Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

7 March 2018*

(Reference for a preliminary ruling — Social security — Maternity benefit — Calculation of the amount on the basis of the income of the insured person during a reference period of 12 months — Person employed, during that period, by an EU institution — National legislation fixing the amount at issue at 70% of the average contribution basis — Restriction on freedom of movement for workers — Principle of sincere cooperation)

In Case C-651/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā tiesa (Supreme Court, Latvia), made by decision of 9 December 2016, received at the Court on 19 December 2016, in the proceedings

DW

v

Valsts sociālās apdrošināšanas aģentūra,

THE COURT (Tenth Chamber),

composed of E. Levits, President of the Chamber, A. Borg Barthet and F. Biltgen (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– DW, by herself,

– the Latvian Government, by I. Kucina and A. Bogdanova, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the European Commission, by I. Naglis and M. Kellerbauer, acting as Agents,

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

gives the following

* Language of the case: Latvian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU and Article 4(3) TEU.

2 The request has been made in proceedings between DW and the Valsts sociālās apdrošināšanas aģentūra (State Social Insurance Agency, Latvia) concerning the determination of the amount of maternity benefit to be granted to DW.

Legal context

3 Article 31 of the Likums '*Par maternitātes un slimības apdrošināšanu*' (Law on maternity and sickness insurance, *Latvijas Vēstnesis*, 1995, No 182, p. 465) provides in paragraphs 1, 6 and 7 thereof:

'1. The average contribution basis for the calculation of a State social insurance contribution shall be determined having regard to the contribution basis of the insured person for a period of 12 months, which period ends two calendar months before the month when the insurable event occurred ...

...

6. If an insured person was not registered as paying State social insurance contributions or was on unpaid leave during part of the period taken into account in the calculation of the average contribution basis provided for in subsection (1) above ..., then, in calculating a maternity or paternity benefit, the average contribution basis for the part of the period referred to, as well as the part of the period for which there is no average contribution basis due to the fact that the person was on unpaid leave, with the exception of periods of unpaid leave for the purpose of looking after a child, shall be established in the amount of 70% of the average monthly contribution basis in the State.

7. If an insured person has no average contribution basis due to the fact that that person was incapacitated from work, on leave relating to the period of pregnancy or on maternity leave, on paternity leave, on unpaid leave for the purpose of looking after a child, or on parental leave, during part of the period taken into account in the calculation of the average contribution basis provided for in subsection (1) above ..., then, the average contribution basis shall be the average contribution basis for the reference period minus the days of temporary incapacity, of leave relating to the period of pregnancy and maternity leave, of paternity leave, of unpaid leave for the purpose of looking after a child, and of parental leave.'

4 Under Article 7 of the Ministru Kabineta noteikumi Nr. 270 '*Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšanas pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība*' (Decree of the Council of Ministers No 270 on the provisions relating to the calculation of the average contribution basis and provisions relating to the grant, calculation and payment of State social security benefits) of 27 July 1998 (*Latvijas Vēstnesis*, 1998, No 223/224, p. 1284):

'7. In order to calculate the average contribution basis of an employee, the contribution basis shall include the entire contribution basis received by an employed worker in the period specified in Section 31(1) of the Law on maternity and sickness insurance:

7.1 as an employed worker

7.1.1. from an employer with whom, on the day of the occurrence of the insurable event, the employed worker has entered into one of the legal relationships referred to in Section 1(2) of the Law on State social insurance, which is the origin of the contribution basis.'

5 Article 8 of the decree states:

‘The average contribution basis for the grant of social insurance benefits in all the cases specified in Section 7 of this Decree shall be calculated according to the following formula:

Vd = (A1 + A2 + … + A12)/D, where

Vd = the average contribution basis per calendar day …

A1, A2… = the amount of the contribution basis obtained in the context of employment for the relevant month in the period of 12 calendar months specified in Section 31(1) of the Law on maternity and sickness insurance, except for premiums, bonuses, benefits and other types of compensation which the employer has paid, in accordance with that provided for in the collective work agreement or employment contract, to the person during their temporary incapacity or while the person was on leave relating to the period of pregnancy and on maternity leave, parental leave or unpaid leave for the purpose of looking after a child;

D = the number of calendar days of the period specified in Section 31(1) of the Law on maternity and sickness insurance, not including therein the calendar days of temporary incapacity for which sickness benefit has been paid, of leave relating to the period of pregnancy and maternity leave, of paternity leave, of unpaid leave for the purpose of looking after a child and of parental leave.’

