

Colin Wolf v Stadt Frankfurt am Main

Reference for a preliminary ruling from the Verwaltungsgericht Frankfurt am Main (Germany)

Directive 2000/78/EC – Prohibition of discrimination on grounds of age – Age limit of 30 for recruitment to intermediate career posts in the fire service – Justification – Aim of creating a balanced age structure to ensure the operational capacity and proper functioning of the fire service

1. In this reference for a preliminary ruling, the Verwaltungsgericht (Administrative Court) Frankfurt am Main (Germany) wishes to know, primarily, whether a national provision which lays down a maximum age of 30 years for recruitment to intermediate career posts in the fire service is a measure which is justified within the meaning of Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. (2)

2. This reference has been made in the context of a dispute between Mr Wolf and Stadt Frankfurt am Main (the City of Frankfurt on Main) relating to the latter's refusal to consider Mr Wolf's application for an intermediate career post in the fire service, because he had exceeded the age limit of 30 years.

3. In this Opinion, I shall explain why I consider that the German legislation laying down that age limit is justified in the light of Articles 4(1) and 6(1) of Directive 2000/78.

I – Legal framework

A – Directive 2000/78

4. Article 1 of Directive 2000/78 states that the purpose of the 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. According to recital 18, the directive 'does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services'.

6. Article 2 of the directive states:

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

2. For the purposes of paragraph 1:

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

...'

7. Article 3(1)(a) of the directive states:

'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:

- (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.'

8. Article 4(1) of the directive is worded as follows:

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

9. Article 6(1) of the directive 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.'

10. Article 17 of the directive is worded as follows:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. ...'

B – *National legislation*

1. The legislation of the *Land* of Hesse

11. Paragraph 3(1)(1) of the Hessische Feuerwehrlaufbahnverordnung (Regulation of the *Land* of Hesse on the careers of officials in the operational divisions of the professional fire services) of 21 December 1994 (3) provides that persons of a maximum age of 30 can be recruited to intermediate career posts in the fire service.

12. Paragraphs 194 and 197 of the Hessisches Beamtengesetz (Law of the *Land* of Hesse on public officials) of 21 March 1962 (4) are worded as follows:

'Paragraph 194 – Retirement

(1) Established police officers retire at the end of the month in which they complete their 60th year (age limit).

(2) If it is in the interests of the service, retirement may, on application by the police officer, be postponed beyond completion of the 60th year for a specified period which must not exceed one year at a time, but not beyond the completion of the 62nd year.

...

Paragraph 197 – Legal status

(1) For officials in the operational divisions of professional fire services, the provisions of Paragraphs 187 and 192 to 194 apply by analogy.

...'

2. Federal legislation

13. The Gesetz über die Versorgung der Beamten und Richter in Bund und Ländern (Law on the pensions of public officials and judges of the Federation and the *Länder*) of 24 August 1976 (5) provides, in the version of paragraphs 4 and 14 applicable at the material time in the main proceedings:

'Paragraph 4 – Entitlement to and calculation of the pension

(1) A pension is granted only if the official

1. has performed service of at least five years

...

Paragraph 14 – Amount of the pension

(1) The pension amounts, for each year of pensionable service, to 1.79375% of pensionable remuneration (Paragraph 5), but at most a total of 71.75%.

...

(4) The pension amounts to at least 35% of pensionable remuneration (Paragraph 5).

...'

14. The Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (6) transposed Directive 2000/78.

15. Paragraph 15 of the AGG is worded as follows:

'Paragraph 15 – Compensation and damages

(1) In the event of a breach of the prohibition of discrimination, the employer is obliged to make good the damage caused thereby. This does not apply if the employer is not responsible for the breach of duty.

(2) The employee can claim appropriate financial compensation for non-pecuniary damage. In the event of non-recruitment, the compensation must not exceed three months' salary if the employee would not have been recruited even if the selection had been free from discrimination.

(3) When collective agreements apply, the employer is obliged to pay compensation only if he acts intentionally or with gross negligence.

...'

II – The main proceedings and the questions referred for a preliminary ruling

16. By letter received on 4 October 2006 at the fire service department of Stadt Frankfurt am Main, Mr Wolf, who was born on 9 December 1976, applied for an intermediate career post in the fire service.

17. On 13 November 2006, Stadt Frankfurt am Main informed Mr Wolf that the next recruitment would take place on 1 August 2007. However, that date was put back to 1 February 2008 with a selection procedure in August 2007.

