Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 3 July 2014[1]

Case C-417/13

ÖBB Personenverkehr AG
v
Gotthard Starjakob

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Social policy — Directive 2000/78/CE — Difference in treatment based on age — Reference date for the purposes of advancement — Discriminatory regulations of a Member State excluding periods of service completed before the age of 18 from accreditation for the purposes of determining pay — Adoption of new regulations with retroactive effect and without financial compensation — Continued difference in treatment — Justifications — Right to payment of the difference in pay — Sanctions — Limitation period)

1. This request for a preliminary ruling concerns the interpretation of Article 21 of the Charter of Fundamental Rights of the European Union[2] and of several provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[3]

2. The questions referred have arisen in the context of proceedings between ÖBB-Personenverkehr AG ('ÖBB') and Mr Starjakob concerning the lawfulness of the occupational pay scheme established by the Austrian legislature to eliminate age discrimination.

I – **Legal framework**

A – *Directive 2000/78*

3. Article 1 of Directive 2000/78 states that the purpose of the 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'.

4. Article 2 of that directive provides:

'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.

1 — Original language: French.
2 — 'The Charter'.
3 — OJ 2000 L 303, p. 16.

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;

…'

5. Article 3(1)(c) of that directive provides that the directive is to apply, within the limits of the areas of competence conferred on the European Community, to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and working conditions, including pay.

6. Article 6 of Directive 2000/78 reads:

'1. 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;

…'

7. Under Article 9(1) of Directive 2000/78, 'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended'.

8. Article 16(1)(a) of that directive provides that Member States are to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

9. Article 17 of that directive relates to sanctions and provides as follows:

'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.'

B – *Austrian law*

10. Until 31 December 1995, Paragraph 3 of the 1963 Regulation on Remuneration in the Federal Rail Transport Sector (Bundesbahn-Besoldungsordnung 1963),[4] entitled 'Reference date for the purposes of advancement' provided as follows:

'(1) For the purposes of ascertaining the reference date for the purposes of advancement, the following are treated as preceding the joining date, excluding periods before the 18th birthday and having regard to the limiting provisions in subparagraphs 4 to 8:

(a) the periods specified in subparagraph 2, in full,

(b) other periods, to the extent of one half.

(2) The periods prior to the date of engagement to be credited under subparagraph 1(a) are:

1. time spent in employment representing at least half the extent prescribed for full-time employees in the context of an employment relationship within the Austrian rail transport sector.

…

6. One single period cannot be taken into account more than once, with the exception of the double accounting provided for in Paragraph 32 of the [1974 Regulation on Remuneration in the Federal Rail Transport Sector (Bundesbahn-Besoldungsordnung 1974, BGBl. 263)]'.

11. Paragraph 3 of the 1963 BO was amended by the Law on Federal Railways (Bundesbahngesetz),[5] Paragraph 53a of which states:

'(1) For employees and pensioners whose service with the Austrian railways (ÖBB) is to commence or commenced … before or on 31 December 2004 and whose individual reference date for the purposes of advancement is to be or was determined on the basis of Paragraph 3 of [the 1963 BO], that date shall be recalculated, after notification of accreditable periods of service, according to the following provisions:

1. For the purposes of ascertaining the reference date for the purposes of advancement, accreditable periods (Z 2) after 30 June in the year during which nine school years are or would have been completed following entry into first grade … are treated as preceding the joining date.

2. Accreditable periods are as set out in the applicable accreditation rules defined in the relevant provisions of the 1963 BO …

(2) In the event that an individual reference date for the purposes of advancement is recalculated under paragraph (1), the following provisions apply:

1. Every period required for advancement in each of the first three salary steps is extended by one year.

2. Advancement takes place on 1 January following completion of each period required for advancement (advancement date).

4 — BGBl. 170/1963, 'the 1963 BO'.

5 — BGBl. I, 129/2011, 'the BBG'.

3. The recalculation of the individual reference date for the purposes of advancement shall be of no effect if it would lead to a decrease in salary compared with the date previously determined. [6]

…

(4) For the reference date for the purposes of advancement to be recalculated, evidence of accreditable periods of service under paragraph (1) must be duly supplied by employees and pensioners on a form provided by the employer. The existing reference date for the purposes of advancement shall remain unchanged and continue to apply to persons who fail to provide that evidence or whose evidence is incorrect or incomplete …

(5) In relation to any salary claims resulting from the recalculation of the reference date for the purposes of advancement, the period from 18 June 2009 until the date of promulgation of the federal law in the BGBl. I, 129/2011 shall be disregarded when calculating the three-year limitation period.'

