Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

5 December 2013 *

(Freedom of movement for workers — Article 45 TFEU — Regulation (EU) No 492/2011 — Article 7(1) — National legislation providing for account to be taken only of a proportion of the periods of service completed with employers other than Land Salzburg — Restriction of freedom of movement for workers — Justifications — Overriding reasons in the public interest — Objective of rewarding loyalty — Administrative simplification — Transparency)

In Case C-514/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Salzburg (Austria), made by decision of 23 October 2012, received at the Court on 14 November 2012, in the proceedings

**Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH**

v

**Land Salzburg,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2013,

after considering the observations submitted on behalf of:

— the Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH, by C. Mahringer, Rechtsanwalt,

— Land Salzburg, by I. Harrer-Hörzinger, Rechtsanwältin, and P. Sieberer, Prozessbevollmächtigter,

— the Austrian Government, by C. Pesendorfer and M. Winkler, acting as Agents,

— the German Government, by T. Henze and by K. Petersen and A. Wiedmann, acting as Agents,

— the European Commission, by J. Enegren, V. Kreuschitz and F. Schatz, acting as Agents,

* Language of the case: German.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2011 L 141, p. 1).

2 The request has been made in proceedings between the Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH (Staff Committee of the company administering the clinics and hospitals of the Province of Salzburg) and Land Salzburg (the Province of Salzburg) concerning the fact that, for the purposes of calculating their remuneration, Land Salzburg took into account only a proportion of the periods of service completed by its employees with another employer.

### Legal context

*European Union ('EU') law*

3 Article 7(1) of Regulation No 492/2011 provides:

'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.'

*Austrian law*

4 Paragraph 1 of the Salzburger Landesbediensteten-Zuweisungsgesetz (Law of the Province of Salzburg governing the assignment of civil servants) (LGBl. 119/2003) is worded as follows:

'(1) Civil servants who, on the day preceding the entry into force of the present Law, were working

1. for the holding company for the clinics of the Province of Salzburg, or

2. in one of the hospitals, clinics or institutions owned by that holding company (St Johanns-Spital – Landeskrankenhaus, Christian-Doppler-Klinik – Landesnervenklinik, Landeskrankenhaus St Veit im Pongau, Institut für Sportmedizin, Zentral- und Servicebereiche, Bildungszentrum)

shall, with effect from the entry into force of the present Law, be assigned, at their current workplace and in accordance with their existing rights and obligations, to permanent positions as civil servants in the employ of [the Gemeinnützigen Salzburger Landeskliniken Betriebs GmbH ('SALK')].

(2) Save where otherwise provided, for the purposes of the present Law "civil servants" means officials … and contractual agents … of [Land Salzburg].'

5 Paragraph 3 of that law provides:

'(1) The manager of [SALK] shall have the authority to hire, for and on behalf of Land Salzburg, … the staff necessary to carry out the work of [SALK] as and when positions become available …

(2) Persons who have been hired under subparagraph (1) shall be contractual agents of Land Salzburg … and shall be regarded as being assigned to positions with [SALK].'

6 Paragraph 53(1) of the Salzburger Landesvertragsbedienstetengesetz (Law of the Province of Salzburg on contractual agents) (LGBl. 4/2000; 'the L-VBG'), in the version applicable at the material time, stated:

'A contractual agent shall advance every two years to the next pay step in his grade. Save where otherwise provided, such advancement shall depend on the reference date for such purposes.'

7 Paragraph 54 of the L-VBG provided:

'The reference date for the purposes of advancement shall be determined by backdating the date of recruitment by a period equal to 60% of other periods of service. "Other periods of service" means the entire period between the date on which an employee reaches the age of 18 (22 in the case of more senior positions) and the date of entering the employ of [Land Salzburg] …'

8 The L-VBG was amended in 2012 with retroactive effect from 1 January 2004 (LGBl. 99/2012). Paragraph 54 of the L-VBG, as amended, is worded as follows:

'(1) The reference date for the purposes of advancement shall be determined by backdating the date of recruitment, in accordance with the rules set out in subparagraph (2), by reference to periods of service beginning after 30 June of the year in which, following commencement of secondary education, nine years of study have been or should have been completed.