18. By letter of 28 February 2007, Stadt Frankfurt am Main informed Mr Wolf that it could not consider his application because he exceeded the age limit of 30.

19. On 12 April 2007, Mr Wolf claimed compensation from Stadt Frankfurt am Main pursuant to Paragraph 21 of the AGG. The amount of the damages claimed was three times the monthly salary he would have received if he had been recruited.

20. After that claim had been rejected by decision of 4 May 2007, upheld on 10 October 2007, Mr Wolf brought proceedings before the Verwaltungsgericht Frankfurt am Main for annulment of the decisions of 4 May and 10 October 2007 and an order for damages against Stadt Frankfurt am Main.

21. Before that court, he maintained that the FeuerwLVO is contrary to the AGG.

22. Since the national court had doubts regarding the compatibility of the German legislation with Articles 6 and 17 of Directive 2000/78, it decided to stay the proceedings and refer the following 10 questions to the Court of Justice for a preliminary ruling:

- '(1) Does the national legislature enjoy generally a wide margin of discretion to exploit the room for manoeuvre in Article 6(1) of Directive 2000/78, or is the discretion limited to what is needed, at any rate when it comes to setting a maximum age for recruitment with a view to a minimum period of service before retirement in accordance with point (c) of the second subparagraph of Article 6(1) of Directive 2000/78?
- (2) Does the criterion of need in point (c) of the second subparagraph of Article 6(1) of Directive 2000/78 express the appropriateness of the means mentioned in the first subparagraph of Article 6(1) of Directive 2000/78 in more concrete terms, thereby restricting the scope of that generally worded provision?
- (3) (a) Is it a legitimate aim in the context of the first subparagraph of Article 6(1) of Directive 2000/78 for an employer to pursue the interest in recruiting officials who will remain in active service for as long as possible by having a maximum recruitment age?
- (b) Is the implementation of such an aim inappropriate as soon as it has the effect that officials serve for longer than is necessary to obtain the minimum pension guaranteed by law in the case of early retirement after five years' service?
- (c) Is the implementation of such an aim inappropriate only once it has the effect that officials serve for longer than is necessary – at present 19.51 years – to earn the minimum pension guaranteed by law in the case of early retirement?
- (4) (a) Is it a legitimate aim within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78 to keep the total number of officials to be recruited to a minimum by means of a maximum recruitment age which is as low as possible, in order to keep to a minimum the number of individual benefits such as provision for accidents or sickness (assistance which also covers family members)?
- (b) In that respect, what significance can be accorded to the fact that, as officials grow older, provisions for accidents or sickness benefits (including for family members) are higher than for younger officials, so that the recruitment of older officials could increase the overall cost of such provision?
- (c) In that respect, must firm forecasts or statistics be available, or are general assumptions based on probability sufficient?
- (5) (a) Is it a legitimate aim within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78 for an employer to wish to apply a particular maximum

recruitment age in order to ensure a “balanced age structure in the particular career”?

- (b) If so, what requirements must the criteria for creating such an age structure satisfy in order to meet the conditions for a ground of justification (appropriateness and necessity, need)?
- (6) Is it a legitimate aim within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78 for the employer to refer, in respect of a maximum recruitment age, to the fact that it is generally possible before reaching that age to acquire the relevant qualifications for recruitment to a training programme in the intermediate career in the fire service, in the form of appropriate school education and vocational training?
- (7) What criteria should be used to assess whether a minimum period of service before retirement is appropriate or necessary?
 - (a) May the need for a minimum period of service be justified exclusively as compensation for the acquisition, solely at the employer’s expense, of a qualification with the employer (qualification for an intermediate career post in the fire service), in order to ensure, with regard to such a qualification, an adequate subsequent period of service with that employer, so that the costs of training the official are thus gradually worked off?
 - (b) What is the maximum permissible length of the service period phase that follows the period of training? Can it exceed five years, and if so, under what conditions?
 - (c) Irrespective of question 7(a), can the appropriateness or necessity of a minimum period of service be justified by the consideration that, in the case of officials whose pensions are financed solely by the employer, the period of active service to be expected from recruitment to likely retirement date must suffice to earn a minimum pension guaranteed by law by serving for a period which is at present 19.51 years?
 - (d) Conversely, is a refusal to recruit someone justified under Article 6(1) of Directive 2000/78 only if the person would be recruited at an age which, given his likely retirement date, would result in the minimum pension being payable although it had not yet been fully earned?
- (8)
 - (a) Should the date of retirement for the purposes of point (c) of the second subparagraph of Article 6(1) of Directive 2000/78 be determined on the basis of the age limit fixed by law for retirement and subsequent receipt of a pension, or must it be based on the statistical mean retirement age of a particular group of officials or employees?
 - (b) Where applicable, to what extent should it be taken into consideration that in individual cases the normal date of an official’s retirement can be postponed by up to two years? Does that circumstance lead to a corresponding increase in the maximum recruitment age?
- (9) May the initial training period to be completed by officials be included in the calculation of the minimum period of service in the context of Article 6(1) of Directive 2000/78? In that respect, is it relevant whether the training period has to be fully accounted for as pensionable service for the purpose of obtaining the pension, or should the period of training be excluded from the time period for which an employer may require a minimum length of service under point (c) of the second subparagraph of Article 6(1) of Directive 2000/78?
- (10) Are the provisions in the second sentence of Paragraph 15(1) and in Paragraph 15(3) of the [AGG] compatible with Article 17 of Directive 2000/78?

