Overview of recent cases before the Court of Justice of the European Union (October 2019-January 2020)

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Abstract
During the period of reporting (1 October 2019-31 January 2020), six judgments are worth noting in the area of EU social security law. In Safeway, the Court had to decide whether Article 119 of the EC Treaty on equal treatment precluded a measure ending discrimination through the fixing, with retroactive effect, of a uniform normal pension age equal to that of the members within the previously disadvantaged category. In Bocero Torrico, the question related to the obligation on Member States, under Regulation 883/2004, to take into account equivalent benefits acquired in other Member States for the purpose of calculating an early retirement pension. WA concerned a discriminatory law that granted a pension supplement solely to women. UB was about a discriminatory law that granted additional benefits for sportspersons based on their citizenship. In ZP, the question concerned Article 62 of Regulation 883/2004 dealing with the calculation of unemployment benefits. Finally, in Pensions-Sicherungs-Verein, the Court had to interpret Article 8 of Directive 2008/94 in the context of a reduction of pension benefits following the insolvency of the employer.

Keywords
Method of calculation of benefits, equal treatment, pension benefits, retroactive effect, sportsperson

1. Fixing with retroactive effect a uniform normal pension age equal to that of the persons in the disadvantaged category: Safeway
The Safeway\textsuperscript{1} case deals with the aftermath of the Barber\textsuperscript{2} judgment by the Court in May 1990.

1. Safeway, C-171/18, EU: C:2019:839.
2. Barber, C-262/88, EU: C:1990:209.

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The pension scheme, created in the form of a trust by Safeway Ltd in 1978, had a fixed normal pension age (NPA) of 65 years of age for men and 60 years of age for women. Following the Barber judgment, where the Court held that fixing a NPA differentiated by gender constituted discrimination, Safeway informed members of its pension scheme, by announcements on 1 September 1991 and 1 December 1991, that the scheme would be amended by fixing a uniform NPA at age 65 for all. It was only later on, on 2 May 1996, that a trust deed was adopted amending the scheme by fixing the uniform NPA at age 65 with retroactive effect (as of 1 December 1991). As the pension rights in the main proceedings concerned a period between 1 December 1991 and 2 May 1996, the question referred was examined in light of Article 119 of the EC Treaty.

The question referred to the Court essentially asked whether Article 119 of the EC Treaty precluded the pension scheme from being amended on 2 May 1996, with retroactive effect from 1 December 1991, so as to equalise the NPA of the members in the previously favoured category (60 years old for women) with the NPA of the members in the previously disadvantaged category (65 years old for men). The Court recalled its judgment in Barber and the consequences of that judgment. For periods between the date of the Barber judgment (17 May 1990) and the adoption of measures reinstating equal treatment, i.e. the transition period, the Court had already found that members in the disadvantaged category must be granted the same advantages as those enjoyed by the members in the favoured category.3 For the period after the adoption of measures reinstating equal treatment, the Court had previously found in its case law that Article 119 of the EC Treaty did not preclude the advantages of members of the favoured category being reduced to match the advantages of members of the disadvantaged category.4

First, there was a dispute as to the moment of the adoption of the measure reinstating equal treatment. The Commission and Safeway were of the opinion that the precise moment when Safeway adopted a measure reinstating equal treatment was when they made announced the uniform NPA at 65 years on 1 December 1991.5 However, using Article 119 of the EC Treaty and the principle of legal certainty, the Court found that the measure that reinstated equal treatment was only introduced on 2 May 1996 when the Trust Deed was adopted.6 Hence, for the period before 2 May 1996, the Court held that the principle of equal treatment could only be complied with by granting members in the disadvantaged category the same advantages as those enjoyed by members in the favoured category.7 The Court recalled its case law where it had already found that the principle of legal certainty precludes a pension scheme from eliminating discrimination by removing, with retroactive effect, the advantages of members in the favoured category.8 In response to the referring court, the Court pointed out that the requirement of legal certainty under EU law cannot be circumvented by the fact that a retroactive effect is allowed under national law and the Trust Deed.9 Furthermore, the Court explained that a retroactive effect is only allowed exceptionally when the measures ending discrimination respect the legitimate expectations of the persons concerned and are in fact warranted by an overriding reason in the public interest.10 In that regard,

3. Ibid, para. 17
4. Ibid, para. 18.
5. Ibid, para. 21.
6. Ibid, paras. 22-32.
7. Ibid, para. 33.
8. Ibid, para. 34.
9. Ibid, para. 37.
10. Ibid, para. 43.
the Court highlighted that the risk of seriously undermining the financial balance of the pension scheme may constitute an overriding reason in the public interest which is ultimately for the referring court to verify. As a result, the Court concluded that Article 119 of the EC Treaty precluded a pension scheme from adopting a measure, for the purpose of ending discrimination, fixing a uniform NPA equivalent to the NPA of the members of the previously disadvantaged category with retroactive effect.

