

Case C-356/21

Request for a preliminary ruling

Date lodged:

7 June 2021

Referring court:

Sąd Rejonowy dla m. st. Warszawy w Warszawie (Poland)

Date of the decision to refer:

16 March 2021

Applicant:

J.K.

Defendant:

TP S.A.

[...]

Warsaw, 16 March 2021

Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw in Warsaw, Poland)

[...]

[...]

REQUEST FOR A PRELIMINARY RULING

In accordance with the order issued on 16 March 2021, the District Court for the Capital City of Warsaw requests a preliminary ruling on the following question pursuant to Article 267 of the Treaty on the Functioning of the European Union:

‘Must Article 3(1)(a) and (c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ [2000] L 303, p. 16) be construed as permitting the exclusion from the scope of Council Directive 2000/78/EC, and consequently also as permitting the exclusion from the application of the sanctions laid down in national law

pursuant to Article 17 of Council Directive 2000/78/EC, of the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality, in a situation where the alleged discrimination consists in a refusal to enter into a civil-law contract under which work is to be carried out by a self-employed natural person when that refusal is based on the sexual orientation of the prospective counterparty?’

[...]

Grounds [...]

A. THE PARTIES AND THEIR REPRESENTATIVES

Applicant: J.K.

[...]

Defendant: TP S.A.

[...].

B. RELEVANT PROVISIONS OF EU LAW

The Treaty on European Union [...]

Article 2. The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ [2000] L 303, p. 16) ('Directive 2000/78/EC')

Article 1. The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 3

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Article 17. Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

C. RELEVANT PROVISIONS OF NATIONAL LAW

Ustawa o wdrożeniu niektórych przepisów prawa Unii Europejskiej w zakresie równego traktowania z dnia 3 grudnia 2010 r. (Law on the Implementation of Certain Provisions of EU Law regarding Equal Treatment of 3 December 2010) (Dziennik Ustaw (Journal of Laws) of 2020, item 2156 – consolidated version) ('the Equality Law')

Article 2(1). This Law shall apply to natural persons, as well as to legal persons and unincorporated organisational units that are granted legal capacity under the law.

Article 4. This Law shall apply to:

...

- (2) the conditions for taking up and pursuing economic or professional activities, including in particular in the context of an employment relationship or work performed under a civil-law contract;

....

Article 5. This Law shall not apply to:

...

(3) the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality;

....

Article 8

1. The unequal treatment of individuals on the basis of sex, race, ethnic origin, nationality, religion, creed, belief, disability, age or sexual orientation shall be prohibited with respect to:

...

(2) the conditions for taking up and pursuing economic or professional activities, including in particular in the context of an employment relationship or work performed under a civil-law contract;

....

Article 13

1. Anyone in respect of whom there has been a breach of the principle of equal treatment shall have the right to compensation.

2. In cases involving a breach of the principle of equal treatment, the provisions of the ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Law of 23 April 1964 – the Civil Code) [...] shall apply.

D. SUBJECT MATTER OF THE DISPUTE IN THE MAIN PROCEEDINGS

In the present case, the applicant is seeking from the defendant the amount of 47 924.92 Polish zlotys (PLN), together with statutory default interest from the date of bringing the action to the date of payment, comprising PLN 35 943.69 by way of compensation and PLN 11 981.23 by way of redress for a breach of the principle of equal treatment on the grounds of sexual orientation in the form of direct discrimination in respect of the conditions for taking up and pursuing economic activities, including in particular under a civil-law contract. The applicant bases the above claim on the allegation that the defendant committed direct discrimination on the basis of the applicant's sexual orientation by cancelling the applicant's shifts scheduled for December 2017 during which the monthly contract for specific work concluded on 20 November 2017 was to be performed, and by refusing to enter into another contract for specific work with the applicant, thereby terminating the parties' cooperation. The applicant indicated that the probable reason for the defendant cancelling the applicant's shifts and terminating cooperation was the fact that the applicant and his life partner released

a Christmas song on YouTube entitled ‘Pokochaj nas w święta’ (‘Love us at Christmas’) as part of the ‘J. & D.’ project whose purpose was to show that there is no difference between same-sex couples living in Poland and different sex couples.

