

Case Reports

2020/2

Introduction of 25 years as maximum age for participation in air traffic controllers recruiting process found unjustified (BE)

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Summary

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Relying on the prohibition of age discrimination stemming from Directive 2000/78, the Brussels Labour Tribunal, in a judgment of 28 November 2019, ruled that an age limit of 25 for the recruitment of air traffic controllers constituted direct discrimination. Its decision was grounded on the fact that even if there are objective reasons related to air traffic safety which may justify setting an age limit for applicants, the employer must adduce concrete evidence based on scientific facts.

Legal background

The Belgian Act of 10 May 2007 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. Those instruments prohibit direct and indirect discrimination on various grounds including age with regard to labour relations and, more specifically for our purposes, as concerns the conditions of access to employment.

This prohibition is however not absolute. In employment relations, the difference of treatment directly based on age can only be justified on the basis of genuine and determining occupational requirements. By

derogation to this rule, a direct distinction based on age shall not constitute discrimination where it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market or other comparable legitimate aims, and the means of achieving that aim are appropriate and necessary.

Further, the Act provides for a reversal of the burden of proof in the event that the Belgian Interfederal Centre for Equal Opportunities and Opposition to Racism (Unia) or the victims present facts from which it may be presumed that there has been discrimination. In this case, it is for the defendant to prove that no discrimination has taken place.

Facts

A dispute related to the prohibition of discrimination on the ground of age came before the Brussels Labour Tribunal in the following context.

The defendant was an autonomous public company responsible for providing air traffic services. In order to select air traffic controllers, the defendant organised comparative recruitment exams. The 12 to 15 best ranked were invited to participate in the two-year training course for prospective air traffic controllers.

After successful completion of the training, a candidate air traffic controller obtains his/her European air traffic controller licence. S/he will then work as an Aerodrome Controller after an internship with the defendant.

On 9 August 2016 an announcement was published concerning a vacancy for the recruitment of prospective air traffic controllers. An age limit of 25 years was imposed. Whoever was older than 25 at the time of closing the registration, was banned. The selection procedure was closed on 9 September 2016. Also in the subsequent selection procedures, the age limit was maintained.

Unia initiated proceedings before the Brussels Labour Tribunal, after failing to reach an agreement in this conflict. Some applicants who were victims of this discrimination voluntarily intervened.

Judgment

The employer stated that the age limit constitutes an occupational requirement, particularly considering the importance of having air traffic controllers with a sufficient situational awareness. According to the employer, the low age limit is necessary in view of the undeniable

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link between ageing and the decline in cognitive spatial skills, which poses a safety risk to air traffic.

The Labour Tribunal accepted that situational awareness is a genuine and determining occupational requirement. Yet it questioned the link between situational awareness and the 25-year age limit as well as the necessity of this requirement for achieving the legitimate aim of guaranteeing the safety of air traffic.

In addition to the main legitimate objective of air traffic safety, the employer gave three sub-objectives: firstly, to maximise the chances of success of prospective air traffic controllers in training so as to ensure continuity in the number of air traffic controllers; secondly, to ensure that each air traffic controller gains sufficient experience to remain able to perform their duties safely during their later career; and thirdly, to ensure staffing requirements through the transfer of experienced air traffic controllers to more complex positions.

The Labour Tribunal accepted these objectives as legitimate but referred to the case law of the European Court of Justice and more particularly to the *Vital Pérez* case (C-416/13) wherein it stated that an age limit for hiring purposes must be appropriate to achieve the objective and must not go beyond what is necessary to achieve it. Although in the *Fries* case (C-190/16) the Court of Justice had left some room for manoeuvre in cases of scientific uncertainty where a high level of safety must be guaranteed, this does not alter the fact that there must at least be uncertainty about the age limit to be applied.

The Labour Tribunal hence challenged the proportionality of the low age limit of 25 years in light of these objectives. Firstly, studies and data do not unequivocally show that young candidates would have a higher success rate. Secondly, the employer assumes that the ability to concentrate decreases from the age of 35 whereas, according to most studies, this actually only happens from the age of 40-50. The premise that one should start at the age of 25 in order to build up sufficient experience (minimum 10 years) to compensate for a reduced ability to concentrate is therefore wrong. Thirdly, according to the same reasoning, it is also possible to guarantee the progression to higher positions with a higher age limit at initial recruitment. The 25-year age limit was thus disproportionate to the legitimate objective.

