JUDGMENT OF THE COURT (Fifth Chamber)
4 March 2004 *

In Case C-303/02,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Peter Haackert

and

Pensionsversicherungsanstalt der Angestellten,

on the interpretation of Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans, A. Rosas, A. La Pergola (Rapporteur) and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— P. Haackert, by J. Winkler, Rechtsanwalt,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Commission of the European Communities, by N. Yerrel and H. Kreppel, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

Judgment

1 By order of 23 July 2002, which reached the Court Registry on 26 August 2002, the Oberster Gerichtshof referred to the Court for a preliminary ruling, pursuant to Article 234 EC, a question on the interpretation of Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24; 'the directive').

2 That question has been raised in proceedings between Mr Haackert and the Pensionsversicherungsanstalt der Angestellten (Salaried Employees' Pension Insurance Institution) concerning the latter's refusal to pay him an early old-age pension on account of unemployment.

Law applicable

Community provisions

3 Article 1 of the directive provides:

'The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment".'

4 Under Article 2 of the directive:

'This Directive shall apply to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons.'

5 Article 3(1) of the directive provides:

'This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

...

— old age,

...

— unemployment;

...'

6 Article 4(1) of the Directive prohibits all discrimination on grounds of sex, in particular as concerns the calculation of benefits.

7 Under Article 7 of the Directive:

'1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of [pensionable] age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

...

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.'

National legislation

8 Article 253a of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security; 'the ASVG', headed 'Early old age pension in the event of unemploy-

ment', in the version thereof resulting from the Sozialrechtsänderungsgesetz 2000 (BGBl. I 2000/92), in force as from 1 October 2000, provides:

'(1) A male insured person is to be entitled to an early old-age pension in connection with unemployment after completion of his 738th month, and a female insured person after completion of her 678th month, if he or she:

1. has completed the qualifying period (Paragraph 236),

2. has acquired at least 180 months of compulsory insurance contributions on the material date ..., and

3. has fulfilled the condition laid down in Article 253b(1), paragraph 4, on the material date (Article 223(2)) and has received a cash benefit stemming from unemployment insurance for at least 52 weeks on account of unemployment within the last 15 months prior to the material date. ...

...'

9 Under Article 253a(4) of the ASVG, where the beneficiary attains the normal retirement age laid down by Article 253 of that law, namely 65 years for men and 60 years for women, the pension is paid as an old-age pension.

10 Article 253 of the ASVG, entitled 'Old-age pension', provides:

'(1) A male insured person is to be entitled to an old-age pension on attaining the age of 65 years (the normal retirement age), and a female insured person on attaining the age of 60 years (the normal retirement age), where the qualifying period has been complied with

...

(3) Persons already entitled to claim an early old-age pension on account of unemployment (Article 253a) ... may not lodge an application for an old-age pension as provided for in subparagraph (1).'

The dispute in the main proceedings and the question referred

11 By decision of 5 December 2000, the Pensionsversicherungsanstalt der Angestellten dismissed an application for an early old-age pension on account of unemployment submitted by Mr Haackert, born on 14 February 1944, on the ground that, in order to receive that benefit, male insured persons must, in accordance with Paragraph 253a of the ASVG, be aged 738 months (61 years and 6 months). As Mr Haackert would not attain that age until 14 August 2005, the old-age risk covered by the insurance had thus not yet materialised.

12 By judgment of 1 August 2001, the Arbeits- und Sozialgericht Wien (Austria), the court of first instance hearing the case in the main proceedings, dismissed Mr

Haackert's action against the decision of 5 December 2000, seeking to obtain the benefit applied for as from 1 October 2000. The court followed the reasoning of the Pensionsversicherungsanstalt der Angestellten in the abovementioned decision.

13 By judgment of 29 January 2002, the Oberlandesgericht Wien confirmed the judgment of 1 August 2001. It took the view that the benefit applied for fell within the exception laid down in Article 7(1)(a) of the directive, and that, therefore, the fact that different retirement ages were fixed for men and women was not contrary to Community law.

14 Mr Haackert has appealed on a point of law ('Revision') against the judgment of the appeal court. The Pensionsversicherungsanstalt der Angestellten, as defendant, argues against Mr Haackert that, at the reference date, he had attained the age of 678 months (56 years and 6 months). Since Mr Haackert had not yet attained the age of 738 months (61 years and 6 months), any right to the benefit sought is, the Pensionsversicherungsanstalt claims, excluded pursuant to Article 253a of the ASVG. The other conditions for the grant of benefit are not disputed. Mr Haackert considers that the fixing of a different age for men and women is contrary to the Community law principle of equal treatment, and that it is sufficient to attain the age of 56 years and 6 months in order to enjoy the benefit applied for.

