



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

6 December 2012*

(Equal treatment in employment and occupation — National rules — Assistance granted to public servants in the event of illness — Directive 2000/78/EC — Article 3 — Scope — Concept of ‘pay’)

In Joined Cases C-124/11, C-125/11 and C-143/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Germany), made by decisions of 28 October 2010, received at the Court on 9 and 24 March 2011, in the proceedings

Bundesrepublik Deutschland

v

Karen Dittrich (C-124/11),

Bundesrepublik Deutschland

v

Robert Klinke (C-125/11),

and

Jörg-Detlef Müller

v

Bundesrepublik Deutschland (C-143/11),

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malaček, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2012,

* Language of the cases: German.

after considering the observations submitted on behalf of:

- K. Dittrich, R. Klinke and J.-D. Müller, by D. Siegfried, Rechtsanwalt,
- the German Government, by M. Dohmen, acting as Agent,
- the European Commission, by J. Enegren and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2012,

gives the following

Judgment

- 1 The present references for a preliminary ruling concern the interpretation 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 references have been made in disputes between federal public servants and the Bundesrepublik Deutschland concerning the reimbursement of medical expenses of their civil partners, or whether account is to be taken of such civil partners for purposes of the assistance granted to federal public servants in the event of illness ('the assistance at issue').

Legal context

EU law

- 3 Recital 13 in the preamble to Directive 2000/78 states:

'This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.'

- 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 Article 2 of Directive 2000/78 states:

'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;

...'

6 Article 3 of Directive 2000/78 defines the scope of that directive as follows:

‘1. 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;

...

3. This Directive does not apply to payments of any kind made by State schemes or similar, including State social security or social protection schemes.

...’.

German law

The Law on registered partnerships

7 Paragraph 1(1) of the Law on registered partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. I, p. 266), as last amended by Paragraph 7 of the Law of 6 July 2009 (BGBl. I, p. 1696; ‘the LPartG’), provides:

‘Two persons of the same sex establish a partnership when they declare, in person and in the presence of the relevant public servant and each other, that they wish to create a partnership together (“life partners”). Such declarations cannot be made conditionally or for a fixed period.’

8 Paragraph 5 of the LPartG, entitled ‘Duty to contribute to the needs of the partnership’, provides:

‘The life partners are each required to contribute adequately to the common needs of the partnership ...’

National provisions on assistance granted to federal public servants

9 The right of federal public servants to receive assistance in cases of illness, care and maternity is enshrined in the German Law on federal public servants (Bundesbeamtengesetz; ‘the BBG’).

10 Paragraph 80 of the BBG, in its version at the time of the applications for assistance lodged by the applicants in the main proceedings, reads as follows:

‘1. Assistance shall be granted to:

1. Public servants who have the right to receive a treatment or are taking parental leave,

2. pensioners who have the right to a pension,

...

Assistance shall also be granted for costs incurred by the spouse of the person entitled who has no income allowing him or her to be economically independent, and for expenses incurred by dependent children who are entitled to be taken into account according to the family supplement paid under the Federal Law on public servants' remuneration (Bundesbesoldungsgesetz). ...

2. In principle, only necessary and economically reasonable expenses are eligible for assistance:

1. in cases of illness and care,

...

3. The assistance is granted in the form of a reimbursement of at least 50% of the eligible expenses.

...

4. The Federal Ministry of the Interior shall provide... by statutory instrument ... the details of the award of the assistance, ...'.

11 Until the entry into force of the Federal Regulation of 13 February 2009 on assistance granted to public servants in cases of illness, care and maternity (Verordnung über Beihilfe in Krankheits-, Pflege- und Geburtsfällen, (Bundesbeihilfeverordnung), BGBI. I S 326; 'the BBhV'), the conditions for granting the assistance in such cases were governed by the administrative directives on assistance granted to public servants in cases of illness, care and maternity (Allgemeine Verwaltungsvorschrift für Beihilfen in Krankheits-, Pflege- und Geburtsfällen (Beihilfenvorschriften); 'the BhV').

