Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

2 April 2020*

(Reference for a preliminary ruling — Social policy — Principle of equal treatment in employment and occupation — Directive 2000/78/EC — Prohibition of all discrimination on grounds of age — Public call for expressions of interest — Conditions of participation — Exclusion of retired public-sector and private-sector employees)

In Case C-670/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court for Sardinia, Italy), made by decision of 21 February 2018, received at the Court on 29 October 2018, in the proceedings

CO

v

Comune di Gesturi,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 14 November 2019,

after considering the observations submitted on behalf of:

– CO, by G.L. Machiavelli, F. Cocco Ortu and M. Tronci, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Santoro and A. Jacoangeli, avvocati dello Stato,

– the Greek Government, by E.-M. Mamouna, acting as Agent,

– the European Commission, by B.-R. Killmann and C. Valero, acting as Agents,

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

gives the following

* Language of the case: Italian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 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 CO and the Comune di Gesturi (Municipality of Gesturi, Italy) in respect of a call for expressions of interest relating to an analysis and consultancy role that excludes retired persons from participating in that call for expressions of interest.

Legal context

EU law

3 Under Article 1 of Directive 2000/78, 'the 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;

(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 3 of the Directive, which is entitled 'Scope', provides:

'1. Within the limits of the areas of competence conferred on the [European Union], 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;

…’

6 Under Article 4(1) of Directive 2000/78:

‘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.’

7 Article 6 of Directive 2000/78, which is entitled ‘Justification of differences of treatment on grounds of age’, provides, in paragraph 1 thereof:

‘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.’

National law

8 Article 5(9) of decreto-legge 6 luglio 2012, n. 95, convertito con modificazioni dalla legge 7 agosto 2012, n. 135 (Decree-Law No 95 of 6 July 2012, converted into law, with amendments, by Law No 135 of 7 August 2012 (Ordinary Supplement to GURI No 156 of 6 July 2012)), in the version of the text amended by Article 6 of decreto-legge 24 guigno 2014, n. 90, convertito dalla legge 11 agosto 2014, n. 114 (Decree-Law No 90 of 24 June 2014, converted into law by Law No 114 of 11 August 2014 (Ordinary Supplement to GURI No 190 of 18 August 2014)) (‘Decree-Law No 95/2012’), regulates the award of analysis and consultancy roles by public administrative authorities and prohibits them, inter alia, from awarding such roles to retired public-sector or private-sector employees. They are likewise prohibited from awarding to such retired persons management positions or positions on the governing bodies of such administrative authorities, as well as on the governing bodies of undertakings and companies controlled by those authorities, with the exception of the roles of member of the boards of regional undertakings and of member or representative of the elected bodies of certain undertakings. Those roles, offices and positions may, however, be awarded to them in cases where they are performed on a voluntary basis. In addition, with regard to the management positions, and without prejudice to their voluntary nature, it is specified that the duration of those terms of office may not exceed one year, a period that may not be extended or renewed, with the same administrative authority.

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

9 On 28 December 2017, the Municipality of Gesturi published a call for expressions of interest with a view to awarding an analysis and consultancy role for the municipal recycling centre.

10 With regard to the conditions of participation, that call for expressions of interest contained a clause requiring that candidates meet the following conditions: 'Degree in medicine and surgery — Specialisation in hygiene — Proven management experience in the Servizio Sanitario Nazionale (National Health Service, Italy) of at least five years — Not a retired private-sector or public-sector employee'.

11 Even though CO satisfied all of the professional requirements set out in that call for expressions of interest, he was not allowed to take part in the procedure by reason of the fact that he is a retired public-sector employee.

12 Taking the view that the clause excluding retired persons from the pool of potentially eligible candidates constitutes indirect discrimination on grounds of age and must therefore be declared unlawful, if not null and void, CO brought an action challenging the call for expressions of interest at issue in the main proceedings before the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court for Sardinia, Italy).

13 In his action, the applicant in the main proceedings submits that Article 5(9) of Decree-Law No 95/2012, which prohibits public administrative authorities from awarding analysis and consultancy roles to retired private-sector and public-sector employees, must be disapplied as being contrary to Directive 2000/78. In addition, he contends, that provision infringes Article 21 of the Charter of Fundamental Rights of the European Union. The applicant alleges that the national legislation at issue in the main proceedings gives rise to indirect discrimination which cannot be justified by any legitimate aim.

