



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 September 2013*

(Social policy — Equal treatment for men and women — Directive 76/207/EEC — Fixed-term employment contract concluded prior to the accession of the Member State — Expiry of the fixed term after the accession — Employment legislation fixing the expiry date for the contract as the last day of the year in which retirement age is reached — Retirement age for men different from the age set for women)

In Case C-614/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 25 October 2011, received at the Court on 30 November 2011, in the proceedings

Niederösterreichische Landes-Landwirtschaftskammer

v

Anneliese Kuso,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas (Rapporteur), E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2013,

after considering the observations submitted on behalf of:

- the Niederösterreichische Landes-Landwirtschaftskammer, by B. Hainz, Rechtsanwalt,
- Ms Kuso, by C. Henseler, H. Pflaum, P. Karlberger, W. Opetnik, Rechtsanwälte, and P. Rindler, Rechtsanwältin,
- the European Commission, by V. Kreuzschitz and C. Gheorghiu, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 3(1)(a) and (c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207').
- 2 The request has been made in proceedings between the Niederösterreichische Landes Landwirtschaftskammer (Chamber of Agriculture of the Province of Lower Austria) ('the NÖ-LLWK') and Ms Kuso, concerning the termination of her employment relationship.

Legal context

European Union ('EU') law

- 3 Article 2 of Directive 76/207 provides:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. For the purposes of this Directive, the following definitions shall apply:

— "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

... '

- 4 Under Article 3 of that directive:

'1. Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;

... '

- 5 Directive 76/207 was repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23), with effect – as specified in Article 34 of Directive 2006/54 – from 15 August 2009. Directive 2006/54 is not applicable to the facts of the case before the referring court.

Austrian law

- 6 In the Law on equal treatment (Gleichbehandlungsgesetz, BGBl I, 66/2004), which transposes Directive 76/207, *inter alia*, into national law, Paragraph 3, entitled ‘Equal treatment in employment relations’, provides:

‘No one may be discriminated against, directly or indirectly, on grounds of sex, in particular by reference to marital or family status, in the context of an employment relationship, notably as regards:

(1) the establishment of the employment relationship,

...

(3) the grant of optional social benefits which cannot be classed as remuneration,

...

(7) the ending of the employment relationship.’

- 7 Ms Kuso’s employment relationship is governed by the Law of 1921 on employees (Angestelltengesetz 1921). Specifically, Paragraph 19(1) of that law provides that an employment contract is to come to an end upon expiry of the period for which it was concluded.

- 8 According to the order for reference, Ms Kuso’s fixed-term employment contract was governed by the rules on employment and remuneration laid down in the Niederösterreichische Landes-Landwirtschaftskammer (Dienst- und Besoldungsordnung der Niederösterreichischen Landes-Landwirtschaftskammer) (‘the DO’). It is necessary, in the view of the referring court, to regard those rules as forming part of the body of national legislation in relation to which the Court is requested to provide an interpretation of EU law.

- 9 Those rules limit the employer’s right to terminate an employment contract in so far as they establish a special regime under which, except in the case of serious misconduct, employees may be dismissed only for certain specific reasons.

- 10 The DO lays down the following provisions:

‘Paragraph 25 – End of the employment relationship

(1) The employment relationship of an employee with pension rights shall come to an end:

(a) upon temporary or permanent retirement

...

(2) The employment relationship of an employee who has obtained the status of employee who cannot be dismissed shall come to an end:

(a) upon attainment of the age limit

...

(3) The employment relationship of an employee who has obtained the status of employee who cannot be dismissed may be terminated by the employer, against the employee's will, in the following circumstances:

...

(c) where, at the date on which the employment relationship comes to an end, the employee has acquired, under the social security legislation, entitlement to a pension in his own right.

Paragraph 26 – Retirement

(1) The Principal Committee of the [NÖ-LLWK] alone may compel an employee to enter temporary or permanent retirement against his will and such retirement shall be governed by the provisions of the pension regulations.

...

