

SUMMARY

## **2017/1 Early retirement pension cannot justify age discrimination (AU)**

***&lt;p&gt;The Austrian Supreme Court has held that the selection of employees for redundancy because of their entitlement to an early retirement pension constitutes unfair dismissal on grounds of direct age discrimination. Although it was accepted that individual employers (here the Austrian Broadcasting Corporation) can pursue a legitimate aim within the meaning of Article 6(1) of Directive 2000/78/EC, the means to achieve that aim were not considered appropriate and necessary. The Court stressed that a balance must be struck between the interests of older and younger employees, taking into account that it is generally easier for younger employees to find a new job. In the case at hand, however, the employer had not managed to show that its redundancy selection programme met that requirement.&lt;/p&gt;***

### **Summary**

The Austrian Supreme Court has held that the selection of employees for redundancy because of their entitlement to an early retirement pension constitutes unfair dismissal on grounds of direct age discrimination. Although it was accepted that individual employers (here the Austrian Broadcasting Corporation) can pursue a legitimate aim within the meaning of Article 6(1) of Directive 2000/78/EC, the means to achieve that aim were not considered appropriate and necessary. The Court stressed that a balance must be struck between the interests of older and younger employees, taking into account that it is generally easier for younger employees to find a new job. In the case at hand, however, the employer had not managed to show that its redundancy selection programme met that requirement.

## **Background**

The usual statutory retirement age in Austria used to be 65 for men and 60 for women, but since the Austrian Constitutional Court found the law violated the principle of equal treatment, new legislation was enacted to steadily increase the retirement age of women. However, equality will not be achieved before 2033.

The Austrian General Social Insurance Act (ASVG) and the General Pension Act (APG) provide two notable exceptions to the normal retirement age. First, the so-called 'corridor pension' requires the employee to be 62 and have a minimum of 37.5 insurance years (rising to 40 years in 2017) and provides a reduced pension compared to the normal state pension. Second, there is another early retirement scheme, known as the 'Vorzeitige Alterspension bei langer Versicherungsdauer', but this is being phased out in 2017 by means of transitional provisions. This form of early retirement generally requires more months of insurance and grants a higher pension in return. As women are entitled to a pension from the age of 60 in any event, these early retirement schemes are not especially relevant for them.

## **Facts**

The plaintiff was employed as a measurement engineer by the state-owned Austrian Broadcasting Corporation (ORF). He was born in 1948 and hired in 1994. His last earnings were a gross salary of € 4,884.39. The plaintiff was dismissed three times altogether: the first time he was dismissed from August 2011, as soon as he became eligible for a corridor pension of € 1,742.68 (net). However, the dismissal was invalidated and held to be unfair by the first instance employment court. The second time the plaintiff was given notice of dismissal was as of September 2012 when he became entitled to an early retirement pension of € 1,914.11 (net). This dismissal was challenged as well, resulting into the Supreme Court decision that is dealt with in the case at hand. Subsequently, the plaintiff was given notice of dismissal as of January 2014, when he finally reached the statutory retirement age of 65 years. This last dismissal was not challenged by the employee. He then received a pension of € 3,090.45 (net). In addition, his benefits from the occupational pension scheme amounted to around € 500 per month. Further, he received a severance payment of € 50,330 (net).

The plaintiff brought a claim in the employment court in Vienna, asking that his second dismissal be rendered ineffective. The court of first instance held that the dismissal was discriminatory on grounds of age and found for the plaintiff. The Court of Appeal annulled the judgment and referred the case back to the court of first instance for complementary proceedings and reconsideration. It held that it is lawful to select employees for redundancy who are entitled to an early retirement state pension, provided the employer can prove that

the redundancies are necessary based on the economic situation of the employer. The plaintiff appealed to the Supreme Court and requested restoration of the judgment delivered by the court of first instance.

## **Judgment**

The Supreme Court ruled in favour of the plaintiff.

The Court first examined whether there was direct or indirect discrimination. Referring to the decision of the ECJ in *Ingeniørforening* (C-499/08), the Court held that, as the redundancy policy was based on a criterion that was inextricably linked to the age of employees, there was direct discrimination.

