JUDGMENT OF THE COURT (Second Chamber)

8 September 2011 *

In Joined Cases C-297/10 and C-298/10,

REFERENCES for preliminary rulings under Article 267 TFEU from the Bundesarbeitsgericht (Germany), made by decisions of 20 May 2010, received at the Court on 16 June 2010, in the proceedings

Sabine Hennigs (C-297/10)

v

Eisenbahn-Bundesamt

and

Land Berlin (C-298/10)

v

Alexander Mai,

* Language of the case: German.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: V. Trstenjak,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 26 May 2011,

after considering the observations submitted on behalf of:

— Ms Hennigs, by M. Peiseler and A. Seulen, Rechtsanwälte,

— Mr Mai, by H.-W. Behm, Rechtsanwalt,

— Land Berlin, by J. Zeisberg, Rechtsanwalt,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the Belgian Government, by M. Jacobs and C. Pochet, acting as Agents,

— the European Commission, by V. Kreuschitz and J. Enegren, acting as Agents,

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

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation of Articles 21 and 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), the principle of non-discrimination on grounds of age, and 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).

2 The references were made in the course of proceedings between two public sector contractual employees, Ms Hennigs and Mr Mai, and their respective employers, the Eisenbahn-Bundesamt and the *Land* of Berlin, concerning the determination of their pay.

Legal context

European Union legislation

3 Recitals 9, 11, 25 and 36 in the preamble to Directive 2000/78 state:

'(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

...

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be jus-

tified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

…

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.'

4 According to Article 1 of Directive 2000/78, 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.'

5 Article 2 of the 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.

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;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …'

6 Under Article 3(1)(c) of the directive, it applies to all persons, as regards both the public and private sectors, including public bodies, in relation inter alia to employment and working conditions, including pay.

7 Article 6 of the directive 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;

…'

8 Article 16 of the directive states:

'Member States shall take the necessary measures to ensure that:

…

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements … are, or may be, declared null and void or are amended.'

9 Article 18 of the directive states:

'Member States … may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. …

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. …'

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

National legislation

Federal legislation on equal treatment

11 The General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897, 'the AGG') transposed Directive 2000/78.

12 Paragraph 10 of the AGG, 'Permissible difference of treatment on grounds of age', provides:

'Paragraph 8 notwithstanding, a difference of treatment on grounds of age is also permissible if it is objective and reasonable and justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

…

2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.

…'

Collective agreements applicable to contractual employees in the public sector

13 According to the referring court, the pay of contractual employees in the public sector is determined by the social partners by means of collective agreements.

— Collective agreements applicable to contractual employees of the *Land* of Berlin (Case C-298/10)

14 At the material time for the main proceedings, employment relationships of contractual employees of the *Land* of Berlin were governed by the Federal Collective Agreement for contractual employees (Bundes-Angestelltentarifvertrag) of 23 February 1961 ('the BAT'). The BAT had been concluded for federal contractual employees but also applied to contractual employees of the *Länder* and municipalities.

15 The BAT had been supplemented by Collective Pay Agreement No 35 pursuant to the BAT (Vergütungstarifvertrag Nr. 35 zum BAT).

16 Paragraph 27 of the BAT reads as follows:

'A. Employees covered by Annex 1a

…

1. In the collective pay agreement, basic pay in the salary groups shall be determined according to age categories. The basic pay of the first age category (initial basic pay) shall be paid from the start of the month in which an employee in salary groups III to X reaches the age of 21 and in salary groups I to IIb the age of 23. Every two years,

the employee shall receive the basic pay of the next age category, until he reaches the basic pay of the last age category (final basic pay).

2. If an employee in salary groups III to X is appointed at the latest at the end of the month in which he reaches the age of 31, he shall receive the basic pay of his age category. If the employee is appointed at a later date, he shall receive the basic pay of the age category which results when the age reached on appointment is reduced by half the number of years completed since the employee reached the age of 31. From the start of each month in which the employee reaches an odd-numbered age, he shall receive the basic pay of the next age category until he reaches the final basic pay. For employees in salary groups I to IIb, the first to third sentences apply *mutatis mutandis*, with 35 years of age being substituted for 31 years of age.

…'

17 Paragraph 27(C) of the BAT provides that professional experience acquired before the employee is appointed may under certain conditions be taken into account to place him in a higher category than would normally have been allocated him on grounds of age.

