

Limitations on Social Plan Benefits for Employees Close to Retirement – Landmark Decision of the European Court of Justice

INTRODUCTION

Social plans are intended to compensate or mitigate economic losses suffered by employees as a result of operational changes, in particular the loss of a job. Generally, however, only a limited budget is available for this purpose. Moreover, the management and works council try to take into consideration, as they should, the different chances affected employees will have on the employment market. In this connection, the question often arises whether social plans may provide for less or no benefits for employees who are close to retirement age, since those employees have the option of collecting – early – retirement benefits and therefore enjoy at least a certain amount of financial security.

At the end of last year, the European Court of Justice decided that a social plan may provide for reduced severance payments to employees who are close to retirement. The court, however, also found that a social plan unlawfully discriminates against disabled employees if the calculation of reduced severance payments takes into consideration the option of employees to collect early retirement benefits on the basis of disability.

FACTS

DECISION OF EUROPEAN COURT OF JUSTICE DATED DECEMBER 6, 2012, CASE NO. C-152/11 SUBMITTED BY ORDER OF THE LABOR COURT OF MUNICH DATED FEBRUARY 17, 2011 CASE NO. 22 CA 8260/10

In the case decided by the European Court of Justice a social plan provided for two different methods for the calculation of severance payments. According to the standard method, employees who were terminated as a result of the operational change were paid a severance payment based upon seniority and age. The age factor increased up to the age of 58, and diminished again for older employees. The age factor therefore had an effect primarily on younger employees and employees close to retirement. Moreover, the management and works council agreed on a special formula to calculate severance payments of employees who at the time they were terminated as a result of the operational change were older than 54. This formula took into consideration, among other factors, the time period left until the earliest possible retirement date – whether retirement benefits were paid with or without reductions. If the severance payment as calculated according to this formula was lower than according to the standard formula, only the lower amount would be paid. However, the severance payment was to be not less than 50% of the severance

payment as calculated according to the standard formula.

These provisions of the social plan were challenged by an employee before the Labor Court of Munich. The plaintiff, who was older than 54, had accumulated seniority of 30 years and was recognized as severely disabled. He was to receive a severance payment which, under the above provisions, would have been one half of the standard severance payment. In the view of plaintiff, this amounted to direct age discrimination. He sued for the amount of the difference between the severance payment paid to him and the severance payment paid to a 54-year-old employee. He did not make an issue of the effect of his disability.

DECISION OF EUROPEAN COURT OF JUSTICE

The European Court of Justice held that while the severance payment provisions of the works agreement constituted direct age discrimination, unequal treatment was justified in that case.

The court reasoned that protecting younger employees and supporting their efforts to find new employment may justify age discrimination against other employees. The intended fair allocation of the limited funds available under a social plan was said to be a legitimate goal. According to the court, it was legitimate to avoid that severance payments paid upon termination would benefit individuals who would not seek new employment, but rather would collect alternative income in the form of retirement benefits. The European Court of Justice also held that the management and works council enjoyed broad discretion in deciding to pursue particular socio-political and labor-policy goals and in determining the measures that were appropriate to achieve those goals.

The European Court of Justice reached a different conclusion with respect to discrimination based on disability. If a severely disabled employee is paid a lower severance payment than a non-disabled employee, the court held, this is unlawful discrimination within the meaning of Directive 2000/78/EC.

Contrary to first appearances, the earliest possible retirement age was said not to be a non-discriminatory factor. Rather, the court explained, it has the result that severely disabled employees invariably will receive lower severance payments as a result of their option to collect early retirement benefits at an earlier point in time than non-disabled employees in the same situation. This

discriminatory treatment, in the view of the court, also is not justified by the fact that disabled employees are eligible for full retirement benefits already several years before non-disabled employees. The court reiterated that discrimination can be justified only based on objective criteria unrelated to the discriminating factor. Reference to the earliest possible retirement date does not meet this standard, in the view of the court, because the earliest possible retirement date depends, among other things, on the factor of "disability."

When pursuing the legitimate goal of fairly allocating the limited funds available under the social plan, the European Court of Justice found, the management and works council in particular failed to take into consideration the needs of severely disabled employees. Severely disabled employees generally have a more difficult time finding new employment than non-disabled employees, the court reasoned, a risk that increases with each year of age. In addition, severely disabled employees generally have higher costs of living due to their disabilities – especially older employees. As a result, the court concluded, the measure provided for in the social plan exceeded the discretion needed for achieving the parties' socio-political goals.

ANALYSIS

This decision should eliminate any uncertainties that were created by the European Court of Justice's *Anderesen* decision of October 12, 2010 (case no. C-499/08). Employees close to retirement may be paid a lower severance payment than younger employees. Whether employees close to retirement may be completely excluded from receiving benefits under a social plan has not been decided by the European Court of Justice. In view of § 10 para. 6 of the German General Non-Discrimination Act (AGG), this appears to be a possibility

at least according to the express language of German law. This problem can, however, be avoided by awarding lower social plan benefits to employees close to retirement. In the future, it must however be taken into consideration that severely disabled employees close to retirement age must be afforded the same treatment as non-disabled employees when it comes to social plan severance payments.

On March 26, 2013 the Federal Labor Court is expected to have an opportunity to address the decision of the European Court of Justice. On that date, the Federal Labor Court will consider the issue of whether calculation of a severance payment may take into consideration the earliest possible date for collecting retirement benefits, which because of special laws may be earlier for women than for men. In the past, the Federal Labor Court has regarded this as justified unequal treatment (decision of September 30, 2008, case no. 1 AZR 684/07). We think it unlikely that the Federal Labor Court will adhere to this view. ■

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