



Court of Justice of the European Union

**PRESS RELEASE No 57/19**

Luxembourg, 8 May 2019

Judgments in Cases C-24/17

Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v  
Republic of Austria and C-396/17 Martin Leitner v Landespolizeidirektion  
Tirol

Press and Information

## **The Austrian system of remuneration and advancement of State officials and contractual public servants remains contrary to the prohibition of discrimination on grounds of age**

*As long as the Austrian legislature fails to take measures to re-establish equal treatment with regard to taking into consideration professional experience acquired before the age of 18, persons treated unfavourably by the old system are entitled to obtain the same advantages as their colleagues who are treated favourably by that system and in particular the payment of compensation*

In Austria, the systems of remuneration and advancement applicable to State officials and contractual public servants initially excluded the taking into account of professional experience acquired before the age of 18. Following the finding made by the Court of Justice that such an exclusion constitutes unjustified discrimination on grounds of age<sup>1</sup>, the Austrian legislator carried out a first review of those systems in 2010 which however failed to remove their discriminatory character.<sup>2</sup>

The systems at issue were again reviewed, in 2015 and in 2016, in order to put an end to that discrimination. That new review provides retroactively that officials and contractual public servants in service are to be transitioned to a new system of remuneration and advancement in the context of which their first grading is determined according to their final remuneration received under the previous system.

The **Oberster Gerichtshof** (Supreme Court, Austria), ruling on an action brought by the **Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst** (Austrian Confederation of Trade Unions, Public Service Union), and the **Bundesverwaltungsgericht** (Federal Administrative Court, Austria), ruling on an action brought by a policeman, Mr Leitner, **ask the Court of Justice in particular whether those new systems remain contrary to EU law**<sup>3</sup>.

**By today's judgments, the Court replies in the affirmative.**

According to the Court, the new systems maintain a difference in treatment between persons treated unfavourably by the old system (namely, those whose experience was, at least partially, acquired before the age of 18) and persons treated favourably by that system (those who obtained, after reaching that age, experience of the same type and of a comparable duration), since the amount of remuneration received by the former is lower than that paid to the latter solely on grounds of their age on the date of their recruitment, although they are in comparable situations.

<sup>1</sup> Case: [C-88/08](#) Hütter.

<sup>2</sup> Case: [C-530/13](#) Schmitzer..In that judgment, the Court ruled that national legislation which, in order to put an end to discrimination on grounds of age with respect to officials, takes into account periods of training and service completed before the age of 18, but which, at the same time, introduced with respect only to officials who are victims of that discrimination, a 3-year extension to the time necessary to advance from the first to the second grade of each employment category and each salary category maintains direct discrimination on grounds of age.

<sup>3</sup> The Charter of Fundamental Rights of the European Union and 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) ('the anti-discrimination directive').

Given that that difference in treatment on grounds of age remains under the new systems, not for a transitional period but definitively, it cannot be justified by the legitimate objective of respecting acquired rights and protecting legitimate expectations. It can also not be justified by budgetary or administrative considerations.

The Court holds therefore that **the new systems are not suitable for the purpose of eliminating all discrimination for officials and contractual public servants who are treated unfavourably by the old systems of remuneration and advancement. On the contrary, they maintain with respect to those persons discrimination on grounds of age.**

The Court consequently replies to the Oberster Gerichtshof and to the Bundesverwaltungsgericht that the prohibition of discrimination on grounds of age precludes national legislation, such as that at issue, which has retroactive effect and which, in order to put an end to discrimination on grounds of age, provides for a transition of officials or contractual public servants in service to a new system of remuneration and advancement in the context of which their first grading is determined according to their final remuneration received under the previous system.

The Court notes that, in the event that national legislation cannot be interpreted in conformity with the anti-discrimination directive<sup>4</sup>, the national court is required to guarantee the legal protection resulting for the individuals from that directive and to ensure the full effect thereof, where necessary by disapplying any incompatible national provision.

Therefore, since discrimination, contrary to EU law, has been established and **as long as measures to re-establish equal treatment have not been adopted, the re-establishment of equal treatment, in cases such as those at issue, involves granting officials and contractual public servants who are treated unfavourably by the old systems the same advantages as those enjoyed by the officials and contractual public servants treated favourably** by those systems, as regards both the taking into account of periods of service completed before the age of 18 and advancement in the remuneration scale.

**It follows also that an official or contractual public servant who is discriminated against is entitled to receive the payment, by his employer, of financial compensation amounting to the difference between the amount of remuneration he should have received if he had not been treated in a discriminatory way and the amount of remuneration he actually received.**

**The Oberster Gerichtshof also questioned the Court concerning the compatibility of the new rules on taking into account the professional experience of State contractual public servants with the free movement of workers.** According to the new system, in order to determine the seniority of a contractual public servant in the remuneration scale, it is necessary to take into account in their entirety previous periods of activity completed in the context of an employment relationship with a local authority or municipal association of a Member State of the European Economic Area, Turkey or Switzerland, with an organisation of the EU or an intergovernmental organisation of which Austria is a member, or with any similar body. By contrast, any other previous period of activity is taken into account only up to 10 years and in so far as it is relevant.

**According to the Court, EU law precludes such legislation.**

It is likely to dissuade migrant workers who have acquired or who are in the process of acquiring relevant professional experience of more than 10 years with other employers, from exercising their right to free movement, without that hindrance to the free movement of workers being justified.

Such legislation is not suitable for achieving the legitimate objective of rewarding experience acquired in the field concerned, which allows the worker to better perform the tasks conferred on him, given that it takes relevant experience into account only to a limited extent. It is also not suitable for realising the objective of encouraging workers' loyalty, since, in light of the large

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<sup>4</sup> See footnote 3.

number of employers to be fully taken into account, it is designed to allow maximum mobility within a group of legally distinct employers and not to reward the loyalty of an employee to a particular employer.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The full text of the judgments [C-24/17](#) and [C-396/17](#) are published on the CURIA website on the day of delivery.*

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