18 The referring court explains, with reference to the BAT, that basic pay is calculated by salary group. Group X is the lowest and group I the highest. The classification of an employee in one of salary groups I to IIa in principle requires a university degree. As regards age categories, the court states, by way of example, that for groups I to Ib final basic salary is attained with age category 47, in other words when the employee reaches the age of 47. The BAT further provides that basic pay is supplemented by a 'local' supplement intended to cover part of the employee's financial burdens associated with his family status.

19 The referring court states that Annex 1c to Collective Pay Agreement No 35 pursuant to the BAT laid down the initial and final basic pay for employees in groups I to X from 1 May 2004. The court also states that the BAT remained in force for contractual employees of the *Land* of Berlin until 1 April 2010.

— Collective agreements applicable to federal contractual employees (Case C-297/10)

20 The employment relationships of federal contractual employees were governed until 1 October 2005 by the BAT and Collective Pay Agreement No 35 pursuant to the BAT.

21 From that date the BAT and Collective Pay Agreement No 35 pursuant to the BAT were replaced for federal and municipal employees by the Collective Agreement for the public service (Tarifvertrag für den öffentlichen Dienst, 'the TVöD').

22 The TVöD no longer provides for age categories or the 'local' supplement. The single system of pay is based on criteria such as the activity, professional experience, and performance. The activity determines the salary group and professional experience and performance determine the step.

23 From 1 October 2005, federal contractual agents were reclassified in the new pay scheme under the TVöD. The details of the reclassification are governed by the Collective Agreement on the transfer of federal employees to the TVöD and laying down transitional rules (Tarifvertrag zur Überleitung der Beschäftigten des Bundes in den TVöD und zur Regelung des Übergangsrechts, 'the TVÜ-Bund').

24 The reclassification of the contractual employees covered by the BAT took place in two stages.

25 In accordance with Paragraph 5 of the TVÜ-Bund, in a first stage, a figure for reference pay was calculated on the basis of the remuneration received in September 2005. The referring court states that that form of transfer allowed the employee to receive remuneration corresponding to his previous pay, so that his established rights were preserved.

26 Under Paragraph 6 of the TVÜ-Bund, for a period of two years, on the basis of the reference pay, an individual intermediate step was allocated to contractual employees within the salary group in which they were classified. As from 1 October 2007, the reclassification became final, with the employee moving from the individual intermediate step to the next higher normal step within the salary group.

27 Since the final reclassification of the employees, their pay has followed the criteria laid down by the TVöD.

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

Case C-298/10

28 Mr Mai, who was born on 28 December 1967, was employed as a contractual employee of the *Land* of Berlin from 16 March 1998 to 31 March 2009. He worked as the manager of a care home. He was classified in BAT group Ia and received basic pay in the gross monthly sum of EUR 3 336,09. The gross monthly sum of basic pay for age category 47 in that salary group was EUR 3 787,14.

29 Mr Mai asked his employer to pay him on the basis of age category 47, although he had not reached the age of 47. He takes the view that the gradation of basic pay by age categories constitutes discrimination on grounds of age against younger employees. He brought proceedings seeking payment by the *Land* of Berlin of a salary corresponding to age category 47 in BAT salary group Ia from 1 September 2006 to 31 March 2009.

30 In those proceedings the *Land* of Berlin appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court). According to that court, Mr Mai is claiming a salary that is not in accordance with the BAT. His claim could succeed only if it were accepted that the calculation of basic pay by reference to age categories constitutes discrimination on grounds of age and is contrary to Article 21 of the Charter and to Directive 2000/78.

31 The Bundesarbeitsgericht observes that Article 6(1)(b) of Directive 2000/78 provides that a difference of treatment on grounds of age may be accepted if it consists inter alia in fixing conditions of age for access to certain advantages linked to employment.

32 It says that the age categories laid down by the BAT may be regarded as representing professional experience. However, professional experience does not always increase with length of service. Sometimes it even diminishes. In that case the criterion of age does not in general reflect professional experience.

33 The Bundesarbeitsgericht raises the question whether the fact that the BAT is a collective agreement negotiated by the social partners changes the approach to be taken to the issue, in view of Article 28 of the Charter, which recognises the right of collective bargaining and to conclude collective agreements.

