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JUDGMENT OF THE COURT (First Chamber)

28 July 2016(*)

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 3(1)(a) — Directive 2006/54/EC — Equal opportunities and equal treatment between men and women in matters of employment and occupation — Article 14(1)(a) — Scope — Definition of ‘access to employment, to self-employment or to occupation’ — Application for a post for the purpose of acquiring the formal status of applicant only in order to claim compensation for discrimination — Abuse of rights)

In Case C-423/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 18 June 2015, received at the Court on 31 July 2015, in the proceedings

Nils-Johannes Kratzer

v

R+V Allgemeine Versicherung AG,

THE COURT (First Chamber),

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

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Kratzer, in person,
- R+V Allgemeine Versicherung AG, by B. Göpfert, Rechtsanwalt,
- the German Government, by T. Henze and A. Lippstreu, acting as Agents,
- the United Kingdom Government, by M. Holt, acting as Agent, and by K. Apps, Barrister,
- the European Commission, by M. Kellerbauer and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1)(a) 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 Article 14(1)(a) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The reference has been made in proceedings between Mr Nils-Johannes Kratzer and R+V Allgemeine Versicherung AG (‘R+V’) concerning his claims for compensation for material damage and injunctive relief brought on the ground that he had suffered discrimination by reason of his age and sex because of the rejection by R+V of his application for a post which had been advertised.

Legal context

EU law

Directive 2000/78

3 Article 1 of Directive 2000/78 provides:

‘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 3(1) of that directive provides:

‘Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...’

5 Article 17 of the directive is worded as follows:

‘Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.
...’

Directive 2006/54

6 Article 1 of Directive 2006/54 provides:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

...’

7 Under Article 14(1) of that directive:

‘There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...’

8 Article 18 of that directive is worded as follows:

‘Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. ...’

9 Article 25 of that directive reads:

‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. ...’

German law

10 Paragraph 1 of the Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897), in the version applicable to the dispute in the main proceedings (‘the AGG’), provides:

‘The objective of this Law is to prevent or eliminate any discrimination on the grounds of race, ethnic origin, gender, religion or belief, disability, age or sexual identity.’

11 Paragraph 2(1) of the AGG provides:

‘Discrimination on one of the grounds listed in Paragraph 1 is prohibited under this law as regards:

1. conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion,

...’

12 Paragraph 6(1) of the AGG states:

‘For the purposes of the present law “employees” are:

1. workers,

...

“Employee” shall also refer to job applicants and persons whose employment relationship has ended.’

13 Under Paragraph 7(1) of the AGG:

‘Employees must not be discriminated against on a ground mentioned in Paragraph 1; this also applies where the person responsible for the discrimination merely assumes, when exercising the discrimination, that one of the grounds given in Paragraph 1 exists.’

14 Paragraph 15(1) and (2) of the AGG is worded as follows:

‘1. Where there is a breach of the prohibition of discrimination, the employer shall be required to make good the damage caused thereby. This shall not apply if the employer is not responsible for the breach of obligations.

2. The employee may claim appropriate financial compensation for non-pecuniary damage. In the event of non-recruitment, the compensation shall not exceed three months’ salary if the employee would not have been recruited even if the selection had been free from discrimination.’

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

15 In March 2009, R+V advertised a trainee positions for graduates in the fields of economics, mathematical economics, business informatics and law.

16 The criteria set out in that advertisement were possession of a very good university degree in one of the fields specified, either completed within the last year or to be completed in the coming months, and relevant practical vocational experience acquired, for example, as an apprentice, trainee or ‘student worker’. Applicants in the legal field were required to have passed both state examinations and an employment law option or medical knowledge.

17 Mr Kratzer applied for a trainee position in the legal field emphasising that he fulfilled not only all the requirements set out in the advertisement but that, as a lawyer and former manager with an insurance company, he had management experience and was used to taking on responsibility and working independently. He also stated that he was attending a training course to become a lawyer specialised in employment law and that, owing to the death of his father, he had dealt with a very large medical law file and, therefore, had extensive experience in that field.

18 On 19 April 2009, R+V rejected Mr Kratzer’s application stating that it was currently unable to offer him a post.

19 On 11 June 2009, Mr Kratzer sent a written complaint to R+V in which he demanded compensation of EUR 14 000 for age discrimination.

20 R+V then invited Mr Kratzer to an interview at the beginning of July 2009 with its head of human resources, stating that the rejection of his application had been automatically generated and was not in line with its intentions.

21 Mr Kratzer declined that invitation and suggested a discussion of his future with R+V once his compensation claim had been satisfied.

22 He brought an action seeking compensation of EUR 14 000 for age discrimination before the Arbeitsgericht Wiesbaden (Wiesbaden Labour Court, Germany). Having then learnt that R+V had awarded the four trainee posts to women only, although the sixty-plus applicants for those posts were divided almost equally between men and women, Mr Kratzer claimed further compensation of EUR 3 500 for discrimination on grounds of sex.

23 After the Arbeitsgericht Wiesbaden (Wiesbaden Labour Court) dismissed his action, Mr Kratzer appealed against that decision to the Hessisches Landesarbeitsgericht (Hesse Regional Labour Court, Germany) which in turn dismissed Mr Kratzer's appeal.

24 Mr Kratzer then brought an appeal on a point of law before the referring court.

25 It is in those circumstances that the Bundesarbeitsgericht (Federal Labour Court, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. On a proper interpretation of Article 3(1)(a) of Directive 2000/78 and Article 14(1)(a) of Directive 2006/54, does a person who, as is clear from his application, is seeking not recruitment and employment but merely the status of applicant in order to bring claims for compensation also qualify as seeking “access to employment, to self-employment or to occupation”?’