The next question before the Court was whether the unequal treatment could be justified. Section 20(3) of the Austrian Equal Treatment Act (GIBG) transposes Article 6(1) of Directive 2000/78. On this question, the plaintiff took the view that an individual employer can never be considered as pursuing a legitimate social policy aim. The Court disagreed, saying there was no reason to suggest such a narrow scope of application was appropriate.

With reference to the decisions in *Palacios de la Villa* (C-411/05), *Rosenbladt* (C-45/09) and *Fuchs and Köhler* (C-159/10 and C-160/10), the Court held that the termination of employees who have reached the normal retirement age was based on political and social consensus in Germany and other Member States that employment should be shared across the generations. Member States enjoy broad discretion as to how to define the measures capable of achieving a legitimate aim, but may not go so far as to frustrate the prohibition under EU law of discrimination on grounds of age. That prohibition must be understood in the light of the right to engage in work, which is recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union. Particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity in the workforce, which is an aim recognised in Recital 25 of Directive 2000/78. Moreover, it helps older workers to realise their potential and maintain their quality of life.

The Court pointed out that the pension reforms of the few last years were aimed at raising the actual retirement age. In that light, employers could not justify the dismissal of older employees purely because of their entitlement to an early retirement pension. The employer had been making a loss for several years and had been dependent on public funding, but that was not considered to constitute a legitimate aim either. The Court referred to the *Schönheit* decision (C-4/02) to explain that budgetary considerations cannot justify discrimination.

However, the Court found that according to the principle of statutory protection against dismissal enshrined in Section 105(3)(c) Austrian Labour Constitution Act (ArbVG), the social hardship of a redundancy must be considered when selecting the employees to be made redundant and this can include taking into account the pension entitlement of employees. But even if 'fair selection' is a legitimate aim it must be pursued by 'appropriate and necessary' means. In this case, the employer could not demonstrate that the situation of older employees had been adequately considered when designing the redundancy programme and therefore the dismissal was held to be discriminatory.

### **Commentary**

With this judgment, the Austrian Supreme Court has confirmed and clarified an earlier decision (9 ObA 113/12a) also dealing with redundancies at the ORF. Being a public service radio and television company, the ORF is not profit-oriented. Half of its revenue comes from radio and TV licence fees, the rest from advertising and other sources. Pursuant to the Austrian Broadcasting Act (the ORF-Gesetz) the ORF is required to cut personnel costs by reducing the number of employees, as well as the cost of each employee. Against this background, the ORF adopted a policy of terminating employment relationships as soon as employees became entitled to a state pension regardless of age and the size of their pension.

However, the Court emphasized that economic factors affecting the employer (e.g. that it was making a loss) are not a legitimate aim that could justify the selection of older (and therefore generally more expensive) employees. On the contrary, a legitimate aim could be to make a fair selection of employees for redundancy.

In addition, however, the redundancy programme must also be 'appropriate and necessary' in pursuit of that legitimate aim. The employer lost the case at hand because to make a fair selection of employees would have required a more balanced programme than it had devised. In other words, it could not legitimately decide to select employees for redundancy simply because they were entitled to an early retirement pension. They needed also to consider how vulnerable the employees would be if made redundant.

In practice, employers tend only to have limited information about those factors. Even if the number and age of dependants is known to the employer, the employees' financial situation (including savings, debts and living costs) is not. In the end therefore, it may be wise for employers not to select employees for redundancy on the basis of their age at all – or indeed, a directly linked criterion such as entitlement to a state pension.

It should be noted that the situation is different for employees who have reached the normal retirement age for men. Based on Austrian case law, those employees cannot challenge their

dismissal, either based on age (or gender) discrimination, or under the statutory protection against 'socially unjust dismissals'.

### **Comments from other jurisdictions**

The Netherlands (Peter Vas Nunes, BarentsKrans): The employee in this case was dismissed for a combination of two reasons: 1) his employer wanted to cut costs by reducing headcount and 2) the employee was entitled to an early retirement pension. In other words, he was selected for redundancy because of his pension entitlement. The entitlement to an early retirement pension was used as a selection criterion in the redundancy programme. Why did the employer decide on this selection criterion? The case report suggests that this was in order "to share employment between the generations". This sounds altruistic. It sounds as if the motive was not that younger staff are less costly than older staff and as if the selection criterion was not chosen in the interests of the employer, but in those of unemployed youth in general. This, surely, is a social policy aim.

