Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

5 July 2012*

(Equal treatment in employment and occupation — Prohibition of discrimination on grounds of age — National legislation conferring on employees an unconditional right to work until the age of 67 and providing for automatic termination of the employment relationship at the end of the month in which the employee reaches that age — Account not taken of the amount of the retirement pension)

In Case C-141/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Södertörns tingsrätt (Sweden), made by decision of 18 March 2011, received at the Court on 21 March 2011, in the proceedings

Torsten Hörnfeldt

v

Posten Meddelande AB,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas, A. Arabadjiev (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Hörnfeldt, representing himself,

— Posten Meddelande AB, by L. Bäckström,

— the Swedish Government, by A. Falk, acting as Agent,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the European Commission, by J. Enegren and K. Simonsson, acting as Agents,

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

* Language of the case: Swedish.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 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 proceedings between Mr Hörnfeldt and his former employer, Posten Meddelande AB, concerning the termination of his contract of employment on the last day of the month during which he reached the age of 67.

Legal context

European Union law

3 Recitals 8, 9 and 11 in the preamble to Directive 2000/78 state:

‘(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on … age … may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.’

4 Article 6 of Directive 2000/78, entitled ‘Justification of differences of treatment on grounds of age’, provides, in paragraph 1(a) 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’.

Swedish law

5 The provisions of Directive 2000/78 on age-related discrimination were transposed into Swedish law by Law (2008:567) on discrimination (diskrimineringslagen (2008:567)).

6 The basic rules on employment protection and working conditions are to be found in Law (1982:80) on employment protection (lagen (1982:80) om anställningsskydd, SFS 1982 No 80; 'the LAS'), Paragraph 32a of which provides:

'Subject to the provisions of this Law, an employee has the right to remain in his employment until the end of the month in which he reaches the age of 67.'

7 Under Paragraph 33 of the LAS, '[if] an employer wishes an employee to leave his employment at the end of the month in which he reaches the age of 67, the employer must give the employee at least one month's written notice.'

8 Paragraphs 32a and 33 of the LAS together form what is called, by common accord, 'the 67-year rule'. Under that rule, every employee enjoys an unconditional right to work until the last day of the month of his 67th birthday, on which date the employment contract may be terminated without dismissal.

9 It is apparent from the file submitted to the Court that the national provisions under which an employment contract may be terminated when the worker is entitled to receive a retirement pension or reaches a certain age were introduced into Swedish law in 1974. In the 1980s, the retirement age and, accordingly, the age at which employment contracts ended were lowered from 67 to 65. In 1991, the retirement age was again raised to 67 but the law still allowed collective agreements to provide that the employment contract could end before that age was reached. Under the 67-year rule, it has been prohibited, since 31 December 2002, whether by individual contract or by collective agreement, to make provision for a compulsory retirement age below 67.

10 In accordance with the principle that income received over the whole of a career must be taken into account, which was introduced by the new retirement pensions regime on 1 January 1996, the income received over the whole of a working career is used as the basis for calculation of the amount of the retirement pension.

11 Mr Hörnfeldt's employment contract was covered by a collective agreement between the employers' organisation Almega Tjänsteförbunden and the trade union for service and communication workers (SEKO).

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

12 Mr Hörnfeldt began working for the then Postverket (postal services agency) in 1989. Although he requested on numerous occasions to be able to work longer hours, he worked, between 1989 and 2006, only one day per week as an hourly-rated employee. Between 2006 and 2008 Mr Hörnfeldt worked 75% of full time. Between 11 October 2008 and 31 May 2009, he had an employment contract of indefinite duration and worked 75% of full time.

13 Mr Hörnfeldt reached the age of 67 on 15 May 2009, and his employment contract was terminated on the last day of that month pursuant to the 67-year rule set out in the LAS and the collective agreement which covered that contract. The amount of the monthly retirement pension which he has received since then is SEK 5 847 net.

