



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

16 June 2016\*

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 2(1) and Article 2(2)(a) — Article 6(2) — Age discrimination — Determination of pension rights of former civil servants — Periods of apprenticeship and of work — Failure to take into account such periods completed before the age of 18)

In Case C-159/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 25 March 2015, received at the Court on 7 April 2015, in the proceedings

**Franz Lesar**

v

**Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, A. Arabadjiev (Rapporteur), J.-C. Bonichot, C.G. Fernlund and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2016,

after considering the observations submitted on behalf of:

- Mr Lesar, by R. Tögl, Rechtsanwalt,
- the Austrian Government, by C. Pesendorfer and J. Schmoll, acting as Agents,
- 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 25 February 2016,

gives the following

\* Language of the case: German.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 2(1), 2(2)(a) and 6(1) and (2) 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 Franz Lesar and Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt (Human Resources Department established by the management board of Telekom Austria AG; hereinafter ‘the Human Resources Department’) concerning the latter’s refusal to take account, for the purpose of calculating pension credits, of periods of apprenticeship and of work preceding the entry into service that the applicant had completed before reaching the age of 18.

### Legal context

#### *EU law*

- 3 As set out in Article 1 of Directive 2000/78, its purpose ‘is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’.

- 4 Article 2 of that directive provides:

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

2. For the purposes of paragraph 1:

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

...’

- 5 Article 6 of that directive is worded as follows:

‘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;

...

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

*Austrian law*

6 Paragraph 53 of the Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965) (Federal Law on the Pension Rights of Federal Civil Servants, their Survivors and the Members of their Families (Law on Pensions 1965)) of 18 November 1965 (BGBl. 340/1965), in the version in force at the time of the facts of the dispute in the main proceedings ('the PG 1965'), entitled 'Pre-service pensionable periods which may be credited', provided as follows:

'(1) Pre-service pensionable periods are the periods listed in subparagraphs 2 to 4, in so far as they precede the date from which the period of federal civil service which gives entitlement to a pension runs. Those periods become periods which give entitlement to a pension by being credited.

(2) The following pre-service pensionable periods shall be credited:

(a) contribution periods in the service of, as an apprentice of or in another employment relationship with a domestic public-law employer;

...

(k) time completed in an occupational training relationship in so far as that training constituted a precondition for the recruitment of the civil servant or where it was carried out in the service of a national public-sector employer;

(l) a period of employment creating an obligation to pay pension insurance contributions under the provisions of the [Allgemeines Sozialversicherungsgesetz (ASVG) (General Social Security Law)] applicable on 31 December 2004;

...'

7 Paragraph 54 of the PG 1965, entitled 'Exclusion of credit and waiver' provides, in subparagraph 2:

'The following pre-service pensionable periods shall not be credited:

(a) periods completed by the civil servant before reaching the age of 18; this limitation does not apply to periods which must be credited in accordance with Paragraph 53(2)(a), (d), (k) and (l), if a transfer contribution is to be paid for such periods in accordance with social security legislation;

...'

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

- 8 Mr Lesar was born on 3 June 1949. Between 9 September 1963 and 8 March 1967, while he was under 18, he worked for the Post- und Telegraphenverwaltung des Bundes (Federal Postal and Telegraph Administration, Austria) under a contract of apprenticeship. From 9 March 1967 he worked as a member of the contract staff of that administration. In parallel to this work he studied at a Federal Academic High School for People in Employment from 14 September 1967 until 17 February 1972. On 1 July 1972 he was taken on by the Federal Government in a public-law employment relationship.
- 9 Prior to his recruitment as a civil servant, Mr Lesar paid pension contributions to the insurance institution during the period of his apprenticeship contract and his employment relationship, including for the period while he was under 18.
- 10 By decision of 23 August 1973, the Post- und Telegraphendirektion für Steiermark (Postal and Telegraph Administration for Styria, Austria) took the view that the period of 5 years and 15 days, consisting of the period between the date on which Mr Lesar reached the age of 18 and the date of his recruitment as a civil servant, had to be unconditionally credited to him as the pensionable periods prior to his entry into service to be taken into consideration in the calculation of his pension entitlement within the meaning of Paragraph 53 of the PG 1965 ('the qualifying periods'). These can be broken down as follows:
- work as a member of the contract staff for the period from 3 June 1967 to 13 September 1967;
  - studies at the Federal Academic High School for People in Employment from 14 September 1967 to 17 February 1972; and
  - work as a member of the contract staff for the period from 1 March 1972 to 30 June 1972.
- 11 By decision of 22 May 1974, the Pensionsversicherungsanstalt der Angestellten (Salaried Employees' Pension Insurance Institution, Austria) decided, in its capacity as an insuring body, to credit and pay to the Federal Government a 'transfer contribution' in respect of the qualifying periods. That amount was ATS 4 785 (approximately EUR 350).
- 12 By decisions of 28 March 1974 and 22 May 1974, the applicant was awarded the sum of ATS 33160.05 (approximately EUR 2 400) as reimbursement, inter alia, of the pension contributions which he had paid during the period of his apprenticeship and periods of work completed before reaching the age of 18.
- 13 The applicant in the main proceedings retired with effect from 1 September 2004. In that context, the Human Resources Department fixed the amount of his pension by taking account solely of the qualifying periods, as recognised by the decision of 23 August 1973.
- 14 On 19 August 2011, Mr Lesar asked his employer for the periods of apprenticeship and of work that he had completed before reaching the age of 18 to be added to the qualifying periods for the purposes of calculating his pension. Following the Human Resources Department's rejection of that request by decision of 23 August 2012, Mr Lesar brought an appeal against that decision before the Verfassungsgerichtshof (Constitutional Court, Austria), which declined jurisdiction and subsequently transferred that appeal to the referring court.
- 15 In the view of the referring court, the refusal to take into consideration, for the purposes of a retirement pension, the pre-service periods of apprenticeship and periods of work completed before the person concerned reached the age of 18 constitutes a difference in treatment based on age, and that court is unsure whether it can be justified.

