JUDGMENT OF THE COURT
13 DECEMBER 1972[1]

Pieter Marsman v M. Rosskamp (Reference for a preliminary ruling by the Arbeitsgericht Rheine)

Case 44/72

Summary

Free movement of persons — Workers — Conditions of employment and work — National legislation — Special social protection — Prohibition on discrimination
(EEC Treaty, Article 48, Regulation No 1612/68 of the Council, Article 7)

The prohibition on discrimination as regards conditions of employment and work laid down in Article 48 of the Treaty and Article 7 of Regulation No 1612/68 of the Council also concerns special protection, especially against dismissal, which the legislation of a Member State confers on specific categories of workers for reasons of a social nature.

In Case 44/72

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Arbeitsgericht Rheine (Labour Court) for a preliminary ruling in the action pending before that court between

PIETER MARSMAN, 161 Deuringerstraat, Hengelo, Netherlands,

plaintiff in the main action,

v

M. ROSSKAMP, 84 Beckerhookstraße, 4432 Gronau, Federal Republic of Germany,

defendant in the main action,

on the interpretation of Article 48 of the Treaty of the European Economic Community and Article 7 of Regulation No 1612/68 of the Council of 15 October

1 — Language of the Case: German.

1968 on freedom of movement for workers within the Community (OJ English Special Edition, 1968 (II), p. 475),

THE COURT

composed of: R. Monaco, President of Chamber, President, P. Pescatore, President of Chamber, A. M. Donner, A. Trabucchi, J. Mertens de Wilmars (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. Article 7 of Regulation No 1612/68 of the Council of 15 October 1968 (OJ English Special Edition, 1968 (II), p. 475) on Freedom of movement for workers within the Community implements the prohibition on discrimination laid down in Article 48 of the Treaty and accordingly paragraph (1) thereof provides that 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.' Article 7(2) adds that such worker shall on the territory of each Member State enjoy the same social and tax advantages as national workers.

2. The plaintiff in the main action, a Dutch national residing in the Netherlands, was a metal-worker employed in the undertaking of the defendant in the main action at Gronau in the Federal Republic of Germany. On 26 February 1971 an accident at work reduced his capacity for work by 60%. For this reason he receives an accident pension paid by the competent German statutory accident insurance body but his employer terminated his contract of employment with effect from 3 December 1971. The plaintiff contested the legality of this dismissal before the Arbeitsgericht Rheine, relying in particular on Paragraph 14 of the Law on seriously disabled persons (Schwerbeschädigtengesetz, Bundesgesetzblatt I, p. 389) under which the dismissal of persons covered by the law requires the prior consent of the Hauptfürsorgestelle für Kriegsbeschädigte und Kriegshinterbliebene (Head Welfare Office for War-disabled Persons and Surviving Dependants).

3. Paragraph 1 of the German Law of 16 June 1953 lists the categories of disabled workers to which it applies and subparagraph (e) thereof refers to those who have suffered an industrial accident. With regard to foreigners, the protection given by the Law is, however, dependent on additional conditions listed in Article 1(3), that is to say: they must (1) reside on the territory of the Federal Republic or in West Berlin and (2) be in receipt of an accident pension within the meaning of the German Law.
Since Mr Marsman did not fulfil the condition as to residence his employer considered that he was entitled to dismiss him without the agreement of the welfare office.

4. Since the court making the reference entertains doubts as to whether the condition relied upon was in accordance with Community law it requests the Court to give a preliminary ruling on the following question:
'Must Article 48 of the EEC Treaty and Article 7 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968 (II), p. 475) be interpreted as meaning that those provisions also refer to the special protection for certain categories of persons against dismissal, in the present case the protection for seriously disabled persons against dismissal, introduced by Paragraph 14 of the Schwerbeschädigtengesetz of 16 June 1953 (Bundesgesetzblatt I, p. 389), so that in the Federal Republic of Germany such protection is also accorded to nationals of the Member States of the EEC who have suffered a reduction of more than 50% in their earning capacity as a result of an industrial accident and who have become entitled *vis-à-vis* the German statutory accident insurance scheme to a corresponding pension without, however, living in the territory of the Federal Republic of Germany or in West Berlin (Paragraph 1(3) of the Schwerbeschädigtengesetz)?'

