SUMMARY

ECJ 13 March 2019, case C-437/17 (Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH), Free movement

Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH – v – EurothermenResort Bad Schallerbach GmbH, Austrian case

Legal background

Article 45 TFEU provides for the freedom of movement of workers within the EU. Article 45(2) provides that this shall entail the abolition of any discrimination based on nationality as regards inter alia employment conditions. Article 7(1) of Regulation No 492/2011 provides the same.

The Austrian law on holidays (*Urlaubgesetz*) provides employees paid annual leave. This amounts to 30 days where the length of service is less than 25 years. It increases to 36 days after completion of the 25th year of service. Paragraph 3 of the *Urlaubgesetz* inter alia provides that any period of service of at least six months spent in another employment relationship in the national territory, also shall be credited for calculating the days of leave, however up to a maximum of five years in total.

Facts

Eurothermen operates in the tourism sector and employs various workers who have completed previous periods of service with different employers outside Austria but within EU Member States. The works council of Eurothermen brought an action against Eurothermen and claimed that all previous years of service, in and outside Austria, be taken into account in establishing the number of days of leave. It asserted that distinguishing between periods of

service in Austria and abroad would be in breach of Article 45 TFEU. The works council's claim was rejected in both First Instance and Appeal. Eventually the Supreme Court (*Oberster Gerichtshof*) asked a preliminary question.

Question

Must Article 45 TFEU and Article 7(1) of Regulation No 492/2011 be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which - for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks - the years of service completed with one or more employers prior to the start of the worker's period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five?

Consideration

Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011

It should be noted that Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted in the same way (*SALK*, C-514/12). Annual leave falls within the scope of both articles. Both articles prohibit not only overt discrimination on grounds of nationality, but also covert forms which lead in fact to the same result. A provision of national law is indirectly discriminatory if it can affect nationals of other Member States more than national workers and if there is a consequent risk that it will place them at a particular disadvantage, unless it is objectively justified an proportionate to the aim pursued (*Eschenbrenner*, C-496/15).

To be entitled to 36 days of annual leave, a worker must have completed 25 years of service, at least 20 of those years completed with the current employer. It is important to note that the national legislation puts in place different treatment based on seniority with the current employer. Workers with 25 years of working experience are treated differently, depending on whether they have completed 20 years of service with their current employer. Consequently, such legislation cannot give rise to discrimination based *directly* on nationality.

Eurothermen (and the European Commission) have asserted that there is indirect discrimination. According to them, Austrian workers reside in their vast majority in Austria and start their career there, making it easier to complete 25 years of service on Austrian territory than workers of other nationalities, who typically start abroad and come to Austria later. For them, it would be more difficult to obtain 25 years of service, rendering the legislation indirectly discriminatory.

However, contrary to what is submitted, it is apparent from the order of reference that there is nothing to indicate that Austrian workers normally remain in the service of their current employer for 25 years (and thus benefit from the legislation). Consequently, it has not been established that Austrian workers are advantaged over nationals of other Member States and, hence, that the workers disadvantaged by the legislation are predominantly nationals of other Member States. The finding as such is not in itself sufficient to conclude that nationals from other Member States are indirectly discriminated.

In the second place, the European Commission cannot base its line of argument either, in general, on case-law according to which, in order for a national measure to be treated as 'indirectly discriminatory', it is not necessary for it to have the effect of placing all nationals of the Member State in question at an advantage or of placing at a disadvantage solely nationals of other Member States (*Giersch and Others*, C-20/12) or, in a targeted manner, on the answer given by the ECJ in *SALK* (C-514/12).

These judgments are relevant only once it has been established that the national legislation at issue is liable to have a greater effect on nationals of other Member States. Since that is not the position in the present case, the conclusion that there would be indirect discrimination cannot be based on that case-law. Moreover, other than in *SALK* (C-514/12), the legislation at issue aims to reward an employee's loyalty to a specific employer (rather than a group of employers). The reasoning in *SALK* therefore cannot be used here.

Article 45(1) TFEU

It is also necessary to determine whether the national provisions at issue constitute an obstacle to the free movement of workers (Article 45(1) TFEU). While Article 45 TFEU aims to facilitate work throughout the EU and aim to prevent rules which put non-domestic workers at a disadvantage, primary EU law cannot guarantee that the move to another Member State will be neutral in terms of social security, as there are differences between Member States (*Erzberger*, C-566/15). EU law only guarantees , within a Member State, that all workers are subject to the same conditions (*Zyla*, C-272/17). The Austrian provisions at issue apply both to employees wishing to leave a current employer who is subject to Austrian law, as well as employees who are attracted by a job in Austria. Other than the works council and the European Commission have claimed, the legislation at issue is not of such kind as to deter Austrian workers who wish to leave their current employer in order to work for an employer in another Member State, while at the same time hoping subsequently to return to their original employer. Such an argument is based on too uncertain and indirect circumstances for that legislation to be regarded as hindring free movement of workers (*Graf*, C-190/98).

Ruling

Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker's period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five.

Creator: European Court of Justice (ECJ)
Verdict at: 2019-03-14
Case number: C-437/17