JUDGMENT OF THE COURT (Third Chamber)

10 March 2011 *

In Case C-379/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeidshof te Brussel (Belgium), made by decision of 15 September 2009, received at the Court on 25 September 2009, in the proceedings

Maurits Casteels

v

British Airways plc,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 October 2010,

after considering the observations submitted on behalf of:

— Mr Casteels, by M. Van Asch, avocat,

— British Airways plc, by C. Willems, S. Fiorelli and M. Caproni, advocaten,

— the German Government, by J. Möller and C. Blaschke, acting as Agents,

— the Hellenic Republic, by E.-M. Mamouna, M. Michelogiannaki and S. Spyropoulos, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent,

— the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2010,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Articles 45 TFEU and 48 TFEU.

2 The reference has been made in the course of proceedings between Mr Casteels, a Belgian national, and the subsidiary, established in Brussels (Belgium), of British Airways plc ('BA'), a company incorporated under the laws of the United Kingdom, concerning the entitlement of Mr Casteels to supplementary pension benefits.

Legal context

3 Paragraph 1(1) of the German Law on the enhancement of occupational old-age pensions (the Gesetz zur Verbesserung der betrieblichen Altersversorgung) of 19 December 1974 (BGBl. I, 1974, p. 3610; 'the BetrAVG') provides:

'An employee who has been given an assurance of old-age, invalidity or survivor's pension benefits on grounds of his employment relationship (occupational old-age pension) shall retain his pension right where his employment relationship terminates prior to the operative event if, at that time, the employee has reached the age of at least 35 and

— either the assurance as to benefits has existed in respect of him for at least 10 years

— or the beginning of his employment was at least 12 years ago and the assurance as to benefits has existed in respect of him for at least three years. …'

4 Paragraph 17(3) of the BetrAVG reads as follows:

'Derogations from the provisions of Paragraphs 2 to 5, 16, 27 and 28 may be effected by collective agreement. The derogating provisions shall apply between employers and employees not bound by a collective agreement if they agree that the relevant provisions of the collective agreement are applicable between them. As to the remainder, the provisions of this Law cannot be derogated from to the employee's disadvantage.'

5 Clause 7 of the Collective Pension Agreement No 3 (Versorgungs-Tarifvertrag Nr. 3; 'the Collective Agreement') in force from 1 January 1988 and concluded between BA's establishment in Düsseldorf (Germany) and the Gewerkschaft Öffentliche Dienste, Transport und Verkehr (trade union for the public-services and transport sector), provides:

'(1) Employees who entered service with BA after 31 December 1977 shall be entitled to repayment of their own contributions, without interest, where they leave the company before the statutory qualification periods have been completed.

(2) The following rules shall apply to employees who entered service with BA before 1 January 1978:

(a) Employees with non-forfeitable entitlements may, where they leave the company before reaching the relevant age, demand payment of the value of the pension entitlement guaranteed by their own contributions …

(b) Employees who leave service with BA of their own free will before the completion of 5 years of service shall be entitled only to benefits which are guaranteed by their own contributions.

Employees who, after the completion of 5 years of service, but before the completion of the statutory qualifying periods, leave service with BA of their own free will or for any another reason, shall be entitled to the pension benefits which are guaranteed up to that time by BA's contributions. …

…'

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

6 Mr Casteels worked for BA without interruption from 1 July 1974. In the course of his working life, Mr Casteels at all times worked for that company in the territory of various Member States, namely the Kingdom of Belgium, the Federal Republic of Germany and the French Republic. He remained continuously linked to BA by a coordinating contract of employment which was amended on numerous occasions depending on the establishment in which he was working.

7 Mr Casteels thus worked in Belgium until 14 November 1988, and then from 15 November 1988 to 1 October 1991 at the BA establishment in Düsseldorf. From 1 October 1991 to 1 April 1996, he was employed by BA in France, and thereafter he worked again in Belgium.

8 Mr Casteels' contract of employment, dated 10 March 1988, provided that he would be affiliated to the BA supplementary pension scheme in existence at the place of his employment.

9 On the occasion of Mr Casteels' transfer from Brussels to Düsseldorf, it was agreed between the parties concerned that Mr Casteels' conditions of employment would be those applicable to German employees who had entered the service of BA on 1 July 1974. However, one exception was provided for with regard to Mr Casteels' affiliation to BA's pension scheme in Germany, which was arranged with the group insurance fund of Victoria Lebensversicherungen AG. That affiliation could not take effect until Mr Casteels had taken up his duties at the BA establishment in Düsseldorf.

10 In the context of the main proceedings, BA disputes Mr Casteels' entitlement to supplementary pension benefits for the period of work completed in Germany on the ground that Mr Casteels voluntarily left the Düsseldorf establishment in 1991 after serving less than the minimum period required, under Clause 7 of the Collective Agreement, for the acquisition of definitive supplementary pension rights under the scheme in force at that establishment.

