

JUDGMENT OF THE COURT (Third Chamber)

18 June 2009 (*)

(Directive 2000/78/EC – Equal treatment in employment and occupation – Age discrimination – Determining the pay of contractual employees of the State – Exclusion of professional experience acquired before the age of 18)

In Case C-88/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberster Gerichtshof (Austria), made by decision of 7 February 2008, received at the Court on 27 February 2008, in the proceedings

David Hütter

v

Technische Universität Graz,

THE COURT (Third Chamber),

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

Advocate General: Y. Bot,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- David Hütter, by T. Stampfer and C. Orgler, Rechtsanwälte,
- Technische Universität Graz, by M. Gewolf-Vukovich, Mitglied der Finanz Prokuratur,
- the Danish Government, by B. Weis Fogh, acting as Agent,
- the Commission of the European Communities, by J. Enegren and B. Kotschy, acting as Agents,

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

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation 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 reference was made in the course of proceedings between Mr Hütter and Technische Universität Graz ('TUG') concerning his grading within the scale for contractual public

servants at the time of his recruitment.

Legal context

Community legislation

3 Recital 25 in the preamble to Directive 2000/78 reads:

'The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'

4 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'.

5 Article 2 of Directive 2000/78, headed 'Concept of discrimination', 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, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this directive applies is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

...'

6 Article 3(1) of Directive 2000/78, headed 'Scope', provides:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

(c) employment and working conditions, including dismissals and pay;

...'

7 Article 6(1) of Directive 2000/78, headed '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;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

8 Under the first paragraph of Article 18 of Directive 2000/78, the Republic of Austria was required to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 2 December 2003 at the latest.

National legislation

9 As explained in the order for reference, Paragraph 128 of the Federal Law of 2002 on the organisation of universities and university studies (Universitätsgesetz 2002, BGBl. I, 120/2002) provides that the terms of contracts of employment concluded between a university and its employees after the entry into force of that law, on 1 January 2004, and until the entry into force of a collective agreement are to be determined by the Law on contractual public servants 1948 (Vertragsbedienstetengesetz 1948, BGBl., 86/1948), as amended by the Law of 2004 (BGBl. I, 176/2004) ('VBG').

10 Paragraph 3(1)(a) of the VBG sets out the rules governing the grading of contractual public servants. Persons must be 15 years of age or older to be recruited as public servants.

11 As regards entitlements dependent on the length of the employment relationship or professional experience, the VBG does not allow any period of service completed before the age of 18 to be taken into account, except in certain specific circumstances that are not relevant to the case in the main proceedings. Thus, when determining the increment reference date, Paragraph 26(1) of the VBG excludes accreditation of periods of service completed before the person concerned attained the age of 18. Periods of service completed 'by way of vocational training ... in a ... university or college ...', as referred to in Paragraph 26(2)(1)(b) of the VBG, are to be accredited for the purposes of determining the incremental step only where they were completed after the person concerned attained the age of 18.

12 Directive 2000/78 was transposed in Austria by the Federal Law on equal treatment 1993 (Bundes-Gleichbehandlungsgesetz 1993, BGBl., 100/1993), as amended by the Law of 2004

(BGBl. I, 65/2004) (the 'B-GIBG'). That law governs contracts of employment with universities. However, according to the national court, the B-GIBG did not make any amendment to Paragraph 26(1) of the VBG, which therefore remains applicable to the facts at issue in the main proceedings.