III – Analysis

23. I propose to examine the first nine questions together. By these questions, the national court asks the Court of Justice, in essence, to rule whether it is possible, under Article 6(1) of

Directive 2000/78, to justify national legislation which lays down an age limit of 30 for recruitment to an intermediate career post in the fire service.

24. In its reference for a preliminary ruling, the national court mentions several aims which might be attributed to the difference in treatment on grounds of age referred to in Paragraph 3(1)(1) of the FeuerwLVO, which is, in principle, prohibited by Article 2(2)(a) of Directive 2000/78. In order to suggest a reply which will be helpful to that court, I think it is necessary to examine all those aims.

25. In the light of the specific and detailed replies given by the German Government to the questions put by the Court during the proceedings, I think that the analysis of this reference for a preliminary ruling should focus on what constitutes the essential aim of the age limit of 30 years, namely the creation of a balanced age structure to ensure the operational capacity and proper functioning of the fire service.

26. It is apparent from the explanations provided by the German Government that the members of the intermediate career in the fire service are required to work in the field. Unlike the management and supervisory duties of the fire service, the activities of the intermediate career are largely characterised by their physical nature.

27. The various areas of activity of the intermediate career are fire-fighting, rescuing people, tasks relating to protecting the environment and dealing with the damage caused by bad weather, rescuing animals and capturing dangerous animals, and also ancillary tasks such as maintaining and checking protective equipment and service vehicles.

28. Each of these areas of activity requires different physical capacities. Thus, in the first two areas of activity, fire-fighting and rescuing people, officials in the intermediate career of the fire service have to meet exceptionally high physical requirements. It should be noted, in that regard, that the protective clothing alone weighs approximately 30 kilogrammes.

29. Owing to these physical demands, these two areas of activity are characterised by an age structure of between 30 and 50 years maximum. In fact, since people lose physical capacity as they age, almost no official is active after the age of between 45 and 50 in the areas of fire-fighting and rescuing people.

30. Officers who exceed that age are then allocated to other tasks which have to be carried out by the intermediate career of the fire service, which make fewer physical demands.

31. Placed in context, the rationale for the age limit of 30 for recruitment to intermediate career posts in the fire service is obvious. It is a question of ensuring that officials in that career may properly complete the tasks which make particularly high physical demands, over a reasonably long period. If account is taken of the fact that a two-year training period has to be added to the age limit of 30, that allows an official in the intermediate career to be active for 18 years (taking the age of 50 as a reference) or 13 years (taking the age of 45 as a reference) in the areas of activity which require a particularly high physical capacity.

32. The proper organisation of the intermediate career of the fire service requires that, when they are allocated to areas of activity which are physically less demanding, the older officials are replaced, in the areas of activity which are more demanding from a physical point of view, by younger officials who will be able to be active in those areas of activity for a reasonably long period. An age limit of 30 for recruitment to the intermediate career is therefore easy to understand, because it enables the fluctuation of staff between the posts which are physically more demanding and those which are less demanding to be compensated by the arrival of young officials able to fulfil tasks such as fighting fires and rescuing people during a sufficiently long period.

33. The German Government has added to its explanations data from studies carried out in the field of industrial and sports medicine. According to the government, the aim of ensuring a reasonable length of employment of officials in the areas of activity which make particularly high physical demands and for which the medical and biological limit is in the region of 45 to 50 years reflects the established medical and biological data. It is apparent from those studies that increased age brings reduced capacity in the cardiovascular system, lungs, musculature and

strength of the human body. It is precisely these physical functions which are of decisive importance in the intermediate career of the fire service.

