

**Case C-86/21**

**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:**

11 February 2021

**Referring court:**

Tribunal Superior de Justicia de Castilla y León (Spain)

**Date of the decision to refer:**

4 February 2021

**Appellant:**

Gerencia Regional de Salud de Castilla y León

**Respondent:**

Delia

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**Subject matter of the main proceedings**

Public service – Nursing staff – Career development – Length of service – Recognition of a period of service in a public hospital in another Member State

**Subject matter and legal basis of the request for a preliminary ruling**

Article 45 TFEU – Free movement of workers – National provision precluding recognition of a period of service in a public hospital in another Member State – Restrictions on the free movement of workers – Absence of general approval criteria for the career systems of staff of the Member States' health services – Article 7 of Regulation (EU) No 492/2011 – Non-discrimination – Article 267 TFEU

**Questions referred for a preliminary ruling**

- 1) Do Article 45 TFEU and Article 7 of Regulation No [492]/2011 preclude a national provision such as Article 6(2)(c) of Decree 43/2009 of 2 July 2009,

which prohibits the recognition of periods of service in a particular occupational category in a public health service of another Member State of the European Union?

- 2) If the answer to question 1 is affirmative, could the recognition of periods of service in the public health system of a Member State be made conditional on the prior adoption of general approval criteria for the career systems of staff of the health services of Member States of the European Union?

### **Provisions of EU law relied on**

Treaty on European Union, Articles 3(2), 26(2) and 45.

Treaty on the Functioning of the European Union, Articles 45, 46 and 168(7).

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, in particular Article 7 thereof.

### **Provisions of national law relied on**

#### **A) State legislation**

General Law 14/1986 on Health (Ley 14/1986, General de Sanidad) of 25 April 1986

Article 44: ‘1. All public facilities and services with responsibility for providing healthcare shall form part of the National Health System. 2. The National Health System comprises all the health services of the State Administration and the health services of the Autonomous Communities as provided for herein.

Law 16/2003 on the cohesion and quality of the National Health System (Ley 16/2003 de cohesión y calidad en el Sistema Nacional de Salud) of 28 May 2003

Article 43: ‘The guarantee of staff mobility throughout the National Health System is one of the essential aspects of its cohesion ...’

Law 44/2003 regulating the healthcare professions (Ley 44/2003 de ordenación de las profesiones sanitarias) of 21 November 2003

Article 37 (general provisions on professional development and recognition thereof): ‘1. The system for recognition of the professional development of the healthcare professionals referred to in Articles 6 and 7 hereof is hereby established ... 3. Professionals who are established or employed in the

territory of the State may voluntarily access the professional development system.’

Article 38: ‘The health authorities shall regulate the recognition of professional development in respect of their own centres and establishments, in line with the following general principles: a) Recognition shall be divided into four grades .... c) To obtain the first grade, it will be necessary to provide evidence of five years’ professional experience ...’

Law 55/2003 on the framework regulations for regulated staff of the health services (Ley 55/2003 del Estatuto Marco del personal estatutario de los servicios de salud) of 16 December 2003

Article 40: ‘...3. The Human Resources Committee of the National Health System shall set down the general principles and criteria for approval of the career systems of the different health services in order to ensure mutual recognition of career grades, their effects for professional purposes and the free movement of those professionals throughout the National Health System ...’

Article 41: ‘1. The pay scheme for regulated staff is comprised of basic remuneration and additional remuneration.’

Article 42: ‘1. Basic remuneration consists of: a) The salary ] b) Three-yearly increments ... c) Bonuses.’

Article 43 (Additional remuneration): ‘2. ... e) Career bonus, intended to reward the grade reached in the professional career structure when that professional development system was established in the relevant category.’

