

granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. However, it needed to consider whether, in a situation where the national law regarded the pension rights in issue as defeasible and open to retroactive amendment, the same principle of equality **precluded** a pension scheme from eliminating discrimination contrary to Article 157 by removing, with retroactive effect, the advantages of the persons within the advantaged category.

In answer, the CJEU held that there was no support under EU law for a power to, in effect, retroactively level down in the circumstances. Such a power would deprive the case law noted above of its effect. Furthermore any measure seeking to eliminate discrimination contrary to EU law constituted an implementation of EU law and so must observe its requirements. Neither national law nor the retroactive provisions of the trust deed could circumvent those requirements.

Finally, the CJEU considered whether there may be any exceptions to the general position above, whereby retroactive amendment **may** be permissible in some circumstances. It observed an exception might arise only where both

1. an overriding reason in the public interest so demanded, and
2. where the legitimate expectations of those concerned were duly respected.

The CJEU observed that a risk of seriously undermining the financial balance of the pension scheme concerned may constitute an overriding reason in the public interest, but noted that in the present case there had been no finding in the national court that such a risk existed and so there appeared to be no objective justification, although this would ultimately be for the national court to verify.

Comment

The decision affirmed the principles of CJEU case law on levelling down during the ‘Barber window’ and in addition dealt with the specific conflict between an express retroactive power of amendment on the face of the pension scheme rules and EU law, indicating that only in exceptional cases might such a power be objectively justified.

It is not known whether S may still seek to raise an argument that the exceptional circumstances may apply, given the amount of money involved.

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Reconciling freedom from discrimination and freedom of expression

NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford (C-507/18);

April 23, 2020

The CJEU has confirmed that having regard to the circumstances in which the statements were made, comments made in the course of a radio interview can constitute discrimination under the Equal Treatment Framework Directive 2000/78 (the Directive).

Implications

The CJEU’s decision followed the opinion of Advocate General (AG) Sharpston in October 2019 (see Briefings 925) and the two are largely in alignment.

The decision allows a wide remit for comments capable of falling within the scope of the Directive, namely those related to employment opportunities. The defence that such remarks are protected by Article 10 was given short shrift – a positive indication for future discrimination claims.

It also presents an opportunity for the Equality and

Human Rights Commission (EHRC) to bolster its enforcement powers and to rely on this decision when considering cases where the Directive is engaged.

Facts

The Associazione Avvocatura per i diritti LGBTI (AA) – an Italian association of LGBTI lawyers – brought a discrimination claim against NH, a senior lawyer, who remarked during an interview on an Italian radio programme that he would never hire a homosexual person to work at his firm.

The Tribunale di Bergamo confirmed that the comments constituted discrimination and NH's subsequent appeal was dismissed by the Corte d'Appello di Brescia on January 23, 2015.

NH appealed to the Corte Supreme di Cassazione which made a referral to the CJEU on the following points:

1. Does the scope of Article 3(1)(a) of the Directive, which prohibits discrimination in access to employment, extend to comments such as those made in the interview?
2. Can an association seek enforcement of the prohibition of discrimination in employment where there is no identifiable victim?

In AG Sharpston's preliminary opinion dated October 31, 2019 she confirmed that associations, such as AA, could bring a claim, provided there was a legitimate interest. Secondly, she confirmed that the comments were capable of falling within the scope of the Directive.

Court of Justice of the European Union

The CJEU confirmed that AA had standing to bring proceedings. While the Directive does not specifically allow for groups to bring a claim in the absence of an individual victim, it does not prevent member states allowing for this in national law. It is for the member state to decide what conditions any group must meet to bring such a claim.

On the second point, the CJEU emphasised the importance of both uniformity in the interpretation of EU law, and of the rights that the Directive protects:

... the concept of 'conditions for access to employment ... or to occupation' within the meaning of Article 3(1)(a) of the directive ... cannot be interpreted restrictively.

Adopting a broad interpretation of the Directive the CJEU dismissed NH's arguments that recruitment was not on-going, and that his comments were simply expressions of a personal opinion. The test for whether such comments are connected to employment opportunities and thus fall within the scope of Article 3(1)(a), is that the link '*must not be hypothetical*'.

Both findings were consistent with AG Sharpston's opinion.

The CJEU acknowledged and extended the AG's criteria when assessing the link between the comments and employment, including as relevant factors: the nature and content of the statements; the status of the person making them; whether that person has or is capable of having a decisive influence over any recruitment policy – or at least could be perceived as having one; that the

statements intended to discriminate on the basis of one of the criteria in the Directive, and the context of the statements and the manner in which they were made.

NH strenuously denied that he was an employer; he had presented himself as a private citizen and as such submitted the Directive could not apply. The AG and the CJEU both rejected this proposition – considering his position within the firm. The court stated that the:

expression of discriminatory opinions in matters of employment and occupation by an employer or a person [emphasis added] perceived as being capable of exerting a decisive influence on an undertaking's recruitment policy is likely to deter the individuals targeted from applying for a post. [para 55]

The CJEU also emphasised that freedom of expression is not an absolute right. It ruled that the Directive specifically allows for its limitation, and between the two competing freedoms – namely of expression and from discrimination – the latter must prevail. If not, '*the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory*'.

Comment

By stating that the concept of conditions for access to employment or to occupation in Article 3(1)(a) '*must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking ... even though no recruitment procedure had been opened, nor was planned*', the CJEU has broadened the range of individuals 'caught' by the scope of the Directive.

Time and future caselaw will tell how far this can be interpreted – it need not be the Chief Executive Officer or recruitment manager making such comments, but what about a human resource officer? A junior lawyer? An assistant?

While this is a positive step for the protection of minorities, practical questions will undoubtedly arise, and it will be interesting to see how this judgment will be applied in practice. The possibility of a broader interpretation of the EHRC's enforcement powers could be another benefit, and could lead to action to ensure employers act fairly, and mindfully, complying with their duties under the Equality Act 2010.

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