Paragraph 65 – Permanent retirement

Male employees shall be entitled to enter permanent retirement at the end of the calendar year in which they attain the age of 65 years and female employees shall be so entitled at the end of the calendar year in which they attain the age of 60 years.'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 11 Ms Kuso had been employed by the NÖ-LLWK since 1 March 1967 under a permanent contract. On 1 January 1980, she agreed to be placed under a model contract incorporating the DO rules so that she could obtain the status of 'employee who cannot be dismissed', in consequence of which the duration of her employment relationship became subject to the limitation under Paragraph 25(2) of the DO.
- 12 Ms Kuso reached 60 years of age in 2008. On 18 July 2008, the head of the human resources department informed her by telephone that her application to continue working beyond retirement age had been rejected at the NÖ-LLWK board meeting on 14 July 2008. According to the NÖ-LLWK, the employment relationship would cease at the end of 2008. By letter of 25 July 2008, Ms Kuso was informed that consent had not been given for the employment relationship to be extended beyond 31 December 2008 and that her employment was therefore deemed to come to an end on 31 December 2008.
- 13 Ms Kuso contested the lawfulness of the termination of her employment relationship before the Landesgericht Korneuburg (Korneuburg Regional Court). The judgment delivered by that court on 21 January 2009, which found against Ms Kuso, was set aside by a judgment delivered on 18 March 2010 by the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as an appellate court in matters concerning employment and social security law. The NÖ-LLWK thereupon appealed on a point of law to the Oberster Gerichtshof (Austrian Supreme Court).
- 14 The Oberster Gerichtshof points out in the order for reference that one of the provisions laid down in the DO rules, which form an integral part of Ms Kuso's employment contract, is that the employment relationship is to come to an end on the last day of the year in which the employee reaches retirement age. However, that age varies according to whether the employee is a man (65 years) or a woman (60 years). Furthermore, the employment contract at issue was concluded before the Republic of Austria acceded to the European Union, but expired after that accession. In the light of the principles of legal

certainty and the protection of legitimate expectations, and the importance accorded to the right to equal treatment as between men and women, the referring court is uncertain as to the temporal and material scope of Directive 76/207.

- 15 The Oberster Gerichtshof also points out that, although there are certain similarities between the case before it and the case which gave rise to the judgment in Case C-356/09 *Kleist* [2010] ECR I-11939, the two cases differ in at least two respects.
- 16 First, in the case giving rise to *Kleist*, Ms Kleist's employment relationship was terminated on the basis of a collective agreement regarded as being of general scope, whereas Ms Kuso's employment relationship is governed by an individual fixed-term employment contract.
- 17 Secondly, in *Kleist*, the employment relationship was brought to an end by dismissal. However, there was no such dismissal in Ms Kuso's case. In the case before the referring court, the employment relationship is based on a fixed-term employment contract and it was brought to an end by the expiry of that contract. Since such employment relationships normally come to an end upon the expiry of the fixed term, without there being any need for a declaration to that effect, the referring court is uncertain whether the facts of the case before it should be distinguished from those on the basis of which the Court gave a ruling in *Kleist*, or whether it is possible to apply to the case before it the approach adopted by the Court in *Kleist*.
- 18 On the view that resolution of the dispute before it depends on the interpretation of EU law, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do points (a) and (c) of Article 3(1) of Directive 76/207 ... preclude national legislation under which discrimination on grounds of sex in connection with the termination of an employment relationship which comes about – pursuant to an individual fixed-term employment contract entered into before the entry into force of that directive (in this case, before the accession of the Republic of Austria to the European Union) – solely through lapse of time is to be examined, not on the basis of the contractual agreement specifying a fixed term, established before the accession and regarded as a "condition governing dismissal", but only in connection with the rejection of the application for an extension of the contract and regarded as a "condition governing recruitment"?'

Consideration of the question referred

- 19 By that question, the referring court asks, in essence, whether points (a) or (c) of Article 3(1) of Directive 76/207 must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, consisting of a body of employment rules which form an integral part of an employment contract concluded before the Member State concerned acceded to the European Union and under which the employment relationship is to come to an end upon attainment of the fixed retirement age, which differs depending on whether the employee is a man or a woman, constitutes discrimination prohibited by that directive where the employee concerned reaches that age after the accession.

Observations submitted to the Court

- 20 The NÖ-LLWK submits that, in the case before the referring court, expiry of the contract is sufficient in itself to bring the employment relationship to an end. However, Ms Kuso's employment relationship did not come to an end because of dismissal, but through lapse of the time specified under the fixed-term employment contract. Since Article 3(1)(c) of Directive 76/207 relates solely to dismissals, that provision cannot be relied on. Moreover, as the employment rules governing the employment

contract in the case before the referring court pre-date the accession of the Republic of Austria to the European Union, such national legislation cannot be said to give rise to discrimination for the purposes of that directive. The NÖ-LLWK argues, therefore, that the question referred should be considered only in terms of a ‘condition governing recruitment’, which involves examining that question in the light of Article 3(1)(a) of Directive 76/207.

- 21 Ms Kuso and the European Commission, on the other hand, maintain that the question referred must be considered only in terms of the ending of the employment relationship. As obligations under an employment contract are ongoing, the correct view is that, as soon as the Republic of Austria acceded to the European Union, the effects of such a contract came within the scope of Directive 76/207. Consequently, the argument based on the fact that the employment contract at issue was concluded before that accession should be rejected and the question should be assessed in the light of Article 3(1)(c) of the directive.