11 According to the Arbeidshof te Brussel, under the German legislation in force during the period in question, Mr Casteels was entitled only to repayment of his own contributions, to the exclusion of those paid by his employer. Therefore, as regards entitlement to supplementary pension benefits, Mr Casteels was, by reason of the fact that

he had worked in different Member States for the same employer, in a less favourable position than if he had always worked in Belgium for that employer.

12 Prior to taking the decision on Mr Casteels' application, the Arbeidshof te Brussel decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can Article 42 EC, in the absence of action on the part of the Council [of the European Union], be invoked by a private individual against his private-sector employer in a dispute before national courts?

(2) Do Article 39 EC, prior to the adoption of [Council] Directive 98/49/EC [of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ 1998 L 209, p. 46)], and Article 42 EC, individually or in conjunction with each other, preclude the following situation:

In the case where an employee who is in the service of the same legal entity/employer, otherwise than in the context of postings, is employed successively in a number of establishments of that employer in various Member States and in each case is subject to the supplementary pension plans applicable to those establishments,

— for the determination of a period for the acquisition of definitive entitlements to supplementary pension benefits (based on the contributions of the employer and the employee) in a particular Member State, no account is taken of the years of service already completed with the same employer in another

Member State or of the employee's membership of a supplementary pension scheme there, and

— the transfer of an employee, with his agreement, to an establishment of the same employer in another Member State is treated as equivalent to the situation, as envisaged in the pension rules, of an employee voluntarily leaving an establishment, in which case entitlements to a supplementary pension are limited to the employee's own contributions,

and that situation has the unfavourable consequence that the employee loses his entitlements to supplementary pension benefits in relation to his employment in that Member State, which would not have been the case had he worked for his employer in only one Member State and remained a member of the supplementary pension scheme of that Member State?'

The questions referred to the Court

The first question

13 By its first question, the national court is essentially asking whether Article 48 TFEU has direct effect, in the sense that an individual can rely on that article against his private-sector employer in a dispute before national courts.

14 In that regard, it must be noted that Article 48 TFEU does not have the objective of laying down a legal rule which is operative as such. It constitutes a legal basis which allows the European Parliament and Council, acting in accordance with the ordinary legislative procedure, to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.

15 That provision thus requires action by the European Union legislature and is for that reason subject in its effects to the adoption of a measure by the institutions of the European Union. It cannot therefore, as such, confer rights on individuals which those individuals might be able to rely on before their national courts.

16 Consequently, the answer to the first question must be that Article 48 TFEU does not have any direct effect capable of being relied on by an individual against his private-sector employer in a dispute before national courts.

The second question

17 By its second question, the national court is essentially asking whether Article 45 TFEU must be interpreted as precluding, for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service already completed by a worker with the same employer in establishments of the employer situated in different Member States and pursuant to the same coordinating contract of employment.

18 The national court is also in doubt as to whether the consensual transfer of an employee to another establishment of the same employer, situated in a different Member State, is to be regarded as a voluntary departure of that employee, within the meaning of the rules of the supplementary pension scheme at issue.

19 It should be noted at the outset that Article 45 TFEU not only applies to the action of public authorities but also extends to rules of any other nature aimed at regulating gainful employment in a collective manner (see Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 30 and the case-law cited).

20 It follows that Article 45 TFEU applies to a situation such as that at issue in the main proceedings, which is characterised by the existence of a collective labour agreement governing the supplementary pension rights of Mr Casteels in relation to BA.

21 It is also settled case-law that all of the provisions of the FEU Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by European Union nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 44 and the case-law cited, and *Olympique Lyonnais*, paragraph 33).

22 Consequently, Article 45 TFEU militates against any measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by European Union nationals of the fundamental freedoms guaranteed by the Treaty (see *Gouvernement de la Communauté française and Gouvernement wallon*, paragraph 45 and the case-law cited).

23 In the case in the main proceedings, even though, admittedly, the provisions of the Collective Agreement, in particular Clause 7 thereof, apply without distinction to all employees working in BA's establishments in Germany and do not differentiate on grounds of the nationality of the employees concerned, the fact nonetheless remains that that collective agreement has the effect of placing workers in Mr Casteels' situation, by reason of the fact they have exercised their right to free movement within the European Union, at a disadvantage in comparison with workers employed by BA who have not exercised such a right.

24 As the Advocate General has noted in point 50 of her Opinion, the Collective Agreement is restricted to the territory of the Federal Republic of Germany.

25 Consequently, first, as regards workers employed by BA who, like Mr Casteels, were transferred from a BA establishment in another Member State to the BA establishment in Düsseldorf, the period of service completed at the first of those establishments is not regarded as a period of service which is relevant for the purposes of determining whether the person concerned has completed the minimum period required for the acquisition of definitive supplementary pension rights under the scheme in force in Germany.

