

# Recent and Current Employment Discrimination Cases in the Court of Justice of the European Union

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## Introduction

This article reviews important recent discrimination decisions issued by the Court of Justice of the European Union (CJEU) within the area of employment. I am taking as “recent” only judgments issued since the beginning of 2013. I will also be reviewing some interesting references currently before the CJEU but yet to be decided as this article went to press.

In this comparatively short time frame there have been historic decisions which have reshaped our understanding of parental rights, disability discrimination and race discrimination. There have been significant decisions on age discrimination, sex discrimination, equal pay, and sexual orientation discrimination. There have been no decisions yet on religion or belief discrimination, but there are two potentially explosive references currently pending before the Court.

## 1. Parental Rights

The CJEU has been in the vanguard of establishing equal rights for new fathers in decisions such as *Land Brandenburg v Sass*<sup>2</sup> and *Roca Álvarez v Sesa Start España ETT SA*.<sup>3</sup> The key question, however, is how far the CJEU is willing to go in classifying different treatment of fathers as contrary to European Union (EU) law. The underlying principle was set out in 2010 in *Roca Álvarez*. This case had the somewhat unusual facts of a man seeking time off to feed expressed breast milk to his unweaned child. Spanish law provided that if a female employee does not claim the time off work for breastfeeding herself, the child’s father may take the time off instead. The father was refused leave, however, because his child’s mother was not

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2 *Land Brandenburg v Ursula Sass*, C-284/02, 18 November 2004.

3 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, C-104/09, 30 September 2010.

an employee but was self-employed. The CJEU said that this was discrimination against men contrary to EU law as it was:

*[L]iable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.<sup>4</sup>*

When faced, however, with the more central issue of whether EU law requires that there must be no discrimination between men and women as regards leave following childbirth, the CJEU backtracked. Spanish law also allows mothers to transfer their maternity leave, once a compulsory period has been taken, to an employed father. The issue in *Betriu Montull v INSS*<sup>5</sup> was whether in order for the father to have rights, the mother had to be an employee within the meaning of the Spanish legislation. Mr Betriu Montull was an employee but his wife was a self-employed lawyer, outside the social security system. He sought maternity benefit for the time after the period of compulsory leave required under Spanish law had expired. The Advocate General thought that the case was indistinguishable from *Roca Álvarez* and that it was sex discrimination to give only employed mothers a primary right.<sup>6</sup> The CJEU, however, took a different view. It said that:

*[T]he mother of a child who is a self-employed person not covered by a state social security scheme does not enjoy any primary right to maternity leave. Consequently, the mother of the child does not have a right to such leave which she could grant to the father of that child.<sup>7</sup>*

It followed that the Spanish legislation did not contravene the Equal Treatment Directive.<sup>8</sup>

Unfortunately, no real attempt was made by the CJEU in *Montull* to distinguish *Roca Álvarez*. Then again, in the next case in the line, there is no mention at all of *Montull* by the Court, though *Roca Alvarez* is referred to twice. Greek law gives nine months parental leave to female civil servants, whereas fathers who are civil servants are entitled to leave only if the mother of their child works or exercises a profession. This was challenged in *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton*<sup>9</sup> as being contrary to the Pa-

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4 *Ibid.*, Para 36.

5 *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, C-5/12, 19 September 2013.

6 *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, C-5/12, 11 April 2013, decision of the Advocate General.

7 See above, note 5, Para 66.

8 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

9 *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton*, C-222/14, 16 July 2015.

rental Leave Directive and the Framework Agreement on parental leave,<sup>10</sup> and also to the recast Equal Treatment Directive.<sup>11</sup> The case involved a magistrate. He applied for parental leave in respect of his young daughter but this was turned down because his wife was not employed. The reference to the CJEU asked whether it is contrary to the Framework Agreement on parental leave and the recast Equal Treatment Directive for legislation to provide that if an employee's wife does not work or exercise any profession, the male spouse is not entitled to parental leave. The Advocate General assigned to the case was Juliane Kokott, the German Advocate General, who has set out a series of pioneering opinions for the Court on family-friendly rights (including in *Roca Alvarez*, but she was not the Advocate General in *Montull*). Her Opinion in *Maistrellis* was not available in English at the time this article went to press, but she recommended that the Court rule that legislation providing that a male judge is not entitled to parental leave where his wife does not work or exercise a profession is contrary to both the Parental Leave Directive and the Equal Treatment Directive. She said that rules such as those at issue strengthen a traditional division of roles in the family and complicates a woman's return to the labour force.<sup>12</sup> This was then echoed by the CJEU, stating that the legislation:

*[F]ar from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.<sup>13</sup>*

The Court concluded that the Greek rules not only contravened the Parental Leave Directive, but also contravened the Equal Treatment Directive.

