JUDGMENT OF THE COURT (Second Chamber)

16 September 2004 *

In Case C-400/02,

REFERENCE for a preliminary ruling under Article 234 EC,

by the Bundesarbeitsgericht (Germany), made by decision of 27 June 2002, received at the Court on 12 November 2002, in the proceedings

Gérard Merida

v

Bundesrepublik Deutschland,

* Language of the case: German.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, J.N. Cunha Rodrigues (Rapporteur), R. Schintgen and N. Colneric, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 January 2004,

after considering the observations submitted on behalf of:

— G. Merida, by F. Lorenz, Rechtsanwalt,

— the Bundesrepublik Deutschland, by W.-D. Plessing, acting as Agent, and E.H. Neuert, Rechtsanwalt,

— the Commission of the European Communities, by G. Braun, R. Lyal and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns Article 39 EC.

2 That reference was made in the course of a dispute between Mr Merida, a French national, and the Bundesrepublik Deutschland concerning the calculation of the increased interim assistance ('Überbrückungsbeihilfe', hereinafter 'interim assistance') paid by the latter to the applicant in the main proceedings pursuant to the Tarifvertrag zur sozialen Sicherung der Arbeitnehmer bei den Stationierungsstreitkräften im Gebiet der Bundesrepublik Deutschland (collective agreement on social security for employees employed by forces stationed in the Federal Republic of Germany) of 31 August 1971 (hereinafter the 'TV SozSich').

Legal framework

Community legislation

3 Under Article 7 of Regulation (EEC) 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:

'1. 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;

...

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

National legislation

4 The TV SozSich provides at Paragraph 4 concerning interim assistance:

'1. Interim assistance shall be paid:

...

(b) in addition to benefit paid by the Bundesanstalt fur Arbeit (Federal Office for Employment) owing to unemployment or professional training programmes (unemployment benefit/assistance, subsistence),

...

3 (a) (1) The basis of assessment of interim assistance payable in addition to remuneration for other employment (subparagraph 1a) shall be the collectively agreed basic remuneration under Paragraph 16(1)(a) of the Tarifvertrag für die Arbeitnehmer bei den Stationierungsstreitkräften im Gebiet der Bundesrepublik Deutschland (collective agreement for employees employed with forces stationed in the Federal Republic of Germany) of 16 December 1966 (hereinafter 'the TV AL II') to which the employee was entitled for a full calendar month on the basis of his contractually agreed normal working time at the time of cessation of employment ...

...

3 (b) The basis of assessment of interim assistance payable in addition to the benefit payable by the Bundesanstalt für Arbeit (point 1(b)) shall be the basis of assessment under the immediately preceding subparagraph less the salary deductions provided for by law. For the purposes of the notional calculation of tax on emoluments and social security contributions regard shall be had to the tax and social security criteria applicable to the employee at the time of payment of the interim assistance, no account, however, being taken of the allowances stated on the tax assessment card ('Lohnsteuerkarte')

4. The interim assistance shall amount:

— during the first year following cessation of employment, to 100%,

— as from the second year, to 90%

— of the difference between the basis of assessment (point 3(a) or (b) and the benefits mentioned at points 1 and 2 above.

If interim assistance is paid in addition to benefits from the Bundesanstalt für Arbeit or sickness or accident assurance, the requisite amount must be added to it in order to cover wage tax.

...'

5 At point 2 of the Erläuterungen und Verfahrensrichtlinien zum TV SozSich — Neufassung 1992 (explanatory memorandum and procedural guidelines on the collective agreement on social security (new version 1992)) the following matters are stated:

'On Paragraph 4(1)

...

2.6.5 Unemployment benefit which, owing to his place of residence, a frontier worker from an EU Member State can receive only in his country of residence is in principle equivalent to benefit payable by the Bundesanstalt für Arbeit where the frontier worker was able to pursue employment on the German employment market from his place of residence at that time.

...

On Paragraph 4(3)

...

