Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 June 2012*

(Directive 2000/78/EC — Equal treatment in employment and occupation — Difference of treatment on grounds of age — Charter of Fundamental Rights of the European Union — General principles of European Union law — Collective agreement — Failure to take into account, for the grading on the salary scale of cabin crew members of an airline, professional experience acquired with another airline belonging to the same group of companies — Contract clause)

In Case C-132/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Innsbruck (Austria), made by decision of 9 March 2011, received at the Court on 18 March 2011, in the proceedings

Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH

v

Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Ó Caoimh, 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:

— Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH, by A. Grundei, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by V. Kreuschitz and J. Enegren, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 1, 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 proceedings between Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH ('Tyrolean Airways') and the Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH (works council of that airline: 'the Betriebsrat') on the interpretation of the collective agreement relating to the Tyrolean Airways cabin crew, in the version applicable to the main proceedings ('the Tyrolean Airways collective agreement'), and, in particular, the question whether periods of service completed with two other subsidiaries of the Austrian Airlines group ('the group'), namely Austrian Airlines AG ('Austrian Airlines') and Lauda Air Luftfahrt Gesellschaft mbH ('Lauda Air') should be taken into account.

Legal context

European Union legislation

3 Articles 1 and 2 of Directive 2000/78 are worded as follows:

'Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

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:

...

(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, ...

...

...'

4 Article 3(1) of Directive 2000/78, headed 'Scope', provides:

'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;

…

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

…'

5 Article 6(1) of Directive 2000/78, headed 'Justification of differences of treatment on grounds of age', provides:

'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;

…'

6 In accordance with Article 16(b) of Directive 2000/78, Member States are to take the necessary measures to ensure that 'any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements … are, or may be, declared null and void or are amended'.

Austrian legislation

7 Tyrolean Airways and Lauda Air are two wholly owned subsidiaries of Austrian Airlines.

8 The merger of Austrian Airlines and Lauda Air followed an agreement between management and employees in 2003. Since then, the employment conditions of the flight and cabin crews of those two companies have been governed by a single collective agreement, which makes no provision for account to be taken of periods of employment previously completed with Tyrolean Airways.

9 The employment relationships of Tyrolean Airways and its flight and cabin crews are subject to the Tyrolean Airways collective agreement.

10 In Annexe III to that collective agreement, headed 'Determination of salaries/table of employment categories', Section 1, headed 'General provisions', provides that the flight and cabin crews are to be graded in categories A or B. Section 1(7) states that 'advancement from category A to category B shall

occur on the completion of three years of service, that is, exactly three years after the recruitment of the employee as a member of the cabin crew' ('the clause at issue in the Tyrolean Airways collective agreement').

11 According to the order for reference, the Tyrolean Airways collective agreement does not state whether 'recruitment' refers to recruitment by Tyrolean Airways or, more generally, by one of the three companies in the group. The provisions on the scope *ratione personae* of that collective agreement merely state that it is applicable to the flight and cabin crews of Tyrolean Airways.

12 Section 3 of Annexe III to the Tyrolean Airways collective agreement, headed 'Tables of remuneration of flight and cabin crews', contains, in paragraphs 4 and 5, a table of remuneration of cabin crew and a specific table of remuneration of cabin crew with less than three years experience.

13 Section 2.2. of the collective agreement relating to the flight and cabin crews of Austrian Airlines provides:

'On advancement to a higher employment category, the following grading shall be effected:

...

2.2. in the case of the cabin crew

2.2.1.
from the employment category of non-certified junior non-certified cabin crew to the employment category of certified junior cabin crew.

The change in category shall be made after the examination for certification is taken, but no earlier than after three years service. The employee shall then be graded in the fourth year of service, with certificate.'

14 The employment contracts of Tyrolean Airways cabin crew normally contain, in section 8 thereof, the following clause:

'The date of commencement of employment, whenever relevant to the application of any rule or entitlement, shall mean the date of commencement of employment with Tyrolean Airways.'

15 It is clear from the documents before the Court that cabin crew members must undergo a training period of six to eight weeks before commencing active duty on their first flight. That training consists of a general part and a specialised part, adapted to the type of aircraft to which the member of staff will be assigned. Where a cabin crew member has previously been employed by another airline in the group in an identical post, the training period is reduced to four weeks. The purpose of that shortened training period is to train the staff in the specific features of the aircraft used by the airline.

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

16 By an action brought on 27 July 2010 before the Landesgericht Innsbruck, the Betriebsrat requested a declaration that the cabin crew members employed by Tyrolean Airways who, in accordance with Section 3.5 of Annex III to the Tyrolean Airways collective agreement, had acquired a minimum of three years experience in total as cabin crew members with Tyrolean Airways and/or Austrian Airlines or Lauda Air should be graded in employment category B.

17 By judgment of 10 December 2010 the Landesgericht Innsbruck upheld the action and held that section 1.7. of Annexe III to that collective agreement must be interpreted as meaning that 'advancement from category A to category B is to occur on the completion of three years service within the group, in other words exactly three years after recruitment as a cabin crew member within the group'.

18 The referring court, before whom Tyrolean Airways brought an appeal, considers that the skills and knowledge which staff acquire within the three airlines belonging to the group are substantively identical. In the opinion of the referring court, the activities of cabin crews within those airlines are almost identical. The only differences are that the location of the kitchen varies depending on the aircraft used and that there are small differences, caused by the specific features of each aircraft, as regards the operations which must be carried out in flight by the cabin crews.

