Case C-660/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

4 December 2020

Referring court:

Bundesarbeitsgericht (Federal Labour Court, Germany)

Date of the decision to refer:

11 November 2020

Applicant and appellant in the appeal on a point of law:

MK

Defendant and respondent in the appeal on a point of law:

Lufthansa CityLine GmbH

Subject matter of the main proceedings

Entitlement of a part-time worker to payment of the difference between remuneration already paid and a higher level of remuneration (*Mehrflugdienststundenvergütung* [remuneration for additional flying duty hours]) in accordance with the principle of *pro rata temporis*

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Does a national statutory provision treat part-time workers in a less favourable manner than comparable full-time workers within the meaning of Clause 4.1 of the Framework Agreement on part-time work annexed to Directive 97/81/EC if it permits additional remuneration for part-time and full-time workers to be uniformly contingent on the same number of

working hours having been exceeded, and therefore allows account to be taken of the overall remuneration, and not of the component of the remuneration that comprises the additional remuneration?

2. If Question 1 is answered in the affirmative:

Is a national statutory provision which allows an entitlement to additional remuneration to be made conditional on the same number of working hours being exceeded uniformly in the case of both part-time and full-time workers compatible with Clause 4.1 and the principle of *pro rata temporis* in Clause 4.2 of the Framework Agreement on part-time work annexed to Directive 97/81/EC if the purpose of the additional remuneration is to compensate for a particular workload?

Provisions of EU law relied on

Framework Agreement on part-time work annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) ('the Framework Agreement'), Clause 3.2 and Clauses 4.1 to 4.3

Provisions of national law relied on

Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), Paragraph 134

Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Law on part-time work and fixed-term contracts; 'the TzBfG'), in particular the third sentence of Paragraph 2(1) and Paragraph 4(1)

Brief summary of the facts and procedure

1 The parties are in dispute as to whether the applicant is entitled, as a part-time worker, to a higher level of remuneration – referred to as *Mehrflugdienststundenvergütung* (remuneration for additional flying duty hours).

2 The defendant is a limited liability company incorporated under German law. It runs an air carrier that operates short-haul and long-haul flights. The applicant has been employed by the defendant as a pilot and first officer since 2001.

3 The applicant has been working part-time since 2010, his working hours reduced to 90% of full-time working hours. In accordance with an agreement between management and the works council, the applicant is deployed as a full-time worker without any reduction in the number of flying duty hours to be worked. However, he receives an additional 37 days of leave per year. His basic remuneration, including service increments, is reduced by 10%.

4 According to the collective wage agreements for the defendant's cockpit crew that are applicable to the employment relationship, one component of the working time that is remunerated by means of the basic pay is the flight duty time. A worker receives remuneration for additional flying duty hours on top of the basic remuneration if he or she has worked a certain number of flying duty hours in a month and has thereby exceeded ('triggered') the thresholds for the higher level of remuneration. For that purpose, the provisions of the collective agreements establish three different hourly rates, incrementally increasing in amount, which are higher than the hourly pay determined on the basis of the basic remuneration. These are to be used to calculate remuneration if the worker has worked 106, 121 and 136 monthly flying duty hours on short-haul flights and has thereby exceeded the 'trigger' thresholds. Lower trigger thresholds of 93, 106 and 120 flying duty hours per month apply to long-haul flights. The collective agreements make no provision, in the case of workers who work part-time, for those thresholds to be reduced according to their part-time percentage.

5 In order to be able to determine the applicant's monthly remuneration for additional flying duty hours, the defendant calculates an individual trigger threshold which takes into account the applicant's part-time work. For flying duty hours which the applicant works in excess of his individual trigger threshold, he receives the hourly pay determined on the basis of his basic remuneration. It is only if his flight duty time exceeds the trigger thresholds applicable to full-time workers that he receives a higher level of remuneration.

6 By his action, the applicant seeks payment from the defendant of the difference between the remuneration already paid and the higher level of remuneration for additional flying duty hours on the basis – in accordance with the principle of *pro rata temporis* – of trigger thresholds that have been lowered according to his part-time factor.

7 The Arbeitsgericht (Labour Court) upheld the action. The Landesarbeitsgericht (Higher Labour Court) dismissed it. By his appeal on a point of law, for which leave was granted by the Higher Labour Court, the applicant continues to pursue his objective of having the defendant ordered to pay the difference in remuneration.