14 The referring court is unsure whether the provision of national law at issue in the main proceedings is compatible with Articles 1 and 2 of Directive 2000/78. If this were in fact to be a case of indirect discrimination, it expresses doubts as to whether there is any possible justification within the meaning of Article 6 of that directive. It is, in its view, unlikely that analysis and consultancy roles, which present a degree of complexity and require certain experience, can be adequately performed by persons starting out on their professional career. A measure precluding the award of such roles to retired persons is, therefore, inappropriate in the light of the aim pursued, which is to promote the replacement of personnel through the recruitment of younger persons.

15 In those circumstances, the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court for Sardinia) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the principle of non-discrimination referred to in Articles 1 and 2 of … Directive [2000/78] preclude the provision in Article 5(9) of Decree-Law No [95/2012] prohibiting public administrative authorities from awarding analysis and consultancy roles to individuals who are already retired public or private employees?'

Consideration of the question referred

16 By its question, the referring court asks, in essence, whether Directive 2000/78 is to be interpreted as precluding national legislation that prohibits public administrative authorities from awarding analysis and consultancy roles to retired persons.

17 As a preliminary point, it should be recalled, with regard to the argument raised by the applicant in the main proceedings alleging that the referring court failed to consider the question in the light of the principle of the freedom to provide services, that national legislation such as that at issue in the main proceedings — which applies to Italian nationals and to nationals of other Member States alike — is, generally, capable of coming within the scope of the provisions relating to the fundamental freedoms established by the FEU Treaty only to the extent to which it applies to situations concerned with trade between Member States (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 24, and order of 4 June 2019, *Pólus Vegas*, C-665/18, not published, EU:C:2019:477, paragraph 17).

18 That, however, is not the case here, since the dispute in the main proceedings is confined in all respects within a single Member State, namely the Italian Republic.

19 In order to answer the question submitted by the referring court, it is important to determine whether the national legislation at issue in the main proceedings comes within the scope of Directive 2000/78 and, if so, whether it establishes a difference in treatment on grounds of age that is capable, as the case may be, of being justified in the light of Article 6 of that directive.

20 First, with regard to whether the legislation at issue in the main proceedings comes within the scope of Directive 2000/78, it is apparent both from its title and preamble and from its content and purpose that that directive seeks 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 include age (judgments of 18 June 2009, *Hütter*, C-88/08, EU:C:2009:381, paragraph 33, and of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 19).

21 In addition, it follows, in particular, from Article 3(1)(a) and (c) of Directive 2000/78 that that directive 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, first, 'conditions for access to employment … including selection criteria and recruitment conditions' and, second, 'employment and working conditions, including dismissals and pay' (see, to that effect, judgments of 18 June 2009, *Hütter*, C-88/08, EU:C:2009:381, paragraph 34, and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 32).

22 National legislation that prohibits, as a general rule, public administrative authorities from awarding analysis and consultancy roles to persons from both the private and public sector because they are retired means that those persons cannot be recruited or employed at all.

23 It follows that such legislation directly affects the establishment of a working relationship and, a fortiori, the pursuit by the persons concerned of certain professional activities and must, therefore, be regarded as laying down rules regarding the conditions for access to employment within the meaning of Article 3(1)(a) of Directive 2000/78.

24 In those circumstances, the legislation at issue in the main proceedings does come within the scope of Directive 2000/78.

25 Second, with regard to whether that legislation establishes a difference of treatment on grounds of age, within the meaning of Article 2(1) of Directive 2000/78, it should be recalled that, under that provision, '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' of that directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(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 of that directive. Pursuant to Article 2(2)(b)

of Directive 2000/78, indirect discrimination exists where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons.

26 In the present case, it is important to note that it is true that Article 5 of Decree-Law No 95/2012 does not make direct reference to a particular age. The exclusion from participation in calls for expressions of interest with a view to the award of analysis and consultancy roles by public administrative authorities applies to all retired persons, even though the age at which those persons were entitled to a retirement pension is not the same for all of them: according to the observations presented by the Italian Government at the hearing, that age may range between 60 and 75 years. However, by referring to retirement, the national legislation at issue in the main proceedings is based indirectly on a criterion linked to age, since the receipt of a retirement pension is subject to the attainment of a particular number of years of work and to the condition that the person has reached a certain age.

