EMPLOYEE PROTECTION AND OR VERSUS EQUAL TREATMENT?*

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1. Development and Protection of Employees on the Work Place in Labour Law:

The main idea and historical development of employee protection in labour law during the last approximately 100 years can be seen to overcome the lack in bargaining powers of the "weaker" service renderers (employees) versus their dominant employer(s). The aim to reduce such discrepancy has always been part of international and national legislation of national laws[1].

In *"individual labour"* law a strong development from employment by "will" to such of proper "employment agreement"[2], turned to be the way that the law makers tried to achieve "equality". The social partners in what form so ever stepped in and formed individual into collective labour agreements.

The creation of *works councils* on the "plant" (and enterprise) level, the involvement of the employees in the business of the employer on social and business questions[3] and *collective bargaining itself*, mainly on the level of employees representatives (trade unions) and employers representatives[4], the achievement of minimum wages and the "pyramid" of agreements as more advantageous provisions for the individual employees in their sometimes different individual employment agreements remain valid can be described to be "cornerstones" of this long term development.

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Author's note: It is a great honor and pleasure for me to have been asked to participate in the Festschrift for Prof Berin Ergin, who not only in Turkey has successfully taught students and even TV viewers about civil and labour law matters and as practitioner of law always takes into account the practical side of our profession as lawyer. She furthermore has been over the years always very active in the field of International Labour law, for which the permanent membership of the UIA law commission gives one of several outstanding examples of her work and commitment.

[1] -in "*administrative" filed* working hours, vacation, health and safety, social security, disability etc. -

[2] e.g. in "civil", = individual labour law e.g. by notice requirements, stringent termination procedures, transfer and classification rules; "duty of care" by the employer versus the employees;

[3] -creation of works councils, plant agreements, social plans -

[4] - chambers of commerce, industrialist unions etc-,

Such turned into a *"tripartite system"*[5] or a form of "social partnership[6]" and was transferred by *supranational "law making"* of the EU[7] from the solely "market orientated" EC into the "European Union".

"Target and Aim" of labour law provisions still remain the same: such focus on the duties of the socially thinking employer (as "pater familias"); the rights of the employees are only "mirrored" by such duties imposed on "him/her".

What is missing in such a system in labour law matters is the fact that the "'in" and "out"-problem'[8] often remains unsolved.

2. Equal Treatment/Anti Discrimination Provisions in General:

There can be seen a strong US influence esp. in labour law issues (to "counterclaim " the individual employment still based on "will"), over the last 40 years as well as strong European Union legislation and case law.

In general "equal treatment" is not limited to labour law[9] or social law[10] but it applies also to – any – other fields of law[11], therefore a much broader application of the principles laid down in the respective Directives[12] is implied on all discrimination issues.

The categories according to EU law are mainly gender, age, sexual orientation, ethnical origin, religion and belief[13] and disability[14]. One has to take a different scope of exceptions[15] into account, has to define if *direct* or *indirect* discrimination[16] is given, as only in indirect discrimination cases a justification of such a discriminatory effect may be justified due to other – political - goals[17].

Personal discrimination or "incidental" discrimination[18] can be claimed and the question whether discrimination could be given is applied in each individual case; no excuses due to collective labour law provisions and

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[5] - esp. on international level including the governments; see: e.g. ILO negotiations and conventions -

[6] e.g. on the national Austrian level, where critics spoke of the "real parliament of power",

[7] e.g. freedom of services, "Accrued Rights Directive" in case of transfer of undertakings, minimum social standards in case of secondment, etc.;

[8] see e.g disablements, age, new forms of "*self- "* but commercially dependent *employment*;

[9] see e.g. EC Directive 76/207,

[10] see e.g. EC Directive 79/7;

[11] (esp. services and goods, EC Directive 2004/113, EJC C-236/09 Ass. Belge des Consommatuers Test-Achats et alia),

