OPINION OF ADVOCATE GENERAL BOT

delivered on 2 September 2010[1]

1. The problems relating to compulsory retirement, to authorisation to make an employee redundant who has reached retirement age, as well as to the employment of workers over a certain age by means of fixed-term contracts have already been dealt with by the Court in several judgments, or will be dealt with in the near future.[2] The present cases will enable the Court to supplement its case-law by dealing with these different issues together this time.

2. The Rajonen sad Plovdiv (Plovdiv District Court) (Bulgaria) has referred questions to the Court on the conformity with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[3] of national legislation which allows an employer to terminate the employment contract of a university professor who has reached the age of 65 and which provides that, beyond that age, the employment relationship may be extended only by way of one-year fixed-term contracts for a maximum total of three years.

3. In the present Opinion, I intend to set out, on the basis largely of existing case-law, the reasons for my view that the directive does not preclude such legislation.

1 — Original language: French.

2 — In relation to compulsory retirement, see the judgment in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 and pending Case C-45/09 *Rosenbladt* and Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler*; in relation to the authorisation to dismiss a worker who has reached retirement age, see the judgment in Case C-388/07 *Age Concern England* [2009] ECR I-1569; on employing, by way of fixed-term contracts, workers who have reached a certain age, see the judgment in Case C-144/04 *Mangold* [2005] ECR I-9981, as well as pending Case C-109/09 *Deutsche Lufthansa*. See also the judgment in Case C-341/08 *Petersen* [2010] ECR I-47, on the subject of a national provision fixing 68 as the maximum age for practising as a panel dentist.

3 — OJ 2000 L 303, p. 16; 'the directive'.

I — The legal framework

A — *European Union law*

4. As provided in Article 1 of the directive, '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'.

5. Article 2 of the directive states:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

…'

6. Article 6(1) of the directive provides:

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order

to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

B — *National legislation*

7. Article 325(3) of the Labour Code[4] provides that an employment contract is to end on expiry of the contractual period without the parties giving prior notice.

8. Article 328 of the Labour Code provides:

'(1) An employer may terminate an employment contract by giving prior written notice to a worker or employee within the periods provided for in Article 326(2) in the following cases:

…

10. When the right to receive a retirement pension has been acquired; and in the case of professors, lecturers and level I and II assistants, and holders of doctorates in science, when they reach the age of 65;

…'

9. Paragraph 11 of the transitional and final provisions of the Law on Higher Education[5] provides:

'On a proposal from the professorate and the central council and/or branch council and after a decision of the academic council,

4 — DV No 26 of 1 April 1986; a subsequent amended version, published in DV No 41 of 2 June 2009, entered into force on 1 July 2009.

5 — DV No 112 of 27 December 1995, last amended and published in DV No 74 of 15 September 2009.

employment contracts with persons qualified to teach may, when those persons reach the age referred to in Article 328(1)(10) of the Labour Code, be extended by one year, and up to a total of no more than three years, in the case of persons occupying the post of professor, and, in the case of qualified persons occupying the post of lecturer, they may be extended up to a total of no more than two years.'

10. Article 7(1)(6) of the Law on Protection against Discrimination[6] provides that 'the fixing of a maximum age for recruitment, based on the training requirements of the post in question or the need for a reasonable period of employment before retirement, on condition that this is objectively justified for the achievement of a legitimate aim and the means of achieving it do not go beyond what is necessary, does not constitute discrimination'.

6 — DV No 86 of 30 September 2003, which entered into force on 1 January 2004; an amended version, published in DV No 74 of 15 September 2009, entered into force on 15 September 2009.

II — The dispute in the main proceedings and the questions referred to the Court

11. The present references for a preliminary ruling involve the same person — Mr Georgiev — and relate to the same facts. The difference between the two references is that the second (Case C-268/09) involves an additional question to the first (Case C-250/09).

12. In 1985, Mr Georgiev began work as a lecturer at the Tehnicheski universitet — Sofia, filial Plovdiv (Technical University of Sofia, Plovdiv Campus ('the University').

13. In 2006, when he reached the age of 65, his employment contract was terminated on the ground that he had reached retirement age.

