

The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07

1) Reference Details

Jurisdiction: European Court of Justice

Date of decision: 5 March 2009

Case Status: Concluded by the European Court of Justice

Link to full case:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-388/07>

2) Facts

The National Council on Ageing ('Age Concern England') is a charity whose aim is to promote the welfare of older people. The charity challenged Regulations 3(1), 7(4) and 30 of the Employment Equality (Age) Regulations 2006 (the Regulations) – which were introduced to implement Council Directive 2000/78/EC – on the basis that these Regulations did not properly implement the Directive. The Directive prohibits discrimination on the grounds of age in the field of employment. It permits certain differences of treatment on grounds of age if they are objectively and reasonably justified by a legitimate, including legitimate employment policy, labour market and vocational training objectives. Furthermore, the means of achieving that aim must be appropriate and necessary. The directive also provides a non-exhaustive list of differential treatment which may be justified.

The Regulations provide that employers may dismiss employees at a “normal retirement age”, or in the absence of such an age of 65 years, without such a dismissal being regarded as discriminatory. The Regulations also provide criteria that must be considered in ascertaining whether or not a dismissal constitutes a “retirement”. Age Concern claimed that the possibility under the Regulations of dismissing an employee aged 65 or more by reason of retirement constituted a direct general defence for discrimination unintended by, and therefore contrary to, article 6(1) of the Directive.

3) Law

Regional Law

Article 6(1) of Council Directive 2000/78/EC - Justification of differences of treatment on grounds of age

National Law

Employment Equality (Age) Regulations 2006

Regulation 3(1) – Discrimination on grounds of age

Regulation 7(4) – Applicants and employees

Regulation 30 – Exception for retirement

4) Legal Arguments

The Applicant

Age Concern claimed that the list provided in article 6(1) was intended to guide States in their implementation of the Directive and impose on them an obligation to set out a specific list of justifiable reasons, by reference to a “legitimate aim”, for differential treatment under national law. It argued that article 6(1) was not intended to permit a general unspecific defence (in this case of “retirement”) as an exception to the non-discrimination provision despite the reason being a proportionate means to achieve a legitimate aim. The applicant considered that article 6(1) was intended to provide for a very limited exception to a fundamental right justified by public interest or social policy within a Member State. The applicant claimed that the test imposed by article 6(1) of the Directive for permissible differential treatment was both objectivity and reasonableness. The applicant concluded that such justification was to be permitted only where there were “weighty reasons and in very exceptional and limited circumstances of the kind set out in article 6 of Directive 2000/78/EC or in specified analogous circumstances.”

The State

The State argued that article 6(1) of the Directive did not impose an obligation on the State to set out a list of justifiable reasons for differential treatment as claimed by Age Concern, saying that

such a requirement would be unrealistic and inappropriate. Among other things, the State highlighted the margin of appreciation that States are allowed in the implementation of Directives and the specific wording of article 6(1) which provides that it is for the Member State to justify its policy choices “within the context of national law.”

5) Decision

The Court drew attention to the fact that although the right to non-discrimination protected by the Directive was a fundamental one, States had a broad discretion with respect to the manner in which they implemented Directives and therefore article 6(1) of the Directive could not be interpreted as requiring Member States to draw up a specific list of the differences in treatment which may be justified by a legitimate aim. Further, the Court opined that it was clear from the words of article 6 that the examples of legitimate aims and justifiable differences in treatment were purely illustrative, as evidenced by the use of the word “include”. The Court further held that it was apparent from article 6(1) that the legitimate aims which could justify derogation from the non-discrimination principle were social policy objectives, such as those related to employment policy, the labour market or vocational training and were clearly distinguishable from personal aims of employers. The Court set out that it was for a national court to decide whether a provision which allowed employers to dismiss workers who have reached retirement age, such as those related to employment policy, the labour market or vocational training, was justified by “legitimate” aims within the meaning of article 6(1) of the Directive.

The Court also held that Member States may, under article 6(1), provide within the context of national law, for certain kinds of differences in treatment on grounds of age if they are ‘objectively and reasonably’ justified by a legitimate aim, such as employment policy, labour market or vocational training objectives and if the means of achieving that aim are appropriate and necessary.

However, States must establish to a high standard of proof the legitimacy of the justifying aim relied on. On this point the ECJ added:

“Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on

the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.”