Case C-511/19

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:

4 July 2019

Referring court:

Areios Pagos (Greece)

Date of the decision to refer:

11 June 2019

Applicant:

AB

Respondent:

Olympiako Athlitiko Kentro Athinon — Spyros Louis

Subject-matter of the main proceedings

Reference for a preliminary ruling — Article 267 TFEU — Directive 2000/78/EC — Equal treatment in employment and occupation — Age discrimination — Indirect discrimination — National legislative provision providing for employees under contract in the broader public sector to be placed on reserve based on the criterion of closest entitlement to retirement on a full old-age pension — Justification for the national legislative provision

Subject-matter and legal basis for the request for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Questions referred

(A) Does the adoption by the Member State of legislation applicable to government, local authorities and public-law legal entities and to all bodies (private-law legal entities) in the broader public sector in general in their

capacity as employer, such as that adopted under Article 34(1)(c), (3)(a) and (4) of Law 4024/2011 placing staff under a private-law contract of employment with the above bodies on reserve for a period not exceeding twenty-four (24) months between 1 January 2012 and 31 December 2013 based solely on the criterion of the closest entitlement to retire on a full old-age pension corresponding to thirty-five (35) years' insurance, constitute indirect age discrimination within the meaning of Article 2(1) and (2)(b) and Article 3(1)(c) of Directive 2000/78/EC, especially given the fact that, under the insurance legislation in force at the time and disregarding cases that are of no relevance here, staff under a contract of employment needed to be insured with the Social Insurance Institute (IKA) or some other major insurance fund for (at least) 10 500 working days (35 years) and to be (at least) 58 years of age in order to substantiate their right to retire on a full-old age pension, without of course precluding the possibility of the above period of insurance (35 years) being completed at a different age depending on the individual case?

(B) If the answer to Question (A) is in the affirmative, can the adoption of a labour reserve system be objectively and logically justified, within the meaning of Article 2(2)(b)(i) and Article 6(1)(a) of the Directive, by the immediate need to ensure organisational, operational and fiscal results and, more specifically, by the immediate need to cut public spending in order to achieve certain quantitative targets by the end of 2011, as referred to in the explanatory memorandum to the law and provided for in particular under the Medium-Term Fiscal Strategy Framework, and thus honour Greece's undertaking to its partner-lenders to address the very acute and prolonged fiscal and economic crisis gripping the country and, at the same time, to restructure and reduce the swollen public sector?

(C) If the answer to Question (B) is in the affirmative:

(1) Is the adoption of a measure such as that adopted under Article 34(1)(c) of Law 4024/2011, providing for the salary of staff placed on reserve to be cut drastically to 60% of the basic salary of which they were in receipt when they were placed on reserve, without at the same time requiring the said staff to work in the relevant public sector, and causing the loss (in fact) of any promotion in terms of pay-scale or employment grade during the period between their being placed on reserve and their dismissal due to retirement on a full old-age pension, an appropriate and necessary means of achieving the above aim, within the meaning of Article 2(2)(b)(i) and Article 6(1)(a) of the Directive, where:

(a) such staff retain the facility to find an alternative occupation (in the private sector) or have the opportunity to pursue a freelance profession or business while on reserve, without losing the right to payment of the aforesaid reduced basic salary, unless the salary or income from their new occupation or employment exceeds the salary of which they were

in receipt prior to being placed on reserve, in which case the above reduced basic salary is cut by the surplus (see Article 34(1)(f)); and

(b) the public-sector employer or, if it is abolished, the Organismos Apascholisis Ergatikou Dynamikou (Hellenic Manpower Employment Organisation, Greece, 'OAED') undertakes to pay both the employer's and the employee's main, supplementary and health and welfare insurance contributions to the relevant insurance fund based on the salary of which the employee was in receipt prior to being placed on reserve pending the employee's retirement (see Article 34(1)(d)); and

