Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

6 December 2012*

(Equal treatment in employment and occupation — Directive 2000/78/EC — Prohibition against any discrimination on grounds of age or disability — Compensation on termination of employment — Social plan providing for a reduction in the amount of redundancy compensation paid to disabled workers)

In Case C-152/11,

REFERENCE for a preliminary ruling pursuant to Article 267 TFEU from the Arbeitsgericht München (Germany), made by decision of 17 February 2011, received at the Court on 28 March 2011, in the proceedings

Johann Odar

v

Baxter Deutschland GmbH,

THE COURT (Second Chamber),

composed of: A. Rosas, acting President of the Second Chamber, U. Lõhmus, A. Ó Caoimh, A. Arabadjiev (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2012,

after considering the observations submitted on behalf of:

— Dr Odar, by S. Saller and B. Renkl, Rechtsanwälte,

— Baxter Deutschland GmbH, by C. Grundmann, Rechtsanwältin,

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

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

after hearing the Opinion of the Advocate General at the sitting on 12 July 2012,

gives the following

* Language of the case: German.

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 2 and paragraph (a) of 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 (OJ 2000 L 303, p. 16).

2 That reference was made in the context of proceedings involving Dr Odar and his former employer, Baxter Deutschland GmbH ('Baxter'), concerning the amount of compensation on termination of employment received by him under the Contingency Social Plan ('CSP') concluded by Baxter and its works council.

Legal context

European Union law

3 Recitals 8, 11, 12 and 15 in the preamble to Directive 2000/78 are worded as follows:

'(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.

…

(11) Discrimination based on religion or belief, disability, age or sexual orientation 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.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. …

…

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.'

4 Article 1 states that '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'.

5 Article 2, entitled 'Concept of discrimination', provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.'

6 Article 3 of Directive 2000/78, entitled 'Scope', provides in paragraph 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;

…'

7 Article 6 of the same directive, entitled 'Justification of differences of treatment on grounds of age', provides in paragraph 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;

…'

8 Article 16 of that directive provides:

'Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) 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.'

German law

German legislation

9 Directive 2000/78 was transposed into German law by the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897) ('the AGG'). That law provides, in Paragraph 1, headed 'Object of the law':

'The object of this law is to prevent or eliminate any discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual orientation.'

10 Paragraph 10 of the AGG, headed 'Permissible difference of treatment on grounds of age', provides:

'Paragraph 8 notwithstanding, a difference of treatment on grounds of age is also permissible if it is objective and reasonable and justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

…

(6) differences in benefits in "social plans" within the meaning of the Law on the organisation of businesses [Betriebsverfassungsgesetz], if the parties have established a compensation scheme which is graduated according to age or length of service and under which the opportunities on the employment market, which depend essentially on age, have been clearly taken into account by a relatively strong emphasis on age, or if the parties have excluded from the benefits of the social plan workers who are financially secure because they are entitled to a pension, after receiving unemployment benefit where applicable.'

11 Paragraphs 111 to 113 of the Law on the organisation of businesses, in the version of 25 September 2001 (BGBl. 2001 I, p. 2518) require arrangements to be put in place in order to alleviate the adverse consequences on workers arising from an operation to restructure an undertaking. Thus, employers and works councils are obliged to conclude social plans to that effect.

12 Paragraph 112 of the Law on the organisation of businesses, entitled 'Agreement on structural changes in the undertaking and social plan', provides in paragraph 1:

'If the management and the works council arrive at an agreement to balance the interests in connection with planned structural changes to the undertaking, the agreement shall be in writing and signed by both parties. The same shall apply in the event of an agreement providing for compensation or mitigation of the economic consequences for the workers resulting from the planned changes to the undertaking (social plan). The social plan shall have the same effects as a works agreement …'

13 Under Paragraph 127 of the Social Security Code (Sozialgesetzbuch), which is found in Book III of that code, regular unemployment benefits are paid for a limited period, determined according to the age of the worker and duration of contributions. A worker is entitled to unemployment benefit corresponding to 12 months' salary before he turns 50, 15 months' salary after turning 50, 18 months' salary after turning 55 and 24 months' salary upon turning 58.

