

JUDGMENT OF THE COURT (Second Chamber)

21 January 2015 (*)

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Article 2(1) and (2)(a) and Article 6(1) and (2) — Difference of treatment on grounds of age — Civil service — Pension scheme — National legislation precluding the taking into account of periods of school education completed before the age of 18)

In Case C-529/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 16 September 2013, received at the Court on 8 October 2013, in the proceedings

Georg Felber

v

Bundesministerin für Unterricht, Kunst und Kultur,

THE COURT (Second Chamber),

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

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Austrian Government, by C. Pesendorfer, acting as Agent,
- 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

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 of Article 2(1) and (2)(a) and Article 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 Felber and Bundesministerin für Unterricht, Kunst und Kultur (Federal Minister for Education, Art and Culture; 'the Bundesministerin') concerning her refusal to take periods of study preceding Mr Felber's entry into service into account, for the calculation of his pension rights.

Legal context

Directive 2000/78

- 3 Under Article 1 of Directive 2000/78, '[t]he purpose of this 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 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 3(1) and (3) of that directive, entitled 'Scope', provides:
 - '1. 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:...

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

...

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes’.

6 Article 6 of the directive reads 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’.

7 Article 7(1) of the directive, entitled ‘Positive action’, provides:

‘With 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’.

Austrian law

- 8 Paragraphs 53, 54 and 56 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; ‘the PG 1965’) were, in the version in force at the time of the facts of the dispute in the main proceedings, worded as follows:

‘Pre-service pensionable periods which may be credited

Paragraph 53(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:

...

- (h) the period of a completed ... course of study at an ... intermediate school, secondary school, academy or related educational establishment, provided that the statutory minimum duration of compulsory education has not been exceeded,

...

Exclusion from being credited or waiver

Paragraph 54 ...

(2) The following pre-service pensionable periods are excluded from being credited:

- (a) the periods completed by the civil servant before having reached the age of 18 ...

...

Special pension contribution

Paragraph 56(1) The civil servant shall make a special pension contribution in so far as the Federal State does not receive, for the pre-service pensionable periods credited, an agreed transfer in accordance with the provisions of social security law ...’.

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

- 9 Mr Felber, who was born in 1956, is a professor and has been a federal civil servant since 1991.
- 10 For the purpose of calculating Mr Felber's pension rights, the pensionable periods prior to his entry into the service of the administration were determined by a decision taken in 1992. Only the periods of training and professional practice completed after the age of 18 were taken into consideration for calculating his pension rights. Consequently, the period of education completed by Mr Felber before the age of 18 — three school years — was not credited. Relying on the judgment in *Hütter* (C-88/08, EU:C:2009:381), Mr Felber requested that that period be credited or purchased by payment of a special contribution.
- 11 The Landesschulrat für Salzburg (School Authority of the Province of Salzburg) rejected his application by decision of 5 November 2010 on the ground that Paragraph 54(2)(a) of the PG 1965 does not authorise the crediting of periods of education completed before the age of 18 in respect of civil servants who, like Mr Felber, are covered by Paragraph 88(1) of the PG 1965 because they were appointed before 1 May 1995. Mr Felber appealed against the decision of the Landesschulrat für Salzburg to the Bundesministerin, but she dismissed his appeal by decision of 1 December 2011.
- 12 Mr Felber subsequently appealed against that decision to the Verfassungsgerichtshof (Constitutional Court), which declined jurisdiction, by decision of 5 March 2012, in favour of the Verwaltungsgerichtshof (Administrative Court). The Verfassungsgerichtshof nevertheless found that the departure of the rules applicable to the crediting of periods of education completed prior to entry into service in the calculation of the amount of retirement pensions from those applicable to the crediting of such periods in the calculation of civil servants' remuneration was compatible with the constitutional principle of equal treatment.
- 13 According to the referring court, the judgment in *Hütter* (EU:C:2009:381) requires a new non-discriminatory calculation of periods of professional practice and vocational training completed by the civil servant concerned before the age of 18. Therefore, the referring court wonders whether it is necessary to carry out that new non-discriminatory calculation only for remuneration rights or also for pension rights.
- 14 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court of justice for a preliminary ruling:
1. Does it constitute — for the moment notwithstanding Article 52(1) of [the Charter] and Article 6 of [Directive 2000/78/EC] — (direct) unequal treatment on grounds of age for the purposes of Article 21(1) of the Charter and Article 2(1) and (2)(a) of the directive if periods of study at an intermediate or secondary school are credited as pre-service pensionable periods only if they

were completed after the civil servant reached the age of 18, where those pre-service pensionable periods are important not only for the pension entitlement but also for the amount of that pension and that pension (total pension) is regarded in national law as the continued payment of remuneration in the context of a public-law employment relationship which still exists even after the civil servant has retired?

