Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

26 September 2013*

(Equal treatment in employment and occupation — Prohibition of discrimination on grounds of age — Directive 2000/78/EC — Article 6(1) and (2) — Refusal to grant availability pay to civil servants who have reached the age of 65 and are entitled to a pension)

In Case C-546/11,

REQUEST for a preliminary ruling under Article 267 TFEU from Højesteret (Denmark), made by decision of 7 October 2011, received at the Court on 26 October 2011, in the proceedings

Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard,

v

Indenrigs- og Sundhedsministeriet,

intervening parties:

Centralorganisationernes Fællesudvalg (CFU),

Kommunale Tjenestemænd og Overenskomstansatte (KTO),

Personalestyrelsen,

Kommunernes Landsforening (KL),

Danske Regioner,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2012,

after considering the observations submitted on behalf of:

— Dansk Jurist- og Økonomforbund, acting on behalf of Mr Toftgaard, by K.-M. Schebye, advokat,

* Language of the case: Danish.

— Kommunernes Landsforening and Danske Regioner, by J. Vinding, advokat,

— the Danish Government, by C. Vang, acting as Agent, assisted by R. Holdgaard, advokat,

— the United Kingdom Government, by S. Ossowski and S. Lee, acting as Agents,

— the European Commission, by J. Enegren and C. Barslev, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2013,

gives the following

Judgment

1 This request 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 request has been made in proceedings between the Dansk Jurist- og Økonomforbund ('DJØF'), acting on behalf of Mr Toftgaard, and Indenrigs- og Sundhedsministeriet (the Ministry of the Interior and Health (formerly the Ministry of the Interior and Social Affairs) ('the Ministry') concerning the latter's refusal to grant availability pay to Mr Toftgaard.

Legal context

European Union legislation

3 Recitals 13 and 25 in the preamble to Directive 2000/78 are worded as follows:

'(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article [157 TFEU], nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

…

(25) 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 As set out in Article 1 of Directive 2000/78, its purpose '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(1) and (2)(a) 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’.

6 Article 3 of that directive, which is headed ‘Scope’, provides in paragraphs 1 and 3 thereof:

‘1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

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

…

…

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

7 Under Article 6 of Directive 2000/78, which is headed ‘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;

…

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.’

Danish legislation

8 Directive 2000/78 was transposed into Danish law by Law No 1417 amending the Law on the prohibition of discrimination in the labour market (lov nr. 1417 om ændring af lov nr. 459 om forbud mod forskelsbehandling på arbejdsmarkedet m.v.) of 22 December 2004 ('the Anti-Discrimination Law').

9 Paragraph 6a of that law is designed to implement Article 6(2) of Directive 2000/78. It is worded as follows:

'Notwithstanding Paragraphs 2 to 5, this law does not preclude the fixing of ages for admission to occupational social security schemes and the use of age criteria in actuarial calculations in the context of such schemes. The use of age criteria shall not lead to discrimination on grounds of sex'.

10 Paragraph 32(1) and (4) of the Law on Civil Servants (Tjenestemandslov), in the version applicable at the time of Mr Toftgaard's dismissal, provided:

'1. A civil servant who is dismissed on the ground that his post has ceased to exist because of restructuring or reorganisation of working methods, shall continue to receive his current salary for three years, subject to subparagraphs 3 and 5 below.

…

4. There shall be no entitlement to availability pay where the civil servant concerned:

(1) is assigned to another post or is offered a post which he is obliged to accept pursuant to Sections 12 and 13;

(2) has reached the aged of 65;

(3) has reached the age-limit fixed for retirement from his post, or

(4) at the date of his dismissal, is unable, for reasons of illness or unsuitability, to take up a post which he is obliged to accept pursuant to Sections 12 and 13.'

11 It is apparent from the order for reference that availability pay is paid by the appointing authority and that the civil servant is obliged to remain available to it during the period in which he receives the availability pay.

12 Under Law No 230 of 19 March 2004 on Pensions for Civil Servants (Tjenestemandspensionslov No 230), in the version applicable to the present case, a civil servant acquires, throughout his career, a pension entitlement. The acquisition of such an entitlement continues during the period in which the civil servant receives availability pay. Pension entitlement is also acquired during the period in which the civil servant would in principle have been entitled to availability pay but in which availability pay was not paid to him by reason of the age-limit set by the Law on Civil Servants.

13 It follows from Paragraph 6(6) of the Law on Pensions for Civil Servants that civil servants can receive their full retirement pension after reaching the age of 65.

