lion, it does not state that the retroactive equalisation of the NPA was necessary to prevent the financial balance of that scheme from being seriously undermined. The case file does not include other information which suggests this. Therefore, there seems to be no objective justification for that measure, but this is nevertheless for the referring court to verify.

Ruling

Article 119 of the EC Treaty (now, after amendment, Article 141 EC) must be interpreted as precluding, in the absence of an objective justification, a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of a normal pension age differentiated by gender, a measure which equalises, with retroactive effect, the normal pension age of members of that scheme to that of the persons within the previously disadvantaged category, in respect of the period between the announcement of that measure and its adoption, even where such a measure is authorised under national law and under the Trust Deed governing that pension scheme.

ECJ 24 October 2019, case C-35/19 (Belgische Staat), Free movement

BU – v – État Belge, Belgian case

Question

Must Article 45 TFEU be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State?

Ruling

Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned.

ECJ 5 November 2019, case C-192/18 (Commission – v – Poland), Gender Discrimination, Fair Trial

European Commission – v – Republic of Poland, EU Case

Legal background

Article 157 TFEU prohibits any discrimination with regard to pay as between men and women, whatever mechanism by which the inequality arises.
Article 5(a) of Directive 2006/54 provides that there is to be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards the scope of such schemes and the conditions of access to them.
Article 9(1) of Directive 2006/54 identifies a number of provisions which, when they are based on sex, either directly or indirectly, are to be included among the provisions contrary to the principle of equal treatment. Article 9(1)(f) applies in particular in the case of provisions based on sex for fixing different retirement ages.

Facts

The Republic of Poland introduced a law which distinguished between women and men as regards (i) the retirement age for judges of the ordinary Polish courts and public prosecutors in Poland and (ii) the age from which early retirement is possible concerning judges of the *Sąd Najwyższy* (Supreme Court). Moreover, the retirement age of judges of the ordinary Polish courts was lowered to 60 years for women and 65 years for men and the Minister for Justice in Poland received the right to authorise the extension of the period of active service as a judge from the age of 60 to 70 for women and the age of 65 to 70 for men.

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Action

The Republic of Poland received a letter of formal notice on 28 July 2017 after the Commission took the view that Poland had failed to fulfil its obligations under (i) Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 and (ii) the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter. The case came before the Grand Chamber.

Consideration

Gender discrimination

As stated in settled case law, it is contrary to Article 157 TFEU and Article 5(a) read in conjunction with Article 9(1)(f) of Directive 2006/54 to impose an age condition which differs according to sex for the grant of a pension that constitutes pay within the meaning of that provision (*Barber*, C-262/88, EU:C:1990:209, paragraph 32; *Niemi*, C-351/00, EU:C:2002:480, paragraph 53; *Commission – v – Italy*, C-46/07, EU:C:2008:618, paragraph 55). Poland's argument in favour of the sex differentiation for the purpose of eliminating discrimination could not be justified. The national measures covered by Article 157(4) TFEU must, in any event, contribute to helping women to conduct their professional life on an equal footing with men (*Griesmar*, C-366/99, EU:C:2001:648, paragraph 64; and *Commission – v – Italy*, C-46/07, EU:C:2008:618, paragraph 57).

Differentiating ages by sex does not offset the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems they may encounter in their professional career (*Commission – v – Italy*, C-46/07, EU:C:2008:618, paragraph 58). Given the foregoing, the Court concluded that Poland had failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54.