2.8.5 Where the employee at the time of cessation of employment was exempt under a double taxation agreement from tax on emoluments, in determining the basis of assessment under point 3(b), account is to be taken of the tax deductible in the case of an otherwise comparable German employee resident in Germany.

...

On Paragraph 4(4)

...

2.9.4 Where an employee is in receipt of interim assistance under point 2.6.5 in addition to the benefit paid by a foreign social security institution, the amount of interim assistance shall be determined by reference to the benefit payable by the Bundesanstalt für Arbeit to which the person concerned would be entitled if he were resident in Germany. If the benefit in fact received is higher the difference is to be offset under Paragraph 5.'

6 Under Paragraph 5 aforesaid benefits other than those provided for in Paragraph 4(1) to which the employee is entitled are to be taken into account for the payment of interim assistance.

7 The agreement between the French Republic and the Federal Republic of Germany for the avoidance of double taxation and making provision for rules on mutual legal and administrative assistance on taxation of income and wealth, and in regard to patent taxes and land taxes, concluded on 21 July 1959, and subsequently amended, (Double taxation agreement) provides at Paragraph 14(1):

'Salaries, wages and analogous remuneration, as well as retirement pensions, paid by one of the Contracting States ... to resident natural persons of the other State in consideration of current or previous military or administrative services shall be chargeable to tax only in the first State. None the less, that provision shall not apply where remuneration is paid to persons possessing the nationality of the other Member State without at the same time being nationals of the first State; in that case, the remuneration is chargeable to tax only in the State of which those persons are resident'.

Dispute in the main proceedings and preliminary question

8 Until 30 November 1999 Mr Merida occupied a post as a civilian employed by the French forces stationed in Baden-Baden (Germany) but resided in France. The TV AL II was applicable to his contract of employment and his remuneration was paid to him by the German authorities on behalf of and for the account of his employer.

9 Under Paragraph 14(1) of the double taxation agreement the gross remuneration received by Mr Merida in respect of his occupational activity, after deduction of social security contributions paid in Germany, was taxable in France. Since the rate of the French tax on wages was lower than that applicable in Germany, Mr Merida received a higher net income than that of an employee in an identical situation to his but residing in the latter Member State.

10 Following termination of his contract of employment Mr Merida received interim assistance under Paragraph 4 of the TV SozSich. In determining its basis of assessment, the German authorities, by means of a notional calculation, deducted from the basic remuneration provided for under the TV AL II 'to which the employee was entitled for a full calendar month at the time of cessation of employment' not only the amount of the German social security contributions but also the German tax on wages. Moreover, pursuant to the provisions of Paragraph 5 of the TV SozSich and point 2.9.4 of the explanatory notes and guidelines, the German authorities deducted from the interim assistance paid to Mr Merida the amount of the unemployment benefit received by the latter in France between 22 February and the end of March 2000.

11 According to Mr Merida, the notional deduction from his basic remuneration of the German tax on wages for the purposes of determining the basis of assessment of the interim assistance is unlawful. In fact, under the double taxation agreement that

benefit is taxable only in France and, in the event, it is being subjected to unlawful double taxation. The notional calculation of net salary under German tax law for the purposes of determining the amount of that benefit, apart from running counter to the objective pursued by it, which is to offset the loss of income consequential upon cessation of employment, is contrary to Community law.

12 Both the first-instance court and the appeal court dismissed Mr Merida's action, whereupon he lodged an appeal on a point of law with the referring court.

13 According to the referring court, in applying national law, the appeal court definitively and correctly dismissed the appeal brought before it as unfounded. In so doing, it was following the case-law of the Bundesarbeitsgericht (Federal Labour Court) to the effect that, as the basis of assessment of the interim assistance, the notional net salary must be determined under Paragraph 4(3)(b) of the TV SozSich. In that regard the Bundesrepublik Deutschland had notionally to take into account German wage tax even in the case of Mr Merida, although he was resident and liable to tax in France.

