Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

28 January 2015*

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 2(1) and (2)(a) — Article 6(1) — Discrimination based on age — National legislation under which inclusion of periods of service completed before the age of 18 for the purpose of determining remuneration is subject to an extension of the periods for advancement — Justification — Whether appropriate for the purpose of achieving the objective pursued — Possibility of challenging the extension of the periods for advancement)

In Case C-417/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 27 June 2013, received at the Court on 23 July 2013, in the proceedings

ÖBB Personenverkehr AG

v

Gotthard Starjakob,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2014,

after considering the observations submitted on behalf of:

— Mr Starjakob, by M. Orgler, Rechtsanwalt, and D. Rief,

— ÖBB Personenverkehr AG, by C. Wolf, Rechtsanwalt,

— the Austrian Government, by G. Hesse, acting as Agent,

— the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2014,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 7(1), 16 and 17 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).

2 The request has been made in proceedings between Mr Starjakob and the ÖBB-Personenverkehr AG ('the ÖBB') concerning the lawfulness of the occupational remuneration system adopted by the Austrian legislature with a view to ending discrimination based on age.

Legal context

Directive 2000/78

3 Article 1 of Directive 2000/78 provides that the purpose of that 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 states:

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

2. For the purposes of paragraph 1:

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

...'

5 Under Article 3(1)(c) of the directive, it applies, 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, inter alia, employment and working conditions, including pay.

6 Article 6(1) of that directive is worded as follows:

'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 Article 7(1) of the directive provides that, '[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1'.

8 Under Article 8(1) of that directive, 'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive'.

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

10 Article 17 of Directive 2000/78, on sanctions, states:

'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'.

Austrian law

The Law on equal treatment

11 Directive 2000/78 was transposed into Austrian law by the 2004 Law on equal treatment (Gleichbehandlungsgesetz, BGBl. I 66/2004, 'the GIBG'). Paragraph 26(2) of that law provides:

'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.'

12 Paragraph 29(1) of the GIBG provides:

'The time-limit for the enforcement of legal rights under Paragraph 26(1) and (5) is six months. That period begins to run from the refusal of the application or promotion. The time-limit for the enforcement of legal rights under Paragraph 26(11) is one year. … Rights resulting from Paragraph 26(2),(3), (4), (6), (8), (9) and (10) shall be subject to the three-year limitation period contained in Paragraph 1486 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch, "the ABGB") … .'

The ABGB

13 Paragraph 1480 of the ABGB concerns limitation. Under that paragraph, 'claims for backdated annual benefits, in particular for interest, pensions, food contributions, benefits for ascendents and for amortisation of capital of agreed annuities, shall lapse after three years; the right itself shall be time-barred for non-use after 30 years'.

14 Paragraph 1486 of the ABGB, entitled 'Specific limitation periods', provides:

'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.

...'

The 1963 Regulation on remuneration in the Federal rail transport sector

15 Employees in the Austrian rail transport taken on before 31 December 1995 were covered by the system of advancement laid down by Paragraph 3 of the 1963 Regulation on Remuneration in the Federal Rail Transport Sector (Bundesbahn-Besoldungsordnung 1963, BGBl. 170/1963, 'the 1963 BO'), which provided:

'(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 7:

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, BGB 263)] …'

The Law on Federal railways

16 Following an agreement between the social partners, the Law on Federal railways (Bundesbahngesetz, BGBl. 852/1992, 'the ÖBB-G') was amended by a law of 2011 (BGBl. I, 129/2011, 'the 2011 Law'). That law amended, inter alia, the system laid down by Paragraph 3 of the 1963 BO. Paragraph 53a of the ÖBB-G now provides:

'(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).

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.

…

(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 2011 Law] shall be disregarded when calculating the three-year limitation period.'

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

17 Mr Starjakob, who was born on 11 May 1965, commenced employment on 1 February 1990 with a company which was the ÖBB's predecessor in title. His reference date for the purposes of advancement was determined by taking into account the period of apprenticeship completed by Mr Starjakob after reaching the age of 18, which was accredited at 50%, while that completed prior to that was disregarded, pursuant to Paragraph 3 of the 1963 BO.

18 In 2012, on the basis of the judgment in *Hütter* (C-88/08, EU:C:2009:381), Mr Starjakob commenced proceedings against the 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.

