Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

13 February 2019*

(Reference for a preliminary ruling — Social security — Pension rights under the national pension scheme for employed persons — Refusal to take into account the period of compulsory military service completed by an official of the European Union after taking up his post — Principle of sincere cooperation)

In Case C-179/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the arbeidsrechtbank Gent (Gent Labour Court, Belgium), made by decision of 22 February 2018, received at the Court on 7 March 2018, in the proceedings

Ronny Rohart

v

Federale Pensioendienst,

THE COURT (Tenth Chamber),

composed of C. Lycourgos, President of the Chamber, E. Juhász and I. Jarukaitis (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Belgian Government, by J.-C. Halleux, C. Van Lul and C. Pochet, acting as Agents, and by C. Vandenberghe, advocaat,

– the European Commission, by B. Mongin and S. Noë, acting as Agents,

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

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, read in conjunction with the Staff Regulations of Officials of the European Union, 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 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').

2 The request has been made in proceedings between Mr Ronny Rohart and the Federale Pensioendienst (Federal Pensions Service, Belgium) concerning that body's refusal to take into account the period of compulsory military service completed by Mr Rohard for the purpose of the calculation of his retirement pension as an employed person.

Legal context

European Union law

3 Article 42 of the Staff Regulations provides:

'An official who is called up for military service or for reserve training or is recalled to serve in the armed forces shall be assigned the special status of "leave for military service".

An official who is called up for military service shall cease to receive his remuneration but shall retain his right to advancement to a higher step and promotion under these Staff Regulations. He shall also continue to enjoy retirement pension rights in respect of his period of service in the armed forces if, after completing it, he pays up his pension contributions.

…'

4 Under Article 13(2) of 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) ('Regulation No 1408/71'), in force when Mr Rohart retired:

'Subject to Articles 14 to 17:

…

(e) a person called up or recalled for service in the armed forces, or for civilian service, of a Member State shall be subject to the legislation of that State. If entitlement under that legislation is subject to the completion of periods of insurance before entry into or after release from such military or civilian service, periods of insurance completed under the legislation of any other Member State shall be taken into account, to the extent necessary, as if they were periods of insurance completed under the legislation of the first State. The employed or self-employed person called up or recalled for service in the armed forces or for civilian service shall retain the status of employed or self-employed person;

…'

Belgian law

5 Article 34(1)(F) of the Koninklijk besluit tot vaststelling van het algemeen reglement betreffende het rust- en overlevingspensioen voor werknemers (Royal Decree concerning general rules for the retirement pension scheme and survivor's pension scheme for employed persons) of 21 December 1967 (*Belgisch Staadtsblad*, 16 January 1968, p. 441), in the version applicable to the facts in the main proceedings ('the Royal Decree') provides that periods of compulsory military service in the Belgian armed forces are to be treated as equivalent to periods of employment, subject to the conditions stated in paragraph 2 of that article.

6 Article 34(2)(3) of the Royal Decree provides:

'The periods referred to in paragraph 1, … (F) … can be treated as equivalent only if the person concerned was working as an employee at the time of the event conferring entitlement to equivalence or was already undergoing a period of unemployment which was treated as equivalent to a period of employment.

The periods referred to in subparagraph [F] of paragraph 1 may also be treated as equivalent if the person concerned had the status of employed person during the three years following the end of those periods and was habitually employed by way of main occupation at least one year in that capacity.

If the pension actually starts for the first time on 1 January 1984 at the earliest, the periods referred to in paragraph 1 … F can be treated as equivalent only if the person concerned does not receive a pension for those periods under another retirement pension scheme or survivor's pension scheme, with the exception of schemes relating to self-employed persons.'

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

7 Mr Rohart worked as an employed person in Belgium from 1 October 1970 to 15 August 1973. On 16 August 1973, he took up employment as an official of the European Commission, where he worked until he retired, on 1 January 2009, with one year's interruption, that is from 1 July 1974 to 30 June 1975, during which time he completed his compulsory military service in Belgium.

8 Mr Rohart, who is in receipt of a pension of the European Union pension scheme, was also awarded a pension by the Belgian employed persons' pension scheme.

9 Following the judgment of 10 September 2015, *Wojciechowski* (C-408/14, EU:C:2015:591), the amount of Mr Rohart's pension entitlement was recalculated at his request by the Federal Pension Service, which established those rights by decisions of 24 May 2017, without, however, taking into account the period spent on compulsory military service. Mr Rohart's request that that period be taken into account was rejected by decision of 1 June 2017, on the ground that he did not meet the conditions for equivalence set out in Article 34 of the Royal Decree, since he was not an employed person for the purposes of that decree at the time he did his military service and nor was he in the three subsequent years.

