



Key Issues: Social Policy – Equal Treatment – Age Discrimination - Request for a Preliminary Ruling

Case: Franz Lesar v Telekom Austria AG

Reference: Case C-159/15, CJEU (First Chamber), 16 June 2016

Legislation: Directive 2007/78/EC

Mr Lesar was born on 3 June 1949. Between 9 September 1963 and 8 March 1967, while he was under 18, he worked for the Federal Postal and Telegraph Administration, Austria under a contract of apprenticeship. From 9 March 1967, he worked as a member of the contract staff of that administration. In parallel to this work he studied at a Federal Academic High School for People in Employment from 14 September 1967 until 17 February 1972. On 1 July 1972 he was taken on by the Federal Government in a public-law employment relationship.

Prior to his recruitment as a civil servant, Mr Lesar paid pension contributions to the insurance institution during the period of his apprenticeship contract and his employment relationship, including for the period while he was under 18.

By decision of 23 August 1973, Postal and Telegraph Administration took the view that the period of 5 years and 15 days, consisting of the period between the date on which Mr Lesar reached the age of 18 and the date of his recruitment as a civil servant, had to be unconditionally credited to him as the pensionable periods prior to his entry into service to be taken into consideration in the calculation of his pension entitlement within the meaning of the applicable national law.

By decision of 22 May 1974, the Salaried Employees' Pension Insurance Institution, Austria decided, in its capacity as an insuring body, to credit and pay to the Federal Government a 'transfer contribution' in respect of the qualifying periods. That amount was ATS 4 785 (approximately EUR 350).

By decisions of 28 March 1974 and 22 May 1974, the applicant was awarded the sum of ATS 33 160.05 (approximately EUR 2 400) as reimbursement, inter alia, of the pension contributions which he had paid during the period of his apprenticeship and periods of work completed before reaching the age of 18.

The applicant in the main proceedings retired with effect from 1 September 2004. In that context, Telekom Austria fixed the amount of his pension by taking account solely of the qualifying periods, as recognised by the decision of 23 August 1973.

On 19 August 2011, Mr Lesar asked his employer for the periods of apprenticeship and of work that he had completed before reaching the age of

18 to be added to the qualifying periods for the purposes of calculating his pension. Following Telekom Austria's rejection of that request, by decision of 23 August 2012, Mr Lesar brought an appeal against that decision before the Constitutional Court, Austria, which declined jurisdiction and subsequently transferred that appeal to the Administrative Court, Austria.

In the view of the referring court, the refusal to take into consideration, for the purposes of a retirement pension, the pre-service periods of apprenticeship and periods of work completed before the person concerned reached the age of 18 constitutes a difference in treatment based on age, and that court is unsure whether it can be justified.

In those circumstances, the Administrative Court, Austria decided to stay the proceedings and to refer a number of questions to the Court of Justice (CJEU) for a preliminary ruling.

Consideration by CJEU

With regard to the question whether the national legislation at issue in the main proceedings leads to a difference of treatment on grounds of age in relation to employment and occupation, the CJEU noted that, under Article 2(1) of Directive 2000/78, the 'principle of equal treatment' is to mean that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive, including age. Article 2(2)(a) of that directive states that, for the purposes of applying Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 of that directive.

It is necessary to examine whether that difference in treatment may be justified under Article 6(2) of Directive 2000/78. In that regard, it must be recalled that, even if, formally, the referring court has limited its question to the interpretation of Articles 2(1), 2(2)(a) and 6(1) of that directive, that does not prevent the CJEU from providing the referring court with a ruling on the interpretation of all EU law which may be of assistance to the referring court in adjudicating in the case pending before it.

It is clear in particular from Article 6(2) of that directive that the Member States may provide that the fixing, for occupational social security schemes, of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age. Since Article 6(2) of Directive 2000/78 allows Member States to provide for an exception to the principle of non-discrimination on grounds of age, that provision must be interpreted restrictively. The CJEU has, in that regard, held that Article 6(2) of Directive 2000/78 applies only to occupational social security schemes that cover the risks of old age and invalidity. Similarly, not all aspects of an occupational social security scheme covering such risks come within the scope of that provision, but only those that are expressly referred to therein.

The CJEU held that:

Articles 2(1), 2(2)(a) and 6(2) of Council Directive 2000/78/EC of 27 November 2000 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes

the taking into account of periods of apprenticeship and of employment completed by a civil servant before reaching the age of 18 for the purpose of granting a pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation seeks to guarantee, within a civil service retirement scheme, a uniform age for admission to that scheme and a uniform age for entitlement to the retirement benefits provided under that scheme.

Why is this decision important?

The calculation of pension entitlements can be complex. The exclusion of periods of apprenticeship and employment before the age of 18 may simplify part of that calculation and will be welcomed by civil service employers but, understandably, not those employees who joined the civil service from school as apprentices or when less than 18 years old

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