SUMMARY

ECJ 28 January 2015, case C-417/13 (ÖBB Personenverkehr AG – v – Gotthard Starjakob), Age discrimination

Facts

Under the Austrian legislation that applied until 2012, service completed before the age of 18 was not taken into account for the purpose of calculating the reference date for advancement to higher steps on the salary scale. In a judgment delivered on 18 June 2009 in the *Hütter* case (C-88/08), the ECJ held that Directive 2000/78 precludes "national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded". To comply with this judgment, Austria amended its legislation in 2011. Employees hired before 2005 were given the option to have their reference date recalculated in such a way that their pre-18 service counted towards determining that date. However, employees wishing to exercise this option (i) had to complete and submit a form including evidence of their pre-18 service and (ii) had to accept that every period required for advancement in each of the first three steps on the salary scale was extended by one year, thereby effectively undoing all or most of the advantage of the statutory amendment. Employees failing to submit such a form retained their old reference date.

Mr Starjakob worked for ÖBB, starting before the age of 18. In 2012, on the basis of the ECJ's judgment in Hütter, he commenced proceedings against ÖBB, claiming payment of the difference between what he was paid from 2007 to 2012 and what he would have been paid

had his pre- 18 service been taken into account. He did not submit the form required for this purpose.

The facts of the case and some of the legal issues closely resemble those on which the ECJ ruled on 11 November 2014, in the Schmitzer case (C-530/13), summarised in the previous issue of EELC.

National proceedings

The *Landesgericht* turned down Mr Starjakob's claim, but on appeal the *Oberlandesgericht* found in his favour. ÖBB appealed to the *Oberster Gerichtshof* (Supreme Court), which referred seven (groups of) questions to the ECJ. Questions 1b and 4 were whether Articles 2 and 6(1) of Directive 2000/78 preclude national legislation which, to end age discrimination, takes account of pre-18 service periods but simultaneously extends the period required for advancement in each of the three first salary steps. Question 1a was whether such legislation must allow an employee whose pre-18 service was not taken into account to obtain financial compensation which corresponds to payment of the difference between the remuneration he actually received and that which he should have received. Question 5 was whether legislation such as that at issue may require such an employee to provide evidence of his pre-18 service on pain of remaining in the old salary system. Questions 6 and 7 related to the limitation period for submitting claims.

ECJ's findings

The ECJ essentially repeated its findings in Schmitzer. Following the amendment of the law in 2011, the reference date is determined without discrimination based on age. However, the legislature neutralised the advantage resulting form this amendment by extending the period required for advancing to the next step on the salary scale in the first three steps, a measure that is likely to apply only to employees with pre-18 service. Consequently, Austrian law continues to apply differing treatment to the two categories of employee concerned. This difference of treatment is not objectively justified (§ 23 – 40).
National legislation which seeks to end discrimination based on age does not necessarily have to allow an employee whose pre- 18 service has not been taken into account in the calculation of his advancement to obtain financial compensation corresponding to payment of the difference between the remuneration he would have received in the absence of such discrimination and that which he actually received. That being said, according to settled case law, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can

be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining (§ 42-47).
Directive 2000/78 is still not being correctly applied since the adoption of the national legislation at issue. The system applicable to the employees favoured by the previous system therefore remains the only valid point of reference. Therefore reestablishing equal treatment, in a case such as that at issue in the main proceedings, involves granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale (§ 48).
Directive 2000/78 does not preclude providing for an obligation of cooperation under which the employee must give his employer evidence relating to the periods of service prior to the age of 18 so that they can be taken into account (§ 52-54).
In the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights derived by individuals from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness) (§ 61).
As regards the principle of effectiveness, it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, to the extent that such time limits are not liable to make it impossible or excessively difficult in practice to exercise the rights conferred by EU law (§ 62).
The date of delivery of the judgment in Hütter does not affect the starting point of the limitation period at issue in the main proceedings and is therefore irrelevant for the purposes of determining whether, in those proceedings, the principle of effectiveness has been respected. The limitation period begins to run, in the case at issue, from the day that the employee was placed in grade by the employer, that is the date on which the employment relationship began. It cannot be disputed that such a time limit constitutes a reasonable time limit for bringing proceedings in the interests of legal certainty. Moreover, in the case in the main proceedings, Mr Starjakob's right to request a re-evaluation of the reference date is not time-barred (§ 65-68).
The principle of equivalence requires that all the rules applicable to actions apply without distinction to actions of infringement of EU law and to similar actions alleging infringement of national law. An action seeking to enforce salary claims, such as that at issue in the main proceedings, is subject to a three-year limitation period. However, employees who have

cooperated benefit from a suspension of the limitation. The provision at issue is a procedural provision governing actions based on infringements not of national law but of EU law, insofar as it was adopted to reflect the guidance from the judgment in Hütter, and the suspension of the limitation period also covers the period between delivery of the judgment and publication of the 2011 law. It follows that, since observance of the principle of equivalence requires the application without distinction of a national rule to actions based on infringements of both EU and national law, that principle is not relevant to a situation such as that at issue in the main proceedings, which concerns two types of actions, both based on an infringement of EU law (§ 71-74).

Ruling

EU law, in particular, Articles 2 and 6(1) of Council Directive 2000/78 [...] must be interpreted as precluding national legislation such as that at issue in the main proceedings, which, to end discrimination based on age, takes account of periods of service prior to the age of 18, but which, simultaneously, includes a rule, (applicable in reality only to employees who are subject to that discrimination) extending by one year the period required for advancement in each of the three first salary steps and in so doing, permanently maintaining a difference in treatment based on age.
EU law, in particular Article 16 of Directive 2000/78, must be interpreted as meaning that national legislation that seeks to end discrimination based on age does not necessarily have to allow an employee whose service before 18 has not been taken into account in calculating his advancement, to obtain financial compensation of payment of the difference between the pay he would have received in the absence of that discrimination and what he actually received. Nevertheless, in a case such as that at issue in the main proceedings, as long as a system to abolish discrimination on grounds of age in conformity with the provisions of Directive 2000/78 has not been adopted, re-establishing equal treatment entails granting employees who have had at least some experience before the age of 18 the same benefits in terms of recognition of periods of service before 18 and advancement on the pay scale, as employees who have had experience of the same type and comparable duration since reaching that age.
EU law, in particular Article 16 of Directive 2000/78, must be interpreted as not preventing the national legislature from providing for an obligation of cooperation, in order to take into account periods of service completed before the age of 18, under which the employee must give his employer the evidence relating to those periods. Nevertheless, there is no abuse of law in (i) an employee's refusal to cooperate with this or (ii) his seeking to obtain payment intended to re-establish equal treatment with other employees who have gained experience of the same type and comparable duration after the age of 18.

The principle of effectiveness must be interpreted as not precluding a national limitation period for claims founded in EU law from starting to run before the date of delivery of a judgment of a court that has clarified the legal position on the matter.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-01-28
Case number: C-417/13