

Case C-223/19

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:

13 March 2019

Referring court:

Landesgericht Wiener Neustadt (Austria)

Date of the decision to refer:

11 March 2019

Applicant:

YS

Defendant:

NK AG

Subject matter of the main proceedings

Payment of EUR 7 096.09 and establishment of future rights on the basis of a pension contract

Subject matter and legal basis of the reference

Interpretation of EU law, in particular the prohibitions of discrimination, Article 267 TFEU

Questions referred

1. Does the scope of Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, and/or of Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, include legislation of a Member State if the effect of that legislation is that the former

employer is to withhold sums of money from a considerably higher proportion of men entitled to an occupational pension than from women entitled to an occupational pension when those occupational pensions are paid out and those sums may be freely used by the former employer, and are such provisions discriminatory within the meaning of those directives?

2. Does the scope of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation include legislation of a Member State that discriminates on the ground of age because the financial burden is borne exclusively by older people who are entitled under private law to the benefits of an occupational pension that was agreed as a direct defined benefit pension, whereas young and relatively young people who have entered into occupational pension contracts are not financially burdened?

3. Are the provisions of the Charter of Fundamental Rights ('the Charter'), in particular the prohibitions of discrimination laid down in Articles 20 and 21 of the Charter, to be applied to occupational pensions even if the Member State's legislation does not cover forms of discrimination as prohibited pursuant to Directive 79/7/EEC, Directive 2000/78/EC and Directive 2006/54/EC?

4. Is Article 20 et seq. of the Charter to be interpreted as precluding legislation of a Member State that implements Union law within the meaning of Article 51 of the Charter and that discriminates, on grounds of sex, age, property or on other grounds, such as, for example, on the basis of the former employer's current ownership, against persons entitled under private law to an occupational pension as compared with other persons entitled to an occupational pension, and does the Charter prohibit such forms of discrimination?

5. Are national rules that place only a small group of people who are contractually entitled to an occupational pension in the form of a direct defined benefit pension under an obligation to make financial payments to their former employer also discriminatory on the basis of property within the meaning of Article 21 of the Charter if they cover only people with relatively large occupational pensions?

6. Is Article 17 of the Charter to be interpreted as precluding legislation of a Member State that provides for expropriatory intervention, directly by law and without compensation, in an agreement relating to an occupational pension in the form of a direct defined benefit pension entered into between two private parties to the detriment of a former employee of a company that has made provision for the payment of the occupational pension and is not experiencing financial difficulties?

7. Does a statutory obligation on the part of the former employer of a person entitled to an occupational pension not to pay out parts of the agreed remuneration (of the agreed occupational pension) represent, as an infringement of freedom of contract, an interference with the employer's right to property?

8. Is Article 47 of the Charter to be interpreted as precluding legislation of a Member State that expropriates directly by law and makes no provision for any challenge to the expropriation other than by way of a claim against the beneficiary of the expropriation (the former employer and the debtor under the pension contract) for damages and reimbursement of the expropriated sum of money?

Provisions of [EU] law cited

TFEU, specifically Article 157

TEU, specifically Articles 2 and 3

Charter of Fundamental Rights of the European Union, specifically Articles 17, 20 et seq., 47 and 51

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, specifically Article 4(1) and Article 7

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, specifically Article 6

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

Provisions of national law cited

Niederösterreichisches Landes- und Gemeindebezügegesetz (Lower Austrian Law on provincial and municipal remuneration), specifically Paragraph 24a

Allgemeines Sozialversicherungsgesetz (General Law on social security, 'ASVG'), specifically Paragraph 711

Sonderpensionenbegrenzungsgesetz (Law on the limitation of special pension arrangements, 'the SpBegrG'), specifically Article 1

Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre (Federal constitutional law on the limitation of remuneration of holders of public office, 'the BezBegrBVG'), specifically Paragraphs 1, 10

Pensionsanpassungsgesetz 2018 (Law on pension adjustment 2018, 'the PAG 2018')

Betriebspensionengesetz (Law on occupational pensions, 'the BPG'), specifically Paragraph 2

Brief summary of the facts and procedure

In addition to a statutory pension, the applicant receives an occupational pension from his former employer, NK AG. The pension contract concluded between the applicant and NK AG on 2 March 1992 contains a direct defined benefit promise by NK AG and an index-linking clause.

The applicant's employment contract with NK AG was terminated by mutual agreement with effect from 1 April 2010.

Since 17 December 2010, the applicant has received, in addition to his statutory pension and an occupational pension from a pension fund, an occupational pension on the basis of the direct defined benefit commitment given by NK AG on 2 March 1992.

Since 1 January 2015, NK AG has withheld a certain amount from that part of the applicant's occupational pension that it was agreed would be in the form of a direct defined benefit. However, the part of the occupational pension that comes from the pension fund is paid out without any deduction.

