2019/40

Provisions on minimum salary based on work experience constitute age discrimination, even if they are not relevant (BE)

CONTRIBUTOR Gautier Busschaert*

Summary

Relying on the prohibition of age discrimination stemming from the Employment Equality Framework Directive 2000/78/EC, the Labour Tribunal of Leuven refused to apply a Collective Labour Agreement establishing the minimum monthly salary for employees depending on their work experience even if the work experience was not relevant and disapplied the Royal Decree enforcing it. The Tribunal based its decision on the fact that this gave a strong advantage to older employees without objective justification.

Legal background

The Belgian Act of 10 May 2007[1] aimed at combatting certain forms of discrimination, including those based on age, transposes EU Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.[2] Those instruments provide for the nullity of provisions infringing the prohibition of discrimination set therein. This prohibition is not absolute. Difference of treatment may be accepted if it pursues a legitimate objective and if the means used to attain this objective are adequate, necessary and proportionate.

Further, Joint Committees are key actors in the Belgian labour law system. Each of them relate to a specific professional sector. On the basis of the Belgian Act of 5 December 1968 on Collective Labour Agreements and Joint Committees,[3] those Committees are entitled to adopt Collective Labour Agreements regulating certain aspects of the professional sector they are competent for, including remuneration.

This is how the Joint Committee 200 (formerly 218), competent for all white collar employees not included within the scope of any other Joint Committee, came to adopt the Collective Labour Agreement of 9 June 2016.[4] This Agreement regulates minimum monthly salary based on an employee's years of work experience and depending on his or her function. To calculate this work experience, the Agreement takes into account not only real work experience in the same company or sector, but also work experience gained elsewhere as a salaried worker, a self-employed worker or even a civil servant. Part-time work is assimilated to full-time work and various periods of suspension of the employment contract are also taken into account such as those due to occupational disease or work accidents, normal sickness or accidents as well as various kinds of leave provided by law.

The Royal Decree of 27 January 2017[5] was then adopted in order to make the application of this Collective Labour Agreement mandatory in the sector.

Facts

A dispute related to both the Collective Labour Agreement of 9 June 2016 and the prohibition of discrimination on the ground of age came before the Labour Tribunal of Leuven in the following context.

The claimant had first been employed in an interior design company under a four-month training contract.

* Gautier Busschaert is an attorney-at-law at Van Olmen & Wynant, Brussels, Belgium.

1. Belgian Act of 10 May 2007 aimed at combatting certain forms of discrimination, *M.B.*, 30 May 2007, p. 29016.
2. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000), O.J., L. 303.
3. Belgian Act of 5 December 1968 on Collective Labour Agreements and Joint Committees, *M.B.*, 15 January 1969, p. 267.
4. Collective Labour Agreement of 9 June 2016 concluded within the Auxiliary Joint Committee for employees establishing minimum sectoral scales on the basis of seniority, made mandatory by the Royal Decree of 27 January 2017, *M.B.*, 14 February 2017. It replaced the Collective Labour Agreement of 28 September 2009 concluded within the Auxiliary Joint Committee for employees establishing minimum sectoral scales on the basis of seniority, made mandatory by the Royal Decree of 21 February 2010, *M.B.*, 21 April 2010.
5. Belgian Royal Decree of 27 January 2017 making mandatory the Collective Labour Agreement of 9 June 2016, concluded within the Auxiliary Joint Committee for employees establishing minimum sectoral scales on the basis of seniority, *M.B.*, 14 February 2017.

doi: 10.5553/EELC/187791072019004004003

It was immediately followed by an open-ended employment contract between the same parties. Their situation fell within the scope of the Agreement of 9 June 2016.
Later on during that second contract, an upgrade of job classification concerning *inter alia* the claimant took place. On this occasion, he realized that his employer calculated his seniority in a way that led to a lower result than the one he considered himself entitled to, based on the rules set by the Collective Labour Agreement in question. He therefore rejected the job classification and the seniority calculation made by his employer. Instead, he claimed the payment of the difference between the salary he had been paid and the salary he deemed himself entitled to according to a correct seniority calculation and job classification.
The parties failed to reach an agreement in this conflict.

