ECLI:EU:C:2017:566

Provisional text

JUDGMENT OF THE COURT (First Chamber)

19 July 2017 (*)

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 2(1) — Article 2(2)(a) — Article 6(1) — Age discrimination — On-call employment contract which may be concluded with persons under 25 years of age — Automatic termination of the employment contract when the worker reaches 25 years of age)

In Case C-143/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 15 December 2015, received at the Court on 9 March 2016, in the proceedings

Abercrombie & Fitch Italia Srl

v

Antonino Bordonaro,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev (Rapporteur), C.G. Fernlund and S. Rodin, Judges,

Advocate General: M. Bobek,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2017,

after considering the observations submitted on behalf of:

– Abercrombie & Fitch Italia Srl, by G. Di Garbo, G. Brocchieri, G. Iorio Fiorelli and E. Ceracchi, avvocati,

– Mr Bordonaro, by A. Guariso, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. De Socio, avvocato dello Stato,

– the European Commission, by D. Martin and G. Gattinara, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1), Article 2(2)(a) and Article 6(1) of 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), and of Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Abercrombie & Fitch Italia Srl ('Abercrombie') and Mr Antonino Bordonaro concerning the termination of his on-call employment contract on the sole ground that he had reached 25 years of age.

Legal context

EU law

3 Article 1 of Directive 2000/78 states that 'the purpose of this directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

4 Article 2 of that directive provides:

'1. For the purposes of this directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...'

5 Article 6(1) of that directive is worded as follows:

'1. Notwithstanding Article 2(2), 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 legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

...'

Italian law

6 Article 34 of decreto legislativo n. 276 — Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n. 30 (Legislative Decree No 276 on the application of delegations in matters relating to employment and the labour market laid down by Law No 30 of 14 February 2003) of 10 September 2003 (Ordinary Supplement to GURI No 235 of 9 October 2003, p. 5; 'Legislative Decree No 276/2003'), in the version in force at the date of conclusion of the contract between Abercrombie and Mr Bordonaro, namely 14 December 2010, provided:

'1. An on-call employment contract may be concluded for the performance of services of a discontinuous or intermittent nature in accordance with the requirements specified in the collective agreements established by the employers' and employees' associations that are most representative at national or territorial level, for predetermined periods in the course of a week, month or year within the meaning of Article 37.

2. An on-call employment contract may, in all circumstances, be concluded in respect of services provided by persons under 25 years of age or by workers over 45 years of age, including pensioners.

...'

7 Article 34(2) of Legislative Decree No 276/2003, in the version in force at the time of Mr Bordonaro's dismissal, provided:

'An on-call employment contract may, in all circumstances, be concluded with persons over 50 years of age and with persons under 24 years of age, on the understanding, in the latter case, that the contractual services must be performed before the age of 25 is reached.'

8 Article 34 of Legislative Decree No 276/2003 was repealed by decreto legislativo n. 81 (Legislative Decree No 81) of 15 June 2015 (Ordinary Supplement to GURI No 144 of 24 June 2015). However, its provisions were repeated, in essence, in Article 13 of the latter legislative decree, pursuant to which:

'1. An on-call employment contract is a contract, also a fixed-term contract, under which a worker makes himself available to an employer to perform services of a discontinuous or intermittent nature in accordance with the requirements specified in the collective agreements, also for predetermined periods in the course of a week, month or year, In the absence of a collective agreement, a decree of the Minister for Employment and Social Policy shall determine the situations where on-call work may be used.

2. An on-call employment contract may, in all circumstances, be concluded with persons under 24 years of age, with the proviso that the contractual services must be performed before the age of 25 is reached, and persons over 55 years of age.

3. In any event, with the exception of the tourism, public venue and performance sectors, on-call employment contracts are permitted, for any worker with the same employer, for a total period not exceeding 400 days actually worked within three calendar years. If that period is exceeded, the contractual relationship becomes one of full-time employment for an indefinite period.

4. During the periods not worked, an on-call worker is not entitled to remuneration or any other right derived from the employment relationship unless he has given an undertaking to the employer to remain available to it on call, in which case he shall receive an availability payment provided for in Article 16.

