



Too old for payment of severance allowance?

Facts of the case

Mr Henrikson was dismissed by Nestor, his employer, on 25 May 2009 at the age of 60. A few days later, he tendered his notice to Nestor and agreed that he would leave his job at the end of June 2009. He was subsequently employed by another company.

Mr Henrikson had been employed by Nestor since 1 June 1984, he was, in principle, entitled to a severance allowance equal to three months' salary under Paragraph 2a(1) of the Law on salaried employees. However, since he had reached the age of 60 by the date of his departure and was entitled to an old-age pension payable by the employer under a scheme, which he had joined before reaching the age of 50, Paragraph 2a(3) of that law, as interpreted in consistent national case-law, barred his entitlement to the severance allowance, even though he remained on the employment market after his departure from Nestor.

In March 2012, the Danish trade union brought an action on Mr Henrikson's behalf against Nestor claiming payment of a severance allowance equal to three months' salary, as provided for in Paragraph 2a(1) of the Law on salaried employees.

On 14 January 2014, the Maritime and Commercial Court upheld the claim brought on behalf of Mr Henrikson, now represented by his legal heirs, for payment of the severance allowance in question.

That court stated that it was clear that the Law on salaried employees was contrary to Directive 2000/78 and found that the previous national interpretation of Paragraph 2a was inconsistent with the general principle of non-discrimination on grounds of age.

Nestor appealed against that decision before the Supreme Court, contending that that kind of interpretation of Paragraph 2a(3) of the Law on salaried employees would be *contra legem*. It also maintained that the application of a rule as clear and unambiguous as that laid down in Paragraph 2a(3) of that law could not be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age without jeopardising the principles of the protection of legitimate expectations and legal certainty.

Legal framework - Relevant European law

Directive 2000/78, according to Article 1 thereof, is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.



Article 2 of Directive 2000/78 provides as follows:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

Article 6 of Directive 2000/78 is worded as follows:

‘1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.’

Legal framework - Relevant national law

The Law on legal relationships between employers and employees (lov om retsforholdet mellem arbejdsgivere og funktionærer (funktionærloven)), in the version applicable to the case before the referring court (‘the Law on salaried employees’), contains in Paragraph 2a thereof the following provisions concerning the severance allowance:

‘1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months’ salary.

2. The provisions of subparagraph (1) shall not apply if the employee will receive a State retirement pension on termination of the employment relationship.

3.No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching the age of 50.

4. The provisions of subparagraph (3) shall not apply if, as at 1 July 1996, the question of the reduction or withdrawal of the severance allowance on account of the employer's payment of an old-age pension is governed by a collective agreement.

5. The provisions of subparagraph (1) shall apply *mutatis mutandis* in the case of unfair dismissal.'

Paragraph 1 of Law No 253 of 7 April 2004, as amended (the 'Anti-discrimination law'), provides, in the first subparagraph thereof, as follows:

'Discrimination for the purposes of this law shall be understood to mean direct or indirect discrimination on the grounds of race, skin colour, religion or belief, political affiliation, sexual orientation, age, disability or national, social or ethnic origin.'

Paragraph 2(1) of the Anti-discrimination law states as follows:

'An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.'

Questions

(1) Is the Charter applicable in this case?

- a. Which factors have to be taken into account, when deciding on the applicability?
- b. Which Charter Articles would in case of applicability be relevant?

(2) Do we „need“ the Charter in this case?

(3) How would you decide on the question of contradiction of the national interpretation of the Salaried Employees Act with Directive 2000/78? How has the national court to proceed in such a case?