Case C-587/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 November 2020

Referring court:

Østre Landsret (Denmark)

Date of the decision to refer:

6 November 2020

Applicant:

Ligebehandlingsnævnet as representative of A

Defendants:

HK/Danmark

HK/Privat

Intervener:

Fagbevægelsens Hovedorganisation (FH)

Subject matter of the action in the main proceedings

Issue of discrimination in so far as A was prevented from standing for election as sector convenor in the trade union HK/Privat on the ground of age. Claim for payment of compensation

Subject matter and legal basis of the reference

Interpretation of Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Directive) as the question has arisen during the proceedings as to whether A, as a politically elected sector convenor in a trade union, is covered by the Employment Directive.

Article 267 TFEU

Question referred for a preliminary ruling

Must Article 3(1)(a) of the Employment Directive be interpreted as meaning that a politically elected sector convenor of a trade union is covered by the scope of the directive in the circumstances described [in the request for a preliminary ruling]?

Provisions of EU law relied on

Article 45 TFEU.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Directive); Article 3(1)(a).

Judgments of the Court of Justice:

C-144/04, *Mangold*, EU:C:2005:709, paragraphs 74, 75, 77 and 78;

C-341/08, *Petersen*, EU:C:2010:4 paragraphs 32 and 33;

C-482/16, *Stollwitzer*, EU:C:2018:180, paragraph 20;

C-229/14, *Balkaya*, EU:C:2015:455, paragraphs 39 to 41;

C-232/09, *Danosa*, EU:C:2010:674, paragraphs 51 and 56;

C-420/18, *IO*, EU:C:2019:490, paragraphs 32 to 36;

C-603/17, *Bosworth*, EU:C:2019:310, paragraphs 23, 25, 26 and 34.

Provisions of national law relied on

Lov om forbud mod forskelsbehandling på arbejdsmarkedet etc (Law on the prohibition of discrimination in the labour market; 'Law on non-discrimination in the labour market'). Denmark transposed Directive 2000/78/EC by lov nr. 253 af 7. april 2004 (Law No 253 of 7 April 2004) and lov nr. 1417 af 22. december 2004 om ændring af lov om forskelsbehandling på arbejdsmarkedet (Law No 1417 of 22 December 2004 amending the Law on the prohibition of discrimination in the labour market), Paragraphs 1 to 3:

Paragraph 1 lays down the general prohibition on all direct or indirect discrimination on the ground of, inter alia, age.

'Paragraph 2 An employer may not discriminate against workers or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.

Paragraph 3

...

> *Subparagraph 3. The prohibition of discrimination shall also apply to any person who introduces provisions and takes decisions concerning access to independent professions.*
>
> *Subparagraph 4. The prohibition of discrimination shall also apply to any person who takes decisions on membership of or participation in a workers' or employers' organisation and the benefits which such organisations confer on their members.'*

The specific notes on draft law No L 181 set out on 17 January 1996 (see *Folketingstidende* 1995-1996, Annex A, page 3543; on Paragraph 2)

The specific notes relating to Paragraph 2 state, inter alia, that the provision is broad in terms of its content, in that it covers all working conditions, both those laid down by contract and those laid down by the employer unilaterally.

The general notes on draft law No L 40 set out on 22 October 2003 (see *Folketingstidende* 2003-2004, Annex A, page 1213 et seq.; paragraphs 2 and 3).

The general comments state that the draft law is intended to transpose parts of the Employment Directive. It also states that the scope *ratione materiae* of the Employment Directive and that of the Law on non-discrimination in the labour market are intended to overlap, with one addition (membership of and participation in a workers' or employers' organisation) in the latter law. In other respects, the draft law is based on the provisions of the directive and does not go beyond the requirements thereof.

The general notes on draft law No L 92 set out on 11 November 2004 (see *Folketingstidende* 2004-2005, 1st session, Annex A, page 2697 et seq.; paragraphs 1, 2.1, 2.1.2. and 4.2).

The draft law introduced the discrimination criterion of 'age' in the Law on non-discrimination in the labour market so as to extend the scope of the law to include a prohibition of discrimination on the ground of age in the labour market.

Ministry of Employment Guidance No 9237 of 6 January 2006 on the Law on non-discrimination in the labour market 2005.

According to this guidance, Paragraph 2 of the law states, inter alia, that an employer may not discriminate against workers or applicants. There is no fixed

definition of worker. The Law on non-discrimination provides protection broadly, from the ordinary workers to the managing director. Case-law has also held that a lower secondary school pupil doing work experience falls within the scope of the law.