14. The academic council of the University, however, authorised Mr Georgiev to continue to work, in accordance with Paragraph 11 of the transitional and final provisions of the Law on Higher Education. A new one-year employment contract was signed,

specifying that Mr Georgiev would work as a lecturer in the faculty of engineering.

15. By a supplementary agreement signed in 2006, the contract was extended for one year.

16. In 2007, Mr Georgiev was appointed to the post of 'professor'.

17. By a new supplementary agreement signed in 2008, the contract was extended for a further year.

18. In 2009, by a decision of the rector of the University, the employment relationship between the University and Mr Georgiev was terminated, in accordance with Article 325(3) of the Labour Code.

19. Mr Georgiev brought two actions before the Plovdiv court. The first seeks to establish that the clause in his first fixed-term contract, which limited his contract to one year, is null and void and should be reclassified as a contract of indefinite duration (action forming the basis of Case C-268/09). The second action relates to the decision of the rector of the University terminating Mr Georgiev's employment relationship with the University once he reached the age of 68 (action forming the basis of Case C-250/09). The Rajonen sad Plovdiv decided to stay the proceedings and to refer the following three questions to the Court for a preliminary ruling. The first two questions relate to both cases, while the third is raised only in Case C-268/09:

'(1) Do the provisions of [the directive] preclude the application of a national law which does not permit the conclusion of employment contracts of indefinite duration with professors who have reached the age of 65? In this context and, more precisely, taking Article 6(1) of the directive into consideration, are the measures in Article 7(1)(6) of the Law on Protection against Discrimination, which introduce age limits for employment in specific posts, objectively and reasonably justified by a legitimate aim, and proportionate, bearing in mind that the directive has been fully transposed into Bulgarian law?

(2) Do the provisions of [the directive] preclude the application of a national law under which professors who have reached the age of 68 are compulsorily retired? In view of the foregoing facts and circumstances of the present case, and if it is found that a conflict exists between the provisions of the directive and the

relevant national legislation which transposed the directive, is it possible that the interpretation of the provisions of Community law results in the national legislation not being applied?

(3) Does national law establish the reaching of the specified age as the sole condition for the termination of the employment relationship of indefinite duration and for the possibility that the relationship can be continued as a fixed-term employment relationship between the same worker and employer for the same post? Does national law establish a maximum duration and a maximum number of extensions of the fixed-term employment relationship with the same employee after the contract of indefinite duration has been converted into a fixed-term contract, beyond which a continuation of the employment relationship between the parties is not possible?'

20. Mr Georgiev, the University, the Bulgarian, German and Slovak Governments, as well as the Commission of the European Communities, submitted written observations.

III — Analysis

21. I shall examine together the three questions referred to the Court, which essentially seek to determine whether the directive is to be interpreted as precluding national legislation which allows an employer to terminate an employment contract of a university professor who has reached the age of 65 and which provides that, beyond that age, the employment relationship may be extended only by way of one-year fixed-term contracts for a maximum total of three years.

22. In order to address these questions, it is appropriate to examine whether the legislation at issue in the main proceedings comes within the scope of the directive, whether it contains a difference in treatment on grounds of age, and, if so, whether the directive precludes such a difference in treatment.

23. First, in respect of the scope of the directive, it should be stated that it follows from Article 3(1)(c) thereof that the directive applies, in respect of the competence conferred upon the European Union, to all persons in relation to employment and working conditions, including dismissals and pay. The legislation at issue in the main proceedings directly affects the duration and detailed rules on the employment relationship binding the parties, as well as, more generally, the pursuit by university professors of their professional

activity, in that it limits their future participation in the labour force beyond the age of 65 and precludes such participation beyond the age of 68. Consequently, there is, in my opinion, no doubt that this legislation comes within the scope of the directive. [7]

24. Next, with regard to the question whether the legislation in question in the main proceedings contains a difference in treatment based on age as regards employment and occupation, it must be stated that, under Article 2(1) of the directive, for the purposes of the latter, the 'principle of equal treatment' means that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive. Article 2(2)(a) of the directive states that, for the purposes of paragraph 1 of Article 2, direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.