The plaintiff "took the view that an individual employer can never be considered to pursue a legitimate social policy aim". I suspect that this view was based on the ECJ's ruling in the Age Concern case, in which the court held (at point 46): "The aims which may be considered legitimate within the meaning of Article 6(1) of Directive 2000/78 are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognize, in the pursuit of those legitimate aims, a certain degree of flexibility for employers".

The Court took a different view. It would have been interesting to read why it did this. Perhaps the fact that the employer in this case, the Austrian Broadcasting Corporation, was "dependent on public funding" was an element in the Court's reasoning.

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): In contrast to Austria, the normal statutory retirement in Germany is 67, for both, men and women. This applies at least for those who were born in 1964 or later. Previously, the usual statutory retirement age had been set at 65. Due to increasing life expectancy and longer periods over which pensions need to be paid, the statutory retirement age has been gradually raised since 2012. Similarly to the Austrian arrangement, German law also has some notable exceptions to the normal retirement age. These provide a reduced pension and are linked to various circumstances, such as age and the number of working years.

Since the implementation of the German Equal Treatment Act (Allgemeine

Gleichbehandlungsgesetz, the 'AGG'), the German transposition of Directive 2000/78, discrimination on grounds of age has been forbidden. This does not only apply to discrimination against older employees in relation to younger ones, but also includes the opposite situation.

However, the age of an employee is still an approved and sometimes even a necessary criterion when it comes to redundancy programmes. The AGG has barely changed anything in this respect. Section 10 of the AGG essentially transposes Article 6.1 of Directive 2000/78 and this explicitly allows for different treatment based on age – provided this is justified by a legitimate aim. The measures taken to fulfill the aim must also be 'appropriate and necessary'.

According to Section 10.3.6 of the AGG, redundancy programmes can provide different benefits, under staggered severance arrangements. These arrangements must take into account the fact that employees have varying abilities to find new jobs in the labour market, especially considering their age. In 2012, the German Federal Labour Court ('BAG') held that Section 10.3.6 of the AGG was covered by Article 6.1 of Directive 2000/78 and was therefore in conformity with EU law. In the Odar-Ruling of 6 December 2012, the ECJ confirmed the perspective of the BAG, along with the way in which redundancies are handled in Germany. Following that case, it was considered legitimate for employers to provide lower termination payments to employees close to the statutory retirement age. Employees who would be entitled to receive a state pension immediately after the expiry of the notice period could be fully excluded from the benefits of a redundancy programme.

Other than that, an employee who has reached the normal retirement age cannot be terminated for that reason alone. Although it is politically and socially accepted that employment should be shared between generations, these employees are also protected by the German Protection Against Dismissal Act (Kündigungsschutzgesetz, the 'KSchG'). Section 41 of Volume VI of the German Social Insurance Code also clarifies that. As long as an employee is included within the scope of the KSchG, he or she can only be dismissed on personal grounds, for misconduct or for operational reasons. However, a contractual agreement that the contract will automatically terminate upon the employee reaching the normal statutory retirement age is still enforceable.

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): A Finnish court would likely have reached the same conclusion as the Austrian Supreme Court. An entitlement to an early retirement pension as a reason for redundancy would constitute unfair termination on grounds of direct age discrimination. According to Finnish case law, selection for redundancy may not be based solely on the age of the employee. In the Finnish Supreme Court's judgment in KKO 2000:64, an employee had been selected for redundancy on the grounds of being

entitled to an unemployment pension. This was conditional on the employee having reached a certain age. However, in another ruling (KKO 2014:47), the Finnish Supreme Court demonstrated that the right to the higher unemployment benefits that an employee is entitled to based on age may serve as grounds to exclude the employee from additional re-employment support from the employer. The purpose of the additional support was to promote equality amongst employees by supporting those who needed it the most. It was therefore acceptable to exclude an employee who had enhanced statutory unemployment support, even though the employee's entitlement to the higher level of statutory support was due to the employee's age.

Subject: Age discrimination

Parties: DI W\*\*\* N\*\*\* (employee) – v – Ö\*\*\* (employer)

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