16 In those circumstances, the Verwaltungsgerichtshof (Administrative Court, Austria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are Articles 2(1), 2(2)(a) and 6(1) of Directive 2000/78 to be interpreted as meaning that they are not compatible with a national provision — such as that in issue in the main proceedings — under which periods of apprenticeship and periods of employment as a contract agent with the Federal Government for which contributions to the compulsory pension insurance scheme were to be paid for the purposes of obtaining a civil servants’ pension are:

- to be credited as pensionable periods prior to entry into service if they are completed after the 18th birthday, whereby the Federal Government in this case receives an agreed transferred contribution in accordance with the provisions of social security law for crediting these periods from the social security agency; or, alternatively
- not to be credited as pensionable periods prior to entry into service, if they are completed before the 18th birthday, whereby there is no agreed transfer to the Federal Government for such periods if they are not credited, and the insured party is reimbursed for any contributions made to the pension insurance scheme, especially considering that, in the event that these periods are subsequently required to be credited under EU law, there would be a possible claim for the refund of the sums reimbursed by the social security organisation from the civil servant as well as the subsequent creation of an obligation on the part of the social security organisation to pay an agreed contribution to the Federal Government?’

### Consideration of the question referred

- 17 By its question the referring court asks, in essence, whether Articles 2(1), 2(2)(a) and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision which excludes taking into account periods of apprenticeship and periods of work completed by a civil servant before reaching the age of 18 for the purposes of granting pension rights and calculating the amount of his retirement pension, although those periods are credited when they are completed after that age is reached.
- 18 It should be noted at the outset that it is common ground that, by excluding, for the purposes of calculating such a retirement pension, some civil servants from the benefit of having the periods of apprenticeship and work completed before the age of 18 taken into account, Paragraph 54(2)(a) of the PG 1965 affects the conditions of pay of those civil servants within the meaning of Article 3(1)(c) of Directive 2000/78 (judgment of 21 January 2015 in *Felber*, C-529/13, EU:C:2015:20, paragraph 24). Accordingly, Directive 2000/78 applies to situations such as that at issue in the main proceedings.
- 19 With regard to the question whether the national legislation at issue in the main proceedings leads to a difference of treatment on grounds of age in relation to employment and occupation, it must be noted that, under Article 2(1) of Directive 2000/78, the ‘principle of equal treatment’ is to mean that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive, including age. 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 is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 of that directive.
- 20 In accordance with Paragraph 53(2)(a) of the PG 1965, for the calculation of pension credits, account must be taken of the contribution periods in the service of, as an apprentice of, or in another employment relationship with a domestic public-law employer. However, pursuant to Paragraph 54(2)(a) of the PG 1965, only those periods that the civil servant has completed after reaching the age of 18 will be credited.

