

In Case 152/73

Reference to the Court under [Article 267 TFEU] by the Bundesarbeitsgericht (Federal Labour Court) for a preliminary ruling in the action pending before that court between

GIOVANNI MARIA SOTGIU, skilled postal worker, residing in Stuttgart,

and

DEUTSCHE BUNDESPOST (German Federal Post Office), Directorate-General, Stuttgart,

on the interpretation of [Article 45(4) TFEU] and of Article 7 (1) and (4) of Regulation No 1612/68 of the Council of 15 October 1968, on freedom of movement for workers within the [Union]

## THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sorensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur), H. Kutscher, C. O. Dalaigh and Lord Mackenzie Stuart, Judges,

Advocate-General: H. Mayras

Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Grounds of judgment

- 1 By Order of 28 March 1973, received at the Court Registry on 20 July 1973, the Bundesarbeitsgericht, in pursuance of [Article 267 TFEU], asked three questions relating to the interpretation of [Article 45(4) TFEU] and

Article 7 (1) and (4) of Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the [Union] (OJ 1968, L 257, p. 2).

These questions were raised within the framework of an action brought against the Federal Post Office by an Italian national employed as a worker by the above organization regarding the payment of a 'separation allowance' which is granted on certain conditions to workers allocated to posts away from their place of residence.

On the first question

- 2 The first question asks whether, having regard to the exception provided for in [Article 45(4) TFEU], workers employed in the public service of a Member State -in this case the postal service- by virtue of a contract of employment under private law, may be excluded from the rule of non-discrimination set out in Article 7 (1) and (4) of Regulation No 1612/68.
- 3 [Article 45 TFEU] secures freedom of movement for workers within the [Union] and to this end provides in paragraph (2) for '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'.

Article 7 (1) of Regulation No 1612/68 stipulates in this respect 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 ...'

Paragraph (4) of the same Article reads: 'Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.'

By virtue of [Article 45(4) TFEU], however, these provisions are not applicable to 'employment in the public service'.

The extent of this exception must therefore be defined.

- 4 Taking account of the fundamental nature, in the scheme of the Treaty, of the principles of freedom of movement and equality of treatment of workers within the [Union], the exceptions made by [Article 45(4) TFEU] cannot have a scope going beyond the aim in view of which this derogation was included.

The interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service.

On the other hand this provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers once they have been admitted to the public service.

The very fact that they have been admitted shows indeed that those interests which justify the exceptions to the principle of non-discrimination permitted by [Article 45(4) TFEU] are not at issue.

- 5 It is necessary to establish further whether the extent of the exception provided for by [Article 45(4) TFEU] can be determined in terms of the designation of the legal relationship between the employee and the employing administration.

In the absence of any distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law.

These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of [Union] law.

- 6 The answer to the question put to the Court should therefore be that [Article 45(4) TFEU] is to be interpreted as meaning that the exception made by this provision concerns only access to posts forming part of the public services and that the nature of the legal relationship between the employee and the employing administration is of no consequence in this respect.

On the second question

- 7 The second question asks whether Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as meaning that the separation allowance paid in addition to wages falls within the concept of 'conditions of employment and work'.

This question is raised both in view of the nature of this payment and having regard to the fact that according to the relevant national provisions it is a matter of an optional payment.

- 8 The aim of Article 7 of Regulation No 1612/68 is to ensure equality of treatment of workers who are nationals of Member States with regard to all statutory or contractual provisions determining their position and in particular their financial rights.

The separation allowance, in so far as it constitutes compensation for the inconveniences suffered by a worker who is separated from his home, represents supplementary remuneration and is thus one of the 'conditions of employment and work' within the meaning of the Regulation.

In this respect it is of little consequence whether the allowance is paid by reason of a statutory or contractual obligation or merely at the option of the State in its capacity as employer.

As soon as the State avails itself of this option on behalf of its own nationals it is obliged to extend the advantage to workers who are nationals of other Member States in the same situation.

- 9 It is therefore appropriate to reply that Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as meaning that a separation allowance, paid in addition to wages, falls within the concept of 'conditions of employment and work' without it being necessary to define whether the payment is made by virtue of an option or of an obligation, either statutory or contractual.

On the third question

- 10 The third question asks whether Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as containing a prohibition not only against

treating a worker differently because he is a national of another Member State of the [EU], but also against treating him differently because he is resident in another Member State.

- 11 The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

This interpretation, which is necessary to ensure the effective working of one of the fundamental principles of the [Union], is explicitly recognized by the fifth recital of the preamble to Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured 'in fact and in law'.

It may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty and the Regulation.

- 12 However, this would not be the case with a separation allowance the conditions of allotment and rules for the payment of which took account of objective differences which the situation of workers may involve according to whether their residence, at the time their taking up a given post, is within the territory of the State in question or abroad.

In this respect the fact that, for workers whose home is within the territory of the State concerned, payment of the separation allowance is only temporary and is bound up with an obligation to transfer the residence to the place of employment, whilst the same allowance is paid for an indefinite period and is not bound up with any such obligation in the case of workers whose residence is abroad, whatever their nationality, may be a valid reason for differentiating between the amounts paid.

In any case it is not possible to state that there is discrimination contrary to the Treaty and the Regulation, if it is apparent from a comparison between the two schemes of allowances taken as a whole that those workers who retain their residence abroad are not placed at a disadvantage by comparison with those whose residence is established within the territory of the State concerned.

- 13 The reply to the question put should be that the taking into consideration, as a criterion for the grant of a separation allowance, on the fact that a worker has his residence in the territory of another Member State may, according to the circumstances, constitute discrimination forbidden by Article 7 (1) and (4) of Regulation No 1612/68.

This is not the case however if the scheme relating to such an allowance takes account of objective differences in the situations of workers according to whether their residence at the time when they take up their employment is within the territory of the State concerned or abroad.

#### Costs

- 14 The costs incurred by the Government of the Federal Republic of Germany, by the Government of the Italian Republic and by the Commission of the European [Union], which have submitted observations to the Court, cannot be reimbursed.

As these proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the Bundesarbeitsgericht it is for the latter to decide as to the costs.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the Government of the Federal Republic of Germany and the Commission of the European [Union];

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty [on the Functioning of the European Union], especially [Articles 45 and 267];

Having regard to Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the [Union];

Having regard to the Protocol on the Statute of the Court of Justice of the European [Union], especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

## THE COURT

in answer to the questions referred to it by the Bundesarbeitsgericht (Fourth Chamber) by Order of 28 March 1973, hereby rules:

1. [Article 45(4) TFEU] is to be interpreted as meaning that the exception made by this provision concerns only access to posts forming part of the public service. The nature of the legal relationship between the employee and the employing administration is of no consequence in this respect.
2. Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as meaning that a separation allowance, paid in addition to wages, falls within the concept of 'conditions of employment and work', without its being necessary to define whether the payment is made by virtue of an option or of an obligation, either statutory or contractual.
3. The taking into consideration, as a criterion for the grant of a separation allowance, of the fact that a worker has his residence in the territory of another Member State may, according to the circumstances, constitute discrimination forbidden by Article 7 (1) and (4) of Regulation No 1612/68. This is not the case however if the scheme relating to such an allowance takes account of objective differences in the situations of workers according to whether their residence at the time when they take up employment is within the territory of the State concerned or abroad.

Lecourt	Donner	Sorensen	Monaco	Mertens de Wilmars
Pescatore			O Dalaigh	Mackenzie Stuart
r	Kutsche			

Delivered in open court in Luxembourg on 12 February 1974.

A. Van Houtte  
Registrar

R. Lecourt  
President