

# Latest CJEU discrimination cases

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# Introduction (1)

## CJEU cases to be discussed

- 5 decisions:
  - *Fries* (2017)
  - *Bordonaro* (2017)
  - *Ruiz Conejeiro* (2018)
  - *John* (2018)
  - *Stollwitzer* (2018)
- Issues:
  - Four of them about **age** discrimination, one about discrimination on grounds of **disability**;
  - Some also touching on other issues: fixed-term employment, discrimination on grounds of nationality, Art. 21 of the Charter of Fundamental Rights (CFR).



# Introduction (2)

## Reminder: various aspects of cases

- Material aspects:
  - Is there **applicable EU law** for my case (personal and material scope)?
  - Does there seem to be **discrimination** (*prima facie* case)?
  - Can the action be **justified**, meaning that there is ultimately no discrimination?
- Enforcement:
  - **Where to go** to complain about discrimination?
  - What must be **proven**?
  - What are the legal **consequences** if discrimination is established?
- Note:

Preliminary ruling cases mostly concern only selected aspects.

# Relevant law

## Which EU law?

- Not always clear ...
- E.g. *Stollwitzer* (2018):
  - Concerns revision of a law on the reference date for the purpose of advancement in terms of remuneration for work.
  - In the reference for a preliminary ruling, the national court asks about:
    - The general principle in EU law of equal treatment;
    - The general principle of the prohibition of discrimination on grounds of age within the meaning of Article 6(3) TEU and Article 21 of the Charter of Fundamental Rights of the European Union;
    - Directive 2000/78;
    - The prohibition of discrimination on grounds of nationality under Art.45 TFEU.

# Scope of application

## Personal and material scope of application

- Limited scope of subjects in EU social anti-discrimination law:
  - Our cases, all about workers:
    - Access to work & dismissal at the same time: *Bordonaro* (2017).
    - Working conditions: *Stollwitzer* (2018), advancement in remuneration.
    - Dismissal: *Fries* (2017), *Ruiz Conejero* (2018), *John* (2018).
  - Other law: access to goods and services, social security, education, ...
- [Note:  
Particularly broad substantive scope under Art. 45 TFEU and Directive 492/2011, on the free movement for workers.]

# Discrimination (1)

## Grounds of discrimination and their relevance

- Starting point:
  - Limited number of grounds...
  - ... except in the context of Art. 21(1) of the Charter of Fundamental Rights (CFR): “Any discrimination based on **any ground such as** sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”
- No real problems regarding the meaning of the grounds in our cases:
  - E.g. *Ruiz Conejero* (2018) on the concept of disability.
  - E.g. *John* (2018) on the concept of fixed-term employment.

# Discrimination (2)

## Different forms of discrimination

- The most recent generation of EU social law prohibits:
  - Direct and indirect discrimination
  - Harassment
  - Instruction to discriminate.
- Other EU law prohibits only direct and indirect discrimination (partly based on CJEU case-law).
- Note:
  - Few cases of direct discrimination today (particularly age).
  - Generally stricter justification rules for direct discrimination.

# Direct discrimination (1)



## ***Bordonaro (2017)***

- Facts:
  - Concerns fixed-term on call employment contracts for persons who have not yet reached 25 years of age.
  - Mr Bordonaro’s contract is automatically terminated upon his reaching this age.
- Issue: direct age discrimination in employment?
- Legal definition in Art. 2(2) of Directive 2000/78:  
“**direct discrimination shall be taken to occur if** 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”.

# Direct discrimination (2)

## ***Bordonaro* - continued**

- CJEU:
  - Scope: Mr Bordonaro is a **worker** within the meaning of internal market case-law.
  - Discrimination:
    - Clear **difference of treatment** on grounds of age.
    - **Comparable situation**? Yes, there are also on call workers in other age groups for whom other regulations apply.
  - Justification:
    - Argument by Italy: aim of combatting youth unemployment, giving young people an initial experience capable subsequently of placing them in a favourable competitive position on the labour market.
    - Note: **Art. 6(1) of Directive 2000/78** allows objective justification in the interest of social and employment goals also for *direct* age discrimination.

# Direct discrimination (3)

## **Bordonaro - continued**

- CJEU on justification under Art. 6(1):
  - **Legitimate aim:**  
Yes, aim of improving the situation of younger people in order to promote their professional integration or to ensure their safety (see *Kücükdeveci*, 2010).
  - **Reasonableness of the action:**  
The situation of an employee who is younger than 25 years and can find entry to the job market on the basis of a flexible fixed-term employment contract such as the casual labour contract is, in the context of a continuing economic crisis and slight progression of the situation in which a person is, who is unemployed, to be preferred.
  - (Plus several other issues.)
- Therefore ultimately no discrimination; context of the economic crisis.

