

**Case C-518/22**

**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:**

3 August 2022

**Referring court:**

Bundesarbeitsgericht (Germany)

**Date of the decision to refer:**

24 February 2022

**Applicant and appellant on a point of law:**

J.M.P.

**Defendant and respondent in the appeal on a point of law:**

AP Assistenzprofis GmbH

---

**Subject matter of the main proceedings**

Claim for payment of compensation for discrimination on grounds of age

**Subject matter and legal basis of the request**

Interpretation of Article 4(1), Article 6(1), Article 7 and Article 2(5) of Directive 2000/78/EC, read in the light of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities and in the light of the requirements of the Charter of Fundamental Rights of the European Union; Article 267 TFEU

**Question referred for a preliminary ruling**

Can Article 4(1), Article 6(1), Article 7 and/or Article 2(5) of Directive 2000/78/EC, read in the light of the requirements of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities ('the UN CRPD'),

be interpreted as meaning that, in a situation such as that in the main proceedings, direct discrimination on grounds of age can be justified?

**Provisions of international law relied on**

United Nations Convention on the Rights of Persons with Disabilities (UN CRPD): Points (c), (h), (j) and (n) of the preamble and Articles 1, 3, 5, 12 and 19

General comment No. 5 (2017) of the UN Committee on the Rights of Persons with Disabilities on living independently and being included in the community: Point 16(a) of Section II and point 80 of Section IV

**Provisions of EU law relied on**

Charter of Fundamental Rights of the European Union: Articles 1, 7, 21 and 26

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): Articles 1, 2, 4, 5, 6 and 7

**Provisions of national law relied on**

Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany): Articles 1 and 2

Allgemeines Gleichbehandlungsgesetz (General Law on equal treatment; ‘the AGG’): Paragraphs 1, 3, 5, 7, 8, 10 and 15

Sozialgesetzbuch Erstes Buch (SGB I) – Allgemeiner Teil (Book I of the Social Code (SGB I) – General Part): Paragraph 33

Sozialgesetzbuch Neuntes Buch (SGB IX) – Rehabilitation und Teilhabe von Menschen mit Behinderungen (Book IX of the Social Code (SGB IX) – Rehabilitation and participation of persons with disabilities): Paragraphs 8 and 78

The AGG prohibits discrimination against employees, including on grounds of age. By way of exception, a difference of treatment is permissible where, by reason of the nature of the activities concerned or of the context in which they are carried out, a certain age constitutes a genuine and determining occupational requirement (Paragraph 8) or where the difference of treatment is objectively and reasonably justified by a legitimate aim (Paragraph 10). In the event of a breach of the prohibition of discrimination, the employer is required to provide compensation for the resulting damage or, in the case of non-material damage, to pay appropriate monetary compensation (Paragraph 15).

Under Paragraph 8 of SGB IX, read in conjunction with Paragraph 33 of SGB I, when providing services for persons with disabilities, the legitimate wishes of those entitled to services must be complied with in so far as they are reasonable. Account must also be taken of the personal circumstances, age, sex, family and religious and philosophical needs of persons entitled to services.

Paragraph 78(1) ('Assistance services') of SGB IX reads: 'Assistance services are provided for the self-determined and independent management of everyday life, including structuring a daily routine. They include, in particular, services for general everyday tasks such as managing a household, forming social relationships, organising day-to-day life, participating in community and cultural life, taking part in leisure activities including sports, and ensuring the effectiveness of medical and medically prescribed services. They include communication with the surrounding world in these areas.'

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

- 1 The defendant offers people with disabilities, inter alia, assistance services in various areas of life ('personal assistance'). Those services are provided in accordance with Paragraph 78(1) of SGB IX.
- 2 In July 2018, the defendant published a job offer stating that A., a 28-year-old student, was looking for female assistants in all areas of everyday life, who should 'preferably be between 18 and 30 years old'.
- 3 The applicant, who was born in March 1968, applied for this job and received a rejection from the defendant. After unsuccessfully asserting her claims out of court, the applicant sought compensation from the defendant under Paragraph 15 of the AGG by way of her action.

### **The essential arguments of the parties in the main proceedings**

- 4 According to the applicant, the defendant discriminated against her in the application procedure on grounds of her age, contrary to the requirements of the AGG, and must therefore pay her compensation under Paragraph 15 of the AGG. The fact that the defendant's job advertisement was expressly addressed to assistants aged 'between 18 and 30' justified the presumption that she, the applicant, was disregarded and thus discriminated against in the application procedure on grounds of her age (which exceeded the age range in the job advertisement). Moreover, the defendant has not rebutted that presumption. The difference in treatment on grounds of age was in no way justified in the assistance service. It was not permissible under the provision on special occupational requirements (Paragraph 8 of the AGG) or under the provision on justified differences of treatment on grounds of age (Paragraph 10 of the AGG). A specific age was not relevant in terms of the relationship of trust in the assistance service. On the contrary, in a case such as the present one, personal assistance provided by

a middle-aged person, with that person's greater life experience, could have considerable advantages for the disabled person. If the selection decision had been free from discrimination, she, the applicant, should have been given the job. She had experience and was extremely well suited for the advertised position.