(c) exemptions from labour reserve status are provided for vulnerable social groups which require protection (other spouse placed on reserve, spouse or child with a disability of at least 67% living with and dependent on the employee, employee with a disability of at least 67%, parents of large families, single-parent family living with and dependent on the employee) (see Article 34(1)(b); and

(d) the aforesaid staff are granted the option of transferring to other vacant posts in public-sector bodies based on objective and merit-based criteria by including them in the selection lists of the Anotato Symvoulio Epilogis Prosopikou (Supreme Council for Civil Personnel Selection, Greece, 'ASEP') (see Article 34(1)(a)), although that option was limited in fact owing to drastic cutbacks in staff recruitment by various public-sector bodies due to the need to cut spending; and

(e) care is taken to adopt measures concerning the repayment of housing loans obtained from the Tameio Parakatathikon kai Daneion (Deposits and Loans Fund, Greece) by workers placed on reserve and to draft an agreement between the Greek State and the Enosi Ellinikon Trapezon (Hellenic Bank Association, Greece) to facilitate the repayment of loans contracted by such staff from other banks, based on each worker's total family income and assets (see Article 34(10) and (11); and

(f) provision has been made under a more recent law (see Article 1(15) of Law 4038/2012, Government Gazette Series I, Number 14) for pension regulations and the payment order to be issued as a matter of priority for the staff referred to under (b) and (c), that is within no more than four months of their dismissal and submission of the supporting documents required in order to release their pension; and

(g) the aforesaid loss of promotion in terms of pay-scale or employment grade by staff under a private-law contract of employment during the period between their being placed on reserve and their dismissal due to retirement on a full old-age pension will not apply in most cases, including the present case, as, due to the length of time the employees

have spent in the public sector, they have already reached the top pay scale and/or employment grade provided for under the applicable legislation governing promotions.

(2) Is the adoption of a measure such as that adopted under Article 34(1)(e) of Law 4024/2011, eliminating, for employees who are dismissed or who retire from their occupation on qualifying for a full old-age pension, all (or a proportion) of the severance pay provided for under Article 8(b) of Law 3198/1955 equal to 40% of the severance pay provided for employees with supplementary insurance (which, in the case of public-sector bodies fulfilling a public service obligation or subsidised by the State, such as the respondent private-law legal entity, is capped at the sum of EUR 15 000), by offsetting it against the reduced salary received during the period on reserve, an appropriate and necessary means of achieving the above aim within the meaning of Article 2(2)(b)(i) and Article 6(1)(a) of the Directive, bearing in mind that the aforesaid staff would otherwise have received that reduced severance pay under the aforesaid applicable labour legislation irrespective of whether they resigned or were dismissed by the body in which they were employed?

Provisions of EU cited

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16): Recital 25 and Articles 1, 2(1) and (2)(b), 3(1)(c) and 6(1)(a)

Provisions of national law cited

Law 4024/2011, Pension arrangements, uniform pay scales/employment grades, reserve labour force and other provisions in application of the Medium-Term Fiscal Strategy Framework 2012-2015 (Government Gazette Series I, Number 226): Article 34

Law 3304/2005, Application of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation (Government Gazette Series I, Number 16)

Law 4443/2016 I) Transposition …of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, …(Government Gazette Series I, Number 232)

Brief summary of the facts and proceedings

1 AB, the applicant in the main proceedings, was engaged by the respondent in the main proceedings, Olympiako Athlitiko Kentro Athinon — Spyros Louis

('OAKA') on 23 June 1982 as an electrician/technician under an employment contract of indefinite duration.

2 By notice issued by OAKA on 30 December 2011, AB was automatically placed on reserve as of 1 January 2012 in application of Article 34(1)(c), (3)(a), (4) and (8) of Law 4024/2011. Although, when he was placed on reserve, he was in receipt of a salary of EUR 3 775.58 (gross) per month, that salary was cut when he was placed on reserve to 60% of his basic salary, giving a total of EUR 1 064.99 (gross) per month as of 1 January 2012.