# Direct discrimination (4)

## Direct discrimination: *John* (2018)

- Facts:
  - Concerns the dismissal of Mr John, a teacher.
  - Termination of the working relationship in accordance with the employment contract on reaching the statutory retirement age.
  - Acceptance of the application for continued employment up until the end of the school year, but not beyond.
- Issues:
  - Age discrimination?
  - Fixed-term employment contract (extension as postponement of a time limit)?



# Direct discrimination (5)

## *John* - continued

- CJEU:
  - Directive 2000/78 (age discrimination):
    - Could constitute an direct discrimination on the basis of age.
    - Automatic termination of employment in itself is, however, justified in accordance with Art. 6(1); see earlier case-law such as *Rosenbladt* (2010).
    - Extension mechanism (even multiple) is likewise no problem:  
Represents favourable terms for the continuation of an employment relationship, which can only happen with the consent of both contracting parties, which must take place, so long as the employment relationship still exists.
  - Directive 1999/70 (fixed-term employment):
    - Special directive based on a framework agreement of the social partners.
    - Prohibits both the **abuse** of fixed-term employment relationships and **unequal treatment** on the basis of this criterion.

# Direct discrimination (6)

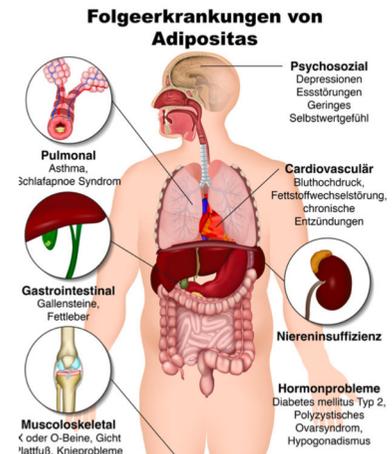
## *John* - continued

- Fixed-term employment relationship? National law is authoritative for this.
- Nevertheless some references of CJEU to EU law:
  - An employment relationship that only ends upon the statutory retirement age is in substance a permanent employment relationship.
  - It is possible to see the postponement included in the disputed provision as a mere contractual postponement of the originally agreed retirement age.
- [Apart from that: here, argument of abuse, **not discrimination**].
- Therefore: ultimately no discrimination.

# Indirect discrimination (1)

## Indirect discrimination: *Ruiz Conejero* (2018)

- Facts:
  - Mr Ruiz Conejero, a cleaner, suffers from a disability (37%, for the most part due to an endocrine metabolic disorder, adipositas).
  - He is often absent from work due to illnesses related to his disability (degenerative arthrosis and polyarthrosis, which have been exacerbated by adipositas).
  - He is dismissed because the total duration of his absence exceeds the maximum period defined by law.
- Mr Ruiz Conejero takes the matter to the court; the case goes to the CJEU for a preliminary ruling.



# Indirect discrimination (2)

## ***Ruiz Conejero* - continued**

- Issue:
  - Mr Ruiz Conejero: direct link between disability and absences.
  - National court: possibly indirect discrimination on grounds of disability.
- Legal definition, Art. 2(b) of Directive 2000/78:

"**indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation 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."

# Indirect discrimination (3)

## *Ruiz Conejero* - continued

- CJEU:
  - Scope: "disability" - see earlier case-law:
    - Means a limitation which results from physical, mental or psychological impairments and which in interaction with various barriers may hinder person concerned's full and effective participation in professional life in equality with other employees.
    - These include adiposity as in the current case; namely if the requirements are met – the national qualification is not sufficient.
  - Direct or indirect discrimination?
    - Criteria: absences that apply equally for all employees.
    - But: disabled people have a higher risk here.
    - Consequently: *prima facie* **indirect discrimination** in accordance with Art. 2(2)(b) of Directive 2000/78.

# Indirect discrimination (4)

## ***Ruiz Conejero - continued***

- Objective justification?
  - Objectively justified: **broad discretion of Member States** - Fight against absenteeism in the workplace is acceptable as an employment policy measure.
  - Adequate and necessary remedy: of the national court to check (CJEU provides a few indications).
  
- Rather “cryptic” finding:

“Art. 2(2)(b)(i) of Directive 2000/78 conflicts with a national regulation according to which an employer may dismiss an employee on the basis of justified, but recurring absences from the workplace, if the absences are caused by illnesses, which are the result of the employee’s disability, unless this regulation does not go beyond what is necessary to pursue the legitimate aim of the fight against absenteeism; the competent court is responsible for checking this.”

