

Recent anti-discrimination case-law of the CJEU

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Introduction (1)

Some important new cases were already discussed

- *Achbita, Bougnaoui* - remarkable in my opinion:

- Delimitation between direct and indirect discrimination in practice.



- Weight given to the employer's right to wish to project an image of neutrality towards customers, (though only in relation to contact with the customers).
- What about the ECtHR?

- *Jyskse Finans* - remarkable in my opinion:

- Reliance on a concrete comparison in relation to the existence of indirect discrimination (rather than comparability).

- Or does the Court mean something else, namely put the focus on „a specific ethnic origin“, rather than ethnic origin more generally?



Introduction (2)

Focus of this presentation: just three cases, but with some particularly interesting issues

- **For the purpose of warming up, step by step:**
Case C-406/15 *Petya Milkova* (9 March 2017): disability and dismissal, role of the general principle of equality, remedies
- Case C-548/15 *de Lange* (10 November 2016): age in vocational training, taxation and scope of Union law
- Case C-443/15 *Parris* (24 November 2016): sexual orientation and age in employment, including the issue of intersectional discrimination

Introduction (3)

Reminder regarding issues raised by cases

- **Enforcement** issues:
 - Where to take a case of alleged discrimination?
 - How to prove the alleged discrimination?
 - What remedies and sanctions if indeed discrimination is found?
- **Substantive** issues:
 - Is the case covered by EU law law (material and personal scope)?
 - Does it look like discrimination on a prohibited ground (prima facie)?
 - Can the treatment be justified (justification ground, proportionality), meaning that in the end there is no discrimination?
- Preliminary ruling cases before the CJEU mostly deal with selected issues only; *Milkova* addresses many of the above issues.

Milkova (1)



Facts and issues

- Facts:
 - Dispute between Ms Milkova and her employer, the Bulgarian Privatisation and Post-Privatisation Control Agency. Ms Milkova is a civil servant; the agency also has private employees.
 - Ms Milkova suffers from a mental illness which has resulted in a disability of 50 %.
 - Her post is abolished and she is dismissed, without authorisation of the labour inspectorate as required by the Bulgarian employment law for the private employees.
- Main legal issue:
Discrimination on grounds of disability under EU law?

Milkova (2)

Procedure

- Ms Milkova brings an action to the Administrative Court for the City of Sofia; she does not succeed.
- Appeal to the Supreme Administrative Court of Bulgaria, which turns to the CJEU with a request for a preliminary ruling.
- The national court's questions concern:
 - The meaning of EU **Directive 2000/78**:
 - Discrimination;
 - Positive action;
 - Occupational requirements – this question is not answered by the CJEU due to a lack of information about its relevance for the case at hand.
 - The **UN Convention** on Persons with Disabilities.

Milkova (3)

Scope of Directive 2000/78

- First question by the CJEU: is the case as such about **disability**?
 - Starting point: no legal definition in the Directive.
 - The concept of disability refers 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 (e.g. *Daouidi*).
 - That is the case here.
- Directive covers both **private and public employment**.
- Finding:
The case does fall within the field of application of the Directive.

Milkova (4)

Is there discrimination?

- Reminder:
 - Four forms of discrimination under Directive 2000/78 (plus argument, in the light of the UN Convention, that a lack of reasonable accommodation also amounts to discrimination).
 - There is discrimination only in the absence of justification.
- Different treatment directly based on disability (prima facie **direct** discrimination)?
 - Art. 2(2)(a): “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”.
 - Here: use of the criterion of the nature of the employment relationship, i.e. a criterion that is **not inseparably linked** to disability; thus no direct link to disability.

Milkova (5)

Discrimination (*continued*)

- Different treatment indirectly based on disability (prima facie **indirect** discrimination)?
 - Art. 2(2)(b): “where an **apparently neutral** provision, criterion or practice would put persons having a particular religion or belief, a particular disability [...] at a particular disadvantage compared with other persons **unless**:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.”