3 On 30 April 2013 OAKA terminated AB's contract of employment and, under the provision of Article 34(1)(e) of Law 4024/2011, which provides for severance pay on dismissal to be offset against the salary paid to the employee while on reserve, it did not pay him statutory severance pay on the grounds that he qualified for a full old-age pension from his insurance fund.

4 Relying *inter alia* on the contradiction between the aforesaid provisions of Article 34 of Law 4024/2011, inasmuch as they introduce age discrimination, and the provisions of Directive 2000/78, AB initiated proceedings in the Monomeles Protodikeio Athinon (Court of First Instance (Single Judge), Athens, Greece), by which he requested, *inter alia*, that the Court find his placement on reserve as of 1 January 2012 to be void, order OAKA to pay him the difference between the salary of which he was in receipt prior to being placed on reserve and the salary which he was paid after being placed on reserve for the period from 1 January 2012 to 30 April 2013, and further find that OAKA was liable to pay him severance pay totalling EUR 32 108.04 (without the EUR 15 000 cap) with statutory interest.

5 The Monomeles Protodikeio Athinon (Court of First Instance (Single Judge), Athens) upheld the claim in part. More particularly, in its judgment, having found that the sole criterion by which AB had been selected for placement on reserve in application of Article 34 of Law 4024/2011 was his closeness to retirement and that this constituted age discrimination which did not serve an objective and rational legitimate aim, in breach of the relevant provisions of Directive 2000/78, as transposed into the national legal system under Law 3304/2005 (as subsequently replaced by Law 4443/2016), the Court held, having interpreted the aforesaid provision of Article 34 of Law 4024/2011 in light of the letter and purpose of the Directive, that the placement of AB on reserve was void and it therefore awarded him the aforesaid difference in salary for the period from 1 January 2012 to 30 April 2013 and found that OAKA was liable for payment to him of the sum of EUR 15 000 in severance pay.

6 OAKA lodged an appeal against the judgment of the Monomeles Protodikeio Athinon (Court of First Instance (Single Judge), Athens) in the Monomeles Efeteio Athinon (Court of Appeal (Single Judge), Athens, Greece), which dismissed the action as unfounded. The court of second instance held, *inter alia*, that AB was not entitled to the difference in salary for the aforesaid period, as his

placement on reserve in application of Article 34 of Law 4024/2011 was entirely valid, in that it did not conflict either with the provisions of the Constitution or with the provisions of Directive 2000/78.

7 The court of second instance held that the labour reserve system served the need to limit wage costs and restore public finances and restructure and limit the swollen public sector and broader public sector, and that it was introduced under the relevant provision of the Medium-Term Fiscal Strategy Framework during the extended economic crisis faced by the country which, in any event, justifies different treatment based on the horizontal and objective criterion of closeness to entitlement to retire on a full pension. At the same time (given that it allows workers placed on reserve to meet their day-to-day needs pending full retirement and takes care to protect vulnerable social groups and to regulate matters concerning the repayment of housing loans, thereby ensuring that their key constitutional and social rights are not affected), it is an appropriate and necessary means of achieving the aforementioned aim.

8 The court of second instance also found that OAKA was included in the bodies covered by the reduced severance pay provisions and that, therefore, the severance pay owed to AB totalled EUR 15 000 (as found by the court of first instance), which was offset against the salary paid to him while on reserve under Article 34(1)(e) of Law 4024/2011.

9 AB lodged an application for annulment of the judgment of the Monomeles Efeteio Athinon (Court of Appeal (Single Judge), Athens), contending, *inter alia*, that the contested judgment was vitiated by error in that, in admitting that the labour reserve system arrangements introduced under Article 34(1)(c), (2), (3), first paragraph, (4) and (9) of Law 4024/2011 are compatible with the Constitution and with Articles 2([2])(b), 3(1)(c) and 6(1), first paragraph, of Directive 2000/78 prohibiting age discrimination, it infringed the above substantive provisions of the Constitution and of EU law.

