

## ORDER OF THE COURT (Tenth Chamber)

7 February 2018 (\*)

(References for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Social policy — Equal treatment of men and women in matters of employment and occupation — Directive 2006/54/EC — National rules providing for the temporary possibility for performing artists having reached retirement age to continue to perform until the age previously laid down for entitlement to a pension, fixed at 47 years old for women and 52 years old for men)

In Joined Cases C-142/17 and C-143/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Court of Cassation, Italy), made by decisions of 15 February 2017, received at the Court on 20 March 2017, in the proceedings

**Manuela Maturi,**

**Laura Di Segni,**

**Isabella Lo Balbo,**

**Maria Badini,**

**Loredana Barbanera**

v

**Fondazione Teatro dell’Opera di Roma,**

and

**Fondazione Teatro dell’Opera di Roma**

v

**Manuela Maturi,**

**Laura Di Segni,**

**Isabella Lo Balbo,**

**Maria Badini,**

**Loredana Barbanera,**

**Luca Troiano,**

**Mauro Murri (C-142/17),**

and

**Catia Passeri**

v

**Fondazione Teatro dell’Opera di Roma (C-143/17),**

## THE COURT,

composed of E. Levits, President of the Chamber, A. Borg Barthet and M. Berger (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

**Order**

- 1 These requests for a preliminary ruling concern the interpretation 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) and Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The requests have been made in proceedings between, inter alia, several workers employed as dancers in the Fondazione Teatro dell'Opera di Roma ('the Foundation') concerning their dismissal on the ground that they had reached the working age limit.

**Legal context***European Union law*

- 3 Article 1 of Directive 2006/54, entitled 'Purpose', 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;
- (b) working conditions, including pay;
- (c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

- 4 Article 2 of that directive, entitled 'Definitions', is worded as follows:

'1. For the purposes of this Directive, the following definitions shall apply:

- (a) 'direct discrimination': where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;
- (b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

...'

5 Article 3 of Directive 2006/54, headed 'Positive action', provides:

'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.'

6 Article 14(1)(c) of Directive 2006/54 reads as follows:

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

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty.'

### *Italian law*

7 According to Italian law, a worker who has reached retirement age may be dismissed 'ad nutum' by his employer, that is without his employer being required to give reasons for that dismissal.

8 According to the referring court, the retirement age for workers in the performing arts sector, in the category for dancers, was 47 years old for women and 52 years old for men. It explains that Article 3(7) of Decree-Law No 64 of 30 April 2010, converted into Law No 100, of 29 June 2010, in the version in force at the material time ('Decree-Law No 64/2010'), changed those age limits for workers of both sexes, setting a common working age limit at 45 years old.

9 That provision also introduced a transitional option for the benefit of those workers, applicable for a period of two years from the date of its entry into force, pursuant to which they could continue to work beyond the common age limit. Therefore, workers employed on permanent contracts having reached or passed the newly adopted retirement age could continue to work until the retirement age previously in force, that is 47 years old for women and 52 years old for men, by exercising that option, renewable annually, within two months of the date of entry into force of that provision or within three months before they reached the qualifying age for a retirement pension.

### **The disputes in the main proceedings and the question referred for a preliminary ruling**

10 As a preliminary point, it should be noted that the disputes in the main proceedings are between workers employed as female and male dancers and the Foundation, their employer. However, as is clear from the orders for reference, and as confirmed by the referring court following a request for clarification from the Court of Justice, the situation of the male workers is irrelevant to the question referred in the present requests for a preliminary ruling. Therefore, in this case, it is appropriate to consider only the situation of the female workers concerned.

11 The latter were employed by the Foundation until 31 March 2014, the date on which they were dismissed on the ground that they had reached the age limit for retirement. The termination of their contracts of employment is based on Article 3(7) of Decree-Law No 64/2010.

12 They brought an action before the Tribunale di Roma (District Court, Rome, Italy) seeking the annulment of their dismissals, re-instatement into their positions and an order for compensation from their employer for the loss caused. They take the view that their dismissals were unlawful, on the ground that they had exercised the option enabling them to continue their employment, laid down in Article 3(7) of Decree-Law No 64/2010, which was renewable annually at least three months before the legal working age limit was reached.