The Contingency Social Plan and the Supplementary Social Plan

14 On 30 April 2004 Baxter concluded a CSP with the company's works council, paragraph 6(1)(1.1) to (1.5) of which reads as follows:

'1. Compensation on termination of employment (except in cases of "early retirement")

1.1 Employees to whom, in spite of every endeavour, no acceptable job can be offered by Baxter in Germany and for whom there is no question of early termination of employment under paragraph 5 and who leave the company (as a result of redundancy for operational reasons or by mutual agreement), shall receive taxable gross compensation in euros in accordance with the following formula:

Compensation = (age factor x length of service x gross monthly pay) ("standard formula compensation")

1.2 Age factor table

Age	Age factors	Age	Age factors	Age	Age factors	Age	Age factors	Age	Age factors
18	0.35	28	0.60	38	1.05	48	1.30	58	1.70
19	0.35	29	0.60	39	1.05	49	1.35	59	1.50
20	0.35	30	0.70	40	1.10	50	1.40	60	1.30
21	0.35	31	0.70	41	1.10	51	1.45	61	1.10
22	0.40	32	0.80	42	1.15	52	1.50	62	0.90
23	0.40	33	0.80	43	1.15	53	1.55	63	0.60
24	0.40	34	0.90	44	1.20	54	1.60	64	0.30
25	0.40	35	0.90	45	1.20	55	1.65		
26	0.50	36	1.00	46	1.25	56	1.70		
27	0.50	37	1.00	47	1.25	57	1.70		

…

1.5 In the case of workers who are more than 54 years old and are made redundant on operational grounds or by mutual agreement, the compensation calculated under paragraph 6(1)(1.1) will be compared with that generated by the following formula:

Months until earliest possible beginning of pension x 0.85 x gross monthly pay ("special formula compensation")

Should [the standard formula compensation] be greater than [the special formula compensation] the smaller amount will be payable. However, the smaller amount must not be less than one half of [the standard formula compensation].

If the figure given by [the special formula compensation] is nil, one half of [the standard formula compensation] will be payable.'

15 On 13 March 2008, Baxter concluded a supplementary social plan ('SSP') with the competent central works council. Paragraph 7 of that plan, relating to compensation, reads as follows:

'Employees covered by this [CSP] and whose employment relationship ends as a result of the operational change will receive the following benefits:

7.1 Compensation: Employees will receive a single payment under paragraph 6(1) [CSP].

7.2 Clarification: With regard to paragraph 6(1.5) of the [CSP], the parties agree on the following clarification: "earliest possible beginning of pension" means the date on which the employee can claim for the first time one of the statutory retirement pensions, including a pension with reductions on the ground that it is drawn early.

…'

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

16 The applicant in the main proceedings, Dr Odar, is an Austrian national who was born in 1950. He is married with two dependent children. He is recognised as being severely disabled, with his degree of disability being 50%. Dr Odar was employed by Baxter or its legal predecessors from 17 April 1979, most recently holding the post of marketing director.

17 Baxter terminated its employment relationship with Dr Odar by letter of 25 April 2008 and offered him further employment at its premises in Munich-Unterschleißheim (Germany). Dr Odar accepted that offer but subsequently decided to resign on 31 December 2009 after the parties agreed that his resignation would not reduce his entitlement to compensation.

18 The order for reference indicates that, under the German retirement pension scheme, Dr Odar may claim an ordinary old-age pension as of age 65, that is, as from 1 August 2015, as well as a retirement pension for severely disabled persons at age 60, in his case from 1 August 2010.