On 23 April 2018, NK AG informed the applicant in writing that his company pension was affected by the provisions of the PAG 2018 and therefore no adjustment was being made to his occupational pension in 2018. The increase in the part of the occupational pension to be paid out directly should have been 3% as from 1 February 2018.

Principal arguments of the parties in the main proceedings

- 1 According to the applicant, he is the subject of discrimination based primarily on his sex, or on account of his age and his property. In addition, the applicant's fundamental right to property has been infringed by an expropriation for no good reason and without compensation and the defendant's fundamental right to property has been infringed through interference with its freedom of contract. Moreover, the applicant does not have recourse to an effective remedy against the provision in question.
- 2 According to the defendant, it is obliged to withhold the amounts in dispute on the basis of Paragraph 24a of the Lower Austrian Law on provincial and municipal remuneration and was obliged not to increase the applicant's occupational pension in 2018 on the basis of Paragraph 711 ASVG. The aforementioned provisions are not contrary to EU law. The applicant's arguments in relation to discrimination based on sex or age are ineffective.

Brief summary of the basis for the reference

- 3 Both Paragraph 24a of the Lower Austrian Law on provincial and municipal remuneration and Paragraph 711 of the General Law on social security (ASVG) were adopted as a result of the SpBegrG. This law amended the Federal constitutional law on the limitation of the remuneration of holders of public office (the BezBegrBVG), which is intended to limit high levels of remuneration of holders of public office. In particular, the personal scope of the BezBegrBVG was extended to include ‘former servants of legal entities that are subject to scrutiny by the *Rechnungshof* (Austrian Court of Auditors)’. As companies governed by private law over which the Federal Government or individual Austrian provinces have a controlling influence are also subject to scrutiny by the Court of Auditors, this law impinges, inter alia, on individual contracts in which employees have agreed an occupational pension with their employer. These rules were enacted as constitutional provisions in order to restrict the possibility of their being legally challenged before the *Verfassungsgerichtshof* (Constitutional Court, Austria).
- 4 The division of powers of the Austrian Federal State means that the SpBegrG, as a Federal law, may not directly impinge on the contracts of employees of companies which, owing to the controlling influence of Austrian provinces over those companies, are subject to scrutiny by the Court of Auditors. Therefore, it was provided in Paragraph 10(6) BezBegrBVG that the provincial legislature is authorised to enact provisions comparable to the Federal provisions in respect of employees and former employees of legal entities in which a province holds a certain amount of share capital. Not every province has made use of this possibility. As shown by the underlying dispute, a corresponding provincial law was enacted in Lower Austria, but not in Vienna, for example.
- 5 The result of these statutory provisions is now shown by the case in dispute. A former manager of a listed public company (*Aktiengesellschaft*) in which the province of Lower Austria holds an approximately 51% interest has for the first time — and to his surprise — come within the scope of the Lower Austrian Law on provincial and municipal remuneration. Before being amended, this law governed only the remuneration of public officeholders of the province, whereas it now also impinges on private employment and pension contracts. Pursuant to Paragraph 24a of the Lower Austrian Law on provincial and municipal remuneration, beneficiaries of pensions and civil servants’ pensions from defined benefit schemes of legal entities that are subject to scrutiny by the Court of Auditors on account of a majority shareholding or effective control due to financial, economic or organisational measures of the province of Lower Austria must pay a pension security contribution. The pension security contribution is to be withheld by the paying body and paid to the legal entity set up under provincial law or the company from which the pension or civil servants’ pension is received. Pursuant to Paragraph 711 ASVG, the pension increase for the 2018 calendar year is not to be determined by reference to the adjustment factor, but rather as specified in that paragraph.

- 6 Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG contain legal provisions that directly interfere with the arrangements and requirements for establishing the amount of the occupational pension to which the applicant is entitled on the basis of a contract with his former employer. They therefore fall within the scope of EU law.
- 7 The view that these provisions are implementing EU law within the meaning of Article 51 of the Charter is supported primarily by the fact that the following provisions of primary and secondary EU law would cover the legislative content of Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG:
 - Articles 2 and 3 TEU, as well as Article 157 TFEU, which, according to the case-law of the Court of Justice, also applies to remuneration from an occupational pension scheme.
 - Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
 - Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
 - The revised equal treatment directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC).
- 8 Reference can be made to the judgment of the Court of Justice of 2 June 2016, Case C-122/15, in which it was found, inter alia, that benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and therefore come within the scope of the equal treatment directives (see also judgment of the Court of Justice of 1 April 2008 in Case C-267/06 — *Maruko*).
- 9 As the Austrian provisions specified above belong directly to the Austrian statutory system of old-age pensions, because they impinge by law on privately agreed pension contracts, they would come within the scope of Directive 79/7/EEC. Pursuant to the judgment of the Court of Justice of 20 October 2011, Case C-123/10 (*Brachner* case), a Member State's annual pension adjustment scheme is also subject to Directive 79/7/EEC.
- 10 Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG separate groups of people with a contractually agreed occupational pension from each other and treat these groups differently. This takes place in such a way that a distinction is primarily made between people who have agreed occupational pensions in the form of a direct defined benefit pension and people who have agreed an occupational pension in another form (e.g. pension fund, insurance).

