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Occupational injuries scheme not inconsistent with European Convention on Human Rights - Saumier v France

Mel Cousins

Case Analyses

Occupational Injuries Scheme Not Inconsistent with European Convention on Human Rights—*Saumier v France*[1]

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"Si l'on commence de tout comparer, on est perdu!"[2]

In a recent ruling, the European Court of Human Rights rejected a challenge to the French scheme of benefits for accidents at work and occupational illness (which forms part of the code de la sécurité sociale) and held that the provisions of the law were not inconsistent with the ECHR art.14. The court was, it is argued, clearly correct as to the outcome and, as is not unusual, clearly wrong as to its approach to the analysis of the legal position. The case is an important one for several European occupational (industrial) injuries schemes which adopt a similar approach to the French system and is also interesting in that it again raises the issue of how the Court addresses the issue of whether there is a comparator in an analogous or "relevantly similar" position.

The facts and national procedures

Ms Saumier worked in a laboratory and, tragically, having been exposed to certain chemicals, developed Parkinson's disease at the age of 27. She claimed compensation under the French scheme for occupational accidents and illnesses (accidents du travail et maladies professionnelles). The French law on compensation for such accidents and illnesses forms part of the code de la sécurité sociale.[3] It provides for various compensations for such accident and illnesses but also provides that, subject to certain provisions, no action could be brought under the general law (droit commun) in relation to occupational accident and injuries covered by the law.

Ms Saumier was found to have an occupational illness and was awarded various compensations including a disability pension. The French social security court (Tribunal des Affaires de Sécurité Sociale or TASS) found that her employer (Transcal) had been grossly negligent and increased her award. On appeal, the Paris Court of Appeal[4] pointed out that, in line with the law[5] as interpreted by the French Constitutional Court,[6] a person covered by the French occupational injuries

[1] *Saumier v France* (74734/14) 12 January 2017. The judgment is available in French.

[2] J.-J. Dupeyroux.

[3] Book IV of the code de la sécurité sociale covers "accidents du travail et maladies professionnelles". It includes arts L.411-1 to L.482-5.

[4] 4 April 2013 (cited in *Saumier v France* (74734/14) 12 January 2017 at [14]–[16]).

[5] Article L.451-1 provides that "Sous réserve des dispositions prévues aux articles L.452-1 à L.452-5, L.454-1, L.455-1, L.455-1-1 et L.455-2 aucune action en réparation des accidents et maladies mentionnés par le présent livre ne peut être exercée conformément au droit commun, par la victime ou ses ayants droit".

[6] Conseil constitutionnel, 2000-8 QPC, 18 June 2010. In this decision, the court upheld the constitutionality of the provisions of the social security code in terms of the equality provisions of the French constitution. Available (including

scheme was not entitled to separate compensation for damage except in relation to issues not covered by the social security code. The court of appeal ruled that she was not entitled to separate compensation for loss of earnings and functional impairment as these were already compensated by the disability pension.[7] In addition, the court held that there was no entitlement to compensation for health costs (which were covered by separate provisions of the social security code)[8] or for long-term carer costs.[9] On further appeal, the Cour de Cassation upheld the decision of the court of appeal and ruled that this interpretation of the law was not in breach of the right of access to the court set out in the ECHR art.6 nor of the right to enjoyment of possessions set out in art.1 of Protocol 1 of the Convention (P1-1).[10]

Ms Saumier complained to the European Court of Human Rights that, unlike victims of negligence under the general law (droit commun), victims of work-related accidents or occupational diseases caused by their employer's negligence were not eligible for compensation in respect of all the damage sustained. She argued that this was inconsistent with the ECHR art.14 which provides:

> "The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The French Government (strangely) argued that the dispute did not fall within the scope of P1-1 but the court (at rather unnecessary length) rejected this argument pointing out that it was only necessary that the issue fell with the scope of (sous l'empire de) P1-1.[11] Therefore, art.14 was brought into play.[12]

The ruling

The court recalled that, under art.14, only differences in treatment based on "status" may be considered discriminatory and that there must be a difference between people in analogous or comparable situations.[13] The court, as is its wont, did not bother to consider whether Ms Saumier's situation did amount to a status but, as we will see, it did return to the comparability issue.