12. In addition, the provisions of the Federal Law on Equal Treatment (Gleichbehandlungsgesetz) [7] state:

'Paragraph 17 — Principle of equal treatment in employment relations

(1) No one may be discriminated against, directly or indirectly, on grounds of … age … in the context of an employment relationship, notably:

…

2. in the determination of remuneration,

…

Paragraph 26 — Consequences of infringement of principle of equal treatment

…

(2) If, owing to an infringement by the employer of the principle of equal treatment contained in Paragraph 17(1)(2), a worker receives for the same work or for work of comparable value a lesser remuneration than that of a worker who is not the subject of discrimination on the grounds set out in Paragraph 17, he or she shall be entitled to receive payment from the employer of the difference and of compensation for non-material damage suffered.

…

Paragraph 29 — Limitation periods for exercise of rights

(1) … Rights resulting from Paragraph 26(2) … shall be subject to the three-year limitation period contained in Article 1486 [of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) [8]].

…'

6 — 'The acquired rights clause'.

7 — BGBl. I, 66/2004.

8 — 'The ABGB'.

13. Finally, the relevant provisions of the ABGB concerning limitation state as follows:

'Paragraph 1480: Claims for backdated annual benefits, in particular for interest … shall lapse after three years; the right itself shall be time-barred for non-use after 30 years.

Article 1486 — Specific limitation periods

Time-barred after three years: claims

…

5. by employees in connection with their remuneration and the reimbursement of costs arising from the contracts of workers, day labourers, domestic staff and all private employees …'

II – **Main proceedings and questions referred**

14. Mr Starjakob commenced his employment on 1 February 1990 with a legal predecessor to ÖBB. The reference date for the purposes of advancement in his case was determined to be 21 May 1986, taking into account periods of service from his 18th birthday onwards. One half of the period of apprenticeship completed by Mr Starjakob after reaching the age of 18 was accredited, while that completed prior to his reaching the age of 18 was disregarded, pursuant to Paragraph 3 of the 1963 BO.

15. According to the information supplied by the Oberster Gerichtshof (Supreme Court, Austria), if the applicant's reference date for the purposes of advancement were to be determined under the new provision in Paragraph 53(a)(1) of the BBG, that is, by also accrediting periods of service completed by the applicant before the age of 18 (after the 30 June following the end of the nine academic years of compulsory general schooling), this would result in a different reference date for the purposes of advancement, namely 22 June 1985. If this new date were applied but Mr Starjakob still graded in accordance with the previous legal position, this would result in a difference in salary in his favour of EUR 3 963.75 gross for the period from November 2007 to June 2012.

16. In 2012, citing the *Hütter* case,[9] Mr Starjakob commenced proceedings against ÖBB claiming payment of the difference that would have been payable to him for the period from 2007 to 2012 if the calculation of his reference date for the purposes of advancement had taken into account the period of apprenticeship completed before his 18th birthday.

17. The Landesgericht Innsbruck (Regional Court, Innsbruck) rejected the claim, holding that Paragraph 53a of the BBG abolished discrimination based on age. Mr Starjakob could only claim that the reference date for the purposes of advancement should be calculated in accordance with subparagraph 1 of that paragraph if he also accepted subparagraphs 2 and 4, relating to the extension of the periods required for advancement and the consequences of breach of the obligation to cooperate. As Mr Starjakob had still not supplied complete evidence of his previous periods of service, the reference date determined in his case remained as it was and he was unable to claim that he had suffered discrimination.

18. On appeal, the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck) upheld Mr Starjakob's claim. The court held that, in the absence of such evidence, the legal position applicable to Mr Starjakob was indeed that set out in the 1963 BO but that this legal position was discriminatory, so that it was necessary to recalculate the reference date for the purposes of

9 — C-88/08, EU:C:2009:381.

advancement taking into account the period of apprenticeship completed before the age of 18. However, to the extent that Paragraph 53a of the BBG did not apply to him owing to the lack of evidence of his previous periods of service, the required period for advancement remained at two years for all the salary steps.