14 The referring court notes that, in addition to his civil servant's pension, a civil servant is also entitled to other retirement benefits such as, inter alia, the State retirement pension which the civil servant can claim concurrently with his civil servant's pension.

15 Law No 1005 of 19 August 2010 on social security pensions (lov nr. 1005 om social pension) sets the legal retirement age at 65 for persons born before 1 January 1959. However, the State retirement pension may, on request by the person concerned, be deferred for up to ten years in return for an increased pension at a later date. It is also permissible to pursue an economic activity while receiving the State retirement pension provided that the income from that work does not exceed certain limits, beyond which the State retirement pension will be reduced or withheld.

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

16 Mr Toftgaard was the Head of the district administration of Vejle (Denmark) until his dismissal on 8 May 2006, with effect from 31 December 2006, on the ground that his post had ceased to exist. Mr Toftgaard was not entitled to availability pay as he was then 65 years old and therefore entitled, from 31 December 2006, to a civil service pension.

17 There was a compulsory retirement age of 70 for civil servants when Mr Toftgaard's employment was terminated. Aged 65 years old at the time, Mr Toftgaard was therefore entitled, but not obliged, to retire. Mr Toftgaard informed the Ministry that he wished to be transferred to a different post and that he was willing to take a reduction in salary if necessary. After his dismissal, Mr Toftgaard performed several remunerated duties providing a modest income.

18 Mr Toftgaard regards the refusal to grant him availability pay as discrimination on grounds of age. For that reason, the DJØF, acting on behalf of Mr Toftgaard, brought an action against Mr Toftgaard's employer, namely the Ministry, before Østre Landsret (Eastern Regional Court). As that action was dismissed, the DJØF brought an appeal before Højesteret (the Supreme Court) submitting, inter alia, that Paragraph 32(4)(2) of the Law on Civil Servants is contrary, in particular, to Directive 2000/78. The DJØF claimed that availability pay is not an occupational social security scheme within the meaning of Paragraph 6a of the Anti-Discrimination Law and Article 6(2) of Directive 2000/78 and that the age-limit of 65 is not an appropriate and necessary means of achieving a legitimate aim within the meaning of Article 6(1) of that directive.

19 The Ministry contended that Paragraph 32(4)(2) of the Law on Civil Servants falls within the scope of the exception provided for in Paragraph 6a of the Anti-Discrimination Law and Article 6(2) of Directive 2000/78, since availability pay should be regarded as an occupational social security scheme within the meaning of those provisions. In the alternative, the Ministry stated that Paragraph 32(4)(2) meets the requirements laid down in Article 6(1) of Directive 2000/78.

20 In those circumstances Højesteret decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 6(2) of [Directive 2000/78] to be interpreted as meaning that Member States may provide that the fixing of age limits for access or entitlement to benefits under occupational social security schemes does not constitute discrimination only where those social security schemes relate to retirement or invalidity benefits?

(2) Is Article 6(2) to be interpreted as meaning that the possibility of fixing age limits concerns only access to the scheme, or is the provision to be interpreted as meaning that the possibility of fixing age limits also concerns entitlement to the payment of benefits under the scheme?

(3) If question 1 is answered in the negative:

Can the expression "occupational social security schemes" in Article 6(2) include a scheme such as the "rådighedsløn" (availability pay) as referred to in Paragraph 32(1) of the [Law on Civil Servants], under which a civil servant may, as special protection in the event of dismissal on

grounds of redundancy, retain his current salary for three years and continue to be credited for years of pensionable service, provided he remains available for assignment to another suitable post?

(4) Is Article 6(1) of [that] Directive to be interpreted as meaning that it does not preclude a national provision such as Paragraph 32(4)(2) of the [Law on Civil Servants], under which availability pay is not paid to a civil servant who has reached the age at which the State retirement pension becomes payable, if he is made redundant?'

Consideration of the questions referred for a preliminary ruling

The first question

21 By its first question, the referring court asks, in essence, whether Article 6(2) of Directive 2000/78 must be interpreted as being applicable only to retirement or invalidity benefits under an occupational social security scheme.

22 In order to answer that question, it is necessary to examine, first, whether the national legislation at issue in the main proceedings, alleged to be discriminatory, falls within the scope of Directive 2000/78.

23 It is apparent both from its title and preamble and from its content and purpose that that directive is intended 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 any of the grounds mentioned in Article 1, which include age (see Joined Cases C-297/10 and C-298/10 *Hennings and Mai* [2011] ECR I-7965, paragraph 49).