[12] -and according to Art 21 of the Charta -

[13] (in labour and outside labour law matters)

[14] (in employment and social matters; 17 according to Art 21 of the Charta)

[15] (see e.g. on age Art 6 para 1 EC Directive 2000/78);

[16] -over the application of "unequal" national laws, ordinances or collective bargaining and plant agreements -

[17] -e.g. employment of younger through fixed pension schemes -

[18] - e.g. as partner or relative of a discriminated person according to the categories mentioned above-

agreements[19] can be brought forward. Generally the jurisprudence of the ECHR is applied by ECJ and procedural *ad-/disad*vantages have to be levied:

A "direct involvement" of the "infringer"[20] in any national proceeding may suddenly arise. Furthermore the national "law maker" will be scrutinized in case of a preliminary ruling of the still efficient European Court of Justice as "developer of the law"; just upon request of the national court[21] hearing such a case.

"Target and aim of anti discrimination provisions" are the rights of the individual person discriminated for equal treatment versus anybody that directly or indirectly might ignore those[22].

As a consequence on international level e.g. the ILO Convention on Night Work for Women was "denounced" by nearly all member states. On the other hand under practitioners in labour law more and more often "confusion" about the complexity of EU law and ECJ jurisprudence and the permanent needs for adjustment of national laws necessary to avoid proceedings before the ECJ for failure to fulfil "treaty" obligations[23] is deplored.

3. Recent cases on EC Discrimination law:

Let me try to explain what I mean with the above title „Employee Protection *and* or *versus* Equal Treatment?"by cting some recent cases on EC Discrimination law.

Gender [and age?]:

On May 10, 2011 the ECJ in Case C-147/08, Jürgen Römer v Freie und Hansestadt Hamburg, held that supplementary retirement pensions paid to former employees and successors of the "Freie und Hansestadt Hamburg" on the basis of state law constitute "pay" and therefore do not fall outside the material scope of Directive 2000/78/EC. This precludes a provision of national law under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner. Direct discrimination on the ground of sexual orientation is given because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

The Austrian Supreme Court, "OGH" as of February 28, 2011, 9 ObA 124/10s, had to decide on the preliminary ruling of the ECJ, November 18, 2010, C-356/09 [Dr Kleist] and held that a forced termination of employment of a female doctor due to her reach of retirement age by Collective Agreement (60

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[19] a differentiation allowed by collective labour law rules nevertheless may constitute discrimination);

[20] - e.g. the employer-

[21] For the time being a direct access of the parties to the ECJ is not given.

[22] in labour law e.g. employers, national law makers, parties of collective agreements);

[23] to avoid financial sanctions and damage claims for the member states in the log run("Liability of member states versus EU citizens),

years versus 65 for male doctors) constitutes direct gender discrimination (no excuse due to political reasons of different Austrian retirement age for women and men; discrimination due to age did not have to be taken into consideration).

On the other hand according to the ECJ`s preliminary ruling of January 12, 2010, C-54/09, Rosenbladt, an automatic termination of employment - though strongly needed by Mrs Rosenbladt - due to her reach of retirement age of 65 years, did not contravene Art 6 para 1 Directive 2000/78 EC (age discrimination; see also ECJ, March 5, 2009, C-388/07, Age Concern England and under "age").

The ECJ, in its preliminary ruling of October 20, 2011; C-123/10 (Opinion of the General Attorney of June 16, 2011,), Brachner, held that a discrimination of women according to Art 4 Directive 7/79 EC by changes in the Austrian social security system seems to be given. It is nevertheless up to the referring national court to decide the issue at hand according to statistical data (Art 634 para 10 ASVG; mere social security pension scheme case[24]);

The ECJ, in its preliminary ruling of July 21, 2011, C-104/10, Kelly held that Article 4 of Council Directive 76/207/EEC and Article 1(3) of Directive 2002/73/EC must be interpreted as meaning that such do not entitle an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question;

Age:

In Cases C-297, 298/10 Hennings and Mai/Bundes-Eisenbahn/Land Berlin, the ECJ held on September 8, 2011 that the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the EU and in Directive 2000/78/EC esp. Articles 2 and 6(1) thereof, must be interpreted as precluding a measure laid down by a collective agreement which provides that, within each salary group, the basic

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[24] Article 3(1) of C Dir 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that an annual pension adjustment scheme such as that at issue in the main proceedings comes within the scope of that directive and is therefore subject to the prohibition of discrimination laid down in Article 4(1) of that directive.

