



CUATRECASAS

Employment Law

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I. Laboratory

Following one of the European Court of Justice's (ECJ) recent ruling, which is examined in this newsletter, it is fitting to draw attention to the wage equality measures implemented by Law no. 60/2018.

The ECJ was called to decide whether the recent Polish judicial reform, establishing different retirement ages for judges based on gender, violated the principle of equal pay. As retirement pensions are considered "remuneration", the ECJ concluded that lower retirement ages for women would violate this principle: it would result in lower pensions for female judges, as pensions are calculated based on age.

Although retirement pensions being considered 'remuneration' is relevant for other issues of employment law, our focus will be on the principle of equal pay for male and female employees for equal work or work of equal value, both in the European and national frameworks.

To achieve this principle (enshrined in European law), the Portuguese legislator, by approving Law no. 60/2017, introduced several measures that employers need to consider. one of them being that employers must "*ensure they have a transparent remuneration policy based on the evaluation of different job components that considers objective criteria common to men and women.*"

While employers are not obliged to put their remuneration policy in a written document (e.g., an internal regulation), having one is advisable. This will enable the employer to clarify the applicable guidelines and, if necessary, prove to external entities that it has established these rules. For example, this is necessary during inspections conducted by the Portuguese Labor Authority (ACT), or when employers need to prove there is no wage discrimination, which happens when interested parties ask the Portuguese Commission for Equality in Labor and Employment (CITE) to provide an opinion on the matter.

Employers should examine carefully whether their "policy", or even better, their decision-making process in remuneration-related matters, complies with the principle of equal pay for male and female employees. It is in an employer's interest to draft and publish such a policy; e.g., through an internal regulation.

Maria da Glória Leitão,
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II. National legislation

Decree-Law no. 167/2019 – Diário da República no. 224/2019, Series I, November 21, 2019
Adjusting the guaranteed minimum monthly wage for 2020

Decree-Law no. 167/2019 increases the guaranteed minimum monthly wage to €635. Its previous value, in force during 2019, was set at €600.

This decree-law will come into force on January 1, 2020.

III. National case law

Ruling by the Évora Court of Appeal, of July 11, 2019

Consuming several alcoholic beverages (five bottles of wine and some beer) fewer than eight hours before take-off constitutes lawful grounds for dismissing an airline pilot

The employee (a pilot) stayed in a hotel for two nights, while waiting to perform his duties on the next flight to Lisbon. On the last night in the hotel, accompanied by his colleague, he consumed a number of alcoholic beverages. He began by drinking beer in the hotel lobby and then drank more beer and five bottles of wine in the hotel restaurant.

Throughout the evening, the employee pestered several guests and staff, having been continually asked to stop such behavior, which included smoking a cigarette in the hotel.

Having a flight scheduled for 5:00 a.m. the next morning, the employee reported for duty and was the pilot-in-command on several flights, with the last one heading to Lisbon. The employee did not inform his employer that he had consumed alcoholic beverages a few hours before flying, nor did he mention that he had not complied with the appropriate rest period.

After receiving an email from the hotel managers describing the employee's behavior, the company launched a preliminary investigation, which resulted in disciplinary proceedings that led to the decision to dismiss the employee, on an allegedly lawful basis.

The employee brought proceedings against his employer for unlawful dismissal, and eventually appealed, following an unfavorable decision by the Court of First Instance, which rejected his claim, considering the dismissal to be lawful.

The Court of Appeal upheld the Court of First Instance judgment, considering that the employee had breached the provisions of Article 70(2)(e) of Decree-Law 289/03, of November 14, adopting the rules of the Convention on International Civil Aviation. This convention



establishes that pilots cannot perform their duties on board when they have consumed alcohol within eight hours before their flight duty or support duty periods.

This case proved that not only had the employee breached this obligation, but that he had breached it in a serious manner, having consumed a significant amount of alcohol.

Considering all the facts, the Court of Appeal ruled that the employee's misconduct was very serious and likely to cause an irreparable breach of the trust that employers must have in their aircraft pilots. Not only had the safety of all the people on board been compromised, but the company's image had also been jeopardized, deterring potential customers from choosing the company when purchasing airline tickets.

