

SUMMARY

# **ECJ 11 November 2014, case C-530/13 (Leopold Schmitzer &ndash; v &ndash; Bundesministerin f&uuml;r Inneres), Age discrimination**

## **Facts**

Mr Schmitzer was under 18 when he was employed as a civil servant. Under the Austrian law as it stood at the time, a civil servant started his career on a certain step on the relevant salary scale and, starting on the 'reference date', would advance to the next step every two years. The reference date could not be below the age of 18. Thus, for example, someone who was hired at age 16 advanced to the next step at age  $18 + 2 = 20$ , and then again at ages 22, 24, etc. In 2009 the ECJ delivered its judgment in the *Hütter* case (C-88/08). The ECJ held that Directive 2000/78 precludes national legislation that excludes periods of service prior to age 18 for the purpose of determining seniority for advancement purposes.

Accordingly, Austria amended its legislation in 2010 retroactively from 1 January 2004. From then on, the reference date was never later than the hiring date. However, Austria simultaneously amended its legislation in such a way that the period for advancement from an employee's initial step on the salary scale to the next step was increased from two to five years. Civil servants who were hired before the change of law were given the option to have their reference date recalculated, but as long as they did not submit a request for recalculation their salary remained unchanged. In 2013, Mr Schmitzer requested a recalculation. His request was granted. However, this did not lead to an increase in his salary, because of the longer period between the initial step and the next step on the salary scale.

## **National proceedings**

Mr Schmitzer requested a review of his salary. He wanted to be paid as if he had moved up

one step on his salary scale every two years starting on his hiring date. The request was turned down. Mr Schmitzer brought proceedings before the *Verwaltungshof*. This court referred six questions to the ECJ. By questions 1 and 3, the court asked, in essence, whether Directive 2000/78 must be interpreted as precluding national legislation which, in order to end age-based discrimination, takes into account pre-18 service but simultaneously introduces a three-year extension of the period required to progress from the first step to the second on the relevant salary scale.

### **ECJ's findings**

1. The comparators in this case are (i) civil servants whose professional service has, if only in part, been acquired before the age of 18 ('civil servants disadvantaged by the previous system') and (ii) those who have acquired experience of the same nature and of comparable length since attaining that age ('civil servants favoured by the previous system') (§ 27).
2. By legislating as it did, Austria introduced a provision that continues to remunerate civil servants who were disadvantaged and those who were favoured by the previous system differently. In doing so, that legislation not only neutralises the advantage resulting from the inclusion of pre-18 service, but also places at a disadvantage only the civil servants disadvantaged by the previous system insofar as the inclusion is likely to apply to them alone. It must therefore be held that the legislation in question is age discriminatory (§ 31-35).
3. Can this difference in treatment be justified? The Austrian government advances two arguments for justification: (i) budgetary considerations and (ii) acquired rights (§ 40 and 42).
4. EU law does not preclude Member States from taking account of budgetary, political, social or demographic considerations, provided that in doing so they observe, in particular, the general principle of the prohibition of age discrimination. Such considerations, however, cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78 (§ 41).
5. As for acquired rights, the protection of the legitimate expectations of civil servants favoured by the previous system constitute legitimate employment policy and labour market objectives, which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age (see Hennigs, C-297/10) (§ 42).
6. However, those objectives cannot justify a measure that maintains age-based difference in treatment that the reform of a discriminatory system is designed to eliminate. Such a measure is not appropriate. Consequently, the legislation at issue is not objectively justified (§ 43-45).

7. The answer to question 2 is that Articles 9 and 16 of Directive 2000/78 must be interpreted as meaning that a civil servant disadvantaged by the previous system must be able to challenge the discriminatory effects of the extension of the period for advancement, even though, at his request, the reference date has been revised (§ 46-51).

8. Questions 4-6 need not be answered (§ 52-53).

### **Ruling**

1. Article 2(1) and (2)(a) and Article 6(1) of Council Directive 2000/78 [...] must be interpreted as precluding national legislation which, with a view to ending age-based discrimination, takes into account periods of training and service prior to the age of 18 but which, at the same time, introduces – only for civil servants who suffered that discrimination – a three-year extension of the period required in order to progress from the first to the second incremental step in each job category and each salary group.

2. Articles 9 and 16 of Directive 2000/78 must be interpreted as meaning that a civil servant who has suffered age-based discrimination – resulting from the method by which the reference date taken into account for the calculation of his advancement was fixed – must be able to rely on Article 2 of that directive in order to challenge the discriminatory effects of the extension of the period for advancement, even though, at his request, that reference date has been revised.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2014-11-11

**Case number:** C-530/13