

Anonymised version

Translation

C-219/20 — 1

Case C-219/20

Request for a preliminary ruling

Date lodged:

26 May 2020

Referring court:

Landesverwaltungsgericht Steiermark (Austria)

Date of the decision to refer:

12 May 2020

Appellant:

LM

Respondent authority:

Bezirkshauptmannschaft Hartberg-Fürstenfeld

[...]

Request

for a

Preliminary Ruling

pursuant to Article 267 TFEU

Parties to the main proceedings [...]:

(a) Appellant: LM,

[...] SK-91304 Kostolná-Záriečie

[...]

(b) Respondent authority: Bezirkshauptmannschaft Hartberg-Fürstenfeld
(district administrative authority, Hartberg-Fürstenfeld, Austria)

[...] 8230 Hartberg

[...] **[Or. 2]**

(c) Interested party: Österreichische Gesundheitskasse (Austrian Health Insurance Fund)

Kompetenzzentrum LSDB (centre responsible for combating wage and social dumping)

[...] 1100 Vienna

[...]

In the proceedings concerning the appeal brought by LM [...] against the administrative penal order of the Bezirkshauptmannschaft (district administrative authority) Hartberg-Fürstenfeld of 12 March 2019, served on 20 February 2020, [...] the Landesverwaltungsgericht Steiermark (Regional Administrative Court of Styria) [...] has made the following

ORDER

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Must Article 6 of the European Convention on Human Rights and Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union be interpreted as precluding a provision of national law which provides for a mandatory five-year limitation period in the case of an offence committed as a result of negligence in administrative-offence proceedings?

II. [...] [procedural law matters] **[Or. 3]**

Grounds

I.

Facts and procedure:

At around 9.50 a.m. on 19 June 2016, investigative agencies of the Finanzpolizei (Financial Police, Austria) carried out a check in 8271 Wagerberg [...]. They came across four people laying tiles.

The persons in question are posted workers of the Slovak company GVAS s.r.o., which has its registered office in [...] 91304 Kostolná-Záriečie. The legal representative of GVAS s.r.o. at the time of the check was LM.

On the basis of a complaint lodged by the Wiener Gebietskrankenkasse (Vienna Area Health Fund)), LM was ordered to pay a total fine of EUR 6 600 (penalty, costs) by the Hartberg-Fürstenfeld district administrative authority in respect of an administrative offence pursuant to Paragraph 7i(5) of the Arbeitsvertragsrechtsanpassungsgesetz (Law on the adaptation of the provisions governing contracts of employment; ‘the AVRAG’) in the version published in Federal Law Gazette (BGBl. I No 152/2015. More specifically, the appellant was accused of being liable, as the person responsible for the company GVAS s.r.o. located in 91304 Kostolná-Záriečie, for the fact that the four aforementioned persons were employed from 11 July 2016 to 21 July 2016 without being paid the remuneration due, having regard to the respective classification criteria. All four workers laid tiles and carried out jointing work. The first and second persons were underpaid by EUR 103.80, or 11.21%, and a fine of EUR 2 000 (or, in the event of non-payment, a custodial sentence of 1 day) was imposed in respect of each of them. The third and fourth persons were underpaid by EUR 77.65, or 9.07%, meaning that, for each person, LM was ordered to pay a fine of EUR 1 000 or, in the event of non-payment, serve a custodial sentence of 16 Dni (sic) [days — should probably read ‘hours’].

The Financial Police carried out the check on 19 June 2016. The administrative penalty order of the Hartberg-Fürstenfeld district administrative authority was not served on the appellant until 20 February 2020. [Or. 4]

The appellant in the case described in the facts is the person responsible for a Slovak company on whom fines and, in the event of non-payment, custodial sentences have been imposed on the basis of pending proceedings concerning administrative offences on the grounds of suspected infringements of the AVRAG in the amount of EUR 6 600 (penalty, costs, disbursements) or, if those fines cannot be collected, a custodial sentence of 1 day/9 Dni (sic) for each of the first two infringements and 16 Dni (sic) for the third and fourth infringements. Paragraph 7i(7) of the AVRAG is applicable to these proceedings before the Regional Administrative Court of Styria.