14 None the less it cannot be ruled out that the social partners acted in breach of Article 39 EC in notionally taking into account, even for employees resident in another Member State, German wage tax for the purposes of determining the basis of assessment of the interim assistance.

15 In that regard the referring court notes that Mr Merida considers that he is being discriminated against inasmuch as if, as at the time when he was employed by the allied forces in Germany, he is obliged to pay tax on his income under French tax law owing to the fact that he receives unemployment benefit in France and interim assistance in Germany, he also has to accept that the basis of assessment for the

purposes of determining the amount of that assistance is a notional net salary determined by making the deductions provided for under German tax law. He would then be subject at the same time to the fiscal law of two Member States, which would be contrary to Article 39 EC.

16 For its part the referring court observes that the charge to tax imposed on the income paid by the Bundesrepublik Deutschland to Mr Merida since the termination of his contract of employment is, as before, governed by the requirements of the double taxation agreement. Mr Merida is wrong to oppose the mere fact that the basis of assessment applicable to the gross amount of the interim assistance is not regulated more favourably in his case than in the case of an employee who is not a frontier worker.

17 None the less, the Bundesarbeitsgericht decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 39 EC infringed by the fact that for the purposes of calculating the basis of assessment of interim assistance in a case arising under Paragraph 4(1)(b) of the TV SozSich account must be taken of the notional German tax on emoluments (second sentence of Paragraph 4(3)(b) of that collective agreement) if the former employee lives and is subject to tax abroad?'

The question referred for a preliminary ruling

18 Article 39 EC prohibits any discrimination founded on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

19 Moreover, Article 7(4) of Regulation No 1612/68, which clarifies and gives effect to certain rights conferred on migrant workers by Article 39 EC (Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, paragraph 12), provides that any clause of a collective agreement concerning remuneration and other conditions of work or dismissal is null and void in so far as it lays down discriminatory conditions in respect of workers who are nationals of the other Member States.

20 It is common ground that a benefit such as interim assistance, which forms part of the benefits awarded to employees in the event of dismissal, comes within the substantive scope of the provisions cited in the preceding paragraph and that a frontier worker in Mr Merida's situation may rely on those provisions in regard to such a benefit (see, in that connection, Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraphs 36, 40 and 41).

21 It has been consistently held that the equal treatment rule laid down in Article 39 EC and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see inter alia Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17).

22 The principle of non-discrimination requires not only that comparable situations must not be treated differently but also that different situations must not be treated in the same way (see, to that effect, Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61).

23 Unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (*O'Flynn*, paragraph 20).

24 Yet, in the present case the notional taking into account of the German wage tax has an unfavourable effect on the situation of frontier workers. In fact, the notional deduction of that tax in determining the basis of assessment of the interim assistance puts at a disadvantage persons who, like Mr Merida, reside and are liable to tax in a Member State other than the Federal Republic of Germany as opposed to workers resident and liable to tax in the latter State.

25 In the case of the latter persons, the basis of assessment serving to determine the amount of interim assistance is determined in such a way that that basis corresponds to the net salary which, in the absence of dismissal, would have been payable to the person concerned at the time of payment of that benefit. That result is achieved by deducting, by means of a notional calculation, in addition to social security contributions, the amount of taxes payable under German tax law which also governed the situation of the person concerned during the course of his employment relationship.

26 During the first year following cessation of the employment relationship, the interim assistance amounts to 100% of the difference between the basis of assessment and the amount of the unemployment benefit (situation envisaged in Paragraph 4(3)(b) of the TV SozSich). Moreover, the second sentence of Paragraph 4(4) of that collective agreement secures the neutrality of any charge to tax imposed on the interim assistance, owing in particular to the fact that the maximum amount exempt from taxation in Germany has been exceeded.

27 Consequently, during the course of the first year following cessation of the employment relationship, the income of former workers residing in Germany is equivalent to that which would be paid to them as active workers.

