Court of Justice of the European Union
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Press and Information

Judgment in Case C-282/11
Salgado González v INSS, TGSS

EU law precludes the Spanish legislation concerning the method of calculation of retirement pensions, inasmuch as the method used does not take sufficient account of the fact that the applicant has also worked in a Member State other than Spain

Spanish legislation grants entitlement to a contributory retirement pension, provided, inter alia, that a minimum contribution period of 15 years has been completed. The 'basic amount' of that benefit is calculated by adding together the worker's contribution bases during the 15 years immediately preceding the last contribution paid in Spain, and by dividing that sum by 210. The 210 divisor corresponds to a total of 12 ordinary contributions and two extraordinary contributions paid during a period of 15 years.

Ms Salgado González paid contributions in Spain to the Special Scheme for Self-Employed Persons from 1 February 1989 to 31 March 1999 and in Portugal from 1 March 2000 to 31 December 2005. She applied for a retirement pension in Spain which was granted to her by the National Institute of Social Security (INSS) from 1 January 2006 in the monthly basic amount of €336.86.

In order to determine whether she had paid contributions for the minimum period of 15 years, the INSS took account, in accordance with EU law, of the periods completed both in Spain and in Portugal. However, in order to calculate the basic amount, the INSS added together the Spanish contribution bases for the period from 1 April 1984 to 31 March 1999 – i.e. the 15 years preceding the payment of Ms Salgado González's last contribution in Spain – and divided them by 210. As she had not started to pay contributions to Spanish social security until 1 February 1989, the contributions included between 1 April 1984 and 31 January 1989 were counted as zero.

Ms Salgado González argued that the contributions she paid in Portugal should also be taken into account when calculating her retirement benefits, and applied for the basic amount to be reassessed and set at €864.14. The INSS refused her application; Ms Salgado González subsequently brought an action before the *Tribunal Superior de Justicia de Galicia* (High Court of Justice, Galicia) (Spain).

That court states that it has no doubt as to the impossibility of including the contributions paid in Portugal in the calculation of the amount of the retirement pension to be paid by Spain, but asks the Court of Justice whether the Spanish legislation, which precludes the adaptation of either the duration of the period of contributions or the divisor used so as to take account of the fact that the worker concerned has exercised his right to freedom of movement, is compatible with EU law[1].

[1] In particular with Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) and as amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006 (OJ 2006 L 114, p. 1), and with 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 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43).

Thus, that court submits that the Spanish legislation puts migrant workers on an unequal footing with non-migrant workers. Firstly, for the same level of contributions, a Community migrant worker will receive a smaller basic amount than a non-migrant worker who has paid contributions only in Spain. Secondly, the more a worker pays contributions in a Member State other than Spain, the less time he has during his professional life to pay contributions in Spain – which contributions are the only ones that can be taken into account for the calculation of the pension.

The Court reiterates, firstly, that EU law does not set up a common scheme of social security, but allows different national social security schemes to exist; its sole objective is to ensure the coordination of those schemes. Thus Member States retain the power to organise their social security schemes. However, in exercising those powers, Member States must nonetheless observe the law of the EU and, in particular, the recognised freedom of every citizen of the EU to move and reside within the territory of the Member States. Accordingly, migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement.

The Court then notes that where the legislation of a Member State provides that benefits are calculated on the basis of average contributions – as is the case in Spain – EU law provides that the calculation of the average contribution basis must be based on the amount only of the contributions actually paid. However, in order to calculate the basic amount of Ms Salgado González's benefit, it appears that the INSS took account not only of the contributions actually paid in Spain, but also added a credited period running from 1 April 1984 to 30 January 1989 in order to fulfil the requirement of contributions spanning a period of 15 years. Those periods having necessarily been calculated as zero, taking them into account had the effect of reducing the average contribution basis. However, the fact remains that as no such reduction would have been made if Ms Salgado González had paid contributions only in Spain, without exercising her right to freedom of movement, such an outcome is contrary to EU law.

The Court adds that the situation might be different if the national legislation laid down adjustment mechanisms for the method of calculation of the theoretical amount of the retirement pension in order to take into account the exercise by the worker concerned of his right to freedom of movement. In the present case, the divisor could be adjusted to reflect the number of contributions for ordinary and extraordinary pay which the insured has actually paid.

Consequently, the Court finds that EU law precludes legislation of a Member State pursuant to which the theoretical amount of the retirement pension of a self-employed worker, migrant or non-migrant, is invariably calculated on contribution bases paid by that worker over a fixed reference period preceding the payment of his last contribution in that Member State, to which a fixed divisor is applied, without its being possible to adapt either the duration of that period or the divisor so as to take account of the fact that the worker concerned has exercised his right to freedom of movement.

NOTE: A request for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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