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

6 On 2 January 2014, DW applied to the State Social Insurance Agency for a grant of maternity benefit for the period relating to her pregnancy. On 2 April 2014, she also applied for a grant of that benefit for the period relating to her maternity leave.

7 The State Social Insurance Agency granted the benefit for the periods from 2 January to 12 March 2014 and from 13 March to 21 May 2014, respectively. The amount of maternity benefit was set at 80% of the average contribution basis per calendar day, which was determined on the basis of the income received by DW in the 12 calendar months from 1 November 2012 to 31 October 2013 and the number of days in that period. Given that during the 12-month reference period DW was employed by an EU institution for 11 months and that she was therefore not registered as an employed worker in Latvia, the State Social Insurance Agency, in accordance with Section 31(6) of the Law on maternity and sickness insurance, set the contribution basis for each of those months at 70% of the average contribution basis in that Member State, namely EUR 395.70. In respect of the month in which DW was registered as an employed worker and paying contributions in Latvia, her effective average contribution basis for that month was taken into account, namely EUR 1 849.73.

8 DW lodged a request seeking recalculation of the amount of her benefit before the administratīvā rajona tiesa (District Administrative Court, Latvia). That court granted her request, on the basis of the provisions of 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, and Corrigendum OJ 2004 L 200, p. 1) as well as those of the FEU Treaty on freedom of movement for workers.

9 The appeal lodged by the State Social Insurance Agency was upheld by the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia). That court held that Regulation No 883/2004, which provides for the aggregation of the periods completed for the purpose of acquiring the entitlement to the benefit, did not apply in the present case since Latvian legislation does not require any prior period of insurance in Latvia in order for maternity benefit to be granted. From this the court inferred that the benefit had been calculated correctly in the light of Latvian legislation alone.

10 DW applied for review of that decision before the Augstākā tiesa (Supreme Court, Latvia) arguing that the provisions relating to the calculation of that benefit are contrary to Articles 45 to 48 TFEU and the Court's case-law (judgment of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107). According to DW, when calculating the benefit to be granted, periods of insurance completed in the institutions of the European Union should not be taken into account and the amount of the benefit should be added to the amount she would have received had she worked in Latvia during the entire reference period. In DW's view, that reasoning is supported by the objective of the benefit at issue, namely to improve the maternity benefit of persons who have been in employment while guaranteeing a minimum wage to persons who are out of work.

11 The State Social Insurance Agency, for its part, is of the opinion that the Court's case-law on the aggregation of periods of activity for the determination of the entitlement to a parental benefit does not apply in the present case, which concerns the calculation of the amount of the maternity benefit.

12 The referring court has doubts as to whether the provisions of Latvian law on the calculation of the amount of the maternity benefit comply with EU law. In that regard, it notes that DW is placed at a disadvantage after exercising her freedom of movement by having decided to work for an EU institution. Indeed, the average contribution basis chosen under Latvian legislation for the 11 months in which DW was employed by an EU institution is considerably less than the basis chosen for the remaining month of work carried out by DW in Latvia. According to the referring court, the method of calculation used to determine the maternity benefit has the effect that, in fact, the amount of that benefit depends on the period of activity of the worker concerned in Latvia.

13 The referring court recalls, in that respect, that under the Court's case-law such legislation may constitute a barrier to freedom of movement for workers is prohibited under Article 45 TFEU. Such legislation cannot be accepted either in the light of the duty of genuine cooperation and assistance which Member States owe and which finds expression in the obligation laid down in Article 4(3) TEU (judgments of 16 December 2004, *My*, C-293/03, EU:C:2004:821, paragraphs 45 to 48; of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraphs 16 and 17; and of 4 February 2015, *Melchior*, C-647/13, EU:C:2015:54, paragraphs 26 and 27).