(2) The following percentages of the periods of service referred to in subparagraph (1) shall be taken into account in backdating the date of recruitment:

1. 100% of periods of service totalling up to three years (up to seven years in the case of employees in pay group (A));

2. 60% of periods of longer duration.'

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

9 SALK is a holding company for three hospitals and for other establishments situated in the Province of Salzburg; Land Salzburg – the defendant in the main proceedings – is the sole shareholder in SALK. Under Austrian law, SALK employees are regarded as officials or contractual agents of Land Salzburg.

10 The documents placed before the Court show that, on 31 May 2012, 716 doctors worked for SALK (113 of whom came from an EU or EEA (European Economic Area) State other than the Republic of Austria), as did 2 850 non-medical healthcare professionals (340 of whom came from an EU or EEA State other than the Republic of Austria).

11 By an action brought on 6 April 2012, the Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH sought from the Landesgericht Salzburg (Regional Court, Salzburg; or 'the referring court') a declaration, effective as between the parties, that SALK employees have the right to have all periods of relevant professional service completed in the European Union or the European Economic Area with employers other than Land Salzburg taken into account in determining the reference date for the purposes of advancement to the next pay step in their grade, on the ground that, if those periods of service had been completed with Land Salzburg, they would have been taken into account in their entirety.

12 The order for reference shows that the action was brought under Paragraph 54(1) of the Arbeits- und Sozialgerichtsgesetz (Law governing labour and social courts). In accordance with that provision, workforce bodies with capacity to be a party to proceedings are able, within their sphere of operation, to bring proceedings in the field of employment law in order to establish the existence or non-existence of rights or legal relationships affecting at least three employees of the establishment or undertaking involved.

13 The referring court states that, in determining the reference date for the purposes of the advancement of a SALK employee to the next pay step in his grade, Paragraph 54 of the L-VBG draws a distinction depending on whether the employee has always worked for Land Salzburg to the exclusion of other employers. If the employee has only ever worked for Land Salzburg, full account is to be taken of the entire period of service, but, if not, account is to be taken of only 60% of the periods of service completed before recruitment by Land Salzburg. As a result, an employee who has worked for Land Salzburg from the very beginning of his career will be placed on a higher pay step than an employee who has accumulated comparable professional experience of equal length with other employers.

14 According to the Landesgericht Salzburg, Paragraph 54 of the L-VBG does not constitute direct discrimination on grounds of nationality, as it applies without distinction to Austrian nationals and to nationals of other Member States. The Landesgericht Salzburg is nevertheless uncertain as to whether that provision is compatible with Article 45 TFEU and Article 7(1) of Regulation No 492/2011.

15 In those circumstances, the Landesgericht Salzburg decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Article 45 TFEU and Article 7(1) of Regulation No 492/2011 preclude national legislation (in the present case, Paragraphs 53 and 54 of [the L-VBG]) under which, in determining the reference date for the purposes of advancement, a public employer is to take into account all uninterrupted periods of service which its employees have completed with it, but is to take into account, on an all-inclusive basis from a certain age, only a proportion of the periods of service which its employees have completed with other public or private employers – whether within Austria or in other EU or EEA States?’

## Consideration of the question referred

### *Admissibility*

16 Land Salzburg argues that the request for a preliminary ruling is inadmissible because it does not provide enough of the factual and legal material needed to enable the Court to give a useful answer to the question referred. In particular, Land Salzburg argues that the referring court has neglected to take account of Paragraph 54 of the L-VBG, as amended, which is applicable to the dispute before it.

17 In that regard, it should be borne in mind that the need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (see Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 57 and the case-law cited, and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 32).

18 The Court also stresses that it is important for the referring court to set out the precise reasons why it is unsure as to the interpretation of EU law and why it considers it necessary to refer questions to the Court for a preliminary ruling (see, to that effect, inter alia, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 46 and the case-law cited, and the Order in Case C-432/10 *Chihabi and Others* [2011] ECR I-5 (summary publication), paragraph 22).

19 In the present case, it must be held that the order for reference contains the factual and legal material necessary for the Court to be able to provide useful answers to the referring court and for the governments of the Member States and other interested parties to be able to submit their own observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. The order for reference has also clearly set out the reasons why the Landesgericht Salzburg has referred a question to the Court of Justice for a preliminary ruling.