It is certainly difficult to reconcile *Montull* and *Maistrellis*, and it is particularly bizarre that the cases were both decided by the same (Fourth) Chamber of the CJEU, with almost entirely the same judges. The finding that Greek legislation is contrary to both Directives is important in countries such as the UK that allow the minimum three months' leave provided for under the Parental Leave Directive on an entirely equal basis as between men and women, but make a father's right to share the additional much longer period of leave available to new mothers (shared parental leave in the UK) parasitic on the entitlement of the mother (strictly

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10 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by Union of European Employer Confederations (UNICE), the European Central Association of Public Sector Employers (CEEP) and the European Trade Union Conference (ETUC) as amended by Council Directive 97/75/EC of 15 December 1997.

11 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

12 *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaiomaton*, C-222/14, 16 April 2015, decision of the Advocate General.

13 See above, note 9, Para 50.

speaking, a mother whose partner does not work will not be entitled to shared parental leave either, but she will be entitled to maternity leave of an equivalent length).

The modern trend has been for more employees to be given more rights to take longer leave for family-related reasons: maternity leave, paternity leave, and parental leave. One consequence is that it will become more common for it to be necessary to make comparisons between an employee who is on statutory leave and employees who have remained at work. This may arise where there is a promotion competition or, as in the Latvian reference to the CJEU, *Riežniece v Zemkopības ministrija*,<sup>14</sup> where there is a redundancy selection exercise. Ms Riežniece was on extended parental leave from her post as a legal adviser in the Latvian Ministry of Agriculture when a redundancy situation arose in 2009. She was one of four in the redundancy pool. Her last performance appraisal had been in 2006 before she went on parental leave. Subsequent to that, the performance appraisal system itself changed. Some of the criteria from 2006 were no longer used and others had been introduced. Two employees who had not taken leave were assessed against the new criteria, whereas Ms Riežniece and another employee on leave were assessed against their last appraisal, covering a different time period. This resulted in Ms Riežniece being selected for redundancy. She claimed that this was contrary to the Equal Treatment Directive and the Parental Leave Directive. The CJEU ruled that EU law requires any such assessment must not place the worker on leave in a less favourable position than workers who did not take leave. It then went on to set out three specific criteria for a national court to apply where workers on leave are being assessed. The national court must:

*[E]nsure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave.*<sup>15</sup>

The second criterion is problematic. Where there has been a change in the appraisal system, it is difficult to see how a requirement to apply identical criteria can operate in practice. It would mean an employer using different criteria for redundancy selection according to whether or not any employees in the pool were on leave, and might pose the risk of being unfair to employees who have not been on leave.

When the Pregnant Workers Directive was adopted in 1992,<sup>16</sup> commercial surrogacy arrangements, whereby a woman carries and delivers a child for another woman or a couple,

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14 *Riežniece v Zemkopības ministrija and Lauku atbalsta dienests*, C-7/12, 20 June 2013.

15 *Ibid.*, Para 56.

16 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

were virtually unknown. Developments in medical science have made this much more feasible and in March 2014 the CJEU handed down its decisions in two cases concerning the rights of mothers who have a child through a surrogacy arrangement: such women are called “commissioning” or “intended” mothers as opposed to “birth” mothers. *C-D v S-T*<sup>17</sup> was a case from the United Kingdom and *Z v A Government Department*<sup>18</sup> was from the Irish Republic. Both cases considered whether a female worker whose baby is carried by a surrogate is entitled to maternity leave under the Pregnant Workers Directive, or to the equivalent of such leave under the recast Equal Treatment Directive. Advocate General Kokott, in the UK case, took the view that the intended mother did have the right to maternity leave because maternity leave is “intended to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth”.<sup>19</sup> The Advocate General expressed the view that in the case of a baby born through surrogacy, the intended mother “is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother.”<sup>20</sup> However, she could not take the Court itself with her on this occasion. The Grand Chamber ruled that the grant of maternity leave presupposes that the worker entitled to such leave has been pregnant and given birth to a child. Therefore, EU law does not require that a mother who has had a baby through a surrogacy agreement should be entitled to maternity leave or its equivalent, although member states are free to apply more favourable rules to commissioning mothers (as Great Britain has now done in the Children and Families Act 2014). The CJEU also ruled the refusal to grant paid leave to an intended mother equivalent to maternity leave did not constitute direct or indirect sex discrimination. There was no direct discrimination because mothers who have a child through a surrogacy arrangement are treated in the same way as fathers. So far as indirect discrimination was concerned, the Court said there was no evidence that the refusal of paid leave put female workers at a particular disadvantage compared with male workers.<sup>21</sup> This was surprising as, on the face of it, one would expect a considerably higher proportion of intended mothers of babies born through surrogacy to seek extended paid leave from work than fathers.