The court pointed out that employees affected by occupational accidents or illnesses in France benefit from a special scheme of insurance which provides for automatic coverage by the health insurance office (CPAM) of medical costs and, where necessary, payment of a disability benefit to compensate for loss of salary.[14]

English, German, Italian and Spanish translations of the ruling) at *http://www.conseil-constitutionnel.fr/decision/2010/2010-8-qpc/decision-n-2010-8-qpc-du-18-juin-2010.48469.html* [Accessed 1 October 2018].

[7] Article L.452-2.

[8] Articles L.431-1 1° et L.432-1 à L.432-4.

[9] Article L.434-2 alinéa 3 although the court accepted that Ms Saumier did not currently satisfy the conditions to receive compensation under this provision.

[10] 13-18.509, 28 May 2014 (cited in *Saumier v France* (74734/14) 12 January 2017 at [18]) at *https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000029017648* [Accessed 1 October 2018].

[11] *Saumier v France* (74734/14) 12 January 2017 at [44].

[12] It is not clear that art.14 was argued before the French courts but it does not appear to have been suggested that Ms Saumier had not exhausted her national remedies.

[13] *Saumier v France* (74734/14) 12 January 2017 at [51]–[52].

[14] *Saumier v France* (74734/14) 12 January 2017 at [54].

This is without the necessity to show any fault on the part of the employer. When the accident or illness is due to gross negligence (faute inexcusable) by the employer, a higher level of compensation is paid.[15] The court accepted that while the general law allowed a person to obtain "full compensation" (réparation intégrale) subject to proving fault, the applicant whose illness had, in fact, been caused by the fault of her employer was not able to obtain full compensation.[16]

However, the court concluded that employees who had suffered an accident at work or contracted an occupational disease as a result of negligence by their employer were not in an analogous or comparable situation to that of individuals who had sustained physical injury or damage to health as a result of negligence by persons who were not their employer. The court gave a number of reasons for this.

First, the relationship between an employer and his or her employee was particular being based on contract and governed by a specific set of rules which were clearly distinguishable from the general rules governing relations between individuals.[17] The French rules governing liability in case of accidents at work and occupational diseases were an expression of this specificity and were very different from those applicable under the ordinary law in that they were not based on proof of negligence, a causal link between the negligence and the damage, and a court process, but on solidarity and automatic entitlement (l'automaticité). The court pointed out that French law provided for (i) automatic cover for temporary total unfitness for work; (ii) automatic compensation for permanent unfitness for work; and (iii) the possibility of obtaining additional compensation in the event of gross negligence (la faute inexcusable) on the part of the employer.

Secondly, compensation for the damage incurred by the employee on account of gross negligence by the employer supplemented the damages automatically received by the former, which also distinguished the employee's situation regarding the position under the ordinary law.

Finally, the court referred to the conclusions of the French Constitutional Court which had pointed to the fact that compensation is no-fault and paid by the CPAM which means that employees do not have to sue their employers and prove negligence.[18] The Constitutional Court concluded that the system guaranteed automatic entitlement, speed and security in compensating for occupational accidents and illnesses.

Accordingly, the court held that the case involved the application of different sets of legal rules to persons in different situations. However, in order for an issue to arise under art.14 of the Convention, there had to be a difference in treatment between persons in analogous or comparable situations. The court therefore concluded that there had been no violation of art.14 of the Convention.[19]

[15] *Saumier v France* (74734/14) 12 January 2017 at [55].
[16] *Saumier v France* (74734/14) 12 January 2017 at [57]. Arguably a rather careless use of language. What exactly is "full compensation"?
[17] *Saumier v France* (74734/14) 12 January 2017 at [60]–[63].
[18] 2000-8 QPC see above.
[19] *Saumier v France* (74734/14) 12 January 2017 at [65]–[67].

Discussion

It is perhaps surprising that this appears to be the first major challenge to European occupational injuries schemes to reach the ECHR.[20] The outcome of the ECHR case would appear to be undoubtedly correct. While one can certainly understand Ms Saumier's feeling that she had been treated unfairly, the issue should have been whether there was an objective justification for having a separate system of laws for persons affected by occupation accidents and diseases. Clearly, in some ways, this system treats employees more favourably in that, for example, it is not necessary to prove negligence on the part of another person. Conversely, there are aspects of this separate system which are less favourable (as in this case where the quantum of damages is lower).