Brief summary of the grounds for the request

Need for a ruling from the Court of Justice

8 The entitlement to further remuneration asserted by the applicant does not arise on the basis of the applicable provisions of the collective agreements. These provide for a higher level of remuneration in the form of remuneration for additional flying duty hours only if the trigger thresholds, which apply uniformly to part-time and full-time workers, have been exceeded. The entitlement does arise, however, if the collective agreement provisions that govern the remuneration for

additional flying duty hours are not compatible with Paragraph 4(1) of the TzBfG. That provision states that 'a part-time worker shall not be treated in a less favourable manner than a comparable full-time worker on account of working on a part-time basis, unless different treatment is justified on objective grounds. The part-time worker shall receive remuneration or another pro rata benefit, the extent of which shall at least correspond to the proportion of his or her work as compared with that of a comparable full-time worker.' There would therefore be an infringement of Paragraph 4(1) of the TzBfG if the trigger thresholds, which apply uniformly to part-time and full-time workers, were to constitute less favourable treatment of part-time workers, for which no objective grounds could be given. Such an infringement would have the effect that the discriminatory rule of the collective agreements would be void under Paragraph 134 of the BGB, which provides that any legal act which infringes a statutory prohibition is void. The discrimination in respect of the past could be eliminated only by means of an 'upward adjustment', because the arrangement resulting in favourable treatment would be the only valid point of reference remaining (see judgments of 14 March 2018, *Stollwitzer*, C-482/16, EU:C:2018:180, paragraph 30, and of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraphs 46 and 47). A 'downward adjustment' is not possible. The applicant would have to be paid the remuneration for additional flying duty hours – of which he was wrongfully deprived – the extent of which corresponds at least to the proportion of his work as compared with that of a comparable full-time worker.

9 The referring court must therefore first examine whether the collective agreement provisions on the remuneration for additional flying duty hours result in part-time workers being treated in a less favourable manner than comparable full-time workers within the meaning of Paragraph 4(1) of the TzBfG.

10 If there is less favourable treatment within the meaning of Paragraph 4(1) of the TzBfG with regard to pay, it would be necessary then to examine whether that different treatment is justified on objective grounds that would allow a deviation from the principle of *pro rata temporis*.

11 Since Paragraph 4(1) of the TzBfG transposed Clauses 4.1 and 4.2 of the Framework Agreement into national law, the Court of Justice's case-law on EU law must be taken into account in the interpretation of Paragraph 4(1) of the TzBfG. This is also the case in view of the fact that the provisions to be examined are contained in collective agreements. The right of collective bargaining guaranteed in Article 28 of the Charter of Fundamental Rights of the European Union must, within the scope of EU law, be exercised in compliance with EU law. When the national social partners adopt measures coming within the scope of the framework agreement concluded by the social partners at EU level, they must comply with that framework agreement (judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraphs 69 and 70).

The first question referred

12 The first question referred concerns the interpretation of Clause 4.1 of the Framework Agreement with regard to the methodology to be used to determine whether a national provision leads to less favourable treatment of part-time workers within the meaning of Clause 4.1 of the Framework Agreement with regard to pay.

13 According to the first sentence of Paragraph 4(1) of the TzBfG, part-time workers must not be treated in a less favourable manner than comparable full-time workers on account of working on a part-time basis, unless different treatment is justified on objective grounds. According to the second sentence of Paragraph 4(1) of the TzBfG, part-time workers must receive remuneration or another pro rata benefit, the extent of which is at least to correspond to the proportion of his or her work as compared with that of a comparable full-time worker. Provisions in collective agreements must also be compatible with Paragraph 4 of the TzBfG. Part-time workers are treated unequally on account of working on a part-time basis if the duration of the working time is the criterion to which the differentiation with regard to the different working conditions is tied.

14 The applicant, as a part-time pilot, is comparable to full-time pilots. The applicant's comparison group for the purpose of Paragraph 4(1) of the TzBfG comprises airline pilots employed on a full-time basis pursuant to the collective agreements.

