



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

4 July 2013*

(Transfer of pension rights acquired in a Member State — Articles 45 TFEU and 48 TFEU — National rules not allowing for the right to transfer to an international organisation having its head office in another Member State the capital value representing the retirement contributions paid to a national social security body — Aggregation rule)

In Case C-233/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di La Spezia (Italy), made by decision of 16 April 2012, received at the Court on 14 May 2012, in the proceedings

Simone Gardella

v

Istituto nazionale della previdenza sociale (INPS),

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 11 April 2013,

after considering the observations submitted on behalf of:

- Mr Gardella, by T. Truppa, R. Ciancaglini and M. Rossi, avvocati,
- the Istituto nazionale della previdenza sociale (INPS), by A. Sgroi, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by G. De Socio, avvocato dello Stato,
- the Czech Government, by M. Smolek, acting as Agent,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the European Commission, by C. Cattabriga and V. Kreuzschitz, acting as Agents,

* Language of the case: Italian.

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 Articles 20 TFEU, 45 TFEU, 48 TFEU and 145 TFEU to 147 TFEU and of Article 15 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Mr Gardella, working at the European Patent Office (EPO), in Munich (Germany) and the Istituto nazionale della previdenza sociale (INPS) (the National Social Security Institute) concerning the INPS's refusal to transfer to the EPO's social security scheme the capital value representing the pension rights he acquired during his periods of employment in Italy.

Legal context

European Union legislation

- 3 Article 11(2) of Annex VIII to the Staff Regulations of European Union officials, established by Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition II, 1968(I), p. 30), as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1) ('the Staff Regulations'), states:

'An official who enters the service of the Communities after:

— leaving the service of a government administration or of a national or international organisation;

or

— pursuing an activity in an employed or self-employed capacity;

shall be entitled, after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations, to have paid to the Communities the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities.

In such case the institution in which the official serves shall, taking into account the official's basic salary, age and exchange rate at the date of application for a transfer, determine by means of general implementing provisions the number of years of pensionable service with which he shall be credited under the Community pension scheme in respect of the former period of service, on the basis of the capital transferred, after deducting an amount representing capital appreciation between the date of the application for a transfer and the actual date of the transfer.

Officials may make use of this arrangement once only for each Member State and pension fund concerned.'

4 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), which replaced Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71'), contains provisions relating to the coordination of social security systems in the European Union.

5 Article 2 of Regulation No 883/2004, entitled 'Scope', provides in paragraph 1:

'1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

6 Article 3(1) of the same regulation, entitled 'Scope', provides:

'This Regulation shall apply to all legislation concerning the following branches of social security:

...

(d) old-age benefits;

...'

7 Article 6 of Regulation No 883/2004, entitled 'Aggregation of periods' provides:

'Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

— the acquisition, retention, duration or recovery of the right to benefits,

— the coverage by legislation, or

— the access to or the exemption from compulsory, optional continued or voluntary insurance,

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.'

8 Article 52 of that regulation, entitled 'Award of benefits', provides in paragraph 1:

'1. The competent institution shall calculate the amount of the benefit that would be due:

(a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);

(b) by calculating a theoretical amount and subsequently an actual amount (pro rata benefit), as follows:

(i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation

it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;

- (ii) the competent institution shall then establish the actual amount of the pro rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.'

Relevant rules of the EPO

- 9 The EPO is an international body established by the Munich Convention of 5 October 1973 and having its head office in Munich.
- 10 The EPO has its own pension scheme, separate from the pension schemes of the Member States and that of the European Union.
- 11 Under Article 12 of the European Patent Office rules on pensions, adopted by its Board of Directors pursuant to Article 33 of that convention, EPO staff may transfer the capital value representing the rights acquired previously under other retirement schemes, in so far as allowed under those schemes. When that is the case, the EPO determines, according to its own rules, the number of years of pensionable service acquired under the original scheme which may be credited to the person concerned and, consequently, for the retirement pension to which that person will be entitled.
- 12 It is apparent from the order for reference that the European Patent Office's rules on pensions do not, however, provide for aggregation of contribution periods, that is to say, for the cumulation of years of pensionable service acquired with the EPO with the rights acquired under other retirement schemes.