19 The Landesgericht Innsbruck (Regional Court of Innsbruck) dismissed the action, holding that Paragraph 53a of the ÖBB-G abolished discrimination based on age. It found that Mr Starjakob could claim that the reference date for the purposes of advancement should be calculated in accordance with Paragraph 53a(1) only if he accepted the consequences linked to that new reference date for the purposes of advancement set out in Paragraph 53a(2), relating to the extension of the periods required for advancement and if he provided evidence of periods of service to be taken into account under Paragraph 53a(4) ('the obligation of cooperation'). As Mr Starjakob had not yet supplied that evidence, his reference date for the purposes of advancement under Paragraph 3 of the 1963 BO was maintained.

20 On appeal, the Oberlandesgericht Innsbruck (Higher Regional Court of Innsbruck) upheld Mr Starjakob's claim. It held that, in the absence of such evidence, the legal position applicable to him was that laid down by the 1963 BO, but that this legal position was discriminatory. Consequently, it considered that it was necessary to determine a new reference date for the purposes of advancement for Mr Starjakob which took into account the period of apprenticeship completed before the age of 18, whilst not applying the extension of the periods required for advancement.

21 In those circumstances the Oberster Gerichtshof (Supreme Court), on appeal, decided to stay the proceedings and to refer the following questions to the Court of Justice 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 [the 2011 Law]) 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) of Directive 2000/78 and Article 6(1) of that directive, 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 ÖBB-G]) must be extended to claims for differences in pay resulting from an old system involving age discrimination?'

Consideration of the questions referred

Question 1(b) and Question 4

22 By Question 1(b) and Question 4, which should be examined first and jointly, the referring court asks, in essence, whether EU law, in particular Articles 2 and 6(1) of Directive 2000/78, must be interpreted as precluding national legislation such as that at issue in the main proceedings which, to end discrimination based on age, takes account of the periods of service prior to the age of 18, and, simultaneously, extends by one year the period required for advancement in each of the three first salary steps.

23 It is appropriate, as a first step, to determine whether there is a difference in treatment as a result of the application of Paragraph 53a of the ÖBB-G within the meaning of Article 2(1) of Directive 2000/78. In that regard, it must be borne in mind 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 that directive. Article 2(2)(a) of that directive states that, for the purposes of applying 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 that directive.

24 In the case in the main proceedings, the categories of person relevant for the purposes of that comparison are, on the one hand, employees whose professional experience has, if only in part, been acquired before the age of 18 ('employees disadvantaged by the previous system'), and, on the other hand, those who have acquired experience of the same nature and of comparable length after attaining that age ('employees favoured by the previous system').

25 As regards the existence of a difference in treatment between those two categories of employee, it is apparent from the documents before the Court that, following the judgment in *Hütter* (EU:C:2009:381), the Austrian legislature, in adopting Paragraph 53a of the ÖBB-G, established a remuneration and advancement system which allows the periods of service after 30 June following the end of the nine years of compulsory general education, whether acquired before or after reaching the age of 18, to be taken into account for the purpose of determining the reference date for the purposes of advancement. As noted by the referring court, that reference date is now determined without any discrimination based on age.

26 Nevertheless, it is necessary to examine whether Paragraph 53a of the ÖBB-G continues to apply differing treatment to the two categories of employee concerned.

27 In that regard, it should be noted that employees disadvantaged by the previous system, who, on the basis of Paragraph 53a(4) of the ÖBB-G, have the periods of service prior to their 18th birthday taken into account, are subject to Paragraph 53a(2) which provides that every period required for advancement in each of the first three salary steps is extended by one year, which extends the period for the next advancement by three years.

28 In contrast, as regards employees favoured by the previous system, it should be noted that they have no reason to request application with respect to themselves of the new calculation of their reference date for the purposes of advancement, to the extent that they have not completed periods of service before the age of 18. In any event, Paragraph 53a(2)(3) of the ÖBB-G provides that the recalculation of the individual reference date is to be of no effect if it would lead to a decrease in salary compared with the date previously determined. In so far as, under that provision, the period required to achieve advancement is extended by one year in each of the first three salary steps, which would lead to a

decrease in salary for them, those favoured employees will not have that provision applied to them, unlike the employees disadvantaged by the previous system who had cooperated for the purposes of the recalculation of their reference date.