19. In those circumstances the Oberster Gerichtshof, on an appeal on a point of law, decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 21 of the [Charter], in conjunction with Articles 7(1), 16 and 17 of [Directive 2000/78], to be interpreted as meaning:

(a) that an employee for whom the employer initially sets an incorrect increment reference date based on an age-discriminatory accreditation of previous periods of service as prescribed by law is in any event entitled to payment of the difference in salary based on the non-discriminatory increment reference date,

(b) or that the Member State has the option of eliminating the age-based discrimination by way of a non-discriminatory accreditation of previous periods of service even without financial compensation (by setting a new increment reference date and at the same time extending the period for advancement to the next salary step), in particular where such a solution, having a neutral effect on pay, is intended to preserve the employer's liquidity and avoid unreasonable expense resulting from recalculation?

(2) If Question 1(b) is answered in the affirmative:

May the legislature:

(a) also introduce such non-discriminatory accreditation of previous periods of service retroactively (specifically by way of the promulgated Law of 27 December 2011, BGBl I 129/2011, retroactive as from 1 January 2004) or

(b) does such accreditation take effect only from the point in time at which the new accreditation and incremental advancement rules are enacted or promulgated?

(3) If Question 1(b) is answered in the affirmative:

Is Article 21 of the Charter, in conjunction with Article 2(1) and (2) and Article 6(1) of [Directive 2000/78], to be interpreted as meaning:

(a) that a legislative rule which provides for a longer period … for incremental advancement for employment at the start of a career, thereby making it more difficult to advance to the next salary step, constitutes an indirect difference in treatment based on age,

(b) and, if such is the case, that such a rule is appropriate and necessary in the light of the limited professional experience at the start of a career?

(4) If Question 1(b) is answered in the affirmative:

Are Article 7(1) and Article 8(1), in conjunction with Article 6(1), of [Directive 2000/78] to be interpreted as meaning that the maintenance of an old, age-discriminatory rule simply in order to protect an employee from being disadvantaged in terms of income by a new, non-discriminatory rule (salary safeguard clause) is permissible and justified in order to preserve existing rights and legitimate expectations?

(5) If Question 1(b) and Question 3(b) are answered in the affirmative:

(a) May the legislature provide that the employee has a duty (or obligation) to cooperate for the purpose of establishing the accreditable previous periods of service and make transfer to the new accreditation and incremental advancement system dependent on fulfilment of that obligation?

(b) Can an employee who fails to cooperate as may reasonably be expected in setting the new increment reference date under the new, non-discriminatory accreditation and incremental advancement system, and who therefore deliberately does not avail himself of the non-discriminatory rule (remaining of his own volition under the old, age-discriminatory accreditation and advancement system), invoke age discrimination under the old system, or does his remaining under the old, discriminatory system simply in order to be able to bring monetary claims constitute an abuse of [law]?

(6) If Question 1(a) or Questions 1(b) and 2(b) are answered in the affirmative:

Does the EU-law principle of effectiveness under the first paragraph of Article 47 of the [Charter] und Article 19(1) TEU require that the period of limitation for claims founded in EU law cannot start to run until the legal position has been conclusively clarified by the pronouncement of a relevant decision by the Court of Justice of the European Union?

(7) If Question 1(a) or Questions 1(b) and 2(b) are answered in the affirmative:

Does the EU-law principle of equivalence require that a restriction, provided for in national law, of the period of limitation for bringing claims under a new accreditation and incremental advancement system (Paragraph 53a(5) [of the BBG]) must be extended to claims for differences in pay resulting from an old system involving age discrimination?'

III – **Analysis**

20. The pay scheme for ÖBB employees is based on an advancement system whereby a pay rise is awarded at the expiry of fixed periods, during the course of which the employee progresses in seniority. These periods run from a reference date for the purposes of advancement which is determined on an individual basis. Periods prior to the start of an employee's service with ÖBB are also accredited.

21. The reference date for the purposes of advancement is therefore a fictitious date which determines salary step grading and, therefore, salary progression. Determination of that date depends on the actual date of taking office and on experience that is considered relevant. The greater the experience, the earlier the date and the higher the grading on the pay scale.

22. On the basis of the ruling in *Hütter*,[10] the Austrian legislature wished to set up a new system permitting the accreditation of periods of service completed by workers before the age of 18, which was not previously the case.

23. It is apparent from the drafting history of Paragraph 53a of the BBG that the Austrian legislature wished to extend to ÖBB employees the reforms that had been made to the public administration at a federal level.

10 — EU:C:2009:381.

