JUDGMENT OF THE COURT (Second Chamber)

18 November 2010 *

In Case C-356/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 4 August 2009, received at the Court on 4 September 2009, in the proceedings

Pensionsversicherungsanstalt

v

Christine Kleist,

* Language of the case: German.

THE COURT (Second Chamber),

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

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 2 September 2010,

after considering the observations submitted on behalf of:

— Pensionsversicherungsanstalt, by A. Ehm, Rechtsanwalt,

— Mrs Kleist, by H. Forcher-Mayr, Rechtsanwalt,

— the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207').

2 The reference has been made in proceedings between Mrs Kleist and her employer, the Pensionsversicherungsanstalt ('the pension insurance institution'), concerning the conditions for termination of her contract of employment.

Legal context

European Union law

3 Directive 76/207, which has been repealed with effect from 15 August 2009 by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23), provided in Article 2:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. For the purposes of this Directive, the following definitions shall apply:

— direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

— indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless 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)(c) of Directive 76/207 states that 'application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to … employment and working conditions, including dismissals, as well as pay as provided for in [Council] Directive 75/117/EEC' of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

5 Article 7(1) 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), provides:

'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;

…'

National law

6 Paragraphs 1 to 3 of the Federal Constitutional Law on Different Pensionable Ages for Male and Female Insured Persons (Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von männlichen und weiblichen Sozialversicherten) of 29 December 1992 (BGBl. 832/1992) are worded as follows:

'Paragraph 1. Statutory provisions which lay down different pensionable ages for males and females covered by statutory social insurance are permissible.

Paragraph 2. From 1 January 2019, the pensionable age for early retirement pensions shall be raised for female insured persons by six months on 1 January each year until 2028.

Paragraph 3. From 1 January 2024, the pensionable age for retirement pensions shall be raised for female insured persons by six months on 1 January each year until 2033.'

7 The General Law on Social Security (Allgemeines Sozialversicherungsgesetz) of 9 September 1955 (BGBl. 189/1955), as amended ('the ASVG'), applies, pursuant to Paragraph 270 thereof, to both salaried employees and other workers. Paragraph 253(1) of the ASVG provides that, when insured persons have attained the normal pensionable age, which is 65 years for men and 60 for women, they are entitled to draw a retirement pension if the qualifying period laid down in Paragraph 236 has been met.

8 It is apparent from the order for reference that under Austrian law the statutory retirement pension (granted under the ASVG) cannot be reduced because an employment relationship is maintained or activity as a self-employed person is engaged in beyond the age conferring entitlement to draw that pension.

9 The collective agreement applicable in the main proceedings is Staff Regulations B for Doctors and Dentists employed by Austria's Social Security Providers (Dienstordnung B für die Ärzte und Dentisten bei den Sozialversicherungsträgern Österreichs; 'the DO.B'). This collective agreement lays down a special regime governing dismissal under which employees whose length of service with the body that employs them is 10 years or more can be dismissed only on certain specified grounds.

10 Paragraph 134 of the DO.B is worded as follows:

'…

(2) Doctors with protection from dismissal have the right to retire if:

…

2. [they have] an entitlement to draw a retirement pension under Paragraph 253 of the ASVG …

…

(4) The board can retire a doctor with protection from dismissal if the doctor:

1. fulfils the conditions pursuant to subparagraph 2, … point... 2 …

…'

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

11 Mrs Kleist, who was born in February 1948, was employed as chief physician by the pension insurance institution.

12 The pension insurance institution took the decision to terminate the employment of all its employees, whether male or female, who satisfied the conditions for retiring them under the DO.B. By letter of 9 January 2007, Mrs Kleist informed her employer that she did not intend to retire at the age of 60 but wished to work until she was 65. Her employer informed her, however, by letter of 6 December 2007, of its decision to retire her from 1 July 2008.

13 Mrs Kleist challenged her dismissal before the Landesgericht Innsbruck (Regional Court, Innsbruck). The judgment delivered by that court on 14 March 2008 finding against Mrs Kleist was set aside by a judgment delivered on 22 August 2008 by the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck) sitting as an

appellate court in matters of employment and welfare law. The pension insurance institution then appealed on a point of law to the Oberster Gerichtshof (Supreme Court).

14 The Oberster Gerichtshof pointed out that the regime governing dismissals established by the DO.B derogates from the general regime laid down by Austrian law in that the latter provides that reasons are not, in principle, required for the unilateral termination of an employment relationship. It stated, however, that that does not preclude the application of the general protection against unlawful dismissal which is afforded, under certain conditions, by Austrian law in cases where such termination has an adverse effect on the worker's fundamental interests and the employer is unable to substantiate the termination on the basis of operational reasons or reasons relating to the worker personally.

