

Genuine Occupational Requirement in the German Fire Service

Case C-229/08, *Colin Wolf v. Stadt Frankfurt am Main*, judgement of the European Court of Justice (Grand Chamber) of 12 January 2010

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Keywords

European Council, Article 13 EC Treaty, ECJ, Directive 2000/78/EC, Age Discrimination, Genuine Occupational Requirement.

Abstract

Colin Wolf v Stadt Frankfurt am Main is the first and only case on age discrimination dealing with Article 4 (1) the Directive: the Genuine Occupation Requirement (GOR) exception. The main legal question is whether the national provision that sets the maximum age for recruitment to intermediate career posts in the fire service 30 years is unjustified discrimination.

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Merkourios 2010 – Volume 27/Issue 71, Case Note, pp. 26-28.

URN: NBN:NL:UI:10-1-100920

ISSN: 0927-460X

URL: www.merkourios.org

Publisher: Igitur, Utrecht Publishing & Archiving Services

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I. Introduction

In 2000, the European Council used its competence under Article 13 EC Treaty and adopted Directive 2000/78/EC.¹ This Directive provides a legal framework for combating discrimination in employment on grounds of religion or belief, disability, age and sexual orientation. Since its adoption the European Court of Justice (ECJ) has received numerous preliminary referrals, mostly dealing with age discrimination. Within this context, the case of Colin Wolf is important because so far it is the only age discrimination case dealing with Article 4(1) of the Directive: the genuine occupation requirement (GOR) exception.

II. Background and Main Legal Question

Mr. Wolf (31 years old) applied for an intermediate career post in the fire service in Frankfurt, Germany. The City of Frankfurt refused to consider his application because he was older than the age limit of 30 year. According to a German national provision only persons under 31 years of age can be recruited to intermediate career posts in the fire service. The German government submits that these posts entail exceptionally high physical demands on certain operations. Persons past the age of 45 to 50 are not able to perform these heavy tasks. Consequently, the age at which a person is recruited determines the length of time within which the person will be able to fulfill the highly demanding tasks. To ensure the operational capacity and proper functioning of the fire service a maximum age limit of 30 year was introduced. Wolf disagreed with the refusal and started domestic procedures claiming he had been discriminated against on the ground of age. The Administrative Court Frankfurt am Main was uncertain about the compatibility of the German provision with Directive 2000/78/EC. Therefore, the Court referred the case to the ECJ for a preliminary ruling under Article 234 EC Treaty. The main legal question that is dealt with in this case is whether the national provision that sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years is unjustified discrimination.

III. The Judgement

Directive 2000/78/EC provides more than one justification or exception to discrimination.² The German Court aligned its preliminary questions to Article 6(1) of the Directive which provides an objective justification clause specifically for age discrimination. However, interestingly, the ECJ found Article 4(1), providing a GOR exception for all grounds, was to be assessed.³ This means that the ECJ assessed whether physical fitness is a characteristic related to age, whether it constitutes a genuine and determining occupational requirement and, further, whether the aim pursued by the provision was legitimate and the requirement proportionate.⁴ The ECJ stated that the activities that come with the job, such as fighting fires, rescuing persons and protecting the environment, are characterised by their physical nature. The possession of particularly high physical capacities may therefore be regarded as a GOR.⁵ Crucial in this judgement is the demonstration of a link between the need to possess high physical capacities and the age of a person. The German government produced scientific data which shows that respiratory capacity, musculature and endurance diminish along with age. From these data the ECJ drew the conclusion that only few officials over the age of 45 have sufficient physical capacity to perform the fire-fighting part of their job. Moreover, there are no officials at the age of 50 that have the capacity of rescuing persons.⁶ Finally, the ECJ found the age limit of 30 was appropriate and necessary to ensure the efficient functioning of the professional fire service.⁷ In conclusion, the ECJ ruled that a national provision such as that at issue is in conformity with the GOR exception of Article 4(1).⁸

IV. Comment

The GOR exception was created to prevent the prohibition of discrimination from making it difficult or impossible to carry on those occupational activities for which a person's sex, race, religion, disability, age or sexual orientation is an indispensable

1 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

2 Directive 2000/78/EC provides exceptions to age discrimination in Arts. 2(2)(b), 2(5), 4(1) and 6.

3 Case C-229/08 *Colin Wolf v Stadt Frankfurt am Main* (ECJ 12 January 2010), paras. 31 and 32.

4 *Colin Wolf v Stadt Frankfurt am Main* (n 3), para. 36.

5 *Colin Wolf* (n 3), para. 40.

6 *Colin Wolf* (n 3), para. 41.

7 *Colin Wolf* (n 3), para. 43.

8 *Colin Wolf* (n 3), para. 46.

prerequisite.⁹ In general, the ECJ has emphasised that the exception must be interpreted strictly since it is a derogation from an individual right laid down in a directive.¹⁰ Nevertheless, in the case of *Colin Wolf* the ECJ interpreted the GOR exception in a much broader manner. On the one hand, this is understandable considering the factor that the work field (fire brigade) is an emergency service. It is emphasized in Directive 2000/78/EC that although the GOR exception only applies in very limited circumstances (recital 23), the Directive does not require emergency services to recruit persons who do not have the necessary capacities to carry out a range of activities (recital 18). On the other hand, the German provision is not directed at persons who do not fulfil the physical fitness requirement at the moment of the application. Instead it applies to all persons older than 30 years regardless of whether they possess the necessary physical capacities. All persons above 30 years are declined on the basis of the assumption that these persons will not possess the necessary physical capacities (maximum) 15 to 20 years from the moment of the application. There will certainly be persons who at the age of 45 have the necessary capacities; similarly there will be persons at the age of 40 who will not. Furthermore, in 15 to 20 years time the techniques in activities like fire fighting may have changed in such a way that the present standard of physical capacities is outdated. For example, Advocate General Bot raised the fact that the protective clothing alone weighs approximately 30 kilograms.¹¹ With technologies advancing at high speed it is unlikely that 15 to 20 years from now the clothing will weigh the same. Additionally, there is an assumption that a person under the age of 31 can fulfil the GOR in the future. But, being under the age of 31 is not a guarantee that persons work a minimum number of years in the fire service. For example, persons can get disabled due to the dangerous tasks in the fire service or persons can decide to change careers. In conclusion, it is in my opinion reasonable that the GOR exception is interpreted more broadly in cases dealing with employment in the armed forces and the police, prison or emergency services. However, in the case of *Colin Wolf* the ECJ goes too far by upholding a rule that excludes all persons older than 30 years even though they fulfil the occupational requirement of possessing high physical capacities. ■

9 A.G. General Mancini in case C-248/83, *Commission v. Germany*, [1985] ECR 1459, para. 7.

10 Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para. 36; case C-273/97, *Sirdar v. The Army Board and Secretary of State for Defence*, [1999] ECR I-7403, para. 23 and case C-285/98, *Kreil v. Bundesrepublik Deutschland*, [2000] ECR I-00069, para. 20.

11 A.G. Bot in *Colin Wolf* (n 3), para. 28.