Milkova (6)

Discrimination (*continued*)

- Here:
 - Apparently neutral measure: the law is formulated in neutral terms.
 - Particular disadvantage: the use of the criterion of the nature of the employment relationship does not appear to mean that particularly persons with a disability are disadvantaged. Thus, no indirect link either.
 - [No need to look into objective justification]
- Discrimination **on the basis of the employment relationship** as such?
 - CJEU: not covered by the Directive; *Agafitei*.
 - Reminder: closed list of grounds, different from e.g. Art. 21 of the Charter of Fundamental Rights or Art. 14 ECHR.
- Finding: no different treatment based on disability and thus no discrimination under Directive 2000/78.

Milkova (7)

What about positive action?

- CJEU usually sees positive action as an issue of **justification** (one of a larger list, depending on the applicable Directive).
- Two aspects, a general and a specific one:
 - Art. 7(1): “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.”
 - Art. 7(2): “**With regard to disabled persons**, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.” – Relevant in *Milkova*.

Milkova (8)

The meaning of Art. 7(2) according to the CJEU

- CJEU: Art. 7(2) authorises specific measures aimed at effectively eliminating or reducing actual instances of inequality affecting people with disabilities, which may exist in their social lives and, in particular, their professional lives, and to achieve **substantive, rather than formal, equality** by reducing those inequalities (*Coleman*).
- This interpretation is **supported by the UN Convention**:
 - Within the framework of EU law, the Convention may be relied on for the purposes of interpreting Directive 2000/78.
 - The Directive must, as far as possible, be interpreted in a manner that is consistent with the Convention (e.g. *Daouidi*).
- Typical approach of the CJEU with respect to international law ...

Milkova (9)

But why Art. 7 if there is no different treatment under the Directive?

- Argument of the Bulgarian Government in *Milkova*:
 - The distinction between employees with and without a disability, in relation to specific protection in the event of dismissal, and intended only for the former, essentially includes positive action for the purposes of Art. 7(2) of the Directive
 - Argument was obviously **meant as a defence** against the allegation of discrimination.
- However, the CJEU takes the argument up in a different context, namely that of **“implementing Union law”** (Art. 51(1) of the EU Charter of Fundamental Rights) / **acting within the scope of Union law** (CJEU case-law on general principles).

Milkova (10)

The limits of Member State action under the Charter

- CJEU on “implementing Union law”:
 - Bulgarian law is an instance of implementation of EU law under the Charter.
 - **Where Member States act within the scope of EU law**, they are required to respect fundamental rights defined in the context of the EU and the general principles of EU law.
- *Note:* the Member States are not obliged to act under Art. 7, but if they do, they must respect primary EU law [compare e.g. *Hudzinski* in the field of internal market law; same mechanism.]
- Here relevant: the **general principle of equal treatment**, “now enshrined in Articles 20 and 21 of the Charter”.

Milkova (11)

Requirements of the principle of equal treatment

- Well established case-law (basics from before the time of the Charter).
- CJEU in *Milkova*:
 - Understanding based on an **Aristotelian approach**:
Comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (= based on an objective and reasonable criterion, i.e. a legally permitted aim, plus proportionality of the measure).
 - How to assess **comparability**:
In the light of all the factors characterising the situations in question, in a specific and concrete manner in the light of the objective and of the aim of the national legislation creating the distinction at issue.

Milkova (12)

Application to the rule in question

- Idea behind the Bulgarian employment law rule on dismissal:
In the case of persons with a disability, a specialised body assesses the impact of the dismissal **on the health of the person** concerned and decides whether or not to authorise that dismissal, in order to protect the worker.
- CJEU:
 - Assessment is made on the basis of this person’s health, not on the basis of the type of employment.
 - “Therefore, the distinction made [...] between employees with a particular disability and civil servants with the same disability **does not appear to be sufficient** in the light of the aim pursued by that legislation, all the more so since both those categories of people with disabilities may be employed by the same administration.”

Milkova (13)

Application to the rule in question (*continued*)

- Task of the national court:
 - It is for the national court to determine whether all the applicable national rules of law provide a **level of protection for civil servants with disabilities which is equivalent** to that provided for under the mechanism for prior authorisation from the labour inspectorate in relation to employees with disabilities, employed in the public administration sector.
 - If not, it would fall to that court to determine whether, and to what extent, legislation of a Member State, such as that at issue in the main proceedings, is **objectively justified** in the light of the principle of equal treatment.
- I.e. CJEU does not ultimately answer the question but leaves it to the national court.