34 In those circumstances, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do rules on pay in a collective agreement for public sector contractual employees which, like Paragraph 27 of the [BAT] in conjunction with Collective Pay Agreement No 35 pursuant to the BAT, determine basic pay in the individual salary groups by age categories infringe the prohibition of age discrimination in primary law (now Article 21(1) of the Charter) as given expression by Directive 2000/78, taking into account also the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter)?'

Case C-297/10

35 Ms Hennigs has since 1 February 2004 been employed as a civil engineer by the Eisenbahn-Bundesamt, which is a federal authority.

36 Under the BAT, she was classified in salary group IVa in Annex Ia. As she was aged 41 when she started work, she was assigned to age category 35, in accordance with Paragraph 27(A)(2) of the BAT.

37 On being transferred from the BAT to the TVöD, Ms Hennigs was reclassified on the basis of reference pay of a total of EUR 3 185,33 calculated by reference to age category 37. As a result, she was placed in salary group 11, in an individual intermediate

step between steps 3 and 4. From 1 October 2007 she was classified in step 4 in salary group 11, which entitled her to basic gross monthly pay of EUR 3 200.

38 Ms Hennigs contests not her salary group but her step within that group. She submits that if she had been classified in step 5 in salary group 11 she would have received a further EUR 435 a month gross. She therefore brought proceedings seeking to be so classified.

39 She submits that the system of age categories laid down by the BAT constituted discrimination on grounds of age and the TVöD continues that discrimination.

40 The Bundesarbeitsgericht, hearing the appeal on a point of law brought by Ms Hennigs, observes that the classification sought by her, in step 5 in salary group 11, would mean that her reclassification was not based on the pay resulting from the application of the BAT. That would be possible only if the BAT, in providing for pay to be calculated by reference to age categories, were unlawful because it breached the prohibition of discrimination on grounds of age. The court refers in this respect to Case C-298/10.

41 As regards the TVÜ-Bund, the Bundesarbeitsgericht raises the question of the degree of latitude available to the social partners in moving from an age-related pay scheme in a collective agreement to one based on other criteria but taking over some elements of the previous pay scheme. It also asks whether the fundamental right of collective bargaining should be taken into account in assessing the lawfulness of the aim pursued. Should the transitional measures be contrary to the prohibition of discrimination on grounds of age, the court asks whether the social partners should immediately have ended the discriminatory system under the BAT or whether they could maintain certain discriminatory provisions in part, on a transitional basis, in

order to preserve temporarily the established rights of the employees concerned, and abolish those provisions progressively. Those issues are the subject of Questions 2 and 3.

42 The Bundesarbeitsgericht asks whether the disproportionate costs the employer would have to bear if the causes of the discrimination were immediately abolished could be a justification for temporarily maintaining the discriminatory provisions. This issue is the subject of Question 4.

43 By Question 5 the Bundesarbeitsgericht asks as to the period available to the social partners to put an end to a discriminatory collective agreement, having regard to the principle of the protection of the legitimate expectations of employees as regards the existing collective system.

44 In those circumstances, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling, the first of which is the same as the question referred in Case C-298/10:

‘1. Do rules on pay in a collective agreement for public sector contractual employees which, like Paragraph 27 of the [BAT] in conjunction with Collective Pay Agreement No 35 pursuant to the BAT, determine basic pay in the individual salary groups by age categories infringe the prohibition of age discrimination in primary law (now Article 21(1) of the Charter) as given expression by Directive 2000/78, taking into account also the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter)?

2. If Question 1 is answered in the affirmative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

   (a) Does the right of collective bargaining give the parties to a collective agreement latitude to eliminate such discrimination by transferring the employees to a new collective pay structure based on activity, performance and professional experience, while preserving their established rights acquired in the old collective system?

   (b) Must Question 2(a) in any event be answered in the affirmative if the final allocation of the transferred employees to the steps within a salary group of the new collective pay structure does not depend solely on the age category attained in the old collective system and if the employees who are admitted to a higher step in the new system typically have more professional experience than the employees allocated to a lower step?

3. If Questions 2(a) and (b) are answered in the negative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

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

(b) Taking into account the right to collective bargaining and the associated autonomy in collective bargaining, must Question 3(a) be answered in the affirmative in any event if parties to a collective agreement agree on such transitional rules?

4. If Questions 3(a) and (b) are answered in the negative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

Must an infringement of the prohibition in primary law of discrimination on grounds of age which characterises a collective pay system and makes it invalid as a whole, even taking into account the associated additional costs for the employer concerned and the right to collective bargaining of the parties to the collective agreement, always only be eliminated by taking the highest age category as a basis in each case when applying the rules on pay in the collective agreement until new rules that are in conformity with Union law come into force?