The defendant moved for the claim to be dismissed, stating that there had been no breach of the principle of equal treatment. The defendant emphasised that neither it nor the law guaranteed to the applicant that the contract for specific work concluded between the parties would be extended. The defendant explained that in December 2017 a reorganisation was carried out at the defendant company, as a result of which the applicant’s tasks, consisting in composing musical settings for programmes, were to be transferred to the newly established Agencja Kreacji Oprawy i Reklamy (Creative and Advertising Agency). The decision to terminate cooperation with the applicant was made by the person responsible for carrying out the reorganisation. In addition, the defendant indicated that the applicant’s sexual orientation was common knowledge.

The parties disagree as to the reasons for the defendant’s termination of cooperation with the applicant, and thus as to whether those reasons amounted to direct discrimination based on the applicant’s sexual orientation.

E. RELEVANT FACTS

[...]

The applicant is a homosexual person. Together with his life partner, he engages in activism on behalf of the LGBT community, which aims to promote tolerance towards same-sex couples living in Poland. Within the framework of that activism, the applicant and his partner run a YouTube channel as part of the ‘J. & D.’ campaign, where they post materials promoting tolerance towards same-sex relationships. On 4 December 2017, on the aforementioned YouTube channel, the applicant and his partner released a music video accompanied by a Christmas song (‘Love us at Christmas’), which showed how persons in same-sex relationships celebrated Christmas. The applicant began his online activities relating to the promotion of tolerance in 2016, when he, together with his partner, published a music video for a hit song by the band Roxette, and subsequently posted a video account of their participation in the GayGala in Stockholm to which they had been invited by Roxette. In connection with the wedding of the applicant and his partner, which took place in Portugal in June 2017, they were guests on the Dzień Dobry TVN (Good Morning TVN) programme broadcast by the national TV station TVN. The employees and associates of the editorial office where the applicant performed his tasks within the defendant’s organisation were aware of the applicant’s sexual orientation.

The defendant operates a nationwide public TV network which employs over 2 000 workers. The applicant, as a mid-level associate within the defendant’s organisation, had no direct contact with the defendant company’s managers.

In the period from 2010 to 2017, cooperation between the applicant and the defendant was based on regularly concluded, consecutive short-term contracts for specific work. The applicant engaged in the above cooperation as part of his activity as a sole trader. The cooperation included the preparation by the applicant of edited material for trailers or features, which were subsequently used in the defendant's promotional materials. The applicant performed his tasks within the defendant's internal organisational unit – Redakcja Oprawy i Promocji Programu 1 (Channel 1 Editorial and Promotional Office), whose manager was W.S. Within the framework of the concluded contracts for specific work, the applicant performed scheduled weekly shifts during which he prepared materials for the defendant's promotional programmes. The applicant's immediate supervisor W.S. assigned shifts to the applicant and a second journalist who performed the same tasks, with each of them working two one-week shifts per month.

As of August 2017, a reorganisation of the defendant's organisational structures was planned. This reorganisation would include the establishment of a new unit: the Agencja Kreacji Oprawy i Reklamy (Creative and Advertising Agency). The new unit was to constitute a combined agency for all of the defendant's television channels, replacing the existing editorial offices of individual channels. The defendant assigned I.Ś. and P.K., both of whom were new employees, to carry out the reorganisation and to vet the associates who were to be transferred to the new agency.

In late October and early November 2017, P.K. held a meeting with the Channel 1 Editorial and Promotional Office, during which he listed the associates who had successfully passed the vetting procedure carried out in connection with the planned reorganisation. The applicant was among the persons listed.

The parties entered into the final contract for specific work with a term of one month on 20 November 2017. On 29 November 2017, the applicant received his work schedule for December 2017 from his immediate supervisor. In that schedule, the applicant was allocated two one-week shifts beginning on 7 and 21 December 2017.