# Enforcement (1)

## *Stollwitzer* (2018)



- Facts:
  - In 2009, the CJEU finds that the Austrian rules of the national railway (ÖBB) on the reference date for advancement in remuneration without taking account of work before the age of 18 years constitutes age discrimination (*Hütter*).
  - In 2015, the CJEU finds that the revised scheme still constitutes age discrimination (*ÖBB Personenverkehr*).
  - Now Mr Stollwitzer complains about the yet again revised rules.
  - The new law retroactively abolishes the age limit and allows only experience acquired with other undertakings operating in the same economic sector to be taken into account (national railway undertakings, other Member States, Turkey, Switzerland).
- Still age discrimination? Also nationality?

# Enforcement (2)

## ***Stollwitzer* - continued**

- CJEU:
  - Starting point:
    - Member States are obliged, in accordance with Art. 16 of Directive 2000/78, to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished.
    - But: does not require Member States to adopt specific measures to be taken in the event of a breach of the prohibition of discrimination but leaves them free to choose, between the different solutions suitable for achieving its intended objective, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise.
  - Thus not automatic levelling up in all cases! See next sheet.

# Enforcement (3)

## ***Stollwitzer* - continued**

- CJEU:
  - On levelling up:
    - The elimination of discrimination does not, in any event, mean that the person discriminated against under the previous legal scheme will automatically enjoy the right to receive, with retroactive effect, that difference in salary or future increases in salary.
    - That will be the case only if, and as long as, measures to restore equal treatment have not been adopted by the national legislature. In that case, 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, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining

# Enforcement (4)

## ***Stollwitzer* - continued**

- CJEU on age discrimination:
  - Age criterion was formally abolished, making it possible to take account of experience gained, irrespective of the age at which it was acquired.
  - Rewarding experience is acceptable.
  - Difference in treatment is no longer based on age, but on the type of employer with whom experience was acquired.
  - Austrian legislature did not exceed the limits of its powers in this field.
- CJEU on discrimination on grounds of nationality, Art. 45 TFEU:  
There is nothing before the Court to justify any finding of infringement of the freedom of movement for workers.
- Note: nothing on general principles / the Charter!

# CFR (1)



## ***Fries (2017)***

- Facts:
  - Pilot Fries works at Lufthansa, who no longer wants to employ him after the age of 65.
  - Reason: Regulation 1178/2011/EU on laying down technical requirements and administrative procedures related to civil aviation aircrew.
  - Accordingly, a holder of a pilot licence who has attained the age of 65 years may no longer act as a pilot of an aircraft engaged in commercial air transport (60-64, with restrictions).
- Mr Fries goes to court and requests compensation; national court turns to the CJEU.
- Issue concerning us: Is the regulation compatible with the **prohibition of discrimination on the basis of age in Art. 21(1) of the Charter?**

# CFR (2)

## **Fries - continued**

- CJEU:
  - Generally:
    - The principle of equal treatment is **a general principle of Union law**, which is laid down in Art. 20 of the Charter. The prohibition of discrimination of Art. 21(1) of the Charter represents a particular expression of this principle.
    - According to established case-law of CJEU, this principle requires that **comparable situations are not treated differently and different situations are not treated the same unless such treatment is objectively justified**.
  - Here obviously unequal treatment (direct) on the basis of age: unfavourable for pilots who are 65 years and older.
  - But: restriction in accordance with Art. 52(1) CFR?
  - Note: CJEU does not consider an objective justification but rather simply the general rule in with Art. 52(1) CFR.

# CFR (3)

## ***Fries* - continued**

- Art. 52(1) CFR :  
"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."
- Compare *Prigge* (2011) on Directive 2000/78, where the CJEU deemed an age restriction unlawful under the given circumstances.
- Different outcome in *Fries* – see next sheet.

# CFR (4)

## ***Fries* - continued**

- CJEU on necessity:
  - It seems “not unreasonable that Union legislature, taking into account the importance of human factors in the area of civil aviation as well as the progressive loss over the years of the physical capabilities necessary for practising a profession as a pilot, deems it necessary to set an age limit for work as a pilot in commercial air transport in order to maintain an appropriate safety level in civil aviation in Europe”.
  - Limit of 65 years: broad discretion of Union legislature with regard to complex medical issues; in the event of uncertainties regarding the existence or scope of risks for human health it can take protective measures without having to wait until the existence and severity of these risks has been proven to the full extent (= precautionary principle).
  - All things considered all right, no violation of Art. 21 of the Charter.

# Thank you for your attention!

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