5. If Question 4 is answered in the negative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

Having regard to the right to collective bargaining of the parties to a collective agreement, would it be compatible with the Union law prohibition of discrimination on grounds of age and the requirement for an effective sanction in the event of a breach of that prohibition to set the parties to a collective agreement a manageable deadline (for instance, six months) for retrospectively remedying the invalidity of the pay system they have agreed, and to stipulate that, in the event that no new rules in conformity with Union law are introduced within the deadline, the highest age category will be taken as a basis in each case when applying the collective agreement, and, if so, what temporal margin for the retrospective

effect of the new rules that are in conformity with Union law could be allowed to the parties to a collective agreement?'

45 By order of 24 September 2010, the President of the Court ordered Cases C-297/10 and C-298/10 to be joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

Preliminary observations

46 By its questions the referring court asks the Court to interpret the principle of non-discrimination on grounds of age, enshrined in primary law in Article 21 of the Charter, as given specific expression by Directive 2000/78.

47 The Court has recognised the existence of a prohibition of discrimination on grounds of age which must be regarded as a general principle of European Union law and was given specific expression by Directive 2000/78 in the field of employment and occupation (see, to that effect, Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 21). The prohibition of all discrimination inter alia on grounds of age appears in Article 21 of the Charter, which, from 1 December 2009, has the same legal status as the Treaties.

48 To answer the questions, it must be ascertained whether the measures at issue in the main proceedings fall within the scope of Directive 2000/78.

49 It is apparent both from its title and preamble and from its content and purpose that that directive is intended to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on any of the grounds mentioned in Article 1, which include age (see Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECR I-9343, paragraph 19).

50 Article 3(1)(c) of Directive 2000/78 states that the directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation inter alia to employment and working conditions, including pay.

51 According to the information provided by the referring court, the measures at issue in the main proceedings govern the scheme of pay for contractual employees in the public sector. Those measures thus affect those employees' conditions of pay within the meaning of Article 3(1)(c) of Directive 2000/78.

Question 1 in Case C-297/10 and the single question in Case C-298/10

52 By its first question in Case C-297/10 and its single question in Case C-298/10, which are worded identically, the referring court seeks essentially to know whether the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter and given expression in Directive 2000/78, more particularly in Articles 2 and 6(1)

of that directive, must be interpreted as precluding a measure laid down in a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age. The court also asks whether, for the purposes of that interpretation, account should be taken of the right to negotiate collective agreements stated in Article 28 of the Charter.

53 The first stage is to examine whether the rules at issue in the main proceedings contain a difference of treatment on grounds of age for the purposes of Article 2(1) of Directive 2000/78. 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 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.

54 In the present case, according to the information provided by the referring court, in the system established by the BAT the basic pay for each job depends, first, on classification in a salary group. Group X is the lowest and group I the highest. Classification in each grade depends on the characteristics of the activity performed by the employee.

55 Secondly, within each group, the employee's basic pay is determined on his appointment by reference to the age category to which he belongs. Every two years he obtains the basic pay of the next age category, until he reaches the basic pay of the last age category in his salary group.

56 An employee recruited in salary group VIb at the age of 21 will thus be classified in age category 21 in that group, whereas a 27-year-old employee recruited in that group will be classified in age category 27.

57 That rule is qualified if the employee is appointed later than the end of the month in which he reaches the age of 31 (if he is classified in one of groups III to X) or 35 (if he is classified in one of groups I to IIb). In that case the basic pay is that of the age category calculated by reducing the employee's age on appointment by half the number of years completed since he reached the age of 31 (or 35, depending on salary group). Thus an employee such as Ms Hennigs, who was 41 when she was appointed in salary group IVa, received the basic pay for age category 35, in other words, only half the period from her 31st to her 41st birthday was taken into account.

58 It is thus apparent that the basic pay received by two employees appointed on the same date in the same salary group will differ according to their age at the time of appointment. It follows that those two employees are in a comparable situation and one of them receives lower basic pay than the other. That employee is thus treated less favourably, because of his age, than the other employee.

59 It follows that the system of pay established by Paragraph 27 of the BAT, read in conjunction with collective pay agreement No 35 pursuant to the BAT, creates a difference of treatment based directly on the criterion of age, for the purposes of Article 2(1) and (2)(a) of Directive 2000/78.