15 The Oberster Gerichtshof then stated that, in determining whether the termination has an adverse effect on the worker's fundamental interests, account is taken of the social cover that he enjoys, including in relation to the drawing of a retirement pension. The same criterion is used in the context of the provision of the DO.B at issue in the main proceedings, a provision which allows the employer not to apply to workers in receipt of a retirement pension protection against dismissal that is enhanced in comparison with the protection resulting from the statutory regime, thereby opening up the possibility of taking on younger workers.

16 The Oberster Gerichtshof inquired whether the criterion of the worker's social situation, to which recourse is thus had by Austrian law in the field of dismissal, must be taken into account, just like the criterion of age, when assessing if the workers' situations are comparable. It observed that men and women are treated in the same way

in this regard, in that they lose the enhanced protection against dismissal afforded by the DO.B if they have social cover.

17 The Oberster Gerichtshof considered that, as regards in particular the extent of the Member States' discretion in shaping employment policy measures, the points of law raised by the case before it had not been explained by the Court of Justice's case-law sufficiently to enable it to give judgment.

18 In that context, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 3(1)(c) of Directive [76/207] to be interpreted — in the context of a system of employment law in which the general protection of employees against dismissal is determined by their social (financial) dependence on the job — as precluding a provision of a collective agreement offering special protection against dismissal, over and above the statutory general protection against dismissal, only until that point in time at which, in a typical case, there is social (financial) cover in the form of a retirement pension if men and women become entitled to draw that retirement pension at different times?

2. In the context of such a system of employment law, does Article 3(1)(c) of Directive [76/207] preclude a decision by a public employer terminating the employment of a female employee just a few months after she acquires the financial cover of a retirement pension, in order to employ new workers who are already pressing to join the job market?'

Consideration of the questions

19 By its questions, which it is appropriate to examine together, the national court asks, in essence, whether Article 3(1)(c) of Directive 76/207 must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit a public employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute discrimination on the grounds of sex prohibited by that directive.

Observations submitted to the Court

20 According to Mrs Kleist, by permitting an employer to retire a female employee when she has attained the age entitling her to draw a retirement pension, namely the age of 60 years, when the right to draw a retirement pension is acquired at a different time depending on whether the employee is a man or a woman, the rules at issue in the main proceedings constitute discrimination on the grounds of sex. Article 3(1)(c) of Directive 76/207 must be interpreted as precluding such rules.

21 Mrs Kleist requests the Court also to rule on the interpretation 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). She submits that this directive precludes national rules such as those at issue in the main proceedings because they result, in addition, in direct discrimination on the grounds of age.

22 The pension insurance institution contends that the rules at issue in the main proceedings establish a difference in treatment which is indirectly based on sex; the difference is justified in light of the objective of promoting employment of younger persons and therefore does not constitute unlawful discrimination. It further submits that a situation should be avoided in which women can concurrently receive both their salary and their statutory pension whilst that possibility is not open to men.

23 The European Commission submits that Article 3(1)(c) of Directive 76/207 must be interpreted as precluding a provision of a collective agreement from offering special protection against dismissal, over and above the statutory general protection against dismissal, only until that point in time at which there is social cover providing the employee with financial resources, in a typical case, in the form of a retirement pension, if men and women become entitled to draw that retirement pension at different times. The objective of promoting employment of younger persons cannot justify such rules.

The Court's reply

24 A preliminary point to note is that the conditions for payment of a retirement pension and the conditions governing termination of employment are separate issues (see, to this effect, Case 152/84 *Marshall* [1986] ECR 723, paragraph 32).

25 In the case of the latter, Article 3(1)(c) of Directive 76/207 provides that application of the principle of equal treatment in relation to dismissals means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies.

26 The term 'dismissal' contained in that provision, a term which must be given a wide meaning, covers an age limit set for the compulsory dismissal of workers pursuant to an employer's general policy concerning retirement, even if the dismissal involves the grant of a retirement pension (see, by analogy, *Marshall*, paragraph 34, and Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 36).

27 It follows that, since Mrs Kleist was retired by her employer, in accordance with the decision taken by it to dismiss all its employees who acquired the right to draw a retirement pension, the main proceedings concern dismissal within the meaning of Article 3(1)(c) of Directive 76/207.

28 It should be observed at the outset that the Court has held that a general policy concerning dismissal involving the dismissal of a female employee solely because she has attained or passed the qualifying age for a retirement pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to Directive 76/207/EEC (see, to this effect, *Marshall*, paragraph 38).

