

Italy, Tribunal of Milan 7 January 2005 and Court of Appeal of Firenze, 27 March 2006

Deciding bodies and decisions

Trib. Milano, 7 January and 22 July 2005

Court of Appeal Firenze, 27 March 2006

Supreme Court, judgement no. 9348 of 26 April 2011

Area of law

Non-discrimination

Subject matter

Can collective contracts prioritise dismissal of employees who are closer to retirement age?

Summary Facts Of The Case

Italian ordinary courts (Tribunal of Milano and Court of Appeal of Florence) were asked by the claimants to declare the unlawfulness of their dismissals, for alleged discrimination on grounds of age. In both cases the claimants had been selected for dismissal in accordance with the guidelines set in the collective agreement concluded by the employer, which identified the reach of the minimum pensionable age as a priority criterion for dismissal in the event of collective dismissal procedures.

These clauses, which were routinely included in the collective agreements concluded by the trade union representatives and employers' associations, had historically been considered lawful. In particular, the Italian Supreme Court had held repeatedly that the proximity to pensionable age could constitute a reasonable justification for differential treatment. Even if this rule could in effect have a detrimental impact on older workers, the social impact would be narrower than if younger workers were affected, and in any case the choice of an objective criterion was legitimate insofar as it was not open to the discretion of the employer.

The matter of discrimination on grounds of age in the field of job relationships is governed by Directive 2000/78, transposed into Italian law by Legislative Decree No. 216/2003. In interpreting this source, the ordinary judges in the instant cases held that the criterion of proximity to pensionable age is indirectly discriminatory because it puts elder workers at a clear disadvantage. In assessing the reasonable justifications advanced to maintain such discrimination, the courts considered that the discriminatory effect is unlawful in those situations where the number of workers to be dismissed by reason of redundancy is determined without a reference to the organizational needs of the firm. In those situations, it is not possible to review the rational link between the industrial adjustments required to implement the redundancy scheme and the single dismissal.

However, the Supreme Court acknowledged that collective agreements must comply with the

principle of non-discrimination, though it is nevertheless still keen to accept clauses legitimizing the employer to terminate the relationship based on the achievement of pensionable age by the worker. In particular, the Supreme Court has reversed another judgment of the Court of Appeal of Florence, deeming that the choice of the proximity to retirement, based on work seniority rather than age, was not discriminatory on grounds of age, and in any case an absolutely reasonable criterion upon which to carry out a redundancy scheme. The Supreme Court, recalling its previous case-law, gave reassurance that this approach is compatible with the obligations stemming from the European commitments of Italy.

Relation to the scope of the Charter

The ordinary courts, referring in their reasoning to the CJEU decision in Mangold, emphasized the horizontal application of the general principle of non-discrimination on grounds of age and reviewed the compatibility of certain typical clauses of collective agreements with the prohibition of discrimination of Legislative Decree No. 216/2003, interpreted in conformity with EU law obligations. Their findings concerned specifically the rationale for the justification of discriminatory policies: proximity to pensionable cannot in itself constitute a reasonable ground for justification, unless the redundancy scheme clarifies which organizational purpose could be achieved through the planned dismissals. Although at the time the general principle of non-discrimination was not grounded on Article 21 of the Charter, it is today.

Impact on Jurisprudence

The reasoning of the Supreme Court was then confirmed in later judgements, i.a. Supreme Court judgement nos. 22914/2015; 11690/2015 and 13794/2015.

Sources - EU and national law

Directive 2000/78

Legislative Decree No. 216/2003

Sources - CJEU Case Law

Case C-144/04 Mangold [2005] ECR I-9981.