24. The legislature's aim was therefore to eliminate the age discrimination caused by not accrediting periods of service completed by ÖBB employees before the age of 18. However, in order to ensure that the effect of this on employers would be cost-neutral, the new system was structured so as to simultaneously extend by one year the period required to progress to each one of the first three salary steps. The new rules also make any recalculation of the reference date dependent on workers supplying evidence of their previous periods of service.

25. The questions asked by the referring court invite the Court to rule on the question of whether the new system established by the Austrian legislature is compatible with the prohibition on age discrimination contained in Article 21 of the Charter and in Directive 2000/78.

26. In essence, the Oberster Gerichtshof wishes to know whether or not a system, such as the one at issue in the main proceedings, which attempts to put an end to age discrimination whilst remaining cost-neutral and preserving workers' acquired rights, is compatible with Directive 2000/78.

27. In order to respond to the various questions raised by the referring court, I will first examine whether, as Mr Starjakob and the Commission maintain, the effect of the new system is to continue the age discrimination which it seeks to eliminate. I will then set out my view on the legal inferences to be drawn by the referring court from the existence of age discrimination and, in particular, whether this necessarily leads to financial compensation for workers who have been discriminated against. Finally I will respond to the questions concerning the conformity with EU law of limitation periods under Austrian law.

A – *The continued existence of age discrimination*

1. Difference in treatment based on age under the new system

28. It is first necessary to examine whether the new system entails a difference in treatment based on age, within the meaning of Article 2(1) of Directive 2000/78. In that regard, it should be remembered that, under that provision, the 'principle of equal treatment' means that there is to 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 that directive states that, for the purposes of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 of the directive.

29. In my opinion, although the new system implemented by the Austrian legislature allows periods of service completed by workers before the age of 18 to be accredited, it retains another sort of difference in treatment based on age.

30. We have seen that, under the new system, recalculating the reference date by accrediting periods of service completed before the age of 18 is coupled with a slower rate of advancement in the first career steps. It is evident from the parties' written replies to the Court's questioning that, under the new system, the individual reference date for the purposes of advancement has to be recalculated for all employees and pensioners who commenced service or who were employed by ÖBB before 31 December 2004. Recalculating the reference date has the effect of extending the advancement period for the employee in question, under Paragraph 53(a)(2)(1) of the BBG.

31. It would appear, therefore, that the new system applies to all workers, apparently ending the previous age discrimination in an egalitarian way.

32. However, as Mr Starjakob and the Commission rightly point out, the way that the various provisions of Paragraph 53(a) of the BBG interrelate means that the new system seems to focus primarily on workers previously discriminated against.

33. As the Austrian Government itself observes, in order to prevent any negative effect on the employee of a recalculated reference date for the purposes of advancement coupled with a slower rate of advancement, Paragraph 53a(2)(3) of the BBG states that the recalculation of the individual reference date for the purposes of advancement is to be of no effect if it would lead to a decrease in salary compared with the date previously determined. In that situation, the extension of the advancement period by three years is not to apply either.

34. It is therefore established that it is only employees for whom the reference date for the purposes of advancement has to be recalculated who are affected by the extension of the first three periods required for advancement.

35. Taking into account the acquired rights clause in Paragraph 53a(2)(3) of the BBG, it is likely that employees relying on the periods of service they completed after the age of 18, and who do not have any periods of service completed prior to that age on which to rely, will not have their reference date recalculated and, consequently, will not have the period required to advance in each of the first three steps extended by a year. Thus, in the case of employees for whom all the accreditable periods of service were completed after the age of 18, an extension of the periods required for advancement purposes would lead to a drop in salary, as they would be placed lower on the pay scale.

36. Therefore, through the application of the acquired rights clause, employees who are in a similar situation in relation to valid periods of service, and who have the same employer, can end up being treated differently, in relation to the length of the periods required for advancement, depending on whether or not their reference date has to be recalculated.

37. The logic inherent in the new system, which links the recalculation of the reference date to a one-year extension of the period required for advancement in each of the first three salary steps, combined with the salary safeguard clause, therefore in fact preserves a difference in treatment between those employees who completed their periods of service before the age of 18 and those who completed all of their accreditable service periods after that age. Only the first category of workers, whose reference date is recalculated, will in practice be affected by the one-year extension of the period required for advancement in each of the first three salary steps.