14 By the action which he has brought before the referring court, Mr Hörnfeldt seeks annulment of the termination of his employment contract on the ground that the 67-year rule constitutes unlawful discrimination based on age.

15 Basing its findings on, inter alia, the judgment in Case C-144/04 *Mangold* [2005] ECR I-9981, the referring court takes the view that national legislation and collective agreements the effect of which is that employment contracts are terminated on the last day of the month in which an employee reaches the age of 67 amount to a difference of treatment based on age. That court therefore asks whether that difference of treatment can be regarded as objectively and reasonably justified by legitimate aims and whether it is appropriate and necessary in order to achieve those aims.

16 Firstly, the referring court finds that the 67-year rule was established to give individuals the right to work longer and increase the amount of their retirement pension. The referring court states that that rule could be regarded as reflecting a balance between considerations relating to budgetary matters, employment policy and labour-market policy. It notes, however, that no explanation of specific grounds for the unconditional right given to an employer to dismiss an employee at the time in question is to be found in the preparatory documents relating to that rule.

17 Secondly, the referring court states that it is apparent from the judgment in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 that one condition subject to which an employment contract may be terminated when the employee reaches a certain age is that that employee is able to benefit from financial compensation in the form of payment of a retirement pension financed by contributions. In that regard, in the judgment in Case C-45/09 *Rosenbladt* [2010] ECR I-9391, the Court of Justice, in the view of the referring court, made no reference to the level of the retirement pension received by the person concerned. In the present case, the 67-year rule has no connection whatsoever with the pension which the individual employee may ultimately receive.

18 In those circumstances, the Södertörns tingsrätt (Södertörn District Court) (Sweden) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Can a national rule which, like the 67-year rule, gives rise to a difference of treatment on grounds of age be legitimate even if it is not possible to determine clearly from the context in which the rule has come into being or from other information what aim or purpose the rule is intended to serve?

2. Does a national retirement provision such as the 67-year rule, to which there is no exception and which does not take account of factors such as the pension which an individual may ultimately receive, go beyond what is appropriate and necessary in order to achieve the aim pursued?’

Consideration of the questions referred

19 By its two questions, which it is appropriate to consider together, the referring court asks, in essence, whether the second subparagraph of Article 6(1) of Directive 2000/78 is to be interpreted as precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee’s employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the pension which the person concerned will receive.

20 As is clear from the decision for reference and from the observations lodged before the Court, it is common ground that the 67-year rule, under which every employee enjoys an unconditional right to work until the last day of the month of his 67th birthday, on which date the employment contract is

terminated without dismissal, unless there is an agreement to the contrary between the employee and the employer, constitutes a difference of treatment on grounds of age within the meaning of Article 6(1)(a) of Directive 2000/78.

21 However, it follows from the first subparagraph of Article 6(1) of Directive 2000/78 that differences of treatment on grounds of age are not to constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment, labour-market and vocational-training policy objectives, and if the means of achieving that aim are appropriate and necessary.

22 In order to answer the questions raised, it is necessary, therefore, to determine whether the 67-year rule is justified by a legitimate aim and whether the means put in place to achieve that aim are appropriate and necessary.

23 It is appropriate to examine the consequences of the fact that the LAS makes no precise mention of the aim pursued by the 67-year rule and, in particular, by Paragraph 33 of that Law. According to the referring court, the LAS does not state clearly the aim pursued by the 67-year rule in setting the age-limit for workers at 67.

24 That fact, however, is not decisive. It cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation at issue as regards the aim pursued has the effect of excluding automatically the possibility that that national legislation may be justified under that provision. In the absence of such precision, it is important that other elements, derived from the general context of the measure concerned, should make it possible to identify the underlying aim of that measure for the purposes of review by the courts as to whether it is legitimate and as to whether the means put in place to achieve it are appropriate and necessary (see Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler* [2011] ECR I-6919, paragraph 39 and the case-law cited).

