Ruling

Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, and the right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave under the first of those articles, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave.

Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

ECJ 7 december 2017, case C-189/16 (Zaniewicz-Dybeck), Free movement, Social insurance

Boguslawa Zaniewicz-Dybeck – v – Pensionsmyndigheten, Swedish case

Summary

A minimum benefit as defined in Article 50 of Regulation No 1408/71 may not be calculated in accordance with Articles 46(2) and 47 of that Regulation, but benefits receive in other Member States may be taken into account in calculating the minimum benefit.

Legal context

Chapter 3 of Regulation No 1408/71 (Coordination Regulation) contains provisions on 'old age and death (pensions)', in particular for those who have been subject to the law of two or more Member States. To the extent relevant for this case, Articles 45, 46 and 47 stipulate that a Member State shall take account, where necessary, periods of insurance or of residence spent under the law of any other Member State. The competent institution of a Member State must calculate the 'theoretical amount' of the benefit that would have been accrued if the person had been covered by the law of that Member State. Applying the *pro rata* method, the theoretical amount forms basis of the eventual benefit to which a worker is entitled. Article 47(1)(d) stipulates that periods of accrual completed under the law of other Member States should be calculated based on the average earnings recorded during the periods of insurance completed under the law of the home Member State ('pro rata calculation'). Further, Article 50 stipulates that the Member State in which the worker resides, must supplement the benefits received by the worker until this reaches the minimum amount of benefit, if the Member State has such a minimum benefit.

A Swedish pension consists of three parts, namely the graduated pension, the supplementary pension and the guaranteed pension. The former two are based on the actual income of the person. The latter aims to provide basic protection for those with little or no income and is a tax-funded residence-based benefit. Those who not have been insured for the full 40 years are entitled to a *pro rata* amount. The internal instructions of the Swedish National Insurance fund stipulate that, in calculating the theoretical amount, each insurance period completed in another Member State must be given a notional value corresponding to the average pensionable value of the insurance periods completed in Sweden.

Facts

Mrs Zaniewicz-Dybeck (Zaniewicz), a Polish national, had worked for 19 years in Poland. She then moved to Sweden, where she lived for 24 years and worked there for 23 years before reaching pensionable age. She then applied for a guaranteed pension. (The predecessor of) the Swedish Pension Authority rejected her application. It applied a *pro rata* calculation, which resulted in a theoretical income above the guaranteed pension. Mrs Zaniewicz appealed against this decision, as the benefits she would receive were much lower than they would have been owing, essentially, to the fact that the pension system in Poland is less beneficial. The National Insurance Fund, the Administrative Court and the Administrative Court of Appeal all dismissed her claims. The referring court wondered whether coming up with a notional amount of benefit from another Member State was the right way to proceed, given the character of the guaranteed pension, and it therefore decided to ask preliminary questions.

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Questions put to the ECJ[5]

1. Must Regulation No 1408/71 be interpreted as meaning that, when the competent institution of a Member State calculates a benefit such as the guaranteed pension at issue in the main proceedings, it is necessary to apply the *pro rata* method of calculation provided for in Article 46(2) of the Regulation and, in accordance with Article 47(1)(d) thereof, to give insurance periods completed by the person concerned in another Member State a notional average value?
2. Must Regulation No 1408/71 be interpreted as precluding the legislation of a Member State under which, when calculating a benefit such as the guaranteed pension at issue in the main proceedings, the competent institution must take account of all the retirement pensions which the person concerned actually receives from one or more other Member State?

ECJ's findings

First, the ECJ emphasized that the Coordination Regulation does not set up a common scheme of social security, but allows national schemes to exist. It only aims to ensure their coordination. Consequently, Member States retain the power to organise their own social security schemes. Member States must nonetheless comply with EU law in terms of the right to move and reside. (*Salgado González*, C-282/11).

Since the Swedish guaranteed pension aims to provide a minimum standard of living, it should be regarded as the minimum benefit, falling within the scope of Article 50 of the Coordination Regulation. Consequently, the right to this benefit should be evaluated based on Article 50 and the relevant national legislation rather than Articles 46(2) and 47 (and national legislation based on these articles).

As regards the second question, the Swedish regulations include foreign pensions that do not qualify as guaranteed pensions, but do form part of the calculation method. Therefore, it must be determined whether Article 50 allows this. The purpose of Article 50 is to guarantee a minimum benefit in cases where the insurance periods of a worker in various countries have been short and, consequently, insufficient for a reasonable living standard (*Torri*, C-64/77 and *Browning*, C-22/81). Therefore, in calculating whether a person is entitled to a minimum benefit such as the guaranteed pension at issue, Article 50 specifically provides that the actual amounts of any retirement pensions received from another Member State should be taken into account.

Ruling

Regulation (EEC) No 1408/71 must be interpreted as meaning that, when the competent institution of a Member State calculates a minimum benefit, such as the guaranteed pension at issue in the main proceedings, it is not inappropriate to apply Article 46(2) or Article 47(1)(d) of the regulation. Such a benefit must be calculated in accordance with Article 50 of the regulation, in conjunction with the provisions of national law, without, however, applying national provisions, such as those in the main proceedings, providing for a pro rata calculation.

Regulation No 1408/71 must be interpreted as not precluding the legislation of a Member State under which, when calculating a minimum benefit such as the guaranteed pension at issue in the main proceedings, the competent institution must take account of all the retirement pensions which the person concerned actually receives from one or more other Member States.

ECJ 20 December 2017, case C-442/16 (Gusa), Free movement, Social insurance

Florea Gusa – v – Minister for Social Protection, Ireland, Irish case

Summary

Self-employed workers who have ceased their activity for reasons beyond their control and who are registered as jobseekers, retain their status as self-employed persons for the purposes of Article 7(1)(a) of Directive 2004/38.

Legal context

Article 7 of Directive 2004/38 (Citizen's Directive) grants EU citizens a right of residence in another Member State for more than three months if they meet certain criteria. This can be the case if they are workers or self-employed persons in the host Member State (paragraph 1). The third paragraph (para b) stipulates that EU citizens retain this inter alia if "he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office". This

5. As rephrased by the ECJ.

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