The acts which LM is alleged to have committed are offences committed as a result of negligence and administrative offences.

An appeal against the penalty imposed was lodged in time.

Thus, the provision of Paragraph 7i(7) of the AVRAG in the version published in BGBl. I No 152/2015, pursuant to which the limitation period for the punishment of offences is five years, is applicable to the present proceedings before the Regional Administrative Court of Styria.

II.

The relevant legal position is as follows:

Provisions of EU law:

Article 6 of the European Convention on Human Rights is worded as follows:

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a **reasonable time** by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a [Or. 5] democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights (the French text reads ‘... has, in particular, the following rights’):

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 41 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) reads:

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a **reasonable time** by the institutions and bodies of the Union.

2. This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. [**Or. 6**]

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) reads:

Right to an effective remedy and to a fair trial

...

Everyone is entitled to a fair and public hearing within a **reasonable time** by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Provisions of national law:

The provisions of Paragraph 7i of the AVRAG in the applicable version of BGBl. I No 459/1993, as amended by BGBl. I No 152/2015, read as follows

Penalties

Paragraph 7i (1) Whosoever fails to supply the necessary documents, in breach of Paragraph 7d(1) or point 3 of Paragraph 7f(1), commits an administrative offence punishable by the district administrative authority by way of a fine in the amount, in respect of each worker, of EUR 500 to EUR 5 000 and, in the event of a repeat offence, of EUR 1 000 to EUR 10 000. Whosoever fails to supply the documents in breach of Paragraph 7g(2) or Paragraph 7h(2) shall also be penalised.

(2) Whosoever, in breach of Paragraph 7f(1), refuses to allow access to working facilities, business premises and external workplaces or work sites, as well as the employees' recreation areas and the roads providing access to those places, or refuses to provide information or otherwise prevents or impedes the check, commits an administrative offence punishable by the [**Or. 7**] district administrative authority by way of a fine in the amount of EUR 1 000 to EUR 10 000 and, in the event of a repeat offence, of EUR 2 000 to EUR 20 000.

(2a) Whosoever refuses to allow documents to be inspected, in breach of Paragraphs 7b(5) and 7d, commits an administrative offence punishable by the district administrative authority by way of a fine in the amount, in respect of each worker, of EUR 1 000 to EUR 10 000 and, in the event of a repeat offence, of EUR 2 000 to EUR 20 000.

(3) Whosoever, in his capacity as an employer, refuses to allow documents to be inspected, in breach of Paragraph 7g(2), shall also be penalised pursuant to subparagraph 2a.

(4) Whosoever

1. in his capacity as an employer within the meaning of Paragraphs 7, 7a(1) or 7b(1) and (9), fails to keep available records of wages, in breach of Paragraph 7d, or
2. as a hiring-out entity, in cases involving the cross-border hiring-out of labour to Austria, fails to supply records of wages to the third-party employer, in a way that can be verified, in breach of Paragraph 7d(2), or
3. as a third-party employer, in cases involving the cross-border hiring-out of labour, fails to keep available records of wages, in breach of Paragraph 7d(2),

commits an administrative offence punishable by the district administrative authority by way of a fine in the amount, in respect of each worker, of EUR 1 000 to EUR 10 000 and, in the event of a repeat offence, of EUR 2 000 to EUR 20 000, and, where more than three workers are affected, in the amount, in respect of each worker, of EUR 2 000 to EUR 20 000 and, in the event of a repeat offence, of EUR 4 000 to EUR 50 000.

