

## JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2013 (\*)

(Directive 2000/78/EC – Equal treatment – Collective agreement which restricts a benefit in respect of pay and working conditions to employees who marry – Exclusion of partners entering into a civil solidarity pact – Discrimination based on sexual orientation)

In Case C-267/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 23 May 2012, received at the Court on 30 May 2012, in the proceedings

**Frédéric Hay**

v

**Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Hay, by A. Lamamra, avocat,
- Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, by J.-J. Gatineau, avocat,
- the French Government, by G. de Bergues, D. Colas and J. Rossi, acting as Agents,
- the Belgian Government, by M. Jacobs, acting as Agent,
- the European Commission, by J. Enegren 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 request for a preliminary ruling concerns the interpretation of Article 2(2) 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).
- 2 The request has been made in proceedings between Mr Hay and Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres ('Crédit agricole'), his employer, concerning the latter's refusal to award him days of special leave and a bonus granted to staff who marry following the conclusion by Mr Hay of a civil solidarity pact (PACS).

## Legal context

### *EU law*

3 Recital 22 in the preamble to Directive 2000/78 states:

‘This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.’

4 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.’

5 According to Article 2 of that directive:

‘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;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, ...

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.’

6 Article 3(1) of the directive is worded as follows:

‘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:

...

(c) employment and working conditions, including dismissals and pay;

...’

### *French law*

#### The Civil Code

7 Article 144 of the French Civil Code (Code civil), as amended by Law No 99-944 of 15 November 1999 (‘the Civil Code’), provides:

‘A male and a female may not contract marriage before they have completed their 18th year.’

8 Article 515-1 of the Civil Code provides:

‘A civil solidarity pact is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organise their life together.’

9 Article 515-4 of the Civil Code states:

‘Partners bound by a civil solidarity pact commit to a life together and to providing mutual material aid and assistance to each other. If the partners do not provide otherwise, the material aid shall be proportionate to their respective means.

Partners shall be jointly and severally liable with regard to third parties for debts incurred by one of them for the needs of everyday life. ...’

The Labour Code

10 Article L.122-45 of the French Labour Code (Code du travail), in the version thereof in force at the time of the facts in the main proceedings (‘the Labour Code’), prohibits direct or indirect discrimination based on, inter alia, sexual orientation in relation to pay and working conditions.

11 Article L.226-1 of the Labour Code provides:

‘All employees shall be granted special leave on the occasion of certain family events, subject to proof being provided, as follows:

1. four days for the employee’s marriage;

...’

Crédit agricole’s national collective agreement

12 Article 20 of Crédit agricole’s national collective agreement, entitled ‘Special leave’, provides:

‘Paid leave, with full pay, shall be granted in the following circumstances:

...

3. Permanent employees

Marriage:

– of the employee: 10 working days;

– of a child of the employee: three working days;

– of a sister or brother of the employee: one working day.

...’

13 Article 34 of Crédit agricole’s national collective agreement, entitled ‘Miscellaneous bonuses and allowances’, provides:

‘Marriage bonus

All employees shall, at the time of their marriage, receive a bonus equal, per month of employment, to 1/36<sup>th</sup> of their monthly salary of the month preceding the marriage.

...’

14 By agreement of 10 July 2008 amending Articles 20, 22 and 34 of Crédit agricole's national collective agreement, those benefits were extended in the event of conclusion of a PACS. The French Association of Banks and Unions (Association française des banques et les fédérations syndicales) also concluded, on 27 September 2010, an addendum to the bank's national collective agreement of 10 January 2000, extending leave for family events to employees in a PACS arrangement. The provisions of that addendum were extended throughout the banking sector by order of 23 December 2010 of the Minister for Labour, Employment and Health.

### **The dispute in the main proceedings and the question referred**

15 Mr Hay has been an employee with Crédit agricole since 1998.

16 On 11 July 2007, Mr Hay concluded a PACS with a person of the same sex. On that occasion, Mr Hay applied for the days of special leave and the marriage bonus granted to employees who marry, in accordance with Crédit agricole's national collective agreement. Crédit agricole refused him those benefits, however, on the ground that, under that collective agreement, they were granted only upon marriage.

