

JUDGMENT OF THE COURT (Grand Chamber)

23 September 2008^{*}

In Case C-427/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesarbeitsgericht (Germany), made by decision of 27 June 2006, received at the Court on 18 October 2006, in the proceedings

Birgit Bartsch

v

Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and L. Bay Larsen, Presidents of Chambers, J.N. Cunha Rodrigues (Rapporteur), R. Silva de Lapuerta, K. Schieman, J. Makarczyk, P. Lindh, J.-C. Bonichot and T. von Danwitz, Judges,

^{*} Language of the case: German.

Advocate General: E. Sharpston,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 October 2007,

after considering the observations submitted on behalf of:

- Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, by J. Masling, Rechtsanwalt,
- the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,
- the Netherlands Government, by C. Wissels, acting as Agent,
- the United Kingdom Government, by E. O'Neill, acting as Agent, and by A. Dashwood, Barrister,
- the Commission of the European Communities, by V. Kreuschitz and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2008,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 13 EC, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and of general principles of Community law.
- ² The reference was made in the context of a dispute between Mrs Bartsch and Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH ('BSH Altersfürsorge'), which is a company provident fund, with regard to this latter's refusal to pay Mrs Bartsch a survivor's pension.

Legal context

The Community rules

- ³ Article 1 of Directive 2000/78 provides:

'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.’

4 Article 6 states:

‘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;
- (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.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.’

- 5 In accordance with the first paragraph of Article 18 of the directive, the latter was to be transposed into the national law of the Member States by 2 December 2003 at the latest. However, the second paragraph of that article states:

‘In order to take account of particular conditions, Member States may, if necessary, have an additional period of three years from 2 December 2003, that is to say a total of six years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. ...’

- 6 The Federal Republic of Germany made use of this option, so that the provisions of Directive 2000/78 on age and disability discrimination were to be implemented in that Member State by 2 December 2006 at the latest.

The BSH Altersfürsorge guidelines

- 7 Paragraph 6(4) of the BSH Altersfürsorge guidelines dated 1 January 1984, in the version of 1 April 1992 ('the guidelines'), provides:

'Conditions for the retirement pension

...

4. A retirement pension (Paragraph 5(1)(b)) shall be paid to the widow(er) of an employee who has died during his or her employment relationship and who had fulfilled the qualifying period (Paragraph 2) provided that a claim for a survivor's pension (widow(er)'s pension) exists under the German statutory pension insurance scheme. This applies *mutatis mutandis* to the widow(er) of the recipient of a retirement pension.

Payments will not be made if

(a) the widow/widower is more than 15 years younger than the former employee,

...'

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

- 8 It is apparent from the decision to refer that Mrs Bartsch, who was born in 1965, married Mr Bartsch in 1986. The latter was born in 1944 and died on 5 May 2004. On 23 February 1988 Mr Bartsch had concluded an employment contract with Bosch-Siemens Hausgeräte GmbH ('BSH'). He started work with them on 1 March 1988 and was employed as a salesman until his death.
- 9 BSH Altersfürsorge, which was established by BSH, undertook to perform any obligations with respect to Mrs Bartsch that that company had contracted concerning a company pension for the benefit of the late Mr Bartsch.
- 10 It is also apparent from the decision to refer that the employment relationship between Mr Bartsch and BSH was governed by the guidelines and, in particular, Paragraph 6 thereof. The situation in the main proceedings falls within the terms of Paragraph 6(4)(a) of the guidelines in so far as Mrs Bartsch is more than 15 years younger than her deceased husband.
- 11 After the death of her husband, Mrs Bartsch requested BSH Altersfürsorge to pay her a survivor's pension on the basis of the guidelines.
- 12 BSH Altersfürsorge rejected Mrs Bartsch's request and she applied to the Arbeitsgericht (Labour Court) for a declaration that the provident fund was obliged to pay her a pension in accordance with the guidelines. The Arbeitsgericht rejected her application and she appealed to the Landesarbeitsgericht (Higher Labour Court), which upheld the judgment at first instance.

13

Mrs Bartsch applied for review on a point of law of the judgment of the Landesarbeitsgericht to the Bundesarbeitsgericht (Federal Labour Court), which decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) (a) Does the primary law of the European Communities contain a prohibition of discrimination on grounds of age, protection under which must be guaranteed by the Member States even if the allegedly discriminatory treatment is unconnected to Community law?

- (b) If question (a) is answered in the negative, does such a connection to Community law arise from Article 13 EC or — even before the time-limit for transposition has expired — from Directive 2000/78 ...?