29 Accordingly, by adopting Paragraph 53a(2)(1) of the ÖBB-G, the Austrian legislature has introduced a provision which continues to treat employees disadvantaged by the previous system and those favoured by that system differently with regard to their position in the salary scale and corresponding salary.

30 In so doing, the national legislation at issue in the main proceedings not only neutralises the advantage resulting from the inclusion of periods of service completed before the age of 18, as follows from paragraph 27 of the present judgment, but also places at a disadvantage only the employees disadvantaged by the previous system in so far as the extension to the periods for advancement is likely to apply to them alone. Consequently, with regard to those employees, the adverse effects of that system have not ceased entirely (judgment in *Schmitzer*, C-530/13, EU:C:2014:2359, paragraph 34).

31 To the extent to which the one-year extension to each period required for advancement in each of the three first incremental steps is applicable only to employees who completed periods of service before reaching the age of 18, it must be held that the national legislation at issue in the main proceedings involves a difference in treatment which is directly based on age within the meaning of Article 2(2)(a) of Directive 2000/78 (see, to that effect, judgment in *Schmitzer*, EU:C:2014:2359, paragraph 35).

32 It is necessary, secondly, to examine whether that difference in treatment can be justified.

33 The first subparagraph of Article 6(1) of Directive 2000/78 states that Member States may provide that a difference in treatment on grounds of age is not to 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 (judgment in *Schmitzer*, EU:C:2014:2359, paragraph 37).

34 The Court has held on numerous occasions that Member States 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 (judgment in *Schmitzer*, EU:C:2014:2359, paragraph 38 and the case-law cited).

35 According to the referring court, the legislation at issue in the main proceedings is, first and foremost, intended to establish a non-discriminatory system of remuneration and advancement. In the context of that reform, the rules making the review of reference dates conditional on submission of a request by each interested party and those relating to the extension of advancement periods, serve objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations.

36 As regards, first, the objective of financial neutrality pursued by the national legislation at issue in the main proceedings, it must be borne in mind that EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination. In that regard, while budgetary considerations may underpin the chosen social policy of a Member State and influence the nature or extent of the measures that that 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 (judgment in *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraphs 73 and 74). This also applies to the considerations of an administrative nature mentioned by the referring court and by the Austrian Government (see, to that effect, judgment in *Schmitzer*, EU:C:2014:2359, paragraph 41 and the case-law cited).

37 As regards, second, respect for the acquired rights and the protection of the legitimate expectations of employees favoured by the previous system with regard to their remuneration, it should be noted that these constitute legitimate employment-policy and labour-market objectives which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age (judgment in *Schmitzer*, EU:C:2014:2359, paragraph 42 and the case-law cited).

38 In the present case, it must be stated that, in so far as Paragraph 53a(2)(3) of the ÖBB-G provides that the recalculation of the individual reference date for advancement is not effective if it involves a decrease in salary of the employees concerned, the new salary system preserves their acquired rights as regards their remuneration.

39 Those objectives cannot, however, justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the reform of a discriminatory system, of which such a measure forms part, is designed to eliminate. Such a measure, even if it is capable of ensuring the protection of acquired rights and legitimate expectations with regard to employees favoured by the previous system, is not appropriate for the purpose of establishing a non-discriminatory system for employees who were disadvantaged by that previous system (judgment in *Schmitzer*, EU:C:2014:2359, paragraph 44).

40 It follows from all the foregoing considerations that the answer to Question 1(b) and Question 4 is that EU law, in particular Articles 2 and 6(1) of Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, to end discrimination based on age, takes account of the periods of service prior to the age of 18, but which, simultaneously, includes a rule, applicable in reality only to employees who are subject to that discrimination, which extends by one year the period required for advancement in each of the three first salary steps and which, in so doing, definitively maintains a difference in treatment based on age.

Question 1(a)

41 By Question 1(a) the referring court asks, in essence, whether Articles 16 and 17 of Directive 2000/78 must be interpreted as meaning that national legislation, which seeks to end discrimination based on age, must necessarily allow an employee whose periods of service completed before the age of 18 have not been taken into account in the calculation of his advancement, to obtain financial compensation which corresponds to payment of the difference between the remuneration which he would have received in the absence of such discrimination and that which he actually received.