## B) Regional legislation

Decree 43/2009 governing the careers of regulated staff of the Castile and Leon Health Service (Decreto 43/2009 por el que se regula la carrera profesional del personal estatutario del Servicio de Salud de Castilla y León) of 2 July 2009

Article 6: ‘1. The professional career structure in the Castile and Leon Health Service consists of four grades. 2. The following conditions for obtaining the first grade in the career structure or for accessing each of the higher grades are hereby established: a) The person concerned must have the status of permanent regulated staff in the occupational category in which he or she is applying for the first or subsequent grades of the relevant career mode and must carry out his or her duties in the Castile and Leon Health Service. b) An application for the first grade in the career structure or for each of the higher grades must be submitted within the time limit and in the manner stipulated in the relevant call for applications. c) The person concerned must provide evidence, as at the date of each call for applications,

of the number of years' professional experience as a regulated staff member in National Health System health centres and institutions completed in each of the career modes for obtaining the first grade, in addition to those completed for access to higher grades, in accordance with the following scale: i. To obtain grade I, it will be necessary to provide evidence of five years' professional experience as a regulated staff member in the National Health System in the occupational category from which the person concerned is applying to access the relevant career mode'.

### **Summary of the facts and procedure in the main proceedings**

- 1 On 13 October 2017, the decision of the Gerencia Regional de Salud de Castilla y León (Regional Health Management Board, Castile and Leon, Spain) of 6 October 2017, launching an ordinary procedure for long-term interim staff and opening the period for submitting applications to access career grade I in respect of the year 2010 was published in the Boletín Oficial de la Comunidad Autónoma de Castilla y León (Official Gazette of the Autonomous Community of Castile and Leon). The conditions for submitting an application to obtain that grade included the requirement to provide evidence of five years' professional experience as a regulated staff member in the Servicio de Salud de Castilla y León (Castile and Leon Health Service) in the category from which access to the relevant career mode was sought.
- 2 On 26 October 2017, Ms Delia submitted her application to access career grade I in the category of nurse, claiming to have 10 years and three months' prior service in that category as at 31 December 2010. That prior service included time spent working at the Hospital Santa María, Lisbon, which is part of the Portuguese national public service, from 20 November 2000 to 25 July 2007.
- 3 Concurrently, Ms Delia lodged an administrative appeal with the Gerencia Regional de Salud de Castilla y León against the decision of 6 October 2017, arguing that the five years' professional experience required in the category from which the person concerned is seeking to access the relevant career mode should be years worked in the Spanish National Health System or in the national health services of any of the Member States of the EU, and not only years worked in the Castile and Leon Health Service.
- 4 The Gerencia Regional de Salud de Castilla y León partially upheld that administrative appeal. In that connection, it held that prior service in the Spanish National Health System should be counted but not prior service in the Portuguese national health service.
- 5 Ms Delia brought administrative proceedings against that decision before Juzgado de lo Contencioso-Administrativo No 3 de Valladolid (Administrative Court No 3, Valladolid, Spain), pleading that her prior service in the Portuguese national health service should also be counted.

- 6 By judgment of 16 December 2019, that court upheld the administrative action brought by Ms Delia on the grounds that the call for applications breached the principle of freedom of movement for workers within the territory of the Union.
- 7 The Gerencia Regional de Salud de Castilla y León has appealed against that judgment to the Tribunal Superior de Justicia de Castilla y León (High Court of Justice of Castile and Leon, Spain).

### **Essential arguments of the parties to the main proceedings**

- 8 Ms Delia submits that the decision of the Gerencia Regional de Salud de Castilla y León conflicts with the principle of freedom of movement for workers within the territory of the Union and the case-law of the Court of Justice on that principle. She further submits that the Gerencia de Salud de las Áreas de León (Leon Area Health Management Board), which is part of the Comunidad Autónoma de Castilla y León (Autonomous Community of Castile and Leon), recognised, for the purpose of three-yearly increments, her prior employment in the Portuguese national health service (Hospital de Santa María, Lisbon) from 20 November 2000 to 21 June 2007 in the category of nurse.
- 9 The Gerencia Regional de Salud de Castilla y León contends that its decision is completely lawful. It argues that neither Ms Delia's appeal nor the judgment under appeal examine the nature, the legal form or the special features of the professional career path as regulated in Spanish law. In addition, the Gerencia Regional de Salud de Castilla y León claims that the case-law cited in the judgment under appeal refers to other factual circumstances relating to mere length of service in employment and does not take into consideration, when assessing that experience, the particular objectives of the organisation in which the person concerned works.

