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ECJ 2 March 2017, case C-496/15 (Eschenbrenner), Freedom of movement

Alphonse Eschenbrenner – v – Bundesagentur für Arbeit, German case

Summary

A frontier worker who claimed insolvency benefit was offered a smaller amount that he would normally have received as net income because German tax rates were applied instead of French tax rates. He claimed this was directly discriminatory on grounds of nationality but the court found that Article 45 TFUE and Article 7 of Regulation (EU) No 492/2011 do not preclude this outcome. The German authorities were entitled to apply German tax rates to the calculation, even though the worker was ordinarily subject to French tax.

Facts

Mr. Eschenbrenner, a French national, was employed as a driver with a business located in Germany. According to a certificate issued by the head of the relevant French taxation centre, Mr Eschenbrenner qualified as a frontier worker pursuant to Article 13(5)(a) of the Tax Convention and in accordance with the provisions of that Convention, was subject to tax in France.

On 29 June 2012, insolvency proceedings were opened against the business Mr Eschenbrenner worked for. By that time, Mr. Eschenbrenner had already made a claim directly against his employer for € 5,571.88 in respect of his pay for the months of April to June 2012.

National proceedings

By virtue of his claim for outstanding salary, Mr. Eschenbrenner requested payment of insolvency benefit. When calculating the amount of the insolvency benefit, the Federal Employment Agency deducted € 3,550.24 (which he received by way of advance payment), as well as an amount corresponding to social security contributions. From the amount he ended up being paid (the judgment does not mention this amount) the Agency moreover, deducted an amount corresponding to income tax, calculated in accordance with German law, amounting for the three months at issue, to € 185, € 175 and € 173.

Mr. Eschenbrenner claimed against that decision saying that the Agency had based its calculation on German tax rates and this was contrary to EU law, as he was not subject to tax in Germany. He argued that this did not allow frontier workers like himself to receive an insolvency benefit equivalent to their previous net pay, as tax was higher in Germany – and that this was discriminatory. The Agency, however, rejected his complaint.

Mr. Eschenbrenner then brought an appeal against the decision of the Social Court of Speyer in Germany but that also failed. He further appealed to the Higher Social Court in Mainz.

That Court considered that Mr. Eschenbrenner could only succeed with his claim if the requirement for equal treatment with employees taxable in Germany, as provided for in EU law, precluded German tax being taken into account. While noting that insolvency benefits are a social advantage within the meaning of Article 7 of Regulation No 492/2011, the Court observed that, under that provision, frontier workers may not be treated differently from national workers on grounds of their nationality and must benefit from the same social and tax advantages as national workers.

The Court also considered that the amount of the insolvency benefit should, in principle, be equal to the usual net pay of the worker, whilst at the same time, the calculation method should ensure that frontier workers are put in the same position as those residing and working in Germany in terms of the amount awarded. However, the calculation method does not specifically allow for frontier workers to obtain compensation equal to their previous net pay.

The Court was unclear as to whether the outcome was compatible with Directive 2008/94. The case law of the ECJ suggests that, although Member States can set caps on payments under the Directive, compensation below the caps should be paid in full. The Court decided to refer certain questions to the ECJ.

Questions put to the ECJ

1. Is it compatible with the rules of primary and/or secondary EU law (in particular Article 45 TFEU and Article 7 of Regulation No 492/2011), in the case of an employee who pursues an occupational activity in Germany but is resident in another Member State and not subject to income tax in Germany and for whom insolvency benefit, under the provisions applicable to him, is not taxable, that, in the event of his employer's insolvency, the remuneration from employment tax used to calculate his insolvency benefit is subject to the notional taxation that would be charged as a deduction on his remuneration from employment were he subject to income tax in Germany, if he no longer has the possibility of asserting a

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claim against his employer for his residual gross remuneration?

2. If Question 1 is answered in the negative, can it be considered compatible with the rules of primary and/or secondary EU law if, in those, the employee retains the possibility of claiming against his employer for his residual gross remuneration?

ECJ's findings

The ECJ found that the calculation method used, does not prescribe differences in treatment depending on a worker's nationality. Mr. Eschenbrenner's claim was that although there was no direct discrimination on grounds of nationality, the calculation method nevertheless had an unfavourable effect on him in comparison with those working and residing in Germany who received the same benefit.

In accordance with the Tax Convention, Mr. Eschenbrenner's pay was subject to income tax in France, which had a lower tax rate than Germany at the time. This meant that the insolvency benefit he received was less than his usual net income.

However, the ECJ was of the view that the power to tax the insolvency benefit, belongs to Germany. In fact, Germany exempts insolvency benefit from tax, but requires an amount equal to income tax at the rate in force at the time to be deducted. The Court found that the unfavourable consequence at issue stemmed solely from differences in the tax rates between Germany and France and did not amount to direct discrimination on grounds of nationality.

Ruling

Article 45 TFUE and Article 7 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, in circumstances such as those at issue in the main proceedings, the amount of the insolvency benefit awarded by a Member State to a frontier worker who is not subject to income tax in that State, and for whom that benefit, under the provisions applicable to him, is not taxable, from being determined by deducting income tax as it applies in that State, from the remuneration used to calculate that benefit, with the consequence that the frontier worker, unlike persons working and residing in that State, does not receive a benefit corresponding to his previous net pay.

The fact that the worker cannot claim against his employer for the difference between the calculation and his usual income, does not change matters.

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