The Italian rules

- 13 The order for reference indicates that, in Italy, the transfer or merger of pension rights as provided for by Law No 29 of 7 February 1979 on the merger of workers' insurance periods for the purposes of social security (Legge n. 29 – Ricongiunzione dei periodi assicurativi dei lavoratori ai fini previdenziali) (GURI No 40 of 9 February 1979), as amended, applies only to employees in the public sector or private sector who have all been contributors to mandatory forms of social security with national institutions, funds and social security schemes. There is a cost attaching to the transfer, which it is for the person concerned to cover.
- 14 The referring court adds that, under the Staff Regulations, EU officials and servants as well as, under specific agreements, those of the European University Institute and the European Investment Bank, may make use of the mechanism for transferring the capital value representing the pension rights acquired previously in the territory of the Italian Republic.
- 15 By contrast, servants of the EPO may not avail themselves of that opportunity because there is no agreement between the EPO and the Italian Republic authorising the transfer to the EPO of the capital value representing the pension rights acquired by workers previously affiliated with the INPS.
- 16 As to the aggregation of contribution periods, the information provided by the referring court indicates that under Regulation No 883/2004 that mechanism, in principle, works to the advantage of employed workers and the liberal professions. It does not, however, apply to employees of the EPO who are as servants of an international organisation and, according to Article 2 of Regulation No 883/2004, cannot be considered to be 'subject to the legislation of one or more Member States'.

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

- 17 Mr. Gardella is an Italian national who has worked for the EPO since 1 May 2002.
- 18 Before holding that post he worked in Italy from 21 December 1992 to 30 April 2002, during which he paid to the INPS a total of 485 weekly insurance contributions (equivalent to 9 years and 17 weeks).
- 19 On 15 September 2008 Mr Gardella asked the INPS to transfer the capital value representing the pension rights he had acquired during that period to the EPO's social security scheme.
- 20 The INPS refused his request on the ground that the rules in Italy did not allow for the transfer requested.
- 21 Mr Gardella therefore brought an action against the INPS's decision to refuse his request before the Tribunale di La Spezia.
- 22 That court found that the absence of rules in the Italian legal order permitting the transfer to the EPO of the capital value representing the pension rights acquired previously in Italy, combined with the absence of provisions in the European Patent Office's rules on pensions permitting the aggregation of contribution periods completed before recruitment, would appear to constitute a hindrance to the free movement of workers in the European Union. The prospect of being unable to utilise contributions paid and years of pensionable service acquired before commencing service at the EPO towards their pension would discourage workers having acquired pension rights in Italy from accepting offers of employment from the EPO. Such a situation would manifestly infringe the rights conferred on Union citizens by Articles 20 TFEU, 45 TFEU and 48 TFEU and would also be incompatible with Articles 145 TFEU to 147 TFEU and Article 15 of the Charter.
- 23 In those circumstances, the Tribunale di La Spezia decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Must Articles 20 [TFEU], 45 [TFEU], 48 [TFEU] and 145 [TFEU] to 147 TFEU and Article 15 of the Charter ... be interpreted as precluding national legislation or national administrative practice which do not permit a worker who is a national of a Member State to transfer to the pension scheme of an international body situated in the territory of another Member State ..., where he works and is insured, the pension contributions credited to the social security scheme of his own State, where he was previously insured?
- (2) As a consequence of the circumstances set out in Question 1, should it be possible to exercise the right to transfer contributions even in the absence of any specific agreement between the Member State of which the worker is a national or the worker's pension institution, on the one hand, and the international body on the other?'

Consideration of the questions referred

- 24 By the questions it has referred, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 20 TFEU, 45 TFEU, 48 TFEU and 145 TFEU to 147 TFEU and Article 15 of the Charter must be interpreted as precluding rules of a Member State which do not allow its nationals employed in an international organisation such as the EPO, established in the territory of another Member State, to transfer to the social security scheme of that organisation the capital value representing the pension rights they have acquired previously in the territory of their Member State of origin, where there is no arrangement between that Member State and the international organisation providing for the possibility of such a transfer.