- (2) Is any prohibition of discrimination on grounds of age arising from the answer to question 1 also applicable between private employers on the one hand and their employees or pensioners and their survivors on the other hand?

- (3) If question 2 is answered in the affirmative:
 - (a) Does a provision of an occupational pension scheme, which provides that a survivor’s pension will not be granted to a surviving spouse in the event that the survivor is more than 15 years younger than the deceased former employee, fall within the scope of the prohibition of discrimination on grounds of age?

- (b) If question 3(a) is answered in the affirmative, can such a provision be justified by the fact that the employer has an interest in limiting the risks arising from the occupational pension scheme?

- (c) If question 3(b) is answered in the negative, does the possible prohibition of discrimination on grounds of age have unlimited retroactive effect as regards the law relating to occupational pension schemes or is it limited as regards the past, and if so in what way?

The questions referred for a preliminary ruling

Question 1

- ¹⁴ In the two parts of its first question, which can be examined together, the referring court asks whether the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is mandatory where the allegedly discriminatory treatment contains no link with Community law. If this is answered in the negative, that court wishes to ascertain whether, in circumstances such as those at issue in the main proceedings, such a link to Community law arises from Article 13 EC or from Directive 2000/78, even before the time-limit allowed to the Member State concerned for transposition has expired.

- 15 It is apparent from the case-law of the Court that, where national rules fall within the scope of Community law and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the general principles of Community law (see to that effect, in particular, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75).
- 16 Neither Directive 2000/78 nor Article 13 EC, however, enable a situation such as that in issue in the main proceedings to be brought within the scope of Community law.
- 17 On the one hand, the guidelines do not constitute a measure implementing Directive 2000/78 and, on the other hand, the death of Mr Bartsch occurred before the time-limit allowed to the Member State concerned for transposing the directive had expired.
- 18 Article 13 EC, which permits the Council of the European Union, within the limits of the powers conferred upon it by the EC Treaty, to take appropriate action to combat discrimination based on age, cannot, as such, bring within the scope of Community law, for the purposes of prohibiting discrimination based on age, situations which, like that in the main proceedings, do not fall within the framework of measures adopted on the basis of that article, specifically Directive 2000/78 before the time-limit provided therein for its transposition has expired.
- 19 Contrary to the argument put forward by the Commission, the case which gave rise to the judgment in Case C-122/96 *Saldana and MTS* [1997] ECR I-5325 cannot support a conclusion contrary to that set out in the previous paragraph.

- 20 That judgment concerned the application of Article 6 of the EC Treaty (now, after amendment, Article 12 EC), which confers directly, within the scope of application of the Treaty, the right to non-discrimination on grounds of nationality (see, in particular, Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 34).
- 21 In that regard the Court noted, in paragraph 22 of *Saldana and MTS*, that the dispute in the main proceedings concerned the protection of interests relied on by a shareholder who was a national of one Member State against a company established in another Member State. At paragraph 23 of the same judgment, the Court pointed out that Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) EC) empowered the Council and the Commission, for the purpose of giving effect to freedom of establishment, to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the EC Treaty (now the second paragraph of Article 48 EC) with a view to making such safeguards equivalent throughout the Community.
- 22 The Court concluded, in paragraph 23, that rules which, in the area of company law, seek to protect the interests of shareholders come ‘within the scope of application of the Treaty’, within the meaning of the first paragraph of Article 6 of the Treaty, and are accordingly subject to the prohibition of discrimination based on nationality.
- 23 The applicability of Community law in that case did not, therefore, result solely from the fact that there was discrimination based on nationality, but depended on the finding that the national rules at issue fell within the scope of application of the Treaty.

24 That latter aspect, moreover, distinguishes this case from that which gave rise to the judgment in *Mangold*. In that case, the national rules in question were a measure implementing a Community directive, namely, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), by means of which those rules were thus brought within the scope of Community law (see *Mangold*, paragraph 75). By contrast, the guidelines at issue in the main proceedings do not correspond to measures transposing Community provisions.

25 In view of the above considerations, the answer to the first question must be that the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. No such link arises either from Article 13 EC, or, in circumstances such as those at issue in the main proceedings, from Directive 2000/78 before the time-limit allowed to the Member State concerned for its transposition has expired.

Questions 2 and 3

26 In view of the answer given to the first question, it is unnecessary to answer the second and third questions.

Costs

- ²⁷ 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 (Grand Chamber) hereby rules:

The application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. No such link arises either from Article 13 EC, or, in circumstances such as those at issue in the main proceedings, from Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, before the time-limit allowed to the Member State concerned for its transposition has expired.

[Signatures]