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

- 13 Mr Hütter, the claimant in the main proceedings, was born in 1986. Together with a female colleague, he completed a period of apprenticeship, from 3 September 2001 to 2 March 2005, as a laboratory technician with TUG, a public body coming under the Federal Law of 2002 on the organisation of universities and university studies.
- 14 Mr Hütter and his colleague were then recruited by TUG, from 3 March 2005 to 2 June 2005, that is to say, for three months. As Mr Hütter's colleague was 22 months older than him, she was recruited at a higher incremental step, which translated into a difference in monthly salary of EUR 23.20. That difference stems from the fact that the period of apprenticeship completed by Mr Hütter after attaining his majority was only approximately 6.5 months, as contrasted with 28.5 months in the case of his colleague.
- 15 Mr Hütter brought an action before the Landesgericht für Zivilrechtssachen Graz (Graz Regional Court for Civil Matters). He sought payment of compensation equivalent to the difference in treatment he received due to his age and which he considers to be unjustified and in breach of both the B-GIBG and Directive 2000/78. That difference in treatment corresponds to the sum of EUR 69.60.
- 16 Mr Hütter was successful at first instance and on appeal and so TUG brought an appeal before the court making the present reference. That court wishes to ascertain in particular whether Article 6 of Directive 2000/78 precludes a national measure that allows employers not to take into account periods of professional experience acquired before attaining majority in order to avoid placing persons who have obtained a secondary education at a disadvantage, to avoid encouraging pupils not to pursue that type of education and, more generally, to avoid making apprenticeship costly for the public sector and to promote the integration of young apprentices into the labour market.
- 17 It is in those circumstances that the Oberster Gerichtshof (Supreme Court) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Are Articles 1, 2 and 6 of [Directive 2000/78] to be understood as precluding national legislation ... which excludes creditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18?'

The question referred for a preliminary ruling

Observations submitted to the Court

- 18 Mr Hütter considers that, where professional experience is equal, there is no justification, under Article 6(1) of Directive 2000/78, to support a difference in treatment based exclusively on the age at which that experience was acquired. A rule such as that at issue in the main proceedings provides a disincentive to pursue an occupation before attaining the age of 18. It constitutes discrimination prohibited under Directive 2000/78.
- 19 TUG denies the existence of discrimination. It contends that Paragraph 26(1) of the VBG applies without distinction to all persons, irrespective of their age. Consequently, there can be no question of any discrimination based on the criterion of age. That provision can be examined only in the light of Article 2(2)(b) of Directive 2000/78, which concerns indirect

discrimination based on apparently neutral criteria.

- 20 TUG contends, in the alternative, that the measure at issue in the main proceedings pursues a legitimate aim and is appropriate and necessary within the meaning of Article 6(1) of Directive 2000/78.
- 21 In fact, it gives the public services a clear and uniform structure for determining the pay of contractual public servants. That is a legitimate aim within the meaning of Articles 2(2) and 6(1) of Directive 2000/78.
- 22 During 2000, approximately 0.03% of apprentices completed their training after attaining the age of 18. The fact that apprentices must provide evidence of periods of professional experience acquired before the age of 18, periods that are not taken into account in the calculation of their remuneration, promotes their integration into the workforce. According to TUG, that thereby enables employers to reduce the costs associated with the recruitment of young apprentices.
- 23 Furthermore, accreditation of periods of employment prior to attaining the age of 18 places persons with a general education at an undue disadvantage. In a Member State such as the Republic of Austria, where the labour market suffers from a lack of people with higher-education qualifications, a measure such as that at issue in the main proceedings also prevents persons from being deterred from a general education.
- 24 The Danish Government considers that Article 6(1) of Directive 2000/78 must be interpreted as not precluding a measure such as that at issue in the main proceedings where it pursues a legitimate vocational training and youth employment policy objective, and is appropriate and necessary.
- 25 That government points to the broad discretion enjoyed by Member States with regard to measures based on the criterion of age (see, to that effect, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 62 and 63, and Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 68).
- 26 The Danish Government considers that making provision for persons under 18 years of age to be paid less than adults encourages the former to undertake further training that will enable them to obtain higher pay. Furthermore, if employers were required to remunerate persons under 18 years of age on the same terms as adult workers, they would naturally be inclined to recruit older, more experienced workers. Lastly, persons under 18 years of age are generally not able to carry out the same tasks as adults. That is why a number of collective agreements in Denmark contain provisions relating to pay that are less favourable towards workers in that age category.
- 27 The Commission of the European Communities considers that the rule at issue in the main proceedings concerns an employment and working condition within the meaning of Article 3(1)(c) of Directive 2000/78, namely pay. The situation at issue in the main proceedings therefore falls within the scope of that directive.
- 28 According to the Commission, the rule excluding periods of service completed under the age of 18 establishes discrimination directly based on age. The fact that the measure at issue in the main proceedings applies without discrimination to any person over 18 years of age is irrelevant in that regard. Discrimination lies in the fact that the rule is more favourable to persons who acquire professional experience after they attain 18 years of age. The circumstances at issue in the main proceedings show the discriminatory effect of that rule, since the claimant in the main proceedings has an equal level of experience but is treated less favourably than one of his work colleagues solely on the ground of the difference in their ages.
- 29 Regarding the justification based on the need to have a uniform system for accrediting periods of professional experience for all employees, the Commission accepts that it may be a

legitimate aim within the meaning of Article 6(1) of Directive 2000/78. It considers, however, that the rule at issue is neither appropriate nor necessary in order to achieve that aim. The system of calculating periods of seniority would be just as uniform and logical if periods of employment before the age of 18 were not excluded.