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

61 The first subparagraph of that provision states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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.

62 At this point in the consideration of the questions referred, and as suggested by the referring court, it should be examined whether the fact that the BAT is a collective agreement changes the assessment of the justification for the difference of treatment on grounds of age established by Paragraph 27 of the BAT, read in conjunction with collective pay agreement No 35 pursuant to the BAT.

63 It is clear from Article 16(1)(b) of Directive 2000/78 that collective agreements, like laws, regulations and administrative provisions, must observe the principle implemented by that directive.

64 Similarly, Article 18 of that directive provides that Member States may entrust the social partners, at their joint request, with the implementation of the directive as regards provisions concerning collective agreements.

65 The Court has repeatedly held that the social partners at national level may, on the same basis as the Member States, provide for measures which contain differences of treatment on grounds of age, in accordance with the first subparagraph of Article 6(1) of Directive 2000/78. Like the Member States, 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 (see Case C-411/05

Palacios de la Villa [2007] ECR I-8531, paragraph 68, and Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 41). In the context of that discretion, the difference of treatment on grounds of age must be appropriate and necessary for achieving that aim.

66 The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, have taken care to strike a balance between their respective interests (see, to that effect, *Rosenbladt*, paragraph 67 and the case-law cited).

67 Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law (see, to that effect, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).

68 Consequently, when they adopt measures falling within the scope of Directive 2000/78, which gives specific expression in the field of employment and occupation to the principle of non-discrimination on grounds of age, the social partners must comply with that directive (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 22).

69 In assessing whether the aim pursued by the measure at issue in the main proceedings is legitimate and whether that measure is appropriate and necessary for achieving that aim, it must be noted that the referring court and the German Government state that the higher pay is justified by the employee's longer professional experience and rewards his loyalty to the undertaking. Moreover, according to some legal writers

and some of the lower courts, the higher basic pay received by older employees on their appointment is compensation for their financial needs, which in most cases are greater because of their social environment.

70 As regards the German Government's argument concerning compensation for the greater financial needs of older employees in connection with their social environment, it has not been shown that there is a direct correlation between the age of employees and their financial needs. Thus a young employee may have substantial family burdens to bear while an older employee may be unmarried without dependant children. In addition, the referring court explains that the basic pay of public sector contractual employees is supplemented by a 'local' supplement, the amount of which varies according to the employees' family burdens.

71 In its observations submitted to the Court, the German Government states that the age criterion used to determine basic pay on appointment is merely a more convenient way of forming categories of employees while taking overall account of their professional experience. When the system under the BAT was set up, there was a direct relationship between employees' ages and the contributions they paid. Where an employee is appointed after reaching the age of 31 (or 35), the employee's age no longer determines on its own the age category of pay. That, it says, is justified by the fact that, after a certain point in time, persons appointed late do not have professional experience that is entirely relevant to the activity they will carry out. It submits that that measure thus fulfils a legitimate aim and is appropriate and necessary.

72 It follows from those observations that the aim mentioned both by the referring court and by the German Government consists in wishing to establish a pay scale for public sector contractual employees so as to take account of employees' professional experience. That aim must in principle be regarded as 'objectively and reasonably' justifying 'within the context of national law' a difference of treatment on grounds of age,

within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78. It should be recalled that the Court has acknowledged that rewarding experience that enables a worker to perform his duties better is, as a general rule, a legitimate aim of wages policy (see Case C-17/05 *Cadman* [2006] ECR I-9583, paragraph 34, and Case C-88/08 *Hütter* [2009] ECR I-5325, paragraph 47). It follows that that aim is 'legitimate' within the meaning of that provision.

73 It remains to ascertain, in accordance with the wording of that provision, whether, within the context of the broad discretion enjoyed by the social partners mentioned in paragraph 65 above, the means used to achieve that aim are 'appropriate and necessary'.

74 The Court has accepted that recourse to the criterion of length of service is, as a general rule, appropriate to achieve that aim, since length of service goes hand in hand with professional experience (see, to that effect, Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 24 and 25; *Cadman*, paragraphs 34 and 35; and *Hütter*, paragraph 47).

75 While the measure at issue in the main proceedings enables an employee to ascend in step in the salary group to which he belongs as his age advances and hence his length of service increases, it is clear that, on his appointment, the initial classification in a particular step in a particular salary group of an employee with no professional experiences is based purely on his age.

