SUMMARY

2010/54: Seniority-based pay scheme must take prior foreign service into account (AT)

<p>Seniority-based pay schemes for public servants must take account of periods of service with comparable employers in other Member States.</p>

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Facts

The content of the employment relationships of employees of the Austrian federal provinces (*Länder*) as well as those of the communes (*Gemeinden*) is governed to a large extent by provincial statutes. Payments, as well as a number of other benefits, (e.g. length of sick leave and holidays and protection against termination) are based on a seniority scheme that takes into account, not only the length of service with the province or the commune, but also time spent in an employment relationship with other Austrian provinces or communes or with the federal state. It therefore does not take into account time spent outside Austria regardless whether the foreign employer was a private or a public entity.

The Act on Employees of the City of Vienna calculates seniority in the way described above. For this reason, a number of nurses sued their employer, the City of Vienna. The case involved a woman who had previously worked in hospitals in Hungary (between 1981 and 1990) and whose service there was not taken into account. Other cases concerned nurses from Poland, Slovakia and the Czech Republic. The plaintiff argued that the Viennese system of only taking into account Austrian periods of service discriminates against employees from other Member States and has a negative effect on their mobility within the European Union. Therefore, she

argued that the provision in the provincial law should be interpreted in accordance with European law, and the time she worked in Hungarian hospitals should fully be taken into account. This would result in her being more favourably ranked in the defendant's seniority-based compensation scheme, and she demanded payment of the difference between the correctly calculated salary and what she actually received.

The defendant, the City of Vienna, argued that the legal provision that obliges public employers to take into account periods service with other public employers referred only to public servants who perform "sovereign" duties, and should therefore not be applied to nurses. This restriction was deemed necessary in order not to favour employees from former "eastern block" countries, where the majority of employees were employed by state entities, over employees from formerly "western" countries, where many employees performing similar services are employed by private entities. The other argument was that the plaintiff's former employer in Hungary was not comparable to the City of Vienna as a local authority.

Judgment

Both the Labour and Social Court of Vienna (*Arbeits- und Sozialgericht Wien*) as well as the Appellate Court of Vienna (*Oberlandesgericht Wien*) decided in favour of the employee and the Supreme Court (*Oberster Gerichtshof*) upheld the decisions of the lower courts.

The Supreme Court first made reference to a decision of the EJC (30 November 2000, C-195/98 - GÖD - v - Republic of Austria) in which it had ruled on a similar provision in Austrian federal law regulating the employment relationship of contractual federal employees. In that case, the ECJ had held that Article 48 of the TEU (now, since the Lisbon Treaty, Article 45 of the TFEU) and Article 7 of Council Regulation (EEC) 1612/68 on freedom of movement for workers within the Community, preclude a national rule concerning the account to be taken of previous periods of service for the purpose of determining pay, where the requirements for periods spent in other Member States are stricter than those applicable to periods spent in comparable institutions of the Member State concerned. Periods of service spent in other Member states in comparable institutions therefore have to be taken into account, even if this has taken place before the Member State's accession into the EU.

The Austrian Supreme Court ruled that the different treatment of service periods accrued with an Austrian employer and those accrued with an employer in other Member States constitute indirect discrimination and an infringement of Article 39 of the EU (now Article 45 of the TFEU) and Article 7 of Regulation 1612/68. Because of the primacy in application of EU law, the Austrian provincial statute must be partially disregarded and comparable periods of service spent in another Member state must be taken into account in full and without any

temporary limitations.

The Supreme Court dismissed the argument that only periods of service where the employee was performing sovereign duties had to be taken into account, as such a restrictive interpretation of the law is not viable, given the explicit wording. It therefore did not have to assess conformity of such an interpretation with European law.

The Court also provided some guidance in what it thought to be "comparable" periods of service. As stated by the ECJ (12 March 1998, C-187/96, *Commission vs. Greek Republic*), this question should be resolved under applicable national law. In the Austrian context, to be comparable, the employment relationship needed to have been with an employer with some form of territorial authority (*Gebietskörperschaft*). In other words, in this context, a public body governed by public and based on the number of persons living in a certain area. Because the plaintiff could prove that she was employed in Hungary under an employment contract with an entity that was owned and run by the federal state or a commune, her period of service in Hungary should have been taken into account by her Austrian employer, the Viennese hospital.

Commentary

This is one of many examples in which, the Austrian federal provinces (which have quite extensive powers of legislation) are slow to adapt their legislation to European requirements, even where there is clear jurisprudence from the EJC. As in this case, they have a tendency to postpone compliance, especially where it would cost money to act in conformity with European law.

It is also no surprise that these cases all concern employees in the health sector, as there is a shortage of skilled national labour and the employment of nationals of new Member States is seen as a strategy for filling this gap. It is shameful that statutory employment law is being abused in this way to get these people to work for lower wages than comparable Austrian employees. Court decisions of this kind are therefore an important step, not only for promoting fairness and equal treatment, but also for (re)establishing Austria as an attractive country for employees from other Member States.

Subject: Miscellaneous

Parties: Martha M*** Đ v Đ Gemeinde Wien (City of Vienna)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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