



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

13 March 2019*

(Reference for a preliminary ruling — Free movement of workers — Article 45 TFEU — Regulation (EU) No 492/2011 — Article 7(1) — Prohibition of discrimination on grounds of nationality — Right to paid annual leave based on the seniority of the worker with the employer — Account taken only in part of previous periods of service completed with other employers — Social law — Disparity between the schemes and legislation of the Member States)

In Case C-437/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 29 June 2017, received at the Court on 19 July 2017, in the proceedings

Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH

v

EurothermenResort Bad Schallerbach GmbH,

THE COURT (Fifth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Fifth Chamber, F. Biltgen and E. Levits (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2018,

after considering the observations submitted on behalf of:

- Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH, by S. Ameshofer, G. Storch and R. Storch, Rechtsanwälte, assisted by K. Mayr, expert,
- EurothermenResort Bad Schallerbach GmbH, by F. Marhold, Rechtsanwalt,
- the Austrian Government, by G. Hesse, acting as Agent,
- the European Commission, by M. Kellerbauer and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU and of Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).
- 2 The request has been made in proceedings between the Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH (works council of the company EurothermenResort Bad Schallerbach GmbH) ('works council of Eurothermen') and EurothermenResort Bad Schallerbach GmbH ('Eurothermen') concerning the merely partial account taken -- for the purposes of calculating the right to paid annual leave of the employees of Eurothermen -- of previous periods of service which those employees completed with other employers.

Legal context

EU law

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

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

Austrian law

- 4 Paragraph 2(1) of the Urlaubsgesetz (Law on holidays) of 7 July 1976 (BGBl. 1976/390, as published in the BGBl. I, 2013/3; 'the UrlG'), is worded as follows:

'The employee shall be entitled to uninterrupted paid holiday for each year of employment. The holiday allowance shall be 30 working days where the length of service is less than 25 years and shall increase to 36 working days after completion of the 25th year.'

- 5 Paragraph 3 of the UrlG provides:

'1. For the purpose of calculating the holiday allowance, periods of service with the same employer, in which there are no interruptions longer than three months in each case, shall be aggregated.

...

2. The following shall be credited for the purpose of calculating the holiday allowance:

(1) Any period of service spent in another employment relationship ... in the national territory, provided that it lasted at least six months in each case;

...

3. Periods pursuant to subparagraph 2, point 1 ... shall be credited only up to a maximum of five years in total ...

...'

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

- 6 Eurothermen is a company operating in the tourism sector. It has its headquarters in Bad Schallerbach (Austria) and employs a number of workers who have completed previous periods of service with different employers in the territory of Member States other than the Republic of Austria.
- 7 The works council of Eurothermen, as the competent body for the employees of Eurothermen, brought an action under the special procedure provided for in Paragraph 54(1) of the Arbeits- und Sozialgerichtsgesetz (Law on labour and social courts) of 7 March 1985 (BGBl. 104/1985).
- 8 That action, brought against Eurothermen, concerns the entitlement to paid annual leave of employees of that company who have completed previous periods of service with different employers in the territory of Member States other than the Republic of Austria.
- 9 According to the works council of Eurothermen, the fact that, under Paragraph 3(2)(1) and Paragraph 3(3) of the UrlG, only a maximum of five years of previous periods of service with other employers established in other Member States is taken into account constitutes a restriction on the free movement of workers, guaranteed in Article 45 TFEU.
- 10 The works council of Eurothermen claims that, in accordance with EU law, those previous periods of service should be taken into account in their entirety, with the result that all workers with 25 years of professional experience are entitled to a sixth week of holiday in accordance with Paragraph 2(1) of the UrlG.
- 11 The request made by the works council of Eurothermen was dismissed at first instance by the Landesgericht Wels (Regional Court, Wels, Austria) and, on appeal, by the Oberlandesgericht Linz (Higher Regional Court, Linz, Austria).
- 12 The Oberster Gerichtshof (Supreme Court, Austria), before which an appeal on a point of law has been brought, has doubts as to whether legislation such as that at issue in the main proceedings constitutes indirect discrimination, in the light of the combined provisions of Article 45 TFEU and of Article 7(1) of Regulation No 492/2011, or an obstacle, within the meaning of Article 45 TFEU. If that were the case, the Oberster Gerichtshof (Supreme Court) considers that the further question as to justification for that scheme arises.
- 13 In that regard, the Oberster Gerichtshof (Supreme Court) states that, according to its own settled case-law and to the unanimous body of academic opinion, Paragraph 3(2)(1) of the UrlG must be interpreted as meaning that periods of service completed with national and non-national employers must be treated in the same way. Thus, notwithstanding the wording of that provision, previous periods of service completed outside Austria must also be taken into account up to a maximum of five years in total.
- 14 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are Article 45 TFEU and Article 7(1) of Regulation No 492/2011 to be interpreted as precluding a national provision such as that in the main proceedings (Paragraph 3(2)(1), in conjunction with Paragraph 3(3) and Paragraph 2(1), of the UrlG), under which a worker who has a total of 25 years of service, but has not completed these with the same Austrian employer, is entitled to only five weeks of annual holiday, whereas a worker who has completed 25 years of service with the same Austrian employer is entitled to six weeks of holiday per year?’