### **Summary of the reasoning in the request for a preliminary ruling**

- 10 Under Spanish legislation, the career structure of regulated staff is the responsibility of the Autonomous Communities, which must comply with the general principles and criteria laid down by basic State legislation. The different health services of the Autonomous Communities are part of the National Health System. In order to make it easier for regulated staff to move between the different health services of the Autonomous Communities, the Decision of 29 January 2007 of the Dirección General de Recursos Humanos y Servicios Económicos Presupuestarios (Directorate General of Human Resources and Budgetary Economic Services) was adopted, which orders publication of the Resolution setting out the general approval criteria for the professional career systems of staff in the health services (BOE. No 50 of 27 February). The professional career structure does not only involve the performance of work (length of service) but also requires that that work be performed in a particular

occupational category and in a specific health department focused on the objectives of the organisation in which the person concerned is employed.

- 11 In accordance with Article 168(7) TFEU, the organisation and delivery of health services is the exclusive responsibility of each Member State. A European health system does not exist and nor have any general criteria been adopted for the approval of the career systems of staff in the health services of the different Member States, unlike the situation in the Spanish National Health System.
- 12 The Court of Justice has held that, in order to determine whether national legislation, such as the legislation at issue in the main proceedings, constitutes a restriction within the meaning of Article 45 TFEU, it must be pointed out that all of the provisions of the FEU Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds within the territory of the Union, and preclude national measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, inter alia, judgments of 15 December 1995, *Bosman*, C-415/93, paragraph 94; of 17 March 2005, *Kranemann*, C-109/04, paragraph 25; and of 11 January 2007, *ITC*, C-208/05, paragraph 31). The Court has also held that national provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute restrictions on that freedom even if they apply without regard to the nationality of the workers concerned (see, inter alia, *Bosman*, paragraph 96; *Kranemann*, paragraph 26; and *ITC*, paragraph 33). The Court has further held that a measure which constitutes an obstacle to freedom of movement for workers could be justified only if it pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of that measure concerned would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, judgment of 31 March 1993, *Kraus*, C-19/92, paragraph 32; and judgments in *Bosman*, paragraph 104; *Kranemann*, paragraph 33; and *ITC*, paragraph 37).
- 13 In the light of the national legislation and the case-law of the Court set out, reasonable doubt exists as to whether Article 45 TFEU and Article 7 of Regulation No 492/2011 preclude a national provision such as Article 6(2)(c) of Decree 43/2009 of 2 July 2009, in so far as that provision does not enable the recognition of periods of service in the occupational category of nurse in a public hospital in another Member State. Indeed, that provision could be considered to breach the principle of freedom of movement for workers and the principle of equal treatment, and also to conceal indirect discrimination. However, on the other hand, that provision could also be considered to be based on objective criteria which are independent of the nationality of the workers concerned and are proportionate to the aim pursued, having regard to the way the professional career path is regulated, and taking account of the fact that no approval criteria exist between the different health systems of the Member States.

- 14 Contributing to those uncertainties is the existence of Spanish case-law laid down by high courts of justice pursuant to which length of service alone is not sufficient and the worker must have been employed in a particular occupational category and in a specific health department which is part of the National Health System. In accordance with that national case-law, it has also be held that, given that the aim pursued by the provision is legitimate, there is no indirect discrimination, taking into account also the fact that it is not only periods worked in other EU Member States which are not counted but also periods worked in Spain in hospitals which are not operationally and organically part of the National Health System. Doubts also exist as to the lawfulness of the contested decision in so far as Ms Delia's prior service in the Portuguese public health service was recognised for the purpose of three-yearly increments, which are part of the basic remuneration received, while, on the other hand, that prior service was not recognised for the purpose of obtaining the grade which would give her the right to receive additional remuneration, the career bonus.

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