2. Equivalent benefits for the purpose of the calculation of an early retirement pension: Bocero Torrico

In the Bocero Torrico case, the Spanish authorities refused to take into account the fact that the applicants were receiving equivalent benefits in Germany in order to calculate their early retirement pension in Spain. The two applicants had worked in Spain and Germany during their careers. Both applied for an early retirement pension in Germany and in Spain but were denied that possibility in Spain. The reason for the refusal was that they did not reach the threshold for early retirement which corresponds to the minimum amount to which they would be entitled upon reaching the statutory retirement age. The applicants disputed that fact. Indeed, they argued that if the Spanish authorities were to take into account the equivalent benefits that they were receiving from Germany, they would reach the minimum amount required in Spain to receive early retirement benefits.

The Court started by stating that there was nothing in Regulation 883/2004 that precluded Spain from fixing a minimum amount for someone to be eligible to an early retirement pension. The Court emphasised that this case did not fall within Article 6 or Article 52(1)(b) of Regulation 883/2004, both articles being related to the aggregation of periods of insurance or residence. Indeed, this case was not about whether the applicants were entitled to a retirement pension, but rather about the calculation of the amount of benefit they should receive under that retirement pension scheme. Hence, the Court relied on Article 5 of the Regulation concerning the equal treatment of benefits, income, facts or events taking place in other Member States. Article 5(a) of Regulation 883/2004 requires a Member State to treat the receipt of social security benefits in another Member State as receipt of equivalent benefits. Based on this provision, the Court held that the Spanish authorities must take into account not only the receipt of social security benefits acquired by the applicants under the Spanish legislation, but also the receipt of equivalent benefits acquired in any other Member State. As to the equivalence of the benefits, the Court held that the test is whether those two old-age benefits are comparable in the aim they pursue and in the legislation which established them. Finally, the Court held that the refusal to consider the equivalent benefits acquired by the applicants in Germany amounted to indirect discrimination which is prohibited by Article 4 of Regulation 883/2004.

11. Ibid.
12. Ibid, para. 44.
13. Bocero Torrico, C-398/18 and C-428/18, EU: C: 2019:1050.
14. Ibid, para. 25.
15. Ibid, paras. 32 and 33.
16. Ibid, para. 35.
17. Ibid, para. 36.
18. Ibid, paras. 41 and 42.
3. Discriminatory treatment with regard to the entitlement to a supplementary pension: WA

In WA, the question was essentially whether Directive 79/7 precluded a national law that grants a pension supplement solely to women who have two children, and not to men in a similar situation.

WA was granted contributory permanent absolute incapacity pension of 100 per cent of the basic amount. WA contested that decision on the ground that, as the father of two daughters, he should be entitled to receive the pension supplement (of 5 per cent) on the same conditions as women who have two children and are in receipt of contributory permanent incapacity pensions. The Instituto Nacional de la Seguridad Social (INSS) refused, as the supplement is granted exclusively to women on the basis of their demographic contribution to social security. The referring court was wondering whether this decision of the INSS was discriminatory in light of EU law.

After reformulation of the referred question, the Court looked into the issue in light of Directive 79/7, since the pension supplement formed part of a statutory scheme providing protection against one of the risks listed in Article 3(1) of Directive 79/7. By looking through the lens of direct discrimination prohibited under Article 4(1) of Directive 79/7, the Court found first that men and women are in comparable situations since the demographic contribution of men is as necessary as that of women. In response to the argument put forward by the Spanish government that the law was created in order to reduce the gap between the pension payments of men and those of women arising from differences in their career paths because women have their professional careers interrupted or shortened due to the fact that they have had at least two children, the Court considered that men may be in the same situation in relation to the bringing-up of their children.

