Although Member States enjoy a wide margin of appreciation when implementing Article 8 of Directive 2008/94, they are nonetheless obliged, in accordance with the objective pursued by that Directive, to ensure a minimum degree of protection for employees. In that regard, the ECJ had already held that a correct transposition of Article 8 required that, in the event of the insolvency of the employer, an employee should receive at least half of the pension he had accrued under any supplementary occupational pension scheme by paying contributions.

In this case, it was apparent from the evidence, and in particular from the information provided by Mr Webb-Sämann, that his monthly pension rights would be reduced by between EUR 5 and EUR 7 per month, as a result of the non-payment of pension contributions during the period at issue. Because the amount was relatively small, the ECJ found that Article 8 did not require there to be a higher level of protection than had already been granted. It found that once Member States have fulfilled their obligation to ensure the minimum level of protection required by Article 8, they had discretion as to how to protect entitlements under supplementary pension schemes if the employer became insolvent.

Ruling

Article 8 of Directive 2008/94/EC does not require that, upon an employer's insolvency, money withheld from a former employee's salary and converted into pension contributions which the employer should have paid into a pension fund on behalf of the employee, should be excluded from the scope of insolvency proceedings.

ECJ 1 December 2016, case C-395/15 (Daouidi), Discrimination

Mohamed Daouidi – v – Bootes Plus SL, Fondo de GarantíaSalarial and Ministerio Fiscal, Spanish case

Summary

A 'temporary' inability to work may qualify as a 'long-term' limitation within the meaning of the ECJ's case law on Directive 2000/78. Whether this is the case is for the national court to determine. The court may take into account that it is not clear how long the person may take to recover.

Facts

Mr Daouidi was employed as a kitchen assistant in a Spanish hotel. He slipped on the kitchen floor, dislocating an elbow, which had to be put in plaster. Eight weeks later, while still temporarily unable to work, he was dismissed with immediate effect on grounds of poor performance. He brought legal proceedings against his employer.

National proceedings

By the time the case was heard in court, which was six months after the accident, Mr Daouidi's elbow was still in plaster. The court found that the true reason for Mr Daouidi's dismissal was not performance but his inability to work for an indeterminate duration. As one of Mr Daouidi's arguments was that his dismissal was based on 'disability' within the meaning of Directive 2000/78, and was therefore discriminatory, the court found it necessary to refer certain questions to the ECJ.

Questions referred to the ECJ

The Spanish court referred five questions to the ECJ. The first four related to the EU Charter of Fundamental Rights. The fifth question was whether a person who is temporarily unable to work for an indeterminate duration has a disability that is 'long-term' within the meaning of the ECJ's case law on Directive 2000/78.

ECJ's findings

The Court held that it had no jurisdiction to answer the first four questions.

As the Court had held previously, the concept of disability in Directive 2000/78 refers to "a limitation which results in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers". Neither the Directive – nor the UN Convention on the Rights of Persons with Disabilities, in line with which the Directive must be interpreted – defines 'long-term'.

The fact that Mr Daouidi was considered to be 'temporarily' unable to work under Spanish law, does not prevent the limitation of his ability to work from being treated as 'long-term' within the meaning of the Directive.

Whether a limitation is 'long-term' must be assessed at the time of the (allegedly) discriminatory act. As this is a

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factual assessment, it is a question to be determined by the referring court. It must make its decision on all of the objective evidence before it, established on the basis of current medical and scientific knowledge and data. The court may find a limitation is long-term (i) if, at the time of the allegedly discriminatory act, it is not clear how long the person is likely to be incapacitated for or (ii) if the person is likely to be incapacitated for a long time.

Ruling

The fact that a person is temporarily incapacitated for work, as defined in national law, for an indeterminate length of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as 'long-term', within the meaning of the definition of 'disability' laid down by the Directive, read in light of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009.

It is possible to find such a limitation 'long-term' either if, at the time of the allegedly discriminatory act, there is no clearly-defined prognosis of short-term progress or if the incapacity is likely to be significantly prolonged before the person recovers.

The referring court must base its decision on all relevant evidence in its possession relating to that person's condition, in particular documents and certificates based on current medical and scientific knowledge and data.

ECJ 15 December 2016, joined cases C-401/15 to C-403/15 (Depesme), Free movement, social insurance

Noémie Depesme (C-401/15), Saïd Kerrou (C-401/15), Adrien Kauffmann (C-402/15) and Maxime Lefort (C-403/15) – v – Ministre de l'Enseignement supérieur et de la Recherche, Luxembourgian case

Summary

These cases concern the refusal by Luxembourg to grant financial aid to students studying in Luxembourg whilst living in France or Belgium, when they would be entitled to such aid under Regulation 492/2011 on free movement (pursuant to Article 45 TFEU), based on their family circumstances, were it not that the person employed in Luxembourg was not their father but their stepfather. The ECJ found in favour of the students.

Ruling

Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 […] must be interpreted as meaning that a child of a frontier worker who is able to benefit indirectly from the social advantages referred to in the latter provision, such as study finance granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State, means not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, where that worker supports that child. The latter requirement is the result of a factual situation, which it is for the national authorities and, if appropriate, the national courts, to assess, and it is not necessary for them to determine the reasons for that contribution or make a precise estimation of its amount.

ECJ (Grand Chamber) 21 December 2016, case C-201/15 (AGET Iraklis), Collective redundancies

Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) – v – Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis; intervener: Enosi Ergazomenon Tsimenton Chalkidas, Greek case

Summary

Where no agreement is reached with employee representatives on a planned collective redundancy, the employer must try to obtain permission from the Minister for Labour – who rarely gives it. The employer in this case argued successfully that this was a serious obstacle to its to freedom to establish and conduct business in Greece.

Facts

AGET Iraklis, a subsidiary of the French Lafarge group, is a producer of cement. It has three plants, one of which is in Chalkida, where it employed 236 workers.

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