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Legal requisites for age thresholds in employer-funded pension plans (GE)

CONTRIBUTOR Othmar K. Traber*

Summary

The Federal Labour Court of Germany has continued to specify the requirements for the legality of age limits in employer-funded pension plans under German law. In this case, according to the Court, the employer could impose a maximum age of 55 as a requirement of entry to the company pension plan.

Facts

The female claimant was born in June of 1961 and had been employed by the defendant the trade union 'ver.di' since July 2016, the contract becoming one for an indefinite term as of November 2016. The employment contract was subject to the binding clauses of a works agreement (general works agreement on the reorganization of commitments to company pensions in ver.di, 'General Agreement'). According to this General Agreement and the 'Pension Regulations 1995', an employee of ver.di is only eligible to join the company pension plan if s/he has entered into employment with the company before their 55th birthday (Section 4(2) of the General Agreement and Section 2(1)(4) of the Pension Regulations 1995).

Referring to this General Agreement, the defendant refused the claimant's application to participate in the company pension plan as she was too old. The employee claimed that she was entitled to be included in the pension plan before the industrial tribunal of the city of Essen. The action was dismissed and was then also rejected by the Düsseldorf Labour Court of Appeal, after which the employee took the case to the Federal Labour Court of Germany (*Bundesarbeitsgericht*, 'BAG').

The claimant argued that the age restriction constituted a violation of Section 7(1) and Section 3 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). She asserted that the age restriction clause constituted both an unjustified direct discrimination based on age and an indirect discrimination based on sex, since women in Germany have on average a significantly shorter timespan in which they pay monthly contributions into the statutory retirement scheme.

Judgment

The BAG upheld the previous courts' dismissal of the case. It considered that the age restriction should be regarded as a direct discrimination within the scope of Section 7 AGG, but was however justified under Section 10 AGG, which contains certain objective justifications based on Article 6(2) of Directive 2000/78/EC. Section 10(1) AGG states that age-based discrimination can be justified if there is a legitimate aim and the measure in question can be considered as proportionate, i.e. as appropriate and necessary. According to the Court, these requirements have been further specified by the German legislature through Section 10(4) AGG, which stipulates that age-based discrimination is permitted when an age threshold is set by an employer regarding the entry of an employee into a company-based system of social security, which includes company pension plans.

According to the BAG, setting the age limit at 55 years of age was still within the justifiable boundaries of Section 10 AGG. By introducing Section 10(4) AGG, the German legislator had expressed the will that age limits for eligibility to a company pension plan can, basically, be considered to be objective and appropriate, unless the specific age limit is set so low that it must be seen as beyond any proportionality (Section 10(1) AGG). The Court also referred to one of its previous decisions concerning the same issue, in which it had ruled that even an age limit set at 50 is still 'just about' justified.

The setting of an age threshold is an expression of a legitimate goal. The Court interpreted the term 'legitimate goals' by referring to the examples stated in Article 6(1) of Directive 2000/78. It concluded that those goals which seek to grow the practice of company pension plans by striking a balance between the interests of all parties who are involved in such a plan are legitimate goals.

* Othmar Traber is a partner at Ahlers & Vogel, Bremen.

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An age limit also constitutes an appropriate measure by which such a balance can be achieved, because it seeks to take into consideration the legitimate interest of an employer to have a reliable and manageable basis for calculation. Concerning the implementation of a company pension plan, employers must have some freedom to design the plan according to their own judgement, which must be respected by the courts.
The defendants age limit is also 'necessary' according to Section 10(1) AGG, because it does not go beyond what is required to achieve the above-mentioned goal. An age limit of 55 also remains within the boundaries of what can be considered an appropriate balance between the contrary interests of the employee and the employer. That balance would only be violated if the timespan in which the employee is not eligible for the company pension plan constituted an inappropriately long part of his or her entire average working life. According to the Court, an age limit of 55 does not result in an inappropriately long part of the working life of an average adult being ineligible for entry into the pension plan.
The Court elaborated on the notion regarding the 'typical' estimated working life in Germany of around 40 years as well as a retirement age of 65. Based on these numbers, an age limit of 55 would give the average employee the opportunity to build up a sufficient pension beforehand for at least 30 years, i.e. during three quarters of the time available. The Court referred to data contained in official records from 2019, which estimated the timespan in which an average German pays into the statutory retirement scheme to be 39 years (36.5 years for women and 41.9 years for men).
Based on the above-stated numbers the Court also ruled that the setting of an age limit at 55 does not constitute an indirect discrimination of women, i.e. sex-based discrimination. The Court did take into consideration that the working life of a woman is often interrupted due to the raising of children. It stated that women, whose working life is interrupted for this reason, should still be able to enter a company pension plan after their maternity leave.
However, based on the necessary abstract consideration of this issue, the Court found that, typically, a woman will be reoccupied well before she has reached the age of 55, so the age limit will not prevent her from entering a pension plan. This led the Court to the assessment that an age limit of 55 does not justify the conclusion that women on average will be affected by that limit more often or more severely than men.
The Court also rejected the need for filing a preliminary ruling by the ECJ in this case. The interpretation of the Union law principle of the prohibition of discrimination on grounds of age on which the provisions of the General Equal Treatment Act are based had been clarified by the ECJ, so that there was no obligation to make a reference. A preliminary ruling on the interpretation of Article 6(2) of Directive 2000/78 was also not necessary because the age limit in Section 2(1)(4) of the company 'Pension Regulations 1995' was appropriate and proportionate in accordance with the requirements of Section 10(4) AGG, which is not based on EU law in this respect. Whether discrimination on grounds of age is objectively justified within the meaning of Article 6 of Directive 2000/78 is to be examined by the national courts.