- 25 It is settled case-law that any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his origin falls within the scope of Article 45 TFEU. A Union national working in a Member State other than his State of origin and who has accepted a post in an international organisation also comes within the scope of that provision (see, to that effect, Case C-185/04 *Öberg* [2006] ECR I-1453, paragraphs 11 and 12 and the case-law cited).
- 26 He does not lose his status as worker for the purposes of Article 45 TFEU because he holds employment with an international organisation (see, to that effect, Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 11).
- 27 It follows that Mr Gardella's situation comes within the scope of Article 45 TFEU.
- 28 In examining the question whether the fact that Mr Gardella may not transfer the capital value representing his pension rights to the EPO's pension scheme may constitute an impediment to the free movement of workers within the European Union, it should be noted as a preliminary point that the option granted under the Staff Regulations to EU officials and other EU servants to transfer to the EU pension scheme the capital value representing the pension rights acquired during previous employment cannot be extended to officials of the EPO or to relations between a Member State and an international organisation such as the EPO.
- 29 The EPO is not an EU institution or body to which those regulations apply.
- 30 Whereas the Staff Regulations are mandatory in their entirety and directly applicable in all Member States, the European Patent Office's rules on pensions, not being a legal act of the European Union, cannot produce such legal effects in the Member States under EU law. Moreover, those rules explicitly provide that the body which manages the pension scheme to which the official in question was a contributor must give its permission before any transfer of the capital value representing the pension rights may take place.
- 31 The EPO is, moreover, an international organisation governed by international law.
- 32 Mr Gardella's situation thus falls to be assessed through a comparison with that of citizens who exercise their right to move freely within the European Union in pursuing paid employment with employers which are not EU institutions or international organisations such as the EPO, and with that of citizens pursuing self-employed activities, which are by far the largest segment for which citizens exercise their right of free movement.
- 33 As regards the coordination of social security systems as between Member States, neither the FEU Treaty nor Regulations Nos 1408/71 and 883/2004 have provided or provide for rules on the transfer of the capital value representing previously-acquired pension rights. Rather, they are based on the principle of aggregation of periods, as evidenced by Article 48 TFEU, as implemented by those regulations.
- 34 It should be noted that Article 48 TFEU, on which the applicant in the main proceedings relies before the referring court in support of his action and which the questions referred also mention, provides that the European Parliament and the Council of the European Union are to adopt 'such measures in the field of social security as are necessary to provide freedom of movement for workers' inter alia by making arrangements to secure for migrant workers the 'aggregation ... of all periods taken into account under the laws of the several countries'. Such an aggregation system of periods was introduced by Regulation No 1408/71 then by Regulation No 883/2004.

