Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

7 November 2013 *

(Reference for a preliminary ruling — Freedom to provide services — Posting of workers — Directive 96/71/EC — Minimum rates of pay — Lump sums and employer contribution to a multiannual savings plan for the benefit of its employees)

In Case C-522/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Germany), made by decision of 18 April 2012, received at the Court on 19 November 2012, in the proceedings

Tevfik Isbir

v

DB Services GmbH,

THE COURT (Seventh Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, G. Arestis, and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Isbir, by S. Hermann, Rechtsanwalt,

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

— the Austrian Government, by A. Posch, acting as Agent,

— the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

— the Swedish Government, by C. Stege and A. Falk, acting as Agents,

— the Norwegian Government, by P. Wennerås, acting as Agent,

— the European Commission, by F. Bulst and J. Enegren, 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 The present request for a preliminary ruling concerns the interpretation of Article 3(1)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1 and corrigenda in OJ 2007 L 301, p. 28, and L 310, p. 22).

2 The request has been made in the context of proceedings between Mr Isbir, working in the industrial cleaning sector, and his employer, DB Services GmbH ('DB Services'), which is an undertaking of the Deutsche Bahn AG group, concerning the factors to be taken into account in determining the minimum wage of the person concerned.

Legal context

European Union law

3 Paragraphs 1 and 8 of Article 3 of Directive 96/71, entitled 'Terms and conditions of employment' provide:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

— by law, regulation or administrative provision,

and/or

— by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

…

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

…

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

…

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

...'

German law

AEntG 2007

4 The Law on mandatory working conditions concerning cross-border services – Posted workers law (Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen – Arbeitnehmer-Entsendegesetz) in the version of 25 April 2007, which entered into force on 1 July 2007 ('the AEntG 2007'), transposes into German national law Directive 96/71 and the subsequent amendments of European Union law, in particular those resulting from Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

5 Paragraph 1 of the AEntG 2007 includes provisions that determine the details for applying collective agreements to foreign employers in the event of posting of workers to Germany.

Fifth Law on Capital Formation

6 The Fifth Law on Capital Formation (Fünftes Vermögensbildungsgesetz) of 4 March 1994 provides for payment by the employer of a monetary contribution to allow the formation of a capital amount on behalf of the worker.

7 The forms of investment provided for by that law are, for example, a stocks and shares savings scheme or other equity holdings, the expenses of a worker relating to construction, acquisition, improvement or extension of a residential property as well as the expenses relating to a capital or savings life insurance policy. In that context, the worker concerned may have access to the contributions in question only after a vesting period of several years, which is regulated differently according to the form of investment.

8 The contributions to the capital formation are subsidised by the State, at least for certain forms of investment.

Collective agreements

– DB Services Nord collective wage agreement

9 The collective agreement on pay for workers and trainees of DB Services Nord GmbH (Entgelttarifvertrag für die Arbeitnehmer und Auszubildenden der DB Services Nord GmbH) of 16 December 2004 ('DB Services Nord collective wage agreement') includes pay scales for workers in the buildings and transport services sector.

10 The DB Services Nord collective wage agreement, which should have been repealed on 30 June 2007, was kept in force until 31 March 2008.

11 The hourly remuneration provided for under the DB Services Nord collective wage agreement was EUR 7.56 for Group A3.

12 The parties to that agreement determined that, with effect from 1 April 2008, that hourly remuneration for Group A3 would be EUR 7.90.

13 Those parties also agreed during their negotiations that, for the period from 1 July 2007 to 31 March 2008, employees would receive two lump sum payments ('the lump sum payments of August 2007 and January 2008'), namely:

— EUR 600 in respect of the increase in profit sharing, paid with the salary for the month of August 2007; and

— a one-off payment of EUR 150 related to the prevailing economic situation, paid with the salary for the month of January 2008.

– Gebäudereinigung 2004 collective wage agreement

14 The collective wage agreement for workers in the building cleaning industry (Lohntarifvertrag für die gewerblichen Beschäftigten in der Gebäudereinigung) of 4 October 2003 ('Gebäudereinigung 2004 collective wage agreement') was declared universally applicable with effect from 1 April 2004.

15 Article 2 of the Gebäudereinigung 2004 collective wage agreement provided for an hourly remuneration of EUR 7.87.

16 That system ceased to be in force on 29 February 2008.

– Mindestlohn Gebäudereinigung collective agreement

17 The collective agreement on the setting of the minimum wage for workers in the building cleaning industry in the territory of the Federal Republic of Germany (Tarifvertrag zur Regelung der Mindestlöhne für gewerbliche Arbeitnehmer in der Gebäudereinigung im Gebiet der Bundesrepublik Deutschland), of 9 October 2007 ('Mindestlohn Gebäudereinigung collective agreement'), provided for a minimum hourly salary of EUR 8.15 for employees belonging to the category corresponding to Group A3.