13 The court hearing the case upheld the action.

14 Following an appeal brought by the Foundation, the Corte d'appello di Roma (Court of Appeal, Rome) dismissed the claims of the workers in the main proceedings. That court held that Article 3(7) of Decree-Law No 64/2010 did not infringe EU law on the ground that, while it lowered the age for

retirement to 45 years old, that provision granted employees having reached that age before the entry in to force of that provision, or during the period between 1 July 2010 and 1 July 2012, the right to benefit from the age limit laid down by the previous national rules, that is 47 years old for women and 52 years old for men.

- 15 According to the Corte d'appello di Roma (Court of Appeal, Rome), the national legislature intended to introduce graduated access to the new working age limit for workers who, close to that new retirement age, were exposed to sudden restrictive change to the previous rules. Therefore, according to that court, there is no incompatibility between the law at issue and the principles of EU law, having regard also to the transitional nature of the provision and the narrow range of beneficiaries.
- 16 The workers concerned in the main proceedings brought an appeal against that judgment before the Corte suprema di cassazione (Court of Cassation, Italy) relying, *inter alia*, on the incompatibility of Article 3(7) of Decree-Law No 64/2010 with Article 157 TFEU, Article 21 of the Charter and Directive 2006/54.
- 17 The Foundation also brought an appeal before the referring court against the judgment of the Corte d'appello di Roma (Court of Appeal, Rome) of 14 October 2015.
- 18 Stating that the outcome of the dispute in the main proceedings depends on the interpretation to be adopted of the concept of 'non-discrimination on the grounds of sex' laid down in Directive 2006/54 and Article 21 of the Charter, the referring court asks whether Article 3(7) of Decree-Law No 64/2010 is compatible with the provisions of EU law relied on by the applicants.
- 19 In those circumstances the Corte suprema di cassazione (Court of Cassation) decided to stay the proceedings in both cases and to refer the following questions to the Court for a preliminary ruling:
- 'Is the national legislation referred to in Article 3(7) of [Decree-Law No 64/2010], according to which "for workers in the performing arts belonging to the category of dancers, the retirement age is fixed for men and women at the forty-fifth year of chronological age, with the use, for workers to whom the contributory or mixed system applies in full, of the transformation coefficient referred to in Article 1(6) of the Law of 8 August 1995, No 335, relative to the higher age. For the two years following the date of entry into force of this provision, the workers referred to in this paragraph employed on contracts of indefinite duration, who have reached or passed the retirement age, are afforded the option, renewable annually, of remaining in service. This option must be exercised through a formal application to be presented to the ente nazionale di previdenza e assistenza per i lavoratori dello spettacolo (ENPALS) (National Welfare and Assistance Office for Workers in the Entertainment Business) within two months of the date of entry into force of this provision, or at least three months before the qualifying age for a retirement pension is reached, without prejudice to the maximum retirement age of 47 years for women and 52 for men", contrary to the principle of non-discrimination on grounds of sex, as laid down in Directive 2006/54 and in the Charter (Article 21)?'
- 20 By order of the President of the Court of 27 April 2017, Cases C-142/17 and C-143/17 were joined for the purposes of the written and oral procedure and of the judgment.

### **Consideration of the question referred**

- 21 Pursuant to Article 99 of the Rules of Procedure of the Court of Justice, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.
- 22 That provision must be applied in the present cases.
- 23 By its question, the referring court asks essentially whether Article 14(1)(c) of Directive 2006/54 must be interpreted as meaning that it prohibits national rules, such as that laid down in Article 3(7) of Decree-Law No 64/2010, pursuant to which workers employed as dancers having reached the retirement age fixed by that regulation at 45 years for both women and men, have the possibility, for a

transitional period of two years, to continue to work up to the working age limit laid down by the previous legislation, fixed at 47 years old for women and 52 years old for men.

