



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

21 December 2016*

(Reference for a preliminary ruling — Social policy — Charter of Fundamental Rights of the European Union — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 2(1) and (2) — Discrimination on grounds of age — Collective labour agreement — Extension of the period of advancement from the first to the second step in the salary scale — Indirect unequal treatment on grounds of age)

In Case C-539/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 24 September 2015, received at the Court on 15 October 2015, in the proceedings

Daniel Bowman

v

Pensionsversicherungsanstalt,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, A. Arabadjiev (Rapporteur) and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Bowman, by P. Ringhofer, Rechtsanwalt,
- Pensionsversicherungsanstalt, by J. Milchram, A. Ehm and T. Mödlagl, Rechtsanwälte,
- the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 21 and 28 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 2(1), 2(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 (OJ 2000 L 303, p. 16).
- 2 The request has been made in proceedings between Mr Daniel Bowman and the Pensionsversicherungsanstalt (pension insurance institution, hereinafter 'the Administration') in relation to a decision of the latter based on a provision of a collective labour agreement laying down a longer period of advancement from the first to the second salary step than that which applies to advancements between subsequent steps.

Legal context

Directive 2000/78

- 3 Article 1 of Directive 2000/78 states that 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;
 - (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 ...
- 5 Article 6(1) of that directive, entitled 'Justification of differences of treatment on grounds of age', provides:

'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;

...'

Austrian law

- 6 Prior to the 80th amendment to the collective labour agreement, the Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern Österreichs (Conditions of Employment A for Employees of Social Security Providers in Austria, 'DO.A') provided:

'Paragraph 13: Reckonable periods of service for classification in the salary scheme

- (1) For classification in the salary scheme (Paragraph 40) there shall be taken into account permanent periods of service completed before the employee's 18th birthday: ...

Paragraph 40: Classification in the salary scheme; advancement

- (1) Employees... shall be classified in the first step of their salary group (service class) in accordance with the provisions of Paragraphs 37 to 39. Where periods of service must be taken into account in accordance with Paragraph 13, sub-paragraph (3) applies to the classification by analogy.
- (2) ... Periods of time spent in salary steps (a) to (c) prior to a person's 18th birthday do not count as periods of service which may be taken into account for the purpose of classification in the salary scheme ...
- (3) ... the employee will be advanced to the next highest step of his salary group (service class) at the end of each two completed years of service (periodic advancement). ...'

- 7 Following the 80th amendment to the DO.A, which also introduced a transitional provision for workers recruited prior to 1 January 2011, those provisions read as follows:

'Paragraph 13: Reckonable period of service for classification in the salary scheme

- (1) The following periods of service, completed after 30 June of the year in which nine school years have or would have been completed after entering into the first school grade, are to be included for the purposes of classification in the salary scheme:

...

- (2a) up to a maximum of three years in aggregate

...

- (b) any period of study in a ... school beyond that required by the general education obligation for the minimum period for that course of study under the provisions of education law, but at most for three years;

...

Under Paragraph 40: Classification in the salary scheme; advancement

- (1) Employees shall be classified in the first step of their salary group (service class) ... Where periods of service must be taken into account in accordance with Paragraph 13, sub-paragraph 3 applies to the classification by analogy. ...
- (3) An employee shall remain in salary step 1 for five years, and from the next salary step onwards shall advance (periodic advancement) on completion of each two years of service into the next highest salary step in his salary group (class of service). ...'

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

- 8 The claimant, who was born on 28 July 1961, has been employed by the Administration under a private law contract of employment since 1 April 1988. The contract is governed by the DO.A, a collective agreement. His remuneration is calculated on the basis of a classification undertaken at the time of his recruitment without account having been taken, at that point in time, of his completed periods of school education. Mr Bowman has, since then, progressed every two years to the next step, in accordance with the provisions of the DO.A, and received an increase in remuneration corresponding to his advancement.
- 9 Prior to its 80th amendment, Paragraph 40(2) of the DO.A provided, in relation to the Administration's employees under the age of 18 at the time of their recruitment, that those under the age of 16, 17 and 18 were classified in steps a, b and c of the applicable salary group respectively, in accordance with Paragraph 37 of the DO.A. It is only after those employees had reached the age of 18 that they progressed to step 1, in which any Administration employee recruited after the age of 18 was also classified, but without being able to invoke previous periods capable of being treated as periods of activity. Consequently, no period of schooling could be taken into account. Furthermore, the salary for steps a, b and c was noticeably lower than that linked to the first step. The same activity or function was therefore paid differently depending on the age at which it was carried out.
- 10 The 80th amendment to the DO.A repealed Paragraph 40(2) and did not replace it, so that steps a, b and c disappeared. The classification of any Administration employee who had not undertaken, before their recruitment date, periods to be taken into account in the career calculation, is carried out, following that amendment, regardless of the age of that employee when entering service. Such an employee is immediately classified in the first step 1. The new scheme did not alter the remuneration for the last step of the salary group at issue, and therefore all employees under the age of 18 were granted a significant salary increase which, depending on the salary group, ranged between EUR 100 and 200 per month.
- 11 Since the 80th amendment to the DO.A, any advancement to the second step can only occur after five years have elapsed. Thereafter, advancements within the following steps occur each time after two years of service. Those biennial advancements terminate at the 18th step, the next advancement then occurring after four years. After the latter, referred to as 'age related bonus', no further advancement is foreseen.