17 On 17 March 2008, Mr Hay brought an action before the Conseil de prud'hommes de Saintes (Labour Tribunal, Saintes) seeking to obtain payment of the marriage bonus, amounting to EUR 2 637.85, and compensation for the days of special leave which he had been refused, in the amount of EUR 879.29. By judgment of 13 October 2008, the Conseil de prud'hommes de Saintes dismissed his action, holding that the bonus granted in the event of marriage is not linked to employment but to marital status and the Civil Code differentiates between marriage and the PACS. It observed, however, that Crédit agricole's national collective agreement had been amended on 10 July 2008 to extend the benefits under that agreement relating to the bonus and leave for marriage to people in a PACS arrangement, but that that extension could not be given retroactive effect.

18 By judgment of 30 March 2010, the Cour d'appel de Poitiers (Court of Appeal, Poitiers) upheld that judgment on the ground that the PACS differs from marriage in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of full age of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood. That court further held that the difference in treatment between spouses, on the one hand, and partners in a PACS, on the other, in relation to benefits paid for family events does not follow from their family situation or from their sexual orientation but from a difference in status resulting from their marital status, which does not place them in an identical situation.

19 On 28 May 2010, Mr Hay brought an appeal against that judgment before the Cour de cassation (Court of Cassation). In Mr Hay's submission, Crédit agricole's refusal to grant him the days of special leave and the marriage bonus provided for under Crédit agricole's national collective agreement constitutes discrimination based on his sexual orientation, contrary to Article L.122-45 of the Labour Code, Articles 1 to 3 of Directive 2000/78 and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

20 Mr Hay observes that, under Article 144 of the Civil Code, only persons of different sexes may marry, whereas, under Article 515-1 of the Civil Code, persons of the same sex only have the possibility of concluding a PACS. That provision, read in conjunction with Crédit agricole's national collective agreement, gives rise to a situation where persons of the same sex in a PACS arrangement do not have access to the days of leave and marriage bonus granted to married employees of the company.

21 In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following question to the Court:

'Must Article 2(2)(b) of [Directive 2000/78] ... be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement which restricts an advantage in respect of pay and working conditions to

employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a [PACS]?’

### **The question referred for a preliminary ruling**

- 22 The question referred is based on the premiss that *Crédit agricole*’s national collective agreement gives rise to indirect discrimination based on sexual orientation within the meaning of Article 2(2)(b) of Directive 2000/78 and concerns the issue of whether such discrimination can be justified.
- 23 In that regard, it must be borne in mind that according to settled case-law even though, formally, the national court has limited its questions to the interpretation of a specific provision of EU law, that does not prevent the Court from providing the national court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see, to that effect, Case C-229/08 *Wolf* [2010] ECR I-1, paragraph 32 and the case-law cited).
- 24 Given the situation in the main proceedings, as set out in the order for reference, it is appropriate to consider the issue whether a national collective agreement like *Crédit agricole*’s gives rise to direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/78.
- 25 Accordingly, the question referred by the national court must be viewed, in essence, as asking whether Article 2(2)(a) and (b) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry.
- 26 As a preliminary point, it should be observed that, as indicated in recital 22 in the preamble to Directive 2000/78, legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment (see Case C-147/08 *Römer* [2011] ECR I-3591, paragraph 38).
- 27 As regards the application of Directive 2000/78 to the provisions of a collective agreement such as the one at issue in the main proceedings, it is clear from the Court’s case-law that, where they adopt measures which fall within the scope of Directive 2000/78, management and labour must respect that directive (see Case C-447/09 *Prigge and Others* [2011] ECR I-8003, paragraph 48, and Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt* [2012] ECR, paragraph 22).
- 28 In providing for the grant of paid days of leave and a marriage bonus on the occasion of a company employee’s marriage, Articles 20 and 34 of *Crédit agricole*’s national collective agreement lay down rules relating to employment and working conditions including, in particular, pay conditions within the meaning of Article 3(1)(c) of Directive 2000/78. The concept of ‘pay’ within the meaning of that provision must be interpreted broadly. It covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the employee receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see Joined Cases C-124/11, C-125/11 and C-143/11 *Dittrich and Others* [2012] ECR, paragraph 35).
- 29 Accordingly, it must be held that Directive 2000/78 is applicable to a situation such as that which gave rise to the main proceedings.
- 30 Under Article 2 of the directive, the ‘principle of equal treatment’ is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive.

