SUMMARY

ECJ 14 March 2018, case C-482/16 (Stollwitzer), Age discrimination

***<p>A salary scale the ECJ had found discriminatory and said should be changed, was not discriminatory after the change.
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Georg Stollwitzer – v – ÖBB Personenverkehr AG, Austrian Case</p>

Legal background

Directive 2000/78/EC (Framework Directive) forbids discrimination based on age. However, Article 6(1) provides that Member States may allow differences of treatment on grounds of age 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.

Following the *Hütter* judgment of the ECJ (C-88/08), Austria changed its 1992 Federal Law on Railways, enacting a new Act, the 2011 Federal Law on Railways. This Act introduced a new method for determining the reference date for the purpose of career advancement and advancement within in a salary scale. However, the 2011 Federal Law on Railways was (again) found to be contrary to EU law, insofar as it took into account worker experience before 18 years of age, yet at the same time extended the time to advance through the first three salary steps (*ÖBB Personenverkehr, C-417/13*). Following that judgment, Austria introduced its 2015 Federal Law on Railways. This Act redesigned the entire salary scale system with retroactive effect. The new system only took into account workers' experience within the railway sector in EU Member States, Turkey and Switzerland. It also introduced a penultimate salary scale to compensate for lower salaries. A safeguard clause would prevent workers from having a reduction in salary following their reclassification (e.g. because non-relevant experience was no longer rewarded). They would be entitled to the same pay as in the old system, until the

salary under the new scheme reached the same level as their old salary.

Facts

Mr Stollwitzer had started working for ÖBB in 1983, but had a reference date in 1980 for the purposes of his salary. Following the previous judgment (C-417/13), Mr Stollwitzer had expected to be compensated for work experience before he was 18 years of age. However, the redesign of the pay scale meant he ended up in a worse position and he only was 'rescued' by the safeguard clause. Stollwitzer started proceedings, claiming that ÖBB should have counted the work experience he had before he reached 18, rather than applying the redesigned system. The referring court asked some preliminary questions.[1]

Questions to the ECJ

Are Article 45 TFEU and Articles 2, 6 and 16 of Directive 2000/78 to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to end discrimination on grounds of age arising as a result of the application of national law that took into account, for the purpose of the categorisation of the employees of an undertaking within pay scales, only periods of activity completed after the age of 18, retroactively abolished that age limit in respect of all such workers and allowed only experience acquired with other undertakings operating in the same economic sector to be taken into account?

Judgment

The 2015 Federal Law on Railways provides for three stages. The first stage entails the retroactive recalculation of the reference date, including a reassessment of previous work experience. The second stage entails the reclassification of the worker into the new system and the application of the safeguard clause, if necessary. The third stage entails the introduction of an additional penultimate pay scale to compensate for any negative effects of the redesign. The ECJ needed to consider the implications of this in light of both previous and possible future discrimination.

The ECJ clarified that the effect of ensuring that national legislation complies with previous judgments does not necessarily imply that the salary of workers who had been discriminated against must be increased. To believe so, as the referring court seems to have done, was a misreading of the cases of *Hütter* (C-88/08) and *ÖBB Personenverkehr* (C-417/13). Member States are free to choose the most appropriate solution to resolve previous issues. Consequently, an employee has no automatic right to be compensated for work experience before the age of 18. The Austrian legislature could legitimately opt to entirely redesign the

system. It seems the referring court also believed that workers who had previously been discriminated against were being denied the possibility of compensation for both the past and the future (as they would be in a higher salary step now). However, the Austrian government argued that non-relevant work experience previously partly counted in determining the reference date, and that this old system therefore also went beyond what was intended, namely compensating relevant work experience. Essentially, like age, this also was therefore a criterion not based on (relevant) experience which enables workers to function better at ÖBB.

In that regard, it is established case law that rewarding experience that enables a worker to perform better, constitutes a legitimate objective of pay policy (*Cadman*, C-17/05 and *Hütter*, C-88/08). Also, whilst a provision that takes into account only certain previous periods of activity and disregards others will impact on pay, this is not based on age, either directly or indirectly. The safeguard clause is only directed against workers with non-relevant experience that is no longer being taken into account. Therefore, any alleged discrimination in relation to the safeguard clause is not based on age but rather on how previous experience has been rewarded. Moreover, the safeguard clause guarantees acquired rights and protects legitimate expectations.

Considering both Member States' obligation to eliminate discrimination and the freedom of national governments to redesign pay schemes in the way they think fit, the Austrian legislature did not exceed the limits of its powers. As the 2015 Federal Law on Railways also rewards relevant experience in other Member States, it also does not impede freedom of movement.

Ruling

Article 45 TFEU and Articles 2, 6 and 16 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, in order to end discrimination on grounds of age arising as a result of the application of national law that took into account, for the purpose of the categorisation of the employees of an undertaking within pay scales, only periods of activity completed after the age of 18, retroactively abolished that age limit in respect of all such workers and allowed only experience acquired with other undertakings operating in the same economic sector to be taken into account.

1 Meanwhile, the Austrian Constitutional Court had held that the redesign of the system with retroactive effect was not unlawful.

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Creator: European Court of Justice (ECJ)
Verdict at: 2018-03-14
Case number: C-482/16 (Stollwitzer)