- But social rights provisions of EU Charter are based on ESC provisions.

## Future Developments?

- Uncertain EU/ECHR/ESC relationship.
- Remains to be seen how the CJEU interprets many of the key provisions of the non-discrimination directives, especially the 2000 Race and Framework Equality Directives.
- Role of NEBs will be key – *Belov* notwithstanding.