2. Article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, that court would be justified in taking the view that that provision precludes a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners.

3. Article 4(1) of Directive 79/7 must be interpreted as meaning that if, in the examination which the referring court must carry out in order to reply to the second question, it should conclude that a significantly higher percentage of female pensioners than male pensioners may in fact have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings, that disadvantage cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard rate was also subject to an exceptional increase in respect of the same year 2008.

pay step of a public sector contractual employee is determined on appointment by reference [solely] to the employee's age[25][26].

The Austrian Supreme Court, OGH as of August 4, 2009, 9 ObA 83/09k held according to the preliminary ruling of the ECJ, June 18, 2009, C-88/08 Hütter that it is not allowed to exclude years of service under a certain age (18) for purposes of classification (into a remuneration scheme of the employer/collective agreement) (Art 1, 2 and 6 Directive 2000/78 EC). A similar preliminary ruling with regard to termination by notice was rendered by ECJ, on January 19, 2010, C-555/07, Kücükdeveci.

A differentiation was made by the ECJ, in its preliminary ruling of January 12, 2010, C-229/08 Wolf, where a maximum hiring age of 30 for fireman was allowed and in its preliminary ruling of the same day, C-341/08 Petersen, where a maximum retirement age for dentists as of 68 was seen to be acceptable due to possible reduced capacity of an "old" dentist and health aspects of their patients. It is up to the national courts to decide on possible exceptions by evaluation of chances in profession by different generations of members of a profession.

In its preliminary rulings of July 21, 2011, C-159, C-160, Fuchs, Köhler; the ECJ accepted a retirement of general attorneys of law with an age of 65 (in some circumstances up to 68), and held that such are not contradicting EC Directive 2000/78[27].

The German BAG as of June 23, 2010, 7 AZR 1021/08, held that a term of 60 years for the end of employment fixed by collective agreement for flight attendants is not permissible ("Acte Claire" given) but the same question with regard to pilots (7 AZR 112/08) was forwarded to the ECJ for preliminary ruling, C-447/09, who sees (following the Opinion of the Attorney General Pietro Cruz-Villallon of May 19, 2011), in his judgement of September 13, 2011, Prigge et al v. Lufthansa, an infringement of Directive 2000/78 EC in a clause of a collective bargaining agreement, "which fixes the age limit from which pilots may no longer carry out their professional activities at 60 whereas national and international legislation fixes that age at 65 and cannot be justified as a measure necessary for public security and protection of health. Therefore Article 4(1) must be interpreted as precluding such a clause in a collective agreement and the first paragraph of Article 6(1) of Directive 2000/78

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[25] The fact that EU law precludes that measure and that it appears in a collective agreement does [however] not interfere with the right to negotiate and conclude collective agreements recognisaed in Article 28 of the Charter of Fundamental Rights of the European Union;

[26] furthermore - these Articles must be [however] interpreted as not precluding a measure in a collective agreement, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.

[27] see also ECJ, November 18, 2010, C-250/09 and C-268/09 Georgiev: University Professor 68, fixed terms after 65 with prolongations in case of legitimate national aim to create high ranking jobs in scientific organisation up to the national courts to decide.

must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision."

4. Human Rights according to the European Convention (ECHR) in General:

The ECHR applies possible discrimination issues in a much "broader" way according to the provisions of the Convention[28].