38. It follows that the new system retains a difference in treatment directly based on the criterion of age, within the meaning of Article 2(1) and Article 2(2)(a) of Directive 2000/78. It is ultimately up the referring court, to whom it falls to interpret the provisions of its national law, to verify whether the new system does indeed entail this difference in treatment based on age.

2. Justification of difference in treatment based on age

39. The second stage is to examine whether that difference in treatment may be justified under Article 6(1) of Directive 2000/78.

40. The first subparagraph of that provision specifies that Member States may provide that differences of treatment on grounds of age are not to 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.

41. The Court has frequently held that Member States may put in place measures incorporating differences in treatment based on age, under Article 6(1), first subparagraph, of Directive 2000/78. They enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it. [11]

42. In view of these principles, it is necessary to determine whether Paragraph 53a of the BBG, and in particular Paragraph 53a(2)(3), is a measure that pursues a legitimate aim and that is appropriate and necessary for the achievement of this aim, in that it allows for the one-year extension of the period required for advancement in each of the first three salary steps not to be applied to those employees who completed all of their accreditable service periods after the age of 18.

43. It is apparent from the explanations supplied to the Court that the new system attempts to reconcile several aims, namely a different method of valuing professional experience at the start of a career, a neutral financial effect of the reforms and the protection of acquired rights.

44. In relation to the desire for a different method of valuing professional experience at the start of a career, my view is that the decision made by the Austrian legislature to extend by a year the period required to advance in each of the first three salary steps is not, of itself, open to criticism. Apart from the fact that such a decision falls, in my opinion, within the limits of the legislature's discretion in relation to social policy, it should be borne in mind that the Court has already held that rewarding experience that enables a worker to perform his duties better is, as general rule, a legitimate aim of wages policy. [12] I consider it warranted for an employer to place a different value on professional experience at the start of a career, which, here, means that the rate of advancement is slower at the start of a career. That experience can gradually become more highly valued as the worker integrates into his work environment and his contribution becomes more efficient.

45. It remains to be determined, under Article 6(1) of Directive 2000/78 whether, in the context of the wide discretion that Member States are acknowledged to enjoy, the measures put in place to achieve that aim are appropriate and necessary.

46. In that regard, as the Commission rightly points out, the existence of a difference in treatment between workers who completed all their service periods after the age of 18 and those who completed their service periods before then suffices to show that the aim of valuing professional experience differently at the start of the career conflicts with the principle of proportionality, which requires that such an aim is pursued in a consistent and systematic manner. [13]

47. In fact, excluding from the one-year extension of the period required for advancement in each of the first three salary steps employees who did not complete the totality of their periods of service after the age of 18 demonstrates, of itself, that the aim of valuing professional experience differently at the start of the career is not pursued in a coherent and systematic manner. Put more simply, it is not the Austrian legislature's real aim.

48. An examination of the drafting history of Paragraph 53a of the BBG shows that, in establishing the new system, the Austrian legislature sought above all to ensure that the reforms had a cost-neutral effect. It is really this aim which led the legislature to connect the determination of a new reference date to a one-year extension of the period required for advancement in each of the first three salary steps.

11 — See *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 68,) and *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 41).

12 — *Hennings and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 72 and the case-law cited).

13 — See, in particular, *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508, paragraph 85).

49. In its observations, the Austrian Government raises the point that the new rules applicable to ÖBB employees should be understood in the context of a large number of other measures aiming to eradicate unjustified age discrimination from the Austrian legal system. The Austrian Government points out that, as a result of *Hütter*,[14] similar measures were needed for employees elsewhere in the public sector, in the Federal State, the Länder and local authorities. The Government states that this affected half a million employees, that is, one eighth of the Austrian workforce.

50. The Austrian Government maintains that accrediting all previous periods of service without simultaneously altering the rate of advancement would have led to additional expense, representing several per cent of the Republic of Austria's economic performance, which that Member State would not have been able to afford.

51. I am of the opinion that these arguments put forward by the Austrian Government must fail. The Court has already held that, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.[15]

52. Finally, as for aiming to preserve the acquired rights of workers who have not been the victims of age discrimination, it should be noted that the protection of the established rights of a category of persons constitutes an overriding reason in the public interest.[16] I consider that this aim also constitutes a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

53. The acquired rights clause contained in Paragraph 53a(2)(3) of the BBG is capable of attaining that aim, to the extent that it prevents a decrease in salary from occurring following the recalculation of the reference date.

54. However, it is still necessary to determine whether or not that clause goes beyond what is necessary to attain that aim.