(5) Whoever, in his capacity as an employer, employs or has employed an employee without paying that employee at least the remuneration to which he is entitled under the law, an ordinance or a collective agreement, having regard to the relevant classification criteria, with the exception of the pay components listed in Paragraph 49(3) of the Allgemeines Sozialversicherungsgesetz (General Law on social security; ‘the ASVG’), commits an administrative offence punishable by the district administrative authority by way of a fine. In the case of underpayments covering several pay periods in a continuous manner, a single administrative offence is committed. Overpayments, based on a collective agreement or employment contract, of pay components due according to the law, regulation or collective agreement shall be offset against any underpayments in the respective wage payment period. With regard to special payments for the [Or. 8] employees referred to in points 1 and 2 of Paragraph 7g(1), an administrative offence pursuant to the first sentence exists only if the employer does not make the special payments or does not make them in full by 31 December of the respective calendar year at the latest. Where no more than three workers are affected

by the underpayment, the fine shall be, in respect of each worker, EUR 1 000 to EUR 10 000 and, in the event of a repeat offence, EUR 2 000 to EUR 20 000, and where more than three workers are affected, the fine shall be, in respect of each worker, EUR 2 000 to EUR 20 000 and, in the event of a repeat offence, EUR 4 000 to EUR 50 000.

(5a) There is no liability under subparagraph 5 if the employer pays, in a way that can be verified, the difference between the remuneration actually paid and the remuneration due to the employee under Austrian legislation before an investigation conducted by the competent institution in accordance with Paragraphs 7f to 7h.

(6) If the district administrative authority establishes that

1. the employer pays to the employee, in a way that can be verified, the difference between the remuneration actually paid and the remuneration due to the employee under Austrian legislation within a period to be specified by the authority, and
2. the shortfall in the remuneration that is relevant pursuant to point 1 of subparagraph 5 is minor, having regard to the respective classification criteria, or
3. the fault of the employer or of its authorised representative (Paragraph 9(1) of the Verwaltungsstrafgesetz (Law on administrative offences; ‘the VStG’)) or responsible agent (Paragraph 9(2) or (3) of the VStG) does not exceed slight negligence,

it is to refrain from imposing a penalty. It is also to refrain from imposing a penalty if the employer pays to the employee, in a way that can be verified, the difference between the remuneration actually paid and the remuneration due to the employee under Austrian legislation before the request by the district administrative authority, and the other conditions laid down in the first sentence are met. Point 4 and the last sentence of Paragraph 45(1) of the VStG are not applicable in proceedings concerning administrative offences under subparagraph 5. If the employer demonstrates to the district administrative authority that it has paid the employee the difference between the remuneration actually paid and the remuneration [Or. 9] due to the employee under Austrian legislation, this must be taken into account as a mitigating factor in the determination of the appropriate penalty.

(7) The limitation period for bringing proceedings (Paragraph 31(1) of the VStG) is three years from the date on which the remuneration fell due. In the case of underpayments that cover several wage payment periods in a continuous manner, the period of limitation for bringing proceedings within the meaning of the first sentence begins to run from the date on which the remuneration for the last wage payment period of the underpayment fell due. **In these cases, the period of limitation for the punishment of offences (Paragraph 31(2) of the VStG) is five years.** With regard to special payments, the periods pursuant to the

first two sentences begin to run from the end of the respective calendar year (third sentence of subparagraph 5).

(7a) In the event that the employer retroactively pays the remuneration due according to the law, regulation or collective agreement for the period of underpayment concerned pursuant to subparagraph 5, the duration of the periods pursuant to Paragraph 31(1) and (2) of the VStG is one year (limitation period for bringing proceedings) or three years (limitation period for the punishment of offences), unless the limitation period begins at an earlier point in time on the basis of subparagraph 7; the period begins to run when the retroactive payment is made.

(8) In proceedings concerning administrative offences

1. pursuant to subparagraph 1, first sentence, subparagraph 2 and subparagraph 4, and pursuant to Paragraph 7b(8), the tax authority shall have the status of party, and, in the cases in subparagraph 5, in conjunction with Paragraph 7e, the Kompetenzzentrum LSDB shall have the status of party,
2. pursuant to subparagraph 5, in conjunction with Paragraph 7g, and in the cases in subparagraph 1, second sentence, and subparagraph 3, the competent sickness insurance institution shall have the status of party,
3. pursuant to subparagraphs 1, 2a, 4 and 5 and pursuant to Paragraph 7b(8), in conjunction with Paragraph 7h, the Bauarbeiter-Urlaubs- und Abfertigungskasse (Construction Workers' Holiday and Severance Pay Fund) shall have the status of party,

even if the complaint is not lodged by the institutions referred to in points 1 to 3. They may lodge an appeal on the merits with the Verwaltungsgericht (Administrative Court) against the decision of an administrative authority and an appeal on a point of law with the Verwaltungsgerichtshof (Supreme Administrative Court) against the judgment or order of an administrative court.