Milkova (14)

Consequences, if discrimination is found

- General issues of enforcement, not part of the aspects explicitly regulated in the Directive.
- Principle of **levelling up**, based on established case-law (e.g. *Jonkman*):
 - Where discrimination has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only **by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category.**
 - National law conflicting with these obligations must be set aside.
 - Here: the system applicable to employees with disabilities, favoured by the current system, is therefore the only valid point of reference.

Milkova (15)

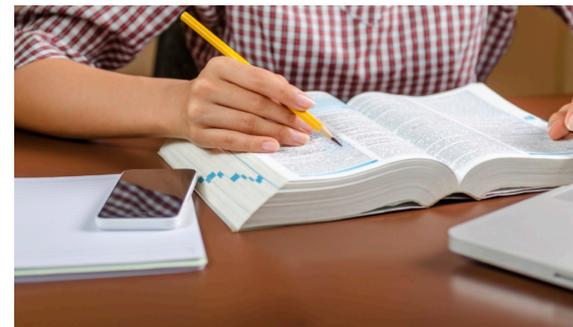
Overall impression

- A somewhat orthodox approach to the issues of direct and indirect discrimination, followed by an interesting twist in the context of an argument brought forward by the Bulgarian Government in order to defend itself against the accusation of discrimination but so to speak used against it in a situation where it did not even need such justification ...
- Reflect:
 - Do you agree with this outcome?
 - What kind of impression might such a judgment create in the Member States?

de Lange (1)

Facts and issues

- Facts:
 - At 32 years of age, Mr de Lange starts training as an airline pilot. He includes the training costs in his **income tax declaration, as a personal deduction**.
 - The tax authorities only accept a partial deduction (flat rate), because the training had been done **after the age of 30**.
- Main legal issue:
 - Discrimination on grounds of age under Directive 2000/78?
 - Or under a general principle? This question will not be answered, since the case is found to fall under the Directive.



de Lange (2)

Scope of the Directive

- Question by the national court:
Does such a **taxation scheme** fall outside the material scope of Directive 2000/78?
- Background
 - The Directives do not mention direct taxation.
 - Compare the debate in Union economic law, in relation to the competence issue. Mantra in CJEU case law (e.g. *Mobistar*).
 - Previous sex equality case-law (*Vergani*):
 - (Un-)favourable tax treatment cannot fall under the concept of pay, because pay must come from the employer;
 - But it can be related to another concept that is relevant under non-discrimination law (in this case: dismissal).

de Lange (3)

Scope (*continued*)

- **Vocational training** is mentioned in Art. 3(1)(b) of Directive 2000/78.
- CJEU:
 - Even though a right to tax deduction is not a precondition for access to vocational training, the resulting financial consequences **may affect the actual accessibility to such training** (i.e. there is a link).
 - Indeed, according to the NL Government, the tax concession seeks to promote the access of young people to training and to improve their position on the labour market.
 - Therefore, such a tax scheme can be regarded as relating to access to vocational training and thus falls within the scope of the Directive.

de Lange (4)

Discrimination – not a difficult issue

- Not discussed by the CJEU.
- It was clear to the national court that there is a difference in treatment based on age; thus it did not ask about this aspect.
- It is also **clear that the difference in treatment is directly based on age.**

de Lange (5)

Justification

- Under Art. 6(1) of Directive 2000/78, it must be examined: “whether the difference in treatment based on the age of the persons who are undertaking such training is objectively and reasonably justified by a **legitimate objective**, whether the means relied on to attain that objective are **appropriate** and whether they do **not go beyond what is necessary** to attain the objective pursued by the national legislature.”
- **Legitimacy:**
 - The provision gives examples such as the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, in order to promote their vocational integration or ensure their protection.
 - The aim indicated by the NL Government is, therefore, legitimate.

de Lange (6)

Justification (*continued*)

- **Proportionality:**
 - Is the means appropriate (suitable)?
 - Is the means necessary (requisite)?
- CJEU on **appropriateness:**

“As regards, in the first place, the appropriateness of a taxation scheme such as that in the main proceedings, it is common ground that such a scheme is capable of improving the position of young people on the labour market in that, for them, it amounts to an incentive to pursue vocational training. It is, however, for the national court to determine whether that is indeed the case.”