30 As regards the justification relating to the equal treatment of apprentices, on the one hand, and pupils in general education, on the other hand, the Commission acknowledges that this may be covered by the vocational training objective referred to in Article 6(1) of Directive 2000/78. It doubts none the less whether the measure at issue in the main proceedings is appropriate or necessary, since that measure places pupils in general education at an advantage as compared with apprentices, since the latter are generally able to acquire professional experience before they attain majority.

31 As regards, lastly, the justification based on integration of young people into the labour market, the Commission doubts whether the measure at issue in the main proceedings has such an effect. The difference in treatment introduced by that measure constitutes a disadvantage which will stay with an employee who suffers it throughout his career. The exclusion of periods of employment completed before the age of 18 does not concern young people exclusively but also, according to the Commission, all contractual public servants covered by the VBG, irrespective of their age at the time of recruitment. The Commission is of the view that there are other less restrictive means of promoting youth employment.

The Court's reply

32 It falls to be ascertained whether national legislation such as that at issue in the main proceedings falls within the scope of Directive 2000/78 and, if so, whether it is a discriminatory measure based on age that might be considered justified with regard to that directive.

33 As is apparent both from its title and preamble and its content and purpose, Directive 2000/78 is designed to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which includes age.

34 More particularly, it follows from Article 3(1)(a) and (c) of Directive 2000/78 that the directive applies, within the framework of the areas of competence conferred on the Community, 'to all persons, as regards both the public and private sectors, including public bodies', on the one hand, in relation to 'conditions for access to employment, ... including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy' and, on the other hand, in relation to 'employment and working conditions, including dismissals and pay'.

35 Paragraph 26 of the VBG excludes, generally, accreditation of any professional experience acquired before the age of 18 for the purposes of grading contractual staff within the scale for the Austrian public service. That provision thus affects the determination of the incremental step at which such persons will be graded. It also has a consequential effect on their pay. Legislation of that nature must therefore be regarded as establishing rules relating to the conditions for access to employment, recruitment and pay, within the meaning of Article 3(1) (a) and (c) of Directive 2000/78.

36 In those circumstances, Directive 2000/78 is applicable to a situation such as that giving rise to the dispute before the national court.

37 Article 2(1) of Directive 2000/78 defines the 'principle of equal treatment' that it seeks to implement as meaning 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 the directive states that, for the purposes of paragraph 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.

- 38 National legislation such as that at issue in the main proceedings imposes less favourable treatment for persons whose professional experience has, albeit only in part, been acquired before the age of 18 as compared with those who have acquired experience of the same nature and of comparable length after attaining that age. Such legislation establishes a difference in treatment between persons based on the age at which they acquired their professional experience. As is demonstrated by the facts at issue in the main proceedings, 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 thus establishes a difference in treatment directly based on the criterion of age, within the meaning of Article 2(1) and (2)(a) of Directive 2000/78.
- 39 It is apparent from Article 6(1) of Directive 2000/78, however, that such differences of treatment on grounds of age do 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'.
- 40 As regards the legitimacy of the aim pursued by the legislation at issue in the main proceedings, it is apparent from the explanations given by the national court that the Austrian legislature intended to exclude accreditation of professional experience acquired before full legal capacity has been attained, at the age of 18, in order not to place persons who have pursued a general secondary education at a disadvantage as compared with persons with a vocational education. Besides this incentive to pursue secondary studies, the national court also mentions the desire of the legislature to avoid making apprenticeship more costly for the public sector and thereby promote the integration of young people who have pursued that type of training into the labour market. It is therefore appropriate to examine whether those aims may be considered legitimate within the meaning of Article 6(1) of Directive 2000/78.
- 41 In that regard, it should be observed that aims that may be considered 'legitimate' within the meaning of Article 6(1) of Directive 2000/78 and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age are social policy objectives, such as those related to employment policy, the labour market or vocational training (Case C-388/07 *Age Concern England* [2009] ECR I-0000, paragraph 46).
- 42 The aims mentioned by the national court come within that category of legitimate aims and may justify differences in treatment associated with 'the setting of special conditions on access to employment ..., including ... remuneration conditions, for young people ... in order to promote their vocational integration' and 'the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment' referred to in Article 6(1)(a) and (b), respectively, of Directive 2000/78.
- 43 Consequently, aims of the kind mentioned by the national court must, in principle, be considered to justify 'objectively and reasonably', 'within the context of national law', as provided in the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on the ground of age prescribed by Member States.
- 44 It is also necessary to ascertain, according to the actual wording of that provision, whether the means used to achieve that aim are 'appropriate and necessary'.
- 45 In this respect, the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy (*Mangold*, paragraph 63).
- 46 Notwithstanding that discretion allowed to the Member States, it should be pointed out that the aims mentioned by the national court may, at first sight, appear contradictory. One of those aims is to encourage pupils to pursue a general secondary education rather than