Unfortunately one has to note the less effective procedure in Strasbourg. Only after all national possible remedies have been undertaken and the "Convention issue" was already argued there, an application to the ECHR might be heard. Consequences of a "positive" judgement are damages and refund of law costs of the plaintiff against the national government. A consultation procedure before the Counsel might result in changes in the national laws. Still long procedures and high numbers of cases and therefore also high numbers of rejections to hear cases is given; nevertheless also the ECHR can be seen as a strong "developer of the law", as the jurisprudence of the ECHR is applied by ECJ (and should be applied by national courts and bodies) and the ECHR is internationally seen to be the "Court of Human Rights" as "last resort".

"Target and Aim" are the rights of the person discriminated according to the provisions of the European Convention on Human Rights versus the respective national government.

5. Recent Cases of the EHRC:

In the Grand Chamber judgement of July 7, 2011, ECHR 093/2011 (Application Nr. 35452/02) Stummer v. Austria no violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights in conjunction with Article 1 of Protocol No. 1 (protection of property) and no violation of Article 4 (prohibition of slavery and forced labour) of a former prisoner's complaint of his non-affiliation to the Austrian old-age pension system for work performed in prison and his consequent inability to receive pension benefits under that scheme was found.

The Chamber judgments of September 23, 2010 ECHR 688 (2010) (application no 425/03 and 1620/03) concerned two dismissals of church employees for adultery. The ECHR unanimously found that domestic courts are required to balance in such cases the rights of both parties and to take into account the specific nature of the post of the employee (in management as director of public relations or only as organist of a church) and therefore found no violation respectively a violation of Article 8 (right to respect for private and family life).

In the Chamber judgment of May 31, 2011, in the case Maggio and others v. Italy (application no. 46286/09 et alia, final), concerning a group of Italian nationals who migrated temporarily to Switzerland to work and the subsequent proceedings they brought on their return to Italy about the calculation of their old-age pension, the ECHR held, unanimously, that there had been a violation of Article 6 para 1 (right to a fair trial) of the European

[28] that also include procedural issues and rights protected by the protocols; see e.g. recent cases below.

Convention on Human Rights as concerned all the applicants; but no violation of Article 1 of Protocol No. 1 (protection of property) to the Convention or of Article 14 in conjunction with Article 6 as concerned Mr Maggio.

In the Chamber judgment of July 21, 2011, in the case Heinisch v. Germany (application no. 28274/08, final), concerning the dismissal of a geriatric nurse after having brought a criminal complaint against her employer alleging deficiencies in the care provided, the ECHR held, unanimously, that there had been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

6. Work place Equality in "day to day" Life of a Practitioner:

What are therefore the conclusions for "day to day work" of practitioners in the field of labour law who have to take into account discrimination issues to safely and effectively counsel and represent their clients? I just might give you some ideas and questions in form of headlines in a nutshell as follows[29]:

First Question: What are the dangers in handling/not handling "Human Resources" correctly to avoid unequal treatment for (indoor and outdoor) counsel of employers?

What law applies?

See e.g. ECJ, January 19, 2010, C-555/07, Kücükdeveci, termination according German law valid, but German national "law" not applicable,

Responsibilities against whom?

- Responsibilities versus the individual employee,
- Her/his colleagues whose rights against discrimination might be infringed;
- Social responsibility versus the work force (works council rights);
- Shareholder rights (especially for stock listed companies);
- Administrative agencies and "the state";

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[29] Some recent Austrian literature:

Wachter, Jahrbuch Altersdiskriminierung 10, nw Verlag 2010,

Wachter, Jahrbuch Altersdiskriminierung 11, nw Verlag 2011;

Kasper, Aktuelles zum Gleichbehandlungsrecht, Ö. Anwaltsblatt 2001/07-08, 310ff.;

A49 Diskriminierung-Zwangspensionierung, infas 4/2011, 154ff.,

EUGH:Versicherungswesen – Ungleichbehandlung von Männern und FRauen unzulässig, RdW 4/2011, 222ff.,