- 24 As a preliminary point, it should be noted that the Court has held that the question of the conditions for payment of a retirement pension and the conditions governing termination of employment are separate issues (see, in particular, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 24).
- 25 As regards the latter, Article 14(1)(c) of Directive 2006/54 provides that application of the principle of equal treatment in relation to dismissals means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies.
- 26 In that connection, the definition of ‘dismissal’ within the meaning of that provision, a term which must be given a wide meaning, covers the termination of the employment relationship on the ground that the worker has reached the working age limit laid down by national law, pursuant to an employer’s general policy concerning retirement, even if it involves the grant of a retirement pension (see, to that effect, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 26).
- 27 It follows that a case, such as those at issue in the main proceedings, in which the workers concerned have, in accordance with the national rules, been automatically retired by their employer on the ground that they have reached the working age, concerns the conditions for dismissals within the meaning of Article 14(1)(c) of Directive 2006/54 (see, to that effect, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 27).
- 28 The Court has already held, as regards Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), which was repealed by Directive 2006/54, that a general policy concerning dismissal involving the dismissal of a female employee solely because she has attained or passed the qualifying age for a retirement pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to Directive 76/207 (judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 28).
- 29 Such an interpretation is also applicable to national rules, such as that in Article 3(7) of Decree-Law No 64/2010, which provides that workers who have reached the working age limit may, for a transitional period, exercise an option enabling them to continue to work if the age at which the employment contract ends definitively differs according to whether the worker concerned is a man or a woman.
- 30 In that connection, it should be noted, first, that under Article 2(1)(a) of Directive 2006/54, direct discrimination occurs where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.
- 31 In the present case, it is clear from Article 3(7) of Decree-Law No 64/2010 that, for a period of two years which started to run from the date of entry into force of that provision, dancers employed on permanent contracts having reached or passed the new retirement age were given the option to continue working, renewable annually, within two months from the date of entry into force of that provision or at least three months before they reached the qualifying age for a retirement pension, up to the age limit for retirement previously in force, that is 47 years old for women and 52 years old for men.
- 32 It is clear from that provision that the conditions for exercising the option at issue depend on the sex of the workers.
- 33 Second, it must be examined whether, in a context such as that governed by those provisions, female workers of 45 years of age are in a comparable situation to that of male workers in the same age bracket within the meaning of Article 2(1)(a) of Directive 2006/54.
- 34 The elements which characterise various situations, and hence their comparability, must be determined and assessed, in particular, in the light of the subject matter of the provisions in question and of the aim

they pursue, whilst account must be taken for that purpose of the principles and objectives of the field to which the measure at issue relates (see, in particular, judgment of 26 October 2017, *BB construct*, C-534/16, EU:C:2017:820, paragraph 43 and the case-law cited).

- 35 In the cases in the main proceedings, the rules establishing a difference in treatment are intended to govern the conditions under which the employment relationship of the workers concerned is terminated.
- 36 In that context, no factors capable of conferring specific characteristics on the situation of female workers as compared with those of male workers can be identified. Therefore, the female workers concerned are not in a comparable situation within the meaning of Article 2(1)(a) of Directive 2006/54 to that of male workers of the same age as regards the conditions for terminating the employment relationship. As a consequence, such a provision establishes a difference of treatment directly based on grounds of sex.
- 37 In those circumstances, given that a difference in treatment directly based on grounds of sex, such as that established by the national rules at issue in the main proceedings, constitutes direct discrimination on grounds of sex within the meaning of Article 2(1)(a) of Directive 2006/54 (judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 42).
- 38 In that connection, it must be recalled that Directive 2006/54 draws a distinction between discrimination directly on grounds of sex and ‘indirect’ discrimination inasmuch as the former cannot be justified by a legitimate aim. By contrast, pursuant to Article 2(1)(b) of that directive, provisions, criteria or practices liable to constitute indirect discrimination can avoid being classified as discriminatory if they are ‘objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’ (judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 41).
- 39 Therefore, a difference of treatment, such as that at issue in the main proceedings, cannot be justified by the wish to avoid exposing the workers concerned to a sudden change, in a restrictive sense, from the preceding rules on continuation of employment.
- 40 Therefore, the answer to the question referred is that Article 14(1)(c) of Directive 2006/54 must be interpreted as meaning that national rules, such as those laid down in Article 3(7) of Decree-Law No 64/2010, pursuant to which workers employed as dancers having reached the retirement age laid down by those rules of 45 years old for both women and men, have the option for a transitional period of two years to continue to work up to the working age limit laid down by the previous rules, set at 47 years old for women and 52 years old for men, establishes direct discrimination based on sex which is prohibited by that directive.

### Costs

- 41 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.

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

**Article 14(1)(c) 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 national rules, such as those laid down in Article 3(7) of Decree-Law No 64 of 30 April 2010, converted into Law No 100, of 29 June 2010, in the version in force at the material time, pursuant to which workers employed as dancers having reached the retirement age laid down by those rules of 45 years old for both women and men, have the option for a transitional period of two years to continue to work until the working age limit laid down by the previous rules, set at 47 years old for women and 52 years old for men, establishes direct discrimination based on sex which is prohibited by that directive**

[Signatures]

\* Language of the case: Italian.