SUMMARY

ECJ 28 June 2012, case C-172/11 (Georges Erny - v - Daimler AG - Werk Worth), Nationality discrimination

Facts

Mr Erny was a Frenchman living in France. He was employed by the German company Daimler and worked just across the border in Germany. Daimler deducted German social insurance contributions from his gross salary but no German income tax (tax on wages) because, pursuant to the relevant convention for the avoidance of double taxation, his income, minus the German social insurance deduction, was subject to French income tax. As the income tax rate in France was lower than that in Germany, his net salary was higher than that of a comparable worker living in Germany. In 2007, Mr Erny made use of an arrangement that Daimler offered to its older workers, under which a worker aged 55 or over can elect to work part-time and to receive, on top of his pro-rated salary, a top-up that brought his net salary up to 85% of his last-earned net salary. Such a top-up is subsidised by the German state and is not taxed under German tax law. The 85% net is calculated - briefly stated - by taking the employee's gross salary and deducting from it either (i) German income tax using certain assumptions or (ii), in the case of workers not subject to German income tax, by deducting notional German income tax, i.e. the tax that would have been deducted had the employee lived in Germany. Mr Erny objected to this method of calculating 85%, which disadvantaged him in two respects. Because (i) German income tax is higher than French income tax and (ii) the top-up was taxed in France, the top-up was less than it would have been had he lived in Germany.

Mr Erny brought proceedings in a German labour court, claiming a higher top-up. The court noted that cross-border workers who are liable to tax in France receive an amount that is appreciably less than 85% of the net income that they received before they began part-time

work for older employees, whereas workers who are liable to tax in Germany receive an amount which corresponds, at a flat rate, to 85% of their previous net income. That situation is due mainly to the fact that the German tax rates are higher than the tax rates in France and that persons in Mr Erny's position also have to pay tax on the top-up amount in France. The court wanted to know whether such a situation is compatible with Article 45(2) TFEU, which prohibits discrimination based on nationality, and Article 7(4) of Regulation *1612/68* (now Regulation *492/2011*), which declares void any clause of a collective or individual agreement concerning employment that authorises discrimination on the basis of nationality.

ECJ's findings

The ECJ begins by rejecting Daimler's argument that what the referring court is seeking is essentially an interpretation of German, not EU law (§ 28-33).
A top-up such as that at issue comes within the scope of Article 45 TFEU and Article 7 of Regulation 1612/68. A cross-border worker in Mr Erny's position may rely on those provisions (§ 38).
The ECJ has consistently held that those provisions prohibit not only overt discrimination but also covert (= indirect) discrimination (§ 39).
The principle of non-discrimination requires not only that comparable situations must not be treated differently but also that different situations must not be treated in the same way (see, inter alia, the ECJ's judgment in Merida, case C-400102) (§ 40).
Taking account, notionally, of the German tax on wages has a detrimental effect on the situation of cross-border workers, insofar as the deduction of that tax places persons like Mr Erny at a disadvantage as compared to workers who live in Germany. In circumstances such as those of Mr Erny there is indirect discrimination on the basis of nationality (§ 41-46).
Daimler justifies this indirect discrimination by highlighting the administrative difficulties which would stem from the application of different methods of calculation depending on the employer's place of residence and the financial consequences of not taking the German tax on wages into account. The ECJ rejects this attempt at justifying the discrimination (§ 47-50).
The same goes for Daimler's argument that the social partners should enjoy autonomy in developing working conditions (§ 49-50).
The ECJ also rejects Daimler's defence that Mr Erny could have elected not to make use of the part-time top-up facility by continuing to work full-time (§ 51-52).

Ruling

Article 45 TFEU and Article 7(4) of Regulation (EEC) No *1612/68* [...] preclude clauses in collective and individual agreements under which a top-up amount such as that at issue in the

main proceedings, which is paid by an employer under a scheme of part-time working for older employees in preparation for retirement, must be calculated in such a way that the tax on wages payable in the Member State of employment is notionally deducted when the basis for the calculation of that top-up amount is being established, even though, under a tax convention for the avoidance of double taxation, the pay, salaries and similar remuneration paid to workers who do not reside in the Member State of employment are taxable in their Member State of residence. In accordance with Article 7(4) of Regulation No *1612/68*, such clauses are void. Article 45 TFEU and the provisions of Regulation No 1612/68 leave the Member States or the social partners free to choose between the different solutions suitable for achieving the objective of those respective provisions.

Creator: European Court of Justice (ECJ)
Verdict at: 2012-06-28
Case number: C-172/11