

Romania, Court of Appeal Targu Mures, Sindicatul Liber, Judgement of 03 June 2009

Deciding bodies and decisions

Court of Appeal of Târgu Mureș, Judgment no.1322/R of 03 June 2009 - Tribunal of Mures
Judgment no.131 of 09 February 2009 - Tribunal of Bucharest Judgment 6633 of 27 October 2009
- Court of Appeal of Bucharest, Judgment 2892R of 18 June 2010

Subject matter

Termination of employment contract solely upon the attainment of retirement age - discrimination between men and women - right to work

Summary Facts Of The Case

- Court of Appeal of Târgu Mureș

C.A., a high school teacher, brought a claim against her school before the Tribunal of Mureș, alleging that by denying her request to continue working until the age of 65, the school had breached the principle of equal treatment between men and women in regard of retirement age.

The Tribunal of Mureș upheld the applicant's request. The Tribunal held that the domestic provision that established a different retirement age for men and women (Art. 41 of Law No. 19/2000) was discriminatory. Under the national measure, women are not free to choose whether to take advantage of the earlier retirement opportunity or not. Women must retire at specified age (60 years), five years earlier than men employees, unless their employer upholds a request to continue the contract. The Tribunal found this measure to violate the right to work of women who do not wish to retire earlier and cannot secure their employer's consent. In addition, the Tribunal held that this provision is discriminatory and contrary to the principle of equal opportunities and treatment between men and women found in Art. 16(2) of the Constitution and Article 14 ECHR.

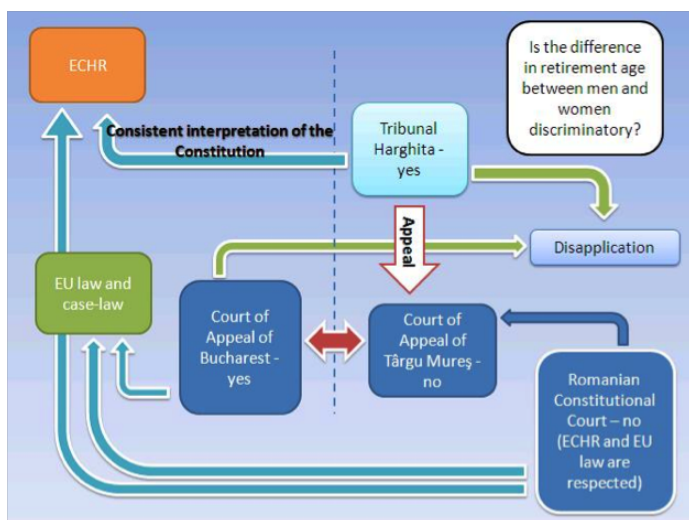
Upon appeal, the Court of Appeal of Târgu Mureș overturned the sentence of the Tribunal and dismissed the claim of the applicant. The Court of Appeal recalled the precedent of the Romanian Constitutional Court No. 191/2008 and 1707/2008, in which the challenged provision had been declared to be compatible with the Constitution, with Art. 14 ECHR and with the Directive 79/7/CEE on the progressive implementation of the principle of equal treatment between men and women. In the Constitutional Court's view, the principle of equality does not require necessarily uniform treatment of men and women, providing the legislator with the power to treat them differently in light of the social circumstances. The Constitutional Court has held in its precedents that Directive 2006/54 excludes the fields of social security from the application of the principle of equality (Decisions No. 818-821/2008 and No.1325/2008).

As such, the Court of Appeal of Târgu Mureș criticized the Tribunal of Mureș for setting aside the applicable domestic rules, in favour of judge-made principles or rules inferred from other regulatory acts, in contravention with the instructions laid down by the Constitutional Court.

- Court of Appeal of Bucharest

The Court of Appeal of Bucharest concluded in the opposite way in similar proceedings. It based its decision on the CJEU's interpretation in Marshall case of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, (replaced by Directive 2006/54/EC). In Marshall, the CJEU held that a general policy whereby a woman's employment is terminated solely because she has attained the pensionable age, that age being different for men and for women, constitutes discrimination on grounds of sex under the Directive. In keeping with this dictum, the Court of Appeal of Bucharest set aside the domestic statute to grant effect to Directive 2002/73/EC. It condemned the employer and ordered the reinstatement of the employee and the payment of damages.