Commentary

The legality of age thresholds for eligibility to a company pension plan has been a long-standing controversial issue in Germany. With this decision the Federal Labour Court has continued its relatively employer-friendly rulings. In the past it had already decided that even an age limit of 50 still 'barely' did not violate the prohibition of age-based discrimination. For example, this applied also to a clause which stipulated that an employee must be with a company for at least 15 years before being eligible to its company pension plan (BAG, 3 AZR 100/11). In contrast, a company pension plan which set an age limit at 45 did constitute an illegal age-based discrimination (BAG, 3 AZR 69/12).
In addition to the subject of age-based discrimination, the Court has also commented on the possibility of indirect sex-based discrimination. The senate concluded that an age limit of 55 does not affect men and women differently to the point where the difference becomes severe enough to no longer be justifiable. However, this argument can be challenged if an age limit is set low enough to cut off around half of the average woman's working life from eligibility into an employer-funded pension plan.
The Court has thus once again shed light on the question to what extent age limits may be set for occupational pension plans. Although the different employment biographies of women and men can certainly play a role, employers, if necessary, together with the social partners, have quite a lot of leeway as to whether they want to take these into account or not.

Comments from other jurisdictions

Austria (Andreas Tinhofer, Zeiler Floyd Zadkovich): In Austria Article 6(2) of Directive 2000/78/EC, which sets out the conditions under which Member States may allow a different treatment based on age, has been implemented almost literally by Section 20(3)-(5) of the Equal Treatment Act (*Gleichbehandlungsgesetz*, 'GlBG'). Section 20(5) GlBG provides that company pension schemes with an age limit do not constitute discrimination on the grounds of age.
However, Section 20(5) GlBG also makes an explicit reference to the prohibition of discrimination on the grounds of sex. Even if there is no case law yet dealing with this question in detail it seems likely that an age limit of 55 years would be accepted by the courts along

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these lines. The reasoning of the BAG applies equally to the Austrian situation, although the statistics regarding the working life of men and women may not be exactly the same.
But there is one important issue that applies to all defined contribution pension fund schemes: they can only perform properly if the contributions for the beneficiaries are paid for a rather long period. Otherwise, the risks that are inherent to the investment on the capital markets would be too high for a company pension scheme.

The Netherlands (Peter Vas Nunes): Article 6(1) of Directive 2000/78 allows Member States to "provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim […]". What types of aim are legitimate? The ECJ has repeatedly ruled that, in order to be legitimate, a provision that discriminates directly on grounds of age must have 'legitimate social policy' objectives, such as those related to employment policy and the labour market (ECJ 5 March 2009, C-388/07 (*Age Concern*)). The Court added that:

> By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.

Thus, the Directive provides for two distinct types of objective justification of age discrimination:
- Article 2(2)(b): indirect age discrimination may be justified by *any* legitimate objective.
- Article 6(1): direct age discrimination can only be justified by an objective that (i) is one of 'social policy' (ii) within the context of national law.

The Dutch Age Discrimination in Employment Act has not correctly transposed this part of the Directive. It allows both indirect *and direct* age discrimination to be justified by *any* legitimate objective. The German AGG seems to be similar.
Article 6(2) of the Directive contains an exception to Article 6(1). It allows Member States to provide "that the fixing for occupational social security schemes of ages for admission […] to retirement benefits […] does not constitute discrimination on the grounds of age […]". Until now, I had assumed that "ages for admission" refers to *minimum* ages. Many Dutch company pension schemes made use of this exception by providing that employees must have reached a certain age – 25 was quite common – before being able to join the scheme. Since 2008, the law provides that such an age for admission may not be above 21. Also, a service threshold may not exceed two months. Before being more or less fiscally outlawed, early retirement schemes frequently included an age threshold, 45 being quite common. These are all minimum age thresholds. This case report raises the question whether "ages for admission" may also refer to *maximum* ages. I do not know whether this was the intent of the Directive's drafters. Its recital clauses do not elucidate on this.
A Member State that makes use of the exception contained in Article 6(2) of the Directive may allow pension schemes to contain a maximum age threshold, even – as The Netherlands have done – *without* having to justify the direct discrimination that the threshold causes. Obviously, however, a Member State that makes use of Article 6(2) may limit the scope of the exception, for example by requiring the employer – as the German AGG seems to have done – to justify it.
Why would a company pension plan bar older employees from joining? In other words, what is the age threshold's objective? My guess is that the pension plan described in this case report is such that the ratio between the benefits and the contributions – from the employer's or the pension fund's point of view – worsens in relation to members' increasing age. In such a pension plan, an employee joining after a certain age – in this case, 55 – is, on average, likely to accrue (or become entitled to) more benefits than correspond with the contributions to be paid by or on behalf of him/her. This can, for example, be the case where the pension plan is of the 'defined benefit' type (particularly the 'final pay' variant that used to be common in The Netherlands until the 1980s), where the pension plan includes survivors' benefits (as is standard in The Netherlands) or where it includes some other form of benefit that on average disproportionally advantages older employees (such as continued contribution-free lifetime membership in the event of long-term disability, as is also standard in The Netherlands).
This case report is not specific on the objective of the age threshold at issue, merely stating that "the setting of an age threshold is an expression of a legitimate goal". If my guess regarding the type of pension plan is correct, the objective would seem to be, not only "the legitimate interest of the employer to have a reliable and manageable basis for calculation", as the report indicates, but also, and perhaps more relevantly, to avoid a disproportionate imbalance between benefits and contributions for the benefit of older employees and to the detriment of the younger staff. For a similar reason the Dutch non-funded early retirement ('VUT') schemes that were common until the 1980s limited admission to those schemes to employees who had been employed (and hence had contributed to the scheme) for a certain minimum length of time, usually ten years.

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