18 The application of the Mindestlohn Gebäudereinigung collective agreement was extended with effect from 1 March 2008.

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

19 Mr Isbir is employed in the industrial cleaning sector and has worked in Germany for DB Services since 1 January 2004.

20 Under the DB Services Nord collective wage agreement, he received an hourly remuneration of EUR 7.56 until 31 March 2008 and EUR 7.90 with effect from 1 April 2008.

21 Mr Isbir applied, as of 1 July 2007, for the more favorable provisions establishing the hourly wages of the building cleaning sector, namely the Gebäudereinigung 2004 collective wage agreement, until 29 February 2008, then the Mindestlohn Gebäudereinigung collective agreement, with effect from 1 March 2008, which were made applicable to all employees and employers of that sector, including those of DB Services.

22 Mr Isbir considered that he should have received an hourly wage of EUR 7.87 and EUR 8.15 instead of EUR 7.56 and EUR 7.90.

23 Although DB Services did not dispute that it was from then on to be subject to the Gebäudereinigung 2004 collective wage agreement, and subsequently to the Mindestlohn Gebäudereinigung collective agreement, it considered that Mr Isbir had in fact already received much more than the minimum hourly wage that he claimed, since he had received, for the period in question and under the collective agreements binding the Deutsche Bahn AG group, amounts which, according to it, should be included in that minimum wage, namely:

— first, the lump sum payments in August 2007 and January 2008,

— secondly, the contribution to the capital formation.

24 It is the issue of whether or not to include those elements of remuneration in the minimum wage that is the the subject-matter of the proceedings before the Bundesarbeitsgericht (Federal Labour Court).

25 That court recognises that the dispute relates to a purely internal situation. However, it argues that, according to the case-law of the Court (Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, and Case C-352/08 *Modehuis A. Zwijnenburg* [2010] ECR I-4303), in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of whether they apply to a purely internal or cross-border situation. In the present case, allegedly, it is apparent from the drafting history of the AEntG 2007 that the concept of 'minimum rates of pay' to which that law refers should, according to the national legislature, be interpreted in the same way, whether it applies to a domestic situation or a situation covered by European Union law.

26 The national court asks to what extent the two amounts mentioned in paragraph 23 of the present judgment fall within the scope of the interpretation which, according to the national court, the Court has already given of minimum rates of pay in its judgment in Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, and which does not include elements of remuneration that alter the relationship between the service provided by the worker and the consideration that he receives in return.

27 In those circumstances, the national court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the expression "minimum rates of pay" in Article 3(1)(c) of Directive [96/71] to be interpreted as referring to the consideration of the employer for the work done by the worker which should be remunerated according to the law, regulation or administrative provision or the universally applicable collective agreement referred to in the opening sentence of Article 3(1) of the directive only and exclusively by the collective minimum wage ("usual work"), meaning that it is only those employer payments which reward that usual work and which must be available to the worker at the latest on the date when they are payable within the respective wage payment period which can be counted towards the fulfilment of the obligation to pay the minimum rate of pay?

2. Is the expression "minimum rates of pay" in Article 3(1)(c) of Directive [96/71] to be interpreted as precluding national provisions or practices according to which payments by an employer are not to be regarded as part of the minimum wage and therefore cannot be counted towards fulfillment of the entitlement to the minimum wage, if the employer makes those payments on the basis of a collective agreement-based obligation,

— and the payments, according to the intention of the parties to the collective agreement and of the legislature, have capital formation objectives for the workers,

and to that end,

— the monthly payments by the employer to the employee are for long-term purposes such as contributions towards savings, the construction or acquisition of a residence or capital life insurance, and

— are subsidised by allowances and tax breaks from the State, and

— the worker is entitled to access those contributions only after several years have elapsed, and

— the level of the contributions in the form of a fixed monthly sum is dependent only on the agreed working time and not on the salary paid ("capital formation contributions")?'

The jurisdiction of the Court

28 It should be noted that the Court has already declared that it has jurisdiction to give preliminary rulings on questions concerning provisions of European Union law in situations where, although the facts in the main proceedings were outside the scope of European Union law, the provisions of that law had been rendered applicable by national law (see, to that effect, *Leur-Bloem*, paragraphs 26 and 27). Likewise, the Court has held that, where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in European Union law in order, in particular, to avoid discrimination against nationals of the Member State in question or any distortion of competition, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to that effect, *Modehuis A. Zwijnenburg*, paragraph 33).