55. I would reiterate that the effect of that provision is to preclude the recalculation of the reference date and the extension of the periods required for advancement if that would lead to a decrease in salary for ÖBB employees, and that this, in practice, appears to affect mainly, if not exclusively, employees who have not been subject to discriminatory treatment, namely those who completed all of their periods of service after the age of 18.

56. Like the Commission, I consider that it would have been possible to achieve the desired result, namely the preservation of the previous pay of employees who had not suffered discrimination, without excluding that category of employees from the application of the one-year extension of the period required for advancement in each of the first three salary steps.

57. Apart from the fact that applying that extension fairly would have demonstrated the coherent approach of the new system in terms of the aim of valuing professional experience differently at the start of a career, the Austrian legislature would have been able to pursue its aim of preserving the acquired rights of workers who have not suffered discriminatory treatment by putting in place a transitional system. In this respect, I would observe that a system such as that provided for in Paragraph 53a of the BBG is not a transitional system, in that it is intended to govern the career of the workers to whom it applies until they reach the last step of the pay ladder.

14 — EU:C:2009:381

15 — *Fuchs and Köhler* (EU:C:2011:508, paragraph 74).

16 — *Commission* v *Germany* (C-456/05, EU:C:2007:755, paragraph 63) and *Hennings and Mai* (EU:C:2011:560, paragraph 90).

58. Setting up a true transitional system would have enabled employees who completed all of their periods of service after the age of 18 to retain the same level of pay during a transitional period, despite the extension of the period required for advancement in each of the first three steps.

59. More specifically, if the reference date is not recalculated to an earlier point in time, the effect of the one-year extension of the period required for advancement in each of the first three salary steps on those employees who have not suffered discriminatory treatment would be to downgrade those employees to a lower step. In the absence of accompanying measures, this downgrading would inevitably mean a drop in pay. To compensate for this drawback, such an accompanying measure could have consisted of providing for the pay previously received by those employees to remain as it was until they regained the salary step on which they were prior to the reforms. In other words, as the Commission explains in its observations, for those employees affected by a loss in income owing to the extension of the periods required for advancement, pay could have remained unchanged by dissociating it from the salary step on which they would effectively be, until such time as they reached the step corresponding to that pay.

60. It is true that such a transitional system would have fixed the pay of workers who had suffered no discrimination for several years. However, aside from the fact that that period would have been short, probably no more than three years in length, such a system does not seem to me to cause excessive harm to workers' rights and it would, in my view, have constituted a satisfactory compromise in order to strike a balance between the elimination of age discrimination, on the one hand, and the protection of rights acquired by workers who had not been discriminated against, on the other.

61. In view of these arguments, I consider that Paragraph 53a(2)(3) of the BBG, to the extent that it effectively excludes those employees who completed all of their periods of service after the age of 18 from the one-year extension of the period required for advancement in each of the first three salary steps, goes beyond what is necessary to attain the aim of preserving those workers' acquired rights.

62. It follows from the above observations that Article 2 and Article 6(1) of Directive 2000/78 must be interpreted as conflicting with a national measure, such as the one at issue in the main proceedings, under which workers who completed their periods of service before the age of 18 may have those periods accredited, in return for a one-year extension of the period required for advancement in each of the first three salary steps, while such an extension is not in practice applied to workers who completed all of their accreditable periods of service after the age of 18.

63. I will now examine the legal inferences to which, in my opinion, the referring court must draw from the continued existence of age discrimination under the new system.

B – *Legal consequences of continued existence of age discrimination*

64. The first point to bear in mind here is the obligation to interpret national law in conformity with EU law, which requires national courts to do whatever lies within their jurisdiction, while taking into consideration the whole body of domestic law and applying the interpretative methods recognised by domestic law, with a view to ensuring that Directive 2000/78 is fully effective and achieving an outcome consistent with the objective pursued by it.[17]

65. Where it is not possible to interpret and apply national legislation in conformity with the requirements of that directive, it should also be remembered that, under the principle of the primacy of EU law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of EU law must be disapplied.[18]

17 — See, to that effect, *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:517, paragraph 56).

18 — See *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 54 and the case-law cited).

66. In addition, it is settled case-law that, where national law provides that a number of groups of persons are to be treated differently, in breach of EU law, and, so long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. [19] The Court also stated that the arrangements applicable to the members of the favoured category remained, for want of the correct application of EU law, the only valid point of reference.

