Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

20 July 2016*

(Reference for a preliminary ruling — Social policy — Directive 2003/88/EC — Article 7 — Right to paid annual — Retirement at the request of the party concerned — Worker failing to use up all his entitlement to annual paid leave before the termination of his work relations — National legislation excluding allowance in lieu of paid annual leave not taken — Sick leave — Public servants)

In Case C-341/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Wien (Administrative Court of Vienna, Austria), made by decision of 22 June 2015, received at the Court on 8 July 2015, in the proceedings

Hans Maschek

v

Magistratsdirektion der Stadt Wien — Personalstelle Wiener Stadtwerke,

THE COURT (Tenth Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, A. Borg Barthet and E. Levits, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Austrian Government, by G. Eberhard, acting as Agent,

— the European Commission, by M. Kellerbauer and M. van Beek, acting as Agents,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

* Language of the case: German.

2 The request has been made in proceedings between Mr Hans Maschek and the Magistratsdirektion der Stadt Wien — Personalstelle Wiener Stadtwerke (Municipal administration of the city of Vienna — Personnel department of the municipal services of Vienna, Austria), his employer, regarding allowance in lieu of paid annual leave not taken by Mr Maschek before the end of his employment relationship.

Legal context

EU law

Directive 2003/88

3 Article 7 of Directive 2003/88, headed 'Annual leave', is worded as follows:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

Austrian law

4 Directive 2003/88 was transposed into Austrian law, and specifically, as regards public servants of the city of Vienna, by Article 41a of the Gesetz über das Besoldungsrecht der Beamten der Bundeshauptstadt Wien — Besoldungsordnung 1994 (Law on the remuneration of public servants of the federal capital of Vienna; 'the Wiener Besoldungsordnung 1994), as amended in 2014 ('BO'):

'(1) Unless reemployed immediately within another department of the city of Vienna, a public servant shall, when he leaves the service or when the employment relationship ends, be entitled to an allowance in lieu of the portion of annual leave that he has not yet used (allowance [for paid annual leave not taken]). He shall be entitled to this allowance only where he did not, by his own actions, use up his entitlement to annual leave.

(2) The public servant shall be responsible for not having used up his entitlement to annual leave in particular where he leaves the service in cases of

1. termination […] in so far as the public servant was dismissed on the ground of fault;

2. dissolution of the employment relationship under Paragraphs 33(1) [unexcused absence from work], 73 [resignation] or 74 [dismissal] [of the Gesetz über das Dienstrecht der Beamten der Bundeshauptstadt Wien (Law on the rules relating to public servants of the federal capital of Vienna — Rules on the services 1994) ('DO')] or

3. entry into retirement at his request under Paragraph 68b(1)(1), Paragraph 68c(1) or Paragraph 115i of the [DO].

…

(3) The [allowance in lieu of paid annual leave not taken] shall be calculated separately for each calendar year for which the entitlement to annual leave has not been used up and has not been forfeited.

(4) The public servant shall be entitled to [allowance in lieu of paid annual leave not taken] for the balance of his recoverable rights which remain after subtracting the days actually used during the calendar year.

...'

5 Paragraph 68c(1) of the DO provides that a public servant who has reached the age of 60 may, at his request, be granted retirement where his departure is compatible with the interests of the service.

6 In accordance with Paragraph 68b(1) of the DO, a public servant who requests it must be granted retirement:

'(1) when he has completed a career which has lasted 540 months

(2) when the public servant is unable to work due to being unfit for work within the meaning of Paragraph 68a(2) of the DO.'

7 Paragraph 115i(1) of the DO provides that a public servant who requests it must be granted retirement if he has reached an age between 720 and 776 months and has completed, before his retirement, a sufficient number of periods of work which can be taken into account for the purposes of calculating his pension.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Mr Maschek, born on 17 January 1949, was a public servant with the city of Vienna from 3 January 1978.

9 Between 15 November 2010 and 30 June 2012, the date of his retirement, he did not report to his place of work.

10 The referring court states that it is apparent from Mr Maschek's administrative file that his employer, in its records, classified as an absence due to illness only the period between 15 November and 31 December 2010.