- 12 Before his recruitment by the Administration, Mr Bowman attended an Austrian federal high school from 1 September 1976 to 30 June 1979, thus for a period of 2 years and 10 months. After the 80th amendment to the DO.A made it possible for periods of school education to be taken into account, Mr Bowman submitted, on 17 May 2012, a request seeking the recalculation of the periods preceding his entry into service of the Administration for the purpose of setting his advancement date, in accordance with Paragraph 13 of the DO.A, in its version resulting from the 80th amendment to the collective agreement. Mr Bowman, therefore, requested from the Administration the payment of a lump sum of EUR 3655.20, with interest and costs, the payment, in future, of a salary corresponding to a classification in salary group F, service class I, salary step 17, and that 1 October 2012 be the date of his next advancement.
- 13 On 27 May 2012, the Administration decided that, whereas, in accordance with the DO.A, in its version resulting from its 80th amendment, Mr Bowman's length of service could be increased by a maximum of three years, no improvement to his salary classification and no modification to his advancement date would follow, because, since that amendment, the advancement to the second step could only occur after five years, rather than after two years as was previously the case.
- 14 The Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna, Austria) upheld the action brought by Mr Bowman against that decision of the Administration. That court considered that the extension of the period for advancement from the first to the second step amounted to indirect discrimination on grounds of age.
- 15 The Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) upheld the appeal against the decision of the Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna) brought by the Administration. The appeal court in particular took the view that the possibility of taking account of periods of school education was introduced by the 80th amendment to the DO.A, at the same time as the measure seeking to extend the period for advancement from the first to the second step of the scheme and that Mr Bowman has been treated in the same way as other workers, both before and after the amendment, so that he was not subject to discrimination on grounds of age.
- 16 Mr Bowman brought an appeal on a point of law against that judgment before the referring court, the Oberster Gerichtshof (Supreme Court, Austria). That court asks whether the extension of the period for advancement from the first to the second step of the scheme established by the DO.A amounts to indirect discrimination on grounds of age. It observes in particular that the 80th amendment to the DO.A does not seek to remove any pre-existing unequal treatment but to make it possible to develop careers by taking account of previous periods. It considers that even if the extension of the period of advancement from the first to the second step were to amount to an indirect difference in treatment on grounds of age, it could nevertheless be justified.
- 17 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 21 of the Charter, in conjunction with Article 2(1) and (2) and Article 6(1) of Council Directive 2000/78, and also having regard to Article 28 of the Charter, to be interpreted as meaning that:

- (a) a provision in a collective agreement 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?'

The question referred for a preliminary ruling

- 18 By its question, the referring court asks, in essence, whether Article 21 of the Charter, as well as Article 2(1) and (2) and Article 6(1) of Council Directive 2000/78, must be interpreted as meaning that they preclude a national collective labour agreement, such as that at issue in the main proceedings, by which an employee, who benefits from account being taken of periods of school education for the purpose of his classification in the salary steps, is subject to a longer period of advancement between the first and second salary step than that which applies between the following steps.
- 19 As a preliminary point, it must be noted that, where they adopt measures which come within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, now enshrined in Article 21 of the Charter, the Member States and the social partners must respect that directive (see, to that effect, judgments of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 48, and of 11 November 2014, *Schmitzer*, C-530/13, EU:C:2014:2359, paragraph 23).
- 20 It is thus, in the first place, necessary to consider whether a collective agreement, such as that at issue in the main proceedings, introduces a difference in treatment on grounds of age, for the purposes of Article 2(1) of Directive 2000/78. In this regard, it should be borne in mind that, under that provision, the principle of equal treatment means that there must 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 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 of that directive. It is clear moreover from Article 2(2)(b) of Directive 2000/78 that, for its purposes, indirect discrimination on grounds of age occurs where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- 21 As regards periods of school education, with which the present case is concerned, it follows from the request for a preliminary ruling that, unlike the scheme pre-dating the 80th amendment to the DO.A, the scheme established by that amendment makes it possible to take them into account in so far as they exceed the general education obligation for the minimum period for that course of study required under the provisions of education law, but at most for three years.
- 22 Moreover, whereas, following the 80th amendment to the DO.A, the period of advancement from the first to the second salary step has been extended by three years, the advancement in the salary scheme is still based on completed years of service.
- 23 It follows that, as noted by the referring court, a collective agreement, such as that at issue in the main proceedings, by which employees who benefit from account being taken of periods of school education for the purpose of their classification in the salary steps are subject to a longer period of advancement within the first salary step than that which applies to the following steps, does not lead to a difference in treatment on grounds of age.
- 24 As regards the question whether such a collective agreement, such as that at issue in the main proceedings, leads, as suggested by the referring court, to indirect discrimination on grounds of age, it must be determined whether, despite a neutral wording, it disadvantages in actual fact a much greater number of persons of a certain age or within a certain age group.
- 25 In the present case, the 80th amendment to the DO.A has the effect that any advancement to the second step requires completion of a period of service of five years, whereas advancements from that step onwards occur every two years of service.

