JUDGMENT OF THE COURT (Grand Chamber)

12 October 2010 *

In Case C-499/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 14 November 2008, received at the Court on 19 November 2008, in the proceedings

Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen,

v

Region Syddanmark,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Arabadjiev, Presidents of Chambers, G. Arestis, A. Borg Barthet, M. Ilešič, J. Malenovský, L. Bay Larsen, P. Lindh (Rapporteur) and T. von Danwitz, Judges,

* Language of the case: Danish.

Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2010,

after considering the observations submitted on behalf of:

— the Ingeniørforeningen i Danmark, acting on behalf of M. Andersen, by K. Schioldann, advokat,

— the Region Syddanmark, by M. Ulrich, advokat,

— the Danish Government, by J. Bering Liisberg and B. Weis Fogh, acting as Agents,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Hungarian Government, by G. Iván, acting as Agent,

— the Netherlands Government, by C.M. Wissels and M. de Mol, acting as Agents,

— the European Commission, by N.B. Rasmussen, J. Enegren and S. Schønberg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2 and 6 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 has been made in the context of a dispute between the Ingeniørforeningen i Danmark and the Region Syddanmark concerning Mr Andersen's dismissal.

Legal context

European Union law

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

'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 According to Article 1 of Directive 2000/78, '[t]he 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 Article 2 of Directive 2000/78, entitled '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, entitled 'Scope', is worded as follows:

'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;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

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

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.'

7 Pursuant to Article 6 of Directive 2000/78, entitled 'Justification of differences of treatment on grounds of age':

'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;

(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.

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.'

National law

8 Paragraph 2a of the Law on salaried employees (Lov om retsforholdet mellem arbejdsgivere og funktionærer) (funktionærloven) contains the following provisions on severance allowances:

'1. In the event of dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.

2. The provision laid down in subparagraph (1) shall not apply if the employee is entitled to an old age pension on termination of the employment relationship.

3. No severance allowance shall be payable, if the employee will – on termination of the employment relationship – receive an old age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 years.

…'

9 The national court notes that, according to settled national case-law, there is no entitlement to a severance allowance where a private pension scheme to which the employer has contributed allows payment of an old-age pension on termination of the employment relationship, even if the employee does not wish to exercise his right to retirement. This holds true even where the amount of the pension will be reduced as a result of the bringing forward of the retirement date.

10 Directive 2000/78 was implemented in Danish national law by Law No 1417 of 22 December 2004, amending the Law on the principle of non-discrimination on the labour market (lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.).

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

11 Mr Andersen was recruited on 1 January 1979 by the Sønderjyllands Amtsråd (Southern Jutland Regional Council), now the Region Syddanmark (Region of Southern Denmark).

12 On 22 January 2006, the Region Syddanmark notified Mr Andersen of its decision to dismiss him with effect from the end of the period of notice, that is to say the end of August of that year. It was determined following arbitration proceedings that he was dismissed unfairly.

13 At the end of his employment relationship with the Region Syddanmark, Mr Andersen, aged 63 at the time, decided not to exercise his right to retirement but to register as a job seeker with the relevant authorities.

14 On 2 October 2006, Mr Andersen brought a claim against his former employer for payment of a severance allowance corresponding to three months' salary, based on the fact that he had completed more than 18 years of service.

15 On 14 October 2006, the Region Syddanmark refused that claim on the basis of Paragraph 2a(3) of the Law on salaried employees, on the ground that Mr Andersen was entitled to draw a pension financed by his employer.

16 The Ingeniørforeningen i Danmark, the trade union representing Mr Andersen, then challenged that decision before the Vestre Landsret (Western Regional Court). It is apparent from the decision to refer that the applicant in the main proceedings submits that Paragraph 2a(3) of the Law on salaried employees constitutes a measure which discriminates against workers over the age of 60, which is incompatible with Articles 2 and 6 of Directive 2000/78. The Region Syddanmark disputes this.

17 It is in those circumstances that the Vestre Landsret decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is the prohibition of direct or indirect discrimination on grounds of age contained in Articles 2 and 6 of … Directive 2000/78 … to be interpreted as precluding a Member State from maintaining a legal situation whereby an employer, upon dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, must, upon termination of the salaried employee's employment, pay an amount equivalent to one, two or three months' salary respectively, while this allowance is not to be paid where the salaried employee, upon termination of employment, is entitled to receive an old-age pension from a pension scheme to which the employer has contributed?'

Consideration of the question referred

18 In order to provide an answer to the question referred by the national court, it should be ascertained whether the national legislation at issue in the main proceedings falls within the scope of Directive 2000/78 and, if so, whether it amounts to difference of treatment on grounds of age that might be considered justified under Article 6 of that directive.