- 5 According to the defendant, any difference in treatment on grounds of age was justified in the light of Paragraphs 8 and 10 of the AGG. Assistance involves highly personal, all-encompassing support with daily living, with the person granted personal assistance generally being constantly and completely dependent on the person providing the assistance and the two of them being together at all times. In the present case, a particular age was a highly personal requirement for meeting the highly personal needs of the person granted personal assistance, A., so that she could adequately participate in social life as a university student.
- 6 When persons with disabilities access personal assistance services, the legitimate wishes and subjective needs of the person granted personal assistance must be taken into account – as provided for in Paragraph 8 of SGB IX – since the personal assistance has a constant impact on the private and intimate areas of that person's life. Against this background, the legitimate wish of the person granted personal assistance for the personal assistant to be of a certain age should be regarded as a genuine and determining occupational requirement within the meaning of Paragraph 8 of the AGG. This is the only way to achieve the purpose of assistance services stated in Paragraph 78 of SGB IX, which is a consequence of the personality rights protected by the Basic Law. That requirement was also reasonable. A difference in treatment on grounds of age is also permissible in this case under Paragraph 10 of the AGG, since it is objectively and reasonably justified by a legitimate aim and the means of achieving the aim of personal assistance are appropriate and necessary.

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 7 The applicant has been directly disadvantaged on grounds of her age by the defendant's rejection. The defendant's job advertisement, seeking a person between the ages of approximately 18 and 30, gives rise to the presumption that the applicant's age was the main or a contributing factor to the rejection. The defendant has not rebutted that presumption.
- 8 The question arises as to how the applicant's rights are to be balanced with those of a person with a disability. Under the provisions of Directive 2000/78/EC and Article 21 of the Charter, the applicant, who is seeking employment, may claim effective protection against discrimination on grounds of her age. Persons with disabilities who – like the 28-year-old student A. – are seeking personal assistance may, under Article 21 of the Charter, claim effective protection against discrimination on grounds of their disability. In addition, Article 26 of the Charter applies in her favour.

- 9 In Germany, when deciding on services for persons with disabilities and performing those services, the legitimate wishes of those entitled to services must be complied with in so far as they are reasonable. Account must be taken, *inter alia*, of the personal circumstances, age and sex of the persons entitled to services. In that context, the person entitled to services may decide on the provider of the services and, in consultation with the latter, decide by whom, how, when, where and in what way the assistance services are delivered.
- 10 The right of persons entitled to services to express their wishes and choices is intended to take into account the right of persons with disabilities to organise their life circumstances as far as possible in a self-determined and autonomous manner and to boost the personal responsibility of the persons concerned as well as their motivation to participate in the community.
- 11 Since personal assistance concerns all areas of life and inevitably reaches far into the private and intimate areas of the life of the person in need of or receiving assistance – which may, depending on the circumstances of the individual case, involve assistance with personal care and hygiene, including assistance when going to the toilet and with dressing and undressing, meaning that the assistants regularly have insight into all areas of the relevant person's life, in some cases including those which are otherwise inaccessible to close friends and relatives – the referring court takes the view that, in order to guarantee human dignity, it is necessary to respect and focus on the wishes of the relevant person with a disability regarding the organisation of his or her own life in terms of personal assistance services. Persons with disabilities therefore need a great deal of freedom in the choice of the people assisting them. Like persons without a disability, they must be able to decide with whom they wish to share their lives. Therefore, in the view of the referring court, the wishes of the relevant person with a disability, regarding personal assistance services, for the assistant to be of a certain age and gender must be respected, in so far as they are appropriate in the particular case.
- 12 The question therefore arises as to whether it is compatible with the requirements of Directive 2000/78/EC for persons with disabilities to specify an age-related preference as a selection criterion in the procedure for hiring a personal assistant, since Article 2(2)(a) of Directive 2000/78/EC prohibits direct discrimination on grounds of age. In that regard, for the purposes of interpreting that directive, it is necessary to take account of the UN CRPD (judgment of the Court of Justice of 11 September 2019, *Nobel Plastiques Ibérica*, C-397/18, EU:C:2019:703, paragraphs 39 and 40), in particular Article 19 thereof, according to which States Parties must ensure that persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others.
- 13 It is conceivable that the difference in treatment is permissible under **Article 4(1) of Directive 2000/78/EC**. According to that provision, Member States may provide that a difference of treatment which is based on a characteristic related to

any of the grounds referred to in Article 1 of the directive – including age – is not to constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