20 Furthermore, the Landesgericht Salzburg observed, in response to a request for clarification addressed to it by the Court under Article 101 of its Rules of Procedure, that Paragraph 54 of the L-VBG, as amended, did not affect the relevance of the question referred, as that provision maintained the taking into account of 60% of all periods of service completed between attaining the age of 18 or 22 and entering the employ of Land Salzburg.

21 Accordingly, the request for a preliminary ruling is admissible.

*Substance*

22 By its question, the referring court asks, in essence, whether Article 45 TFEU and Article 7(1) of Regulation No 492/2011 are to be interpreted as precluding national legislation under which, in determining the reference date for the purposes of the advancement of an employee of a local or regional authority to the next pay step in his grade, account is to be taken of all uninterrupted periods of service completed with that authority, but of only a proportion of any other periods of service.

23 Article 45(2) TFEU prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration or other conditions of work and employment. Article 7(1) of Regulation No 492/2011 constitutes merely the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU within the specific field of conditions of employment and work and must therefore be interpreted in the same way as Article 45(2) TFEU (Case C-371/04 *Commission* v *Italy* [2006] ECR I-10257, paragraph 17 and the case-law cited).

24 Indisputably, given that it affects workers' remuneration, determination of the reference date for the purposes of advancement falls within the material scope of the provisions cited in the preceding paragraph.

25 The equal treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 492/2011 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (see, inter alia, Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17, and Case C-172/11 *Erny* [2012] ECR, paragraph 39).

26 Unless objectively justified and proportionate to the aim pursued, a provision of national law – even if it applies regardless of nationality – must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (see, to that effect, Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 54 and the case-law cited).

27 In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question (*Erny*, paragraph 41 and the case-law cited).

28 In the present case, by refusing to take into account in their entirety any relevant periods of service that a migrant worker has completed with an employer established in a Member State other than the Republic of Austria, the national legislation at issue in the main proceedings is liable to affect migrant workers more than national workers, placing the former at a particular disadvantage as they will in all likelihood have accrued professional experience in a Member State other than the Republic of Austria before entering the employ of Land Salzburg. Thus, a migrant worker who has accrued relevant professional experience with employers established in a Member State other than the Republic of Austria and whose professional experience with those employers is of the same length as the experience accrued by a worker who has spent his entire career working for Land Salzburg will be placed on a lower pay step than the latter.

29 In addition, the referring court observes that the legislation in question has a similar impact on employees re-entering the employ of Land Salzburg, who, after initially working for Land Salzburg, have gone on to work for other employers, as only 60% of the total periods of service completed by those workers before re-entering the employ of Land Salzburg will be taken into account. That legislation is thus likely to deter workers already employed by Land Salzburg from exercising their right to freedom of movement: if they decide to leave the employ of Land Salzburg, only a proportion of the periods of service that they have completed up to that point will be taken into account for the purposes of determining their remuneration if ever they wish to re-enter the employ of Land Salzburg at a later date.

30 However, provisions of national legislation which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute obstacles to that freedom even if they apply without regard to the nationality of the workers concerned (see, inter alia, Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 26, and Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 34).

31 It is admittedly true that the legislation at issue in the main proceedings may operate to the detriment not only of migrant workers, but also of Austrian workers who have accrued relevant professional experience with an employer established in Austria other than Land Salzburg. However, as was pointed out in paragraph 27 above, in order for a measure to be treated as being indirectly discriminatory, it is unnecessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question.

32 All the provisions of the Treaty on the Functioning of the European Union relating to freedom of movement for persons are intended, as are those of Regulation No 492/2011, to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place nationals of Member States at a disadvantage if they wish to pursue an economic activity in the territory of another Member State (see, to that effect, inter alia, *Kranemann*, paragraph 25, and *Olympique Lyonnais*, paragraph 33).

33 Regarding the arguments put forward by the Austrian and German Governments, both of which take the view that the national legislation at issue in the main proceedings has only a random impact on a migrant worker's decision to join SALK, it should be borne in mind that the reasons why a migrant worker chooses to make use of his freedom of movement within the European Union are not to be taken into account in assessing whether a provision of national law is discriminatory. The possibility of exercising a freedom so fundamental as the freedom of movement for persons cannot be limited by such considerations, which are purely subjective (*O'Flynn*, paragraph 21).