19 Baxter paid Dr Odar compensation under the CSP of EUR 308 253.31 (gross). Application of the standard formula would have generated a compensation figure of EUR 616 506.63 (gross). In using the special formula and basing itself on an assumption of earliest possible beginning of pension, namely 1 August 2010, Baxter calculated compensation totalling EUR 197 199.09 (gross). It accordingly paid him the minimum guaranteed amount, that is to say, 50% of EUR 616 506.63.

20 By letter of 30 June 2010, Dr Odar brought an action before the Arbeitsgericht München (Employment Court, Munich), asking that Baxter be ordered to pay him further compensation of EUR 271 988.22 (gross), which corresponds to the difference between the compensation actually paid to him and the amount that he would have received if he had been 54 years old (the period of service being the same) on the date of termination of his employment. Dr Odar submits that the calculation of the compensation due to him under the CSP discriminates against him because of his age and his disability.

21 The referring court seeks clarification as to whether the third sentence of Paragraph 10(6) of the AGG and Paragraph 6(1)(1.5) of the CSP are compatible with Directive 2000/78. It observes that, if the former provision of national law is incompatible with European Union law and, consequently, does not apply, Dr Odar's action before it must be upheld. The rule laid down in the latter provision cannot be based on a rule which is incompatible with that directive.

22 In those circumstances, the Arbeitsgericht München decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Is a national rule which provides that different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable, contrary to the prohibition of discrimination on the ground of age, laid down by Articles 1 and 16 of [Directive 2000/78] or is that unequal treatment justified under [the second subparagraph of] Article 6[(1)(a)] of [the directive]?

2. Is a national rule which provides that different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable, contrary to the prohibition of discrimination on the ground of disability laid down by Articles 1 and 16 of [Directive 2000/78]?

3. Is a rule of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, an alternative calculation will be made of the compensation on the basis of the earliest possible date on which their pension will begin – by comparison with the more normal method of calculation, which takes account in particular of the length of service – and the smaller amount of compensation, though still at least one half of the normal sum in compensation, will be paid, contrary to the prohibition of discrimination on the ground of age laid down by Articles 1 and 16 of [Directive 2000/78], or is that unequal treatment justified under [the second subparagraph of] Article 6[(1)(a)] of [Directive 2000/78]?

4. Is a rule of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, an alternative calculation will be made of the compensation on the basis of the earliest possible date on which their pension will begin – by comparison with the more normal method of calculation, which takes account in particular of the length of service – and the smaller amount of compensation, though still at least one half of the normal sum in compensation, will be paid, the alternative method of calculation taking into account a retirement pension on the ground of disability, contrary to the prohibition of discrimination on the ground of disability laid down by Articles 1 and 16 of [Directive 2000/78]?’

The questions referred for a preliminary ruling

The first two questions

23 By its first two questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 2(2) and 6(1) of Directive 2000/78 must be interpreted as precluding national legislation providing that different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable.

24 In that regard, it should be remembered at the outset that, according to the Court’s settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the

Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27; Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR, paragraph 15; and Case C-378/10 *VALE Építési* [2012] ECR, paragraph 18).

25 It is clear that that is precisely the case here.

26 The first two questions relate to a situation, envisaged by the third sentence of Paragraph 10(6) of the AGG, in which the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable.

27 Yet there is nothing in the order for reference indicating that the main proceedings concern such a situation. On the contrary, the referring court has observed that, unlike the possibility provided for in that provision of the AGG, the CSP does not allow for workers approaching retirement to be excluded from compensation on termination of employment; nor does it allow for unemployment benefits received by the worker to be taken into account. As is apparent from the case-file, Dr Odar received compensation on termination of employment, but that compensation was reduced pursuant Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, which he has challenged with his action before the referring court.

28 It is thus quite clear that the question of the compatibility of the third sentence of Paragraph 10(6) of the AGG with Directive 2000/78 is abstract and purely hypothetical in relation to the dispute in the main proceedings.

29 In those circumstances, it is not necessary to give an answer to the first and second questions put by the referring court.

The third question

30 By its third question, the referring court asks, in essence, whether Articles 2(2) and 6(1) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount.