Brief summary of the basis for the request for a preliminary ruling

10 According to the explanatory memorandum to Law 4024/2011, Article 34 implemented the labour reserve system provided for under the Medium-Term Fiscal Strategy Framework and under Article 37(7) of Law 3986/2001, in order to honour Greece’s undertakings towards its partner-lenders to place 30 000 public-sector workers on reserve and save EUR 300 000 000 during 2012 and to complete the procedure by the end of 2011. According to that memorandum, the main benefits of the measure are that it directly ensures organisational, operational and fiscal results in keeping with the strategic aim of limiting the size of the government and cutting public spending, without at the same time making most of the workers placed on reserve unemployed or jeopardising their pension and also without engendering any mass opposition among the staff of the public administration and the broader public sector or, in the overwhelming majority of

cases, burdening the above bodies with the cost of severance pay, which would have been a financial disaster.

11 Bearing the aforementioned aim in mind, that intervention on the part of the legislature in introducing the labour reserve system based on the horizontal criterion of employees' closeness to entitlement to a full old-age pension from their insurance fund does not infringe the fundamental constitutional principles enshrined in Articles 2 (protection of the value of the human being), 4 (equality of citizens) and 5 (free development of individuality) of the Constitution. That is because, in times of prolonged economic crisis, the legislature may introduce immediate spending cuts which place a financial burden on large sections of the population, with the aim of improving the future fiscal and economic situation, especially where such measures simultaneously seek to achieve the legitimate aim of restructuring and limiting the swollen public sector and include specific individual arrangements to enable the workers placed on reserve to meet at least some of their basic day-to-day needs and specific provisions to mitigate the adverse impact which they suffer, so as to ensure that their key constitutionally protected individual and social rights are not affected.

12 Moreover, staff employed by the government, local authorities, public-law legal entities and public-sector bodies in general (such as OAKA) to fill posts under a private-law contract of employment of indefinite duration may be dismissed by the body which employs them at any time by terminating their contract of employment under the relevant provisions of labour law. Consequently, as the public body concerned could freely terminate their contract of employment, the legislature was perfectly within its right to opt for the less onerous reserve system for those employees close to retirement.

13 Moreover, unlike permanent civil servants in the narrow public sector, staff employed under a private-law contract of employment do not enjoy permanent status and, consequently, they are not subject, even *mutatis mutandis*, to the provisions of Article 103(2) and (4) of the Constitution, the first of which states that no-one may be appointed to a post not provided by law and the second of which states that civil servants holding posts provided by law are to be permanent, based on which the Symvoulio tis Epikrateias (Council of State, Greece) found the provision of Article 33 of Law 4024/2011, introducing a pre-retirement standby system for permanent civil servants of general government, local authorities and public-law legal entities and containing similar arrangements to Article 34 (but not the provision of Article 34 relating to this case) to be unconstitutional.

14 In the light of the above, the referring court dismissed as unfounded the ground for annulment to the extent that it alleged that Article 34 of Law 4024/2011 is unconstitutional, and went on to examine that ground to the extent that it alleges that that provision infringes EU law.

15 Article 34(1)(c), (3), first paragraph, and (4) of Law 4024/2011 introduce a labour reserve system for persons already employed under a private-law contract of

employment by government, local authorities, public-law legal entities and private-law legal entities in the broader public sector for a period of no more than two years (from 1 January 2012 to 31 December 2013), based on the horizontal criterion of closeness to entitlement to retirement on a full old-age pension corresponding to 35 years' insurance during the above period.

16 During that period and pending fulfilment of the necessary retirement requirements, the persons on reserve suffer a drastic reduction in salary, but are not required to work for their public-sector employer. Also, the severance pay to which they would otherwise be entitled is offset against the reduced salary which they receive while on reserve and their placement on reserve is considered as advance notice of dismissal for the purpose of all the legal consequences that entails.