The Irish case raised an additional issue of interest. The claimant in that case was fertile but had no uterus and therefore could not support a pregnancy. She claimed that the refusal to grant her paid leave equivalent to maternity or adoption leave amounted to discrimination against her on the ground of disability. The Framework Employment Equality Directive<sup>22</sup> has no definition of “disability”, but, as we discuss in more detail below, the CJEU has applied the

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17 *C-D v S-T*, C-167/12, 18 March 2014.

18 *Z. v A Government department and The Board of management of a community school*, C-363/12, 18 March 2014.

19 *C-D v S-T*, C-167/12, 26 September 2013, decision of the Advocate General, Para 45.

20 *Ibid.*, Para 46.

21 See above, note 17, Para 49.

22 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

definition of disability contained in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). This focuses on whether the limitation from which the person suffers, in interaction with various barriers, hinders the person's full and effective participation in professional life on an equal basis with other workers. In *Z*, the CJEU concluded that the claimant's impairment did not disable her at work:

*[T]he inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z's condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.*<sup>23</sup>

## 2. Sex Discrimination

In addition to the parental rights cases which raise sex discrimination issues, there is one other recent sex discrimination case of note: the 2014 decision in *X*.<sup>24</sup> This was a Finnish reference which casts doubt on whether legislation which relies on sex-based actuarial factors is compatible with EU law. The case concerned the Finnish statutory insurance scheme for workplace accidents, which is carried out by private insurance companies. The Finnish legislation governing the calculation of payment for long-term disability uses separate actuarial tables for men and women. The claimant, a man, was given compensation for an accident at work that was €279 less than that which would have been payable to a woman of the same age and in a comparable situation. He brought a discrimination claim before the CJEU. The Finnish Government attempted to justify the use of sex-based actuarial factors on grounds that the life expectancies of men and women are different. However, the CJEU said that the calculation of compensation "cannot be made on the basis of a generalisation as regards the average life expectancy of men and women"<sup>25</sup> since "there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation."<sup>26</sup> The CJEU ruled that EU law precludes:

*[N]ational legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.*<sup>27</sup>

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23 See above, note 18, Para 81.

24 *X*, C-318/13, 3 September 2014.

25 *Ibid.*, Para 37.

26 *Ibid.*, Para 38.

27 *Ibid.*, Para 40.

Article 18 of the recast Equal Treatment Directive provides that compensation for discrimination must be real, effective and “dissuasive and proportionate to the damage suffered”. *Arjona Camacho v Securitas Seguridad España* is a new Spanish reference before the Court at the time of writing which asks whether this enables the national court “to award the victim reasonable punitive damages that are truly additional”.<sup>28</sup> Can the national court award damages that go “beyond the full reparation of the actual loss and damage suffered by the victim” and serve “as an example to others”?<sup>29</sup> In those countries, where damages are limited to economic loss, or to economic loss from discrimination plus proof of emotional distress suffered, this case could add to the sanctions available in respect of unlawful discrimination.

### 3. Equal Pay

In contrast to earlier years, there have been very few recent equal pay references to the CJEU. The 2013 decision in *Kenny v Minister for Justice, Equality and Law Reform*,<sup>30</sup> however, is noteworthy. The case arose out of the “civilianisation” of the Gardai in Ireland, by which civil servants have taken over some administrative work from the police. However, some police officers (mainly male) remained in designated posts doing administrative work alongside the civil servants (mainly female), and the men were paid considerably more. The women claimed a violation of their entitlement to equal pay. The Irish High Court reference pre-supposed that there was prima facie indirect discrimination in pay, but the CJEU went out of its way to question this on the basis that the two groups – the civil servants and the police officers - had different qualifications. It said that:

*[W]here seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 141 EC (...) Professional training is not merely one of the factors that may be an objective justification for giving different pay for doing the same work; it is also one of the possible criteria for determining whether or not the same work is being performed.*<sup>31</sup>

This is a problematic test. Differences between claimants and their comparators in training or qualifications should not be treated as sufficient in themselves to mean that the work done

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28 *María Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A*, C-407/14, lodged on 27 August 2014.