5. The provisions of this section shall not apply to employment relationships within public administrations.'

9 Article 38 of Legislative Decree No 276/2003 provides:

'1. Without prejudice to the prohibition of direct and indirect discrimination laid down in the legislation in force, an economic and regulatory system which is less favourable overall than that covering a worker at an equivalent level for equal work shall not be applied to an on-call worker in respect of the periods worked.

2. The economic, regulatory and social protection system of an on-call worker shall be proportionate, according to the employment services actually supplied, in particular as regards the amount of the overall remuneration and of each of its components and the vacation leave, leave in respect of sickness, industrial accident or industrial disease, maternity and parental leave.

...'

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Mr Bordonaro was employed by Abercrombie from 14 December 2010 on a 'fixed-term employment contract', which was converted on 1 January 2012 into a contract for an indefinite period, in order to perform night warehouseman tasks. The contract provided that he must, on an on-call basis, upon each request to that effect from the undertaking, 'provide assistance to clients and operate a till'.

11 Mr Bordonaro worked at night four to five times per week for the first months of his employment then, from 2011, between three and four times per week. The working shifts were allocated among all the staff in accordance with a two-monthly work schedule. After realising that his name was no longer included in the work schedule following that which ended on 16 July 2012 and not having received any fresh requests to carry out work, Mr Bordonaro contacted the Human Resources department of Abercrombie. By email of 30 July 2012, the head of that department informed him that his employment contract with Abercrombie had ended on 26 July 2012, the day of his 25th birthday, since, from that date, 'the age requirement [was] no longer satisfied'.

12 Mr Bordonaro brought an action before the Tribunale di Milano (District Court, Milan, Italy) seeking a ruling that his on-call, fixed term contract and his dismissal were unlawful as a result of age discrimination. Since the Tribunale di Milano (District Court, Milan) declared the action inadmissible, Mr Bordonaro appealed to the Corte d'appello di Milano (Court of Appeal, Milan, Italy) which, by judgment of 3 July 2014, held that there was an employment relationship of an unlimited duration and ordered Abercrombie to reinstate him in his post and to compensate him for the loss suffered.

13 Abercrombie appealed on a point of law against that judgment to the Corte suprema di cassazione (Supreme Court of Cassation, Italy). Mr Bordonaro lodged a cross-appeal.

14 The referring court entertains doubts as to the compatibility of Article 34(2) of Legislative Decree No 276/2003, in the versions applicable to the main proceedings, with Directive 2000/78 and the principle of non-discrimination on grounds of age. It notes in particular that that provision does not appear to contain any appropriate express reason for the purposes of Article 6(1) of that directive.

15 In those circumstances, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the rule of national law set out in Article 34 of Legislative Decree No 276/2003, according to which an on-call employment contract may, in all circumstances, be concluded in respect of services provided by persons under 25 years of age, contrary to the principle of non-discrimination on grounds of age referred to in Directive 2000/78 and Article 21(1) of the Charter?'

Consideration of the question referred

16 By its question referred for a preliminary ruling, the referring court asks, in essence, whether Article 21 of the Charter and Article 2(1), Article 2(2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years.

17 As a preliminary point, it must be noted that, where they adopt measures which come within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, now enshrined in Article 21 of the Charter, the Member States and the social partners must respect that directive (judgments of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, point 48; of 11 November 2014, *Schmitzer*, C-530/13, EU:C:2014:2359, paragraph 23; and of 21 December 2016, *Bowman*, C-539/15, EU:C:2016:977, paragraph 19).

18 It is thus, in the first place, necessary to consider whether a provision, such as that at issue in the main proceedings, introduces a difference in treatment on grounds of age, for the purposes of Article 2 of Directive 2000/78. In that regard, it should be borne in mind that, under that provision, the 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive. Article 2(2)(a) of Directive 2000/78 states that, for the purposes of applying Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1.

19 As regards, first of all, the question, raised by the European Commission, of whether Mr Bordonaro may be classified as a 'worker' within the meaning of Article 45 TFEU, it must be recalled that according to consistent case-law of the Court, that concept has a specific independent meaning and must not be interpreted narrowly. So, any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (judgments of 3 July 1986, *Lawrie-*

Blum, 66/85, EU:C:1986:284, paragraphs 16 and 17; of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172, paragraph 26; and of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraph 23).