42 In that regard, it should be noted that Article 17 of Directive 2000/78 is not relevant to the question raised, which relates not to the infringement of national provisions adopted under that directive, but to the application of national legislation which, as is apparent from the answer to Question 1(b) and to Question 4, itself includes discrimination based on age, contrary to that directive.

43 Next, it should be borne in mind that, in accordance with Article 16 of Directive 2000/78, the Member States are obliged to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished.

44 That article does not prescribe a specific measure to be taken by the Member States or by a private employer in the event of a breach of the prohibition of discrimination but leaves them free to choose between the different solutions suitable for achieving its intended objective, depending on the different situations which may arise.

45 It is therefore appropriate to consider that that article must be interpreted as meaning that national legislation which seeks to end discrimination based on age does not necessarily have to allow an employee whose periods of service completed before the age of 18 have not been taken into account in the calculation of his advancement, to obtain financial compensation which corresponds to payment of the difference between the remuneration which he would have received in the absence of such discrimination and that which he actually received.

46 That being said, according to settled case-law, where discrimination contrary to EU law has been established, as 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, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining (see judgments in *Jonkman and Others*, C-231/06 to C-233/06, EU:C:2007:373, paragraph 39, and in *Landtová*, C-399/09, EU:C:2011:415, paragraph 51).

47 The Court has stated that that approach is intended to apply only if there is a valid point of reference (see judgment in *Specht and Others*, C-501/12 to C-506/12, EU:C:2014:2005, paragraph 96). That is so in the case in the main proceedings.

48 As is clear from the answer to Question 1(b) and Question 4, EU law, in particular Directive 2000/78, is still not being correctly applied after adoption of the national legislation at issue. The system applicable to the employees favoured by the previous system therefore remains the only valid point of reference. Therefore re-establishing equal treatment, in a case such as that at issue in the main proceedings, involves granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale.

49 It follows from the foregoing that the answer to Question 1(a) is that EU law, in particular Article 16 of Directive 2000/78, must be interpreted as meaning that national legislation which seeks to end discrimination based on age does not necessarily have to allow an employee whose periods of service completed before the age of 18 have not been taken into account in calculating his advancement to obtain financial compensation which corresponds to payment of the difference between the remuneration which he would have received in the absence of such discrimination and that which he actually received. Nevertheless, in a case such as that at issue in the main proceedings, as 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, re-establishing equal treatment entails granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, as regards the recognition of periods of service completed before the age of 18 but also advancement in the pay scale.

Questions 2 and 3

50 Having regard to the answer given to Question 1(b) and Question 4, there is no need to answer Questions 2 and 3 referred by the national court.

Question 5

51 By Question 5, the referring court asks, in essence, whether EU law, in particular Directive 2000/78, must be interpreted as preventing the national legislature from providing, for the purposes of taking into account periods of service completed before the age of 18, for an obligation of cooperation under which the employee must give his employer the evidence relating to those periods and that, in the absence of such cooperation, the reference date for the purposes of advancement previously applicable

to him is maintained. The referring court also asks whether the fact that an employee does not comply with that obligation and, therefore, voluntarily remains in the old system solely in order to be able to enforce the pecuniary claims constitutes an abuse of law.

52 In that regard, it is apparent from the file before the Court that determining the new individual reference date requires the cooperation of the employee concerned and that he must, in accordance with the first sentence of Paragraph 53a(4) of the ÖBB-G, inform his employer of periods of service before the age of 18. Under the second sentence of Paragraph 53a(4) of the ÖBB-G, if the employee does not provide that information, his reference date for the purposes of advancement under Paragraph 3 of the 1963 BO is maintained.

53 That cooperation is necessary to be able to calculate a reference date for the purposes of advancement without discrimination, in so far as an employer cannot reasonably be required to determine itself the previous periods of service for each of its employees. It must, in addition, be noted, that the personal interests of the employee are at stake and that the obligation of cooperation is necessary to enable the employer to comply with its legal obligations, in particular those arising from Paragraph 53a(1)(1) of the ÖBB-G, which was adopted in order to take account of the guidance provided in the judgment in *Hütter* (EU:C:2009:381).

54 Consequently, it must be stated that neither Article 16 of Directive 2000/78 nor any other provision of that directive precludes a provision such as Paragraph 53a(4) of the ÖBB-G from providing for an obligation of cooperation under which the employee must give his employer the evidence relating to the periods of service prior to the age of 18 so that they can be taken into account.