29 *Ibid.*

30 *Margaret Kenny and Others v Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána*, C-427/11, 28 February 2013.

31 *Ibid.*, Paras 28 and 29.

is not the same if those differences are not relevant to how the job is done. Most jobs will be done in the same way no matter what qualifications are brought to them. Factors which influence the “personal equation” are legitimate to take into account at the justification stage, but the more coherent approach is that they should only be taken into account at the equal work stage where they so influence how the job is done that one can say that the work itself is truly not the same. Be that as it may, the key question posed by the Irish court was whether “the interests of good industrial relations” can be taken into account as an objective justification for the difference in pay?<sup>32</sup> This is a vital point because where work has been job evaluated, much of the remaining pay differential is the product of negotiated settlements which protect men’s pay. The CJEU ruled that the interests of good industrial relations cannot “of itself, constitute the only basis justifying (...) discrimination”,<sup>33</sup> but it qualified this by adding that:

*[T]he interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.*<sup>34</sup>

This begs the question of how much weight can be given to the interests of good industrial relations.

#### **4. Disability Discrimination**

The Framework Employment Equality Directive, as noted above, prohibits discrimination by employers on grounds of “disability” but contains no definition of what “disability” is covered or who is a disabled person entitled to rely on the protection offered by the Directive. In one of its most important recent decisions, the Danish case, *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab*,<sup>35</sup> the CJEU has filled in the gap and done so in an expansive way. The CRPD is notable for incorporating the “social model” of disability. A recital to the Convention says that:

*[D]isability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.*<sup>36</sup>

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32 *Ibid.*, Para 35.

33 *Ibid.*, Para 48.

34 *Ibid.*, Para 50.

35 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, C-335/11 and C-337/11, 11 April 2013.

36 Preamble to the Convention on the Rights of Persons with Disabilities, Para (e).

Accordingly, Article 1 of the Convention provides that:

*Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

The European Union is a signatory to the CRPD and in *Ring*, the CJEU held that the Convention is now an integral part of the European legal order and takes precedence over EU legislation itself.<sup>37</sup> As a result, it ruled that the Framework Employment Equality Directive “must, as far as possible, be interpreted in a manner consistent with that Convention.”<sup>38</sup> Whereas, in the only other reference to deal with disability, *Chacon Navas v Eurest Colectividades SA*,<sup>39</sup> the Court drew a distinction between disability and sickness, and said that “sickness” is not covered by the Framework Employment Equality Directive, in *Ring*, the Court, applying the Convention, held that the concept of “disability” for the purposes of the Directive:

*[M]ust be understood as referring to a limitation which results in particular from a physical, mental or psychological impairment 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.*<sup>40</sup>

The Court also called into question employer absence control policies which treat days of absence on grounds of illness linked to disability the same as absence through illness not linked to disability. The Court pointed out that such a policy will indirectly discriminate against disabled workers in that a worker with a disability “has the additional risk of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence on grounds of illness”<sup>41</sup> and consequently of reaching the limit provided for under the absence control policy. In such circumstances, the CJEU ruled, the policy would have to be objectively justified, not by deciding whether or not counting disability-related absences would be a reasonable accommodation, but by deciding whether it was justified according to the stricter test of showing that the policy was a proportionate means of achieving a legitimate aim.

The CJEU built on *Ring* in its much-publicised decision in *Fag og Arbejde, acting on behalf of Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Bullund*,<sup>42</sup> which concerned the claim by a Danish childminder that it was contrary to EU law to dismiss him

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37 See above, note 35, Paras 28–32.

38 *Ibid.*, Para 32.

39 *Sonia Chacón Navas v Eurest Colectividades SA*, C-13/05, 11 July 2006.

40 See above, note 35, Para 38.

41 *Ibid.*, Para 76.

42 *Fag og Arbejde, acting on behalf of Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Bullund*, C-354/13, 18 December 2014.

because he was obese (he weighed some 160 kgs or 350 lbs). Mr Kaltoft's claim was put on two bases. First, it was argued on his behalf that discrimination on grounds of obesity is contrary to EU law as such. In effect, this would have entailed either treating the grounds for unlawful discrimination under EU law as open-ended, similarly to the open-ended grounds under Article 14 of the European Convention on Human Rights, or declaring that obesity is a new protected characteristic. The CJEU was clear that only the EU legislator can adopt new grounds for unlawful discrimination. The second basis of argument was that obesity should be regarded as a disability for the purposes of the Framework Employment Equality Directive. On this question, the CJEU concluded that obesity is not a disability as such, but that it can amount to a disability if, applying the words of the CRPD, it entails:

*[A] limitation resulting 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.*<sup>43</sup>

Thus, it is the effects of the obesity that decide whether a claimant falls within the scope of the statutory protection. Importantly, the CJEU lays down the general principle that the cause of a person's disability is irrelevant:

*The concept of 'disability' within the meaning of Directive 2000/78 does not depend on the extent to which the person may or may not have contributed to the onset of his disability.*<sup>44</sup>

Accordingly, whether Mr Kaltoft was obese because he has a glandular disorder or because of poor eating habits is not a consideration. The question is whether the worker's obesity:

*[H]indered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.*<sup>45</sup>

The CJEU emphasised that it is sufficient if the disability acts as "a hindrance" to exercising a professional activity; it does not have to render it impossible for the person to work. Moreover, the fact that Mr Kaltoft was able to do his job for 15 years even though he was obese for that entire period did not negate his claim to be disabled if he satisfied the requirements of the definition in the CRPD.<sup>46</sup> Accordingly, on the one hand, after *Ring*, it

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43 *Ibid.*, Para 64.

44 *Ibid.*, Para 56.

45 *Ibid.*, Para 60.

46 *Ibid.*, Paras 61–62.

would seem that a person may be treated as disabled – and entitled to a reasonable accommodation – for some jobs but not for others. On the other hand, after *Kaltoft*, it would seem that a person may be treated as disabled if they would be hindered generally in professional life as a result of their impairment even if they are not so hindered in their particular job at the moment.

## 5. Sexual Orientation Discrimination

The Romanian reference to the CJEU, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*<sup>47</sup> concerned some outrageously homophobic remarks by Gigi Becali, the financial patron of the football club, FC Steaua. Mr Becali told an interviewer:

*Not even if I had to close FC Steaua down would I accept a homosexual on the team (...) Perhaps he's not a homosexual (...) but what if he is? (...) There's no room for gays in my family and Steaua is my family (...) Rather than having a homosexual on the team, it would be better to play a junior. That's not discrimination. No one can force me to work with anyone.*<sup>48</sup>

The reference to the CJEU asked whether this and similar statements amounted to a prima facie case of sexual orientation discrimination. This is obvious, but there were complications. First, the complaint was not brought by the footballer concerned but by a Romanian gay rights group against the statutory enforcement agency (for not levying a penalty that was severe enough). The CJEU held that the Equality Directives do not require an identifiable claimant. Secondly, could the club as employer be saddled with legal liability for statements made by Mr Becali, who was only a shareholder and not the club's legal representative or a person having the legal capacity to represent it in recruitment matters? The CJEU ruled that “the mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar”<sup>49</sup> to establishing a prima facie case against the employer. Instead, the employer could refute a prima facie case of discrimination with “a body of consistent evidence”, which might include:

*[A] reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.*<sup>50</sup>

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47 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, C-81/12, 25 April 2013.

48 *Ibid.*, Para 35.

49 *Ibid.*, Para 48.

50 *Ibid.*, Para 58.

## 6. Age Discrimination

Whereas in parental rights and disability discrimination the CJEU can be said to be ahead of the curve, the same is not the case with age discrimination. The recent jurisprudence of the CJEU on age discrimination has been less progressive than many of the Court's decisions as regards discrimination on the basis of other characteristics. In part, this may be because the Community legislator itself treated age differently in the Framework Employment Equality Directive by allowing direct age discrimination to be justified.<sup>51</sup> In part, this may be because the members of the CJEU have yet to fully take on board that employment discrimination based on an arbitrary age criterion can be no less offensive than other forms of prohibited discrimination.

We can see this difference in approach even in a recent age discrimination case where the claimant succeeded. *Vital Pérez v Ayuntamiento de Oviedo*<sup>52</sup> is a reference to the CJEU from Spain which asked if it is prohibited age discrimination for a municipality to fix a maximum age of 30 for recruitment to the post of local police officer. In 2010, in *Wolf v Stadt Frankfurt am Main*,<sup>53</sup> the CJEU upheld a maximum recruitment age of 30 for a post involving frontline fire-fighting duties. It did so not on the basis that imposing a recruitment age limit was justified as a proportionate means of achieving a legitimate aim. Instead, the CJEU controversially held that physical fitness was a "genuine and determining occupational requirement"<sup>54</sup> for the job within the meaning of Article 4(1) of the Framework Employment Equality Directive. In *Vital Pérez*, the Court continued to accept that possession of particular physical capabilities may be regarded as a "genuine and determining occupational requirement", in this case for the purposes of employment as a local police officer; and that the possession of particular physical capacities is a characteristic relating to age.<sup>55</sup> Thus, it continues to accept that there are circumstances in which stereotypes directly linked to chronological age may be valid (in marked contrast to its approach to gender stereotypes in *X*).<sup>56</sup> In this case, however, the CJEU concluded that the age limit was disproportionate. It distinguished *Wolf* on the basis that whereas "scientific data" before the Court in that case established that front-line fire fighters requires "exceptionally high" physical capacities and that very few individuals over the age of 45 have those capacities, this is not the case with all of the capacities which a police officer requires.<sup>57</sup> Moreover, other Spanish municipalities operate different, or no, maximum recruitment ages for police officers and the maximum age for recruitment to the Spanish national