Decision

The Labour Tribunal of Leuven referred to the case law of the ECJ and more particularly to the *Hennigs and Mai* case wherein it stated that "*the Court has acknowledged that rewarding experience that enables a worker to perform his duties better is, as a general rule, a legitimate aim of wages policy (…). It follows that that aim is 'legitimate' within the meaning of that provision*" (C-297/10 and C-298/10 [2011] ECR I-07965, para. 72; referring to Case C-17/05 *Cadman* [2006] ECR I-9583, para. 34, and Case C-88/08 *Hütter [2009] ECR I-5325, para. 47)*.
The Tribunal went on by considering that taking into account professional experience (possibly via length of service) when determining wage in principle constitutes an indirect difference of treatment as younger workers have by definition and, in most cases, less experience than older ones. Such an indirect distinction forms a prohibited discrimination unless it is objectively justified and the means to attain that objective justification are appropriate and necessary.
Focusing its analysis on the rules set by the Collective Labour Agreement of 9 June 2016, the Tribunal pointed out that by calculating minimum monthly salary on the basis of an aggregation of many periods that did not correspond to *relevant* work experience, older workers almost unfailingly could claim more experience than younger ones, without this difference of treatment being objectively justified. Indeed, the definition of work experience used by the Collective Labour Agreement did not necessarily reward experience that enables a worker to perform their duties better but professional experience more generally.
On this basis, the Tribunal turned to the principle of primacy of EU law over national law and to Article 9 of the aforementioned Belgian Act of 5 December 1968, which provides for the nullity of any provision of a Collective Labour Agreement that would be contrary to mandatory provisions of Belgian Acts and Decrees as well as of international conventions and regulations binding in Belgium. Those include EU Directive 2000/78 through its Belgian transposition.
The Tribunal also referred to Article 15 of the Anti-discrimination Act of 10 May 2007 which provides for the nullity of provisions infringing the prohibition of discrimination set out in the Act, even if they arise from a Collective Labour Agreement.
This led the Labour Tribunal to declare null and void the part of the Collective Labour Agreement of 9 June 2016 dealing with the definition of professional experience and to disapply the Royal Decree of 27 January 2017 on the ground that both infringed the prohibition of discrimination on the ground of age as embodied in EU law and transposed in Belgian law.
As a consequence of this, the Collective Labour Agreement lost its mandatory power so that it became possible for the parties to derogate from it, which they did by agreeing on a specific salary in the employment contract. As the agreed salary had already been paid, the claim of the employee was dismissed as unfounded.

Commentary

This decision seems in line with the case law of the ECJ since rewarding professional experience is accepted only insofar as this professional experience is *relevant* and so enables a worker to perform their duties better.
Defining professional experience so widely as considering mere entry in the labour market as sufficient for collecting years of experience would not fit with the rationale for the Court's acceptance of relevant work experience as a legitimate objective, which is that workers through their years of experience are supposed to bring added value to their employer.
What added value can an employer expect from an employee who has acquired a lot of experience through the years but outside the company or even outside the sector where the company is active? The author does not see any valid reason to remunerate more favourably this older worker than a younger worker with more specific experience in the sector to which the company belongs, in the company or even in the specific function they perform within the company.
This decision might trigger important changes in (sectoral) collective labour agreements in Belgium which often confer on professional experience such a wide scope for wage determination. It will also call for transitional measures as some employees might see their remuneration reduced as a result of the suppression of the difference in treatment. Finally, social partners should look for an acceptable alternative to the current system which could be based on professional experience within the sector or more narrowly length of service within the company.

doi: 10.5553/EELC/187791072019004004003

Comments from other jurisdictions

Austria (Hans Georg Laimer and Lukas Wieser, zeiler.partners Rechtsanwälte GmbH): Collective bargaining agreements in Austria often provide for salary or wage schemes, which are (also) based on service periods. Such a differentiation may in general be a discrimination based on the age of the employees, as younger employees may earn less under such schemes. However, according to the Austrian legislator professional experience, which is of value to the employer, as well as loyalty towards the employer are legitimate goals for such a differentiation. Thus, if the collective parties or the employer are able to prove that the salary or wage scheme is based on such legitimates goals the differentiation is justified although younger employees may be treated less favourable than older ones (cf. Government Bill 307 BlgNr, XXII GP, 16; *Windisch-Graetz* in Neumayr/Reissner, *ZellKomm3* § 20 GlBG Mn 16). A legitimate goal may be the professional experience, such as stated as relevant experience in the ECJ case law. Moreover, the loyalty of the employee may also be a legitimate goal, as it may protect the employer from being forced to hire and train a new employee. However, as far as can be seen no Austrian Supreme Court case law, confirming this view of the legislator with regard to legitimate goals for such an age discrimination, currently exists.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The core statements of the decision are in line with German labour law and the jurisdiction of the German Federal Labour Court (*Bundesarbeitsgericht*, the 'BAG').
In Germany, it has become generally accepted that collective bargaining agreements can be invalid if the provisions violate higher-ranking law. This also includes the provisions of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – 'AGG').
The main provision under which collective bargaining agreements are subject to legal review is Section 7(2) AGG. Accordingly, provisions in agreements are invalid if they violate the prohibition of discrimination under the law. In other words, provisions are invalid if they (at least indirectly) discriminate employees on the grounds of gender, race or ethnic origin, religion or belief, age, disability and sexual identity. Hence, the prohibitions of discrimination represent a limit to the autonomy of collective bargaining.
However, not every different treatment leads to a prohibited discrimination. An (indirect) different treatment can be justified. This means the bargaining parties are allowed to regulate claims in collective bargaining agreements in a differentiated manner if the difference in treatment is based on a legitimate aim, is objectively appropriate, necessary and proportionate.
Having said that, the legal consequences in case of the invalidity of a collective bargaining agreement due to a violation of the prohibition of discrimination or equal treatment have not yet been conclusively clarified. In principle, it is up to the bargaining parties to decide whether or how they want to replace or amend an invalid collective bargaining provision. However, the BAG several times in the past has assumed – in order to eliminate discrimination – that the same regulations should apply to discriminated employees as to the employees benefiting from the collective bargaining agreement. This was most recently the case in relation to a collective bargaining provision, which intended to exclude employees retroactively from a more favourable pension commitment, depending on their entrance date (BAG, judgment of 9 December 2015 – 4 AZR 684/12).