Ministry of Employment Guidance No 9118 of 4 February 2019 on the Law on non-discrimination in the labour market; paragraph 3.2.1.

The guidance reiterates that there is no fixed definition of what is meant specifically by a 'worker' and therefore a specific overall assessment must be carried out on a case-by-case basis, whereby account may be taken of, inter alia, whether the work is performed in person, whether the person concerned is subject to supervision and instruction, the work is performed at the employer's expense and risk, the work is performed on the employer's behalf and from more than one place of work, and whether the employer withholds taxes collectable at source. There is no exhaustive list of factors which may be included in the assessment.

HK's federal and sectoral statutes; Paragraph 9 of HK's sectoral statutes of 2009 stipulates that only members who are under the age of 60 on the date of the election may be elected as sector convenor.

The federal and sectoral statutes are not legislation adopted by the Danish Parliament, but provisions adopted by the congress of HK.

Danish case-law

There is no decision of the Danish legal system as to whether a politically elected sector convenor of a trade union is included among the persons protected by the Law on non-discrimination in the labour market.

However, there are decisions on the legal status of the politically elected conveners of trade unions in other areas of law, including in relation to the Law on holidays and the Law on proof of appointment, in which the conveners concerned were not considered to be employed since they were not subject to an employer's instructions but, on the contrary, held an honorary office under the authority of a trade union's general meeting and were therefore not covered by the scope of the laws concerned.

Succinct presentation of the facts and the procedure in the main proceedings

1 A, who was born in 1948, was hired as a professional employee in a local branch of HK in 1978. In 1992 she was elected as deputy convenor of the HK/Service sector (subsequently HK/Privat) and in 1993 was elected as convenor of the sector concerned. A was re-elected every four years unopposed and contested the post of sector convenor until 8 November 2011 when the age limit on eligibility laid down in Paragraph 9 of HK's sectoral statutes prevented her from standing for re-election that year since she had reached the age of 63.

2 HK is a large trade union with around 230 000 members and the organisation of the trade union is laid down in HK's statutes, which are provisions adopted by HK's congress. HK primarily organises salaried employees in shops and offices in private undertakings and in central administrations, regions and municipalities. There are statutes for HK/Danmark (the federal statutes) and statutes for the trade union sectors under HK/Danmark (the sectoral statutes).

3 HK/Privat, which has around 100 000 members, is one of four independent sectors under HK/Danmark. The sectors are represented by the sector convenor of HK/Danmark's highest management bodies, including the management board, the executive committee and Senior Management. The sector convenor also manages the sector's activity in accordance with the decisions taken by the congress, the management board and the sector congress, and the sector board has the power to deal with all ongoing professional matters within the areas of the sector, having regard to the professional and political principles laid down by the management board.

4 According to the information provided, A did not have any outside occupation and was therefore employed full-time as elected sector convenor of HK from 1993 to 2011. An example of A's payslip from November 2011 shows that, inter alia, multimedia tax, labour market pension contribution, pension contributions and insurance, etc. are paid from her fixed monthly salary of DKK 69 548.93. Her 'contract for elected persons' lays down the terms governing salary and fees, working time, holiday, maternity leave, work tools etc., insurance and professional secrecy, and so on.

5 It is common ground that Paragraph 9 of HK's sectoral statutes entail direct discrimination against A on the ground of age if A is covered by the scope of the Employment Directive.

6 On 12 August 2014, A lodged a complaint with the Ligebehandlingsnævnet (Equal Treatment Board) because she was unable to stand for re-election as sector convenor on account of the age limit laid down in the sectoral statutes. On 22 June 2016, the Ligebehandlingsnævnet took a decision in the case and ruled that it was contrary to the Law on non-discrimination in the labour market for A to be unable to stand for re-election to the post of sector convenor at the congress in 2011. The Ligebehandlingsnævnet held that the post of sectoral convenor is in fact an occupation within the meaning of the Employment Directive and thus is covered by the Law on non-discrimination in the labour market, which implements the directive, and must be interpreted in accordance with the directive and in such a way that achievement of the objective of the provisions is ensured, regardless of whether the post of sector convenor entails elements characteristic of both workers and self-employed persons.

7 HK/Danmark and HK/Privat failed to comply with the decision of the Ligebehandlingsnævnet and, on 7 June 2018, the Ligebehandlingsnævnet, acting as the representative of A, brought an action against HK/Danmark and HK/Privat

before Københavns Byret (Copenhagen District Court) which, by order of 19 September 2019, referred the case to the Østre Landsret (High Court of Eastern Denmark) on account of the importance of the principle involved.