10 The referring court, which has been seised of an action for annulment of those decisions, notes that the compulsory military service period completed by Mr Rohart was not taken into account either for the calculation of his pension under the EU pension scheme or for the calculation of his pension under the Belgian scheme because he did not meet the conditions for equivalence under Article 34 of the Royal Decree. Therefore, according to that court, the question arises as to whether those conditions are contrary to the Staff Regulations and the principle of sincere cooperation laid down in Article 4(3) TEU.

11 In that regard, the referring court considers that the case in the main proceedings raises a question comparable to those examined in the judgments of 16 December 2004, *My* (C-293/03, EU:C:2004:821), and of 10 September 2015, *Wojciechowski* (C-408/14, EU:C:2015:591). It observes that the period of compulsory military service completed by Mr Rohart would have been taken into account for the calculation of his pension had he pursued his career in Belgium as an employed person, civil servant or self-employed person, and it would also have been taken into account had he pursued his career in another Member State, in accordance with Article 13 of Regulation No 1408/71 and, accordingly, he is placed at a disadvantage because he has worked as an EU official.

12 In those circumstances, the arbeidsrechtbank Gent (Gent Labour Court, Belgium) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must the principle of sincere cooperation as laid down in Article 4(3) TEU, in conjunction with the Staff Regulations …, be interpreted as precluding the legislation of a Member State which does not permit the period of military service completed by an employee in a Member State to be taken into account in the calculation of that employee's retirement pension that is based on his record of employment in that Member State, because, at the time of his military service and also subsequently, the person concerned worked uninterruptedly as an official of the [Union], and consequently, does not satisfy the conditions for equivalence as laid down in the legislation of that Member State?'

Consideration of the question referred

13 By its question, the referring court asks, in essence, whether Article 4(3) TEU, in conjunction with the Staff Regulations, must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, under which, when determining the pension entitlement of a worker who occupied a position as an employed person in that Member State before becoming an EU official and completed, after becoming an EU official, his compulsory military service in that Member State, that worker is not entitled to have his period of military service treated as equivalent to a period of actual work as an employed person — treatment to which he would have been entitled if, at the time he was called up for military service or for at least one year during the three years following the end of his military service, he had been employed in a position covered by the national pension scheme.

14 It should be noted that EU law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits. Nevertheless, the Member States must comply with EU law when exercising that power, which includes the principles identified by the Court in its case-law relating to the interpretation of the principle of sincere cooperation in conjunction with the Staff Regulations (judgment of 10 September 2015, *Wojciechowski*, C-408/14, EU:C:2015:591, paragraph 35 and the case-law cited).

15 In this connection, the Court has previously held that the Staff Regulations were adopted by means of a Council regulation, namely Regulation No 259/68, which, by virtue of the second paragraph of Article 288 TFEU, is of general application, is binding in its entirety and is directly applicable in all Member States and that it follows that, in addition to having effects within the EU administration, the Staff Regulations are also binding on Member States in so far as their cooperation is necessary in order to give effect to those regulations (see, to that effect, judgment of 10 September 2015, *Wojciechowski*, C-408/14, EU:C:2015:591, paragraphs 36 and 41 and the case-law cited).

16 Furthermore, in paragraph 49 of the judgment of 16 December 2004, *My* (C-293/03, EU:C:2004:821), the Court held that the principle of sincere cooperation laid down in Article 10 EC — which now finds expression in Article 4(3) TEU — in conjunction with the Staff Regulations, must be interpreted as precluding national legislation which does not permit years of employment completed by an EU national in the service of an EU institution to be taken into account for the purposes of entitlement

to an early retirement pension under the national scheme. In paragraph 34 of the order of 9 July 2010, *Ricci and Pisaneschi* (C-286/09, not published, EU:C:2010:420), the Court stated that the same applies as regards entitlement to an ordinary retirement pension.