de Lange (7)

Justification (*continued*)

- **Necessity:**
 - NL Government: persons over the age of 30 are not excessively disadvantaged, as they can deduct a fixed amount (which corresponds to the average of costs) at all ages. Also, they usually have more money.
 - CJEU:
 - Broad discretion enjoyed by the Member States and both sides of industry enjoy in the field of social policy and employment
 - It does not appear that a Member State which adopts a taxation scheme of the type in question goes beyond what is necessary.
 - However, it is for the national court to determine whether that is the case in the main proceedings.
- **Reflect: do you agree? Too much deference to Member State competence or just right?**

Parris (1)



Facts and issues

- **Facts:**
 - Dispute between Mr Parris, an Irish and UK national, and his former employer, Trinity College Dublin (TCD) a.o.
 - TCD refuses to grant Mr Parris' civil partner, on Mr Parris' death, the survivor's pension provided for by the occupational benefit scheme of which Mr Parris is a member. Reason: the rules exclude the payment of a survivor's benefit where the member married or entered into a civil partnership after the age of 60.
- **Main legal issue:**
Discrimination on grounds of sexual orientation and / or age as prohibited under Directive 2000/78?

Parris (2)

Some more background regarding the facts

- Mr Parris' personal situation:
 - Stable same-sex relationship for more than 30 years.
 - When it becomes possible in the UK to register such partnerships, Mr Parris does so in 2009, when he is aged 63. There is no possibility to have the partnership recognised in Ireland.
 - In June 2010, **the Civil Partnership Act is adopted in Ireland**. On 12 January 2011, the UK partnership is recognised in Ireland.
- National court:
Discrimination on grounds of sexual orientation or age?
Discrimination arising from the combined effect of the two?

Parris (3)

Discrimination on grounds of sexual orientation?

- **Scope** of Directive 2000/78:
Includes survivor's pensions under an occupational pension scheme, as established by previous case-law (e.g. *Maruko*).
- Discrimination on grounds of **sexual orientation** under Art. 2?
 - No direct discrimination: surviving civil partners are not treated less favourably than surviving spouses as regards the survivor's benefit.
 - Indirect discrimination?
 - The situation is a consequence of the Irish law at the time of Mr Parris' 60th birthday, and of the absence, of transitional provisions in the new law.
 - Recital 22 of the Directive: the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.
 - Therefore no prima facie indirect discrimination either.

Parris (4)

Comparison with previous case-law

- On direct discrimination:
Is this a change of approach or consistent with e.g. *Hay*?
- On indirect discrimination: the competence issue again!
 - Marital status and the benefits flowing therefrom are matters which fall within the competence of the Member States. The Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect.
 - Compare with the ECtHR: *Vallianatos v Greece* (2013), re registered partnerships under Art. 8 ECHR in conjunction with Art. 14 ECHR.

Parris (5)

Discrimination on grounds of age?

- **Different treatment directly based on age** (Art. 2 of the Directive):
The rule in question treats members who marry or enter into a civil partnership after their 60th birthday less favourably than those who do so before reaching the age of 60.
- Objective justification, Art. 6(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’.

Parris (6)

Objective justification (*continued*)

- CJEU:
 - Art. 6(2) applies only to occupational social security schemes that cover the risks of **old age** and invalidity, and only to aspects covering risks that are expressly referred to therein (*Lesar*, 2016).
 - Here: survivor's benefit is a form of old age pension, age requirement for access to the survivor's benefit under the pension scheme. Thus justification; no discrimination on grounds of age.
 - The fact that it was **impossible for Mr Parris to enter into a civil partnership before reaching the age of 60** „does not affect that conclusion at all“, since that was a consequence of the fact that national law did not provide for any form of civil partnership for same-sex couples and EU law did not preclude that state of national law.

- Again: do you agree with this outcome?

Parris (7)

Combined effect of sexual orientation and age

- Raises the issue of **intersectional discrimination**: neither sexual orientation nor age, but perhaps the combination?
- CJEU:
„While discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.“
- Thus: multiple discrimination yes, intersectional discrimination no – rather conservative approach. Do you agree?

Thank you for your attention!

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