Some European countries—such as the UK and Ireland-operate a non-exclusive system whereby compensation obtained under the occupational (or industrial) injuries scheme can be taken into account in assessing damages under the common law. Others (such as France) have systems, like the US, where the occupational injuries scheme acts as a bar to recovery in tort. But this is surely an area where the court should allow a considerable margin of discretion to the Contracting States to decide what is appropriate in the context of their own specific socio-economic conditions. On that basis, I would argue that the court should have found the French system to be objectively justified for the reasons set out in its ruling (at [60]–[63]), including the no-fault compensation, and the fact that the compensation is guaranteed by the CPAM.

Unfortunately, however, the court, while upholding the law, did not adopt this analysis but rather held that employees who had contracted an occupational disease as a result of negligence by their employer were not in a comparable situation to that of individuals who had sustained an illness or disease as a result of negligence by persons who were not their employer.

It is difficult to accept, in principle, that employees who contract an illness or disease are not, in general, comparable, to other persons who contract an illness or disease for the purposes of art.14. Whether any difference in treatment is justifiable is a separate issue. Would the court accept non-comparability if, for example, liability for work-related diseases was abolished or reduced to a very low level? As has been argued by Baker, it would be preferable for the court to consider such cases on the basis of justification as this (unlike comparability) allows for explicit consideration of issues of proportionality.[21]

The European Court of Human Rights has consistently stated that "in order for an issue to arise under Article 14, the first condition is that there must be a

[20] Although the general approach of having a workers compensation scheme as a legal alternative to tort claims has been long upheld in the US (see, e.g. *New York Central Railroad v White* 243 U.S. 188 (1917)), there have been several challenges to the US state workers compensation laws on the basis that specific cutbacks violated this "grand bargain" between employers and employees. See, e.g. *Torres v Seaboard Foods* 373 P.3d 105, 2016 OK 207 (2016) where the Oklahoma Supreme Court struck down a specific change under the Due Process Clause of the State Constitution. A minority of the court would also have found a breach of equal protection. In *Vasquez v Dillard's* 381 P.3d 768, 2016 OK 89 (2016), the same court held that legislation allowing employers to "opt out" of the existing workers compensation law by providing more limited cover was an unconstitutional special law under the Oklahoma Constitution. See M. C. Duff, "Worse than Pirates or Prussian Chancellors: a State's Authority to Opt-Out of the Quid Pro Quo" [2016] *Marquette Benefits and Social Welfare Review* Vol.17(2) 1–56.

[21] A. Baker, "Comparison tainted by justification: against a 'compendious question' in Article 14 discrimination" [2006] *Public Law* 476.

difference in the treatment of persons in relevantly similar situations".[22] Unfortunately, however, the court has not given clear guidance as to how to analyse whether situations are "relevantly similar" and has tended to decide cases on the basis of (lack of) comparability when these might have been better decided on the basis of justification.[23] However, in other cases the court has taken a different (and arguably better) approach. For example, in *Stummer*, the court held that in relation to the issue of access to pension insurance "the applicant as a working prisoner was in a relevantly similar situation to ordinary employees" and decided the case of the basis of justification.[24]

In this case, it is submitted that the court was clearly incorrect to take into account the legislation under challenge in concluding that there was no comparability. One of the reasons for the lack of comparability outlined by the court is that the victim of an occupational accident is in a different situation because, in the first instance, the payment of damages is the responsibility not of the direct employer but of the collectivity of employers (who fund the occupational injuries branch of the social security scheme).[25] This is, with respect, entirely circular reasoning:

> "The law under challenge by the applicant is not inconsistent with Article 14 because the existence of the law under challenge means that the applicant is not in a comparable situation for the purposes of Article 14."

Right answer, wrong reasons.

Mel Cousins
Trinity College Dublin

[22] *Carson v United Kingdom* (42184/05) (2010) 51 E.H.R.R. 13 at [61].
[23] As in *Carson v United Kingdom* (42184/05) (2010) 51 E.H.R.R. 13.
[24] *Stummer v Austria* (37452/02) (2012) 54 E.H.R.R. 11 at [91].
[25] *Stummer v Austria* (37452/02) (2012) 54 E.H.R.R. 11 at [64].