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Refusal to credit periods of prior employment with different employers infringes Article 45 TFEU (AT)

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Summary

In its decision rendered on 29 September 2020, the Austrian Supreme Court (*Oberster Gerichtshof*, 'OGH') ruled that periods of prior professional services of doctors completed with employers in the EU or the EEA other than the current employer must be taken into account for salary classifications to guarantee the freedom of movement of workers under Article 45 of the Treaty on the Functioning of the European Union ('TFEU'). The argument that the provision in question served as a genuine loyalty bonus was only a secondary aspect of the regulation and thus insufficient to legitimise a violation of Article 45 TFEU.

Facts

The defendant was an insurance institution, which administered seven accident hospitals and four rehabilitation facilities. The applicable collective bargaining agreement, '*Dienstordnung B*' ('DO.B'), which applied to the employment relationships of doctors employed by the defendant, *inter alia*, regulated the qualifying period of service for classification in the relevant salary scheme and acted as the basis of remuneration. Section 13 DO.B in its original version stated:

> For the purpose of classification in the salary scale (Section 40 [DO.B]), the following […] periods of service shall be taken into account: 1. periods of service with the insurance institution; 2. […]. 3. up to a maximum of five years in total a) periods of service in other employment relationships as an employed doctor, if the individual employment relationships have lasted at least six months without interruption, b) periods of self-employment as a doctor, if they have each lasted at least six months without interruption, c) periods of service as a doctor in an employment relationship with an employer under public law, if they have lasted at least six months each, d) […] 4. […].

However, whilst doctors, who joined an accident hospital before January 2003, were still credited with all their previous periods of service, those doctors, who joined after this date, were only partially credited for prior employment periods. They would have benefited from a further crediting of periods of prior service if they would have acquired these periods – as regulated in Section 13 DO.B – "with the insurance institution" or with the defendant itself.

As at least three employees were affected by Section 13 DO.B, the works council of the respective accident hospital filed a lawsuit before the Labour and Social Court. It claimed that those employment periods previously completed with employers within the EU or the EEA, other than institutions of the defendant, were to be taken into account for the salary classification in the same way as if they had been completed with institutions of the defendant.

Judgment

The Labour and Social Court, as court of first instance, upheld the claim. In its appeal, the defendant tried to portray Section 13 DO.B as a type of loyalty bonus.

After an interruption of the legal proceedings to await the ECJ's decision on a reference for a preliminary ruling under Article 267 TFEU (C-703/17 *Krah*), the Court of Appeal (*Oberlandesgericht Graz*, 'OLG Graz') confirmed the decision of the Labour and Social Court. In accordance with previous case law of the ECJ (C-224/01 *Köbler*; C-514/12 *Salk*; C-24/17 *Österreichischer Gewerkschaftsbund*; and C-703/17 *Krah*) as well as with a decision of the OGH on an earlier version of Section 13 DO.B (9 ObA 98/16a), the OLG Graz ruled that Section 13 DO.B infringed Article 45 TFEU due to its ability to affect the free movement of workers. The OLG Graz stated that Section 13 DO.B, whilst honour-

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ing employees' loyalty, would indirectly lead to an isolation of the respective labour market, thus making it hard to justify the pursuing of the said objective. Hence, the OLG Graz rejected the defendant's argumentation, holding that the respective salary classification scheme neither pursued a legitimate aim as set out in the TFEU nor was it justified by any overriding reasons relating to the public interest, which would legitimise a violation of Article 45 TFEU.

The OGH rejected the defendant's extraordinary appeal and stated in line with the decision of the OLG Graz that, in order to ensure the free movement of workers, periods of previous professional activities completed with employers in the EU or EEA must also be taken into account for the purpose of classification in the salary scheme, not only the periods served with the defendant. The free movement of workers is one of the fundamental principles of the EU. All provisions of the TFEU on the free movement of persons prevent measures that could discriminate against workers who wish to pursue an employed activity in the territory of another Member State. Any interference with this freedom, however insignificant it may be, is prohibited. Regulations, such as those of Section 13 DO.B, are only permissible if they pursue one of the legitimate aims set out in the TFEU or if they are justified by compelling reasons in the general interest. Their application must also be suitable to ensure the achievement of the aim and must not go beyond what is necessary to achieve it. In addition, the OGH stated that, in any case, Section 13 DO.B not only has the effect of rewarding the loyalty of the employees, but also leads to an advantage in mobility within the companies belonging to the defendant. In the system of the DO.B, however, loyalty to the company is primarily compensated through advancement and not through classification in the salary system. According to the case law of the ECJ, a loyalty bonus that takes into account the work for several employers or departments, establishments or locations is not a real loyalty bonus and is therefore unsuitable as a justification. An employer's interest in retaining certain employees would have to be concretely justified in relation to a specific office and the specific activity performed there. This was not the case here.