24 More specifically, it follows from Article 3(1)(c) of Directive 2000/78 that it is to apply within the limits 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 inter alia 'employment and working conditions, including dismissals and pay'.

25 The scope of Directive 2000/78 must therefore be understood, in the light of Article 3(1)(c) and Article 3(3), read in conjunction with recital 13 in the preamble to the directive, as excluding social security or social protection schemes, the benefits of which are not equivalent to 'pay' within the meaning given to that term for the application of Article 157(2) TFEU, and payments of any kind made by the State with the aim of providing access to employment or maintaining employment (Case C-267/06 *Maruko* [2008] ECR I-1757, paragraph 41, and Case C-147/08 *Römer* [2011] ECR I-3591, paragraph 32).

26 The concept of pay, within the meaning of Article 157(2) TFEU, comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer (see, inter alia, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 12).

27 In the present case, the availability pay, provided for by the Law on Civil Servants, is paid monthly for three years by the State, acting in its capacity as a public employer, to a civil servant dismissed on the ground that his post has ceased to exist. The amount of availability pay corresponds to the level of salary received by the civil servant before he is placed on 'stand-by'.

28 In addition, it must be noted that in return for the entitlement to availability pay, the civil servant is obliged to remain available to his employer during the period in which he receives that pay. If his employer offers him a suitable alternative post, the civil servant is obliged to take it up. If he does not take up that post, he loses the entitlement to availability pay.

29 It is apparent from the foregoing that availability pay represents immediate consideration in cash, paid by the employer to the civil servant in respect of his employment, and thus constitutes pay within the meaning of Article 157(2) TFEU.

30 Accordingly, by excluding an entire group of civil servants from entitlement to availability pay, Paragraph 32(4)(2) of the Law on Civil Servants affects the conditions of pay of those civil servants within the meaning of Article 3(1)(c) of Directive 2000/78. Directive 2000/78 therefore applies to a situation such as that at issue in the case in the main proceedings.

31 Second, it is necessary to examine whether the legislation at issue in the main proceedings establishes a difference of treatment on grounds of age, for the purposes of Article 2(1) of Directive 2000/78.

32 Under Article 2(1) of Directive 2000/78, the 'principle of equal treatment' is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive, including age. Article 2(2)(a) of that directive states that, for the purposes of applying Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 of that directive.

33 In the present case, given that Paragraph 32(4)(2) of the Law on Civil Servants has the effect of depriving civil servants who have reached the age of 65 of entitlement to availability pay, that provision establishes a difference of treatment directly based on age within the meaning of Article 2(2) of Directive 2000/78.

34 Third, it is necessary to examine whether, Member States may rely on Article 6(2) of Directive 2000/78, in order to provide that such a difference of treatment does not constitute discrimination on grounds of age.

35 In the words of Article 6(2) of Directive 2000/78, in the French language version thereof, Member States may provide, notwithstanding Article 2(2) of that directive, that 'ne constitue pas une discrimination fondée sur l'âge la fixation, pour les régimes professionnels de sécurité sociale, d'âges d'adhésion ou d'admissibilité aux prestations de retraite ou d'invalidité, y compris la fixation, pour ces régimes, d'âges différents pour des travailleurs ou des groupes ou catégories de travailleurs et l'utilisation, dans le cadre de ces régimes, de critères d'âge dans les calculs actuariels, à condition que cela ne se traduise pas par des discriminations fondées sur le sexe' ['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'].

36 The Danish language version of Article 6(2) of Directive 2000/78 differs from the text reproduced in paragraph 35 above in that it makes no reference to, in particular, 'prestations de retraite ou d'invalidité' (retirement or invalidity benefits).

37 It must be noted in that regard that it is settled case-law that provisions of European Union law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of text of

European Union law, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, inter alia, Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 31 and case-law cited).

38 So far as concerns the versions of Article 6(2) of Directive 2000/78 in the other languages of the European Union, it is clear that they refer expressly, like the French language version reproduced in paragraph 35 above, to the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits. For example, the Spanish language version of that provision refers to 'la determinación, para los regímenes profesionales de seguridad social, de edades para poder beneficiarse de prestaciones de jubilación o invalidez u optar a las mismas'; the German language version uses the words 'bei den betrieblichen Systemen der sozialen Sicherheit die Festsetzung von Altersgrenzen als Voraussetzung für die Mitgliedschaft oder den Bezug von Altersrente oder von Leistungen bei Invalidität'; the English language version of the provision in question mentions 'the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits', while the Polish language version uses the wording 'ustalanie, dla systemów zabezpieczenia społecznego pracowników, wieku przyznania lub nabycia praw do świadczeń emerytalnych lub inwalidzkich'.