15 According to the third sentence of Paragraph 2(1) of the TzBfG, comparable full-time workers within the meaning of Paragraph 4(1) of the TzBfG are workers 'having the same type of employment relationship and the same or a similar activity'. The criteria set out in Clause 3.2 of the Framework Agreement, which define 'comparable full-time worker', are also based on the content of the activity of the persons concerned (judgment of 1 March 2012, *O'Brien*, C-393/10, EU:C:2012:110, paragraph 61; see also judgment of 28 February 2013, *Kenny and Others*, C-427/11, EU:C:2013:122, paragraph 27). The provisions of the collective agreements make the remuneration to be paid for additional flying duty hours dependent solely on whether the relevant activity is performed to a certain extent. All workers who are classified as cockpit crew and who work flying duty hours are covered in the same way by the provisions of the collective agreements. They perform comparable activities. The working conditions differ only in the shorter working time of part-time workers as a result of additional days of leave, as in the case of the applicant.

16 The decision on the appeal on a point of law hinges on whether, with regard to the remuneration for additional flying duty hours, the applicant, a part-time worker, is treated in a less favourable manner than pilots who work on a full-time basis. The decisive factor in that respect is how Clause 4.1 of the Framework Agreement is to be interpreted; specifically, which methodology is to be used to assess whether part-time workers are treated unequally with regard to pay.

17 The question raised requires clarification by the Court of Justice. It is true that the referring court previously proceeded on the assumption that, ever since – at the latest – the judgment of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, the legal question as to which methodology is to be used to assess whether part-time workers are placed at a disadvantage with regard to pay no longer arises. However, since concerns about the methodology adopted by the referring court – in which the individual components of remuneration are taken into consideration – have been expressed in the case-law of the German labour courts and in the legal literature, the referring court can no longer proceed on the assumption that there is no reasonable doubt in that regard.

18 If the assessment of unequal treatment is to be based on the overall pay, in line with the approach taken by the Court of Justice in the judgment of 15 December 1994, *Helmig and Others*, C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, EU:C:1994:415, paragraph 26 et seq., less favourable treatment of part-time workers can be ruled out. Part-time and full-time pilots would then receive the same remuneration for hours worked in excess of the part-time worker's individual trigger thresholds. In that case, the appeal on a point of law would not be successful.

19 If, on the other hand, the various components of remuneration are to be considered separately, in line with the approach taken by the Court of Justice in the judgments of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, and of 27 May 2004, *Elsner-Lakeberg*, C-285/02, EU:C:2004:320, it can be assumed that there is unequal treatment, which results from the fact that part-time airline pilots benefit from the higher level of remuneration only after they have worked flying duty hours between their individual first trigger threshold – reduced according to their part-time factor – and the fixed trigger thresholds without receiving a higher level of remuneration. If the remuneration component consisting in the remuneration for additional flying duty hours is considered in isolation, a part-time worker receives the higher level of remuneration in the form of the remuneration for additional flying duty hours not for the first hour by which the first individual trigger threshold is exceeded, but only when the threshold applicable to full-time workers is exceeded. This applies accordingly to the second and third levels of the trigger thresholds. For part-time workers, the threshold from which an entitlement arises would not be lowered in proportion to their individual working time. This would have a negative impact on the relationship between performance and consideration for part-time workers and would therefore lead to direct unequal treatment. The referring court would then have to assess whether the different treatment is justified on objective grounds. This point is the subject of the second question referred.

The second question referred

20 The second question referred concerns the interpretation of Clauses 4.1 and 4.2 of the Framework Agreement as regards the objective grounds justifying less

favourable treatment of part-time workers and a deviation from the principle of *pro rata temporis*.

21 If part-time employees are treated in a less favourable manner with regard to remuneration by the collective agreement provisions on remuneration for additional flying duty hours, the referring court must assess whether the unequal treatment can be justified on an objective ground within the meaning of the first sentence of Paragraph 4(1) of the TzBfG. In so doing, it is necessary to examine whether the principle of *pro rata temporis* in accordance with the second sentence of Paragraph 4(1) of the TzBfG makes it necessary to lower, according to the part-time factor, the trigger thresholds that apply uniformly to full-time and part-time workers under the provisions of the collective agreements, or whether the purpose of the benefit allows a deviation from that principle.