25 As is apparent from the decision for reference, the preparatory documents relating to the LAS and Law (2008:567) on discrimination make mention of a number of objectives concerning employment policy and labour-market policy. The 67-year rule seeks, among other things, to increase the amount of the future retirement pension by allowing the worker to work after the age of 65 and to counteract the shortage of labour which would result from large numbers of forthcoming retirements. The referring court also states that, according to the Equality Ombudsman (Diskrimineringsombudsmannen), the 67-year rule is justified on the ground that it frees up posts for younger workers on the labour market.

26 The Swedish Government argues that the 67-year rule seeks, firstly, to avoid termination of employment contracts in situations which are humiliating for workers by reason of their advanced age; secondly, to enable retirement pension regimes to be adjusted on the basis of the principle that income received over the full course of a career must be taken into account; thirdly, to reduce obstacles for those who wish to work beyond their 65th birthday; fourthly, to adapt to demographic developments and to anticipate the risk of labour shortages; and, fifthly, to establish a right, and not an obligation, to work until the age of 67, in the sense that an employment relationship may continue beyond the age of 65. Fixing a compulsory retirement age also makes it easier for young people to enter the labour market.

27 In the submission of that Government, such an age-limit reflects the political and social consensus which has long prevailed between the social partners. That consensus, it argues, reflects the aim of employment policy, which is to encourage older workers to continue their career and establishes a balance between the worker's interest in working for a long time, on the one hand, and the wish to foster a smooth transition from working life to retirement, on the other.

28 In that regard, the Court has held that the automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement (*Rosenbladt*, paragraph 44).

29 Furthermore, in accordance with the case-law, encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved (Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-11869, paragraph 45, and *Fuchs and Köhler*, paragraph 49).

30 Therefore, aims such as those described by the Swedish Government must, in principle, be regarded as 'objectively and reasonably' justifying, 'within the context of national law', as provided for by Article 6(1) of Directive 2000/78, a difference in treatment on grounds of age such as that provided for by Paragraph 33 of the LAS (see, by analogy, *Rosenbladt*, paragraph 45).

31 It remains to be established whether, in accordance with the wording of Article 6(1) of Directive 2000/78, the means used to achieve that aim are appropriate and necessary.

32 In the light of the broad discretion granted to the Member States and, as necessary, to the social partners at national level in choosing not only to pursue a particular aim in the field of social and employment policy, but also in defining measures to implement it, it does not appear unreasonable for the social partners to take the view that a measure such as the 67-year rule may be appropriate for achieving the aims set out above (see, to that effect and by analogy, *Rosenbladt*, paragraphs 41 and 69).

33 Firstly, it may be accepted that the 67-year rule, by establishing a right to work until that age, makes it possible for obstacles for those who wish to work beyond their 65th birthday to be reduced, for retirement pension regimes to be adjusted on the basis of the principle that income received over the whole of a career must be taken into account, and for adaptation to demographic developments and anticipation of the risk of labour shortages.

34 Secondly, it can also be accepted that the 67-year rule, by authorising employers to terminate an employment contract when the employee has reached that age, makes it possible to avoid a situation in which employment contracts are terminated in situations which are humiliating for elderly workers. It may also be accepted that, depending on the situation in the relevant labour market or in the undertaking involved, where the number of employees affected is limited, that rule makes it easier for young people to enter and/or remain in the labour market.

35 The referring court asks, essentially, whether the mechanism of automatic termination of employment contracts, laid down in Paragraph 33 of the LAS, is strictly necessary, in so far as it does not provide for account to be taken of the amount of the retirement pension which the person concerned may ultimately receive.

36 Mr Hörnfeldt points out in this regard that, having been employed part-time for a long period, his presence on the labour market was abnormally brief and, consequently, the limited amount of his retirement pension is unreasonable. The continuation of his employment contract for two or three years would allow the amount of his retirement pension to be increased by approximately SEK 2 000 per month. Mr Hörnfeldt submits that an exception to the 67-year rule ought therefore to be allowed in respect of workers who, like him, wish to continue to work.