76 Thus an employee with no professional experience, appointed at the age of 30 to a job in one of salary groups III to X will, as from his appointment, receive basic pay equivalent to that received by an employee of the same age, in the same job, but ap-

pointed at the age of 21 and with nine years' length of service and professional experience in his job. Similarly, the former employee will reach the highest step in his group with a shorter length of service and less professional experience than those of the latter employee appointed at the age of 21 in the lowest step in his group. While Paragraph 27(C) of the BAT does provide for the possibility, under certain conditions, of taking into account the professional experience acquired by the employee before his appointment in order to classify him in a higher step than would normally have been assigned him as a result of his age, the German Government explained at the hearing that, in the opposite case, the employee's lack of professional experience does not mean that he is classified in a lower step than that assigned him as a result of his age.

77 It follows that the determination according to age of the basic pay step on appointment of a public sector contractual employee goes beyond what is necessary and appropriate for achieving the legitimate aim, relied on by the German Government, of taking account of the professional experience acquired by the employee before he is appointed. It should be observed that a criterion also based on length of service or professional experience but without resorting to age would, from the point of view of Directive 2000/78, appear better adapted to achieving the legitimate aim mentioned above. The fact that, for a large number of employees appointed at a young age, the step in classification corresponds to their professional experience and that the criterion of age coincides in most cases with their length of service does not alter that assessment.

78 It follows from all the above considerations that the answer to the single question in Case C-298/10 and to Question 1 in Case C-297/10 is that the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter and given specific expression in Directive 2000/78, and more particularly Articles 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is de-

termined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter.

Questions 2 and 3 in Case C-297/10

79 By its second and third questions in Case C-297/10, which should be considered together, the referring court asks essentially whether Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter must be interpreted as precluding the social partners from enjoying sufficiently broad discretion to put an end to the discrimination on grounds of age by transferring contractual employees to a new collective pay system based on objective criteria, while maintaining, in order to carry out the transfer to that new collective pay system, unequal treatment of employees of different ages, if the consequent discrimination is justified by the preservation of established rights, it is progressively reduced, and the only other possible solution would be to reduce the pay of older employees.

80 As a preliminary point, regarding the relationship between the implementation of the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 and the right of collective bargaining recognised in Article 28 of the Charter, reference should be made to the considerations in paragraphs 62 to 68 above.

81 As stated in paragraphs 19 to 25 above, the BAT and Collective Pay Agreement No 35 pursuant to the BAT were replaced, as regards federal employees, by the TVöD from 1 October 2005. The pay system established by the TVöD no longer provides for age categories or for the 'local' supplement, but introduces a single system of pay. That

pay is determined in accordance with criteria such as the activity, professional experience and the performance of the employee. The latter two criteria serve to decide the pay step within each salary group. The transitional provisions for reclassifying employees in connection with the transfer from the pay system established by the BAT to that under the TVöD were laid down by the TVÜ-Bund.

82 In the system established by the TVÜ-Bund, each employee concerned by the reclassification received a 'reference pay' in an amount equivalent to his previous pay. That reference pay corresponded to an individual intermediate step assigned for a period of two years. At the end of that period, the definitive reclassification took place by means of a transfer from the individual intermediate step to the next higher normal step in the salary group concerned.

83 The referring court seeks to know whether the transitional classification system established by the TVÜ-Bund for the transfer from the pay system under the BAT to that under the TVöD, first, introduces or perpetuates a difference of treatment on grounds of age and, secondly, is justified by the fact that the social partners sought to maintain the established rights of employees as regards pay.

84 As to whether the TVÜ-Bund introduces a difference of treatment on grounds of age within the meaning of Article 2(1) and (2) of Directive 2000/78, it appears from the referring court's findings that the classification of employees in an individual intermediate step meant that the employee received reference pay equivalent in amount to what he received under the BAT. However, the pay received under the BAT consisted principally of the basic pay which had been calculated on appointment exclusively by reference to the employee's age. As the Court stated in paragraph 59 above, the method of calculating basic pay created a difference of treatment based directly on the criterion of age, for the purposes of Article 2(1) and (2)(a) of Directive 2000/78. By

taking as the basis for determining the reference amount the pay previously received, the system established by the TVÜ-Bund perpetuated the situation in which some employees receive lower pay than other employees, even though they are in comparable situations, on the sole ground of their age on appointment.