- 21 Thus, national legislation such as that at issue in the main proceedings provides for less favourable treatment for persons whose professional experience has, albeit only in part, been acquired before reaching the age of 18 as compared with those who have acquired experience of the same nature and of comparable length after reaching that age. Such legislation establishes a difference in treatment between persons that is based on the age at which they acquired their professional experience. That criterion may even lead to a difference in treatment between two persons who have pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages. Such a provision therefore establishes a difference in treatment that is based directly on the criterion of age, within the meaning of Article 2(1) and Article 2(2)(a) of Directive 2000/78 (see, to that effect, judgments of 18 June 2009 in *Hütter*, C-88/08, EU:C:2009:381, paragraph 38, and of 21 January 2015 in *Felber*, C-529/13, EU:C:2015:20, paragraph 27).
- 22 It is, nevertheless, necessary to examine whether that difference in treatment may be justified under Article 6(2) of Directive 2000/78. In that regard, it must be recalled that, even if, formally, the referring court has limited its question to the interpretation of Articles 2(1), 2(2)(a) and 6(1) of that directive, that does not prevent the Court from providing the referring court with a ruling on the interpretation of all EU law which may be of assistance to the referring court in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of that question (judgments of 26 September 2013 in *HK Danmark*, C-476/11, EU:C:2013:590, paragraph 56, and of 29 October 2015 in *Nagy*, C-583/14, EU:C:2015:737, paragraph 20).
- 23 It is clear in particular from Article 6(2) of that directive that the Member States may provide that the fixing, for occupational social security schemes, of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age.
- 24 Since Article 6(2) of Directive 2000/78 allows Member States to provide for an exception to the principle of non-discrimination on grounds of age, that provision must be interpreted restrictively (judgment of 26 September 2013 in *HK Danmark*, C-476/11, EU:C:2013:590, paragraph 46 and the case-law cited).
- 25 The Court has, in that regard, held that Article 6(2) of Directive 2000/78 applies only to occupational social security schemes that cover the risks of old age and invalidity (judgment of 26 September 2013 in *HK Danmark*, C-476/11, EU:C:2013:590, paragraph 48 and the case-law cited). Similarly, not all aspects of an occupational social security scheme covering such risks come within the scope of that provision, but only those that are expressly referred to therein (see, to that effect, judgment of 26 September 2013 in *HK Danmark*, C-476/11, EU:C:2013:590, paragraph 52).
- 26 In the present case it is therefore necessary to examine whether the national legislation at issue in the main proceedings is part of an occupational social security scheme which covers the risk of old age or invalidity and, if so, to examine whether that legislation comes within one of the situations covered by that provision, namely the ‘fixing ... of ages for admission or entitlement to retirement or invalidity benefits’.
- 27 On the one hand, it must be noted that Directive 2000/78 does not define what is to be understood by an ‘occupational social security scheme’. A definition of that concept is, however, included in Article 2(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), under which occupational social security schemes are ‘schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [OJ 1979 L 6, p. 24] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity,

occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional’.

- 28 In that regard, as the Advocate General noted, in essence, in point 45 of his Opinion, it is apparent from the documents submitted to the Court that the retirement scheme for federal civil servants at issue in the main proceedings is a scheme which provides workers of a given occupational sector with benefits designed to replace the benefits provided for by statutory social security schemes within the meaning of 2(1)(f) of Directive 2006/54. Federal civil servants are excluded from the pension insurance scheme introduced by the ASVG because they are employed in the federal public administration, in so far as their employment relationship gives them a right to retirement benefits equal to those provided for by that retirement insurance scheme.
- 29 On the other hand, the Austrian Government has submitted that the scheme at issue in the main proceedings fixes the age from which members begin to pay contributions to the civil service pension scheme and acquire the right to receive a full retirement pension in order to guarantee, inter alia, equal treatment of civil servants in that respect.
- 30 In those circumstances, as the Advocate General noted in point 37 of his Opinion, legislation such as that at issue in the main proceedings constitutes an expression of the freedom enjoyed by the Member States under Article 6(2) of Directive 2000/78 to fix, in relation to occupational social security schemes, an age for admission to civil service retirement schemes or entitlement to retirement benefits which are paid under that scheme. The wording of that provision is such that it allows the Member States not only to fix different ages for employees or groups or categories of employees, but also to fix, within an occupational social security scheme, an age for admission or entitlement to retirement benefits.
- 31 Therefore, the view must be taken that such legislation seeks to ensure the ‘fixing ... of ages for admission or entitlement to retirement or invalidity benefits’ within the meaning of Article 6(2) of Directive 2000/78.
- 32 Consequently, the answer to the question referred is that Articles 2(1), 2(2)(a) and 6(2) of Council Directive 2000/78 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes the taking into account of periods of apprenticeship and of employment completed by a civil servant before reaching the age of 18 for the purpose of granting a pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation seeks to guarantee, within a civil service retirement scheme, a uniform age for admission to that scheme and a uniform age for entitlement to the retirement benefits provided under that scheme.

### **Costs**

- 33 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 (First Chamber) hereby rules:

**Articles 2(1), 2(2)(a) and 6(2) 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 not precluding national legislation, such as that at issue in the main proceedings, which excludes the taking into account of periods of apprenticeship and of employment completed by a civil servant before reaching the age of 18 for the purpose of granting a pension entitlement**

**and the calculation of the amount of his retirement pension, in so far as that legislation seeks to guarantee, within a civil service retirement scheme, a uniform age for admission to that scheme and a uniform age for entitlement to the retirement benefits provided under that scheme.**

[Signatures]