67. It follows from this case-law that, so long as a system to abolish discrimination on grounds of age in a way that conforms with the provisions of Directive 2000/78 has not been adopted, the national court must set aside any discriminatory domestic law, without having to request or await its prior removal by the legislature, and to apply to the persons within the disadvantaged category the same system enjoyed by persons within the other category.

68. In the context of the main proceedings, this therefore means, in my opinion, that the reference date for the purposes of advancement should be recalculated as 22 June 1985, without the need for a one-year extension of the period required for advancement in each of the first three salary steps. According to the information supplied by the referring court, this leads to a difference in salary of EUR 3 963.75 gross payable to Mr Starjakob, for the period from November 2007 to June 2012.

69. If payment of the difference in salary can indeed be claimed by Mr Starjakob on the basis of the case-law referred to above, I would point out that, in the light of the information supplied by the referring court, he may also claim the award of financial compensation based on the national provisions implementing Directive 2000/78, and in particular the provisions implementing Article 17 of that directive.

70. As the Court stated in *Asociația Accept*, [20] Article 17 of Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions applicable to infringements of the national provisions adopted pursuant to that directive and for taking all measures necessary to ensure that they are applied. Although it does not call for the adoption of specific sanctions, that article requires that the sanctions applicable to infringements of the national provisions pursuant to that directive must be effective, proportional and dissuasive. [21]

71. According to the Court, the rules on sanctions put in place in order to transpose Article 17 of Directive 2000/78 into the national law of a Member State must in particular ensure, in parallel with measures taken to implement Article 9 of that directive, real and effective legal protection of the rights deriving from it. The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect while respecting the general principle of proportionality. [22] In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78. [23]

72. It is true that, in relation to sanctions for a breach of the prohibition on discrimination, Article 17 of Directive 2000/78 leaves it to Member States to choose between the different solutions suitable for achieving their objective. [24]

19 — See, in particular, *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 57); *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraph 39); and *Landtová* (C-399/09, EU:C:2011:415, paragraph 51).

20 — C-81/12, EU:C:2013:275.

21 — Ibid. (paragraph 61).

22 — Ibid. (paragraph 63 and the case-law cited).

23 — Ibid. (paragraph 64).

24 — See, by analogy, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 28).

73. However, once a Member State has chosen particular rules on sanctions, it must apply them in conformity with the requirements of EU law.

74. In particular, according to the Court, if a Member State chooses to penalise breaches of the prohibition on discrimination by the award of compensation, then, in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be appropriate in relation to the damage sustained and must, therefore, amount to more than purely nominal compensation. [25] It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of EU law, in so far as it is given discretion to do so under national law. [26]

75. In the light of these facts, it is important to underline that Paragraph 26(2) of the Federal Law on Equal Treatment which, as was confirmed at the hearing, transposes Article 17 of Directive 2000/78 into Austrian law, provides that a worker who has been discriminated against has a right to payment from the employer of the difference in pay as a result of discrimination and to compensation for non-material damage suffered.

76. The right to payment of the difference in pay as a result of discrimination on grounds of age is therefore expressly provided for in the Austrian legislation transposing Directive 2000/78, so that I do not see how, in the context of the main proceedings, the employer could avoid this. Moreover, Paragraph 26(2) of the Federal Law on Equal Treatment also provides that a worker such as Mr Starjakob may claim compensation for non-material damage suffered.

77. It is clear that the payment that Mr Starjakob claims for the difference in pay requires his cooperation. In my opinion, while he cannot be compelled to cooperate, by supplying evidence of his periods of service completed before the age of 18, under a new system where, as we have seen, age discrimination continues, he must nevertheless provide such evidence to the referring court.

78. I will now examine the sixth and seventh questions relating to the compatibility of limitation periods under Austrian law with EU law.

C – *Compatibility of limitation periods under Austrian law with EU law*

79. There are two limitation periods that need to be differentiated.

80. First, the Austrian legislation sets a 30-year limitation period on an employee's right to request a re-evalution of the periods of service that are to be taken into account in determining the reference date for the purposes of advancement. [27] It is clear from the file that Mr Starjakob is not affected by this 30-year limitation period.

81. Secondly, Austrian law sets a three-year limitation period on salary claims. [28]

25 — Idem.

26 — Idem.

27 — Paragraph 1480 of the ABGB.

28 — Paragraph 29(1) of the Federal Law on Equal Treatment, which refers to Paragraph 1486(5) of the ABGB.