19 First, as regards whether the legislation at issue in the main proceedings falls within the scope of Directive 2000/78, it should be noted that it is apparent from both its title and preamble and its content and purpose that Directive 2000/78 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.

20 More particularly, it follows from Article 3(1)(c) of Directive 2000/78 that the directive applies, within the framework of the areas of competence conferred on the European nion, 'to all persons, as regards both the public and private sectors, including public bodies', in relation to 'employment and working conditions, including dismissals and pay', inter alia.

21 By generally excluding a whole category of workers from entitlement to the severance allowance, Article 2a(3) of the Law on salaried employees thus affects the conditions regarding the dismissal of those workers for the purposes of Article 3(1)(c) of Directive 2000/78. That directive therefore applies to a situation such as the one which gave rise to the dispute before the national court.

22 Second, as regards the issue whether the legislation at issue in the main proceedings contains a difference of treatment on grounds of age for the purposes of Article 2(1) of Directive 2000/78, it should be recalled that under that provision, 'the "principle of equal treatment" means 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 that 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.

23 In the present case, Article 2a(3) of the Law on salaried employees deprives certain workers of their right to the severance allowance on the sole ground that they are entitled to draw, on termination of the employment relationship, an old-age pension from their employer under a pension scheme which they joined before attaining the age of 50 years. It is apparent from the documents before the court that entitlement to an old-age pension is subject to a minimum age requirement which, in Mr Andersen's

case, was set under a collective agreement at 60 years. That provision is thus based on a criterion which is inextricably linked to the age of employees.

24 It follows that the national legislation at issue in the main proceedings operates a difference of treatment based directly on grounds of age for the purposes of Article 1 of Directive 2000/78 in conjunction with Article 2(2)(a) thereof.

25 Third, it is necessary to examine whether that difference of treatment may be justified under Article 6 of Directive 2000/78.

26 In that regard, the first subparagraph of Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not 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.

27 In order to assess whether the aim pursued by the legislation at issue in the main proceedings is legitimate, it should be noted, firstly, that the severance allowance aims, as the national court points out by referring to the explanatory notes to the draft Law on salaried employees, to facilitate the move to new employment for older employees who have many years of service with the same employer. Secondly, although the legislature intended to restrict entitlement to that allowance to workers who, on termination of the employment relationship, are not eligible for an old-age pension,

the drafting history of that legislative measure, cited by the national court, shows that the restriction is based on the observation that those who are eligible for an old-age pension generally decide to leave the labour market.

28 In its written observations, the Danish Government pointed out that the restriction in Article 2a(3) of the Law on salaried employees guarantees, in a simple and rational manner, that employers do not pay double compensation to long-serving employees who have been dismissed, as this would not serve any employment policy objective.

29 The aim pursued by the severance allowance of protecting workers with many years of service in an undertaking and helping them to find new employment falls within the category of legitimate employment policy and labour market objectives provided for in Article 6(1) of Directive 2000/78.

30 According to that provision, those objectives may justify, by way of derogation from the prohibition of discrimination on grounds of age, differences of treatment related, inter alia, to 'the setting of special conditions on … employment and occupation, including dismissal and remuneration conditions, for … older workers … in order to promote their vocational integration or ensure their protection'.

31 Consequently, aims of the kind pursued by the national legislation at issue in the main proceedings must, in principle, be considered to justify 'objectively and reasonably' and 'within the context of national law', as provided for in the first subparagraph of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age.

32 It is also necessary to ascertain, according to the actual wording of that provision, whether the means used to achieve those aims are 'appropriate and necessary'. In the present case it must be examined whether Article 2a(3) of the Law on salaried employees enables the attainment of the employment policy objectives pursued by the legislature without unduly prejudicing the legitimate interests of workers who, as a result of that provision, find themselves deprived of the severance allowance on the ground that they are entitled to an old-age pension to which the employer has contributed (see, to that effect, Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 73).

33 In that regard, it should be noted that the Member States enjoy a broad discretion in the choice of the measures capable of achieving their objectives in the field of social and employment policy (Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63, and *Palacios de la Villa*, paragraph 68). However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age (Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 51).

34 Restricting the severance allowance to only those workers who, on termination of the employment relationship, are not entitled to an old-age pension to which their employer has contributed does not appear unreasonable in the light of the objective pursued by the legislature of providing increased protection for workers for whom it is very difficult to find new employment as a result of their length of service for an undertaking. Article 2a(3) of the Law on salaried employees also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment.

35 Therefore, it must be considered that a provision such as Article 2a(3) of the Law on salaried employees does not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the legislature.

36 It still needs to be ascertained whether that measure goes beyond what is necessary to attain the objective pursued by the legislature.