5. The action for reference was entered in the Court Register on 10 July 1972.

The plaintiff, the Commission, the German Government and the Italian Government submitted written observations.
After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided that a preparatory inquiry was unnecessary.
On 15 November 1972 the Commission, represented by Mr Karpenstein, and the German Government, represented by Mr Seidel, presented oral argument.
The Advocate-General delivered his opinion at the hearing on 20 November 1972.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

The *plaintiff in the main action* claims that in his capacity as a frontier worker he is entitled to the protection given to seriously disabled persons as he was informed by his trade insurance association ('Berufsgenossenschaft').
The *Commission* considers that in any event in so far as a person becomes severely disabled as a result of an industrial accident, the question referred to the Court must immediately and unconditionally be answered in the affirmative.
The duty to give workers equal treatment contained in Article 48(2) of the Treaty and Article 7(1) of Regulation No 1612/68 applies—as stated *ipsis verbis* in the said Article 7—to any conditions of employment and work whether they are based on a law, a decree, a collective bargaining agreement or agreements under private law. Dismissal is, moreover, expressly mentioned by that provision which draws no distinction between an ordinary dismissal and a dismissal prohibited or discouraged for social reasons by the national legislation. In both cases the relevant provision fixes the conditions of employment and work for workers.

The Commission thus has no doubt that the prohibition on discrimination laid down in the abovementioned articles also extends to provisions which make the dismissal of a worker whose earning capacity has been reduced as a result of an industrial accident subject to the authorization of a national body. In order to avoid doing exactly what is prohibited by Article 48(2) of the EEC Treaty and the regulations adopted in implementation thereof, that is to say creating discrimination, the absence of such authorization must in principle produce the same effects for the nationals of Member States as for German nationals.

With regard to the Schwerbeschädigtengesetz, the inequality of treatment consists in the fact that German nationals enjoy advantages under the law without regard being had to residence or the grant of an accident pension whilst the nationals of Member States as 'non-Germans' are required to reside in the Federal Republic or West Berlin and to have acquired a right to benefit against the German social security institutions.

The Commission suggests that the following reply should be given to the question referred for a preliminary ruling:

'The principle of the equality of treatment of nationals of Member States contained in Article 48 of the EEC Treaty and Article 7 of Regulation No 1612 of the Council of 15 October 1968 also applies to provisions which, under national law, make the dismissal of a worker whose earning capacity has been reduced as a result of an industrial accident subject, for social reasons, to particularly stringent conditions'.

The *German Government* considers that the rule against discrimination laid down in Article 48 of the Treaty and Article 7 of Regulation No 1612/68 applies to all conditions of employment and work. Such equality of treatment also holds good with regard to the special guarantees against dismissal which may be provided in favour of certain categories of person even if such special protection, as in the case of severely disabled persons, corresponds to a particular welfare obligation of the State towards the relevant category of persons. It is incompatible with the objectives of freedom of movement that the equal treatment of workers from other Member States and workers of the host country does not extend to that particular aspect of the conditions of employment.

In this connexion, the German Government cites the judgment of the Court of 15 October 1969 in Case No 15/69 ([1969] ECR 363 *et seq.*) in which it says that 'the Community rules relating to matters of social security are based on the principle that the law of each Member State must ensure that nationals of other Member States employed within its territory receive all the benefits which it grants to its own nationals'.

Since Regulation No 1612/68 is directed applicable, the provisions of national law which do not conform to the provisions which it lays down are amended or supplemented by the provisions contained in that regulation. The regulation produces this effect because the provisions of Community law take precedence over national laws. The Federal Government considers that the precedence of Community law follows from the fact that European law would be an inadequate instrument for the attainment of the objectives of the Communities if the Member States could deprive measures of Community law of all effect by enacting conflicting national legislation.

Since this is the legal position and in view especially of the pre-eminence and the direct applicability of the provisions of Regulation No 1612/68 the Federal Government has not so far considered it necessary formally to amend the relevant law. Nevertheless it intended to avail itself of the opportunity afforded by a review of the Schwerbeschädigtengesetz which was necessitated on other grounds to take account of the new legal situation and consequently to amend the said law.

The German Government proposes the following reply to the question which has been referred:

'In view of the provisions of Article 48 of the EEC Treaty and of Article 7 of

Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community all nationals of the Member States of the EEC employed in the Federal Republic of Germany regardless of whether they are resident there are entitled to the special guarantees under Articles 1 and 14 of the Schwerbeschädigtengesetz of 16 June 1953 provide against dismissal'.