55 As regards whether there is any abuse of law, it must be recalled that, in accordance with settled case-law of the Court, EU law cannot be relied on for abusive or fraudulent ends (see, inter alia, judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 29; and in *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 42).

56 A finding of abuse requires a combination of objective and subjective elements. With regard to the objective element, it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved. As regards the subjective element, it must be apparent that there is an intention to obtain an improper advantage from the EU rules by artificially creating the conditions laid down for obtaining it (see judgment in *Torresi*, EU:C:2014:2088, paragraphs 44 to 46 and the case-law cited).

57 In the case in the main proceedings, it is clear from the answer to Questions 1 and 4 that the national legislation at issue always entails discrimination based on age. In those circumstances, and having regard to what has been stated in paragraphs 46 to 48 of the present judgment, Mr Starjakob's refusal to cooperate for the purposes of applying that legislation and his action seeking, in order to re-establish equal treatment with employees favoured by the previous system, to obtain payment of the difference in remuneration which would have been due for the period between 2007 and 2012 if his reference date for the purposes of advancement had been calculated by taking into account the period of service completed before his 18th birthday cannot be regarded as an abuse of law intended to obtain an unfair advantage under the EU legislation.

58 Having regard to the foregoing, the answer to Question 5 is that EU law, in particular Article 16 of Directive 2000/78, must be interpreted as not preventing the national legislature from providing, for the purposes of taking into account periods of service completed before the age of 18, an obligation of cooperation under which the employee must give his employer the evidence relating to those periods. Nevertheless, there is no abuse of law in (i) an employee's refusal to cooperate for the purpose of the

application of national legislation such as that at issue in the main proceedings, which involves discrimination based on age contrary to Directive 2000/78, and (ii) his action seeking to obtain payment intended to re-establish equal treatment with employees favoured by the previous system.

Question 6

59 By Question 6, the referring court asks, in essence, whether the principle of effectiveness must be interpreted as requiring that a national limitation period for claims which are founded in EU law must not start to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter.

60 According to the referring court, the court of appeal considers that, until delivery of the judgment in *Hütter* (EU:C:2009:381), there was a legal obstacle to the action for the implementation of different rights to be re-evaluated and that, therefore, the limitation period could not begin to run before 18 June 2009, the date of delivery of that judgment.

61 In that regard it should be borne in mind that according to settled case-law, 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) (see, inter alia, judgment in *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 63 and the case-law cited).

62 As regards the principle of effectiveness, the Court has stated that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty to the extent that such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (judgment in *Pohl*, C-429/12, EU:C:2014:12, paragraph 29 and the case-law cited).

63 With regard to the question whether the date of delivery of the judgment in *Hütter* (EU:C:2009:381) affects the determination of the starting point of a limitation period fixed by national law, it should be noted that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines, where required, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force (judgment in *Pohl*, C-429/12, EU:C:2014:12, paragraph 30 and the case-law cited).

64 So far as concerns the starting point of the limitation period, the Court has pointed out that this, in principle, is a matter for national law and that the fact that the Court may have ruled that the breach of EU law has occurred generally does not affect the point at which that period starts to run (judgment in *Pohl*, EU:C:2014:12, paragraph 31 and the case-law cited).

65 Consequently, it is appropriate to note that the date of delivery of the judgment in *Hütter* (EU:C:2009:381) does not affect the starting point of the limitation period at issue in the case in the main proceedings and is therefore irrelevant for the purposes of determining whether, in the main proceedings, the principle of effectiveness has been respected (see, to that effect, judgment in *Pohl*, EU:C:2014:12, paragraph 32).

66 As is apparent from the request for a preliminary ruling, in accordance with Paragraph 1480 of the ABGB, the right to request a re-evaluation of the remuneration and rectification of the categorisation is time-barred for non-use after 30 years. That limitation period begins to run, in the case in the main proceedings, from the day that the employee was placed in grade by the employer, that is the date on which the employment relationship began.

67 It cannot be disputed that such a time-limit constitutes a reasonable time-limit for bringing proceedings in the interests of legal certainty, within the meaning of the case-law reiterated at paragraph 62 of the present judgment.