27 National legislation that prohibits retired persons from participating in calls for expressions of interest for the grant, by public administrative authorities, of analysis and consultancy roles must be regarded as subjecting such persons to less favourable treatment than that reserved for all persons still carrying on a professional activity.

28 Such legislation therefore establishes indirect discrimination on the grounds of the age of the person concerned, unlike, inter alia, the legislation at issue in the case which gave rise to the judgment of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraphs 28 and 30), which applied according to the status or socio-professional category to which the person concerned was assigned nationally, prohibiting the combination of a retirement pension received with income from professional activity.

29 It follows that the legislation at issue in the main proceedings constitutes an indirect difference of treatment on grounds of age within the meaning of Article 1, in conjunction with Article 2(2)(b), of Directive 2000/78.

30 Third, with regard to whether that difference of treatment may be justified in the light of Article 6 of Directive 2000/78, it should be observed that the first subparagraph of Article 6(1) states that a difference of treatment on grounds of age is not to constitute discrimination if, within the context of national law, it is 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.

31 Article 6 of the Directive also stipulates that such differences of treatment may include, inter alia, the setting of special conditions on access to employment for young people or the fixing of a maximum age for recruitment.

32 In the present case, it is apparent from the request for a preliminary ruling that the purpose of the national legislation at issue in the main proceedings is to ensure the replacement of personnel through the recruitment of young people. In addition, it follows from the written observations of the Italian Government that Article 5 of Decree-Law No 95/2012 pursues a dual objective, namely, first, to implement an effective revision of public expenditure by reducing the operating costs of the public administrative authority, without adversely affecting the essence of the services provided to citizens, and, second, to facilitate the rejuvenation of the personnel of public administrative authorities, by promoting the access of younger people to the civil service.

33 In that regard, it is important to note, from the outset, that reliance on several aims at the same time, which are either linked to one another or classed in order of importance, does not preclude the existence of a legitimate aim within the meaning of Article 6(1) of Directive 2000/78 (judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraphs 44 and 46).

34 In addition, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the employment protection measures which it wishes to adopt, they cannot in themselves constitute an aim pursued by that policy (see, to that effect, judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 51).

35 It follows that the aim of achieving an effective reduction of public expenditure, in so far as Article 5 of Decree-Law No 95/2012 forms part — in a general economic context — of the measures necessary to reduce the excessive deficits of the Italian public administrative authorities and seeks, more specifically, to prevent the cumulation of salaries and retirement pensions from public funds, may influence the nature or scope of the employment protection measures, but cannot in itself constitute a legitimate aim.

36 As for the aim of ensuring a rejuvenation of current personnel, it should be recalled that the legitimacy of such an aim of public interest relating to employment policy cannot reasonably be called into question, since it features among the objectives expressly laid down in the first subparagraph of Article 6(1) of Directive 2000/78 and, in accordance with the first subparagraph of Article 3(3) TEU, the promotion of a high level of employment is one of the ends pursued by the European Union (see, to that effect, judgment of 16 October 2007, *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 64).

37 According to the case-law of the Court, encouragement of recruitment unquestionably constitutes a legitimate aim of Member States' social or employment policy, in particular when the improvement of opportunities to enter the labour market for certain categories of workers is involved, inter alia the promotion of the access of young people to a profession (see, to that effect, judgments of 16 October 2007, *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 65, and of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 37).

38 More specifically, it is justified, by way of derogation from the principle of the prohibition of discrimination on grounds of age, to establish differences of treatment connected with conditions for access to employment where the objective pursued is to establish an age structure that balances young and older civil servants in order to facilitate the recruitment and promotion of young people (see, to that effect, judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraph 50).

39 Consequently, the employment policy objectives pursued by the national legislation at issue in the main proceedings must, in principle, be regarded as being capable of providing objective and reasonable justification for a difference of treatment on grounds of age.

40 It remains to be determined, in accordance with the actual wording of the first subparagraph of Article 6(1) of Directive 2000/78, whether the means deployed to achieve those aims are 'appropriate and necessary'.

41 Thus, it is important to ascertain whether Article 5 of Decree-Law No 95/2012 allows the employment policy objectives pursued by the legislature to be achieved without, however, unduly prejudicing the legitimate interests of retired persons, who, by virtue of that provision, are prevented from being re-employed.

42 In that connection, it should be recalled that Member States enjoy broad discretion in their choice not only to pursue a particular aim amongst others in the field of social and employment policy, but also in the definition of measures capable of achieving that aim (see, to that effect, judgments of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 63, and of 16 October 2007, *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 68). However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age (judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 33).