None of the derogations from direct discrimination put forward by the Spanish government were accepted by the Court. Firstly, recourse to Article 4(2) of the Directive, which provides that the principle of equal treatment is without prejudice to the protection of women on the ground of maternity, was rejected by the Court. Indeed, the Court emphasised that Spanish law did not refer to any maternity leave or disadvantage suffered by women in their careers when having a child. The Court added that the supplement is equally granted to women who have adopted children, showing that the law was not intended to protect the biological condition of women who have given birth. In addition, the Court excluded recourse to Article 7(1)(b) of Directive 79/7, which concerns the possibility of derogating from direct discrimination in giving an advantage in their entitlement to old-age pension to persons who have brought up children and who have therefore interrupted their careers. Here again, the Court found that there was no requirement in the Spanish law to have brought up children or to have interrupted a career in order to be entitled to the pension supplement. Finally, Article 157(4) TFEU which permits granting specific

19. WA v. Instituto Nacional de la Seguridad Social (INSS), C-450/18, EU: C:2019:1075.
20. Ibid, para. 35.
21. Ibid, para. 46.
22. Ibid, para. 48.
23. Ibid, paras. 49-50.
24. Ibid, para. 51.
25. Ibid, para. 55.
26. Ibid, paras. 57 and 59.
27. Ibid, para. 58.
28. Ibid, para. 61.
29. Ibid, para. 62.
advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers could not be applied since the pension supplement was only about granting women a surplus at the time of the pension and not a real remedy or compensation for the problems they may face during their careers.\(^{30}\)

4. Discriminatory treatment with regard to the entitlement to additional benefit for sportspersons: UB

In UB,\(^{31}\) the applicant was a Czech national, resident for 52 years in the territory of what is now Slovakia. He was a member of the national ice hockey team of the Czechoslovak Socialist Republic, for whom he won a gold medal in the European Ice Hockey Championship and a silver medal in the World Ice Hockey Championship. On the dissolution of the Czech and Slovak Federative Republic, UB took out Czech nationality. However, he continued to be resident in Slovakia, where he was employed in a primary school until at least 2006. He applied to the Slovak authorities for an additional benefit for sportspersons who have represented the State. He was denied this benefit as he did not fulfil the condition relating to Slovak citizenship.

After reformulating the question referred, the Court examined whether Article 45(2) TFEU and more specifically Article 7(2) of Regulation 492/2011 precluded a national law which grants benefits for sportspersons who have represented the State, from restricting these benefits to those who are Slovak citizens. First, the Court held that the additional benefit in the case at hand was to be considered as a ‘social advantage’ under Article 7(2) of Regulation 492/2011 that could contribute to the integration of the worker into the Member State thereby achieving the objective of freedom of movement for workers.\(^{32}\) In addition to providing financial security and compensating for the fact that high-level sportspersons are not able to fully integrate into the labour market due to their commitments, the Court found that the additional benefit had the purpose of giving those sportspersons a certain social prestige. In particular, the Court considered that the social prestige was capable of facilitating the integration of migrant workers into the society of the Member State.\(^{33}\) By applying Article 7(2) of Regulation 492/2011 to the case, the Court concluded that it precluded a national law, such as the Slovak one which discriminates on the basis of nationality, from doing so.\(^{34}\)

5. Method of calculation of unemployment benefits for frontier workers: ZP

In ZP,\(^{35}\) the Court was asked to rule on the interpretation of Article 62 of Regulation 883/2004 concerning the method for calculating the amount of unemployment benefits for frontier workers.

The applicant, a German national residing in Germany, worked from 1 July 1990 until 31 October 2014 in Switzerland, and from 1 November 2014 until 24 November 2014 in Germany. Upon becoming unemployed, he applied for unemployment benefit in the Member State of

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30. Ibid, paras. 64 and 65.
31. UB v Generálny riaditeľ Sociálnej poisťovne Bratislava, C-447/18, EU: C:2019:1098.
32. Ibid, para. 49.
33. Ibid, para. 52.
34. Ibid, para. 53.
35. ZP v Bundesagentur für Arbeit, C-29/19, EU: C:2020:36.
residence, Germany. Article 62 of Regulation 883/2004 prescribes that, when a Member State chooses to calculate unemployment benefits on the basis of the amount of the previous salary, the calculation must be based on the salary of the applicant’s last activity as an employed person. German law requires at least 150 days of contributions to be paid in order to take the salary of the person as the basis for calculating unemployment benefits. In considering the 150 days of contributions, the German authorities looked solely at the period of work of the applicant in Germany, thereby denying the possibility of taking into account the periods of contributions completed in Switzerland. Since the periods of contributions paid by the applicant in Germany were below the threshold of 150 days, the German authorities opted for a notional assessment of the benefits which was less favourable for the applicant.