28 Conversely, in regard to frontier workers in Mr Merida's situation, the notional deduction of German wage tax in determining the basis of assessment of the interim assistance does not enable the same result to be achieved by means of the payment of that benefit which is, as was previously the salary received by Mr Merida, chargeable to tax in France under Paragraph 14(1) of the double taxation agreement.

29 In order to warrant the application of that method of assessment to frontier workers the German authorities highlight the administrative difficulties which would stem from the application of different methods of assessment depending on the place of residence of the person concerned and the budgetary consequences of the failure to take into account German wage tax.

30 However, these objections based on the increase in financial burdens and possible administrative difficulties must be rejected. In fact, grounds of that kind cannot justify the Federal Republic of Germany's failure to comply with its obligations under the EC Treaty (Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 38).

31 At the hearing the German Government stated that the second sentence of Paragraph 4(4) of the TV SozSich had to be interpreted as meaning that a person in Mr Merida's situation was entitled to secure reimbursement in Germany of the amount of tax paid, if appropriate, by way of interim assistance in the Member State of residence. In fact, that clause sought to neutralise any tax which might be payable owing to receipt of that benefit, whatever the State in which it was paid.

32 None the less, the fact, even upon the supposition that it is established, that the amount of tax paid in the Member State of residence is subsequently reimbursed in the Member State of employment is not such as to alter the conclusion that the notional taking into account of German wage tax is revelatory of discrimination to the detriment of workers in Mr Merida's situation.

33 In fact, the notional deduction of German wage tax in determining the basis of assessment of the interim assistance is in no way connected with the income tax paid by the worker in France in the course of his employment relationship with the result that even if an amount corresponding to the tax paid by the recipient of that benefit in France is subsequently reimbursed in Germany, such a benefit may in the final analysis turn out to be of a lower amount than that corresponding to the difference between the remuneration paid during the course of active life and the unemployment benefit received by the person concerned.

34 Nor, moreover, is it disputed that that is so in the main proceedings in which application of the notional deduction of German wage tax to frontier workers in Mr Merida's situation in fact results in those workers losing a part of the net income which they received when they were working with the forces stationed in Germany, that part corresponding to the difference between the amount of income tax paid in France and the higher amount of German wage tax notionally deducted on calculation of the interim assistance.

35 Thus, in the case of frontier workers in Mr Merida's situation the notional application of the German wage tax prevents the payment of the interim assistance from offsetting, during the course of the first year following cessation of the

employment relationship, loss of wages consequent thereon, contrary to the position in the case of workers residing in Germany.

36 Conversely, such set-off could be achieved if the German authorities determined the basis of assessment of the interim assistance which is chargeable to tax in France in accordance with Paragraph 14(1) of the double taxation agreement without notionally deducting German wage tax which was not payable on the wages paid during the period of employment of the person concerned, and whilst not reimbursing income tax paid in France.

37 In those circumstances the reply to the question raised must be that Articles 39 EC and 7(4) of Regulation No 1612/68 preclude national legislation provided for in a collective agreement under which the amount of a social benefit, such as interim assistance ('Überbrückungsbeihilfe'), paid by the Member State of employment is calculated in such a way that the tax on wages payable in that State is notionally deducted on determination of the basis of assessment of that benefit, even though, under a double taxation agreement, salaries, wages and analogous emoluments paid to workers not residing in the Member State of employment are chargeable to tax only in the Member State in which such workers are resident.

Costs

38 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 (Second Chamber) rules as follows:

1. **Articles 39 EC and 7(4) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community preclude national legislation provided for in a collective agreement under which the amount of a social benefit such as interim assistance ('Überbrückungsbeihilfe') paid by the Member State of employment is calculated in such a way that the tax on wages payable in that State is notionally deducted on determination of the basis of assessment of that benefit, even though, under a double taxation agreement, salaries, wages and analogous emoluments paid to workers not residing in the Member State of employment are chargeable to tax only in the Member State in which such workers are resident.**

Signatures.