- 35 It is thus not apparent from Article 45 TFEU, read in the light of Article 48 TFEU, that there is an obligation for a Member State to provide for the option for an official of an international organisation, such as the EPO, of transferring the capital value representing previously-acquired pension rights to the pension scheme of that international organisation, or that there is an obligation to conclude an international agreement to that effect.
- 36 Consequently, the absence of such an option for officials of an international organisation such as the EPO cannot be considered to be an impediment to the free movement of workers for the purposes of Article 45 TFEU.
- 37 The following remarks are apposite in relation to the other provisions of the FEU Treaty and of the Charter mentioned in the questions referred.
- 38 According to settled case-law, Article 20 TFEU, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU in relation to freedom of movement for workers (see Case C-3/08 *Leyman* [2009] ECR I-9085, paragraph 20 and the case-law cited).
- 39 As regards Article 15(2) of the Charter, it must be borne in mind that Article 52(2) thereof, which provides that rights recognised by the Charter for which provision is made in the treaties are to be exercised under the conditions and within the limits defined therein. In that vein, Article 15(2) of the Charter reiterates inter alia the free movement of workers guaranteed by Article 45 TFEU, as confirmed by the explanations relating to that provision.
- 40 Articles 145 TFEU to 147 TFEU lay down the objectives of and general measures for EU employment policy. The right asserted by the applicant in the main proceedings or the obligation for a Member State to guarantee such a right cannot be inferred from those provisions.
- 41 Consequently, in order to answer the questions referred, an analysis of Articles 45 TFEU and 48 TFEU is sufficient.
- 42 The applicant in the main proceedings alleges that, if his action before the referring court is dismissed, he risks losing his acquired pension rights, because, firstly, the EPO does not apply the aggregation mechanism and, secondly, in Italy his employment or contribution periods may not amount to the minimum period required under national legislation for vesting entitlement to a pension.
- 43 The INPS disputes that allegation, although at the hearing it was unable to rule out the occurrence of such an eventuality.
- 44 It is true that Article 48 TFEU provides for the introduction of arrangements to secure for migrant workers the aggregation of periods ‘taken into account under the laws of the several countries’ and that Article 18 of Regulation No 1408/71, just like Article 6 of Regulation No 883/2004 subsequently, provides that the periods completed under the legislation ‘of any other Member State’ are to be aggregated; these do not encompass periods relating to employment with the EPO.
- 45 Nevertheless, if the mechanism for transferring the capital value representing the pension rights acquired previously in a Member State to the pension scheme of a new employer in another Member State cannot apply, depriving a worker of the right to aggregate periods completed under the legislation of several Member States, a right which all employed workers generally have with all employers in a Member State, apart from international organisations such as the EPO, constitutes, in principle, an impediment to the free movement of workers for the purposes of Article 45 TFEU.

- 46 Such rules give rise to a situation where persons who have exercised their right of free movement, including employment or contribution periods which do not amount to the minimum period required under national legislation for vesting entitlement to a pension, risk losing the opportunity of receiving old-age benefits to which they would have been entitled had they not accepted employment in another Member State with an international organisation and is, therefore, liable to impede their exercise of their right to free movement. It is for the national court to ascertain whether or not the Italian rules on old-age benefits have such an effect.
- 47 At the hearing the INPS did not put forward any grounds of general interest which might provide justification for such a restriction on free movement.
- 48 Consequently, a worker such as Mr Gardella, upon reaching retirement age, must be able to request aggregation of his employment periods in Italy with his employment periods with the EPO in order to confer entitlement to an old-age pension.
- 49 In the light of the foregoing, the answer to the questions referred is that Articles 45 TFEU and 48 TFEU must be interpreted as not precluding rules of a Member State which do not allow its nationals employed in an international organisation such as the EPO, established in the territory of another Member State, to transfer to the social security scheme of that organisation the capital value representing the pension rights they have acquired previously in the territory of their Member State of origin, where there is no arrangement between that Member State and the international organisation providing for the possibility of such a transfer. However, where a mechanism for transferring the capital value representing the pension rights acquired previously in a Member State to the pension scheme of a new employer in another Member State cannot apply, Article 45 TFEU must be interpreted as precluding rules of a Member State which do not allow account to be taken of employment periods which a European Union national completed with an international organisation such as the EPO, established in the territory of another Member State, for the purposes of conferring entitlement to an old-age pension.

Costs

- 50 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 (Fifth Chamber) hereby rules:

Articles 45 TFEU and 48 TFEU must be interpreted as not precluding rules of a Member State which do not allow its nationals employed in an international organisation such as the European Patent Office, established in the territory of another Member State, to transfer to the social security scheme of that organisation the capital value representing the pension rights they have acquired previously in the territory of their Member State of origin, where there is no arrangement between that Member State and the international organisation providing for the possibility of such a transfer.

Where a mechanism for transferring the capital value representing the pension rights acquired previously in a Member State to the pension scheme of a new employer in another Member State cannot apply, Article 45 TFEU must be interpreted as precluding rules of a Member State which do not allow account to be taken of employment periods which a European Union national completed with an international organisation such as the European Patent Office, established in the territory of another Member State, for the purposes of conferring entitlement to an old-age pension.

[Signatures]