In its answer to the national court, the Court recalled that, while it is for the Member States to determine the method of calculation for unemployment benefits, they must do so in a manner that does not infringe the rules of Regulation 883/2004. Hence, pursuant to Article 62(1) of Regulation 883/2004, once the Member State chooses to base the calculation of the benefits on the amount of the previous salary, there is no derogation allowed. Furthermore, under Article 62(2), if a Member State fixes a reference period for the purpose of determining the applicant’s salary, periods during which the person concerned was subject to the legislation of another Member State must be taken into account. The opposite conclusion would lead to less favourable treatment of those workers who have exercised their right to free movement compared to those who have spent their entire careers in one Member State. As a result, the use of a notional salary is not allowed in calculating the unemployment benefit for a worker, such as the applicant, as it would hinder the free movement of persons.

6. Reduction of old-age pension after insolvency of an employer: 
_Pensions-Sicherungs-Verein_

In the context of a reduction in old-age pensions following the insolvency of an employer, _Pensions-Sicherungs-Verein_ dealt with the interpretation of Article 8 of Directive 2008/94 on the obligation of Member States to ensure the necessary measures for protecting the interests of employees.

The applicant, Mr. Bauer, benefited from a pension paid by a pension fund on the basis of contributions made by his former employer to the _Pensionskasse für die Deutsche Wirtschaft_ (Pension Fund for the German Economy), as well as an occupational old-age pension granted directly by his former employer. After financial difficulties, the _Pensionskasse_ reduced the amount of benefits in 2013. In total, between 2003 and 2013, the monthly pension paid to Mr. Bauer was reduced by 13.8 per cent, which represents a loss of EUR 82.74 per month, and a reduction of 7.4 per cent in the total amount of Mr. Bauer’s occupational pension. His former employer offset the reductions until insolvency proceedings were initiated against it. PSV, the institution responsible for guaranteeing the payment of occupational old-age pensions in the event of the insolvency of an

36. Ibid, para. 40.
37. Ibid, paras. 27 and 28.
38. Ibid, para. 30.
39. Ibid, para. 37.
40. Ibid, para. 42.
41. _Pensions-Sicherungs-Verein_, C-168/18, EU: C:2019:1128.
employer, took over the responsibility for the payment of the occupational pension. It, however, refused to offset the reductions applied to the old-age pension paid by the Pensionskasse. As a result, Mr. Bauer continued to receive a reduced pension from the Pensionskasse.

The Court first held that Article 8 of Directive 2008/94 applied to Mr. Bauer’s situation where the employer cannot, upon insolvency, offset losses resulting from a reduction in the amount of old-age pension benefits paid by the responsible inter-occupational institution.42

The second question asked whether the reduction in the benefits paid to an employee such as Mr. Bauer, who still received at least half of his benefits, was to be considered as manifestly disproportionate so as to give rise to the obligation on the Member State to ensure a minimum degree of protection. The Court held that, although it had previously found that correct transposition of Article 8 required a former employee to receive at least half of the old-age benefits,43 certain circumstances might lead to the conclusion that the reduction should still be considered manifestly disproportionate where the former employee’s ability to meet his or her needs is seriously compromised.44 This would be the case when the reduction resulted in the former employee living below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.45

Finally, the third and fourth questions dealt with the direct effect of Article 8 of Directive 2008/94, which questioned the responsibility of PSV in guaranteeing the occupational pension benefits against the risk of an employer’s insolvency. The Court found that the essential elements of Article 8, namely, the person entitled to protection, the content of the protection, and the identity of the person liable to provide protection, were all sufficiently clear, precise and unconditional.46 Regarding the responsibility of PSV, the Court held that it must bear the obligation to provide a minimum degree of protection in respect of old-age benefits under Article 8 of Directive 2008/9447 if the Member State concerned has delegated that obligation to PSV, which was ultimately for the referring court to verify.48

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42. Ibid, para. 36.
43. Ibid, para. 41.
44. Ibid, paras. 41-44.
45. Ibid, para. 44.
46. Ibid, paras. 50-54.
47. Ibid, para. 55.
48. Ibid, para. 56.