34. Those studies also describe a phenomenon of premature ageing where workers are subjected to difficult working conditions. It is clear that officials in the intermediate career of the fire service are subject to physical pressures linked to the environment (for example, heat, humidity and noise), to particular physical demands (for example, lifting and carrying heavy loads, working in awkward positions) and to night-work and shift-work, which may speed up the ageing process in that occupation. In my view, this phenomenon accentuates the need to ensure that young officials, who are able to fulfil the more difficult tasks during a sufficiently long period, replace the officials who are no longer able to carry out those tasks.

35. In the light of all these considerations, there is no doubt, in my view, that an age limit of 30 for recruitment to an intermediate career post in the fire service is justified, either under Article 4(1) or under Article 6(1) of Directive 2000/78.

36. As regards, first, Article 4(1) of Directive 2000/78, I note that it provides that '[n]otwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

37. We have seen that the nature of several of the areas of activity in which the firemen in the intermediate career of the fire service are required to operate and the conditions in which they carry out their main tasks require particularly high physical capacities. Since those physical capacities naturally diminish with age, I consider that age is an essential characteristic of the proper exercise of the most physically demanding activities of that profession. In my view, therefore, an age limit of 30 may be regarded as an essential and determining occupational requirement for ensuring the operational capacity of the intermediate career of the fire service.

38. The legitimacy of such an aim is clear from recital 18 in the preamble to Directive 2000/78, which, let us recall, states that the directive 'does not require ... the armed forces and the police, prison or *emergency services* to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to *the legitimate objective of preserving the operational capacity of those services*'. (7) Furthermore, such a requirement is proportional, because, as the information provided by the German Government shows, it does not go beyond what is necessary for firemen in the intermediate career of the fire service to be able to fulfil properly those tasks which are the most physically demanding during a sufficiently long period.

39. It is apparent from these considerations that, in my view, an age limit of 30 for recruitment to an intermediate career post in the fire service is justified in the light of Article 4(1) of Directive 2000/78.

40. Concerning, secondly, Article 6(1) of Directive 2000/78, it should be recalled that, under that article, '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'.

41. Aims that may be considered 'legitimate' within the meaning of Article 6(1) of Directive 2000/78 and, consequently, capable of justifying an exception to 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. (8)

42. In my view, the aim of creating a balanced age structure in order to ensure the operational capacity and proper functioning of the fire service constitutes an aim relating to employment policy which is 'legitimate' within the meaning of Article 6(1) of Directive 2000/78. The creation of a balanced age structure within the fire service may be regarded as forming part of the

establishment of an employment policy within the service, the parameters of which stem from the tasks which the service has to carry out and which satisfies a requirement in the public interest.

43. As regards the matter of whether the means used to achieve that aim are 'appropriate and necessary' within the meaning of that article, it should be pointed out that 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. [\(9\)](#)

44. The effect of recital 18 of Directive 2000/78 is to reinforce this broad discretion where it concerns the definition of an employment policy within the police, prison and emergency services.

45. In those circumstances, and in the light of the contextual details in the information provided by the German Government and set out above, I consider that Paragraph 3(1)(1) of the FeuerwLVO, in laying down an age limit of 30 for eligibility for recruitment to an intermediate career post in the fire service, does not go beyond what is appropriate and necessary in order to create a balanced age structure to ensure the operational capacity and proper functioning of the fire service.

46. Finally, since, in this case, there is no infringement, under Directive 2000/78, of the prohibition of discrimination on grounds of age, a reply to Question 10, which concerns the consequences of such an infringement, is not necessary.

IV – Conclusion

47. In the light of all the foregoing considerations, I propose that the Court give the following ruling:

Articles 2(2)(a), 4(1) and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which lays down an age limit of 30 for recruitment to an intermediate career post in the fire service.

[1](#) – Original language: French.

[2](#) – OJ 2000 L 303, p. 16.

[3](#) – 'the FeuerwLVO'.

[4](#) – GVBl. I, p. 26.

[5](#) – BGBl. I, p. 3839.

[6](#) – BGBl. 2006 I, p. 1897, 'the AGG'.

[7](#) – Emphasis added.

[8](#) – Case C-88/08 *Hütter* [2009] ECR I-0000, paragraph 41 and the case-law cited.

[9](#) – *Ibid* (paragraph 45 and the case-law cited).