31 Regarding, first, the question whether the national legislation at issue comes within the scope of Directive 2000/78, it must be pointed out that it is apparent both from its title and the preamble and from its content and purpose that Directive 2000/78 seeks to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1 of that directive, which include age.

32 More specifically, it follows from Article 3(1)(c) that Directive 2000/78 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'.

33 In providing for a reduction in the amount of compensation on termination of employment for workers older than 54 years of age, Paragraph 6(1)(1.5) of the CSP affects the conditions of termination of employment of those workers within the meaning of Article 3(1)(c) of Directive 2000/78. Such a provision therefore comes within the scope of that directive.

34 According to the Court's settled 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 the directive (Case C-447/09 *Prigge and Others* [2011] ECR I-8003, paragraph 48, and Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt* [2012] ECR, paragraph 22).

35 Regarding the question whether the rules in question provide for a difference in treatment based on age within the meaning of Article 2(1) of Directive 2000/78, it should be observed that Paragraph 6(1)(1.5) of the CSP has the effect, in respect of workers over 54 years of age who have been made redundant on operational grounds or whose employment relationship has been terminated by mutual agreement between the undertaking and the worker, that the compensation calculated using the standard formula is compared to the compensation calculated using the special formula, with the lower amount being granted to the worker in question, that worker being nevertheless guaranteed to receive at least half of the amount resulting from the application of the standard formula.

36 Pursuant to those provisions, Dr Odar was paid the amount of EUR 308 357.10, corresponding to half of the standard formula compensation. All other things being equal, had he been 54 years old at the time his employment was terminated, he would have been entitled to compensation of EUR 580 357.10. The fact that he was older than 54 thus led to the application of the comparative method and the payment of an amount lower than that to which he would have been entitled if he had not been older than 54. It thus appears that the calculation method provided for in the CSP in the event of termination of employment on operational grounds does give rise to a difference in treatment on the basis of age.

37 Next, it is necessary to examine whether that difference in treatment may be justified under the first subparagraph of Article 6(1) of Directive 2000/78. That provision states that a difference in treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

38 The referring court observes, in relation to the aim of the national measures at issue in the main proceedings, that the wording of Paragraph 6(1)(1.5) of the CSP does not shed any light on which objectives are being pursued. It is apparent from the case-file submitted to the Court, however, that they are identical to the rule in the third sentence of Paragraph 10(6) of the AGG. As observed by the referring court, the detailed rules decided upon for the application of the social plan by management and workers must be such as effectively to promote achievement of the objective referred to in that provision of the AGG, and not undermine disproportionately the interests of disadvantaged age groups.

39 According to Article 112 of the Law on the organisation of businesses, in the version in force on 25 September 2001, the meaning and purpose of a social plan are to offset or alleviate the adverse consequences on workers arising from an operation to restructure the undertaking concerned. In its written observations, the German Government stated in that regard that compensation paid under a contingency social plan is not aimed specifically at facilitating reintegration into employment.

40 A difference in the compensation paid under a contingency social plan on grounds of age pursues an objective based on the view that, since the economic disadvantages will manifest themselves in the future, certain workers who will not be faced with such disadvantages resulting from loss of their employment, or only to a limited extent compared with others, may, as a rule, be excluded from entitlement to compensation.

41 The German Government observes that a social plan must provide for a distribution of limited resources, so that it may fulfil its 'transitional function' in respect of all workers, not just older workers. Such a plan cannot, in principle, jeopardise the survival of the undertaking or the remaining posts. The third sentence of Paragraph 10(6) of the AGG also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment.

42 That national provision is thus aimed at granting compensation for the future, protecting younger workers and facilitating their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources in a social plan.

43 Such objectives are capable of justifying, by way of derogation from the general rule prohibiting discrimination on grounds of age, differences in treatment relating, inter alia, to 'the setting of special conditions on … employment and occupation, including dismissal and remuneration conditions, for young people [and] older workers … in order to promote their vocational integration or ensure their protection' within the meaning of the second subparagraph of Article 6(1) of Directive 2000/78.