- 14 In this respect, it is not yet clear whether the wish expressed by a person with a disability, in the context of his or her right to self-determination, that the person providing personal assistance should be of a specific age is a characteristic within the meaning of that provision (on this concept, the referring court refers, *inter alia*, to the judgment of the Court of Justice of 15 July 2021, *Tartu Vangla*, C-795/19, EU:C:2021:606, paragraph 32) or whether an age preference can be a genuine and determining occupational requirement. That could be disputed in the light of the case-law of the Court of Justice (judgments of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204, paragraphs 39 and 40, and of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 63), according to which the requirement must be objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out and the lawfulness of a difference of treatment depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. The specific wish in question cannot be generalised and, as such, is not objectively dictated by the nature of the occupational activities of personal assistance or of the context in which they are carried out. The wish in question is based on subjective priorities for the person in question to independently control their own way of life. However, in the view of the referring court, it is essential to respect this right of self-determination and to comply with it when hiring a person to provide personal assistance, in so far as the wishes are justified and appropriate.
- 15 The referring court is also unsure whether **Article 6(1) of Directive 2000/78/EC** may apply in a situation such as that at issue in the main proceedings. According to that provision, Member States may provide that differences of treatment on grounds of age are not to constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. A ‘legitimate aim’ could be that of taking into account the right of persons with disabilities to organise their life circumstances as far as possible in a self-determined and autonomous manner and to strengthen the personal responsibility of the persons concerned as well as their motivation to participate in the community. In addition, the question arises as to what requirements, if any, must be observed for the purposes of assessing reasonableness and necessity.
- 16 The referring court notes that, according to the case-law of the Court of Justice, Member States enjoy a broad discretion, not only in choosing to pursue a particular aim, but also in defining the measures capable of achieving it. However, that discretion cannot have the effect of frustrating the implementation of the

principle of non-discrimination on grounds of age (see, inter alia, judgments of 3 June 2021, *Ministero della Giustizia [Notaries]*, C-914/19, EU:C:2021:430, paragraph 30, and of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 33).

- 17 The referring court then points out that, under **Article 7 of Directive 2000/78/EC**, the principle of equal treatment does not prevent Member States from maintaining or adopting, with a view to ensuring full equality in practice, specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. According to the national provision transposing Article 7 of Directive 2000/78/EC, a difference of treatment is permissible not only with regard to equality in professional life, but also more generally where appropriate and proportionate measures are taken to prevent or compensate for existing disadvantages linked to a particular ground. In this respect, it is questionable whether Article 7 of Directive 2000/78/EC, in so far as it is to be understood in the light of Article 19 of the UN CRPD and the underlying human rights approach of the UN CRPD and in the light of the safeguards provided for in Articles 1, 7, 21 and 26 of the Charter, can be relevant for a justification of the discrimination on grounds of age in a case such as that in the main proceedings, even though the purpose of personal assistance is not equality in professional life. In that regard, the referring court notes that Article 5(4) of the UN CRPD expressly authorises specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities and refers to the judgment of the Court of Justice of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraph 48 et seq.).
- 18 Lastly, **Article 2(5)** of Directive 2000/78/EC provides that that directive is to be without prejudice to measures laid down by national law which, in a democratic society, are necessary, inter alia, for the protection of the rights and freedoms of others. According to the case-law of the Court of Justice, the grounds mentioned in Article 2(5) of Directive 2000/78/EC – such as the protection of the rights and freedoms of others – may be seen as possible ‘justifications’ (see judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 52). It is in that context that the referring court asks whether, in a case such as that at issue in the main proceedings, Article 2(5) of Directive 2000/78/EC can justify the unfavourable treatment of the applicant on grounds of age.
- 19 In that regard also, it could be that personal assistance services must respect the right of persons with disabilities to independence and autonomy. Since a person without a disability who is the same age as 28-year-old student A. is undoubtedly free autonomously to decide the age of the people with whom he or she wishes to share his or her daily life, the referring court deems that there is much evidence to support the notion that persons with disabilities must also be guaranteed such a free right of determination with regard to personal assistance. Persons with disabilities are guaranteed the full enjoyment of human rights and fundamental freedoms without discrimination under the preamble of the UN CRPD. Furthermore, according to Article 1 of the UN CRPD, the full and equal enjoyment of all human rights and fundamental freedoms by all persons with

disabilities is to be promoted, protected and ensured. Respect for their inherent dignity is also to be promoted. It is in this context that the referring court asks whether, in that regard, hiring a person to provide personal assistance includes the right to express wishes and make choices in terms of age. Here, too, the safeguards provided for in Articles 1, 7, 21 and 26 of the Charter could be of particular importance.

WORKING DOCUMENT