20 The overall assessment of Mr Bordonaro's employment relationship makes it necessary to take into account factors relating not only to the number of working hours and the level of remuneration but also to the right to paid leave, to the continued payment of wages in the event of sickness, to a contract of employment which is subject to the relevant collective agreement, to the payment of contributions and, as appropriate, the type of those contributions (see, to that effect, judgment of 4 February 2010, *Genc*, C-14/09, EU:C:2010:57, paragraph 27).

21 In that regard, it must be borne in mind that Mr Bordonaro was employed on 14 December 2010 on the basis of an on-call, fixed-term employment contract in order to perform, at each request to that effect from Abercrombie, the work of a night warehouseman. As is clear from the file before the Court, he worked at night four to five times per week for the first months of his employment then, as from 2011, between three and four times per week. Furthermore, at the hearing before the Court, Mr Bordonaro stated that he was in the same situation as 400 other Abercrombie employees, whose contract was governed by collective agreements.

22 It is thus clear that, having regard to the conditions under which it was performed, the accuracy of which it is for the referring court to ascertain, Mr Bordonaro's work cannot be regarded as being purely marginal and ancillary, within the meaning of the case-law cited in paragraph 19 of this judgment.

23 It is therefore probable that the employment contract held by Mr Bordonaro is such as to allow him to assume the status of 'worker' within the meaning of Article 45 TFEU. It is for the national court, which is the only court with detailed and direct knowledge of the dispute in the main proceedings, to assess whether that is the case.

24 Next, it is necessary to examine whether Mr Bordonaro is entitled to claim to have been treated differently because of his age.

25 With regard to the requirement relating to comparable situations, it must be pointed out that, on the one hand, it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned (judgment of 12 December 2013, *Hay*, C-267/12, EU:C:2013:823, paragraph 33 and the case-law cited).

26 In the present case, it must be noted that Article 34 of Legislative Decree No 276/2003 established two different regimes as regards not only access to and conditions of employment but also the dismissal of on-call workers on the basis of the age category to which those workers belong. While, in the case of workers aged 25 years or more and up to 45 years, an on-call employment contract may be concluded only with

a view to the performance of services of a discontinuous or intermittent nature in accordance with the requirements specified in the collective agreements and for predetermined periods, the conclusion of such an on-call employment contract in the case of workers aged under 25 years or over 45 years is not subject to any of those conditions and may be used 'in all circumstances', with the stipulation, as the Italian Government stated at the hearing, that contracts concluded with workers aged under 25 years automatically come to an end when those workers reach the age of 25 years.

27 Accordingly, for the application of provisions such as those at issue in the main proceedings, the situation of a worker who is dismissed for the simple fact that he has reached the age of 25 years is objectively comparable to that of workers in other age categories.

28 Thus, it must be held that the provision at issue in the main proceedings, in so far as it provides that an on-call contract may be concluded 'in all circumstances' with a worker of under 25 years of age and comes to an end automatically when that worker reaches the age of 25 years, creates a difference of treatment on grounds of age, for the purposes of Article 2(2)(a) of Directive 2000/78.

29 It is necessary, secondly, to examine whether that difference in treatment can be justified.

30 In that regard, the first subparagraph of Article 6(1) of Directive 2000/78 provides 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 legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

31 It must be borne in mind that the Member States enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (judgment of 11 November 2014, *Schmitzer*, C-530/13, EU:C:2014:2359, paragraph 38 and the case-law cited).

32 With regard to whether the provision at issue in the main proceedings is justified by a legitimate aim within the meaning of Article 6(1) of Directive 2000/78, it is apparent from the observations of the Italian Government that that provision forms part of a legal framework intended to make the employment market more flexible and thus to increase employment levels.

33 With regard, in particular, to the category of workers aged under 25 years, it is apparent from the observations of the Italian Government that the possibility granted to employers to conclude, 'in all circumstances', an on-call employment contract and to terminate that contract when the worker in question reaches the age of 25 years is intended to facilitate the entry of young people to the labour market. That government pointed out that, on a labour market in difficulty such as the Italian market, the lack of

professional experience is a factor which hampers young people. Moreover, the possibility of entering the world of work and of acquiring experience, even if it is flexible and limited in time, could constitute a springboard towards new employment opportunities.

