Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 November 2014*

(Reference for a preliminary ruling — Social policy — Framework Agreement on part-time work — Principle of non-discrimination — Collective agreement providing for a dependent child allowance — Calculation of allowance paid to part-time workers in accordance with the principle of pro rata temporis)

In Case C-476/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 13 September 2012, received at the Court on 24 October 2012, in the proceedings

Österreichischer Gewerkschaftsbund

v

Verband Österreichischer Banken und Bankiers,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 25 September 2013,

after considering the observations submitted on behalf of:

— the Österreichischer Gewerkschaftsbund, by A. Ehm, Rechtsanwalt,

— the Verband Österreichischer Banken und Bankiers, by B. Hainz, Rechtsanwalt,

— the European Commission, by B. Eggers and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Clause 4 of the Framework Agreement on part-time work concluded on 6 June 1997 ('the Framework Agreement on part-time work'), which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10) ('Directive 97/81'), and the interpretation of Article 28 of the Charter of Fundamental Rights of the European Union.

2 The request has been made in proceedings between the Österreichischer Gewerkschaftsbund (Austrian Trade Union Federation) and the Verband Österreichischer Banken und Bankiers (Austrian Association of Banks and Bankers ('the VÖBB')) concerning a dependent child allowance paid on the basis of the collective agreement applicable to bank staff and bankers ('the collective agreement').

Legal context

European Union law

3 According to Clause 1(a) of the Framework Agreement on part-time work, one of the objectives of the agreement is 'to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work'.

4 Clause 4 of that framework agreement, entitled 'Principle of non-discrimination', provides:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of pro rata temporis shall apply.

…'

Austrian law

5 Paragraph 19d of the Law on working time (Arbeitszeitgesetz) provides:

'1. Work is "part-time" when the number of hours of agreed work per week is, on average, less than the normal statutory number of hours worked each week or less than the number of normal hours worked each week as provided for by the applicable collective agreement.

…

6. Part-time workers may not suffer a disadvantage compared with full-time workers on the ground that they work part-time, unless there are objective reasons to justify a difference in treatment. …

7. In the event of dispute, the employer must prove that any less favourable condition is not based on the activity being done on a part-time basis.'

6 In accordance with Chapter III of the collective agreement, entitled 'Social Benefits', 'household allowances and dependent child allowances are granted as social benefits'.

7 Paragraph 21(2) of the collective agreement entitled 'Household allowance', states:

'The household allowance for … part-time workers is calculated by dividing the amount payable to full-time workers … by the number of weekly working hours on a full-time basis as provided by the collective agreement (that is, 38.5 hours) and by multiplying the result by the number of weekly working hours of the part-time worker concerned.'

8 Paragraph 22 of the collective agreement, entitled 'Dependent child allowance', is worded as follows:

'1. Workers are entitled to a dependent child allowance for each child in respect of whom they are entitled to a statutory family allowance and for whom they provide evidence of its receipt. …

…

4. Article 21(2) … applies by analogy to dependent child allowance.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 The Österreichischer Gewerkschaftsbund, as the competent body for the employees in the Austrian banking sector, lodged an application for a declaration under the special procedure provided for in Paragraph 54(2) of the Law on Labour and Social Courts (Arbeits- und Sozialgerichtsgesetz, BGBl. Nr.104/1985).

10 That application, directed against the VÖBB, as the competent body representing employers in the Austrian banking sector, seeks a declaration from the Oberster Gerichtshof (Supreme Court) that part-time workers falling within the scope of the collective agreement are entitled to payment of the full amount of the dependent child allowance provided for in Paragraph 22(1) of that collective agreement and not to only an amount calculated *pro rata* on the number of hours worked.

11 In those circumstances, expressing doubts as to the effect of the principle *pro rata temporis* in the case before it, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the principle of *pro rata temporis* under Clause 4.2 of the [Framework Agreement on part-time work] to be applied to a child allowance provided for in a collective agreement — such allowance being a social benefit provided by the employer in order to meet part of the parents' expenses for the maintenance of the child in respect of whom the allowance is obtained — on the basis of the (appropriate) nature of that benefit?

2. If the answer to Question 1 is in the negative,

Is Clause 4.1 of the [Framework Agreement on part-time work] to be interpreted as meaning that the disadvantage suffered by part-time workers, due to the reduction in their entitlement to dependent child allowance in proportion with their working time, is — having regard to the social partners' wide discretion in the determination of a particular social and economic policy objective and of the measures capable of achieving it — objectively justified on the basis that a prohibition of a proportionate grant

(a) makes part-time work in the form of parental part-time working and/or minor activity during a period of parental leave more difficult or impossible; and/or

(b) leads to distortion of competition on account of the greater financial burden placed on employers who employ a larger number of part-time workers, and to a lesser willingness on the part of employers to take on part-time workers; and/or

(c) leads to more favourable treatment of part-time workers who have additional part-time work and multiple entitlement to a benefit — such as a dependent child allowance — under a collective agreement; and/or

(d) leads to more favourable treatment of part-time workers, because they have more free time than full-time workers and thus have better childcare options available to them?

