Key Issues: **Free Movement of Workers – Preliminary Ruling**

Case: **Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH v EurothermenResort Bad Schallerbach GmbH**

Reference: **Case C-437/17, CJEU (Fifth Chamber), 13 March 2019**

Legislation: **Article 45 TFEU, Regulation (EU) No 492/2011**

Background

Eurothermen is a company operating in the tourism sector. It has its headquarters in 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 Austria. The Works Council of Eurothermen (as the competent body for the company's employees) brought an action against Eurothermen concerning 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 Austria.

According to the Works Council, the fact that, under Austrian national law, 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. The Works Council 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 Austrian national law.

The request made by the Works Council was dismissed at first instance by the Regional Court, Wels, Austria and, on appeal, by the Higher Regional Court, Linz, Austria

The Supreme Court, Austria, before which an appeal on a point of law was brought, had 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. In those circumstances, the Supreme Court decided to stay the proceedings and to refer a question to the Court of Justice of the EU (CJEU) for a preliminary ruling.

Consideration by CJEU

As a preliminary point, the CJEU 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.

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 those provisions. 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.

In that context, the CJEU 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.

As regards the existence of possible discrimination, it is important to note that national legislation, such as that at issue in the main proceedings, puts in place 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.

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.

In order for the difference in treatment between workers, based on their seniority with their current employer, to be regarded as indirectly discriminatory 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. However, the CJEU found 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 the legislation in question gives Austrian workers in particular an advantage over workers who are nationals of other Member States.

The CJEU held that:

> **Article 45 TFEU and Article 7(1) of Regulation (EU) 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.**

Why is this decision important?

It is common practice for an employer to award a senior employee, who has completed a prescribed period of service, with additional holiday entitlement. This judgment makes clear that national legislation may enable the employer to exclude or limit service completed by the employee with other employers in another Member State.

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