44 Moreover, the aim of preventing compensation on termination from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension must be considered to be legitimate (see, to that effect, Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECR I-9343, paragraph 44).

45 In those circumstances, objectives such as those pursued by Paragraph 6(1)(1.5) of the CSP must, in principle, be held to be capable of justifying differences in treatment on grounds of age, 'objectively and reasonably' and 'within the context of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78.

46 It is still necessary to ascertain whether the means employed are appropriate and necessary and do not go beyond what is required to achieve the objective pursued.

47 It should be borne in mind that the Member States and, as necessary, the social partners at national level have broad discretion 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 (see, to that effect, Case C-141/11 *Hörnfeldt* [2012] ECR, paragraph 32).

48 As to whether the provisions of the CSP and the SSP at issue are appropriate, it should be observed that the reduction in compensation granted to workers who, on the date of termination of their employment, are financially secure, does not seem unreasonable in the light of the purpose of such social plans, which is to enhance protection for workers for whom the transition to new employment is challenging due to their limited financial means.

49 Therefore, it must be considered that a provision such as Paragraph 6(1)(1.5) of the CSP does not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the German legislature.

50 As to whether those provisions are necessary, it is true that Paragraph 7(7.2) of the SSP provides that the earliest possible beginning of pension for the purposes of Paragraph 6(1)(1.5) of the CSP means the date on which the worker can claim for the first time one of the statutory retirement pensions, including a pension with reductions on the ground that it is drawn early.

51 However, as observed in paragraph 27 above, the CSP provides only for a reduction in the amount of compensation on termination granted to those workers.

52 It should be observed, firstly, that Paragraph 6(1)(1.5) of the CSP provides that the compensation granted to the worker concerned corresponds to whichever amount is lowest of the amounts calculated using the standard formula or the special formula, with the recipient having nevertheless the guarantee that the amount actually paid to him will be at least equal to half of the amount calculated using the standard formula. Moreover, as emerges from the table reproduced in paragraph 14 above, the age factor, which is one of the coefficients in the standard formula and the special formula, increases progressively from the age of 18 (0.35) until 57 (1.70). It is only as of age 59 that that factor starts to decrease (1.50), reaching its lowest level at age 64 (0.30). Secondly, the fourth subparagraph of that provision provides that, even if the use of the special formula gives a result of nil, the worker concerned will be entitled to one half of the standard formula compensation.

53 In the light of the assessment made by the referring court, it must be observed that Paragraph 6(1)(1.5) of the CSP is the result of an agreement negotiated between employees' and employers' representatives exercising their right to bargain collectively which is recognised as a fundamental right. The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement (see, to that effect, Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 67).

54 In the light of the foregoing, the answer to the third question is that Articles 2(2) and 6(1) of Directive 2000/78 must be interpreted as not precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount.

The fourth question

55 By its fourth question, the referring court asks, in essence, whether Article 2(2) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.

56 Regarding, firstly, the question whether Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, provides for a difference in treatment for the purposes of Article 2(1) of Directive 2000/78, it should be observed that the amount of compensation on termination paid to the worker is reduced pursuant to Paragraph 7(7.2), taking account of the earliest possible beginning of pension. Moreover, eligibility to receive a retirement pension is subject to a minimum age requirement and that age is different for severely disabled persons.

57 As observed by the Advocate General in point 50 of her Opinion, the first component in the special formula calculation will always be lower for a severely disabled worker than for a non-disabled worker of the same age. In the present case, the fact that the calculation is based, in an ostensibly neutral manner, on the pensionable age, leads to a situation where severely disabled workers, who are eligible for a pension at 60 rather than 63 in the case of non-disabled workers, receive less compensation on termination of employment because of their serious disability.