29 In this connection, it should be noted, first, that under the first indent of Article 2(2) of Directive 76/207 direct discrimination occurs where one person is treated less

favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

30 In the present instance, it is apparent from Paragraph 134(2)(2) and (4)(1) of the DO.B that doctors with protection from dismissal can nevertheless be dismissed when they acquire the right to draw a retirement pension under Paragraph 253 of the ASVG. Pursuant to Paragraph 253(1) of the ASVG, men acquire that right when they have attained 65 years of age and women when they have attained 60 years of age. The effect of this is that female workers can be dismissed when they have attained 60 years of age whilst male workers cannot be dismissed until they have attained 65 years of age.

31 Since the criterion used by such provisions is inseparable from the workers' sex, there is, contrary to the assertions of the pension insurance institution, a difference in treatment that is directly based on sex.

32 Second, it must be examined whether, in a context such as that governed by those provisions, female workers of 60 to 65 years of age are in a comparable situation, within the meaning of the first indent of Article 2(2) of Directive 76/207, to that of male workers in the same age bracket.

33 The national court inquires, in essence, whether the circumstance that female workers of 60 to 65 years of age have social cover by virtue of the statutory retirement pension is such as to make their situation specific vis-à-vis the situation of male workers in the same age bracket, who do not have such cover.

34 The comparability of such situations must be examined having regard inter alia to the object of the rules establishing the difference in treatment (see, to this effect, Case C-19/02 *Hlozek* [2004] ECR I-11491, paragraph 46, and, by analogy, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 26).

35 In the case in the main proceedings, the rules establishing the difference in treatment at issue are designed to govern the circumstances in which employees can lose their job.

36 In the context of that case, contrary to the position in the cases which gave rise to the judgments in Case C-132/92 *Roberts* [1993] ECR I-5579 (paragraph 20) and in *Hlozek* (paragraph 48), the advantage accorded to female workers of being able to claim a retirement pension from an age five years younger than that set for male workers is not directly connected with the object of the rules establishing a difference in treatment.

37 That advantage cannot place female workers in a specific situation vis-à-vis male workers, as men and women are in identical situations so far as concerns the conditions governing termination of employment (see, to this effect, Case 151/84 *Roberts* [1986] ECR 703, paragraph 36).

38 Furthermore, as is apparent from the order for reference, the circumstance referred to in paragraph 33 of the present judgment results from the fact that the Republic of

Austria wished to establish, in accordance with the exception laid down in Article 7(1)(a) of Directive 79/7 to the principle of equal treatment, a regime prescribing a different statutory pensionable age for men and women in order to compensate for the disadvantage suffered by women socially, in relation to the family and economically.

39 The Court has repeatedly held that, given the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex, provided for in that provision, must be interpreted strictly, so as to be applicable only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the possible consequences thereof for other social security benefits (see, to this effect, *Marshall*, paragraph 36; Case C-207/04 *Vergani* [2005] ECR I-7453, paragraph 33; and Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 36).

40 Since, as is apparent from paragraph 27 of the present judgment, the rules at issue in the main proceedings concern the subject of dismissal within the meaning of Article 3(1)(c) of Directive 76/207, and not the consequences referred to in Article 7(1)(a) of Directive 79/7, the exception is not applicable to those rules.

41 Third, Directive 76/207 draws a distinction between discrimination directly on grounds of sex and 'indirect' discrimination inasmuch as only provisions, criteria or practices liable to constitute indirect discrimination can, by virtue of the second

indent of Article 2(2) of that directive, avoid being classified as discriminatory if they are 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. Such a possibility is not, by contrast, provided for in respect of differences in treatment liable to constitute direct discrimination within the meaning of the first indent of Article 2(2) of the directive.

42 In those circumstances, given that (i) the difference in treatment established by rules such as those at issue in the main proceedings is directly on grounds of sex, whilst, as is apparent from paragraph 37 of the present judgment, the situations of men and women are identical in the present instance, and (ii) Directive 76/207 contains no exception, applicable in the present case, to the principle of equal treatment, it must be concluded that that difference in treatment constitutes direct discrimination on grounds of sex (see, to this effect, *Vergani*, paragraph 34).

43 That difference in treatment cannot therefore be justified by the objective, relied upon by the pension insurance institution, of promoting employment of younger persons.

44 As regards, finally, the possibility that there is discrimination on the grounds of age within the meaning of Directive 2000/78, it should be recalled that, in proceedings under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the

relevance of the questions which it submits to the Court (see, inter alia, Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 32).

45 Since the national court has not asked the Court to interpret that directive and the order for reference does not even reveal that such discrimination has been pleaded in the main proceedings, examination of this issue does not appear to be of use for disposing of those proceedings.

46 The answer to the questions referred therefore is that Article 3(1)(c) of Directive 76/207 must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute direct discrimination on the grounds of sex prohibited by that directive.

Costs

47 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 3(1)(c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute direct discrimination on the grounds of sex prohibited by that directive.

[Signatures]