22 In line with Clause 4.1 of the Framework Agreement, the second sentence of Paragraph 4(1) of the TzBfG does not provide for an absolute prohibition of discrimination. The provision gives concrete expression to the general prohibition of discrimination laid down in the first sentence of Paragraph 4(1) of the TzBfG in relation to remuneration or other pro rata benefits. Paragraph 4(1) of the TzBfG prohibits a deviation from the principle of *pro rata temporis* to the detriment of part-time workers if there are no objective grounds for doing so. However, the difference in workload alone does not justify treating full-time and part-time workers differently. The grounds of justification must be of a different nature. The assessment of the objective justification of the different treatment must be oriented towards the purpose of the benefit. Different treatment of part-time workers can be justified only if the ground on which it is based can be derived from the relationship between the purpose of the benefit and the extent of the part-time work.

23 The collective agreement provisions on the remuneration for additional flying duty hours serve the purpose of providing compensation for a particular burden and not, as assumed by the applicant, of providing compensation for a sacrifice of leisure time. That is the result of an interpretation of the provisions of the collective agreements.

24 Accordingly, it should first be noted that the remuneration for additional flying duty hours accrues only for a specific activity. It is paid only for specific periods of flight duty time worked, within the meaning of the provisions of the collective agreements. Had the parties to the collective agreements intended to provide compensation for a sacrifice of leisure time, they would have had to have set a maximum time limit for all activities that are to be regarded as working time under the collective agreements. This is because an encroachment on the protected leisure time occurs irrespective of the specific activity carried out. Second, it must be noted that, in view of the fact that the provisions of the collective agreements require a high degree of flexibility from the employees in terms of their time, they must assume that the employer may call upon them to perform work up to the limit of what is permissible under working time law. It therefore stands to reason

that the associated encroachment on personal leisure time should already be compensated for by the basic remuneration. Finally, the collective agreement provision concerning the organisation of duty rosters, which provides for the requirement of an equal burden, also militates in favour of the purpose being to balance the workload. According to that provision, when organising duty rosters, employees are to be scheduled and assigned in such a way as to ensure, to the greatest degree possible, an 'equal burden' on all employees.

25 An important factor for the decision on the appeal on a point of law is whether, in itself, the purpose laid down in the collective agreements can justify less favourable treatment of part-time workers and a deviation from the principle of *pro rata temporis*. That factor depends on how Clauses 4.1 and 4.2 of the Framework Agreement are to be interpreted, specifically whether the purpose pursued by the provisions of the collective agreements, which is to provide compensation for a particular workload, is generally capable of justifying unequal treatment of part-time employees.

26 From the point of view of the referring court, the question as to whether the purpose of the provision of the collective agreements, which is to balance workloads, can justify the less favourable treatment of part-time workers remains open. The legal position does not appear to be clear from the outset – *acte clair* – nor has it been clarified by the case-law of the Court of Justice in a manner that removes all reasonable doubt (*acte éclairé*).

27 The referring court infers from the existing case-law of the Court of Justice that only objective grounds can enter into consideration as justification of unequal treatment within the meaning of Clause 4.1 of the Framework Agreement. The concept of 'objective grounds' must be understood as requiring the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose (judgment of 1 March 2012, *O'Brien*, C-393/10, EU:C:2012:110, paragraph 64).

28 From the point of view of the referring court, this question of law cannot be regarded as having been clarified, because the Court of Justice has stated on several occasions that it is for the national court to determine whether objective grounds justify a difference in treatment (judgments of 1 March 2012, *O'Brien*, C-393/10, EU:C:2012:110, paragraph 67; of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 43; and of 27 May 2004, *Elsner-Lakeberg*, C-285/02, EU:C:2004:320, paragraph 18). The reason for this is that, in each of those cases, it was necessary to determine whether a ground of justification had been invoked at all in the specific case and whether a ground cited stood up to scrutiny against the standard of justification to be applied. The referring court takes the view that the statements made in those cases did not relate to the question whether factual circumstances are capable in themselves of justifying unequal treatment of part-time workers. The Court of Justice has already held that a specific ground – budgetary considerations – cannot be regarded a priori as justification (judgment of 1 March 2012, *O'Brien*, C-393/10, EU:C:2012:110, paragraph 66).

29 If the balancing of workloads cannot be relied on to justify less favourable treatment of part-time workers, the appeal on a point of law will be successful.

30 If the balancing of burdens were to constitute a suitable ground on which to justify different treatment of part-time workers, the referring court would be required to examine in detail whether the specific form taken by the system for balancing burdens by means of the chosen thresholds responds to a genuine need of the undertaking, is appropriate for achieving that objective and is necessary for that purpose. If this were to be the case, the appeal on a point of law would not be successful.