37 The prohibition of discrimination on grounds of age set out in Directive 2000/78 must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union. 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. Keeping older workers in the labour force promotes diversity in the workforce, which is an aim recognised in recital 25 in the preamble to Directive 2000/78. Furthermore, it contributes to the realising of their potential and to the quality of life of the workers concerned, in accordance with the concerns of the European Union legislature set out in recitals 8, 9 and 11 in the preamble to that directive (*Fuchs and Köhler*, paragraphs 62 and 63).

38 In order to examine whether the measure at issue in the main proceedings goes beyond what is necessary for achieving its objective and unduly prejudices the interests of workers who reach the age of 67, that measure must be viewed against its legislative background and account must be taken both of the hardship that it may cause to the persons concerned and of the benefits derived from it by society in general and by the individuals who make up society (*Rosenbladt*, paragraph 73).

39 In that regard, it must be pointed out, firstly, that the 67-year rule makes it possible for the social partners to make use, by means of individual contracts or collective agreements, of the mechanism of automatic termination of employment contracts only from the age of 67, since Paragraph 32a of the LAS prohibits the imposition of a compulsory retirement age lower than 67. That paragraph thus confers on the employee an unconditional right to continue his professional activity until his 67th birthday, in particular in order to augment the income on the basis of which his retirement pension will be calculated and thus to increase the amount of that pension.

40 Secondly, the termination, by operation of law, of an employment contract as a result of a measure such as that set out in Paragraph 33 of the LAS does not have the automatic effect of forcing the persons concerned to withdraw definitively from the labour market. On the one hand, that provision does not establish a mandatory scheme of automatic retirement. It lays down the conditions under which an employer may derogate from the principle of the prohibition of discrimination on grounds of age and terminate the employment contract of an employee on the ground that he has reached the age of 67.

41 On the other hand, the Swedish Government has argued that, if the employment contract is terminated, an employer may offer the employee concerned a fixed-term employment contract. The employer and the employee can then freely agree on the duration of that contract and can also, if necessary, renew it.

42 Thirdly, the 67-year rule is not based solely on the fact that a specific age has been reached, but also takes account of the fact that the worker is entitled to financial compensation by means of a replacement income in the form of a retirement pension at the end of his working life (see, to that effect and by analogy, *Rosenbladt*, paragraph 48).

43 It is apparent from the observations submitted to the Court that the age designated in Paragraph 33 of the LAS, on the one hand, corresponds to what was, at the material time, the statutory retirement age and, on the other, is higher than the age at which a retirement pension may be drawn. That pension generally comprises three elements, namely an earnings-related pension, a premium pension and a supplementary pension.

44 Fourthly, it is apparent from the observations submitted to the Court that those persons who cannot receive an earnings-related pension or the amount of whose pension is low can obtain a retirement pension in the form of basic coverage from the age of 65 years, a guaranteed pension, housing benefit and/or old-age benefit.

45 It must be borne in mind in this regard that, in paragraph 47 of the judgment in *Rosenbladt*, the Court held that there was no undue prejudice to the legitimate interests of the workers concerned despite the fact that, in the case which gave rise to that judgment, the retirement age was lower than that laid down in Paragraph 33 of the LAS and the amount of the retirement pension received by Ms Rosenbladt was significantly lower than that which Mr Hörnfeldt can hope to receive.

46 In the light of all these factors, the accuracy of which it is for the referring court to ascertain, it cannot validly be argued that Directive 2000/78 precludes a national measure such as that at issue in the main proceedings.

47 Consequently, the answer to the questions referred is that the second subparagraph of Article 6(1) of Directive 2000/78 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as that measure is objectively and reasonably justified by a legitimate aim relating to employment policy and labour-market policy and constitutes an appropriate and necessary means by which to achieve that aim.

Costs

48 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:

The second subparagraph 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 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as that measure is objectively and reasonably justified by a legitimate aim relating to employment policy and labour-market policy and constitutes an appropriate and necessary means by which to achieve that aim.

[Signatures]