According to the *Italian Government* it is necessary to ascertain whether the prohibition on discrimination enshrined in Article 48 of the EEC Treaty and Article 7 of Regulation No 1612/68 of the Council applies not only to normal instances of dismissal but also to the special case of protection afforded against dismissal to certain categories of persons in whose favour national legislation provides that the State shall provide special social assistance. According to the Italian Government it is necessary to consider the wording of Article 7 of the Treaty which is particularly important. It may be inferred from the principle of non-discrimination which is laid down in that article that the protection provided for by a law of one of the Member States in favour of national workers extends to other Community workers in the service of national undertakings even if they reside on the territory of another State. The Italian Government considers that this general principle is clearly expressed in Article 48 of the Treaty and Article 7 of the Treaty and Article 7 of Regulation No 1612/68.

The Italian Government considers that an affirmative answer must be given to the question referred and that it is necessary to declare that:

'When the legal provisions of a Member State establish a special system with regard to the dismissal of national workers those provisions must also apply to workers of other countries of the Community in the service of a national employer even if the worker in question does not reside on the territory of the relevant State'.

Grounds of judgment

1 By an order of 15 May 1972 which was received at the Court Registry on 10 July 1972 the Arbeitsgericht Rheine referred, under Article 177 of the Treaty establishing the European Economic Community, a question on the interpretation of Article 48 of that Treaty and of Article 7 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968 (II), p. 475).

2 Under Article 48 of the Treaty, freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Under Article 7 of Regulation No 1612/68, a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment (Article 7 (1)) but shall enjoy the same social and tax advantages as national workers (Article 7 (2)).

3 It is clear from the file that the main action concerns whether a worker of Dutch nationality employed in a German undertaking who suffers an industrial accident in the Federal Republic of Germany resulting in a loss of earning capacity of more than 50% enjoys the special protection against dismissal introduced by Paragraph 14 of the Schwerbeschädigtengesetz of 16 June 1963 when he fulfils the conditions to which the grant of such protection is subject except that he does not live in the Federal Republic of Germany and the latter condition is required only of foreign workers and not of those of German nationality. The question referred by the national court therefore asks whether the prohibition on discrimination referred to in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 also concerns the special protection against dismissal which the legislature of a Member State only grants, on specific social grounds, to certain fixed categories of workers.

4 Article 48 of the Treaty prescribes the abolition of any discrimination based on nationality between workers as regards employment, remuneration and other conditions of work and employment in order to ensure freedom of movement for workers which is essential to the Common Market. This provision is subject only to the conditions which are laid down restrictively in Article 48(3) and relate to public policy, public security or public health. The Community rules on social security are based on the principle that the law of each Member State must give the nationals of other Member States employed on its territory all the advantages which it grants its own nationals. It follows that the prohibition on discrimination set out in Article 48 also concerns the special protection which the legislation of a Member State accords to specific categories of workers for reasons of a social nature.

5 When Article 7 of Regulation No 1612/68 specifically mentioned dismissal amongst the conditions of work and employment which workers of other Member States must enjoy on an equal footing with national workers, it merely ensured the proper implementation of Article 48. It follows that this provision also refers to the special conditions, in particular regarding dismissal, which may be enjoyed in a Member State by specific categories of national workers.

Costs

6 The costs incurred by the Commission of the European Communities, the Government of the Federal Republic of Germany and the Government of the Italian Republic which submitted observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Arbeitsgericht Rheine, the decision on costs is therefore a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action, the Commission of the European Communities, the Government of the Federal Republic of Germany and the Government of the Italian Republic;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 48 and 177;
Having regard to Regulation No 1612/68 of the Council, especially Article 7;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the question referred to it by the Arbeitsgericht Rheine by an order of 15 May 1972, hereby rules:

The prohibition on discrimination as regards conditions of employment and work laid down in Article 48 of the Treaty and Article 7 of Regulation No 1612/68 of the Council also concerns the special protection, in particular against dismissal, which the legislation of a Member State accords to specific categories of workers for reasons of a social nature.

Monaco Pescatore Donner

Trabucchi Mertens de Wilmars

Delivered in open court in Luxembourg on 13 November 1972.

A. Van Houtte
Registrar

R. Monaco
President