29 The national court notes in that regard that the national legislature intended, as is apparent from the drafting history of the AEntG 2007, which transposed Directive 96/71 into German national law, that 'internal situations and situations which fall within the scope of European Union law, especially as regards cross-border posting of workers' should be interpreted uniformly.

30 In such a case, and pursuant to the allocation of judicial functions between national courts and the Court of Justice under Article 267 TFEU, it is for the national court alone to assess the precise scope of such a reference to European Union law, the jurisdiction of the Court of Justice being confined to considering provisions of that law only. Consideration of the limits which the national legislature may have placed on the application of European Union law to purely internal situations is a matter for national law and consequently falls within the exclusive jurisdiction of the courts of the Member State (*Leur-Bloem*, paragraph 33).

31 It follows from the foregoing that the Court has jurisdiction to rule on the questions submitted by the national court.

Consideration of the questions referred

32 By its two questions, which should be examined together, the national court asks, in essence, whether Article 3(1)(c) of Directive 96/71 is to be interpreted as precluding the inclusion in the minimum wage of elements of remuneration such as those at issue in the main proceedings and which concern, first, two lump sum payments determined in the context of the negotiation of a collective agreement and, secondly, a capital formation contribution.

33 In that regard, it should be noted that the European Union legislature adopted Directive 96/71 with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where

an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service. It follows from recital 13 in the preamble to that directive that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host Member State by employers who post workers there. Nevertheless, that directive did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the EC Treaty and the general principles of European Union law (Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 58 to 60).

34 In order to ensure that the nucleus of mandatory rules for minimum protection is observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, inter alia the minimum rates of pay, including overtime rates (*Laval un Partneri*, paragraph 73).

35 As the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States (*Laval un Partneri*, paragraph 68).

36 Furthermore, it should be recalled that the second subparagraph of Article 3(1) of Directive 96/71 expressly refers, for the purposes of that directive, to the national law or practice of the Member State to whose territory the worker is posted to determine the minimum rates of pay referred to in the first subparagraph of Article 3(1).

37 In that context, it must be noted that Directive 96/71 does not itself provide any substantive definition of the minimum wage. The task of defining what are the constituent elements of the minimum wage, for the application of that directive, therefore comes within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States.

38 In that regard, the Court has already held that allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return for that service, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind (*Commission* v *Germany*, paragraph 39).

39 In that regard, the Court held that it was normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage (*Commission* v *Germany*, paragraph 40).

40 Accordingly, only the elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration that he receives in return, on the other, can be taken into account in determining the minimum wage within the meaning of Directive 96/71.

41 In circumstances such as those of the main proceedings, it is appropriate, first, to note that the lump sum payments of August 2007 and January 2008 appear, as the national court points out, as consideration for the usual work of the workers concerned, as provided for in a collective agreement of universal application, namely the DB Services North collective wage agreement.

42 Admittedly, those payments were made outside the period in which they were supposed to pay for the service provided by the workers concerned. However, that fact does not, in itself, affect the classification of such remuneration provided that the parties to DB Services Nord collective wage agreement intended, in that way, to introduce an increase in wages in consideration of the work, taking into account the national practice, during the negotiation of such a collective agreement, and upon expiry of the previous collective agreement, of anticipating, by those lump sum payments, the application of the new salary scale. It is for the national court, however, to determine whether such a classification actually corresponds to the intention of the parties to that collective agreement.

43 Secondly, the capital formation contribution seems, in view of its objective and its characteristics as set out by the national court, to alter the relationship between the service provided by the worker and the consideration which he receives by way of remuneration for that service.

44 Even if such a contribution is not separable from the work done, it is distinguishable from the salary itself. Since its aim, by the formation of a capital amount that the worker will benefit from in the longer term, is to achieve an objective of social policy supported, in particular, by a financial contribution from the public authorities, it cannot be regarded, for the application of Directive 96/71, as forming part of the usual relationship between the work done and the financial consideration for that work from the employer. It is for the national court, however, to verify whether that is indeed the case in the proceedings before it.

45 In the light of the foregoing considerations, the reply to be given to the questions referred must be that Article 3(1)(c) of Directive 96/71 is to be interpreted as meaning that it does not preclude the inclusion in the minimum wage of elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives by way of remuneration for that service, on the other. It is for the national court to verify whether that is the case as regards the elements of remuneration at issue in the main proceedings.

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 (Seventh Chamber) hereby rules:

Article 3(1)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, is to be interpreted as meaning that it does not preclude the inclusion in the minimum wage of elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives by way of remuneration for that service, on the other. It is for the national court to verify whether that is the case as regards the elements of remuneration at issue in the main proceedings.

[Signatures]