15 The referring court states, first, that early old-age pension in the event of unemployment, as provided for in Article 253a of the ASVG, is designed to establish an early entitlement to old-age pension where, for reasons connected with age, illness, reduced working capacity, or for other reasons, it is no longer possible, save at the price of certain difficulties, for the insured person to find a job during a certain period.

16 It also states that Mr Haackert falls with the scope of the directive *ratione personae*, that the system of early old-age pension on account of unemployment falls within the scope of the directive *ratione materiae*, and that it is, moreover, discriminatory, since the minimum age required in order to benefit from such a system is different for men and for women. The question therefore, according to the referring court, is whether the exception to the principle of equal treatment between men and women in the area of social security, laid down in Article 7(1)(a) of the directive, applies to an early old-age pension on account of unemployment, which is subject to an age condition that is different as between men and women.

17 In that respect, the referring court considers that it is not certain that the system of early old-age pension on account of unemployment is an old-age or retirement pension within the meaning of Article 7(1)(a) of the directive. In the light of the objective of that system, the right to a financial benefit from unemployment insurance over a period of 52 weeks constitutes an essential element in order to qualify. On that view, the unemployment situation of the person concerned is the criterion that determines the benefit, the fact of attaining a certain age and fulfilling the conditions concerning periods for acquiring rights being merely supplementary conditions.

18 If early old-age pension on account of unemployment is not to be classified as an old-age pension, the referring court considers that the further question arises whether that benefit falls within the term 'other benefits' within the meaning of Article 7(1)(a) of the directive, benefits in respect of which the fixing of a different retirement age has consequences.

19 In that respect, the referring court refers to the case-law of the Court of Justice according to which the fixing of a different age by reference to sex in legislation concerning benefits other than old-age and retirement pensions can be justified

only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes (Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 12; Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 26).

20 In that context, as regards maintenance of the financial equilibrium of the social security system, the referring court states that December 2001 saw the payment in Austria of 1 083 134 old-age pensions, 123 220 early old-age pensions for long duration of contributions, 82 852 early old-age pensions for reduced working capacity or incapacity for work (this type of pension was abolished by the legislature on 30 June 2000) and 15 386 early old-age pensions on account of unemployment (of which 2 860 were paid to men and 12 526 to women). The percentage of early old-age pensions on account of unemployment paid in December 2001 in relation to the total of old-age pensions and early old-age pensions thus represented barely 1.2%. Moreover, still in December 2001, a total of 381 228 pensions for reduced working capacity or incapacity for work were paid.

21 Therefore, according to the referring court, the abolition of the discrimination at issue in the main proceedings would not have heavy consequences for the financial equilibrium of the social security system as a whole.

22 Concerning the guarantee of coherence between the early old-age pension on account of unemployment and the old-age pension for which provision is made in Article 253 of the ASVG, the referring court observes that the first link between those two benefits resides in the fact that the latter replaces the former when the insured person reaches the statutory retirement age. In addition, the court sees a direct link between the minimum age required in order to enjoy the disputed benefit and the statutory retirement age, in that the age for men and women was originally fixed at five years before the statutory retirement age, and then, after the raising of the age necessary in order to enjoy early old-age pension, at three and a half years before that statutory age.

23 In those circumstances, the Oberster Gerichtshof, taking the view that resolution of the dispute before it depended on an interpretation of Community law, decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is the derogation contained in Article 7(1)(a) of ... Directive 79/7 ... to be interpreted as being applicable to a benefit such as the early old-age pension in connection with unemployment in respect of which different pensionable ages for men and for women are determined in national law?'

The question referred

24 In order to reply to the question referred, it first needs to be examined whether a benefit such as that at issue in the main proceedings can be regarded as an old-age pension within the meaning of Article 7(1)(a) of the directive. If not, it would then be necessary to examine whether the condition of a different retirement age according to sex for granting that benefit is capable of being regarded, for the purposes of that provision, as a consequence which may follow from the retirement age fixed by national legislation for enjoying an old-age pension.

25 On the first point, it is sufficient to note that, whilst the granting of an early old-age pension on account of unemployment is indeed subject to an age condition, the fact remains that, according to the national legislation in question, that benefit is granted only to persons who, during the last 15 months preceding the reference date, received a financial benefit from insurance against unemployment for at least 52 weeks.

26 It follows that such a benefit cannot constitute an old-age pension within the meaning of Article 7(1)(a) of the directive, which, being a provision in derogation, must, in accordance with consistent case-law, be interpreted strictly having regard to the fundamental importance of the principle of the equality of treatment (see, in particular, *Thomas*, paragraph 8, and *Buchner*, paragraph 21).

27 It therefore needs to be determined, secondly, whether the fixing of a different age condition according to sex for granting the benefit at issue in the main proceedings may be regarded, within the meaning of Article 7(1)(a) of the directive, as a consequence which follows from the retirement age fixed by national legislation for enjoying an old-age pension.

