SUMMARY

ECJ 26 September 2013, case C-546/11 (Dansk Jurist-og Økonomforbund acting on behalf of Erik Toftgaard - v - Indenrigs- og Sundhedsministeriet with five intervening parties), Age discrimination

Facts

Mr Toftgaard was a civil servant. He was dismissed on the ground that his post had ceased to exist. Paragraphs 32(1) and (4) of the Danish Law on Civil Servants provided: 1. A civil servant who is dismissed on the ground that his post has ceased to exist because of restructuring or reorganisation of working methods, shall continue to receive his current salary for three years [...]. 4. There shall be no entitlement to availability pay where the civil servant concerned: [...] 2. has reached the age of 65. As Mr Toftgaard was 65 at the time of his dismissal he was not eligible for "availability pay". Although he was eligible for a civil service pension, it was lower than the pension he would have received had he continued working, the compulsory retirement age for civil servants being 70.

National proceedings

On behalf of Mr Toftgaard, his union brought an action against his employer, the Ministry of the Interior and Health. The Regional Court dismissed the action, whereupon Mr Toftgaard appealed to the Supreme Court, which referred questions to the ECJ regarding the interpretation of Articles 6(1) and 6(2) of Directive 2000/78. Article 6(1) prohibits age

discrimination that is not objectively justified. Article 6(2) states that "*Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex*".

ECJ's findings

1. The scope of Directive 2000/78 excludes benefits that are not equivalent to "pay" within the meaning of Article 157 TFEU. The concept of "pay" comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. In the present case, the availability pay is paid monthly for three years by the State in its capacity as employer. For entitlement to availability pay, the civil servant is obliged to remain available to his employer. If the employer offers the civil servant a suitable alternative post, he is obliged to take it up on pain of losing entitlement to availability pay. In these circumstances, the availability pay at issue constitutes "pay" within the meaning of Directive 2000/78, which therefore applies to the situation in question (§ 23-30).

2. Paragraph 32(4)(2) of the Law on Civil Servants establishes a difference of treatment on the grounds of age (§ 31-33).

3. Although the Danish version of Article 6(2) of Directive 2000/78 omits the words "retirement or invalidity benefits", that provision must be read as if those words had been included (§ 35-43).

4. Availability pay is neither a retirement benefit nor an invalidity benefit. Therefore, Article 6(2) of the Directive does not apply in circumstances such as those at issue (§ 44).

5. The Danish government claims that the legislation at issue seeks to strike a balance between the State's need to be able to make the public administration more efficient by adapting and restructuring it on the one hand, and the need to protect of civil servants from undue personal and political pressure on the other. In particular, the aim of that legislation is two-fold: (i) to maintain the availability of civil servants with a view to their assignment to a suitable alternative post; and (ii) to guarantee the independence of civil servants by protecting them from all external pressures. Excluding civil servants who are already eligible for a pension from entitlement to availability pay is said to be justified by the need to prevent abuse, insofar as it is, generally speaking, unlikely that those civil servants would be available to take up an alternative post. Moreover, such civil servants, it is said, require less protection

since they are already entitled to adequate replacement income, such as a retirement pension. Given the broad discretion available to Member States in their choice, not only to pursue a particular aim in the field of social and employment policy, but also to define measures capable of achieving it, these aims are legitimate (§ 49-53).

6. The limitation of entitlement to availability pay to civil servants who are not entitled to a retirement pension does not appear to be manifestly inappropriate to achieve said objectives. In the absence of availability pay, civil servants not yet eligible for a retirement pension would be forced to join the labour market with the result that, when a new post was offered to them in the public administration, they would no longer be available. On the other hand, civil servants who are already eligible for a retirement pension are, generally speaking, less likely to re-join the civil service in order to take up a new post, taking account of their professional or personal circumstances (§ 55-58).

7. It is true that civil servants who are eligible for a retirement pension are less likely to accept an assignment to an alternative post. However, it is also apparent that those civil servants may rely on a stable and enduring replacement income, whereas civil servants who are not eligible for a retirement pension and who have been made redundant require increased protection. Civil servants belonging to that second category are, generally speaking, more vulnerable to financial and social pressures, insofar as, in the absence of availability pay, they would be deprived of a stable income. Availability pay is thus designed to protect civil servants belonging to that second category from such pressures by guaranteeing adequate income for three years.

8. It should also be noted that the Danish legislature took action in order to mitigate the adverse impact of the legislation at issue in the main proceedings by providing that civil servants who have reached the age of 65 continue to be credited for pensionable service throughout the period during which they should have received availability pay but did not in fact do so, by reason of their age. None the less, it must be noted that paragraph 32(4)(2) of the Law on Civil Servants treats civil servants who will actually receive a retirement pension in the same way as those who are eligible to receive such a pension (§ 61-65).

9. The effect of the measure at issue is to deprive civil servants who wish to remain in the labour market of the entitlement to availability pay merely because they could, *inter alia* because of their age, draw a pension. That measure may thus force those civil servants to accept a retirement pension that is lower than the pension to which they would be entitled if they were to remain in employment for more years, in particular where they have not made contributions for a sufficient number of years to be entitled to draw a full pension. Moreover, the legitimate objectives pursued by the legislation at issue in the main proceedings may be

attained by less restrictive, but equally appropriate, measures. Thus, provisions that limit entitlement to availability pay solely to civil servants who have temporarily waived their right to receive a retirement pension in order to continue employment, while providing measures to punish any abuse in cases where civil servants refuse to take up another suitable post, ensure that only civil servants who are actually available to take up an alternative post are entitled to receive availability pay (§ 66-69).

10. It is true that, generally speaking, it cannot be insisted that a measure such as that at issue in the main proceedings should involve an individual examination of each particular case to establish what is best suited to each civil servant, since the management of the regime concerned must remain technically and economically viable. However, such an individual examination of whether civil servants under the age of 65 are available already seems to form an integral part of the regime established by the national legislation at issue in the main proceedings, since the assignment of dismissed civil servants to alternative posts depends on the skills of those concerned in the light of the requirements of the posts offered to them. In light of the foregoing, it must be held that the legislation at issue in the main proceedings, insofar as civil servants who are eligible to draw a retirement pension are automatically excluded from receiving availability pay, goes beyond what is necessary to ensure the objectives pursued (§ 70- 72).

Ruling

1. Article 6(2) of Council Directive 2000/78 [...] must be interpreted as being applicable only to retirement or invalidity benefits under an occupational social security scheme.

2. Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy.

Creator: European Court of Justice (ECJ)
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