43 In addition, it is for the competent authorities of the Member States to find the right balance between the different interests involved (judgment of 16 October 2007, *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 71).

44 The prohibition of discrimination on grounds of age must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights. It follows that particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Retaining older workers in the labour force promotes diversity in the workforce. However, the interest represented by the continued employment of those persons must be taken into account in respecting other, potentially divergent, interests (see, to that effect, judgments of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraphs 62 to 64, and of 5 July 2012, *Hörnfeldt*, C-141/11, EU:C:2012:421, paragraph 37).

45 It is therefore important to determine whether, in exercising the broad discretion enjoyed by it in the field of social and employment policy, the legislature sought to achieve a balance between the desire to promote the access of young workers to employment and respect for the right of older persons to engage in work.

46 Thus, as regards the objective pursued consisting, in general terms, of ensuring the rejuvenation of the employed labour force, it may be argued that such an aim does not go beyond what is necessary, where a refusal to employ or recruit retired persons, whose professional life has ended and who are in receipt of a retirement pension, may be reasonably envisaged with a view to promoting the full employment of the active labour force or the access of younger people to the labour market.

47 By contrast, as the referring court has observed, it is uncertain whether the measure at issue in the main proceedings, namely the prohibition of retired persons from participating in calls for expressions of interest for the award of analysis and consultancy roles, does in fact allow the opportunities to enter the workforce to be improved for younger people. Since performance of the analysis and consultancy roles may prove delicate and complex, an older person is likely to be better placed, given the experience that he or she has acquired, to carry out the role entrusted to him or her. Accordingly, that person's recruitment is beneficial both to the public administrative authority behind the call for expressions of interest and in the light of the general interest. Although a rejuvenation of current personnel may take place if individuals who already have some experience express their interest in carrying out such roles, thereby allowing younger workers — who will follow them into the position which they free up — to access the labour market, those analysis and consultancy roles must not be isolated, fixed-term jobs offering no possibility of subsequent professional development.

48 In addition, it would be necessary to determine whether the prohibition at issue in the main proceedings does not go beyond what is necessary to achieve the aim pursued by unduly prejudicing the legitimate claims of retired persons, since it is based solely on the criterion of the age at which a retirement pension may be received and does not take into account whether or not the level of the retirement pension received by the persons concerned at the end of their professional career is reasonable.

49 It would be relevant to take account of the level of the retirement pension which the persons concerned are likely to receive, since the national legislation at issue in the main proceedings allows such persons to hold management positions for a fixed term and on a voluntary basis, in accordance with the budgetary considerations invoked by the Italian Government in parallel with the employment policy objective based on a rejuvenation of current personnel.

50 It is for the national court, which alone has jurisdiction to assess the facts at issue in the main proceedings and to interpret the applicable national law, to examine whether the prohibition imposed on retired persons participating in calls for expressions of interest with a view to the award of analysis and consultancy roles is appropriate for ensuring attainment of the objective pursued and genuinely

reflects a concern to attain it in a consistent and systematic manner (see, to that effect, judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 53).

51 In that context, it falls to the national court, inter alia, to determine whether the possibility of awarding management positions held on a voluntary basis does not, in reality, constitute an objective of budgetary policy pursued by the legislation at issue in the main proceedings which is at odds with the employment policy objective based on the rejuvenation of current personnel.

52 In the light of all of the foregoing considerations, the question referred must be answered to the effect that Directive 2000/78, in particular Article 2(2), Article 3(1) and Article 6(1) thereof, must be interpreted as not precluding national legislation prohibiting public administrative authorities from awarding analysis and consultancy roles to retired persons in so far as, first, that legislation pursues a legitimate employment policy and labour market objective and, second, the means deployed to achieve that objective are appropriate and necessary. It is for the referring court to determine whether that is in fact the case in the main proceedings.

Costs

53 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 (Eighth Chamber) hereby rules:

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in particular Article 2(2), Article 3(1) and Article 6(1) thereof, must be interpreted as not precluding national legislation prohibiting public administrative authorities from awarding analysis and consultancy roles to retired persons in so far as, first, that legislation pursues a legitimate employment policy and labour market objective and, second, the means deployed to achieve that objective are appropriate and necessary. It is for the referring court to determine whether that is in fact the case in the main proceedings.

[Signatures]