25. By allowing an employer to terminate an employment contract of a university professor who has reached the age of 65, and by providing that, beyond that age, the employment relationship may be extended only by way of one-year fixed-term contracts for a maximum total of three years, the legislation at issue in the main proceedings treats university professors who have reached the age of 65, as well as those who have reached the age of 68, less favourably than other university professors who are working. Unlike other professors who are working and who, in principle, benefit from a contract of indefinite duration, professors who are 65 years old are forced to accept a fixed-term contract if they wish to continue working. Furthermore, professors who turn 68 are obliged to cease their work within the university. Such legislation therefore establishes a difference in treatment based directly on age, as covered by Article 2(1) and (2)(a) of the directive. [8]

26. It is now necessary to examine whether or not the differences in treatment resulting from the national legislation at issue in the main proceedings comply with the directive. It is apparent, in this regard, from the first subparagraph of Article 6(1) of the directive that differences in treatment based on age do not constitute discrimination prohibited by Article 2 of that directive 'if, within the context of national law, they are objectively and

7 — See, by analogy, *Palacios de la Villa*, paragraphs 45 and 46, and *Age Concern England*, paragraphs 27 and 28.

8 — It is apparent from the case-file that, under Bulgarian law, a male employee's employment contract may be terminated, in principle, at the age of 63. If university professors appear, from this perspective, to be in an advantageous position in comparison with other employees, this does not, however, rule out the possibility that they may be the victim of a difference in treatment on grounds of age which is potentially contrary to the directive, as the comparison is to be made with the situation of university professors who have not reached the age of 65 or 68 years.

reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'

27. The wording of the legislation at issue in the main proceedings does not expressly set out the aim pursued. As the Court has previously held, where the national legislation in question does not specify the aim pursued, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts as to whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary. [9]

28. In the main proceedings, it is ultimately for the national court, which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to identify the aim which that legislation pursues and to establish whether this is a legitimate aim within the terms of the first subparagraph of Article 6(1) of the directive. [10]

29. This being so, in order to provide the national court with an appropriate response to enable it to resolve the dispute in the main proceedings, it is necessary to examine whether the directive precludes differences in treatment on grounds of age, such as those at issue in the main proceedings, regard being had to the objectives which have been put forward as possible justification in the written observations submitted to the Court.

30. The principal objective put forward is that of apportioning employment opportunities between generations within the profession concerned. According to the arguments set out by several interveners to these proceedings, that is to say, the Bulgarian, German and Slovak Governments, as well as the Commission, the legislation at issue in the main proceedings, in pursuing this objective, allows younger generations to be guaranteed the opportunity to achieve professorial positions and assures the quality of teaching and research.

31. In the words of Article 6(1) of the directive, aims which may be considered as 'legitimate', within the meaning of that provision, include legitimate employment policy,

9 — See, inter alia, *Petersen*, paragraph 40 and the case-law cited.

10 — See, inter alia, *Age Concern England*, paragraph 47, and *Petersen*, paragraph 42.

labour market and vocational training objectives. The Court has, in this regard, previously held that the promotion of recruitment undeniably constitutes a legitimate social policy or employment policy objective of the Member States, and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for certain categories of workers to enter the labour market. Similarly, a measure intended to promote the access of young people to the profession of university professor may be regarded as an employment policy measure. [11]

32. At the present stage, it is appropriate to ascertain whether, according to the terms of Article 6(1) of the directive, the methods implemented to achieve that objective are 'appropriate and necessary'. It is important to bear in mind in this regard that the Member States enjoy a broad discretion in the choice of the measures capable of achieving their objectives in the field of social and employment policy. [12]

33. In its judgment in *Petersen*, the Court noted that, in view of developments in the employment situation in the sector concerned, it did not appear unreasonable for the authorities of a Member State to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, might make it possible to promote the employment of younger ones. As to the setting of that age limit at 68, the Court took the view that this age appeared sufficiently high to serve as the endpoint for practising a profession. [13] It is apparent from the judgment in *Palacios de la Villa* that the same assessment may be made in relation to an age limit of 65, [14] a fortiori as, following the example of the situation in the present proceedings, this age limit does not necessarily result in the retirement of workers who have reached this age.