28 Mr Haackert, the Austrian Government and the Commission of the European Communities refer, as does the national court, to the interpretation of Article 7(1)(a) given by the Court of Justice in *Buchner*. In that context, Mr Haackert and the Commission consider that the different age fixed for men and women as a condition for granting an early old-age pension on account of unemployment is not a consequence of the difference in age fixed by national legislation for the granting of old-age pensions. Early old-age pension on account of unemployment does not therefore, in their submission, fall within the scope of Article 7(1)(a) of the directive. The Austrian Government argues, on the other hand, that that benefit does fall within the scope of that provision because the discrimination which it introduces is objectively necessary in order to ensure coherence as between early old-age pension on account of unemployment and the old-age pension.

29 On that point, the case-law shows that the temporary maintenance of different retirement ages according to sex may necessitate the subsequent adoption, after expiry of the period prescribed for transposition of the directive, of measures which are indissociable from that derogation and also amendments to such measures. To prohibit a Member State which has set different retirement ages for

men and women from adopting or subsequently amending, after expiry of the period prescribed for transposition of the directive, measures linked to that age difference would be tantamount to depriving the derogation for which Article 7(1)(a) of the directive provides of its practical effect.

30 Where, pursuant to Article 7(1)(a) of the directive, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to that age difference. That will be the case if those forms of discrimination are objectively necessary to avoid endangering the financial equilibrium of the social security system or in order to ensure coherence between the system of retirement pensions and that of other benefits (see *Buchner*, paragraphs 23 to 26, and case-law cited therein).

31 Concerning, first, the condition regarding preservation of the financial equilibrium of the social security system, the order for reference shows that the percentage of early old-age pensions on account of unemployment paid in December 2001 in relation to the total of old-age pensions and early old-age pensions represented barely 1.2%. Moreover, the Austrian Government has not raised any argument before the Court concerning the preservation of the financial equilibrium of the social security system.

32 In those circumstances, it must be concluded that the removal of such discrimination could not have any serious effect on the financial equilibrium of the social-security system.

33 Moving on to the question of the preservation of coherence between early old-age pension on account of unemployment and the old-age pension, it is true that, in *Buchner*, the Court established that the difference in age according to sex for entitlement to an early old-age pension in the case of incapacity for work was not objectively necessary in order to ensure coherence between that benefit and the old-age pension. However, under the system at issue in that case, women were entitled to an early old-age pension on account of incapacity for work at the age of 55 years, namely five years before the normal retirement age, while men enjoyed the same entitlement at the age of 57 years, namely eight years before the normal retirement age.

34 In the present case, however, the retirement age fixed for the benefit at issue in the main proceedings and the normal retirement age are objectively linked, not only because the old-age pension is substituted for the early old-age pension on account of unemployment where the persons concerned attain the normal retirement age, but also because the age at which that benefit may be claimed is the same for men as for women, namely three and a half years before the normal retirement age (see, to that effect, Case C-139/95 *Balestra* [1997] ECR I-549, paragraph 40).

35 Under the national legislation at issue, the normal age for retirement is 65 years for men and 60 years for women, and it is possible to draw early pension on account of unemployment at the age of 61 years and 6 months for men and 56 years and 6 months for women.

36 In addition, the order for reference and the observations of the Austrian Government show that the system of early old-age pension on account of unemployment, as laid down in Article 253a of the ASVG, is designed to establish an early entitlement to old-age pension where, for reasons connected with age,

illness or reduced working capacity, or for other reasons, it is no longer possible, save at the cost of certain difficulties, for the insured person to find a job during a certain period. That benefit is therefore designed to assure an income to a person who is no longer capable of being reintegrated into the employment market before attaining the age entitling him or her to an old-age pension.

37 In those circumstances, it must be concluded that the introduction of the discrimination at issue in the main proceedings may be regarded as objectively necessary in order to ensure coherence between early old-age pension on account of unemployment and the old-age pension.

38 Having regard to the above, the answer to the referring court's question must be that the derogation provided for in Article 7(1)(a) of the directive must be interpreted as applying to a benefit such as early old-age pension on account of unemployment, for which a different age condition by reference to sex has been established, since such a condition may be regarded, within the meaning of that provision, as a consequence which may follow from the enactment in national legislation of a different age condition by reference to sex for the granting of old-age pensions.

Costs

39 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Oberster Gerichtshof by order of 23 July 2002, hereby rules:

The derogation provided for in Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as applying to a benefit such as early old-age pension on account of unemployment, for which a different age condition by reference to sex has been established, since such a condition may be regarded, within the meaning of that provision, as a consequence which may follow from the enactment in national legislation of a different age condition by reference to sex for the granting of old-age pensions.

Jann Timmermans Rosas

La Pergola von Bahr

Delivered in open court in Luxembourg on 4 March 2004.

R. Grass V. Skouris

Registrar President