The Netherlands (Peter Vas Nunes): This case is an example of how an employer can use (some might say, misuse) the anti-discrimination laws to defend against an 'ordinary' pay claim, that is to say, a claim having no relation to discrimination. The employee claimed that he had been underpaid, arguing (*inter alia*) that he had more seniority (10.5 years) than the employer had determined (8 years), so that, according to the applicable collective agreement, he should have been placed on a higher step in the relevant pay scale. The employer countered, somewhat cynically but with success, that the pay scale (which it had hitherto used without a problem) was discriminatory and, hence, invalid.
There have been only a few cases in The Netherlands – not many – where the employer, not the employee, was the party relying on the anti-discrimination laws.
The court in this case held that the method by which the collective agreement calculates salary level distinguishes on the grounds of age. The court went on to reason that the relevant provisions in the collective agreement are therefore illegal unless objectively justified. So far so good. My problem with the judgment is that it is rather brief on the issue of objective justification. All it says is that, according to ECJ doctrine, in a classical seniority-based pay system, rewarding experience on the job is a legitimate aim. The implication seems to be that other criteria than work experience are not legitimate. This elicits two queries. First, what is experience? Take the example of a person who becomes a teacher later on in life. Such a person can have valuable experience in totally different positions and, indeed, 'life experience' that merits rewarding. There is quite some Dutch case law (admittedly, old case law) concerning women who interrupted their career for some years following pregnancy, in order to take care of their young children, and then re-entered the labour market. Was it fair to reward them as employees without relevant experience? Secondly, I can think of other legitimate aims for determining salary level (again, in a classical; seniority-based pay system) than experience. For instance, an employer may want to reward retention and loyalty.

Romania (Andreea Suciu and Teodora Mănăilă, Suciu | The employment law firm): The case at hand represents a good example of an objective criteria misappropriated in

doi: 10.5553/EELC/187791072019004004003

regulating employment relations. The danger of apparent neutral or objective criteria used to hide discriminatory practices continues to be the subject of analysis in national and European courts.

This type of broad meaning for the notion of *work experience* is largely used by public authorities when acknowledging social rights (for example in the case of child-care indemnity or calculation of retirement pension) and less likely in collective agreements. In Romania most collective agreements establish a minimum payment scale based on the work experience within the respective company, thus they relate to a stricter meaning of the notion.

Further, the Romanian Labour Code expressly states that within the employment relationship, the principle of equality shall apply to all employees. Thus, from a Romanian employment law perspective, the findings of the Belgian court are correct, the determination of minimum payment based on criteria not relevant to the activity performed by the respective employee or the company's field of activity only favour older employees who in general have more years of work. As such differences of treatment do not fulfil a legitimate aim, it is appropriate for them to be sanctioned.

United Kingdom (Richard Lister, Lewis Silkin LLP): I agree with Gautier that the Labour Tribunal's decision appears correct, and consistent with the ECJ case law on the legitimacy of rewarding work experience. While early authorities seemed to create a blanket justification for employers basing employment-related decisions on experience/length of service criteria, the *Cadman* judgment clearly established that employees may challenge service-related pay where they raise 'serious doubts' that greater length of service actually enables job holders to perform their duties better, in which case the employer will be required to provide detailed objective justification.

In the UK, generally speaking, courts and tribunals tend to accept that recruiting, rewarding or retaining employees with longer service or a certain level of experience is a potentially legitimate aim, with most cases turning on the issue of proportionality. Interestingly, though, there is a specific exemption in the UK's Equality Act 2010 that precludes an indirect age discrimination claim where length of service is used to determine a worker's benefits in certain circumstances. It provides an absolute exemption for 'benefits' awarded with reference to a length of service criterion of up to five years, and allows a length of service criterion of over five years where the employer 'reasonably believes that doing so fulfils a business need'.

Subject: Age discrimination

Parties: Unknown

Court: Labour Tribunal of Leuven

Date: 11 April 2019

Case number: 18/457/A

Internet publication: https://www.rechtbanken-tribunaux.be/sites/default/files/ar_leuven/news_files/vonnis%20arbrb%20Leuven%2011%20april%202019%20PC%20200%20%28002%29.pdf

doi: 10.5553/EELC/187791072019004004003