8 As the representative of A, the Ligebehandlingsnævnet claimed that HK/Danmark and HK/Privat should pay A compensation of DKK 1 080 000 or, in the alternative, a lesser amount. HK/Danmark and HK/Privat contended that the action should be dismissed or, alternatively, that a lesser amount should be paid. The Fagbevægelsens Hovedorganisation (FH) (Danish Trade Union Confederation) intervened in support of HK/Danmark and HK/Privat's contention that the action should be dismissed.

9 The Østre Landsret finds that there is such uncertainty as to whether A, as a politically elected sector convenor in HK and in the specific circumstances, is covered by the Employment Directive, that a reference should be made for a preliminary ruling.

Principal arguments of the parties in the main proceedings

10 **The Ligebehandlingsnævnet, as the representative of A,** claimed, inter alia, that the Law on non-discrimination in the labour market (see the Employment Directive) applies, that Paragraph 9 of the sectoral statutes entails a restriction on 'access to an occupation' (see Article 3(a) of the Employment Directive), and that the prohibition of non-discrimination on the grounds of age laid down in the Employment Directive is not limited to workers alone. It is therefore not decisive that the position of sector convenor entails elements which are characteristic of both traditional workers and self-employed persons. The Employment Directive has a broad objective and is not limited in the same way as, for example, the Proof of Appointment Directive (Directive [91/533/EC]) or the Working Time Directive (Directive 2003/88/EC), which, under Articles 1 and 3 to 7 thereof, are limited to conferring rights on 'employees'.

11 First, the prohibition of discrimination on the ground of age undoubtedly applies to the use of age limits on appointment. Second, the principle certainly also applies to age limits on the right to pursue self-employment where there is no relationship of instruction. Third, the prohibition undoubtedly applies to membership of and participation in an employees' or employers' organisation and the benefits which such organisation confers on its members (see Article 3(1)(d) of the directive and Paragraphs 3(4) of the law).

12 Nowhere in the provisions of the directive or the preamble thereto is it stated that the scope of the directive is limited to 'workers' or 'employees', understood as meaning persons who perform work for others or in accordance with their instructions. The Employment Directive is not a workers' protection directive intended to safeguard the employee as the weaker party to an employment relationship. The purpose of the Employment Directive is to remove, for reasons relating to social or public interest, all obstacles to access to self-support and the

capacity to contribute to society through gainful employment, either as a worker or a self-employed person.

13 It follows from the inclusion of, inter alia, 'self-employment' and the distinction between 'employment' and 'occupation' in Article 3 of the directive that the directive precisely covers more than merely 'employees' in the traditional sense. That is further supported by the English language version of Article 3 of the Employment Directive, which distinguishes similarly between 'employment' and 'occupation', and the French language version, which distinguishes between 'emploi' and 'travail'.

14 Overall, there is no justification for a strict interpretation of the scope of the prohibition which would mean that it does not apply, simply because the position of sector convenor entails elements which are characteristic of both a worker and a self-employed person. It would be contrary to the fundamental objective of the Employment Directive if A could 'fall between two stools' by virtue of the formal circumstances of her employment.

15 It is irrelevant that the position of sector convenor is obtained by election. There is no substantive reason for treating the condition relating to the restriction of the right to stand for election differently from general conditions of employment in an undertaking or self-employment as regards discrimination on the ground of age.

16 Finally, it is claimed that, as sector convenor, A performs work which, to a large extent, is a worker's job by nature and, in any event, an occupation. Even if HK's premiss that protection under the Law on non-discrimination in the labour market depends on the existence of an 'employment relationship' were to be accepted, it is argued that that condition is specifically satisfied or, in the alternative, that an 'occupation' was involved. By way of comparison, reference can be made to the case-law of the Court of Justice of the European Union ('Court of Justice') in related areas. For example, the Court of Justice has held that a member of a board of directors of a capital company who, in return for remuneration, provides services to the company which has appointed him and of which he is an integral part, who carries out his activities under the direction or supervision of another body of that company and who can, at any time, be removed from his duties without such removal being subject to any restriction is treated as a 'worker' covered by Directive 98/59/EC relating to collective redundancies (see judgment in *Balkaya*, paragraph [39]). In the view of the Court of Justice, the decisive factor is not that the board member enjoys a considerable degree of latitude in the performance of his duties that exceeds considerably that of a worker within the meaning of German law or that the director in question is elected by the general meeting of shareholders (see abovementioned judgment, paragraphs 40 to 41). The decisive factor is that the director in question is subject to the supervision of the general meeting of shareholders of the company and can be removed from it. The same is true of A.