82. It is settled case-law that, in the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). [29]

83. In its sixth question, the referring court, in essence, requests the Court to rule on whether EU law and in particular the principle of effectiveness means that the limitation period for rights based in EU law does not start to run until the date of a judgment from the Court clarifying the legal position.

84. The answer to this question can be found in the judgment in *Pohl* [30], in which the Court held, in relation to the 30-year limitation period, that EU law and in particular the principle of effectiveness is not incompatible with national legislation setting such a period, which starts to run on the date of conclusion of the agreement on the basis of which the reference date was fixed or on the date of being graded on the wrong salary step, regarding an employee's right to seek a re-evaluation of the periods of service to be accredited in the determination of that reference date.

85. In arriving at that conclusion, the Court pointed out that the starting point for the limitation period is, in principle, a matter for national law and the fact that the Court may have ruled that a breach of EU law has occurred does not, in principle, affect this starting point. [31] The Court concluded that the respective dates on which the judgments in *Österreichischer Gewerkschaftsbund* [32] and *Hütter* [33] were handed down did not affect the starting point of the 30-year limitation period and, therefore, were irrelevant for the purposes of determining whether, in the main proceedings in the *Pohl* case, [34] the principle of effectiveness had been respected.

86. Such a solution may, in my opinion, be extended to the three-year limitation period applicable to salary claims arising from discrimination. EU law does not in any way make application of this time-limit dependent on the date when judgment was handed down in *Hütter*, [35] namely 18 June 2009.

87. That being said, in accordance with the principle of procedural autonomy, the Austrian legislature was free to take account of the date on which judgment was handed down in *Hütter*, [36] as it did in Paragraph 53(a)(5) of the BBG, to bring about a restriction of the three-year limitation period.

88. Finally, in its seventh question, the referring court asks the Court to rule on the question whether the principle of equivalence requires that a restriction, provided for in Paragraph 53a(5) of the BBG, of the limitation period for bringing salary claims resulting from the fixing of a new reference date for the purposes of advancement under the new system must be extended to claims for differences in pay resulting from an old system entailing age discrimination.

89. I would reiterate that, under Paragraph 53(a)(5) of the BBG, '[i]n relation to any salary claims arising from the recalculation of the reference date for the purposes of advancement, the period from 18 June 2009 until the date of promulgation of the federal law in the BGBl. I, 129/2011 shall be disregarded when calculating the three-year limitation period'.

29 — See, in particular, *Pohl* (C-429/12, EU:C:2014:12, paragraph 23 and the case-law cited).

30 — EU:C:2014:12.

31 — *Pohl* (C-429/12, EU:C:2014:12, paragraph 31 and the case-law cited).

32 — C-195/98, EU:C:2000:655.

33 — EU:C:2009:381.

34 — EU:C:2014:12.

35 — EU:C:2009:381.

36 — Idem.

90. In accordance with the principle of the primacy of EU law, the national court is obliged only to set aside those provisions of its domestic law that infringe EU law. Although, as discussed, the provisions of Paragraph 53a of the BBG which have the effect of continuing age discrimination must be set aside by the national court, this is not the case with provisions that comply with EU law, such as Paragraph 53a(5) of the BBG. This provision of the new system is, in my opinion, fully applicable in the context of the main proceedings.

IV – **Conclusion**

91. In the light of the above considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Oberster Gerichtshof as follows:

Article 2 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 contrary to a national measure such as that in the main proceedings under which workers who completed their periods of service before the age of 18 may have these accredited, in return for a one-year extension of the period required for advancement in each of the first three salary steps, while this extension is not, in practice, applied to workers who completed all their accreditable periods of service after the age of 18.

For as long as a system to abolish age discrimination in a way that conforms with the provisions of Directive 2000/78 has not been put in place, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged category the same arrangements as those enjoyed by persons in the other category.

It is for the national court to apply the legislation transposing Directive 2000/78 into its national law and, in particular, the legislative provisions transposing Article 17 of that directive, to a situation such as that in the case in the main proceedings.

EU law does not conflict either with the application of a three-year limitation period on salary claims resulting from age discrimination or with a decision by the national legislature to restrict that limitation period for the whole of the period between 18 June 2009, being the date when the *Hütter* judgment (C-88/08, EU:C:2009:381) was handed down, and the date of promulgation of national legislation providing for the accreditation of periods of service completed prior to the age of 18.