- 11 In relation to the people who have entered into an occupational pension in the form of a direct defined benefit pension, a further distinction is then made as to whether they did so with a company that is currently subject to scrutiny by the Court of Auditors or whether the contract was entered into with another company. In this context, it is irrelevant whether or not the company was being scrutinised by the Court of Auditors at the time when the occupational pension agreement was entered into.
- 12 The provisions specified above give rise to the following differences of treatment:
- Anyone who receives an occupational pension in the form of a pension fund model or life insurance model is not covered by the Austrian laws specified above. For these people, it is irrelevant whether or not the former employer is currently subject to scrutiny by the Court of Auditors.
 - Anyone who had agreed an occupational pension in the form of a direct defined benefit pension with a legal entity but whose entitlement was settled before 1 January 2015 is not covered by the Austrian laws specified above. For these people, it is likewise irrelevant whether or not the former employer is currently subject to scrutiny by the Court of Auditors.
 - Anyone who has agreed a direct defined benefit pension with a company that is subject to scrutiny by the Court of Auditors is covered by the legislation. Anyone who has agreed an occupational pension in the form of a direct defined benefit pension with a company that is not currently subject to scrutiny by the Court of Auditors is not covered.
 - Anyone who has agreed a direct defined benefit pension with a company that is subject to scrutiny by the Court of Auditors, but whose shareholder is an Austrian province that has not adopted a statutory provision such as Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration, for example Vienna, is not covered.
 - All young and relatively young persons are not covered by the legislation, as no occupational pensions in the form of direct defined benefit pensions have been concluded in Austria since approximately 2000. Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG therefore cover only people whose pension contracts were entered into before the year 2000. Since, in the past, such pension contracts were generally only entered into after the employee had worked at the company for a relatively long period and had reached a certain management level (it can be assumed that, on average, the employee will have been older than 40 years of age when entering into such a contract), these people are therefore old to very old today. By contrast, relatively young people are not covered by the provisions specified above, because employers agree pension fund models or insurance models with them when pension contracts are entered into. In this way, the provisions specified above

distinguish people who are over the age of around 60 from people who are under the age of around 60.

- 13 It was also explained in the proceedings, in detail and with reference to official Austrian statistics, that both Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG predominantly impinge on the occupational pensions of men. For this reason, Paragraph 711 ASVG was not applied in parallel proceedings before a different labour and social security court, on account of incompatibility with EU law.
- 14 These differences of treatment could discriminate against the applicant, on the ground, primarily, of his sex, or of his age and his property. They would therefore conflict not only with the equal treatment directives, but also with the general prohibitions of discrimination in primary law, in particular Article 20 et seq. of the Charter.
- 15 The withholding of so-called ‘pension security contributions’ to the benefit of the defendant should not and cannot serve to balance out the economic and/or legal situation as between the sexes. Nor can failing to increase the applicant’s occupational pension in 2018, which likewise benefits only the defendant, serve to improve the situation of women. Moreover, such measures are neither appropriate nor necessary for achieving the objective of gender equality.
- 16 The conditions for the exclusions pursuant to Article 7 of Directive 79/7/EEC in respect of Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration or the fundamental provisions of the SpBegrG or of Paragraph 711 ASVG do not appear to be met either.
- 17 In its judgment in Case C-123/10 (*Brachner*), the Court of Justice ruled that an annual pension adjustment scheme indirectly discriminated against women and therefore infringed Article 4(1) of Directive 79/7/EEC if in fact a significantly higher percentage of female pensioners than male pensioners was affected and was also disadvantaged.
- 18 If this interpretation of Directive 79/7/EEC also applies to the opposite case, in which men are considerably more affected by a specific provision than women, the applicant, as a man, would be indirectly discriminated against by Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG.
- 19 In its judgment in Case C-123/10 (*Brachner*), the Court of Justice expressly stated that a pension adjustment scheme was designed to ensure that the purchasing power of all pensions was at least maintained in the light of consumer price developments. The adjustment clause in the applicant’s pension contract is also intended to serve the same purpose. On the other hand, Paragraph 711 ASVG prohibits the defendant from adjusting the applicant’s occupational pension in accordance with the contract in 2018.