12 The BhV were annulled because they encroached on a field reserved for legislation, but they continue to apply, however, to expenses incurred prior to 14 February 2009, the date on which the BBhV entered into force. Under Paragraph 3 of the BhV, members of the family of the person entitled who are eligible for assistance include the spouse and dependent children, but not the person with whom the person entitled has entered into a registered partnership.

13 Paragraph 1 of the BBhV provides:

'The present regulation governs the award of assistance in the cases provided for by statute. The assistance supplements the personal medical cover which, as a rule, must be paid for out of current remuneration.'

14 Paragraph 2 of the BBhV is worded as follows:

'Persons entitled to assistance

1. Unless otherwise provided in subparagraphs 2 to 5, a person shall be entitled to assistance if, when the benefit is provided, he is

1. a public servant,

2. in receipt of a public service pension, or

3. a former public servant.

2. Entitlement to assistance is, furthermore, subject to the condition that a benefit such as remuneration, remuneration for public service officials, emoluments for interns, a pension, a temporary indemnity, a widow's pension, an orphan's allowance ... or a temporary allowance ... is due to the person entitled. Entitlement to assistance is not affected by unpaid leave taken under the rules on special leave (Sonderurlaubsverordnung), provided that that leave does not exceed one month.

...’

15 Paragraph 4 of the BBhV, which specifies the eligible family members, provides:

‘Provided that the total amount of his or her income does not exceed ... EUR 17 000, the spouse is entitled to the assistance.

...’

16 Paragraph 46 of the BBhV, entitled ‘Calculation of the assistance’, states:

‘1. The assistance is granted in the form of a payment of a percentage (calculation rate) of the eligible costs incurred by the person entitled and the eligible members of his family. ...

2. Provided that subparagraph 3 does not provide otherwise, the calculation rate is:

1. 50% for the person entitled,

2. 70% for those in receipt of a pension, other than orphans,

3. 70% for the eligible spouse, and

4. 80% for eligible children and orphans.

3. The calculation rate of the entitlement to the assistance granted to the person entitled shall be 70% if that person has two or more dependent children. ...’

17 The third sentence of Paragraph 80(1) of the BGG was amended with retroactive effect from 1 January 2009 by the Law of 14 November 2011 (BGBl. I, p. 2219) and now includes civil partners within the family members eligible for the assistance at issue. Paragraph 4(1) and point (3) of Paragraph 46(2) of the BBhV were also amended accordingly with retroactive effect from 14 February 2009.

The disputes in the main proceedings and the question referred for a preliminary ruling

18 The applicants in the main proceedings in Cases C-124/11 and C-135/11, who are federal public servants, unsuccessfully lodged applications with the Bundesrepublik Deutschland for assistance for medical expenses incurred, in December 2004 and November 2005, by their respective civil partners within the meaning of the LPartG.

19 By judgments delivered on 16 June and 26 May 2009, respectively, the Verwaltungsgericht Berlin (Administrative Court, Berlin) upheld the actions brought against those refusals, ruling that, although entitlement to assistance did not derive from the BhV as civil partners were not included therein as family members able to be taken into account in that respect, that entitlement did, however, follow from Directive 2000/78.

20 It found that the case-law of the Court of Justice (Case C-267/06 *Maruko* [2008] ECR I-1757) left no room for doubt that assistance provided to public servants in the event of illness could be categorised as ‘pay’ for the purposes of that directive. In that regard, it noted that the assistance at issue was received by reason of the employment relationship alone and was not a benefit paid by the general State social security or social protection schemes, as is apparent from, inter alia, the interrelationships between the assistance at issue and the appropriate remuneration commensurate with office.