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51 See above, note 22, Article 6.

52 *Mario Vital Pérez v Ayuntamiento de Oviedo*, C-416/13, 13 November 2014.

53 *Colin Wolf v Stadt Frankfurt am Main*, C-229/08, 12 January 2010.

54 *Ibid.*, Para 40.

55 See above, note 52, Para 41.

56 See above, Section 2.

57 See above, note 52, Paras 53–54.

police force has been abolished. Furthermore, the advertised job qualifications stipulated that candidates would have to pass stringent physical tests, which would make it possible to ensure that local police officers possess the particular level of physical fitness required. Nor could the age limit be objectively justified under Article 6(1)(c) of the Framework Employment Equality Directive in that it was based on the training requirements of the post and the need for a reasonable period of employment before retirement. The retirement age for police officers was 65 and there was no evidence linking the age limit to training requirements.<sup>58</sup>

If the CJEU wishes to revisit this issue, it will have the opportunity in *Salaberria Sorondo v Academia Vasca de Policia y Emergencias*,<sup>59</sup> which asks whether a maximum age of 35 years for participation in the selection process for recruitment as a police officer in the Basque Country is compatible with the Framework Employment Equality Directive.

*Specht and Ors v Land Berlin and Ors*<sup>60</sup> followed on from the 2011 decision in *Hennigs v Eisenbahn Bundesamt*<sup>61</sup> and relates to the former German practice of linking public sector pay to the age of the employee at the time of recruitment. The CJEU ruled that this is age discrimination contrary to Framework Employment Equality Directive, but the more interesting dimension to the case is that the Court went on to hold that transitional measures which perpetuated the age discrimination by providing that pay increments would continue to be determined in accordance with basic pay under the old system did not contravene the Directive. This was said to be justified on the basis of budgetary considerations and the difficulties that would be entailed in reclassifying each individual civil servant. The Court acknowledged that: “as a rule, justifications based on an increase in financial burdens and possible administrative difficulties cannot justify failure to comply with the obligations arising out of the prohibition of discrimination”<sup>62</sup> but it held that in this case:

*[T]he preservation of previous remuneration and, as a consequence, the preservation of a scheme establishing a difference in treatment based on age made it possible to prevent loss of remuneration and (...) were a crucial factor in enabling the domestic legislature to arrange the transition.*<sup>63</sup>

These are much the same arguments, of course, that are used to justify continuing unequal pay between men and women.

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58 *Ibid.*, Paras 55–58.

59 *Gorka Salaberria Sorondo v Academia Vasca de Policia y Emergencias*, C-258/15, lodged on 1 June 2015.

60 *Specht and Ors v Land Berlin and Ors*, C-501/12, 19 June 2014.

61 *Sabine Hennigs (C-297/10) v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai*, C-297/10, 8 September 2011.

62 See above, note 60, Para 77.

63 *Ibid.*, Para 67.

The next case in the line is *Schmitzer v Bundesministerin für Inneres*.<sup>64</sup> Austrian legislation for pay in the public sector provided that payments based on length of service did not take into account periods of service prior to age 18. In the 2009 case of *Hütter v Technische Universität Graz*,<sup>65</sup> the CJEU held that this was unjustified age discrimination. The Austrian Government then made various changes purportedly to comply with the ruling and introduce a non-discriminatory system. These included transitional arrangements, but it was argued that the transitional arrangements continued to disadvantage those who had been disadvantaged by the previous system. This led to a further age discrimination claim, which ended up before the CJEU in the form of *Schmitzer*. Once again, the Austrian Government defended the discriminatory transitional arrangements on grounds that it was “motivated by budgetary considerations”.<sup>66</sup> So *Schmitzer* gave the CJEU the opportunity to give a more authoritative pronouncement on whether an employer is able to justify discrimination by arguing that it would be too expensive not to discriminate, and the case was referred to the Grand Chamber. It ruled that budgetary constraints are not a defence in themselves. An employer cannot simply say that it cannot spend any more money to achieve equal treatment. The Court said:

*With regard to the objective of budgetary equilibrium pursued by the national legislation at issue in the main proceedings, it must be borne in mind that EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination. In that regard, while budgetary considerations may underpin the chosen social policy of a Member State and influence the nature or extent of the measures that that Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.*<sup>67</sup>

Prior to age discrimination legislation, it was common for severance payment or redundancy payment schemes to exclude employees who were eligible for a retirement pension. In *Andersen v Region Syddanmark*<sup>68</sup> in 2010, the CJEU held that a Danish law which excluded workers from receiving a severance allowance if they are eligible to receive a retirement pension amounted to unjustifiable direct discrimination on grounds of age, where no distinction was drawn between those who actually take their pension and those who wish to continue to work. This has been revisited by the CJEU in another Danish reference, *Ingeniørforeningen i*

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64 *Leopold Schmitzer v Bundesministerin für Inneres*, C-530/13, 11 November 2014.

65 *David Hütter v Technische Universität Graz*, C-88/08, 18 June 2009.

66 See above, note 64, Para 40.

67 *Ibid.*, Para 41.

68 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, C-499/08, 12 October 2010.

*Danmark, acting on behalf of Poul Landin v Tekniq, acting on behalf of ENCO A/S – VVS.*<sup>69</sup> In this case, Mr Landin was given notice of dismissal when he was age 67. He was not paid a severance allowance because he was entitled to the State pension, even though he had postponed taking the pension and was actively seeking alternative employment. The CJEU this time held that the provision “does not appear unduly to prejudice the legitimate interests of workers who have reached the ordinary age of retirement.”<sup>70</sup> The Court purported to distinguish this case from *Andersen* on the grounds that the pension at issue in that case was paid from age 60 and an employee would risk a reduction in pension entitlement if he or she took early retirement. Not surprisingly, perhaps, these two decisions have resulted in a third reference from Denmark, *DI [Dansk Industri], acting on behalf of Ajos A/S v Estate of Rasmussen*, which also asks whether the prohibition on age discrimination applies to a scheme under which employees are not entitled to severance allowance if they are entitled to an occupational old age pension, “irrespective of whether they choose to remain on the employment market or retire.”<sup>71</sup> What is somewhat surprising is that the Danish court goes on to ask if it is found that it is contrary to EU age discrimination law for an employer not to pay the severance allowance in such a case, then can the Danish court “undertake a weighing up” of the principle of non-discrimination:

*[W]ith the principle of legal certainty and the related principle of the protection of legitimate expectations and, following that weighing-up, reach the conclusion that the principle of legal certainty must prevail over the principle prohibiting discrimination on grounds of age.*<sup>72</sup>

This is certainly a novel and disturbing argument, which would have huge consequences if it was upheld by the CJEU.

## 7. Race Discrimination

The Race Discrimination Directive and the Charter of Fundamental Rights prohibit discrimination because of “racial or ethnic origin.”<sup>73</sup> The Directive covers both employment and access to goods and services and there is a single definition of “direct” and “indirect” discrimination for any discrimination falling within the Directive’s scope. This definition, found in Article 2 of the Directive, uses parallel wording to that found in the other two European

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69 *Ingeniørforeningen i Danmark, acting on behalf of Poul Landin v Tekniq, acting on behalf of ENCO A/S – VVS*, C-515/13, 26 February 2015.

70 *Ibid.*, Para 44.

71 *DI [Dansk Industri], acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, C-441/14, lodged on 24 September 2014.

72 *Ibid.*

73 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Charter of Fundamental Rights of the European Union, Article 21.

directives covering employment discrimination – the recast Equal Treatment Directive and the Framework Employment Equality Directive. This is what makes the decision of the Grand Chamber of the CJEU in the Bulgarian reference, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsias*,<sup>74</sup> so momentous for employment discrimination law, even though the facts of the case are about access to services. The Race Directive defines indirect discrimination as occurring “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”. *CHEZ* establishes the principle that indirect discrimination applies to a person who shares a disadvantage, even if they do not share the characteristic of the group that leads to such disadvantage. Accordingly, where a neutral practice causes a particular disadvantage to members of an ethnic group, anyone who is similarly disadvantaged may bring an indirect discrimination claim even if they are not themselves a member of the group that is particularly disadvantaged.