14 In those circumstances, the Augstākā Tiesa (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 4(3) TEU and Article 45(1) and (2) TFEU be interpreted as not precluding legislation of a Member State such as that at issue in the main proceedings that, for the purposes of determining the amount of a maternity benefit, does not exclude from the 12-month period which is to be used in determining the average contribution basis the months in which the person worked in an EU institution and was covered by the joint insurance scheme of the [European Union], but that, on the grounds that, during that period, the person was not insured in Latvia, equates her income with the average contribution basis in the State, which may substantially reduce the amount of the maternity benefit granted in comparison with the possible amount of the benefit that the person could have received if, during the period under consideration for the purposes of the calculation, she had not worked for an EU institution ... but had been employed in Latvia?'

Consideration of the question referred

15 By its question, the referring court asks, in essence, whether Article 4(3) TEU and Article 45 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings that, for the purposes of determining the average contribution basis when calculating the amount of maternity benefit, equates the months of the reference period in which the person concerned worked in an EU institution and was not insured in that Member State with a period of unemployment and applies to them the average contribution basis in that Member State, which has

the effect of substantially reducing the amount of the maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that Member State alone.

16 As a preliminary point, it must be borne in mind that, although Member States retain the power to organise their social security schemes, by determining, inter alia, the conditions on which social security benefits are granted, they must nonetheless, when exercising that power, observe EU law and, in particular, the provisions of the Treaty on freedom of movement for workers (see, to that effect, judgments of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 43; of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 38; and of 6 October 2016, *Adrien and Others*, C-466/15, EU:C:2016:749, paragraph 22).

17 It is thus appropriate to ascertain whether the provisions of the Treaty on freedom of movement for workers apply in a situation such as that at issue in the main proceedings. If that is the case, it must then be determined, first, whether national legislation such as that at issue in the main proceedings constitutes an obstacle to the freedom of movement for workers and, secondly, if that is the case, whether that obstacle is justified.

18 With regard, in the first place, to whether the provisions of the Treaty relating to the free movement for workers apply, it is important to recall that it is settled case-law that an EU national who, irrespective of his place of residence and his nationality, exercises the right to freedom of movement for workers and who has been employed in a Member State other than that of origin falls within the scope of Article 45 TFEU (judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 14, and of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 11 and the case-law cited).

19 In addition, an EU 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 in particular, to that effect, judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 15; of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 12 and the case-law cited; and of 4 July 2013, *Gardella*, C-233/12, EU:C:2013:449, paragraph 25). Such a national does not lose his status as worker for the purposes of Article 45 TFEU because his post is with an international organisation (judgment of 4 July 2013, *Gardella*, C-233/12, EU:C:2013:449, paragraph 26).

20 It follows that DW's situation comes within the scope of Article 45 TFEU.

21 With regard, in the second place, to whether the application of national legislation such as that at issue in the main proceedings constitutes an obstacle to the freedom of movement for workers, it should be observed that the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the European Union, and preclude measures which might place EU citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 17; of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 14 and the case-law cited; of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 44; and of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, point 39).

22 Thus, provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 18, and of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 15 and the case-law cited).

23 Indeed, Articles 45 TFEU is intended in particular to prevent a worker who, by exercising his right of freedom of movement, has been employed in more than one Member State from being treated, without objective justification, less favourably than one who has completed his entire career in only one Member State (see, inter alia, to that effect, judgments of 7 March 1991, *Masgio*, C-10/90, EU:C:1991:107, paragraph 17, and of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 42).

24 In the present case, it is apparent from the file before the Court that under the applicable national legislation a worker who was not registered as paying State social insurance contributions during the 12-month reference period due to the fact that she worked in an EU institution is equated with a person without an occupation and receives a minimum amount of maternity benefit calculated on the basis of the average contribution in the Member State in question, whereas the maternity benefit of a worker who has carried out her career in that Member State is calculated on the basis of the contributions paid to the State social security system during the reference period.

25 It is important, in that regard, to note that although the applicable national legislation does not, as such, require payment of State social insurance contributions during the reference period as a condition for a maternity benefit to be granted, the fact remains that the application of the rules for calculating the benefit at issue produce a similar result, since the amount of the benefit granted to a worker who was employed by an EU institution is substantially less than that to which she could have been entitled had she worked in the territory of the Member State concerned and contributed to its social security system.

26 The Court has indeed held that national legislation which does not take into account, for the calculation of the amount of parental benefit, periods of employment completed under the Joint Sickness Insurance Scheme of the European Union is likely to dissuade citizens of a Member State from working within an institution of the European Union situated in another Member State since, by accepting employment with such an institution, they lose the right to benefit under the national sickness insurance scheme from family benefits to which they would have been entitled had they not accepted that employment (judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 19, and of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 16).