On 4 December 2017, the applicant, together with his partner, released a music video for the Christmas song 'Love us at Christmas'.

On 5 or 6 December 2017, a meeting took place which concerned the preparation of Christmas material for broadcast on the defendant's television channels. The meeting was attended by the applicant's immediate supervisor W.S., as well as by I.Ś, P.K. and the head of the Channel 2 Editorial and Promotional Office, L.R. During the meeting, the question was asked whether a Christmas spot was planned. I.Ś. or P.K. answered that, after all, J. (Channel 1) already had a spot and its own Santas.

After the meeting, I.Ś. or P.K. asked the applicant's immediate supervisor W.S. for information about the applicant's work schedule and subsequently gave instructions to suspend the applicant and assign his shifts to another person.

On 6 December 2017, the applicant received an e-mail from his immediate supervisor cancelling the shift beginning on 7 December 2017, which was to be taken over by another journalist.

On 20 December 2017, the applicant asked his immediate supervisor W.S. whether he should report for his scheduled shift on 21 December 2017. In response, he was informed that P.K. was not planning to cooperate with the applicant any longer.

As a consequence of the above, the applicant did not work any shifts in December 2017 and no contract for specific work was concluded with him for a subsequent period. With that, the cooperation between the parties came to an end.

The defendant did not raise any objections regarding the quality of the material prepared by the applicant.

The applicant was replaced by K.K., who had neither the qualifications nor the experience to perform the tasks previously performed by the applicant.

The Creative and Advertising Agency formally began its operations on 1 January 2018.

F. GROUNDS FOR THE REQUEST

The [District Court for the Capital City of Warsaw] is referring the above question for a preliminary ruling because its examination of the case has given rise to doubts as to whether it is permissible to exclude the application of the protection afforded by Directive 2000/78/EC to the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality in a situation where discrimination based on sexual orientation concerns the choice of a natural person who is a party to a civil-law contract and works as a self-employed sole trader.

The scope of Directive 2000/78/EC is clearly defined in Article 3 thereof. The provisions of Article 3(1)(a) and (c) of that directive are relevant to the present case. They guarantee protection against discrimination with regard to the conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, as well as employment and working conditions. Directive 2000/78/EC does not contain a definition of self-employment and does not clarify the extent to which self-employment should be covered by the protection afforded by the directive, that is to say, whether that protection can be excluded by safeguarding the right of the counterparty of the person discriminated against on the grounds of the characteristics listed in

Article 1 of that directive to choose the party with whom that counterparty wishes to establish a business relationship.

The doubts of the [District Court for the Capital City of Warsaw] are related to the provisions of national law implementing Directive 2000/78/EC, namely Article 5(3) of the Equality Law, which excludes from the scope of the protection provided therein the freedom of choice of a party to a contract so long as that choice is not based on sex, race, ethnic origin or nationality. Such regulation would mean that discrimination on the basis of sexual orientation is permissible so long as that discrimination manifests itself in the freedom of choice of a party to a contract. The above issue has a direct impact on the resolution of the present case, as the defendant, within the framework of its freedom to choose the party to a contract, decided not to enter into another contract for specific work with the applicant, who is a sole trader. In the view of the [District Court for the Capital City of Warsaw], the applicant's activity as a sole trader should be classified as self-employment within the meaning of Article 3(1)(a) of Directive 2000/78/EC. Moreover, the [District Court for the Capital City of Warsaw] believes that the purpose of Article 3(1)(a) of Directive 2000/78/EC is also to provide protection against discrimination on the basis of sexual orientation in such a situation, since refusing to enter into a contract with a self-employed person solely on the basis of his or her sexual orientation appears to be a restriction on the conditions for that person's access to self-employment.

In the light of Article 267 of the Treaty on the Functioning of the European Union, the interpretation of the analysed Article 3(1)(a) of Directive 2000/78/EC falls within the exclusive jurisdiction of the Court of Justice of the European Union, and therefore this request for a preliminary ruling is justified.

[...]