The case concerned Anelia Nikolova, who runs a shop in a predominantly Roma district of a Bulgarian town, but is not Roma herself. The electricity company put meters in Roma districts considerably higher than in other districts, ostensibly so as to avoid tampering, making them less visible to consumers. Ms Nikolova brought a complaint that she was unable to check her electricity meter and that this amounted to discrimination. Could she complain about discrimination based on ethnic origin in those circumstances, even though she was not Roma herself? The Grand Chamber of the CJEU has held unequivocally that she can: the principle of equal treatment applies not to a particular category of person but by reference to the grounds of discrimination.

*[The] principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds.*<sup>75</sup>

This appears to extend to indirect discrimination the principle of associative discrimination set out by the CJEU in *Coleman v Attridge Law*,<sup>76</sup> where a mother of a disabled child was found to have been directly discriminated against because of her child’s disability. Moreover, as Advocate General Kokott put it in her Opinion in *CHEZ*, the principle of discrimination by association is not restricted to cases where there is a close personal link or association as in *Coleman*, but also covers a case of “collateral damage” as here.<sup>77</sup> If Ms Nikolova had been living in an area that was not mainly Roma, she would have been given a more accessible electricity meter.

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74 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16 July 2015.

75 *Ibid.*, Para 56.

76 *S. Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008.

77 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsias*, C-83/14, 12 March 2015, decision of the Advocate General, Para 58.

## 8. Religion or Belief Discrimination

Unlike the European Court of Human Rights, the CJEU has not been called upon to adjudicate in cases of alleged discrimination because of religion or belief. This is now going to change. Two similar references were made to the CJEU at the end of March 2015 and the beginning of April, one from France and one from Belgium. Both references concern Islamic headscarves.

The French case, *Bouagnaoui v Micropole Univers SA*<sup>78</sup> concerns a design engineer who was sent by her employer to clients. A customer complained that the veil she wore “embarrassed” a number of its employees, and demanded that this should not recur. The employer discussed this with Mrs Bouagnaoui and asked her to observe a principle of “neutrality” as regards her dress when dealing with clients. When she refused, she was dismissed. The reference to the CJEU asks, must Article 4(1) of the Framework Employment Equality Directive:

*[B]e interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?*<sup>79</sup>

The Belgian reference, *Achbita v G4S Secure Solutions NV*<sup>80</sup> concerned a receptionist who was contracted out to another company, Atlas Copco. Sometime after her employment began, she decided to wear an Islamic veil. G4S is part of an international company and this was regarded as infringing a “strict neutrality” rule in the workplace. The reference to the CJEU asks if Article 2(2)(a) of the Framework Employment Equality Directive should:

*[B]e interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?*<sup>81</sup>

The two references raise some issues that go to the heart of discrimination law. In both cases what is at issue appears to be a hijab rather than a full-face covering such as a burqa or

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78 *Asma Bouagnaoui, Association de défense des droits de l’homme (ADDH) v Micropole Univers SA*, C-188/15, lodged on 24 April 2015.

79 *Ibid.*

80 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, lodged on 3 April 2015.

81 *Ibid.*

niqab, as was considered by the European Court of Human Rights case of *SAS v France*.<sup>82</sup> The hijab does not give the appearance of cutting its wearer off from the rest of society, the main ground on which the Strasbourg Court upheld the right of the French government to prohibit face covering in public places. Moreover, whereas in the author's view the burqa is plainly an instrument of men's oppression of women and cannot sensibly be reconciled with feminism, there is a stronger case for regarding the Islamic veil as being an expression of modesty and an affirmation of faith by a significant number of the women concerned. It has to be acknowledged, however, that this is not the way the Islamic veil is regarded in more secular societies than Great Britain, such as France and Belgium. Thus, the cases will require the CJEU to adjudicate on key issues such as the right of an employer to dictate dress codes to its employees, an employer's right to impose a "neutral" workplace, whether EU law obliges an employer to accommodate manifestation of an employee's religious beliefs as suggested by the European Court of Human Rights in *Eweida v United Kingdom*,<sup>83</sup> and the extent to which an employer is entitled to limit an employee's religious expression in order to comply with the preferences of a customer.

## Conclusion

The CJEU has been responsible for significant developments in the interpretation of EU protections from discrimination in the employment sphere since 2013. These developments have affected protection from discrimination on a variety of grounds including sex, race and disability. How it will treat the highly contentious issue of accommodation of religious practices in the workplace remains to be seen.

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82 *SAS v France*, Application No. 43835/11, 1 July 2014.

83 *Eweida v The United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.