85 That difference of treatment is liable to continue under the TVöD, since, according to the information provided by the referring court, the definitive reclassification took place on the basis of the individual intermediate step assigned to each employee under the TVÜ-Bund.

86 It follows from the above that both under the TVÜ-Bund and under the TVöD, of the employees affected by the transfer from the pay system under the BAT to that under the TVöD, some receive lower pay than others despite being in comparable situations, on the sole ground of their age on appointment, which constitutes direct discrimination on grounds of age within the meaning of Article 2 of Directive 2000/78.

87 The Court must therefore examine whether that difference of treatment on grounds of age may be justified under Article 6(1) of that directive.

88 To that end, it must be examined in the light of the principles set out in paragraphs 61 and 65 above whether the difference of treatment on grounds of age in the TVÜ-Bund, and consequently in the TVöD, is a measure that pursues a legitimate aim and is appropriate and necessary for achieving that aim.

89 As regards the aim pursued by the social partners when negotiating the TVöD and the TVÜ-Bund, it appears from the order for reference and from the German Government's observations that when the contractual employees were reclassified in the new collective pay system it was ensured that they would keep their established rights and would have their previous pay maintained.

90 In this respect, in the context of a restriction of freedom of establishment, the Court has held that the protection of the established rights of a category of persons constitutes an overriding reason in the public interest which justifies that restriction, provided that the restrictive measure does not go beyond what is necessary for that protection (see, to that effect, Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraphs 63 and 65).

91 It appears, as regards the provisions of the collective agreements at issue in the main proceedings, that the social partners' aim was to replace a collective pay system based largely on age, and hence discriminatory, with a new system based on objective criteria. According to the information provided to the Court by the German Government, if the changeover from the system laid down by the BAT to that under the TVöD had taken place without transitional measures, 55 % of federal contractual employees would have suffered an average monthly loss of income of EUR 80. To relieve that disadvantage, the social partners provided for previous pay to be maintained. According to the German Government, the drawing up of transitional arrangements intended to protect established advantages was an integral part of the compromise reached by the social partners when concluding the TVöD.

92 The Court has held that leaving it to the social partners to strike a balance between their respective interests offers considerable flexibility, as each of the parties may, where appropriate, reject the agreement (see *Palacios de la Villa*, paragraph 74, and *Rosenbladt*, paragraph 67). It is thus apparent that the maintenance of earlier pay, and consequently of a system that discriminates according to age, had the aim of avoiding losses of pay and was a decisive factor in enabling the social partners to implement

the changeover from the system laid down by the BAT to that under the TVöD. The transitional rules in the TVÜ-Bund must therefore be regarded as pursing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

93 It remains to ascertain whether, in accordance with the wording of that provision, the means used to achieve that aim are 'appropriate and necessary'.

94 The referring court states that the only way of avoiding a reduction in employees' pay was classification in an individual intermediate step that ensured pay corresponding to that previously received.

95 It should be observed that the system of reclassifying employees implemented by the TVöD and the TVÜ-Bund concerns only employees who are already in post.

96 Moreover, following their definitive reclassification, employees' pay will progress solely in accordance with the criteria laid down by the TVöD, which do not include age. It follows that the discriminatory effects will tend to disappear as the pay of employees progresses.

97 By its transitional and temporary character, this situation may be distinguished from that at issue in Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR I-773, in paragraph 32 of which the Court held that the possibility of derogation without temporal limitation from the principle of non-discrimination on grounds of sex worked against the achievement of the objective of equal treatment of men and women.

98 It is thus apparent that it was not unreasonable for the social partners to adopt the transitional measures implemented by the TVÜ-Bund and that those measures are appropriate for avoiding a loss of income on the part of federal contractual employees, and that they do not go beyond what is necessary to achieve that aim, having regard to the broad discretion enjoyed by the social partners in the field of determining pay.

99 Accordingly, the answer to Questions 2 and 3 in Case C-297/10 is that Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter must be interpreted as not precluding a measure in a collective agreement, such as that at issue in the main proceedings, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.

100 In view of the answer to Questions 2 and 3, there is no need to answer the other questions referred.

Costs

101 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Second Chamber) hereby rules:

1. **The principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and more particularly Articles 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter of Fundamental Rights of the European Union.**

2. **Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a measure in a collective agreement, such as that at issue in the main proceedings in Case C-297/10, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.**

[Signatures]