34. In my view, it is appropriate to acknowledge that a Member State may legitimately attempt, by setting an age limit, to guarantee that a balanced mix of ages exists within the body of university professors. In my opinion, the mix of different generations of lecturers and researchers promotes an exchange of experiences as well as innovation, and thereby the development of the quality of teaching and research at universities. Moreover, bearing in mind the fact that the number of vacant posts within the sector is limited, and that careers within that sector may be relatively long, it is reasonable to take the view that a

11 — See, by analogy, *Petersen*, paragraph 68 and the case-law cited.

12 — See, inter alia, Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 38 and the case-law cited.

13 — *Petersen*, paragraph 70.

14 — *Palacios de la Villa*, paragraph 72.

maximum age limit will facilitate younger people in entering the profession.

35. From that point of view, legislation such as that at issue in the main proceedings does not appear to me to go beyond what is necessary in order to secure the objective of apportioning employment opportunities between generations within the profession concerned.

36. The proportionate nature of this legislation is attributable, first, to the fact that, both at the age of 65 and at the age of 68, a university professor who finds that he is required to cease working is entitled to a retirement pension. That legislation cannot therefore be regarded as adversely affecting, to an excessive degree, the legitimate claims of workers who would have to cease working by reason of the fact that they have reached an age between 65 and 68, as such legislation is not based solely on a set age, but also takes into consideration the fact that, at the end of their professional career, the persons concerned will benefit from financial compensation by being granted a retirement pension, the amount of which, moreover, Mr Georgiev does not contest. [15]

37. Next, it must be noted that the fact that professors have the option of working beyond the age of 65 by means of fixed-term contracts results in a relaxation of the rule on pensionable age by allowing professors over this age to continue working for a further three years. This option therefore contributes to limiting the difference in treatment facing professors who have reached the age of 65.

38. In relation to this aspect of the legislation at issue in the main proceedings, it is necessary to draw a clear distinction between the present cases and that which gave rise to the judgment in *Mangold*. In that judgment, the Court held that a national measure authorising the conclusion of a fixed-term contract, without objective justification, with workers who have reached the age of 52 is contrary to the directive. Unlike the current cases, the national legislation at issue in *Mangold*

15 — In this connection, see *Palacios de la Villa*, paragraph 73, in which the Court referred to a retirement pension 'the level of which cannot be regarded as unreasonable'. The definition of what this formula covers is one of the problems at the centre of *Rosenbladt*.

concerned workers who had not acquired a right to a retirement pension and whose contracts were liable to be extended an indefinite number of times. Furthermore, the legislation here at issue in the main proceedings concerns only one specific category of workers, whereas the legislation at issue in *Mangold* was general in its application.

39. Finally, I note that, whilst it has several times had the opportunity to state that the benefit of stable employment is viewed as a major element in the protection of workers, the Court has also, at the same time, accepted that there are circumstances in which fixed-term employment contracts are liable to respond to the needs of both employers and workers. [16]

40. This appears to me to be precisely the position in the present cases. The use of fixed-term contracts can reconcile the wish that might be expressed by professors to continue working after the age of 65 with the need for universities to reassess, on an annual basis, in the light of their needs and the specific features of the department in question, whether such continuation does not have an adverse effect on a fair allocation of employment opportunities between the generations within that profession.

41. I conclude from all of these factors that Article 2(2)(a) and Article 6(1) of the directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows an employer to terminate an employment contract of a university professor who has reached the age of 65 and which provides that, beyond that age, the employment relationship may be extended only by way of one-year fixed-term contracts for a maximum total of three years, in so far as that legislation seeks to allocate employment opportunities between the generations within that profession, this being a matter for the national court to determine.

16 — See, inter alia, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 87 and the case-law cited.

IV — Conclusion

42. In view of all of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling by the Rajonen sad Plovdiv:

Article 2(2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows an employer to terminate an employment contract of a university professor who has reached the age of 65 and which provides that, beyond that age, the employment relationship may be extended only by way of one-year fixed-term contracts for a maximum total of three years, in so far as that legislation seeks to allocate employment opportunities between the generations within that profession, this being a matter for the national court to determine.