Fair trial

Member States need to make sure that a court is independent in order to interpret and apply EU law as stated in the second subparagraph of Article 19(1) TEU. The latter has two aspects to it: independence and impartiality. Moreover, the necessary freedom of judges from all external intervention or pressure requires a certain guarantee of irremovability. Consequently, the mechanism for which the Minister for Justice has the right to authorise judges of those courts to continue actively to carry out judicial duties beyond the retirement age should first of all be seen in the light of judicial independence and impartiality. The fact that an organ, such as the Minister for Justice, is entrusted with the power whether or not to grant any extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of justice has been undermined. However, it is necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them (*Commission – v – Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 112 and the case law cited). The power held in the present instance by the Minister for Justice for the purpose of deciding whether or not to authorise judges of the ordinary Polish court to carry out duties, from the age of 60 to 70 for women and the age of 65 to 70 for men, does not meet the two mentioned aspects and therefore gives rise to reasonable doubts. Article 69(1b) of the Law on the ordinary courts consists of too vague and unverifiable criteria. In addition, the Minister for Justice is not required to state reasons regarding his decision of extension of the period for which judicial duties are carried out nor can the decision be challenged in court proceedings. Moreover, based on Article 69(1) of the Law of ordinary courts the latter decision must be made no earlier than 12 months and no later than 6 months and no period is laid down in which the Minister for Justice must adopt his decision. Consequently, the length of the period for which judges have to wait after the extension has been requested falls within the Minister's discretion. As regards the principle of irremovability, this is inherent in judicial independence (*Commission – v – Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 96). The principle of irremovability fails to comply in this case given that the period that the Minister for Justice must authorise is considerable and the relatively long period of uncertainty regarding that authorisation. The power of the Minister for Justice for the purpose of deciding whether or not to authorise judges of the ordinary Polish court is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post (*Commission – v – Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 85). Altogether, the Court found that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter.

Ruling

The Court (Grand Chamber):

1. Declares that, in establishing, by Article 13(1) to (3) of the *ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw* (Law amending the Law on the system of ordinary courts and certain other laws) of 12 July 2017, a dif-

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ferent retirement age for men and women who are judges in the ordinary Polish courts and the *Sąd Najwyższy* (Supreme Court, Poland) or who are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of 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;

2. Declares that, in granting, pursuant to Article 1(26)(b) and (c) of the Law amending the Law on the system of ordinary courts and certain other laws of 12 July 2017, the Minister for Justice (Poland) the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, as lowered by Article 13(1) of that Law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;
3. Orders the Republic of Poland to pay the costs.

ECJ 19 November 2019, joined cases C-609/17 and C-610/17 (TSN), Paid leave

Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry – v – Hyvinvointialan liitto ry; Auto- ja Kuljetusalan Työntekijäliitto AKT ry – v – Satamaoperaattorit ry, Finnish cases

Legal background

Article 7(1) of Directive 2003/88/EC stipulates that employees are entitled to at least four weeks of paid leave. Article 15 gives Member States the right to apply laws more favourable to the protection of the safety and health of workers. The right to paid leave is enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union as well. The applicable Finnish law provides that days of paid leave during sickness are carried over only partly, but this may not reduce the worker's entitlement to four weeks' annual leave.

Facts

Both cases concerned employees whose period of leave coincided with sick leave. Their employers refused to carry over all overlapping days. The employees (and their unions) claimed that this was contrary to Directive 2003/88 and Article 31(2) of the Charter. The employers (and their representative organisations) asserted that this was not the case, as the minimum leave was not affected. In both cases, the Finnish labour court asked preliminary questions.

Questions

1. Is Article 7(1) of Directive 2003/88 to be interpreted as precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of four weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness?
2. Is Article 31(2) of the Charter to be interpreted as precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of four weeks laid down in Article 7(1) of Directive 2003/88, and yet exclude the carrying over of those days of leave on the grounds of illness?

Consideration

First question

Directive 2003/88/EC does not preclude domestic provisions granting paid annual leave for more than four weeks under the conditions laid down by national law (*Dominguez*, C-282/10, para. 47; *Neidel*, C-337/10, para. 34; *Maschek*, C-341/15, para. 38; *Hein*, C-385/17, para. 31). It is apparent from the wording of the Directive that its purpose is to lay down minimum safety and health requirements for the organisation of working time. Member States can apply provisions more favourable to workers. The rights granted beyond the minimum are not governed by the Directive but by national law, although such rights cannot compensate for possible infringements elsewhere (*Hein*, C-385/17, paras. 42–43; *Julián Hernández and Others*, C-198/13, paras. 43–44). Member States can thus decide to grant additional rights and the conditions thereof.

The Court has held that Member States can limit the accrual of paid leave during illness, provided that the entitlement is at least four weeks (*Dominguez*, C-282/10, para. 49) or that no allowance in lieu is due for the excess leave above four weeks, which was not taken due to sickness (*Neidel*, C-337/10, para. 36; *Maschek*, C-341/15, para. 39). A similar solution must prevail where a Member State excludes the right to carry over days of paid leave which exceed that minimum period.

Second question

Article 51(1) defines the scope of the Charter: the provisions thereof are addressed to the Member States only

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