34 Moreover, the articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental provisions of EU law and any restriction of that freedom, however minor, is prohibited (see, inter alia, Case C-169/98 *Commission* v *France* [2000] ECR I-1049, paragraph 46, and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 52 and the case-law cited).

35 Consequently, national legislation such as the legislation at issue in the main proceedings is liable to restrict freedom of movement for workers, an effect which is in principle prohibited by Article 45 TFEU and Article 7(1) of Regulation No 492/2011.

36 A measure of that kind cannot be accepted unless it pursues one of the legitimate aims listed in the Treaty or is justified by overriding reasons in the public interest. Even so, application of that measure still has to be such as to ensure achievement of the objective in question and must not go beyond what is necessary for that purpose (see, to that effect, inter alia, *Kranemann*, paragraph 33, and *Olympique Lyonnais*, paragraph 38).

37 In that regard, the referring court finds that the legislation at issue in the main proceedings introduces a 'loyalty reward' for workers who spend their entire career with the same employer. Land Salzburg and the Austrian Government contend that the legislation in question does not introduce any such reward.

38 Even assuming that the legislation in question does indeed pursue the objective of rewarding workers' loyalty to their employers, and even though such an objective may conceivably constitute an overriding reason in the public interest (see Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 83), it must be found that, given the characteristics of that legislation, the obstacle which it entails is not such as to ensure achievement of that objective.

39 Indeed, the referring court has observed, in response to the request for clarification mentioned in paragraph 20 above, that SALK employees, as officials or contractual agents of Land Salzburg, benefit from account being taken of all previous uninterrupted periods of relevant service – relevant, that is, in terms of duties performed, whether at SALK or elsewhere – completed not only with SALK, but with Land Salzburg generally.

40 However, in view of the large number of potential employers coming under the authority of Land Salzburg, that pay scheme is intended to allow mobility within a group of distinct employers and not to reward the loyalty of an employee to a particular employer (see, to that effect, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 49).

41 Land Salzburg contends, as do the Austrian and German Governments, that the legislation at issue in the main proceedings pursues the legitimate aims of administrative simplification and transparency. Regarding the former aim, they argue that the adoption of the fixed rate of 60% in respect of all periods of service completed with employers other than Land Salzburg replaces the previous – more complex – system, simplifying the calculations which the administration must carry out in order to determine the reference date for the purposes of advancement (as it is no longer necessary to examine the entirety of each newly-recruited worker's professional career on an individual basis) and reducing, as a result, the related administrative costs.

42 However, it is not possible to accept that the aim of administrative simplification, designed merely to reduce the public administration's workload, inter alia by simplifying the calculations which that administration must carry out, constitutes an overriding reason in the public interest capable of justifying the restriction of a freedom so fundamental as the freedom of movement for workers guaranteed by Article 45 TFEU.

43 Moreover, the fact that simplification of that kind makes it possible for administrative costs to be reduced is a purely economic consideration and in consequence cannot, according to settled case-law, constitute an overriding reason in the public interest (see, in particular, Case C-96/08 *CIBA* [2010] ECR I-2911, paragraph 48 and the case-law cited).

44 In so far as the national legislation at issue in the main proceedings is intended to ensure greater transparency in the determination of the reference date for the purposes of advancement to higher pay steps, it must be found that, in any event, that legislation goes beyond what is necessary to achieve that aim: the desired transparency could be achieved through measures which do not restrict freedom of movement for workers, such as the establishment and publication or dissemination by appropriate means of predetermined and non-discriminatory criteria for assessing the length of relevant professional experience for the purposes of advancement.

45 In the light of the foregoing, the answer to the question referred is that Article 45 TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted as precluding national legislation under which, in determining the reference date for the purposes of the advancement of an employee of a local or regional authority to the next pay step in his grade, account is to be taken of all uninterrupted periods of service completed with that authority, but of only a proportion of any other periods of service.

## Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is 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 (Second Chamber) hereby rules:

**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 precluding national legislation under which, in determining the reference date for the purposes of the advancement of an employee of a local or regional authority to the next pay step in his grade, account is to be taken of all uninterrupted periods of service completed with that authority, but of only a proportion of any other periods of service.**

[Signatures]