39 The wording of Article 6(2) of Directive 2000/78, in the versions reproduced in paragraph 38 above, suggests moreover that that provision is intended to apply only in the cases exhaustively listed. If the European Union legislature had wished to extend the scope of that provision beyond the cases expressly referred to therein, it would have done so explicitly by using, for example, the expression 'inter alia'.

40 The purpose and general scheme of Directive 2000/78 supports that conclusion. Indeed, that directive gives expression, in the field of employment and occupation, to the principle of non-discrimination on grounds of age which is regarded as a general principle of European Union law (see, to that effect, Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 21). The prohibition of all discrimination on grounds, inter alia, of age is found in Article 21 of the Charter of Fundamental Rights of the European Union, which, from 1 December 2009, has the same legal value as the treaties.

41 Since Article 6(2) of Directive 2000/78 allows Member States to provide for an exception to the principle of non-discrimination on grounds of age, that provision must be interpreted strictly (see, by analogy, Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 60).

42 However, an interpretation of Article 6(2) of Directive 2000/78 to the effect that that provision is intended to apply to all occupational social security regimes would extend its scope, disregarding the requirement that that provision must be interpreted strictly.

43 It follows that Article 6(2) of Directive 2000/78 applies only to occupational social security schemes covering the risks of old age and invalidity.

44 In the present case, even supposing that availability pay forms part of an occupational social security scheme, it is clear, having regard to the factors described in paragraphs 27 to 29 above, that availability pay is neither a retirement benefit nor an invalidity benefit. Consequently, Article 6(2) of Directive 2000/78 does not apply in circumstances such as those of the case in the main proceedings.

45 In the light of the foregoing considerations, the answer to the first question is that Article 6(2) of Directive 2000/78 must be interpreted as being applicable only to retirement or invalidity benefits under an occupational social security scheme.

The second and third questions

46 In view of the answer given to the first question, there is no need to answer the second and third questions.

The fourth question

47 By its fourth question, the referring court asks, in essence, whether Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision under which a civil servant who has reached the age at which a retirement pension becomes payable is not entitled, for that very reason, to availability pay intended for civil servants dismissed when their posts ceased to exist.

48 Under Article 6(1) of Directive 2000/78, 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 policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

49 It is therefore necessary to examine, first, whether the legislation at issue in the main proceedings pursues a legitimate aim. In that regard, the Danish Government claims that that legislation seeks to strike a balance between the State's need to be able to adapt, restructure and make more efficient the public administration, on the one hand, and the protection of civil servants from undue personal and political pressure, on the other. In particular, the aim of that legislation is two-fold: (i) to maintain the availability of civil servants with a view to their assignment to a suitable alternative post; and (ii) to guarantee the independence of civil servants by protecting them from all external pressures. Excluding civil servants who are already eligible for a pension from entitlement to availability pay is said to be justified by the need to prevent abuse, in so far as it is, generally speaking, unlikely that those civil servants would be available to take up an alternative post. Moreover, such civil servants, it is said, require less protection since they are already entitled to adequate replacement income, such as a retirement pension.

50 It should be recalled in that regard that, as European Union law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 68).

51 The aim of ensuring the availability of civil servants and their protection in the event of redundancy, while limiting entitlement to availability pay only to civil servants who require protection and who comply with their obligation to remain available, falls within the category of legitimate employment policy and labour market objectives provided for in Article 6(1) of Directive 2000/78.

52 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 young people, older workers … in order to promote their vocational integration or ensure their protection'.

53 Consequently, objectives 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.

54 It is also necessary to ascertain, according to the actual wording of that provision, whether the means used to achieve those objectives are 'appropriate and necessary'.

55 As regards whether the national legislation at issue in the main proceedings is appropriate, it must be noted that to limit entitlement to availability pay solely to civil servants who, inter alia, are not entitled to a retirement pension does not seem to be unreasonable in the light of the aim pursued by the legislature; to provide increased protection for civil servants who do not have a stable and enduring replacement income.

56 The national legislation at issue in the main proceedings also appears to be appropriate to achieve the objective of ensuring the availability of civil servants in the event of redundancies. Civil servants not yet eligible for a retirement pension would be forced, in the absence of availability pay, to join the labour market with the result that, when a new post was offered to them in the public administration, they would no longer be available. On the other hand, civil servants who are already eligible for a retirement pension are, generally speaking, less likely to re-join the civil service in order to take up a new post, taking account of the professional or personal inconveniences that that may entail.

