

SUMMARY

ECJ 7 November 2018, C-432/17 (O'Brien), part-time work

Dermod Patrick O'Brien – v – Ministry of Justice, UK case

Summary

Periods of service prior to the deadline for transposing Directive 97/81/EC (amended by Directive 98/23/EC) must be taken into account for the purpose of calculating the retirement pension entitlement.

Legal background

Directive 98/23/EC extended the scope of Directive 97/81/EC (Framework Agreement on part-time work) to the United Kingdom. Its transposition deadline was 7 April 2000. Clause 4 of the Framework Agreement stipulates that part-time workers shall not be treated less favourably than comparable full-time workers solely because they work part-time, unless different treatment is justified on objective grounds. The UK implementation legislation (Part-time Workers Regulations 2000) came into force on 1 July 2000.

Facts

Mr O'Brien was a part-time recorder of the Crown Court from 1978-2005 on a *per diem* basis. He was classified in a part-time worker category which was not entitled to a pension. In 2005, he claimed a pension, as he felt wrongly excluded from the entitlement. The subsequent proceedings ultimately led to the ECJ case *O'Brien* (C-393/10). In that case, it was held that national law cannot establish a distinction between full-time judges and part-time judges remunerated on a daily fee basis, unless such a difference in treatment is justified by objective grounds.

In the subsequent proceedings taking place in the UK, it was established that there was no objective justification for the difference in treatment and, hence, that Mr O'Brien was entitled

to a pension. In determining its height, the question rose whether the years of service prior to the transposition deadline should be taken into account. This again led to various proceedings, eventually leading to the UK Supreme Court asking a preliminary question.

Question

Must Directive 97/81 be interpreted as meaning that periods of service completed prior to the deadline for transposing that directive, which are taken into account when calculating the pension of a full-time worker, must be taken into account when calculating the pension entitlement of a comparable part-time worker?

Consideration

According to settled case law, procedural rules generally apply from the date on which they enter into force (*Commission – v – Spain*, C-610/10). Substantive rules are usually interpreted as applying to situations existing before their entry into force inly insofar as it follows clearly from their terms, objective or general scheme that they have such effect (e.g. *Meridionale Industria Salumi and Others*, C-212/80 to 217-80).

In addition, a new legal rule applies from the entry into force of the act introducing it, and that, while it does not apply to legal situations that arose and became definitive prior to that entry into force, it does apply immediately to the future effects of a situation which arose under the old law, and to new legal situations. The position is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (*Commission – v – Moravia Gas Storage*, C-596/13). Neither Directive 97/81 nor the Framework agreement derogates from that principle.

Therefore, it must be examined whether the gradual acquisition of pension entitlements over the period preceding the transposition deadline have become definitive at the transposition date.

In this regard, the UK government asserted that deferred pay is accrued similarly to ‘normal’ forms of pay. This means that the pension entitlement is earned and increased after each completion of a period of service. Consequently, Mr O’Brien would not have accrued any pension rights before the transposition deadline. According to the UK government, there are similarities with *Barber* (C-262/88) en *Ten Oever* (C-109/91), in which there also were no retroactive effects.

However, the ECJ took the view that the situations in those cases were different. They concerned the temporal effects of a judgment, rather than the retroactive effect of a rule of law. Moreover, the UK government at no time requested to limit the temporal effects of the first ECJ judgment. A restriction of that kind can only be permitted in the judgment which rules on the interpretation requested (*Barber*, C-262/88).

Secondly, regarding the argument that the calculation of the periods of service should be distinguished from the rights to a pension, the ECJ was of the view that it could not be said that the right to a pension is accrued at the end of each period of service. It is only subsequently, taking into account the relevant periods of service that pension rights can be calculated.

Consequently, if the accrual of pension takes place both before and after the transposition deadline, the calculation of those rights is governed by the directive, including for periods of service prior to its entry into force. This situation is also to be distinguished from the situation of the colleagues of the appellant (which the UK government had raised in its arguments).

Ruling

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998, must be interpreted as meaning that, in a case such as that at issue in the main proceedings, periods of service prior to the deadline for transposing Directive 97/81, as amended by Directive 98/23, must be taken into account for the purpose of calculating the retirement pension entitlement.

Creator: European Court of Justice (ECJ)

Verdict at: 2018-11-07

Case number: C-432/17