

ECJ 5 July 2017, case C-190/16 (Fries), Age discrimination

Werner Fries – v – Lufthansa CityLine GmbH,
German case

Summary

The non-discrimination principle and the freedom of occupation, as provided for in the Charter of Fundamental Rights of the European Union, do not prevent the EU from setting an age limit for pilots involved in commercial air transport, provided that this is done in accordance with Article 52(1) of the Charter.

Facts

Werner Fries was employed as a pilot by Lufthansa. He was also involved in training other pilots, under an additional agreement made to his employment contract. In October 2013, he reached the age of 65. On 31 December 2013, his employment contract expired because he had reached the ordinary state retirement age (in terms of the state pension), in accordance with the applicable collective agreement.

As from 31 October 2013, Lufthansa had no longer employed Fries. It referred to European legislation, arguing that Fries was no longer permitted to be a pilot in commercial air transport, as he had reached the age of 65.

Legal background

The International Civil Aviation Authority (established by the Convention on International Civil Aviation, to which all EU Member States are a party) has developed legislation on airline safety. Certain of its flight crew licensing requirements have been adopted in Annex I to EU Regulation No 1178/2011. In the Annex, ‘Commercial air transport’ is defined as “*the transport of passengers, cargo or mail for remuneration or hire*” and it contains the following provisions on the age of pilots:

- the holder of a pilot’s licence between 60–64 years of age shall not act as a pilot of an aircraft engaged in commercial air transport except as a member of a multi-pilot crew, provided that s/he is the only pilot in the flight crew of 60 years or older; and
- the holder of a pilot’s licence from 65 years of age onwards shall not act as a pilot of an aircraft engaged in commercial air transport.

Articles 15(1) and 21(1) of the Charter contain the freedom to choose an occupation and engage in work, along with the principle of non-discrimination. Article 52(1) of the Charter stipulates how the rights and freedoms recognized by the Charter can be limited.

National proceedings

Mr Fries claimed before the German Federal Labour Court (Bundesarbeitsgericht, the ‘BAG’) that Lufthansa’s refusal to employ him as a pilot was unlawful. He requested that Lufthansa be ordered to pay him for November and December 2013. The BAG decided to stay proceedings and refer preliminary questions to the ECJ, as the proceedings centred around two issues:

- the validity of the age of 65 as the point at which a person should no longer be entitled to work as a pilot in commercial air transport;
- the scope of “commercial air transport”, within the context of other duties (e.g. ‘ferry flights’ and the training of other pilots).

Questions put to the ECJ

1. Is point FCL.065(b) in Annex I to Regulation No 1178/2011 valid in light of Article 15(1) and Article 21(1) of the Charter?
2. Must point FCL.065(b) in Annex I to Regulation No 1178/2011 be interpreted as prohibiting the holder of a pilot’s licence who has attained the age of 65 from acting as a pilot in ferry flights operated by an air carrier carrying no passengers, cargo or mail, and working as an instructor and/or examiner on board an aircraft, without being part of the flight crew?

ECJ's findings

As to the first question,¹ the Court noted that Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must 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 EU or the need to protect the rights and freedoms of others.

In this case, the limitation (i.e. 65 years of age) stems from law (i.e. Regulation No 1178/2011). Further, the limitation respects the essential contents of the principle of non-discrimination, as it is limited to the question of restrictions on the performance of pilot duties to ensure aviation safety. Regarding whether it met an objective of general interest, the ECJ held that the objective of establishing and maintaining a high uniform level of civil aviation safety in Europe constituted an objective of general interest (*Prigge and Others*, C-447/09). As regards the proportionality principle, measures that aim to avoid accidents by monitoring pilots' aptitude and physical capabilities for human failure are undeniably measures intended to ensure air traffic safety. It is undeniable that those capabilities diminish with age and this justifies including an age limit as an appropriate means. A limitation on the non-discrimination principle could only be appropriate if there was a genuine concern to attain it in a consistent and systematic manner. The ECJ found that the age limit reflected the differences between commercial and non-commercial transport, the first involving a greater degree of technical complexity and more people. The fact that the age limit only applied to commercial air transport may therefore strengthen the case that the airline's stance was proportionate.

As to the fixing of the age limit at 65, EU law allows for broad discretion in terms of complex medical questions, such as the particular physical capabilities necessary for a person to act as an airline pilot. Where there is uncertainty as to the existence or extent of the risks to the health of individuals, the EU may take precautionary measures without waiting for the risks to materialise. Faced with scientific uncertainty, EU law may prioritise measures that guarantee a high level of safety, provided they are based on objective data. The age limit of 65 may be regarded as sufficiently high to serve as the end-point for piloting commercial aircraft. It reflects the international rules on air transport, which contain the same age limit. Given that the rules are based on extensive professional debate and expertise, they are of particular relevance in assessing the proportionality of the rule. EU law does not require an individual examination of each licence holder over 65. Moreover, Regulation

No 1178/2011 combines the age limit of 65 with an individualised approach for those between 60 and 64. In addition, the age limit does not force people out of the labour market, as there is no automatic retirement or termination of the employment contract. This meets the proportionality test and as such, the age limit is compatible with the Charter.

As for the alleged breach of the right to work and pursue a freely chosen occupation (Article 15 of the Charter), the ECJ held that this was not an absolute right but had to be considered in relation to its social function. Restrictions may be imposed provided that they correspond to objectives of general interest pursued by the EU and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference that impairs the substance of the right. In this case, the ECJ found that the age limit did not affect the substance of the freedom to choose an occupation. Therefore, the ECJ held that the validity of the age limit was not affected by the right to freedom of occupation.

Regarding the second question put to the ECJ, concerning the scope of "commercial air transport", the wording to the provision made it clear that only situations meeting the cumulative criteria of (i) attaining the age of 65; (ii) acting as the pilot of an aircraft; (iii) which is engaged in commercial air transport, fall under the age limit. Neither ferry flights nor activities associated with the training of pilots fell within the scope of the measure referred to in Regulation No 1178/2011.

Ruling

1. Consideration of the first and second questions of the BAG has revealed nothing that might affect the validity of point FCL.065(b) in Annex I to Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, in the light of Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union.
2. Point FCL.065(b) in Annex I to Regulation No 1178/2011 must be interpreted as prohibiting the holder of a pilot's licence who has attained the age of 65 neither from acting as a pilot in ferry flights, operated by an air carrier carrying no passengers, cargo or mail, nor from working as an instructor and/or examiner on board an aircraft, without being part of the flight crew.

1. In fact, the ECJ rephrased the first two questions of the BAG into one question.