58 As evidenced by Dr Odar's observations and acknowledged by Baxter at the hearing, had Dr Odar not been severely disabled, he would have received EUR 570 839.47 in compensation on termination.

59 It follows that Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, the application of which has the effect of the compensation on termination paid to severely disabled workers being lower than that paid to non-disabled workers, gives rise to a difference in treatment based indirectly on disability for the purposes of the combined provisions of Articles 1 and 2(2)(a) of Directive 2000/78.

60 It is appropriate, secondly, to consider whether, in a context such as that governed by the provision at issue in the main proceedings, severely disabled workers in an age bracket approaching retirement are in a comparable situation, within the meaning of Article 2(2)(a) of Directive 2000/78, to that of non-disabled workers in the same age bracket. The German Government submits that the respective starting points for those two categories of workers are objectively different in terms of their entitlement to receive a pension.

61 It must be noted that workers in age brackets approaching retirement are in a situation comparable to that of other workers concerned by the social plan, since their employment relationship with their employer ends for the same reason and in the same circumstances.

62 The advantage granted to severely disabled workers consisting in entitlement to claim a retirement pension as from three years earlier than non-disabled workers does not place them in a different situation in relation to those workers.

63 It is accordingly necessary to examine, in the light of Article 2(2)(b) of Directive 2000/78, whether the difference in treatment between those two categories of workers is objectively and reasonably justified by a legitimate aim and whether the means employed are appropriate and do not go beyond what is necessary to achieve that aim, as pursued by the German legislature.

64 It has been held above in paragraphs 43 to 45 that objectives such as those pursued by Paragraph 6(1)(1.5) of the CSP must, in principle, be held to be capable of justifying differences in treatment on grounds of age, 'objectively and reasonably' and 'within the context of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78. Furthermore, as is apparent from paragraph 49 above, such a national provision does not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the German legislature.

65 In order to examine whether Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, goes beyond what is necessary to achieve the aims pursued, it is necessary to place the provision in the context of which it forms a part and to consider the adverse effects it is liable to cause for the workers concerned.

66 Baxter and the German Government state, in essence, that the lower amount of compensation on termination received by Dr Odar is justified in the case of severely disabled workers by the advantage they have consisting in entitlement to claim a retirement pension as from three years earlier than non-disabled workers.

67 That line of reasoning cannot be upheld, however. Firstly, there is discrimination based on disability when the disputed measure is not justified by objective factors unrelated to such discrimination (see, by analogy, Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29; Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 67; and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 43). Moreover, such a line of reasoning, if accepted, would undermine the effectiveness of the national provisions providing for that advantage, the rationale for which is generally to take account of the specific difficulties and risks faced by severely disabled workers.

68 It thus appears that management and the workers, in pursuing the legitimate objective of a fair distribution of limited financial resources allocated to a social plan which is proportionate to the needs of the workers concerned, omitted to take account of relevant factors affecting, in particular, severely disabled workers.

69 They disregarded the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age. Severely disabled people have specific needs stemming both from the protection their condition requires and from the need to anticipate possible worsening of their condition. As observed by the Advocate General in point 68 of her Opinion, regard must be had to the risk that disabled workers may throughout their lives have financial requirements arising from their disability which cannot be adjusted and/or that, with advancing age, those financial requirements may increase.

70 It follows that, in ultimately paying a severely disabled worker compensation on termination on operational grounds which is lower than the amount paid to a non-disabled worker, the measure at issue in the main proceedings has an excessive adverse effect on the legitimate interests of severely disabled workers and therefore goes beyond what is necessary to achieve the social policy objectives pursued by the German legislature.

71 Therefore, the difference in treatment resulting from Paragraph 6(1)(1.5) of the CSP cannot be justified under Article 2(2)(b)(i) of Directive 2000/78.

72 In the light of the aforegoing considerations, the answer to the fourth question is that Article 2(2) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.

Costs

73 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. **Articles 2(2) and 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 rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a**

calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount.

2. **Article 2(2) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.**

[Signatures]