3. If the answer to Question 1 and Question 2 is in the negative:

Is Article 28 of the Charter of Fundamental Rights [of the European Union] to be interpreted as meaning that where, in a system of employment law in which substantial elements of minimum employment standards are established in accordance with the agreed social policy assessments of specially selected and qualified parties to a collective agreement, a point of detail in a collective agreement (albeit a point that breaches the EU law principle of non-discrimination) — in this case, the proportionate grant of child allowance in the case of part-time working — is invalid (according to national practice), the penalty of invalidity extends to all the provisions of the collective agreement relating to that area (in this case, child allowance)?'

The questions referred for a preliminary ruling

The first question

12 By its first question, the referring court asks essentially if Clause 4.2 of the Framework Agreement on part-time work must be interpreted to the effect that the principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by the employer of a part-time worker pursuant to a collective agreement such as that in issue.

13 In that connection, it must be observed, in the first place, that according to the information provided by the referring court in its request for a preliminary ruling, the dependent child allowance concerned is not a benefit provided for by law and paid by the State. It is paid by the employer pursuant to a collective agreement, negotiated by the contracting parties for the benefit of workers with dependent children.

14 It follows that that allowance cannot be treated as a 'social security benefit', within the meaning of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), even though it pursues objectives similar to those of certain benefits provided for by that regulation.

15 In the second place, it must be observed that, according to that information, which was confirmed at the hearing, the parties to the main proceedings agree that the allowance concerned constitutes 'pay' to the worker.

16 The classification of the dependent child allowance corresponds, as the Advocate General observed in paragraph 36 of her Opinion, to that resulting from EU law. It must be recalled that, according to settled case-law, under Article 157(2) TFEU 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is settled case-law that that concept

covers any consideration, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment, from his employer (see judgment in *Hliddal and Bornand*, C-216/12 and C-217/12, EU:C:2013:568, paragraph 41 and the case-law cited).

17 In that context, the Court has explained that the legal nature of that consideration is not important for the purposes of the application of Article 157 TFEU provided that it is granted in respect of the employment (see judgment in *Krüger*, C-281/97, EU:1999:396, paragraph 16).

18 The Court has also held that, '[a]lthough it is true that many advantages granted by an employer also reflect considerations of social policy, the fact that a benefit is in the nature of pay cannot be called in question where the worker is entitled to receive the benefit in question from his employer by reason of the existence of the employment relationship (judgment in *Barber*, C-262/88, EU:C:1990:209, paragraph 18).

19 Since the dependent child allowance is part of a worker's pay, it is determined by the terms of the employment relationship agreed between the worker and the employer.

20 It follows that if, according to the terms of that employment relationship, the worker is employed part-time, it must be held that the calculation of the dependent child allowance in accordance with the principle of *pro rata temporis* is objectively justified, within the meaning of Clause 4.1 of the Framework agreement on part-time work, and appropriate within the meaning of Clause 4.2 thereof (see, by analogy, judgment in *Heimann and Toltschin*, C-229/11 and C-230/11, EU:C:2012:693, paragraph 34 and the case-law cited).

21 In that connection, it must, on the one hand, be observed that clearly the nature of the benefit at issue in the main proceedings cannot preclude the application of Clause 4.2 of the Framework Agreement on part-time work, since the dependent child allowance, which is one of the advantages paid in cash to workers, is a divisible benefit (see, by analogy, judgments in *Impact*, C-268/06, EU:C:2008:223, paragraph 116, and *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 34).

22 On the other hand, it must be recalled that the Court has already applied the principle of *pro rata temporis* to other benefits payable by the employer and related to a part-time employment relationship.

23 Thus, the Court has held that, in the case of part-time employment, EU law does not preclude a retirement pension being calculated *pro rata temporis* in the case of part-time employment (see, to that effect, judgment in *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraphs 90 and 91), nor does it preclude paid annual leave from being calculated in accordance with the same principle (see, to that effect, judgments in *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 33, and *Heimann and Toltschin*, EU:C:2012:693, paragraph 36).

24 In the cases giving rise to those judgments, taking account of the reduced working time as compared with that of a full-time worker constituted an objective criterion allowing a proportionate reduction of the rights of the workers concerned.

25 Having regard to all of the foregoing considerations, the answer to the first question referred is that Clause 4.2 of the Framework Agreement on part-time work must be interpreted as meaning that the principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by an employer to a part-time worker pursuant to a collective agreement such as that in issue.

The second and third questions

26 In view of the answer to the first question, there is no need to reply to the other questions referred by the national court.

Costs

27 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Clause 4.2 of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998, must be interpreted as meaning that the principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by an employer to a part-time worker pursuant to a collective agreement such as that applicable to the employees of Austrian banks and bankers.

[Signatures]