Further, the employer also tried to justify the direct difference of treatment based on age by invoking legitimate objectives aside from situational awareness as an occupational requirement: a high quality level of air traffic control, preventing disputes about the suitability of an aspirant, maximising the chances of success, ensuring sufficient experience to perform the job in a safe manner at a later age, and ensuring staffing needs. These justifications were also rejected by the Labour Tribunal, which based its reasoning on the case law of the European Court of Justice, more specifically the *Prigge* (C-447/09) and the *Age Concern England* (C-338/07) cases, wherein it stated that the legitimate objective must concern a social policy objective and that this objective must also be an objective of general interest.

The Labour Tribunal thus disapproved the defendant's justification as these objectives were either purely dictated by the self-interest of the company or the employer did not demonstrate that the age limit of 25 years was necessary for the social policy purpose invoked.

According to the Labour Tribunal, the age limit of 25 constituted direct discrimination on grounds of age. Incidentally, the judgment also suggested that a higher age limit of e.g. 30 would be more likely to pass the justification test.

An appeal against this judgment is currently pending before the Labour Court of Brussels.

Commentary

This judgment deals with an issue which is of common concern since many Member States seem to have similar restrictions in place for selecting air traffic controllers. It accepts situational awareness as an occupational requirement furthering air traffic safety yet highlights that the 25-year age limit is not necessary with a view to attain this legitimate objective.

The Labour Tribunal does not discard age as a determining factor as such but questions that the threshold should be so low whereas there are no objective data indicating situational awareness is impacted when reaching 35 years of age. The employer upon whom lies the burden of proof indeed failed to adduce any scientific evidence pointing at a decrease of situational awareness as from that age. The assertion that many Member States use the same threshold was not enough for the Labour Tribunal which required concrete data justifying the 25-year age limit and so the loss of situational awareness as from 35 years.

The Labour Tribunal mentioned the possibility of raising the limit to 30 years of age which would resonate with the findings of most scientific studies. It also suggested not making the limit absolute and to take other factors into account which would decrease the need for situational awareness such as prior experience or higher studies. These are important findings for the Member States which would contemplate a change of their regulations.

Another lesson to be drawn from this case is that proportionality must always be assessed in view of the concrete circumstances of the case. Since the burden of proof is reversed once a discrimination can be presumed, it is for the employer to build its case for proportionality with objective data based on scientific studies if it wants to avoid a finding of discrimination.

Also interesting is that *Unia* was proposing to put a preliminary question to the European Court of Justice as to the compatibility of the restriction with Directive 2000/78/EC. *Unia* also raised the issue of whether it would be acceptable for the employer to invoke social policy objectives which are not enshrined into public regulation. This is a valid question. The Labour Tribunal did not refer it to the European Court of Justice but it accepted that the employer could invoke social policy objectives on its own. Is this because the employer was a public undertaking? Or because any undertaking, public

or private, may seek to pursue public interests through social policy commitments? There is no way to know but this resonates with similar debates in other fields of EU law (mainly competition and free movement) where the European Court of Justice has often accepted that private undertakings may sometimes act in the public interest.

Comment from other jurisdiction

Germany (David Meyer, Luther Rechtsanwalts-gesellschaft mbh): The situation in Germany is similar to the one in Belgium. Germany's main air navigation service provider (Deutsche Flugsicherung – DFS) has established an age limit of 24 years (when applying) and 25 years (when beginning the training). The DFS cites similar reasons for this limit like in Belgium.

The German General Equal Treatment Act (AGG) permits an unequal treatment according to § 8 AGG or § 10 AGG. This either requires unequal treatments (*not only due to age*) to be genuine and determining occupational requirements provided the purpose is legitimate and the requirement is proportionate (§ 8 AGG). Besides unequal treatments *due to age* may be justified provided they are objective, proportionate and justified by a legitimate aim (§ 10 AGG). This expressly includes age limits for applicants (No. 3).

Age limits for applicants have been subject already to European and German jurisdiction before, albeit in respect of less restrictive limits. An age limit of 30 years for firefighters has been confirmed by the ECJ's jurisdiction (C-229/08). Though, the same limit was rejected for local police officers (C-416/13). The German Federal Administrative Court has declared an age limit of 42 for officials to be lawful with reference to the case law of the ECJ (2 C 11/15).

Like in Belgium it seems highly questionable if the age limit of 24/25 by the DFS is lawful. The age limit is even lower than the firefighter one's by at least 5 years. The ECJ referred to "exceptionally high physical demands" for firefighters. The same demands are likely not given in case of air traffic controllers. As the Brussels Labour Tribunal states, most scientific studies do not indicate such significant losses of physical performance at the age of 25.

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