



Reports of Cases

Case C-356/21

J.K.

v

TP S.A.

(Request for a preliminary ruling from the Sąd Rejonowy dla m.st. Warszawy w Warszawie (Poland))

Judgment of the Court (Second Chamber), 12 January 2023

(Reference for a preliminary ruling – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 3(1)(a) and (c) – Conditions for access to self-employment – Employment and working conditions – Prohibition of discrimination based on sexual orientation – Self-employed person working on the basis of a contract for specific work – Termination and non-renewal of contract – Freedom to choose a contracting party)

1. *Social policy – Equal treatment in employment and occupation – Directive 2000/78 – Scope – Conditions for access to employment, to self-employment or to occupation – Concept – Independent and uniform interpretation – Broad interpretation (Arts 19(1), 45 and 153(2) TFEU; Council Directive 2000/78, recitals 9 and 11 and Arts 1 and 3(1)(a))*

(see paragraphs 34-43)

2. *Social policy – Equal treatment in employment and occupation – Directive 2000/78 – Scope – Conditions for access to employment, to self-employment or to occupation – Concept – Contractor engaged in an independent economic activity – Genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the contractor to earn his livelihood – Refusal to conclude a contract for specific work with that contractor on the ground of sexual orientation – Included (Council Directive 2000/78, Art. 3(1)(a))*

(see paragraphs 44-47, 49-51)

3. *Social policy – Equal treatment in employment and occupation – Directive 2000/78 – Scope – Employment and working conditions – Concept – Involuntary termination of activity of a self-employed person – Termination and non-renewal of contract for specific work on the ground of the contractor's sexual orientation – Included (Council Directive 2000/78, Art. 3(1)(c))*

(see paragraphs 61-63, 65, 66)

4. *Social policy – Equal treatment in employment and occupation – Directive 2000/78 – Prohibition of discrimination based on sexual orientation – Measures laid down by national law necessary for the protection of the rights and freedoms of others – Freedom of choice of contracting parties – Contractor engaged in an independent economic activity – Refusal to conclude or renew a contract for specific work with that contractor on the ground of sexual orientation – National legislation excluding that refusal from the protection against discrimination referred to in the directive – Not permissible (Council Directive 2000/78, Arts 2(5) and 3(1)(a) and (c))*

(see paragraphs 72, 73, 75-79, operative part)

Résumé

Between 2010 and 2017, J.K. personally prepared, on the basis of consecutive short-term contracts for specific work, concluded in the context of his independent economic activity, audiovisual material, trailers or features for the Editorial and Promotional Office of a channel of TP, a company which operates a nationwide public television channel in Poland.

On 20 November 2017, a new contract for specific work was concluded between J.K. and TP for a term of one month, providing for two one-week shifts in December. However, following the publication by J.K. and his partner, on 4 December 2017, of a video on YouTube aimed at promoting tolerance towards same-sex couples, TP informed J.K. that those two one-week shifts had been cancelled.

J.K. therefore did not carry out any shift in December 2017, and no new contract for specific work was concluded between him and TP.

Subsequently, J.K. brought an action before the referring court, the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court, Warsaw, Poland), seeking, inter alia, compensation for non-material harm resulting from TP's refusal to renew his contract, terminating their professional relationship, on the ground, according to J.K, of his sexual orientation.

In the context of that dispute, that court has doubts as to the compatibility of a provision of Polish law¹ with EU law, in so far as that provision excludes the freedom of choice of contracting parties from the protection against discrimination conferred by Directive 2000/78,² so long as that choice is not based on sex, race, ethnic origin or nationality.

¹ Article 5(3) of the ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Law on the transposition of certain provisions of EU law regarding equal treatment) of 3 December 2010 (Dz. U. No 254, item 1700). In its consolidated version (Dz. U. of 2016, item 1219), that provision states that that law does not apply to the freedom of choice of contracting parties, provided that that choice is not based on sex, race, ethnic origin or nationality.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (O) 2000 L 303, p. 16).

In that regard, the Court of Justice holds that Article 3(1)(a) and (c) of Directive 2000/78 preclude such a national provision which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.

Findings of the Court

In the first place, the Court points out that the terms ‘employment’, ‘self-employment’ and ‘occupation’ in Article 3(1)(a) of Directive 2000/78 must be interpreted broadly.³ Directive 2000/78 is thus intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood. It is nevertheless necessary to distinguish activities falling within the scope of that directive from those consisting of the mere provision of goods or services to one or more recipients, which do not fall within that scope.

It is therefore necessary, in order for occupational activities to fall within the scope of Directive 2000/78, that those activities are genuine and are pursued in the context of a legal relationship characterised by a degree of stability, which is for the referring court to assess as regards the activity pursued by J.K.

Since that activity constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling J.K. to earn his livelihood, in whole or in part, the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as ‘employment’ or ‘self-employment’.

The Court concludes that, in order for a person to be able to pursue his or her occupational activity effectively, the conclusion of a contract for specific work constitutes a factor the existence of which may be essential. Consequently, the concept of ‘conditions for access’ to self-employment⁴ may include the conclusion of such a contract, and the refusal to conclude that contract on grounds linked to the sexual orientation of that contractor falls within the scope of Directive 2000/78.

In the second place, as regards the interpretation of Article 3(1)(c) of Directive 2000/78,⁵ the Court observes that the concept of ‘employment and working conditions’ in that provision, having regard to the objective of that directive, refers, in a broad sense, to the conditions applicable to any form of employment or self-employment, whatever the legal form in which it is pursued.

³ As provided in Article 3(1)(a) of Directive 2000/78, ‘within the limits of the areas of competence conferred on the [European Union], [that] Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to 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’.

⁴ Within the meaning of Article 3(1)(a) of Directive 2000/78.

⁵ Under Article 3(1)(c) of Directive 2000/78, that directive is applicable in relation to employment and working conditions, including dismissals and pay.

Consequently, the fact that J.K. was unable to complete any of the shifts provided for in the contract for specific work appears to constitute an involuntary termination of activity of a self-employed person which may be assimilated to dismissal of an employee, which is a matter for the referring court to determine. In those circumstances, TP's decision not to renew the contract for specific work with J.K. on the ground, according to the latter, of his sexual orientation, thus terminating the professional relationship between them, falls within the scope of Article 3(1)(c) of Directive 2000/78.

In the third and last place, the Court points out that to accept that freedom of contract allows a refusal to contract with a person on the ground of that person's sexual orientation would be tantamount to depriving Article 3(1)(a) of Directive 2000/78 of its practical effect in so far as that provision specifically prohibits any discrimination based on that ground as regards access to self-employment.

Thus, since the freedom to conduct a business is not absolute, the provision of Polish law at issue, which does not include sexual orientation among the exceptions to the freedom to choose a contracting party, cannot justify, in the present case, an exclusion from the protection against discrimination conferred by Directive 2000/78, where that exclusion is not necessary, in accordance with Article 2(5) of that directive, for the protection of the rights and freedoms of others in a democratic society.