19 The referring court considers that the clause at issue in the Tyrolean Airways collective agreement and, consequently, the clause normally to be found in section 8 of the employment contracts of Tyrolean Airways cabin crew, constitute discrimination on grounds of age, since they establish a distinction according to the age at which a cabin crew member has acquired the skills and knowledge required by Tyrolean Airways. It is true that, in accordance with the Court's case-law, the legal consequences of a failure to respect fundamental rights are defined by national law, but, drawing a parallel with cases relating to anti-competitive agreements, the referring court envisages the possibility of a ground of absolute nullity.

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

'1. Does European Union law as currently applicable, in particular in Article 21 of [the Charter] (in conjunction with Article 6(1) TEU), the general legal principle of European Law (Article 6(3) TEU) relating to the prohibition of age discrimination, and Articles 1, 2 and 6 of [Directive 2000/78], preclude a national collective agreement which, for the purpose of grading staff in employment categories under the [Tyrolean Airways] collective agreement, and thus determining the level of remuneration, discriminates indirectly against older workers by taking account only of their skills and knowledge which they have acquired as [cabin crew members] with one specific airline but not the substantively identical skills and knowledge which they have acquired with another airline within the same group of companies? Does this also apply to employment contracts which were entered into before 1 December 2009?

2. Can a national court treat as void and disapply a clause of an individual employment contract which indirectly infringes Article 21 of [the Charter], the general legal principle of European Union law relating to the prohibition of age discrimination, and/or Articles 1, 2 and 6 of [Directive 2000/78], by analogy with Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, and with the case-law concerning agreements breaching anti-trust rules in Case 22/71 *Béguelin* [1971] ECR 949, on grounds of the horizontal direct effect of the fundamental rights of the European Union?'

Consideration of the questions referred for a preliminary ruling

The first question

21 By its first question, the referring court seeks, in essence, to ascertain whether European Union law, in particular Article 2 and Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of a collective agreement which takes into account, for the purposes of grading in the employment categories provided for in that agreement and, therefore, determination of the level of pay, only the professional experience acquired as a cabin crew member of a specific airline, while excluding substantively identical experience acquired in the service of another airline belonging to the same group of companies.

22 In accordance with the case-law, where they adopt measures which fall within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect that directive (Case C-447/09 *Prigge and Others* [2011] ECR I-8003, paragraph 48 and case-law cited).

23 In those circumstances, the first question falls to be examined solely in the light of Directive 2000/78.

24 The clause at issue in the Tyrolean Airways collective agreement provides that advancement from employment category A to employment category B is to occur on the completion of three years of service. That provision therefore affects the determination of the employment category in which workers are placed when recruited by that airline. Consequently, that provision also affects their pay. A regulatory provision of this nature must be regarded as establishing rules relating to conditions for access to employment, recruitment and pay, within the meaning of Article 3(1)(a) and (c) of Directive 2000/78.

25 Accordingly, it must be held that Directive 2000/78 is applicable to a situation such as that which gave rise to the main proceedings.

26 In the main proceedings, the Betriebsrat argued that cabin crew members of the airlines concerned who are able to claim several years prior professional experience within the group would, if recruited by Tyrolean Airways, be demoted to employment category A.

27 The first question appears to rest on the premiss that discrimination on grounds of age could arise as a result of the failure, pursuant to the clause at issue in the Tyrolean Airways collective agreement, to take into account periods of service completed with other airlines in the group.

28 It must be recalled on that point that it is clear from Article 2(1) of Directive 2000/78, read together with Article 1 thereof, that, for the purposes of that directive, the principle of equal treatment requires that there be no direct or indirect discrimination whatsoever on the grounds of, inter alia, age. It is clear moreover from Article 2(2)(b) of that directive that, for the purposes of that directive, indirect discrimination on grounds of age occurs where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

29 However, while a provision such as that the tenor of which is set out in paragraph 21 of this judgment is likely to entail a difference in treatment according to the date of recruitment by the employer concerned, such a difference is not, directly or indirectly, based on age or on an event linked to age. It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the age of that cabin crew member at the time of his or her recruitment. That provision is therefore based on a criterion which is neither inextricably (see, *a contrario*, Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECR I-9343, paragraph 23) nor indirectly linked to the age of employees, even if it is conceivable that a consequence of the application of the criterion at issue may, in some individual cases, be that the time of advancement of the cabin crew members concerned from employment category A to employment category B is at a later age than the time of advancement of staff members who have acquired equivalent experience with Tyrolean Airways.

30 In those circumstances, it cannot be considered that the clause at issue in the Tyrolean Airways collective agreement establishes a difference of treatment on grounds of age, in terms of the combined provisions of Article 1 and Article 2(2)(b) of Directive 2000/78.

31 It follows from the foregoing that the answer to the first question is that Article 2(2)(b) of Directive 2000/78 must be interpreted as not precluding a provision of a collective agreement which takes into account, for the purposes of grading in the employment categories provided for in that agreement and, therefore, determination of the level of pay, only the professional experience acquired as a cabin crew member of a specific airline, while excluding substantively identical experience acquired in the service of another airline belonging to the same group of companies.

The second question

32 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

33 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:

Article 2(2)(b) 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 provision of a collective agreement which takes into account, for the purposes of grading in the employment categories provided for in that agreement and, therefore, determination of the level of pay, only the professional experience acquired as a cabin crew member of a specific airline, while excluding substantively identical experience acquired in the service of another airline belonging to the same group of companies.

[Signatures]