27 It follows that national legislation such as that at issue in the main proceedings constitutes an obstacle to and, therefore, discourages the pursuit of an occupation outside the Member State in question, whether in another Member State or within an EU institution or an international organisation, in so far as, by accepting such a post, a worker who was previously or subsequently insured in the Member State in question receives, under the social security regime of that Member State, a benefit of an amount substantially lower than that to which she would have been entitled had she not exercised her right to free movement.

28 Consequently, such national legislation constitutes an obstacle to the freedom of movement for workers which is, in principle, prohibited by Article 45 TFEU.

29 That finding is not called into question by the Latvian Government's argument that temporary benefits, like maternity benefits, are not likely to constitute a major obstacle when a worker is deciding whether or not to accept a post within an EU institution or in the territory of a Member State other than that of origin. In that regard, suffice it to note that the question whether or not there is a barrier to freedom of movement for workers is not assessed in the light of the durability of the benefit concerned. In accordance with the Court's case-law, the articles of the Treaty concerning the free movement of persons are fundamental provisions of the European Union and any restriction, even minor, of that freedom is prohibited (judgment of 15 February 2000, *Commission* v *France*, C-34/98, EU:C:2000:84, paragraph 49).

30 In order to provide a comprehensive reply to the referring court, it is appropriate to analyse, in the third place, whether there is any justification for the restriction of the freedom of movement for workers.

31 In that regard, it follows from the Court's case-law that a measure restricting one of the fundamental freedoms guaranteed by the Treaty may be justified only if it pursues a legitimate objective which is compatible with the Treaty and respects the principle of proportionality. For that to be the case, such a measure must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (see, inter alia, judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 22, and of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 19 and the case-law cited).

32 The Latvian Government submits in that regard that the national legislation at issue in the main proceedings is based on reasons in the public interest and that the maternity benefit, which relies on the principle of solidarity, was introduced to guarantee the stability of the State social security system. According to the Latvian Government, that system, the self-financing of which is ensured by the direct link between the contributions paid and the maternity benefit granted, supports the improvement of the demographic situation.

33 In that respect, it must be noted that, while reasons of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty, national legislation may, however, constitute a justified restriction of a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest. Therefore, it is conceivable that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the public interest capable of justifying the undermining of the provisions of the Treaty concerning the right of freedom of movement for workers (judgment of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 53 and the case-law cited).

34 Nevertheless, according to the settled case-law of the Court, it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined by EU law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system (judgment of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 54).

35 It must be noted that, in the present case, such an analysis is lacking. In its written observations to the Court, the Latvian Government merely made general statements without providing any specific evidence substantiating its argument that the national legislation at issue in the main proceedings was justified by reasons in the public interest. As to the alleged justification concerning the direct link between the contributions paid and the amount of benefit granted, it cannot be upheld since the grant of the benefit itself is not subject to any obligation to make contributions.

36 Consequently, and in the light of the information contained in the file before the Court, the restriction of the freedom of movement for workers at issue in the main proceedings is not justified.

37 Given that it has been found that the legislation at issue in the main proceedings is incompatible with the principle of freedom of movement for workers guaranteed by Article 45 TFEU, there is no need to rule on the interpretation of Article 4(3) TEU (judgment of 6 October 2016, *Adrien and Others*, C-466/15, EU:C:2016:749, paragraph 37).

38 In the light of all the foregoing, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings that, for the purposes of determining the average contribution basis when calculating the amount of maternity benefit, equates the months of the reference period in which the person concerned worked in an EU institution and was not insured in that Member State with a period of unemployment and applies to them the average contribution basis in that Member State, which has the effect of substantially reducing the amount of the maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that Member State alone.

Costs

39 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 (Tenth Chamber) hereby rules:

Article 45 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings that, for the purposes of determining the average contribution basis when calculating the amount of maternity benefit, equates the months of the reference period in which the person concerned worked in an EU institution and was not insured in that Member State with a period of unemployment and applies to them the average contribution basis in that Member State, which has the effect of substantially reducing the amount of the maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that Member State alone.

[Signatures]