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Commentary



Ruling in *J. K. vs. TP S.A.* regarding Discrimination of a Self-Employed Worker Based on Sexual Orientation

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Introduction

This case, *J. K. vs. TP S.A.*, concerns a preliminary ruling by the Court of Justice of the European Union (CJEU) regarding the interpretation of Directive 2000/78 on equal treatment in employment and occupation. The preliminary question was asked in the light of a claim brought before the referring court.

The applicant, a self-employed worker, entered into a series of short-term contracts for specific work with TP, a company that operates a nationwide public television channel in Poland. This happened over a long period, specifically, between 2010 and 2017. The last of these contracts was concluded on 20 November 2017. Given the nature of the contract, the applicant depended on TP for his working hours. He was scheduled to work in two one-week shifts beginning on 7 and on 21 December 2017 respectively. However, two days after the applicant and his partner published a YouTube video aimed at promoting tolerance toward same-sex couples, the one-week shift scheduled to start on 7 December 2017 was canceled. Later, the second shift, due to start on 21 December 2017, was canceled as well. No new contracts between the applicant and TP were signed after these cancellations.

The applicant submits that the cancellation of his shifts and the nonrenewal of the contract are due to discrimination based on sexual orientation linked to the YouTube video. He therefore claims a sum in PLN by way of compensation

and for nonmaterial harm. TP contends that the action should be dismissed and submits that the relevant Polish law does not guarantee the renewal of the contract. Indeed, Article 5(3) of the Polish law on equal treatment does not include sexual orientation as a forbidden discrimination ground in situations relating to freedom of contract.

Against this background, the referring court questions whether the situation at issue falls within the scope and protection of Article 3(1)(a) and (c) of Directive 2000/78. If so, Article 5(3) of the Polish law on equal treatment might not be compatible with EU law.

Analysis

In its answer to the preliminary question, the CJEU first addressed the scope of the concept of “conditions for access to employment, to self-employment or to occupation” as mentioned in Article 3(1)(a) Directive 2000/78. Several mutually reinforcing considerations lead to the conclusion that the refusal to conclude a contract for specific work with a self-employed contractor based on his sexual orientation falls within the scope of this provision.

The CJEU considers that the directive does not refer to the law of the Member States to define the concept of “conditions for access to employment, to self-employment or to occupation”. Instead, the terms of a provision of EU law must normally be given an autonomous and uniform interpretation throughout the European Union, as evident from long-established case law such as the CJEU’s rulings in *Associazione Avvocatura per i diritti LGBTI*¹ and *HK/Danmark and HK/Privat*.² From these precedents, it also follows that because the directive does not define these terms, they must be interpreted by reference to their usual meaning in everyday language, taking into account the context in which they occur and the purposes of the rules of which they are part. Based on this analysis, the CJEU notes that the conditions for access to any occupational activity, whatever the nature and characteristics of such activity, are covered by Article 3(1)(a) of Directive 2000/78.

The scope of Article 3(1)(a) is not limited to *workers* within the meaning of Article 45 TFEU. Apart from the fact that Article 3(1)(a) expressly refers to self-employment, it also follows from the terms *employment* and *occupation* understood in their usual sense, that the EU legislature did not intend to limit

1 CJEU, *Associazione Avvocatura per i diritti LGBTI*, 23 April 2020, C-507/18, EU:C:2020:289, para. 31.

2 CJEU, *HK/Danmark and HK/Privat*, 2 June 2022, C-587/20, EU:C:2022:419, para. 25.

the scope of Directive 2000/78 in this way. Additionally, it follows from the objectives of the directive that the concept of “conditions for access” cannot be interpreted restrictively. Nevertheless, for occupational activities to fall within the scope of Directive 2000/78, those activities must be genuine and pursued in the context of a legal relationship characterized by a degree of stability. In that context, the CJEU notes that the activity the applicant pursued constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling him to earn his livelihood. An important element from the CJEU’s considerations in this respect is that for the applicant to pursue his occupational activity effectively, the conclusion or renewal of a contract may be essential. Therefore, the concept of “conditions for access” to self-employment, within the meaning of Article 3(1)(a), may include the conclusion of a contract such as that at issue.