If the answer to the first question is in the affirmative:

Can a situation in which the status of applicant was obtained not with a view to recruitment and employment but for the purpose of claiming compensation be considered as an abuse of rights under EU law?’

Consideration of the questions referred

26 By its questions, which it is helpful to consider together, the referring court asks, in essence, whether Article 3(1)(a) of Directive 2000/78 and Article 14(1)(a) of Directive 2006/54 must be interpreted as meaning that a situation in which a person who, by presenting his application for a post, seeks to obtain not that post but only the formal status of applicant with the sole purpose of claiming compensation, falls within the concept of ‘access to employment, to self-employment or to occupation’, within the meaning of those provisions, and whether, under EU law, such a situation may be considered to be an abuse of rights.

27 It should be noted that, in accordance with the settled case-law of the Court, in a reference for a preliminary ruling under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case in the main proceedings (see, *inter alia*, judgment of 25 October 2012 in *Rintisch*, C-553/11, EU:C:2012:671, paragraph 15). In that context, the Court is empowered to rule on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (see, *inter alia*, judgment of 9 November 2006 in *Chateignier*, C-346/05, EU:C:2006:711, paragraph 22).

28 Consequently, it is on the basis of the facts indicated by the Bundesarbeitsgericht (Federal labour Court) in its decision to refer that the questions referred by that court must be answered.

29 In that regard, it is apparent from that decision that the dispute in the main proceedings is characterised by the fact that Mr Kratzer's application for a trainee position with R+V was not submitted with a view to obtaining that position but only with a view to obtaining the formal status of an applicant with the sole purpose of claiming compensation on the basis of Directives 2000/78 and 2006/54.

30 A factual situation with characteristics such as those described in the abovementioned decision is, in principle, outside the scope of Directives 2000/78 and 2006/54.

31 It should be noted that, according to the actual wording of the titles of those directives, they concern employment and occupation.

32 According to settled case-law of the Court, it is apparent from both its title, preamble, content and purpose that Directive 2000/78 seeks to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which include age (see, *inter alia*, judgments of 16 October 2007 in *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 42; of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 39; and of 13 November 2014 in *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 28).

33 Regarding Directive 2006/54, its purpose, in accordance with the first paragraph of Article 1 thereof, is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

34 In particular, it follows from Article 3(1)(a) of Directive 2000/78 and indent (a) of the second subparagraph of Article 1 and Article 14(1)(a) of Directive 2006/54 that those directives apply to a person seeking employment, and also in regard to the selection criteria and recruitment conditions of that employment (see judgment of 19 April 2012 in *Meister*, C-415/10, EU:C:2012:217, paragraph 33).

35 However, a person making an application for a post in circumstances such as those described at paragraph 29 of the present judgment clearly is not seeking to obtain the post for which he formally applies. That person cannot, therefore, rely on the protection offered by Directives 2000/78 and 2006/54. A contrary interpretation would be incompatible with the objective pursued by those directives, which is to ensure equal treatment ‘in employment and occupation’ to all persons by offering them effective protection against certain forms of discrimination, in particular concerning ‘access to employment’.

36 Furthermore, such a person cannot, in those circumstances, be regarded as a ‘victim’ within the meaning of Article 17 of Directive 2000/78 and Article 25 of Directive 2006/54 or a ‘person injured’ having sustained ‘loss’ or ‘damage’, within the meaning of Article 18 of Directive 2006/54.

37 Moreover, according to settled case-law of the Court, EU law cannot be relied on for abusive or fraudulent ends (see judgment of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 29 and the case-law cited).

38 A finding of an abusive practice requires a combination of objective and subjective elements (see judgment of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 31).

39 First, with regard to the objective element, such a finding requires that it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved (see judgments of 14 December 2000 in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 52, and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 32).

40 Second, such a finding requires a subjective element, namely that it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage (see judgments of 21 February 2006 in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 75; of 22 December 2010 in *Weald Leasing*, C-103/09, EU:C:2010:804, paragraph 30; and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33).

41 In order to establish the existence of the second element, which relates to the intention of operators, account may be taken, in particular, of the purely artificial nature of the transactions concerned (see, to that effect, judgments of 14 December 2000 in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 53 and 58; of 21 February 2006 in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 81; of 21 February 2008 in *Part Service*, C-425/06, EU:C:2008:108, paragraph 62; and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33).

42 It is for the national court to verify, in accordance with the rules of evidence of national law, provided the effectiveness of EU law is not undermined, whether the factors constituting an abusive practice are present in the case before it (see judgments of 14 December 2000 in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 54; of 21 July 2005 in *Eichsfelder Schlachtbetrieb*, C-515/03, EU:C:2005:491, paragraph 40; of 21 February 2006 in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 76; and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 34).

43 In that regard, if it appears objectively, first, that despite formal compliance with the conditions laid down in Directives 2000/78 and 2006/54 the objective pursued by those directives has not been achieved and, second, that Mr Kratzer applied artificially for a post with the essential aim of not actually taking up that post but of relying on the protection offered by those directives with a view to obtaining an undue advantage, which is for the national court to determine, it would then have to be considered that Mr Kratzer is relying abusively on that protection.

44 In those circumstances, the answer to the questions referred is that Article 3(1)(a) of Directive 2000/78 and Article 14(1)(a) of Directive 2006/54 must be interpreted as meaning that a situation in which a person who in making an application for a post does not seek to obtain that post but seeks only the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of ‘access to employment, to self-employment or to occupation’, within the meaning of those provisions, and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights.

Costs

45 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 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Article 14(1)(a) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, must be interpreted as meaning that a situation in which a person who in making an application for a post does not seek to obtain that post but only seeks the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of ‘access to employment, to self-employment or to occupation’, within the meaning of those provisions, and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights.

[Signatures]

* Language of the case: German.