- 21 The applicant in the main proceedings in Case C-143/11, who is a retired federal public servant, requested, during the month of July 2006, that his civil partner be taken into account for the assistance at issue, something which the defendant in the main proceedings refused to do.
- 22 The applicant's action in the main proceedings seeking a declaration that the civil partner must be treated as a spouse for purposes of the assistance at issue was unsuccessful at first and second instance. The appeal court, in particular, found that there had not been an infringement of Directive 2000/78 on the ground that the applicant in the main proceedings was not, with regard to the granting of the assistance at issue for his civil partner, in a situation which was comparable to that of a spouse.
- 23 In the three cases in the main proceedings, the unsuccessful party appealed on a point of law ('Revision') to the Bundesverwaltungsgericht (Federal Administrative Court).
- 24 The referring court states that, under the BhV, the applicants, in each of the cases in the main proceedings, cannot make claims for the assistance in question solely because their civil partners, unlike spouses, are not family members eligible for assistance.
- 25 The referring court specifies, moreover, that; should the assistance at issue come within the scope of Directive 2000/78, the applicants in the main proceedings would be entitled to the assistance claimed. Under that directive, equal treatment between public servants having a civil partner and those who are married is required since, as regards the benefit sought, namely the assistance granted to public servants in the event of illness, the situation between, on the one hand, civil partners and, on the other, married spouses is comparable.
- 26 Nevertheless, the referring court has doubts as to whether the assistance at issue must be considered to be an element of pay within the meaning of Article 157 TFEU, which then comes under Directive 2000/78, or to be a benefit provided by the State social security or social protection schemes, or a benefit treated as such, which is excluded from the scope of that directive.
- 27 In that regard, the referring court points out that the criteria which were defined by the Court of Justice for pension schemes, in order to distinguish between pensions paid under a professional benefits scheme and those provided by a State social security scheme, are not met in full in respect of the assistance at issue. It takes the view, furthermore, that those criteria are not appropriate in the context of protection schemes in the event of illness.
- 28 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following question in each of the cases in the main proceedings to the Court of Justice for a preliminary ruling:

'Does Directive 2000/78 establishing a general framework for equal treatment in employment and occupation apply to national legislation on the grant of assistance to public servants in cases of illness ("Beihilfe")?'

The question referred for a preliminary ruling

- 29 By its question, which is identical in each of the cases in the main proceedings, the referring court asks, in essence, whether assistance granted to public servants in the event of illness, such as that granted to public servants of the Bundesrepublik Deutschland under the Law on federal public servants, comes within the scope of Directive 2000/78.

- 30 It is apparent from Article 3(1)(c) and 3(3) of Directive 2000/78 that the directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation to, inter alia, conditions of pay and that it does not apply to payments of any kind made by State schemes or similar, including State social security or social protection schemes.
- 31 As the Court has held, the scope of Directive 2000/78 must be understood, in the light of its Article 3(1)(c) and 3(3), read in conjunction with recital 13 in its preamble, as excluding social security or social protection schemes, the benefits of which are not equivalent to ‘pay’ within the meaning given to that term for the application of Article 157 TFEU (*Maruko*, paragraph 41, and Case C-147/08 *Römer* [2011] ECR I-3591, paragraph 32).
- 32 Accordingly, Article 3(3) of Directive 2000/78 cannot be interpreted as meaning that a financial benefit granted in the event of illness to a public servant, which constitutes ‘pay’ within the meaning of Article 157 TFEU, falls outside the scope of that directive (see, to that effect, *Römer*, paragraph 33).
- 33 It is therefore necessary to determine whether a financial benefit granted under a protection scheme against illness such as that provided for German federal public servants may be treated in the same way as ‘pay’ within the meaning of Article 157 TFEU.
- 34 In accordance with Article 157(2) TFEU, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- 35 As regards, firstly, the material element of pay, it is apparent from the case-law of the Court that the concept of ‘pay’, within the meaning of Article 157 TFEU, must be interpreted broadly. It covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the worker 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 Case C-360/90 *Bötel* [1992] ECR I-3589, paragraph 12, and Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 29).
- 36 A financial benefit, such as the assistance granted to German federal public servants in the event of illness, under which 50% to 80% of the eligible health care expenses incurred by the public servant or certain members of his family are covered, also comes – from the material point of view – within the concept of ‘pay’ for the purposes of Article 157 TFEU.
- 37 Secondly, it is necessary to examine whether the assistance at issue is granted to the public servant by reason of the latter’s employment. It follows from settled case-law that, in order to determine whether a benefit comes within the scope of Article 157 TFEU, the one criterion which may prove decisive is whether the benefit was granted to the worker by reason of his employment relationship, and all the more so because this is the only criterion which is based on the wording of that provision itself (see, with regard to retirement pensions, *Maruko*, paragraph 46 and the case-law cited).
- 38 The specific criteria identified by the Court to assess the classification of a retirement benefit as pay, within the meaning of Article 157 TFEU, in particular those according to which that benefit must depend directly on the period of service completed and its amount calculated by reference to the last salary (see *Maruko*, paragraph 48 and the case-law cited) are, for their part, irrelevant with regard to a benefit such as that at issue in the main proceedings, which seeks, not to provide the interested party with a deferred income after the cessation of the employment relationship, but to cover health expenses incurred during that relationship or after it.
- 39 As the Advocate General noted at point 45 of his Opinion, the causal link mentioned at paragraph 37 of the present judgment is present in these cases. The assistance at issue is granted solely to German federal public servants, or former German federal public servants, who constitute a specific category

