

Ruling

1. Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution.
2. Article 8 of Directive 2008/94 must be interpreted as meaning that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.
3. Article 8 of Directive 2008/94, which lays down an obligation to provide a minimum degree of protection, is capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought.

ECJ 19 December 2019, case C-460/18 P (HK – v – Commission), Miscellaneous

HK – v – European Commission, Council of the European Union, EU case

Summary

Denial of surviving spouse pension found legitimate, as living together cannot be considered equal to marriage or registered non-marital partnership.

Ruling

The Court:

1. Sets aside the judgment of the General Court of the European Union of 3 May 2018, HK v Commission (T-574/16, not published, EU:T:2018:252);
2. Dismisses HK's action seeking annulment of European Commission's decision refusing to grant him the benefit of the survivor's pension and to pay compensation for the material and non-material damage alleged;
3. Orders HK, the European Commission and the Council of the European Union to bear their own costs at first instance and on appeal.

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ECJ 19 December 2019, case C-465/18 (Comune di Bernareggio), Miscellaneous

AV, BU – v – Comune di Bernareggio (intervener: CT), Italian case

Summary

An unconditional right of pre-emption to pharmacists employed by the municipal pharmacy in a tendering procedure is contrary to the freedom of establishment.

Legal background

Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Such prohibition also applies to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Article 12(2) of Law No 362/1991 is an Italian law that states that in the event of a transfer of ownership of a municipal pharmacy, the employees thereof shall have a right of pre-emption.

Article 2112 of the Codice civile (Civil Code) is an Italian law that protects the employees of an undertaking in case of a transfer of that undertaking and implements Directive 2001/23. This Civil Code aims to ensure that the employment relationship with the transferee continues and employees retain all rights under that relationship.

Facts and initial proceedings

In order to sell a municipal pharmacy, the Municipality of Bernareggio launched a tendering procedure. The highest bidders, in this case AV and BU, would be granted the transfer of the license for the pharmacy starting from a basic contract value of 580 000 euros. However, the license was awarded to a pharmacist employed by the municipal undertaking (CT) based on the conditional right of pre-emption. CT had not joined the tendering procedure and was accorded precedence ex Article 12(2) of Law No 362/1991. AV and BU argued that the former article was contrary to the principles of free competition and equal treatment laid down in EU law.

Question

Must Article 49 TFEU be interpreted as precluding a national measure that grants an unconditional right of pre-emption to pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender?

Consideration

Restriction of the freedom of establishment

First, the Court notes that it must be examined whether Article 12 (2) of Law No 362/1991 constitutes a restriction of the freedom of establishment ex Article 49 TFEU. In this light, the Court notes that Article 49 TFEU precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of freedom of establishment (*Apothekerkammer des Saarlandes and*

Others, C-171/07 and C-172/07 paragraph 22). Given the time and money associated with the tendering procedure, the unconditional right of pre-emption for the pharmacists employed by that pharmacy is likely to discourage pharmacists from other Member states to participate in such a tendering procedure. Especially since a pharmacist who is employed by the municipal pharmacy is able to match the most economically advantageous bid without participating in the call for tenders. Consequently, the Court concludes that the unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender, by conferring an advantage on the pharmacists employed by the municipal pharmacy, tends to discourage or even prevent pharmacists from other Member States from acquiring a fixed place of business for the practice of their profession in Italy. Article 12 (2) of Law NO 362/1991 thus constitutes a restriction of the freedom of establishment.

Justification restriction of the freedom of establishment

The unconditional right of pre-emption granted to the pharmacists employed by a municipal pharmacy aims to ensure that pharmacies are run more effectively in two ways: by ensuring continuity in the employment relationship of pharmacists and by capitalizing on the experience gained by those pharmacists in running the pharmacy. The latter may justify the restriction of Article 49 TFEU on the ground of protecting public health. In addition, a justification of the restriction of the freedom of establishment could be the objective to ensure that the public has a supply of medicinal products which is reliable and of good quality (*Venturini and Others*, C-159/12 to C-161/12, paras. 40 and 41).

The restriction regarding the freedom of establishment must be appropriate for ensuring attainment of the objective pursued and, if so, the restriction must not go beyond what is necessary to obtain that objective (*Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, paras. 25 and 52). Given the foregoing, the continuity in the employment relationship of the pharmacists is not appropriate to attain the objective to protect the public health. In principle, the rights of the employees of a municipal pharmacy, in the event of that pharmacy's sale, are already ensured in Article 2112 of the Civil Code. Moreover, the capitalization on the experience gained by pharmacists in running the pharmacy cannot be considered as appropriate to attain the objective to protect the public health since this reasoning gives rise to a non-rebuttable presumption. That presumption entails that pharmacists employed by a municipal pharmacy are best placed to manage that pharmacy as owners. This reason behind the grant of the right of pre-emption is not based on any real assessment of the experience actually gained, the quality of

service provided, or the duties actually performed within the municipal pharmacy.

As a concluding remark, the selling of a pharmacy is regulated with certain safeguards under national law, namely that pharmacies can only be sold to pharmacists whose names appear in the register of pharmacists and who either have the requisite qualifications to acquire a pharmacy or at least two years' professional experience. Given the latter, the objective of capitalizing on the professional experience gained could be attained through less restrictive measures such as the award of additional points under the tendering procedure to tenderers who provide proof of experience in managing a pharmacy.

Ruling

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Note

As a primary point, the Court held (paras. 26-31) that only Article 49 TFEU is relevant in deciding the dispute in the main proceedings since the acquisition of a pharmacy for an indefinite period falls within the scope of Article 49 TFEU, in that it enables an economic activity to be pursued by means of a stable arrangement (*Gebhard*, C-55/94, para. 39; *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, paras. 23-24). In addition, the Court notes that the request for the preliminary ruling is admissible given several reasons (see paras. 32-36).

ECJ 22 January 2020, case C-177/18 (Baldonado Martín), Fixed-term work, other forms of discrimination

Almudena Baldonado Martín – v – Ayuntamiento de Madrid, Spanish case

Summary

The absence of severance compensation for interim civil servants is not contrary to Directive 1999/70.

Legal background

Clause 4(1) of the Framework Agreement, set out in the Annex to Council Directive 1990/70, prohibits, in respect of employment conditions, less favourable treatment of fixed-term workers compared to comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

The measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships are laid down in Clause 5(1)(a) to (c) of the Framework Agreement.

Article 49(1)(c) of the Workers' Statute is a Spanish law that states that workers covered by the Statute receive compensation equivalent to twelve days' remuneration for each year of service upon expiry of their employment contract.

Article 52 of the Workers' Statute contains objective grounds which may justify the termination of the employment contract. In accordance with Article 53(1)(b) of that Statute, the termination of an employment contract on any of the grounds set out in Article 52 confers entitlement on the worker to payment of compensation equivalent to twenty days' remuneration per year of service.

Facts

Baldonado Martín (hereafter 'BM') was assigned by the Municipality of Madrid as an interim civil servant to maintain green spaces. This assignment decision stated not only that BM would be employed to cover a vacant post until such time as the post was filled by an established civil servant, but also that that post would be abolished if the established civil servant being replaced