Consideration of the question referred

15 By its question, the referring court asks, in essence, whether Article 45 TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which — for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks — the years of service completed with one or more employers prior to the start of the worker's period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five.

Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011

16 As a preliminary point, it must be noted that Article 45(2) TFEU prohibits all discrimination based on nationality between workers of the Member States as regards employment, remuneration or other conditions of work and employment. Article 7(1) of Regulation No 492/2011 constitutes merely the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU within the specific field of conditions of employment and work and must therefore be interpreted in the same way as that article (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken, 'SALK'*, C-514/12, EU:C:2013:799, paragraph 23 and the case-law cited).

17 Since the entitlement to paid annual leave conferred on workers unquestionably forms part of the field of employment and work conditions, the national legislation at issue in the main proceedings therefore comes within the scope of the provisions cited in the preceding paragraph.

18 In that regard, it is settled case-law that the equal-treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 492/2011 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (see, inter alia, judgments of 5 December 2013, *SALK*, C-514/12, EU:C:2013:799, paragraph 25 and the case-law cited, and of 2 March 2017, *Eschenbrenner*, C-496/15, EU:C:2017:152, paragraph 35 and the case-law cited).

19 In that context, the Court has stated that a provision of national law — even if it applies regardless of nationality — must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other Member States more than national workers and if there is a consequent risk that it will place the worker from a different Member State at a particular disadvantage, unless it is objectively justified and proportionate to the aim pursued (see judgment of 2 March 2017, *Eschenbrenner*, C-496/15, EU:C:2017:152, paragraph 36 and the case-law cited).

20 In the present case, under Paragraph 2(1) and Paragraph 3(1) to (3) of the UrlG, the entitlement to paid annual leave is increased to six weeks after 25 years of professional experience in the case where the periods of service have been completed with the current employer. If the worker has previously been employed with one or more other employer, a maximum period of only five years in total is taken into account. Thus, in order to be entitled to six weeks' paid annual leave, a worker must have completed 25 years of service with the current employer or must have completed a total of 25 years of service with at least 20 of those years completed with the current employer.

21 As has been noted in paragraph 13 of the present judgment, even though the wording of Paragraph 3(2)(1) of the UrlG refers only to previous periods of service completed in 'the national territory', that provision must, according to the settled case-law of the Oberster Gerichtshof (Supreme Court) and to a unanimous body of academic opinion, be interpreted as meaning that previous periods of service completed by a worker with other employers are taken into account in the same way whether they were completed in the national territory or in another Member State, that is to say, only up to a maximum of five years in total.

- 22 As regards the existence of possible discrimination contrary to Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011, it is important to note that national legislation, such as that at issue in the main proceedings, puts in place, as the Advocate General observes in point 21 of his Opinion, a difference in treatment between workers based on their seniority with their current employer. According to that legislation, the years worked with one or more previous employers account only for a maximum of five years of professional experience even if their actual number exceeds five, with the result that a worker with a total of 25 years of professional experience who has completed at least 20 of those years with his current employer is entitled to six weeks' paid annual leave, whereas a worker with a total of 25 years of professional experience but who has not completed 20 of those years with his current employer is entitled to only five weeks' paid annual leave.
- 23 It follows that, as such legislation is applicable without distinction to all workers who have completed at least 25 years of service, regardless of their nationality, it cannot give rise to discrimination based directly on nationality.
- 24 According to the works council of Eurothermen and the European Commission, the national legislation at issue in the main proceedings should be regarded as being indirectly discriminatory. It is argued that Austrian workers reside in their vast majority in Austria and start their professional careers there, and can therefore easily work uninterruptedly for the same employer for 25 years and, for that reason, are entitled to a sixth week of paid annual leave under Paragraph 2(1) of the UrlG. In that context, it is submitted, it is sufficient to note that the majority of workers who meet the condition of 25 years' length of service, provided for in Paragraph 2(1) of the UrlG, are Austrian.
- 25 By contrast, they submit, workers who are nationals of other Member States generally start their career in their Member State of origin and will take up employment with an Austrian employer only later in their career. Thus, it is argued, it is more difficult for them to achieve the required seniority in order to be entitled, in the same way as Austrian workers, to the sixth week of paid annual leave. In that respect, it is submitted that the majority of workers who are affected by the merely partial account taken of previous periods of service completed with other employers under Paragraph 3(3) of the UrlG are nationals of other Member States.
- 26 First, it should be noted that the national legislation at issue in the main proceedings adversely affects all workers, both Austrians and nationals of other Member States, who have a total of 25 years of professional experience but have not completed at least 20 of those years with their current employer in comparison with those who have 25 years of professional experience and who have completed at least 20 of those years with their current employer. With regard to that first category of workers, the fact of having changed jobs means that the professional experience acquired with previous employers accounts for only a maximum of five years pursuant to Paragraph 3(3) of the UrlG.
- 27 In order for that difference in treatment between workers based on their seniority with their current employer to be regarded as indirectly discriminatory, within the meaning of Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011, it must, by its very nature, be liable to have a greater effect on workers who are nationals of other Member States than on national workers.
- 28 However, contrary to what is submitted by the works council of Eurothermen and the Commission, it is apparent from the order for reference that there is nothing to indicate that Austrian workers normally remain in the service of their current employer for 25 years. Consequently, it has not been established that that legislation gives Austrian workers in particular an advantage over workers who are nationals of other Member States.
- 29 In the light of those considerations, it cannot be concluded that the workers affected by the merely partial account taken of previous periods of service completed with other employers under Paragraph 3(3) of the UrlG are predominantly nationals of other Member States.

