

**Reference for a preliminary ruling
from the Cour de Cassation, France
lodged on 16 June 2010 —
Sandrine Bonnaire and Nicolas
Duvauchelle v Huxiyun Ltd**

(Case C-297/10)

(2010/C 260/03)

Language of the case: French

Referring court

Cour de Cassation, France

Parties to the main proceedings

Applicants: Sandrine Bonnaire,
Nicolas Duvauchelle

Defendant: Huxiyun Ltd

Questions referred

1. Taking into account that Huxiyun Ltd is a Japanese enterprise, does a policy of measuring the basic pay in individual salary groups by age categories and gender categories, infringe the primary-law prohibition of age discrimination and gender discrimination (now Article 21(1) of the CFREU) as given expression by Directives 2000/78/EC and 2006/54/EC?

2. Taking into account the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter of Fundamental Rights of the European Union, 'CFREU'), does a collective agreement on terms of pay for employees, as described above, infringe the primary-law prohibition of age discrimination and gender discrimination (now Article 21(1) of the CFREU) as given expression by Directives 2000/78/EC and 2006/54/EC?

3. If questions 1 and 2 are answered in the affirmative by the Court of Justice of the European Union or by the Cour de Cassation on the basis of the ruling of the Court of Justice in the preliminary reference proceedings:

(a) Does the right to collective bargaining give the parties to a collective agreement the discretion to eliminate such discrimination by transferring the employees to a new collective pay structure based on job, performance and professional experience, whilst preserving the entitlements they acquired in the old tariff structure?

(b) Must question 3 a) in any event be answered in the affirmative if the final assignment of the transferred employees to the grades within a pay group of the new collective pay structure does not depend solely on the age category attained in the old tariff structure and if the employees who are admitted to a higher grade of the new structure typically have more professional experience than the employees assigned to a lower grade?

4. If questions 3 (a) and (b) are answered in the negative by the Court of Justice of the European Union or by the Cour de Cassation on the basis of the principles set out by the Court of Justice in its preliminary ruling:

(a) Is indirect discrimination on grounds of age justified by the fact that it is a legitimate aim to preserve acquired social entitlements and because it is an appropriate and necessary means of achieving that aim to temporarily continue to treat older and younger employees differently for the purposes of a transitional arrangement, if this difference of treatment is being gradually phased out and the only alternative in practice would be to reduce the pay of older employees?

(b) Taking into account the right to collective bargaining and the associated autonomy in collective bargaining, must question 4(a) be answered in the affirmative if parties to a

collective agreement agree on such a transitional arrangement?

5. If questions 4(a) and (b) are answered in the negative by the Court of Justice of the European Union or by the Cour de Cassation on the basis of the principles set out by the Court of Justice in its preliminary ruling:

(a) Even taking into account the associated additional costs for the employer concerned and the right of the parties to a collective agreement to collective bargaining, must the infringement of the primary-law prohibition on age discrimination, which is inherent in a collective pay structure and which makes it invalid as a whole, always only be eliminated by taking the highest age category as a basis in each case when applying the collective pay agreements until a new system which is in conformity with Union law comes into force?

(b) Must the infringement of the primary-law prohibition on gender discrimination, which is inherent in a collective pay structure and which makes it invalid as a whole, always only be eliminated by taking the gender in receipt of the highest wages as a basis in each case when applying the collective pay agreements until a new system which is in conformity with Union law comes into force?

6. If question 5 is answered in the negative by the Court of Justice of the European Union or by the Cour de Cassation on the basis of the principles set out by the Court of Justice in its preliminary ruling:

Having regard to the right of the parties to a collective agreement to collective bargaining, would it be compatible with the Union law prohibition on age and gender discrimination and the requirement for an effective sanction in the event of a breach of that prohibition, to grant the parties to a collective agreement a manageable deadline (e.g. six months) in which to retrospectively correct the invalidity of the pay structure they have agreed, and stipulate that in the event that no new structure which is in conformity with Union law is introduced within the deadline, in applying collective rules in each case the highest age category will be taken as a basis and, if so,

what discretion in terms of the duration of the retrospective effect of the new structure which is in conformity with Union law could be granted to the parties to a collective agreement?

I. Background

Sandrine Bonnaire is a 27-year-old accountant. When the major Japanese corporation Huxiyun Ltd. (approx. 32,000 employees worldwide) opens a branch in Paris, France, she finds employment there, together with approx. 200 other accountants. After a few weeks, Mme Bonnaire discovers that her colleague, Jean Gabin, who is 43 years old, earns 640 Euros per month more than her.

Sandrine's best friend, Nicolas Duvauchelle, 34, is an expert in technology marketing. He works in a marketing team of 10 people, comprising 8 men and 2 women. When alerted to the possibility by Sandrine, he finds out that he earns 540 Euros less than his 40-year-old, female colleague, Juliet Binoche.

Women are very rare in technology marketing while the accounting department is relatively gender equal.

After some investigation, it turns out that Huxiyun has a payment policy which has been formed in a collective agreement with its employees in Japan. It states that:

1. wages are partly age-dependant. Every employee, no matter how long he or she has worked for Huxiyun Ltd., receives a cumulative bonus of 40 Euros per year of life, beginning at the age of 25 and extending to the age of 65.
2. wages are partly gender-dependant. Women or men will receive higher payment in certain fields, in order to reach specific objectives. In particular, either gender will be supported through higher wages in any department in which their gender is in a clear minority.

Sandrine and Nicolas find this highly unfair and sue Huxiyun in the Conseil de Prud'hommes, claiming equal payment to the named colleagues. They win their case. Huxiyun appeals to the Cour d'Appel and, after losing again, to the Cour de Cassation.

II. Relevant Provisions of French Law (fictitious)

“Collective Agreements Act 2010”

Section 3 – Status of Collective Agreements

(1) Provisions of a collective agreement entered into within the territory of the French Republic or in the EU shall be directly applicable in France and shall therefore have the force of law.

(2) Provisions of a collective agreement entered into outside of the territory of the French Republic or the EU shall be applicable in France and shall therefore have the force of law, subject to the approval of the French Ministry of Employment.

Section 4 – Definition of “Force of Law”

“Force of Law” includes the right of both parties to the employment contract to rely upon the terms of the collective agreement, irrespective of the terms of the employment contract.

“Special Measures in Employment Act 2009”

Section 10 – Age-Specific Employment Measures

An age-specific term within a collective agreement does not constitute discrimination if the term promotes a legitimate social aim.

Section 21 – Gender-Specific Employment Measures

A gender-specific term within a collective agreement does not constitute discrimination if the term promotes a legitimate social aim, including:

–[...]

–Promoting an equal gender balance within a particular industry or sector

–[...]

“Retirement Age Act 1987”*Section 3 – Compulsory Retirement Age*

All employees in France may be required to compulsorily retire from the age of 65

III. Explanatory Notes

- Huxiyun's collective agreement has been approved by the French Ministry of Employment. For the purposes of the moot, this means its age- and gender-specific terms have been explicitly approved by the French government as conforming within national law. Accordingly there is no question of the enforceability of the collective agreement in the EU.
- Directives 2000/78/EC and 2006/54/EC have been transposed into French law. The relevant provisions are set out below.
- The applicants assert that French law has not been correctly transposed, as it gives companies too much discretion to include potentially discriminatory provisions within their collective agreements. The applicants want to rely on the Directive (or failing that, general principles of EU law, where available) because they do not appear to have a remedy under national law. The Cour de Cassation was sympathetic to their arguments, and decided to refer to the case to the ECJ for comment.