vocational education. Another aim is to promote the recruitment of persons who have had a vocational education rather than of persons with a general education, as can be seen from paragraph 40 above. Therefore, in the first case, it is a matter of not placing persons with a general secondary education at a disadvantage as compared with those who have had vocational training and, in the second case, the reverse. It is therefore difficult, at first sight, to accept that national legislation such as that at issue in the main proceedings can, simultaneously, be of advantage to each of those two groups at the expense of the other.

- 47 Besides that lack of internal consistency, it must also be observed that the national legislation at issue in the main proceedings relies on the criterion of previous professional experience for the purposes of determining grading within the scale and, consequently, the pay of contractual public servants. Rewarding experience that enables the worker to perform his duties better is, as a general rule, acknowledged to be a legitimate aim. That is why the employer is free to reward such experience (see Case C-17/05 *Cadman* [2006] ECR I-9583, paragraphs 35 and 36). The fact remains, however, that national legislation such as that at issue in the main proceedings does not merely reward experience but also establishes, where experience is equal, a difference in treatment on the basis of the age at which that experience was acquired. In those circumstances, such an age-related criterion therefore has no direct relationship with the aim, so far as the employer is concerned, of rewarding professional experience.
- 48 As regards the aim of not treating a general secondary education less favourably than a vocational education, it should be noted that the criterion of the age at which previous experience was acquired applies irrespective of the type of education pursued. It excludes accreditation both of experience acquired before the age of 18 by a person who has pursued a general education and of that acquired by a person with a vocational education. That criterion may therefore lead to a difference in treatment between two persons with a vocational education or between two persons with a general education based solely on the criterion of the age at which they acquired their professional experience. In those circumstances, the criterion of the age at which the vocational experience was acquired does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education. In that regard, it is clear that a criterion based directly on the type of studies pursued without reference to the age of the persons concerned would, so far as Directive 2000/78 is concerned, be better suited to achieving the aim of not treating general education less favourably.
- 49 As regards the aim of promoting integration into the labour market of young people who have pursued a vocational education, it should be pointed out that non-accreditation of experience acquired before the age of 18 applies without distinction to all contractual public servants, whatever the age at which they are recruited. Thus, that criterion of the age at which professional experience was acquired does not single out a group of persons defined by their youth in order to give them special conditions of recruitment intended to promote their integration into the labour market. A rule such as that at issue in the main proceedings can be distinguished from measures such as those mentioned by the Danish Government that are designed to promote the integration of young people below the age of 18 into the labour market, in so far as those measures provide minimum conditions of pay for such young people that are below those for older workers. Since it does not take into account people's age at the time of their recruitment, a rule such as that at issue in the main proceedings is not therefore appropriate for the purposes of promoting the entry into the labour market of a category of workers defined by their youth.
- 50 Consequently, legislation with the characteristics at issue in the main proceedings cannot be regarded as appropriate within the meaning of Article 6(1) of Directive 2000/78.
- 51 Therefore, the reply to be given to the national court is that Articles 1, 2 and 6 of Directive 2000/78 must be interpreted as precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before

the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded.

Costs

52 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 (Third Chamber) hereby rules:

Articles 1, 2 and 6 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 which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded.

[Signatures]