- 30 In addition, contrary to what is claimed by the Commission in its observations, on the assumption that it is established that the majority of workers who satisfy the criterion of 25 years' length of service, provided for in Paragraph 2(1) of the UrlG, are Austrian nationals, that finding is not in itself sufficient to allow the conclusion, as is apparent from paragraph 28 of this judgment, that workers who are nationals of other Member States suffer indirect discrimination.
- 31 Secondly, the Commission cannot base its line of argument either, in general, on the case-law of the Court according to which, in order for a national measure to be treated as 'indirectly discriminatory', it is not necessary for it to have the effect of placing all nationals of the Member State in question at an advantage or of placing at a disadvantage solely nationals of other Member States (judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 45 and the case-law cited) or, in a targeted manner, on the answer given by the Court in its judgment of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799).
- 32 First, as the Advocate General observes in point 35 of his Opinion, the case-law cited in the previous paragraph is relevant only once it has been established that the national legislation at issue in the main proceedings is liable to have a greater effect on nationals of other Member States than on national workers. Since, in the present case, that is not the position, that case-law cannot serve as a basis for finding that the legislation must be regarded as being indirectly discriminatory.
- 33 Secondly, the case which gave rise to the judgment of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799), concerned the employees of a regional authority whose legislation at issue sought to allow mobility within a group of specific employers and not to reward the loyalty of an employee towards a particular employer. It follows that the reasoning of the Court in that judgment cannot be transposed to the national legislation at issue in the main proceedings in the present case, since the specific objective of that national legislation is to reward a worker's loyalty towards his current employer.
- 34 It follows from the foregoing considerations that national legislation, such as that at issue in the main proceedings, which establishes a difference in treatment between workers based on their seniority with their current employer cannot be regarded as indirectly discriminatory against workers who are nationals of other Member States and, therefore, as being contrary to Article 45(2) TFEU.

Article 45(1) TFEU

- 35 It is also necessary to determine whether the national provisions at issue in the main proceedings constitute an obstacle to the free movement of workers, prohibited by Article 45(1) TFEU.
- 36 In that regard, it must be noted that, admittedly, Article 45 TFEU and all of the Treaty provisions on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their Member State of origin to enter the territory of another Member State and reside in that State in order to pursue an activity there (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited).
- 37 However, primary EU law cannot guarantee to a worker that the move to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 34 and the case-law cited).

- 38 EU law guarantees only that workers active in a Member State other than their Member State of origin are subject to the same conditions as workers of that other Member State (judgment of 23 January 2019, *Zyla*, C-272/17, EU:C:2019:49, paragraph 45 and the case-law cited).
- 39 As the Advocate General observes in points 51 and 58 of his Opinion, such considerations apply both to a worker wishing to leave an employer subject to Austrian legislation and to a worker who is a national of another Member State and who is attracted by a job in Austria.
- 40 Contrary to what is claimed by the works council of Eurothermen and the Commission, the national legislation at issue in the main proceedings is not of such a kind as to deter Austrian workers who wish to leave their current employer in order to work for an employer in another Member State, while at the same time hoping subsequently to return to their original employer. It should be noted, as the Advocate General observes in points 60 to 62 of his Opinion, that such an argument is based on a set of circumstances which are too uncertain and indirect for that legislation to be capable of being regarded as liable to hinder the free movement of workers (see, to that effect, judgment of 27 January 2000, *Graf*, C-190/98, EU:C:2000:49, paragraph 25).
- 41 It follows from the foregoing that national legislation, such as that at issue in the main proceedings, cannot be classified as an ‘obstacle to the free movement of workers’, prohibited under Article 45(1) TFEU.
- 42 In the light of all the foregoing considerations, the answer to the question referred is that Article 45 TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker’s period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five.

Costs

- 43 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:

Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker’s period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five.

[Signatures]