

Lastly, the ECJ clarifies that stand-by must be regarded as ‘working time’. The ECJ’s reasoning is as follows. It was not the first time that ECJ had to rule on stand-by time and it was apparent from prior case law that the determining factor for the classification of ‘working time’ within the meaning of the Working Time Directive was the requirement that the worker was physically present at the place determined by the employer and available to the employer to provide services immediately in case of need. In the case at hand, Mr Matzak was not only to be contactable during his stand-by time, he was also obliged to respond to calls from his employer within eight minutes and required to be physically present at the place determined by the employer. The Court considers that even if that place was Mr Matzak’s home and not his place of work, the obligation to remain physically present at the place determined by the employer and the geographical and temporal constraints resulting from the need to reach his place of work within eight minutes are such as to objectively limit the opportunities which a worker in Mr Matzak’s circumstances had to devote himself to his personal and social interests. In the light of those constraints, Mr Matzak’s situation differs from that of a worker who, during his stand-by duty, must simply be at his employer’s disposal inasmuch as it must be possible to contact him.

Ruling

Article 17(3)(c)(iii) of the Working Time Directive must be interpreted as meaning that the Member States may not derogate, with regard to certain categories of firefighters recruited by the public fire services, from all the obligations arising from the provisions of that directive, including Article 2 thereof, which defines, in particular, the concepts of ‘working time’ and ‘rest periods’.

Article 15 of the Working Time Directive must be interpreted as not permitting Member States to maintain or adopt a less restrictive definition of the concept of ‘working time’ than that laid down in Article 2 of that directive.

Article 2 of the Working Time Directive must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the prior classification of those periods as ‘working time’ or ‘rest period’.

Article 2 of the Working Time Directive must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within eight minutes, very significantly restricting the opportunities for other activities, must be regarded as ‘working time’.

ECJ 28 February 2018, case C-46/17 (John), Fixed-term work

Hubertus John – v – Freie Hansestadt Bremen,
German case

Summary

The Framework Agreement on fixed-term work and the Equal Treatment (Framework) Directive do not forbid a provision that allows parties to postpone the operation of a retirement age clause in employment periods for fixed time, even if this means that they can be extended infinitely.

Legal background

The Framework Agreement on fixed-term work of 18 March 1999, which is an Annex to Council Directive 1999/70/EC contains certain provisions on fixed-term work. Clause 3 defines a fixed-term worker as an employee for whom the end of the employment contract end is based on objective conditions, such as a specific date, completing a specific task, or the occurrence of a specific event. Clause 4(1) provides that fixed-term workers shall not be treated unfavourably compared to permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Clause 5(1) provides that EU Member States shall take measures to limit the use of fixed-term contracts, such as having objective reasons for renewal, a maximum total duration of successive fixed-term contracts, or a maximum number of renewals. Following Clause 5(2), Member States must also determine under what conditions fixed-term contracts shall be regarded as “successive” and therefore be deemed contracts of indefinite duration.

Directive 2000/78/EC (the ‘Equal Treatment Directive’) establishes a general framework for equal treatment in employment and occupation. Articles 2(1) and 2(2) forbid direct and indirect discrimination, in the case of the latter, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Article 6(1) provides *inter alia* that Member States may 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, including there being legitimate employment policy, labour market or vocational training objectives, and the means of achieving that aim are appropriate and

necessary. These differences of treatment may include dismissal conditions.

German law provides that if an agreement provides for the termination of the employment relationship upon reaching the normal retirement age, the parties to the employment contract may postpone the termination date by agreement during the employment relationship, including on more than one occasion, if necessary.

Facts and national proceedings

Mr John was a teacher in service of the Free Hanseatic City of Bremen. His employment contract was subject to a collective agreement which contained a clause to the effect that employment contracts end upon the employee reaching retirement age. Mr John would retire at the end of the 2014/15 school year but asked an extension of a year (by means of a fixed-term contract), which was granted. He then asked for another extension, which his employer refused.