of workers (see, to that effect, judgment of 13 November 2008 in Case C-46/07 *Commission v Italy*, paragraph 40 and the case-law cited) pursuant to their employment relationship with the State. That assistance accordingly appears indissociably linked to the status of German federal public servants, and, under Paragraph 2(2) of the BBhV, receipt of that assistance is subject to payment of remuneration or a benefit in lieu thereof to the person entitled. The link between the assistance at issue and the employment relationship is also apparent from the fact that, in accordance with that provision, a public servant who is on unpaid leave cannot benefit from that assistance if the duration of the leave exceeds one month.

- 40 Thirdly, it is apparent from the wording of Article 157 TFEU that a benefit received by the worker by reason of his employment constitutes ‘pay’, within the meaning of that provision, only if it is paid by the employer itself.
- 41 As regards the cases in the main proceedings, the fact, underlined by the referring court, that the assistance at issue is governed by legislation and that it does not supplement a social benefit due under a regulation of general application is not of such a nature to call into question the classification as pay which attaches to a benefit granted by the State acting as an employer under an employment relationship (see, to that effect, Case C-7/93 *Beune* [1994] ECR I-4471, paragraphs 26 to 29 and 37; Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 37; and Case C-351/00 *Niemi* [2002] ECR I-7007, paragraphs 41 and 42).
- 42 It is apparent from the information provided by the applicants in the main proceedings and by the Bundesrepublik Deutschland in response to a written question from the Court that the assistance at issue is financed by the State administration concerned acting as an employer in respect of staff expenditure, and not by the social security budget. It is, however, for the national court to determine that that is indeed the case.
- 43 Having regard to the foregoing considerations, the answer to the question referred is that Article 3(1)(c) and 3(3) of Directive 2000/78 must be interpreted as meaning that assistance granted to public servants in the event of illness, such as that granted to public servants of the Bundesrepublik Deutschland under the Law on federal public servants, falls within the scope of that directive if it is the responsibility of the State, as a public employer, to finance it, this being a matter for the national court to determine.

Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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 (Third Chamber) hereby rules:

Article 3(1)(c) and 3(3) 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 meaning that assistance granted to public servants in the event of illness, such as that granted to public servants of the Bundesrepublik Deutschland under the Law on federal public servants (Bundesbeamtengesetz), falls within the scope of that directive if it is the responsibility of the State, as a public employer, to finance it, this being a matter for the national court to determine.

[Signatures]