Gerhartl, Diskriminierung im Bewerbungsverfahren; ASOK 2010, 242 ff.;

Gerhartl, Diskriminierung im Vorfeld einer Bewerbung; ASOK 2010, 140 ff.;

Trattner, Diskriminierung bei Dienstjubiläen, ASOK 2011, 177 ff.;

Trattner, Diskriminierungsschutz im Stellenbesetzungsverfahren der öffentlichen Verwaltung, ASOK 2010, 248 ff.;

Stix-Hackl, Europäische Rechtsprechung und das soziale Europa, Punktationen, Nova & Varia 2/10, 83 f., Hgb. Juristenverband;

See also Bartosch, Die Rechtsprechung des EuGH zum europäischen Arbeitsrecht, Recht der Internationalen Wirtschaft, 4/2012, 177ff;

When?

Initiating the employment:

- what kind of public offers in employment permissible (public announcements in e.g. newspaper or internet ads must be written in a "neutral" form, and e.g. in Austria have to contain minimum payment offered according to tariffs, according to Federal Gazette Nr. "BGBl" I 2011/7)
- selection procedure (public procurement rules versus "boy friends connections"; equal job opportunities given?),
- statements of the employer versus potential employees (esp. what kind of questions to job applicants permissible?),

Procedure:

in door: versus individual position seekers, other employees and work councils; outside: trade unions and/or national agencies involvement, ?

During employment:

a) "normal" employment decisions: classification of the work place, payment schemes, bonus payments, in kind bonuses, "advancement of the individual employee", rights in case of maternity/paternity leave, differentiation in case of part time justified?, scope of protection in the work place etc.,

b) harassment [mobbing, "bossying"], infringement and internal investigation cases;

Procedure: in door and outside: versus individual employees, other employees and work councils trade union and/or national agencies, penal prosecutors [esp. in case of b)] involvement?

Termination of employment: secondment and transfer into other positions permissible?, termination by notice or immediate dismissal, definite termination in case of retirement by law etc.;

Procedure:

a) internal procedures possible or prerogative (before going outside)

b) court/labour relation boards proceedings: versus individual employees, other employees and work councils; outside trade union and/or national agencies (in case of mass lay-offs] involvement?

Consequences:

In case of infringement/non obedience/malpractice or just non conformity of employer with laws, collective agreements, rules, jurisprudence etc:

charges against employer based on penal law provisions, penal administrative charges against employer, against management, senior officials of employees, reinstatement, damages and penal damages, payments of social security charges unduly withheld (including penalties), confrontation of management and senior officials with courts and anti-discrimination bodies, publication of cases, judgements and/or rulings, media reactions, etc.

Second Question: What are the dangers in handling/not handling "Equal Treatment Cases" correctly to avoid highly possible loss of justified claims of individual employees/work force by counsel of employees?

In-Door: Work Council members: very often remain in a non solvable conflict of interest between the representation of the work force (their main task) and individual rights of single employees for equal treatment.

What law to apply?

See e.g. ECJ, January 19, 2010, C-555/07, Kücükdeveci, termination according German law valid, but German national "law" not applicable,

In case of infringement of EU law: "Acte Claire" given?

In case of infringement of the EHRC: specific requirements to plead before the national courts such facts and infringements are a prerogative for later filing with the ECHR;

What Procedure to be taken?

What forums to hear the case available?

e.g. Internal proceedings of the employer, "equal treatment" bodies, labour courts, civil or criminal courts?

What form of application: reinstatement, fines, and damages?

Against whom: employer, other employees, national bodies,

Deadlines to be held (see e.g. ECJ, July 7, 2010, C-246/09, Bulicke, in case of discrimination of age, a national procedural law that all claims against infringer must be entered in a period of only two months is seen to be valid!);

Length and costs of the procedure foreseeable, lawyers costs insured, collective aid available etc.?