Mr John then brought proceedings against his employer, claiming that his fixed-term contract based on the provision at issue would be contrary to European law and that this extension in fact had been for an indefinite period. The referring *Landesarbeitsgericht Bremen* (Regional Employment Court) was unsure whether the provision in the collective agreement was consistent with the Framework Agreement and the Equal Treatment Directive, as it doubted if a retirement clause could make an employment contract for a fixed-term extend infinitely. For the same reasons, it thought that the provision in the collective agreement could infringe the Equal Treatment Directive. The court therefore decided to stay proceedings and ask preliminary questions to the ECJ.

Questions to the ECJ⁹

Must Article 2(2) and Article 6(1) of Directive 2000/78 be interpreted as precluding a national provision, such as that at issue in the main proceedings, insofar as it makes the postponement of the date of termination of the employment of workers having reached the legal qualifying age for a retirement pension subject to the consent of the employer, for a fixed term?

Must Clause 5(1) of the Framework Agreement be interpreted as meaning that it precludes a national provision, such as that at issue in the main proceedings, insofar as it allows the parties to an employment contract, without additional requirements, indefinitely to postpone, by common agreement during the employment relationship, including on more than one occasion if necessary, the date of termination of the employment

relationship, related to reaching the normal retirement age, simply because the worker, by reaching normal retirement age is entitled to a pension?

ECJ's findings

As regards the first question, the Equal Treatment Directive is without prejudice to national provisions on retirement ages. They must take account of the impairment of performance of workers which generally occurs with age, as well as the desire and the need of older workers to use their free time as they wish. Retirement age clauses are widely used in Member States. It is a mechanism based on a balance of various considerations (e.g. political, economic and social) and the choice between prolonging people's working lives or taking early retirement. In *Rosenbladt* (C-45/09), a similar provision had not been deemed to go beyond what was necessary to reach the objectives pursued.

The provision at issue is not the retirement age clause, but the provision that allow parties to postpone termination indefinitely. The German government argues that any extension of an employment contract should require mutual agreement between the employer and employee and this was included at the request of the social partners. It applies to employees who need to make a choice between extending their employment relationship and ending their working life. It argues that it is a good thing for mutual consent to be required, as it means the outcome will not be considered unfavourable within the meaning of Article 2(2) of the Equal Treatment Directive.

As regards the second question, the German government argued that the issue fell outside the scope of the Framework Directive. A retirement age clause does not make an employment contract a fixed-term contract. Retirement clause are not intended to establish short employment relationships; in fact these employment relationships can last decades. Equally, the postponement of retirement cannot be deemed to be a new fixed-term employment contract. However, the referring court stated that including a retirement age in a contract results in it being a fixed term contract.

The ECJ noted that the contracts and employment relationships to which the Framework Agreement applies are not governed by it or by EU law, but by national law and practice. Retirement age clauses are widely used in Member States and employment contracts which are terminated by retirement clauses may already have lasted decades (as argued by the German government). Moreover, it is possible that the postponement provided is merely regarded as a contractual postponement of the retirement age.

If the German court holds that a postponement of the retirement age must be considered an employment con-

9. As rephrased and re-ordered by the ECJ.

tract for a fixed term, whether this infringes Clause 5(1) of the Framework Agreement must be considered. Member States must implement at least one of the three measures in that article. As regards the concept of ‘objective reasons’ within the meaning of Clause (5)(1) (a) of the Framework Agreement, this must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that context of justifying the use of successive fixed-term employment contracts. Those circumstances may result from the nature of the job and its inherent characteristics or, possibly, from the pursuit of a legitimate socio-policy objective of a Member State.

An employee who reaches the retirement age is generally at the end of his or her working life and does not normally have the option of an indefinite term contract to consider as an alternative to a fixed term contract. Moreover, any extension needs the agreement of the parties, so that it can be extended on the same terms, without the employee losing his or her pension rights. This also cannot be a reason against extending the retirement age.

Ruling

Article 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding a national provision such as that at issue in the main proceedings, to the extent that it makes the postponement of the date of termination of employment of workers who have reached the legal qualifying age for a retirement pension subject to the agreement of employer, for a fixed term.

Clause 5(1) of Framework agreement on fixed-term work concluded on 18 March 1999, in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, insofar as it permits the parties to a contract of employment, without additional requirements, indefinitely to postpone, by common agreement during the course of the employment relationship, including on more than one occasion if necessary, the agreed date of termination related to reaching the normal retirement age, simply because that worker, by reaching the normal retirement age, is entitled to a retirement pension.