The Court’s answer

- 22 It is necessary to establish whether, as Ms Kuso and the Commission maintain, the ending of the employment relationship on the basis of Paragraph 25(2)(a) of the DO falls within the scope of Article 3(1)(c) of Directive 76/207.
- 23 First, it is necessary to consider whether Article 3(1)(c) of Directive 76/207 applies *rationae temporis* in circumstances such as those of the case before the referring court.
- 24 In order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from the terms, the objectives or the general scheme of those rules that such effect must be given to them (see, inter alia, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49 and the case-law cited).
- 25 It should be recalled, however, that new rules apply immediately to the future effects of a situation which arose under the old rules (Case 270/84 *Licata v CES* [1986] ECR 2305, paragraph 31, and *Pokrzeptowicz-Meyer*, paragraph 50). The Court has also ruled that, from the date of accession, the provisions of the original Treaties are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the relevant Act of Accession (see Case C-122/96 *Saldanha and MTS* [1997] ECR I-5352, paragraph 13).
- 26 As regards Directive 76/207 and the main proceedings, the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1; ‘the Act of Accession’) entered into force on 1 January 1995. Article 2 of the Act of Accession provides that ‘[f]rom the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act’. In that regard, Annex XV to the Act of Accession, to which Article 151 thereof refers, expressly applies to Directive 76/207.
- 27 The Act of Accession does not lay down any specific conditions regarding the application of Directive 76/207 – apart from a temporary derogation relating to night work for women, under Section V of Annex XV to that Act, which is not a situation which arises in the case before the referring court – and that directive is therefore binding upon the Republic of Austria from the date of its accession to the European Union and accordingly applies to the future effects of situations which came about before that accession (see, to that effect, *Saldanha and MTS*, paragraph 14).

- 28 It is next necessary to reject the argument put forward by the NÖ-LLKW to the effect that, by relying on the fact that Directive 76/207 has applied ever since the accession of the Republic of Austria to the European Union, in order to dispute the ending of her employment relationship, Ms Kuso is seeking to call into question rights acquired prior to that accession and is undermining the principle of the protection of her employer's legitimate expectations.
- 29 The Court has held that a fixed-term employment contract concluded before the entry into force of the Europe Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/EC, ECSC, Euratom of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1), did not exhaust its legal effects on the date of its signature, but, on the contrary, continued regularly to produce its effects throughout its duration (see, to that effect, *Pokrzeptowicz-Meyer*, paragraph 52).
- 30 Furthermore, the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which have arisen under earlier rules (see, to that effect, *Pokrzeptowicz-Meyer*, paragraph 55).
- 31 Accordingly, the NÖ-LLKW could not legitimately have expected that Directive 76/207 would have no influence on the rules governing the contract concluded in 1980, which were set to become relevant only at the time when that contract came to an end. Consequently, the fact that Directive 76/207 applied ever since the accession of the Republic of Austria to the European Union cannot, for the purposes of disputing the ending of the employment relationship at issue in the main proceedings, be regarded as affecting a situation which had arisen earlier.
- 32 Secondly, it should be borne in mind that the Court has consistently held that Article 3 of Directive 76/207, which corresponds to Article 5 of that directive in its original version, is unconditional and sufficiently precise to be relied on by an individual against the State (see Case 152/84 *Marshall* [1986] ECR 723, paragraph 52, and Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 21) and that one of the entities against which provisions of a directive capable of having direct effect may be enforced is a body which, whatever its legal form, has been made responsible, pursuant to a measure adopted by a public authority, for providing, subject to the control of that public authority, a service in the public interest and which, for those purposes, enjoys exceptional powers as compared with the rules applicable to relations between individuals (see, to that effect, *Foster and Others*, paragraph 22). As the referring court states – and neither the parties to the main proceedings nor the Commission contest the point – the NÖ-LLKW is one of the bodies which enjoys exceptional powers as compared with the rules applicable to relations between individuals.
- 33 Thirdly, it is necessary to establish whether Article 3(1)(c) of Directive 76/207 must be interpreted as meaning that national legislation under which an employment relationship is to come to an end through lapse of the time specified under the employment contract, expressed in terms of an age for men and a different age for women, constitutes discrimination for the purposes of that directive.
- 34 It should be recalled, first, that the expiry of the fixed-term employment contract at issue in the main proceedings is determined by reference to the DO, a body of employment rules which form an integral part of that contract and, secondly, that the age at which entitlement to a retirement pension arises under those rules differs according to whether the employee is a man or a woman.
- 35 Admittedly, the Court has held that the non-renewal of a fixed-term employment contract when it comes to the end of its specified term cannot, in principle, be regarded as a case of dismissal (see, to that effect, Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915, paragraph 45).