57 Moreover, Paragraph 32(4)(2) of the Law on Civil Servants also limits the scope for abuse in the form of civil servants who intend to retire being entitled to a payment intended to ensure their availability.

58 Consequently, it must be held that a national provision such as that at issue in the main proceedings does not appear to be manifestly inappropriate to achieve the legitimate objectives set out in paragraph 49 above.

59 It is nevertheless necessary to ascertain whether that provision goes beyond what is necessary to ensure those objectives.

60 The Danish Government claims in that regard that entitlement to availability pay should be strictly limited to civil servants who demonstrate a real need for that pay and who are actually available to re-join, if necessary, the public administration.

61 It is admittedly true that, as stated in paragraph 56 above, civil servants who are eligible for a retirement pension are accordingly less likely to accept an assignment to an alternative post.

62 It is also apparent that those civil servants may rely on a stable and enduring replacement income, whereas civil servants who are not eligible for a retirement pension and who have been made redundant accordingly require increased protection. Civil servants belonging to that second category are, generally speaking, more vulnerable to financial and social pressures, in so far as, in the absence of availability pay, they would be deprived of a stable income. Availability pay is thus designed to protect civil servants belonging to that second category from such pressures by guaranteeing adequate income for three years.

63 It should also be noted that the Danish legislature took action in order to mitigate the adverse impact of the legislation at issue in the main proceedings by providing that civil servants who have reached the age of 65 continue to be credited for pensionable service throughout the period during which they should have received availability pay but did not in fact do so, by reason of their age.

64 None the less, it must be noted that Paragraph 32(4)(2) of the Law on Civil Servants treats civil servants who will actually receive a retirement pension in the same way as those who are eligible to receive such a pension.

65 It is apparent from the documents before the Court that, at the age of 65, civil servants are entitled to retire but are not obliged to do so.

66 However, under the legislation at issue in the main proceedings, both civil servants who wish to retire and who will consequently receive a retirement pension and civil servants who wish to pursue their professional career within the public administration beyond the age of 65 are excluded from receiving availability pay.

67 Thus, in pursuing the legitimate aim of preventing that pay from being claimed by civil servants who are not seeking to take up a new post but who will receive a replacement income in the form of a retirement pension, the effect of the measure at issue is to deprive civil servants who wish to remain in the labour market of the entitlement to that pay merely because they could, inter alia because of their age, draw such a pension.

68 That measure may thus force those civil servants to accept a retirement pension which is lower than the pension to which they would be entitled if they were to remain in employment for more years, in particular where they have not made contributions for a sufficient number of years to be entitled to draw a full pension.

69 Moreover, the legitimate objectives pursued by the legislation at issue in the main proceedings may be attained by less restrictive, but equally appropriate, measures. Thus, provisions which limit entitlement to availability pay solely to civil servants who have temporarily waived their right to receive a retirement pension in order to continue employment, while providing, in cases where civil servants refuse to take up another suitable post, for measures to punish any abuse, ensure that only civil servants who are actually available to take up an alternative post are entitled to receive availability pay.

70 It is true that, generally speaking, it cannot be insisted that a measure such as that at issue in the main proceedings should involve an individual examination of each particular case in order to establish what is best suited to the specific needs of each civil servant, since the management of the regime concerned must remain technically and economically viable.

71 However, such an individual examination of whether civil servants under the age of 65 are available already seems to form an integral part of the regime established by the national legislation at issue in the main proceedings, since the assignment of dismissed civil servants to alternative posts depends on the skills of those concerned in the light of the specific requirements of the posts which are actually offered to them. In addition, such an individual examination is already provided for, as the DJØF claims, in Paragraph 32(4)(4) of the Law on Civil Servants.

72 In the light of the foregoing, it must be held that the legislation at issue in the main proceedings, in so far as civil servants who are eligible to draw a retirement pension are automatically excluded from receiving availability pay, goes beyond what is necessary to ensure the objectives pursued.

73 Consequently, the difference in treatment resulting from Paragraph 32(4)(2) of the Law on Civil Servants cannot be justified under Article 6(1) of Directive 2000/78.

74 In the light of the foregoing, the answer to the fourth question is that Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy.

Costs

75 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:

1. **Article 6(2) 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 being applicable only to retirement or invalidity benefits under an occupational social security scheme.**

2. **Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy.**

[Signatures]