- 20 The distinguishing criterion ‘scrutiny of the applicant’s former employer by the Court of Auditors’ is not suitable for distinguishing between groups of people with occupational pensions. The reason for this is that, in fact, the purpose of scrutiny by the Court of Auditors is to scrutinise the shareholdings of the province of Lower Austria in a company operating in the private sector and listed on the stock exchange and has nothing to do with the contractual relationship between the applicant and NK AG. This is apparent in particular from the fact that commercially identical occupational pension contracts in the form of pension fund models or insurance models are not covered by the provisions specified above, even though the position as regards scrutiny of the employer by the Court of Auditors is no different. The use of this criterion in the laws specified above to distinguish between groups of people who are entitled to an occupational pension is therefore discriminatory per se and must not be used to differentiate salaries or occupational pensions.
- 21 The SpBegrG and, in its wake, Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG, were adopted solely to impinge on so-called ‘old contracts’, which did not appear to the current members of the Austrian Parliament to be politically justifiable. As occupational pension contracts in the form of direct defined benefit pensions are held only by old or very old people, whereas younger people generally receive occupational pensions in the form of pension fund models, this potentially constitutes indirect discrimination based on age.
- 22 The Austrian provisions specified above relate solely to people with relatively large contractual pension entitlements. The reduction of relatively large occupational pensions without a justifiable public interest in such a provision could therefore also be discriminatory on the ground of property.
- 23 The differences of treatment caused by Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG are not justified in those laws. Only the explanatory notes on the government’s bill for the SpBegrG cite, as objectives, the ‘Remedying of imbalances that have arisen in connection with special pensions’ and the ‘Sustainable securing of financing for pension benefits’.
- 24 In this regard, the applicant stated that he did not receive a ‘special pension’, but rather an occupational pension. It is not clear from the provisions specified above which imbalances were supposed to be remedied by Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG. Neither in those laws nor in the explanatory notes relating to them was there a definition as to what an ‘imbalance’ was supposed to be, or how long it could be assumed to have existed for. It was in the very nature of occupational pensions that the amounts to which beneficiaries are entitled could vary. The applicant’s pension contract was with a listed public company; this contract must now be performed. The fact that there are people who receive smaller

occupational pensions cannot justify the discriminatory measures of the laws specified above.

- 25 ‘Sustainable securing of financing for pension benefits’ is guaranteed in the case of the defendant even without the discriminatory laws, as the defendant has already built up sufficient pension reserves on account of Austrian laws of general application. NK AG operates successfully and has never asked the provincial or Federal legislature for support in the fulfilment of its contractual obligations to pay an occupational pension. In addition, ‘sustainable securing of financing’ would also be de facto impossible due to the forms of discrimination brought about by the law.
- 26 The differences of treatment brought about by Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG cannot be justified by Article 6(1) or (2) of Directive 2000/78/EC. Neither Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration nor Paragraph 711 ASVG has any effect whatsoever on employment policy, the labour market or vocational training.
- 27 National provisions that are contrary to EU law should not be applied, even between two or more private contracting parties (see judgment of the Court of Justice of 19 January 2010, Case C-555/07, [*Küçükdeveci*], and of 22 November 2005, Case C-144/04, [*Mangold*]).
- 28 Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG could infringe the following fundamental rights of the Charter:
- Article 17 of the Charter — Right to property: The laws specified above expropriate for no good reason and without compensation. Pursuant to Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration, the debtor in an agreement relating to an occupational pension in the form of a direct defined benefit pension is obliged to withhold a sum of money to which the creditor of that agreement is contractually entitled, and may use that sum for any purposes. Paragraph 711 ASVG prohibits the debtor in a pension agreement from adjusting the value of a pension in accordance with the contract. No compensation for these expropriations is paid to the affected pensioners by the Federal Government or by the provinces. In addition to the expropriation of the applicant, the effect of these provisions is that the defendant’s own fundamental right to property is infringed through interference with its freedom of contract.
 - Article 20 et seq. of the Charter — Non-discrimination: The Austrian laws specified above infringe the prohibitions of discrimination contained in Title III of the Charter. The differences of treatment described are neither in the public interest nor objectively justified or appropriate. They serve only the debtor of a pension contract, being NK AG in this case — a commercially successful, listed public company in the energy and environment sector.

- Article 47 of the Charter — Right to an effective remedy: Neither Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration nor Paragraph 711 ASVG makes provision for an effective remedy for directly challenging the withheld parts of a contractually agreed occupational pension. The expropriation takes place directly by law, without a more specific legal act that could be challenged. The only option is to bring an action against the contracting partner of the occupational pension under private law.
- 29 The question whether Paragraph 24a of the Lower Austrian law on provincial and municipal remuneration and Paragraph 711 ASVG must be disapplied on account of its incompatibility with EU law is of decisive importance for the further progress of the proceedings and should be clarified in advance.

WORKING DOCUMENT