68 Moreover, the referring court observes that, in the case in the main proceedings, Mr Starjakob's right to request a re-evaluation of the reference date is not time-barred.

69 Having regard to the foregoing, the answer to Question 6 is that the principle of effectiveness must be interpreted as meaning that, in a case such as that at issue in the main proceedings, it does not preclude a national limitation period for claims which are founded in EU law from starting to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter.

Question 7

70 By Question 7, the referring court asks, in essence, whether the principle of equivalence must be interpreted as meaning that the suspension of the limitation period laid down by new national legislation for actions seeking to have periods of service completed before the age of 18 taken into account must be extended to actions seeking to obtain payment of the difference between the remuneration which would have been received in the absence of discrimination based on age and that actually received on the basis of previous legislation providing for such discrimination.

71 It should be borne in mind, in addition to the case-law cited in paragraph 61 of the present judgment, that the principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law (judgments in *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 33, and in *Barth*, C-542/08, EU:C:2010:193, paragraph 19).

72 As is apparent from the file before the Court, an action seeking to enforce salary claims, such as that at issue in the main proceedings, is subject to the three-year limitation period resulting from the provisions of Paragraph 1486(5) of the ABGB in conjunction with Paragraph 29(1) of the GIBG. However, employees who have cooperated, as required by Paragraph 53a(4) of the ÖBB-G, benefit from the suspension of the limitation period laid down in Paragraph 53a(5). According to the referring court, having regard to the principle of equivalence, suspension of the limitation period under that provision should also apply to proceedings to enforce salary claims which are based on discrimination on grounds of age arising under the previous system.

73 However, it must be stated that a provision, such as Paragraph 53a(5) of the ÖBB-G, is a procedural provision which governs actions based on infringements not of national law but of EU law, in so far as it was adopted to reflect the guidance from the judgment in *Hütter* (EU:C:2009:381), and that suspension of the limitation period also covers the period between delivery of that judgment and that of publication of the 2011 Law.

74 It follows that, since observance of the principle of equivalence requires the application without distinction of a national rule to actions based on infringement of EU law and those based on infringements of national law, that principle is not relevant to a situation such as that at issue in the main proceedings, which concerns two types of actions, both based on an infringement of EU law.

75 Having regard to the foregoing, the principle of equivalence is irrelevant to a situation such as that at issue in the main proceedings.

Costs

76 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 (Second Chamber) hereby rules:

1. **EU law, in particular, Articles 2 and 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 precluding national legislation such as that at issue in the main proceedings, which, to end discrimination based on age, takes account of periods of service prior to the age of 18, but which, simultaneously, includes a rule, applicable in reality only to employees who are subject to that discrimination, which extends by one year the period required for advancement in each of the three first salary steps and which, in so doing, definitively maintains a difference in treatment based on age.**

2. **EU law, in particular Article 16 of Directive 2000/78, must be interpreted as meaning that national legislation which seeks to end discrimination based on age does not necessarily have to allow an employee whose periods of service completed before the age of 18 have not been taken into account in calculating his advancement to obtain financial compensation which corresponds to payment of the difference between the remuneration which he would have received in the absence of such discrimination and that which he actually received. Nevertheless, in a case such as that at issue in the main proceedings, as 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, re-establishing equal treatment entails granting employees whose experience was, if only in part, acquired before the age of 18 the same benefits as those enjoyed by employees who have obtained, after reaching that age, experience of the same type and comparable duration, as regards the recognition of periods of service completed before the age of 18 but also advancement in the pay scale.**

3. **EU law, in particular Article 16 of Directive 2000/78, must be interpreted as not preventing the national legislature from providing, in order to take into account periods of service completed before the age of 18, for an obligation of cooperation under which the employee must give his employer the evidence relating to those periods. Nevertheless, there is no abuse of law in (i) an employee's refusal to cooperate for the purpose of the application of national legislation such as that at issue in the main proceedings, which entails discrimination based on age contrary to Directive 2000/78, and (ii) his action seeking to obtain payment intended to re-establish equal treatment with employees who have obtained, after reaching that age, experience of the same type and a duration comparable to his.**

4. **The principle of effectiveness must be interpreted as meaning that, in a case such as that at issue in the main proceedings, it does not preclude a national limitation period for claims which are founded in EU law from starting to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter.**

[Signatures]