After establishing that the applicant’s situation may fall within the scope of Article 3(1)(a), which is for the referring court to ascertain, the CJEU addresses the scope of Article 3(1)(c). This clause provides that the directive is applicable “in relation to employment and working conditions, including dismissals and pay” and does not include a reference to self-employed labor. However, from the case law mentioned earlier, such as *HK/Danmark and HK/Privat*,³ it is apparent that Directive 2000/78 seeks to eliminate all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, regardless of the legal form in which it is provided. The formal categorization of an employment relationship under national law therefore cannot be decisive for protection under Directive 2000/78. This consideration is based on established case law.⁴ In fact, terminating a self-employed worker such as the applicant by not renewing a contract could lead to their being in a vulnerable position comparable to that of an employed worker who has been dismissed, as in the CJEU’s *Gusa* ruling.⁵

The right to equal treatment is not absolute. Article 2(5) Directive 2000/78 provides that deviations are possible if measures are “laid down by national law which, 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.” It is for the referring court to weigh the facts and circumstances of the case and to determine whether Article 5(3) of the Polish law on equal treatment constitutes direct or indirect discrimination based on the sexual orientation of

3 Ibid.

4 See, by analogy, CJEU, *Danosa*, 11 November 2010, C-232/09, EU:C:2010:674, para. 69.

5 CJEU, *Gusa*, 20 December 2017, C-442/16, EU:C:2017:1004, para. 43.

the applicant. If the referring court were to find such discrimination, according to the CJEU, that discrimination cannot be justified on the grounds referred to in Article 2(5). These grounds need to be interpreted strictly, as clear from earlier CJEU case law, such as *Cafaro*.⁶ Although Article 5(3) of the Polish law is a measure laid down by national law, as required by Article 2(5) Directive 2000/78, and appears to protect the rights and freedoms of others (freedom of contract), it is not necessary in a democratic society. Like the right to equal treatment, the right to freedom of contract that the Polish provision aims to protect is not absolute. According to the CJEU ruling in *Sky Österreich*,⁷ the freedom to conduct a business, which is protected under Article 16 of the Charter of Fundamental Rights of the European Union,⁸ must be viewed in relation to its social function. The CJEU notes that the Polish legislature itself apparently considered that discrimination could not be regarded as necessary for safeguarding freedom of contract in a democratic society, in that Article 5(3) of the Polish law on equal treatment provides for a number of exceptions. Moreover, to accept that freedom of contract allows a refusal to contract with a person based on that person's sexual orientation would deprive Article 3(1)(a) Directive 2000/78 of its practical effect in so far as that provision specifically prohibits any discrimination based on that ground in regard to access to self-employment.

Conclusion

EU Member States need to ensure that their national legislation conforms with EU law, which includes the implementation of EU directives. Sometimes a national provision of a Member State might be in accordance with a part of EU legislation but not with other EU provisions. This case illustrates the broad scope of the equal treatment framework that Directive 2000/78 aims to create, and the tension possible between the right to equal treatment and other rights set out in EU legislation, such as the freedom of contract. In cases such as the one at issue, these rights must be weighed against each other if exercising one right leads to a limitation of the other. As the CJEU makes clear, in this balance the right to freedom of contract cannot justify that Article 3(1)(a)

6 CJEU, *Cafaro*, 7 November 2019, C-396/18, EU:C:2019:929, para. 42.

7 CJEU, *Sky Österreich*, 22 January 2013, C-283/11, EU:C:2013:28, para. 45.

8 See also CJEU, *Bank Mellé Iran*, 21 December 2021, C-124/20, EU:C:2021:1035, para. 79.

Directive 2000/78 is deprived of its practical effect. This needs to be reflected by national equal treatment provisions, such as Article 5(3) of the Polish law on equal treatment. It is now up to the referring court to assess the situation in the main proceedings and give its ruling with the CJEU's answer to the preliminary question in mind.