- 36 However, it is settled case-law that, in the field of equal treatment, the term ‘dismissal’ is broadly construed (see Case 19/81 *Burton* [1982] ECR 555, paragraph 9; *Marshall*, paragraph 34; Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 36; Case C-207/04 *Vergani* [2005] ECR I-7453, paragraph 27; and *Kleist*, paragraph 26).
- 37 Specifically, the Court has held that, in the context of Directive 76/207, the term ‘dismissal’ must be so construed as to cover the ending of the employment relationship between a worker and his employer, even as part of a voluntary redundancy scheme (*Burton*, paragraph 9), and that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained or passed the qualifying age for a retirement pension, that age being different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that directive (see, to that effect, *Marshall*, paragraph 38, and *Kleist*, paragraph 28).
- 38 As the Commission points out in its written observations, given that the employment rules at issue in the main proceedings are binding and that they set a retirement age which differs according to whether the employee is a man or a woman, they are similar to the regime examined by the Court in *Kleist*.
- 39 In the case before the referring court, therefore, the ending of Ms Kuso’s employment relationship, pursuant to Paragraph 25(2)(a) of the DO, amounts to a case of dismissal for the purposes of Article 3(1)(c) of Directive 76/207.
- 40 Next, it is necessary to establish whether the ending of that employment relationship constitutes a case of unlawful dismissal for the purposes of Article 3(1)(c) of Directive 76/207. To that end, consideration must be given as to whether or not the reason for that dismissal constitutes direct or indirect discrimination on grounds of sex for the purposes of Article 2 of that directive.
- 41 Under the first indent of Article 2(2) of Directive 76/207, ‘direct discrimination’ exists where one person is treated less favourably, on grounds of sex, than another person is, has been or would be treated in a comparable situation.
- 42 Paragraph 25 of the DO provides that the employment relationship of employees is to come to an end when they reach retirement age. However, under Paragraphs 26 and 65 of the DO, the retirement age for employees is 65 years in the case of men, but 60 years in the case of women.
- 43 Since the differentiating criterion used in those provisions relates expressly to the sex of the employees, it must be held that such national legislation creates a difference in treatment which is directly on grounds of sex.
- 44 In order to establish whether that difference in treatment constitutes unlawful discrimination for the purposes of Directive 76/207, it is necessary to consider whether, in circumstances such as those of the case before the referring court, men and women employees are in a comparable situation.
- 45 It is settled case-law that the comparability of such situations must be examined in the light, inter alia, of the object of the national legislation establishing the difference in treatment (see, to that effect, Case C-19/02 *Hlozek* [2004] ECR I-11491, paragraph 46, and *Kleist*, paragraph 34).
- 46 In the case before the referring court, the object of Paragraphs 25, 26 and 65 of the DO, which establish the difference in treatment between men and women, is to specify the conditions in which employment relationships may be terminated.
- 47 The advantage granted to women employees, consisting in their entitlement to a retirement pension at an age which is five years lower than that fixed for men, is not directly related to the object of the rules establishing a difference in treatment.

- 48 That advantage does not place women employees in a specific situation *vis-à-vis* men employees, as the situations of men and women are identical so far as the conditions governing termination of the employment relationship are concerned (see *Kleist*, paragraph 37 and the case-law cited).
- 49 It must therefore be held that men and women employees are in a comparable situation.
- 50 Under Article 2(2) of Directive 76/207, which establishes a distinction between direct and indirect discrimination, only indirect discrimination can escape being classified as ‘discrimination’ if it is ‘objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’. By contrast, no such possibility is open in the case of direct discrimination.
- 51 Since, as was found in paragraph 43 above, national legislation in the terms of the employment rules at issue in the main proceedings creates a difference in treatment directly on grounds of sex, the discrimination which it establishes is not open to objective justification.
- 52 Accordingly, since the Court has found, first, that the difference in treatment established by such legislation is directly on grounds of sex and that men and women employees are in a comparable situation, and, secondly, that Directive 76/207 does not allow any exception in the case of direct discrimination, it must be held that that difference in treatment constitutes direct discrimination on grounds of sex, prohibited by the directive.
- 53 Consequently, the answer to the question referred is that Article 3(1)(c) of Directive 76/207 must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, consisting of a body of employment rules which form an integral part of an employment contract concluded before the Member State concerned acceded to the European Union and under which the employment relationship is to come to an end upon attainment of the fixed retirement age, which differs depending on whether the employee is a man or a woman, constitutes discrimination prohibited by that directive where the employee concerned reaches that age after the accession.

Costs

- 54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 3(1)(c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, consisting of a body of employment rules which form an integral part of an employment contract concluded before the Member State concerned acceded to the European Union and under which the employment relationship is to come to an end upon attainment of the fixed retirement age, which differs depending on whether the employee is a man or a woman, constitutes discrimination prohibited by that directive where the employee concerned reaches that age after the accession.

[Signatures]