17 In so deciding, the Court held, in paragraphs 45 to 48 of the judgment of 16 December 2004, *My* (C-293/03, EU:C:2004:821), and in paragraphs 29 to 33 of the order of 9 July 2010, *Ricci and Pisaneschi* (C-286/09, not published, EU:C:2010:420), that the legislation at issue in the cases which gave rise to that judgment and that order could impede the recruitment by the EU institutions or bodies of national officials with a certain length of service. The Court pointed out that such legislation was liable to discourage employment within an EU institution or body, inasmuch as, by accepting employment with such an institution or body, a worker who was formerly a member of a national pension scheme risked losing the right to benefit under that scheme from an old-age pension to which he would have been entitled had he not accepted that employment. It held that such consequences could not be accepted in the light of the duty of genuine cooperation and assistance which Member States owe the European Union and which finds expression in the obligation, previously laid down in Article 10 EC and now in Article 4(3) TEU, to facilitate the achievement of its tasks.

18 The Court has, furthermore, held in the judgment of 10 September 2015, *Wojciechowski* (C-408/14, EU:C:2015:591), that Article 4(3) TEU, in conjunction with the Staff Regulations, precludes legislation of a Member State under which the retirement pension payable to a worker by virtue of the service performed as an employed person in that State is reduced or refused on account of his subsequent occupational record within an EU institution, observing, inter alia, at paragraph 43 of that judgment, that such legislation is also liable to impede not only the recruitment by those institutions of national officials with a certain length of service but also the retention of experienced officials in the service of those institutions.

19 In the present case, it also appears that the legislation of a Member State, such as that at issue in the main proceedings, which deprives a worker who completed his compulsory military service in that Member State while he was an EU official of the benefit of having his period of military service treated as equivalent to a period of actual work — a benefit to which he would have been entitled if, at the time he was called up for military service or during the three years following the end of that service, he had been employed in a position covered by the pension scheme of that Member State or, in accordance with Article 13(2)(e) of Regulation No 1408/71, in another Member State — is also liable to impede the recruitment of officials within those institutions.

20 Such legislation may deter a worker holding employment covered by the pension scheme of the Member State concerned from becoming an EU official before completion of his compulsory military service or during the three years following that service.

21 The dissuasive nature of such legislation may, moreover, be even greater when the national pension scheme requires a person to have completed a minimum number of years' employment in order to receive a pension and, therefore, the fact that the period of compulsory military service is not taken into account as a period of actual work may in certain cases result not in a reduction of the amount of the pension but in the absence of the right to a pension.

22 Such consequences cannot be accepted in the light of the duty of sincere cooperation and assistance which Member States owe the European Union and which finds expression in the obligation laid down in Article 4(3) TEU to facilitate the achievement of the European Union's tasks.

23 In that regard, the argument put forward by the Belgian Government to justify the refusal to take into account the period of compulsory military service completed by Mr Rohart, based on the fact that he did not pay contributions into the national pension scheme during that period, cannot be accepted since that it also the case of workers who were employed before or after completion of their

compulsory military service in a position covered by that scheme or in another Member State, who are entitled to have that period treated as equivalent to a period of actual work under Article 34 of the Royal Decree.

24 Nor can that government rely on the fact that Mr Rohard could have, pursuant to Article 42 of the Staff Regulations, made a retroactive payment to the EU pension scheme in order for that period to be taken into account for the purpose of his pension under that scheme. That provision merely lays down an option, which every official concerned is free to decide whether or not to exercise, to make voluntary contributions to that scheme. Consequently, an official's decision not to exercise that option cannot result in the loss of his rights under the national pension scheme, except for the loss of the voluntary and optional nature of those contributions (see, to that effect, judgment of 10 September 2015, *Wojciechowski*, C-408/14, EU:C:2015:591, paragraph 52).

25 In the light of all the foregoing considerations, the answer to the question referred is that Article 4(3) TEU, in conjunction with the Staff Regulations, must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, under which, when determining the pension entitlement of a worker who occupied a position as an employed person in that Member State before becoming an EU official and completed, after becoming an EU official, his compulsory military service in that Member State, that worker is not entitled to have his period of military service treated as equivalent to a period of actual work as an employed person — treatment to which he would have been entitled if, at the time he was called up for military service or for at least one year during the three years following the end of his military service, he had been employed in a position covered by the national pension scheme.

Costs

26 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 4(3) TEU, in conjunction with the Staff Regulations of Officials of the European Union, 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, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, under which, when determining the pension entitlement of a worker who occupied a position as an employed person in that Member State before becoming an EU official and completed, after becoming an EU official, his compulsory military service in that Member State, that worker is not entitled to have his period of military service treated as equivalent to a period of actual work as an employed person — treatment to which he would have been entitled if, at the time he was called up for military service or for at least one year during the three years following the end of his military service, he had been employed in a position covered by the national pension scheme.

[Signatures]