Commentary

In summary, the OGH stated that a provision, which privileged prior employment periods with the same institution in one Member State, did not pursue one of the legitimate aims set out in the TFEU and infringed the free movement of workers according to Article 45 TFEU. This legal opinion is in line with the previous case law of the ECJ. Furthermore, based on the fundamental rights of the EU, not only the Member States, but also the parties to a collective bargaining agreement, such as the DO.B, are bound by the fundamental freedoms of the EU, especially the freedom of movement of workers.

However, in our opinion, the OGH had to assess a specific regulation, namely Section 13 DO.B and did not have to clarify a question of principle. Nevertheless, an incorrect classification into a collective bargaining agreement may lead to the following legal issues: On the one hand, the employees concerned may raise civil claims against the employer. On the other hand, significant administrative penalties for underpayment pursuant to the Act against Wage and Social Dumping (*Lohn- und Sozialdumping Bekämpfungsgesetz*, 'LSD-BG') may be imposed, for which the legal representatives of the employer are personally liable. In practice, it is therefore questionable whether the relevant case law actually supports the free movement of workers, since it could also mean that employees with professional experience will be more expensive for employers than before. This may also have a negative effect on seeking employment within the EU.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): In Bulgaria this issue has been resolved by an express regulation on the matter. Such type of additional compensation on top of the regular salary of the employee is not known as a 'loyalty bonus', but rather as an additional compensation for length of service and professional experience.

The Regulation on the Structure and Organization of Work Remuneration provides that the employee is entitled to additional remuneration if, for a minimum period of one year, he or she has worked and still works in the employer's enterprise, including at different workplaces and positions, or if the employee has worked in the enterprise prior to a change of employer. Calculation of this additional remuneration takes into account the service and professional experience of the employee acquired under an employment contract, or another type of relationship (e.g., state official or freelancer) constituting grounds for social insurance of the employee against all social security risks or against all social security risks except for labour accidents, professional disease, and unemployment, in another enterprise but at the same or similar position, profession, or work or at a position, profession, or work of similar nature. This means that the employee is incentivized to develop his/her skills in the same professional area, rather than in the same enterprise.

It is important to note that the same rule applies if Bulgarian citizens or citizens of other Member States and the members of their families have worked or have practiced their profession in the territory of the EU Member States at the same or similar position, profession, or work or at a position, profession, or work of similar nature.

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Germany (Andre Schüttauf/Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH): Taking into account the above-mentioned decisions of the ECJ (C-224/01 *Köbler* and C-703/17 *Krah*), the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') also recently made a decision on the violation of the free movement of workers according to Article 45 TFEU by clauses on salary classification (BAG, judgment of 29 April 2021 – ref. 6 AZR 232/17).

The BAG decided about a clause in a collective agreement according to which a salary classification is made in levels one to five regarding the relevant professional experience. According to this clause, prior employment periods with the same employer are fully taken into account, but prior employment periods with another employer are only taken into account up to the third level. The Court ruled that the limited consideration of professional experience – provided that it was acquired within the EU – violates the free movement of workers according to Article 45 TFEU.

Furthermore, the BAG commented on the scope of application of Article 45 TFEU. It stated that the scope of application of the provision is only fulfilled if the employee concerned has actually acquired the professional experience in another Member State of the EU. In such cases, the collective clause is – as already mentioned – inapplicable because it is contrary to Union law. If, on the other hand, the employee has gained the professional experience with another employer in Germany, the provision would remain applicable, as the scope of Article 45 TFEU is not debated. Accordingly, the free movement of workers does not apply to a nationally limited situation.

Italy (Caterina Rucci, Katariina's Guild): The principle discussed in this case is a very important one in various respects. It relates in fact not only to freedom of movement, in so far as it prevents former work experience from being considered and accepted within the EU, but is also connected to the non-discrimination principle in so far as it prevents non-nationals, or women (the vast majority in this sector), from accessing certain work activity and being duly paid for it.

This is especially important (and Covid-19 is a recent horrible example) for all medical and non-medical personnel working in hospitals and facing incredible problems in having their qualifications recognized and being duly paid. In addition, this connects in Italy at least, but presumably in a number of EU countries, to non-EU nationals employed in hospitals, often without any training in relation to local security measures, nor knowledge of the meaning of the most important vocabulary.

The vast majority of personnel in Italian hospitals are non-nationals, and often not EU citizens that are not even directly hired by the hospitals but just supplied, with a lower salary, by very small agencies applying minor (pretended) collective agreements.

Also in these cases, where former work experience in similar activities is not recognized, whether for the related working seniority or for payment, an important infringement of freedom of movement is carried out daily.

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