Diagram



Vertical external (domestic appellate court – ECtHR)

Vertical internal (first instance tribunal – court of appeal; constitutional court – court of appeal)

Through the use of consistent interpretation the Court of Appeal of Bucharest and the first instance tribunal (on the one hand) and the Court of Appeal Targu Mures and Constitutional Court (on the other) came to different conclusions on the interpretation of the principle of equality.

Impact on Jurisprudence

Given the uncertainty of higher courts, the ordinary courts seized with similar disputes in the future can raise a preliminary question to the CJEU asking whether the provisions at stake are compatible with Directive 2006/45 (now superseding Directive 2002/73).

The claimant whose claim was rejected by the Court of Appeal of Târgu Mureș could bring a claim

before the ECtHR for the Romanian courts' failure to implement the Convention.

Impact on Legislation / Policy

The lack of consensus of the national appellate courts, might determine the legislator to intervene and correct the dissenting interpretation of the law given by the national courts.

The need of legislator intervention was also stressed by the Polish high courts, confronted with the same legal problem. Adopting a similar opinion as the Court of Appeal of Bucharest and the Tribunal of Mures, the Polish Supreme Court and the Constitutional Tribunal encouraged the ordinary courts to disregard the legal provisions on retirement age differential, even in the absence of a new law. In this sense, the Polish Constitutional Tribunal expressly called the legislator to intervene and amend the law in line with the established jurisprudence (see: Constitutional Tribunal of Poland, Judgment K 63/07 of 15 July 2010).

Sources - ECHR

- Article 14
- Protocol 12

In subsidiary:

- Article 8
 - Article 1 Protocol 1
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Sources - CJEU Case Law

- C-152/84 Marshall

The Court of Appeal of Bucharest invoked Marshall case, to justify the disapplication of the national law. The Court noted that in line with the CJEU reasoning in Marshall, a national policy under which a woman's employment contract is terminated solely because she attained the pensionable age, that age being different for men and for women, constitutes discrimination on grounds of sex and is contrary to the Directive.

Sources - Internal or external national courts case law

- Constitutional Court of Romania, Decision no. 1007/2008 and Decision 191/2008
 - Court of Appeal Bucharest file 10942/3/LM/2004
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Comments

1. **The Tribunal adopted a dissenting judicial interpretation to prior Constitutional Court decisions in the light of the principle of non-discrimination**

The Tribunal had challenged the validity of the domestic provisions in light of an interpretation of the Constitution consistent with the supra-national obligations, namely the Directive 2006/54/EC (see Art. 1(2)(c)) and Art. 14 of the ECHR in conjunction with Art. 8 or Art. 1 of Protocol 1.

2. The Court of Appeal of Târgu Mureș used the authority of the Constitutional Court to dismiss the interpretation advanced by the Tribunal

The interpretation of the Tribunal was overturned by the Court of Appeal of Târgu Mureș based on a self-granted *margin of appreciation*. The Court thereby was in line with the Constitutional Court's view that equal treatment cannot always demand indistinctly applicable measures.

3. The Court of Appeal of Bucharest set aside the domestic provisions breaching Directive 76/207/EEC (now Directive 2006/54/EC)

The Court of Appeal of Bucharest invoked CJEU's precedent in Marshall to confirm that a differential treatment based solely on the sex of the individual is inherently discriminatory.

4. Opposite approach to the Polish Constitutional Tribunal and Supreme Court

The Constitutional Court and Supreme Court of Poland encouraged ordinary judges to disregard the differential of the retirement age for men and women, even in the absence of a new law (see Retirement age case, Poland). In Romania, the higher courts did precisely the opposite. They dismissed the ordinary courts' attempts to implement the principle of equality and *disapply* domestic provisions, as undue judicial activism. The stance taken by the Court of Appeal of Bucharest is more EU-friendly, but it gives little reassurance to the ordinary court, because of the diverging outcome reached in similar cases.

5. The Italian Pisa Tribunal went further in its interpretation of principle of non-discrimination in EU law. The Tribunal confronted with a similar legal problem as the Romanian judiciary, provided a more extensive consistent interpretation of domestic provisions with EU law. As such, the Pisa Tribunal did not stop at the finding that the difference in retirement age constitutes discrimination on the basis of sex, but also concluded that the different retirement age affects the monetary rights of female workers, which might constitute a violation of Art. 157 TFEU on equal pay.