(9) In cases involving the cross-border posting or hiring-out of workers, the administrative offence shall be deemed to have been committed in the district of the district administrative authority in which the place of work (or the place of deployment) of the workers posted or hired out to Austria is located, or, if the place of work (or the place of deployment) changes, the place where the check is carried out. **[Or. 10]**

(10) In order to assess whether there is an employment relationship within the meaning of this Federal law, it is necessary to have regard to the genuine economic substance and not to the external appearance of the situation.

III.

The Regional Administrative Court of Styria is prompted by doubts as to the compatibility of Paragraph 7i(7) of the AVRAG with EU law to submit a request for a preliminary ruling to the Court of Justice of the European Union.

[...] [discussion of entitlement to submit a request for a preliminary ruling]

In principle, administrative or punitive measures must not go so far beyond what is necessary to attain the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty. It is, however, for the referring court to determine, in the light of the foregoing considerations, whether the penalties provided for by the applicable national legislation are proportionate (CJEU, C-430/05, *Ntinionik Anonymi Etaireia Emporias*, EU:C:2007:410, paragraph 54).

The Court of Justice has also held that Member States are required to comply with the principle of proportionality not only as regards the determination of factors constituting an infringement and the determination of the rules concerning the severity of fines, but also as regards the assessment of the factors which may be taken into account in the fixing of a fine (see CJEU, Joined Cases C-497/15 and C-498/15, *Euro-Team Kft.*, EU:C:2017:229, paragraphs 42 and 43; CJEU, C-501/14, *EL-EM-2001*, EU:C:2016:777, paragraph 41). **[Or. 11]**

The Court of Justice has further stated in its case-law that the severity of the sanctions must be commensurate with the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect (see CJEU, C-81/12, *Asociatia Accept*, EU:C:2013:275, paragraph 63; CJEU, C-383/92, *Commission v United Kingdom*, paragraph 42). At the same time, however, the general principle of proportionality must be respected (see CJEU, C-81/12, *Asociatia Accept*, EU:C:2013:275, paragraph 63; CJEU, C-101/01, *Lindqvist*, EU:C:2003:596, paragraphs 87 and 88; CJEU, C-430/05, *Ntinionik Anonymi Etaireia Emporias*, EU:C:2007:410, paragraph 53; CJEU, C-418/11, *Texdata Software*, EU:C:2013:588, paragraph 50; CJEU, C-565/12, *LCL Le Credit Lyonnais SA*, EU:C:2014:190, paragraph 45).

The national legislation provides that the limitation period for the punishment of offences in cases involving underpayment is five years. Confirmation of the penalty in the dispute in the main proceedings would mean that the appellant would have to pay a fine of EUR 6 600.00 for two underpayments of EUR 103.80, or 11.21%, and two underpayments of EUR 77.65, or 9.07%, which took place back in 2016.

Although the penalties are not particularly severe, it seems questionable how a person accused of a petty offence committed through negligence is still supposed to defend himself adequately before a court after almost five years.

Finally, the purpose of a reasonable limitation period in cases involving a criminal charge is, inter alia, to ensure that the accused person is able to defend himself as effectively as possible. If evidence is lost or witnesses cannot

be located or simply cannot remember what happened after such a long time, an accused person or defendant is placed at a considerable disadvantage, which the provisions of, in particular, Article 6 ECHR and the second paragraph of Article 47 of the Charter are intended to prevent.

Since the Austrian legislature has opted for a particularly long limitation period of 5 years for offences committed as a result of negligence under the law on administrative offences, the referring court takes the view that there is a possible infringement of European law, the application of which takes precedence over national law. [Or. 12]

IV.

[...] [discussion of entitlement to submit a request for a preliminary ruling]

[...]