37 In that regard, it is apparent from the explanations provided by the national court, the parties to the main proceedings and the Danish Government that, in exercising the broad discretion which it enjoys in the field of social and employment policy, the legislature sought to strike a balance between legitimate yet competing interests.

38 According to those explanations, the legislature weighed the protection of workers who, because of their length of service, are generally among the oldest workers, against the protection of younger workers who are not entitled to a severance allowance. The drafting history of Law No 1417 of 22 December 2004, which implemented Directive 2000/78, cited by the national court, shows, in that regard, that the legislature took account of the fact that the severance allowance, as an instrument for reinforced protection of a category of workers defined in relation to their length of service, constitutes a form of difference of treatment to the detriment of younger workers. The Danish Government thus points out that the restriction of the scope of the severance allowance provided for in Article 2a(3) of the Law on salaried employees makes it possible not to extend a social protection measure which is not intended to apply to younger workers beyond what is necessary.

39 In addition, that government stated that the measure at issue in the main proceedings seeks to strike a balance between the protection of workers and employers' interests. The measure thus aims to ensure, in accordance with the principle of proportionality and the need to counter abuse, that the severance allowance is paid only to those for whom it is intended, namely those who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment. That

measure, it submits, also makes it possible to prevent employers from being forced to grant the severance allowance to persons to whom they will also be paying an old-age pension on termination of the employment relationship.

40 It is apparent from the foregoing that Article 2a(3) of the Law on salaried employees, in so far as it excludes from entitlement to the severance allowance workers who will receive, on termination of the employment relationship, an old-age pension from their employer, does not go beyond what is necessary to attain the objectives which it pursues.

41 However, that finding does not provide a complete answer to the question referred by the national court. That court pointed out that that provision treats those who will actually receive an old-age pension from their employer in the same way as those who are eligible for such a pension.

42 It is true that the Danish legislature intervened in order to prevent such an exclusion from unduly prejudicing the legitimate interests of workers. Since 1996 Article 2a(3) of the Law on salaried employees has provided that the exclusion from entitlement to the severance allowance is not applicable to workers who have joined an old-age pension scheme with their employer after attaining the age of 50 years. That provision thus permits the allowance to be paid to workers who, although eligible for a pension, have not been affiliated to their pension scheme for long enough to receive a pension which is sufficient to guarantee them a reasonable income.

43 The fact none the less remains that Article 2a(3) of the Law on salaried employees excludes from entitlement to the severance allowance all workers who are eligible, on termination of the employment relationship, for an old-age pension from their

employer and who joined that pension scheme before attaining the age of 50 years. It must therefore be examined whether such an exclusion goes beyond what is necessary to achieve the pursued objectives.

44 It is apparent from the explanations provided by the national court and the Danish Government that that exclusion is based on the idea that, generally speaking, employees leave the labour market if they are eligible for an old-age pension from their employer and joined that pension scheme before attaining the age of 50 years. As a result of that age-based assessment, workers who satisfy the criteria for eligibility for a pension from their employer yet wish to waive their right to their pension temporarily and to continue with their career will not be able to claim the severance allowance even though it is intended to protect them. Thus, in pursuing the legitimate aim of preventing that allowance from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension, the measure at issue actually deprives workers who have been made redundant and who wish to remain in the labour market of entitlement to the severance allowance merely because they could, inter alia because of their age, draw such a pension.

45 That measure makes it more difficult for workers who are eligible for an old-age pension subsequently to exercise their right to work because, unlike other workers with the same years of service, they are not entitled to the severance allowance when in the process of seeking new employment.

46 In addition, the measure at issue in the main proceedings prohibits an entire category of workers defined on the basis of their age from temporarily waiving their right to an old-age pension from their employer in exchange for payment of the severance allowance, which, after all, is aimed at assisting them in finding new employment. That measure may thus force workers to accept an old-age pension which is lower than the

pension which they would be entitled to if they were to remain in employment for more years, leading to a significant reduction in their income in the long term.

47 Consequently, by not permitting payment of the severance allowance to workers who, although eligible for an old-age pension from their employer, none the less wish to waive their right to such a pension temporarily in order to continue with their career, Article 2a(3) of the Law on salaried employees unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued by that provision.

48 Therefore, the difference of treatment resulting from 2a(3) of the Law on salaried employees cannot be justified under Article 6(1) of Directive 2000/78.

49 Consequently, the answer to the question referred is that Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding national legislation pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they have joined before attaining the age of 50 years cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment.

Costs

50 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 (Grand Chamber) hereby rules:

Articles 2 and 6(1) of Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they have joined before attaining the age of 50 years cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment.

[Signatures]