17 These arrangements are designed to serve the need to make the immediate cuts in wage costs agreed between Greece and its partner-lenders and to restructure the public and broader public sector in light of the severe economic crisis gripping the country.

18 The arrangements in question do not specify a particular age limit for the staff placed on reserve and the question of direct age discrimination within the meaning of Article 2(1)(a) of Directive 2000/78 does not arise. However, the legislative arrangement in question is based on the horizontal criterion of workers' closeness to entitlement to a full old-age pension from their insurance fund on completion of 35 years' insurance, provided that retirement requirements are fulfilled during that period of time from 1 January 2012 to 31 December 2013. Consequently, the question arises as to whether the legislative arrangement enacted under Article 34(3), first paragraph, and (4) of Law 4024/2011 constitutes indirect age discrimination within the meaning of Article 2(1)(b) of the Directive, especially given the fact that, under the insurance legislation and disregarding cases that are of no relevance here, insured persons under a contract of employment, such as AB, could also have substantiated their right to a full old-age pension from their insurance fund based solely on the fact that they had been insured with the Social Insurance Institute (IKA) or some other main insurance fund for (at least) 10 500 working days (35 working years) as an employee working under a contract of employment and were also 58 years of age (those being the age and working-day limits that applied at the time).

19 It should, of course, be noted that this particular case does not preclude the possibility of the period of insurance (35 years) being completed at a later (or earlier) age than 58, depending on when the employee's working life and insurance began or other reasons pertaining to the individual; however, aside from the aforesaid minimum period of insurance as an employee (35 years), employees insured by the IKA must also be at least 58 years old in order to substantiate their right to a full old-age pension after thirty-five years in work.

20 If the above legislation does indeed constitute indirect age discrimination within the meaning of the Directive, the question then arises as to whether the reasons set out in the explanatory memorandum to the law are an objectively and rationally legitimate aim which justifies different treatment, bearing in mind the conditions under which it was decided to place some staff on reserve, and, furthermore, as to whether the following specific legislative measures with regard to the salaries and severance pay of the employees placed on reserve are an appropriate and necessary means of achieving that aim within the meaning of Articles 2(2)(b) and 6(1) of Directive 2000/78:

(a) the measure adopted under Article 34(1)(c) of Law 4024/2011, providing for a drastic cut to the salary of the staff placed on reserve to 60% of their basic salary, without at the same time requiring the said staff to work in the relevant public sector, thereby eliminating any promotion in terms of pay-scale or employment grade during the period between their being placed on reserve and their dismissal due to retirement on a full old-age pension, bearing in mind the measures provided for under the law to protect that staff (facility to find alternative occupation or self-employment without losing the right to payment of the aforesaid reduced basic salary, undertaking by the body or the OAED to pay both the employer's and the employee's insurance contributions to the relevant insurance fund based on the employee's previous salary pending the employee's retirement, exemption from reserve status for vulnerable social groups which require protection, option for such staff to transfer to other vacant posts in public-sector bodies, measures regarding the repayment of housing loans obtained by such staff, etc.); and

(b) the measure adopted under Article 34(1)(e) of Law 4024/2011, eliminating, for employees who are dismissed or who retire from their occupation on qualifying for a full old-age pension, all (or a proportion) of the statutory severance pay equal to 40% of the severance pay provided for employees with supplementary insurance (which, in the case of public-sector bodies which fulfil a public service obligation or are subsidised by the State, such as OAKA, is capped at the sum of EUR 15 000), by offsetting it against the reduced salary received during the period on reserve, which severance pay that staff would otherwise have received under the aforesaid applicable labour legislation irrespective of whether they resigned or were dismissed by the body in which they were employed.

21 In the light of the above, the question arises as to the compatibility of the above provisions of Article 34 of Law 4024/2011 with the provisions of Articles 2(1) and (2)(b), 3(1)(c) and 6(1)(a) of Directive 2000/78. Therefore, the referring court unanimously finds that the questions must be referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267 TFEU.