17 **HK/Danmark and HK/Privat** contend, inter alia, that the concept of worker would have to be distorted beyond recognition to cover A, who is politically elected. She was not in a relationship of subordination to any manager; she was formally and substantively subject only to her own views under the authority of the congress; she could not be removed – not even by the sector board – but only dismissed by the election of a new convenor at a congress every four years or at an extraordinary congress; no 'organisation' had authority over the union representative. The central elements of the duties and rights associated with the definition of worker are therefore not present. The use of a 'contract for elected persons' which contains the same information as an employment contract can have no bearing on the outcome of the case.

18 The core of an employment relationship in EU law is that there is work in a relationship of subordination in return for remuneration. In accordance with settled case-law, that concept of 'worker' within the meaning of Article 45 TFEU must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned and the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration.

19 Paragraph 2 of the Law on non-discrimination in the labour market defines an employer as a person subject to duties and a worker as a person enjoying rights. Thus, the directive was implemented in Danish law using the words 'arbejdsgiver' [employer] and 'lønmodtager' [worker]. Inherent in those concepts in Danish labour law is the premiss that the person subject to duties cannot be a congress which can decide every four years whether a person who is in fact subject only to his or her own views, is to remain in office. Thus, an elected person also differs from a manager. If A, as an elected person, is to be compared with a person in the world of company law, it should not be with a manager, but rather a chief executive.

20 The fact that executive directors are not covered by the concept of worker/employee has been established by the Court of Justice (see judgments in *IO*, paragraphs 31 to 36, and *Bosworth*, paragraph 25). The Ligebehandlingsnævnet and A are seeking to extend the *Balkaya* judgment to include elected persons, but there is no justification for such an interpretation. There is not a single specific ruling, decision or opinion from any body governed by EU law stating that it was intended that elected chairs and member of boards of directors should be among the categories covered by the Employment Directive.

21 It is in the DNA of HK and HK/Privat for politically elected persons not to be employees and for the prohibition of discrimination on the ground of age thus not to cover politically elected persons. HK/Privat, the other sectors and the trade union confederation maintain, in everyday life and practice, a clear distinction between politically elected persons and employees.

22 In addition to the above considerations, the legal arguments put forward by HK can be summarised as being that union representatives elected to political posts in HK cannot be regarded as workers/employees under Paragraph 2(1) of the Law on non-discrimination in the labour market or the EU directive. Union representatives are not employed, they are not subject to instructions and they cannot be removed. The post of convenor of a professional organisation does not constitute an occupation within the meaning of the directive. It is objectively justified by a legitimate aim to have an age limit and the associations may lawfully adopt selection criteria involving age restrictions. It makes no difference that politically elected persons receive financial compensation or that they are full-time.

Succinct statement of the reasons for the reference

23 The Court of Justice may assume that A was employed full-time as sector convenor in the trade union HK and had no outside occupation. As sector convenor, A was responsible for overall management of HK/Privat and her duties consisted, in particular, in laying down policy in the sector's professional field, concluding and renewing the sector's agreements, selecting agreement requirements for the sector, and implementing decisions adopted by the sector board, the sector congress and HK/Danmark's management board, of which A was also a member. Under the 'contract for an elected person', A's monthly salary amounted to DKK 69 548.93, which was adjusted on an ongoing basis. It is also clear that A was not covered by the provisions of the Funktionærloven (Law on salaried employees) since a political office was involved, that A was not covered by an agreement but followed HK's administrative rules, that the Ferieloven (Law on holidays) applied, and that A had an obligation to maintain professional secrecy.

24 The Court of Justice may further assume that A, as elected sector convenor, was not employed under a contract of service in which she was subject to instructions from a superior but, on the contrary, held an honorary office under the authority of the sector congress which had elected her. However, at the same time it should be assumed that A was employed full-time as sector convenor during the period stated and received a considerable salary which constituted her entire livelihood, and that the role of sector convenor also included certain elements characteristic of ordinary workers.

25 The Employment Directive has a broad objective and the Court of Justice has not defined in detail the concepts of 'employment', 'self-employment' and 'occupation' in Article 3(1)(a) concerning the scope of the directive. The directive contains no provisions which relate expressly to politically elected persons in trade unions and the Court of Justice does not appear to have ruled on whether or not politically elected persons in trade unions are covered by the Employment Directive.

26 The Østre Landsret finds that there is uncertainty as to whether A, as a politically elected sector convenor in a trade union, is covered by the Employment Directive, including in the circumstances described above.

27 Since clarification thereof is of decisive importance to the outcome of the case, the Østre Landsret finds it necessary to request the Court of Justice to answer the question set out above.