IV. European case law

Judgment by the European Court of Justice, of November 5, 2019

Establishing different retirement ages for judges based on sex violates the principle of equal pay

The European Court of Justice (ECJ) was called upon to give judgment on an action for failure to fulfil obligations brought by the European Commission against Poland.

The case concerned Poland establishing different retirement ages for male and female judges.

In the Commission's first claim, the ECJ focused on Article 157 (1) of the Treaty on the Functioning of the European Union (TFEU), which establishes that each Member State must ensure that the principle of equal pay for male and female workers is applied, with the basic understanding of "equal pay for equal work or work of equal value."

To determine whether a retirement pension falls within the scope of Article 157 TFEU, the court turned to its case law, which establishes that, if the pension is paid to the employee based on the employee's work post, then it can be classified as 'remuneration' within the meaning of Article 157 TFEU. Applying this criterion to the case, retirement pensions for judges, who are civil servants, are therefore considered remuneration.

Under Polish law, the amount of the pension in question can vary depending on the employee's seniority and an additional seniority-based allowance is established. Therefore, the ECJ concluded that female judges cannot have the same wage expectations as those of male judges, because they must retire at a younger age.



Based on this, the ECJ held that, by adopting these national measures, Poland failed to comply with its obligations under Article 157 TFEU (enshrining the principle of equal pay for male and female workers), under Directive 2006/54 (setting out that provisions establishing different retirement ages based on sex violate the principle of equal treatment), and under Article 19 TFEU (establishing the possibility of taking measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).

Judgment by the European Court of Justice, of November 7, 2019

EU law does not prevent national legislation from determining the automatic termination of the employment relationship of airline pilots working for companies engaged in air transport associated with public security, when they reach 60 years of age.

On January 19, 2012, an employee (pilot) was informed that, under Italian law, his employment contract would automatically terminate on September 19, 2012, the date he reached 60 years of age.

The employee brought proceedings in the *Tribunale di Roma* (Court of First Instance) to have his dismissal declared unlawful.

The domestic court analyzed point FCL.065 of Annex I to EU Regulation 1178/2011 (establishing the technical requirements and administrative procedures related to civil aviation aircrew), which allows those with pilot licenses to continue serving as pilots in commercial air transportation (with some exceptions) when aged between 60 and 64. Only pilots 65 years of age and older are completely prohibited from doing so.

Following this, the national court submitted a request to the ECJ for a preliminary ruling. The court specifically wanted to know whether this national measure is compatible with the principle of non-discrimination on the grounds of age set out in Directive 2000/78 (and in Article 21 (1) of the EU Charter of Fundamental Rights).

By establishing the automatic termination of the employment relationships of the company's pilots when they reach 60 years of age, the national measure means a certain group of employees are treated less favorably than others who perform the same activity for the same employer. However, the domestic court wanted to know if the directive precludes national regulations like the one at issue, of which the aim is to ensure adequate safety standards for state flights, in the interest of public security.

The ECJ referred to Article 2(5) of the Directive, which exempts domestic measures that “in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others”.



In addition to the ECJ having previously addressed air safety as one of the aims set out in Article 2(5) of the Directive, allowing measures designed to prevent air accidents by monitoring pilots' skills and physical capabilities, the court stated that flights operated by the company in question must guarantee public security, as they pose greater risks than those typically associated with commercial air transportation.

Given that EU law does not take a position on the matter, the ECJ held that Article 2(5) does not prohibit Member States from adopting domestic measures, which may include setting an age limit at which pilots must stop their professional activity.

The ECJ also focused on Article 4(1) of the Directive, which allows Member States to establish that different treatment on the grounds of age does not constitute discrimination when, due to the nature of the activities or the context they are carried out in, such characteristics constitute a genuine and determining occupational requirement, provided the objective is legitimate and the requirement is proportionate.

Regarding the aviation sector, the ECJ has already considered that airline pilots must have specific physical capabilities, and that those capabilities diminish with age. Therefore, the characteristic of age could constitute "a genuine and determining occupational requirement" for working as an airline pilot. At the same time, guaranteeing air traffic safety and protecting public security could be regarded 'legitimate objectives' that justify a different treatment. This leads to the conclusion that Article 4(1) does not preclude Member States from adopting internal measures that fulfil the above characteristics, as the solutions in question are proportionate, which is a requirement controlled by national courts.



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