- 26 In that respect, it must be noted that the referring court relies on the premiss that the introduction of a longer period of advancement from the first to the second salary step than that which applies to progression to the following steps concerns mainly workers who are newly-recruited by the Administration and who cannot properly rely, for the purposes of their classification in the salary steps, on periods preceding their entry into service. The group made up of the workers whose salaries are lower is, generally, constituted mainly by younger persons, so that, according to the referring court, it cannot be ruled out that the scheme introduced by the 80th amendment to the DO.A disadvantages younger workers in terms of their salary.
- 27 It must nevertheless be noted that, in the present case, the existence of a difference in treatment based indirectly on age cannot be based on that sole finding.
- 28 Indeed, it follows from the documents submitted to the Court, first, that the scheme introduced by the 80th amendment to the DO.A provides that the classification of Administration employees in the salary steps depends in particular, as is apparent from paragraph 21 of the present judgment, on completed periods of school education. Those periods of school education may be taken into account for the purposes of that classification, regardless of the age of the employee at the time of recruitment. Therefore, such a scheme is based on criterion which is neither inextricably nor indirectly linked to the age of employees (see, by analogy, judgment of 7 June 2012, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft*, C-132/11, EU:C:2012:329, paragraph 29).
- 29 Second, it must be noted that the situation of Mr Bowman, which nevertheless led the referring court to ask the present question, does not seem to correspond to that of a worker whose professional experience is in its early days and who cannot rely on proper periods of service, since he is able to prove, as is apparent from the documents before the Court, a period of school education as well as close to thirty years of service with the Administration.
- 30 Consequently, even if a young worker, newly recruited and with little experience, who asks for his periods of school education to be taken into account for classification in the salary steps, will, in practice, be subject to the extension in the period for advancement within the first step, it remains the case that, as Mr Bowman's situation demonstrates, an older worker benefiting from a substantial period of service with the Administration and making an identical request, will also and on the same grounds, potentially or retroactively, be subject to the same extension.
- 31 Indeed, as is apparent from a response provided by the Administration to a written question of the Court, the collective agreement at issue in the main proceedings, in so far as it concerns inclusion of periods of school education and the extension of the period for advancement within the first step of the salary scheme, applies in the same way to all workers who make a request for such inclusion, including, retroactively, workers who have already reached higher steps.
- 32 It follows that a collective agreement, such as that at issue in the main proceedings, by which employees who benefit from account being taken of periods of school education for the purpose of their classification in the salary steps are subject to a longer period of advancement between the first and second salary steps, does not lead to a difference in treatment indirectly based on age.
- 33 Consequently, the answer to the question referred is that Article 2(1) and (2) of Directive 2000/78 must be interpreted as not precluding a national collective labour agreement, such as that at issue in the main proceedings, by which an employee who benefits from account being taken of periods of school education for the purpose of his classification in the salary steps is subject to a longer period of advancement between the first and second salary step, as long as that extension applies to every employee benefiting from the inclusion of those periods, including retroactively to those having already reached the next steps.

Costs

- ³⁴ 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 (Sixth Chamber) hereby rules:

Article 2(1) and (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 a national collective labour agreement, such as that at issue in the main proceedings, by which an employee who benefits from account being taken of periods of school education for the purpose of his classification in the salary steps is subject to a longer period of advancement between the first and second salary step, as long as that extension applies to every employee benefiting from the inclusion of those periods, including retroactively to those having already reached the next steps.

[Signatures]