- 31 As to whether there is direct discrimination, Article 2(2)(a) of Directive 2000/78 provides that direct discrimination is to be taken to occur when a person is treated in a less favourable manner than another person in a comparable situation, on one of the grounds listed in Article 1 thereof, including sexual orientation.
- 32 Accordingly, the existence of direct discrimination presupposes that the situations being weighed up are comparable (see, inter alia, *Römer*, paragraph 41).
- 33 In that regard, it should 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 (see Case C-267/06 *Maruko* [2008] ECR I-1757, paragraphs 67 to 69, and *Römer*, paragraph 42).
- 34 Thus, the Court has held, in respect of registered life partnerships, as provided for under the German Law on registered life partnerships (*Gesetz über die Eingetragene Lebenspartnerschaft*), that the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage (see *Römer*, paragraph 43).
- 35 As regards the days of paid leave and the bonus which the provisions at issue in the main proceedings grant to employees on the occasion of their marriage, it is necessary to examine whether persons who enter into a marriage and persons who, being unable to marry a person of their own sex, enter into a PACS, are in comparable situations.
- 36 It is apparent from the order for reference and the file submitted to the Court that persons of the same sex may conclude a PACS in order to organise their life together by committing, in the context of that life together, to providing material aid and assistance to each other. The PACS, which must be the subject of a joint declaration and registration with the Registry of the court within whose jurisdiction the persons concerned establish their common residence, constitutes, like marriage, a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties. Although the PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and the PACS arrangement, the latter was, at the time of the facts in the main proceedings, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties.
- 37 Thus, as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee's marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry.
- 38 It should be noted in that regard that, in keeping with the case-law referred to in paragraph 33 of this judgment, the fact that the French Conseil constitutionnel (Constitutional Council) held, in its Decision No 2011-155, Ms Laurence L., that married couples and couples in a PACS arrangement were not in a comparable situation for the purposes of a survivor's pension, does not rule out the comparability of the situation of married employees and homosexual employees in a PACS arrangement for the purposes of the grant of days of leave and bonuses at the time of marriage.
- 39 Similarly, the differences between marriage and the PACS, noted by the Cour d'appel de Poitiers in the dispute in the main proceedings, in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood, are irrelevant to the assessment of an employee's right to benefits in terms of pay or working conditions such as those at issue in the main proceedings.

- 40 In that context, it should be noted that Crédit agricole's national collective agreement grants those benefits on the occasion of marriage, irrespective of the rights and obligations arising from marriage. This is confirmed by the fact that Article 20 of that collective agreement grants special leave not only on the occasion of a permanent employee's marriage but also on the occasion of the marriage of that employee's children, brother or sister.
- 41 As regards the very existence of discrimination, it is apparent from the Court's case-law that a Member State's rules which restrict benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual permanent employees in a PACS arrangement who are in a comparable situation (see, to that effect, *Maruko*, paragraph 73, and *Römer*, paragraph 52).
- 42 Articles 20 and 34 of Crédit agricole's national collective agreement grant paid leave and a bonus to employees who enter into marriage. Since marriage is not, according to the information provided by the referring court, accessible to persons of the same sex, they cannot receive those benefits.
- 43 The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in *Maruko* and *Römer*, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.
- 44 The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.
- 45 Moreover, as the discrimination is direct, it may be upheld, not on the basis of a 'legitimate aim' within the meaning of Article 2(2)(b) of Directive 2000/78, as that provision covers only indirect discrimination, but only on one of the grounds referred to in Article 2(5) of that directive, namely public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others.
- 46 It should be observed in that regard that none of those grounds have been relied on in the dispute in the main proceedings. Moreover, as Article 2(5) establishes an exception to the principle of the prohibition of discrimination, it must be interpreted strictly (see *Prigge and Others*, paragraph 56).
- 47 In the light of the foregoing considerations, the answer to the question referred is that Article 2(2)(a) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a PACS with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.

### 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 (Fifth Chamber) hereby rules:

**Article 2(2)(a) 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 precluding**

**a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.**

[Signatures]

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\* Language of the case: French.