2. If so, may a civil servant — in the absence of a justification in accordance with Article 52(1) of the Charter and Article 6 of the directive (see question 3 below) — rely on the direct applicability of Article 21 of the Charter and Article 2 of the directive in proceedings concerning an application for the crediting of pre-service pensionable periods even if he is not yet retired at that time, especially since under national law — if the legal position has not changed upon his retirement — the legal force of the rejection of such an application could be held against him in a pension assessment procedure or in the case of a fresh application for the crediting of those periods?
3. If so, is this unequal treatment for the purposes of Article 52(1) of the Charter and Article 6(1) and (2) of the directive
 - (a) justified in order to accord to persons whose date of birth lies after the date on which school began in the year they started school or to persons who attend a type of school with an extended upper stage and, for that reason, have to attend school after the age of 18 in order to complete their studies the same conditions as to persons who complete intermediate or secondary school before the age of 18, even if the eligibility of periods of school attendance after the age of 18 is not restricted to the abovementioned cases;
 - (b) justified in order to exclude from the entitlement periods in which, in general, no gainful activity takes place and accordingly no contributions are paid? Does such a justification exist irrespective of the fact that at first no contributions are payable also in respect of periods of attendance at intermediate or secondary schools after the age of 18 and in the event of the subsequent crediting of such periods of school attendance a special pension contribution is payable in any case?
 - (c) justified because the exclusion of the crediting of pre-service pensionable periods completed before the age of 18 is to be regarded as equivalent to setting an ‘age for admission to an occupational social security scheme’ within the meaning of Article 6(2) of the directive?’

Consideration of the questions referred

Preliminary observations

- 15 By its questions, the referring court asks the Court to interpret the principle of non-discrimination on grounds of age, as enshrined in Article 21 of the Charter and given expression in Directive 2000/78.
- 16 As is apparent from the case-law of the Court, where they adopt measures which fall 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, Member States must respect the directive (see, to that effect, judgments in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 48, and *Tyrolean Airways Tiroler Luftfahrt*, C-132/11, EU:C:2012:329, paragraph 22).
- 17 In those circumstances, it is appropriate to examine the questions referred in the context of the dispute in the main proceedings, involving an individual and the national administration, solely in the light of Directive 2000/78.

The first and third questions

- 18 By its first and third questions, which should be examined together, the referring court asks, in essence, whether Article 2(1) and (2)(a) and Article 6(1) and (2) of Directive 2000/78 must be interpreted as precluding national legislation which excludes the crediting of periods of school education completed by a civil servant before the age of 18 for the purpose of the grant of pension entitlement and the calculation of the amount of his retirement pension, although those periods are credited when they are completed after that age is reached.
- 19 It is necessary, first, to ascertain whether the national legislation at issue in the main proceedings falls within the scope of Directive 2000/78. In that regard, it follows from Article 3(1)(a) and (c) of the directive that that it applies, within the framework of the areas of competence conferred on the European Union, ‘to all persons, as regards both the public and private sectors, including public bodies’, 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 in relation to ‘employment and working conditions, including dismissals and pay’.
- 20 The scope of Directive 2000/78 must therefore be understood, in the light of Article 3(1)(c) and (3), read in conjunction with recital 13 in the preamble to that directive, as excluding social security or social protection schemes, the benefits of which are not equivalent to ‘pay’ within the meaning given to that term for the application of Article 157(2) TFEU (see, to that effect, judgments in *HK Danmark*, C-476/11, EU:C:2013:590, paragraph 25, and *Dansk Jurist- og Økonomforbund*, C-546/11, EU:C:2013:603, paragraph 25).
- 21 The concept of pay, within the meaning of Article 157(2) TFEU, comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his

employer (judgments in *HK Danmark*, EU:C:2013:590, paragraph 26, and *Dansk Jurist- og Økonomforbund*, EU:C:2013:603, paragraph 26).

- 22 The issue in the main proceedings is the failure to take periods of study completed by Mr Felber before the age of 18 and before his entry into the federal civil service into account for the calculation of his pension points.
- 23 As is apparent from the order for reference, the amount of the retirement pension depends on periods of service and equivalent periods and on the salary received by the civil servant. The retirement pension constitutes a future cash payment, paid by the employer to his employees, as a direct consequence of their employment relationship. That pension is, under national law, regarded as pay which continues to be paid in the context of an employment relationship which continues after the civil servant becomes entitled to retirement benefits. That pension constitutes, on that basis, pay within the meaning of Article 157(2) TFEU.
- 24 It follows that, by excluding, for the purposes of calculating such a retirement pension, some civil servants from the benefit of having the periods of study they 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. Accordingly, Directive 2000/78 applies to situations such as that at issue in the main proceedings.
- 25 Secondly, as regards 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.
- 26 In accordance with Paragraph 53(2)(h) of the PG 1965, the period of a course of study completed by the civil servant at an intermediate school, a secondary school, an academy or a related educational establishment must be credited, provided that the statutory minimum duration of education has not been exceeded. However, under 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.
- 27 As noted by the referring court, national legislation such as that at issue in the main proceedings favours persons who undertake or finish such studies after their 18th birthday in so far as only those persons will benefit from the crediting of the periods of study they completed in an intermediate or secondary school before their

entry into the federal civil service. Such legislation establishes a difference in treatment between persons based on the age at which they completed their school education. That criterion may even lead to a difference in treatment between two persons who have pursued the same studies, 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 (see, by analogy, judgment in *Hütter*, EU:C:2009:381, paragraph 38).