34 At the hearing, the Italian Government stated that the main and specific aim of the provision at issue in the main proceedings is not to give young people stable access to the labour market, but merely to give them an initial opportunity of entering it. By that provision, the intention is to give them an initial experience capable subsequently of placing them in a favourable competitive position on the labour market. Thus, that provision concerns a stage prior to that of full access to the labour market.

35 It must be noted that those considerations connected with access to the labour market and mobility are applied to young people who are looking for a first job, namely one of the categories of the population particularly vulnerable to a risk of social exclusion. At the hearing, the observation was made on behalf of Mr Bordonaro himself that the employment level of young people, that being understood as the age category of between 15 and 25 years, fell from 51% to 39% between 2004 and 2016.

36 It must be recalled that, in accordance with point (a) of the second subparagraph of Article 6(1) of Directive 2000/78, differences in treatment may be 'the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection'.

37 Furthermore, encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved (judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraph 49 and the case-law cited).

38 Similarly, the Court has held that the objective of promoting the position of young people on the labour market in order to promote their vocational integration or ensure their protection can be regarded as legitimate for the purposes of Article 6(1) of Directive 2000/78 (judgment of 10 November 2016, *de Lange*, C-548/15, EU:C:2016:850, paragraph 27). It has been held that the facilitation of recruitment of younger workers by increasing the flexibility of personnel management constitutes a legitimate aim (see, to that effect, judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraphs 35 and 36).

39 In those circumstances, it must be held that, in so far as it is intended to facilitate the entry of young people to the labour market, the national provision at issue in the main proceedings pursues a legitimate aim for the purposes of Article 6(1) of Directive 2000/78.

40 Accordingly, it is necessary to examine whether the means used to attain that objective are appropriate and necessary.

41 As regards the appropriateness of a provision such as that at issue in the main proceedings, it must be noted that a measure which authorises employers to conclude less rigid employment contracts may, having regard to the broad discretion enjoyed by the Member States in that area, be considered as being appropriate to achieve a degree of flexibility on the labour market. The view may be taken that undertakings may be encouraged by the existence of an instrument less onerous and costly than the usual contract and thus be prompted to respond more to job applications from young workers.

42 As regards the necessity of the provision at issue in the main proceedings, it must be observed, as Abercrombie submits, that, in a context of a persistent economic crisis and weak growth, the situation of a worker aged under 25 years who, thanks to a flexible and temporary employment contract, can access the labour market is preferable to the situation of someone who does not have such a possibility and who, as a result, is unemployed.

43 Moreover, the Italian Government explained at the hearing that those forms of flexible work are necessary to facilitate workers' mobility, increase the adaptability of employees to the labour market and give access to that market to persons in danger of social exclusion, while eliminating forms of illegal work.

44 That government also pointed out at the hearing that it is necessary, in order to achieve the aim pursued by the national provision at issue in the main proceedings, that the greatest possible number of young people should have access to that type of contract. If the employment contracts concluded in accordance with Article 34(2) of Legislative Decree No 276/2003 were stable, undertakings would not be in a position to offer work to all young people, so that a large number of young people would not have the opportunity to have access to those forms of employment.

45 Furthermore, the Italian Government observed that the measure at issue in the main proceedings is accompanied by a number of guarantees. Thus, Article 38 of Legislative Decree No 276/2003 provides that 'an economic and regulatory system which is less favourable overall than that covering a worker at an equivalent level for equal work shall not be applied to an on-call worker in respect of the periods worked'.

46 In those circumstances, in the light of the broad discretion enjoyed by Member States in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it, the view must be taken that it was reasonable for the national legislature to regard as necessary the adoption of a provision such as Article 34(2) of Legislative Decree No 276/2003.

47 Having regard to the foregoing considerations, the answer to the question referred must be that Article 21 of the Charter and Article 2(1), Article 2(2)(a) and Article 6(1) of

Directive 2000/78 must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1), Article 2(2)(a) and Article 6(1) 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 provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

[Signatures]

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* Language of the case: Italian.