26 By contrast, workers employed in the Düsseldorf establishment who have a length of service with BA equal to that of Mr Casteels but who have not exercised their right to free movement are able to claim an uninterrupted length of service for purposes of verifying completion of the period required, pursuant to the provisions of the Collective Agreement, for acquisition of definitive entitlement to supplementary pension benefits under the scheme in force at that establishment. Those workers benefit from continuity in the acquisition of their rights to a supplementary pension, whereas the period during which Mr Casteels acquired rights under the scheme in force at that establishment was unable to reach the minimum threshold required by Clause 7 of

the Collective Agreement on the ground that the acquisition of length of service with BA had, with regard to Mr Casteels, been interrupted by virtue of the fact that it resulted from periods of service completed in establishments of that same employer in different Member States.

27 Second, workers employed by BA who are transferred, with their consent, from the BA establishment in Düsseldorf to an establishment of the same employer in another Member State are deemed to have left BA, for the purposes of the Collective Agreement, with the result that they only have a right, under Clause 7(2)(b) of that collective agreement, to benefits which are guaranteed by the contributions which they themselves paid in the case where they were transferred before the expiry of a period of service of 5 years.

28 By contrast, as the Advocate General observes in point 51 of her Opinion, a BA employee who accepts a transfer from the Düsseldorf establishment to another BA establishment in Germany is not deemed to have left BA, for the purposes of the Collective Agreement, and therefore does not come within the scope of application of the provision of the Collective Agreement mentioned in the previous paragraph.

29 By making no provision for account to be taken of years of service completed by a BA employee in a BA establishment in another Member State, and by treating the consensual transfer of a BA employee to a BA establishment in another Member State as a voluntary departure from BA, the Collective Agreement thus places workers who exercise their right to free movement at a disadvantage inasmuch as they suffer financial losses as well as an adverse effect on their supplementary pension rights. The prospect of such a disadvantage is liable to dissuade workers, such as Mr Casteels, from leaving their employer's establishment in one Member State in order to take up a position with an establishment of that same employer in another Member State

(see, to that effect, *Gouvernement de la Communauté française and Gouvernement wallon*, paragraph 48).

30 Since the scheme at issue in the main proceedings in the present case constitutes an obstacle to the freedom of movement for workers which is, in principle, prohibited by Article 45 TFEU, that scheme can be allowed only on condition that it pursues a legitimate objective in the public interest, is appropriate to ensuring the attainment of that objective, and does not go beyond what is necessary to attain the objective pursued (see, inter alia, *Gouvernement de la Communauté française and Gouvernement wallon*, paragraph 55 and the case-law cited).

31 BA points out, in this respect, that that scheme is designed to prevent a worker from being affiliated simultaneously to several pension schemes in different Member States. However, as the Advocate General has observed in point 79 of her Opinion, there is, in a situation such as that of Mr Casteels, reason to fear, not unjust enrichment of the migrant worker, but, on the contrary, unjustified disadvantages through the loss of supplementary pension rights for the period during which Mr Casteels was affiliated to the German supplementary pension scheme.

32 The objective of staff loyalty invoked by BA cannot reasonably be advanced as justification for the unfavourable treatment suffered by workers who, when exercising their right to free movement within the European Union, remain in the service of the same employer.

33 According to established case-law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in conformity with the requirements of European Union law (see Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11; Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 68).

34 In that regard, it is important to bear in mind that Mr Casteels, who worked continuously for BA from 1 July 1974, must, on a construction of the second subparagraph of Clause 7(2)(b) of the Collective Agreement in accordance with Article 45 TFEU, be able to be regarded as having been in the service of BA since that date and as not having left that employer at the time of his transfer to BA's establishment in France in order to be entitled to benefits based on his own contributions as well as on those of BA for the period of his affiliation to the scheme in force in the BA establishment in Düsseldorf.

35 That provision of the Collective Agreement provides that employees who entered the service of BA before 1 January 1978 and who, after the completion of five years of service, but before the completion of the statutory qualifying periods, leave the service of BA of their own free will or for any another reason, are also entitled to the pension benefits which are guaranteed up to that time by BA's contributions. It must be pointed out in that regard that, at the hearing before the Court, BA acknowledged that Clause 7(2) of the Collective Agreement could be applied to Mr Casteels.

36 It follows from the foregoing that the answer to the second question is that Article 45 TFEU must be interpreted as precluding, in the context of the mandatory application of a collective labour agreement:

— for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment; and

— a worker who has been transferred from an establishment of his employer in one Member State to an establishment of the same employer in another Member State from being regarded as having left the employer of his own free will.

Costs

37 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 (Third Chamber) hereby rules:

1. Article 48 TFEU does not have any direct effect capable of being relied on by an individual against his private-sector employer in a dispute before national courts.

2. Article 45 TFEU must be interpreted as precluding, in the context of the mandatory application of a collective labour agreement:

— for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-

inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment;

— **a worker who has been transferred from an establishment of his employer in one Member State to an establishment of the same employer in another Member State from being regarded as having left the employer of his own free will.**

[Signatures]