- 28 Thirdly, it is necessary to consider whether that difference of treatment may, however, be justified under Article 6(1) of Directive 2000/78.
- 29 The first subparagraph of that provision states that 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.
- 30 As regards, first, the question whether the aim pursued by the national legislation at issue is legitimate, the Court has consistently held that Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see the judgment in *Specht and Others*, C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 46 and the case-law cited).
- 31 In that regard, it is apparent from the case-file before the Court that the crediting of periods completed by a civil servant prior to his entry into service and outside of his employment relationship is an exception which was introduced so as not to disadvantage, in terms of the acquisition of pension rights, civil servants who, prior to entering the federal civil service, achieved a higher level of education compared to those whose appointment has no specific educational requirement and who were, consequently, able to enter the civil service from the age of 18. Thus, the rules of the pension scheme for civil servants are said to be designed so that the total career to be taken into consideration for the purposes of the calculation of the amount of the retirement pension extends back to the minimum age for entry into State service. The national legislation at issue in the main proceedings aims to harmonise the starting date for contributions to the pension scheme and, therefore, the maintenance of the pensionable age. In that context, the exclusion of the crediting of periods of education completed before the age of 18 is said to be justified by the fact that the person concerned is not engaged, in principle, during those periods, in any gainful activity giving rise to the payment of contributions to the pension scheme.

- 32 In so far as the pursuit of such an aim ensures observance of the principle of equal treatment for all persons in a specific sector and relates to an essential element of their employment relationship, such as the time of retirement, that aim constitutes a legitimate employment policy objective (see, by analogy, judgment in *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraph 61).
- 33 Secondly, it is necessary to determine, in the light of the wording of Article 6(1) of Directive 2000/78, whether, in the context of the broad discretion enjoyed by the Member States, referred to in paragraph 30 above, the means of achieving that aim are appropriate and necessary.
- 34 As regards the appropriateness of Paragraph 54(2)(a) of the PG 1965, it is apparent from the case-file before the Court that the minimum age for employment in the public service is set at 18 years and that, therefore, a civil servant can only participate in and contribute to a civil servants' pension scheme after that age.
- 35 Consequently, the exclusion, pursuant to that provision, of the crediting of periods of education completed before the age of 18 is appropriate for achieving the legitimate objective of adopting an employment policy which enables all the members of the civil servants' pension scheme to begin to contribute at the same age and to acquire the right to receive a full retirement pension, and thus guaranteeing equal treatment of civil servants.
- 36 As regards, the question whether the national legislation at issue in the main proceedings goes beyond what is necessary to attain the objective pursued, it must be pointed out that the application in the main proceedings seeks to take into account only periods of education completed in an intermediate or secondary school, not periods of employment, as in *Hütter* (EU:C:2009:381).
- 37 In that regard, the national legislation at issue in the main proceedings appears coherent in the light of the justification stated by the referring court, namely the exclusion of the periods during which the person concerned does not pay contributions to the pension scheme from the calculation of the retirement pension.
- 38 First, periods of study such as those at issue in the present case do not give rise to the payment of such contributions. Secondly, as regards periods of study completed by the civil servant before reaching the age of 18 years, it is apparent from the order for reference that they are not considered to be periods equivalent to years of service and, can therefore be taken into account for the calculation of pension rights only on the condition, set out in Paragraph 56 of the PG 1965, that a special contribution corresponding to the missing contributions is made. According to the documents before the Court, that special contribution compensates for the absence of contribution, by the person concerned, during those years of study to the pension scheme by means of compulsory contributions. That special contribution fulfils, therefore, a compensation function.

- 39 In those circumstances, taking into account the broad discretion enjoyed by the Member States 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, a measure such as that provided for in Paragraph 54(2)(a) of the PG 1965 is appropriate to achieve the objectives referred to in paragraphs 31 and 32 above and does not go beyond what is necessary to achieve those objectives.
- 40 Consequently, the answer to the first and third questions is that Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes the crediting of periods of school education completed by a civil servant before the age of 18 for the purpose of the grant of pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation is objectively and reasonably justified by a legitimate aim relating to employment policy and labour-market policy and constitutes an appropriate and necessary means of achieving that aim.

The second question

- 41 In view of the answer to the first and third question, it is unnecessary to reply to the second question.

Costs

- 42 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:

Article 2(1) and (2)(a) and Article 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 not precluding national legislation, such as that at issue in the main proceedings, which excludes the crediting of periods of school education completed by a civil servant before the age of 18 for the purpose of the grant of pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation is objectively and reasonably justified by a legitimate aim relating to employment policy and labour market policy and, secondly, it constitutes an appropriate and necessary means of achieving that aim.

[Signatures]

* Language of the case: German.