11 Mr Maschek's employer apparently did not object to Mr Maschek's other absences, in period from 1 January 2011 to 30 June 2012, due to it having concluded with him two agreements relating to those absences and their consequences.

12 The first agreement, concluded on 20 October 2010, states as follows:

‘1. General The situation does not allow in any case in the city of Vienna to continue to avail of the services of Mr Maschek as head of unit beyond the period specified below. Given the retirement of Mr Maschek scheduled for 1 October 2011, the city of Vienna agreed with him the following:

2. Retirement request on 1 October 2011 Mr Maschek shall present by the end of the year a written request for retirement with effect from 1 October 2011.

3. Head of unit position In order to ensure a smooth transition, Mr Maschek shall keep his position as head of unit until 31 December 2010. Until that date, he shall use 5 to 6 weeks of his annual leave. The division of the leave will be carried out by the end of October in accordance with the Wiener Linien [city of Vienna guidelines]. On 1 January 2011, Mr Maschek shall be relieved of his position as head of unit.

4. Waiver of service From 1 January 2011, the Magistratsdirektion-Personalstelle Wiener Stadtwerke shall waive the services of Mr Maschek, who shall keep his salary.’

13 The second agreement, signed on 21 July 2011, which replaced the first one, is worded as follows:

‘1.

General The parties to this agreement agree that the services of Mr Maschek in the head of unit position may not be availed of beyond the period specified below. Given the retirement of Mr Maschek scheduled for 1 July 2012, the city of Vienna agreed with him the following:

2. Pension request on 1 July 2012 Mr Maschek shall present a written request for retirement with effect from 1 July 2012. The retirement decision concerning Mr Maschek will be delivered to him personally [...] Mr Maschek declares in writing that he will bring no legal action against this decision.

3. Head of unit position Mr Maschek served as head of unit until 31 December 2010. He was relieved of this position with effect from 1 January 2011.

4. Waiver of service From 1 January 2011, the Magistratsdirektion-Personalstelle Wiener Stadtwerke, in agreement with Wiener Linien GmbH & Co KG, shall dispense with the services of Mr Maschek, who shall keep his salary … ...

7. Suspensive condition This agreement is subject to the condition that the full legal effects of the waiver of 21 July 2011 shall occur and that Mr Maschek makes the legally binding declaration to waive any legal action as provided for in Article 2 of this agreement.’

14 At the time of the conclusion of the second agreement, Mr Maschek also filed a request for retirement. His employer accordingly adopted, on 21 July 2011, a decision by which Mr Maschek retired with effect from 1 July 2012, on the basis of Paragraph 115i(1) of the DO. Mr Maschek then made a commitment to waive any legal action against that decision.

15 According to the referring court, it is thus established, first, that from 15 November 2010 to 31 December 2010, the absence of Mr Maschek from his place of work was justified as sick leave and, second, that from 1 January 2011 to 30 June 2012, namely until the end of his employment relationship due to retirement, Mr Maschek was required not to report to his place of work due to the instructions of the service, resulting from the application of the second agreement.

16 Mr Maschek claims nevertheless that he fell ill a little before 30 June 2012. He is of the opinion, therefore, that he is entitled to an allowance in lieu of paid annual leave not taken and submitted a request in that regard to his employer.

17 By decision of 1 July 2014, his employer rejected his request on the basis of Paragraph 41a(2)(3) of the BO.

18 The Verwaltungsgericht Wien (Administrative Court of Vienna), before which Mr Maschek brought an action against that decision, expresses, first, doubts about the compatibility of Paragraph 41a(2) of BO with Article 7(2) of Directive 2003/88.

19 Paragraph 41a(2) of the BO, in its view, might deprive the public servant 'responsible for not having used up his entitlement to annual leave' of the entitlement to an allowance in lieu of paid annual leave not taken, including, where he retires on the basis of Paragraph 115i(1) of the DO, as is the case at issue in the main proceedings.

20 Thus, the referring court considers, with regard to a situation such as that in the main proceedings, that Paragraph 41a(2) of the BO is likely to be at odds with the Court's case-law relating to Article 7 of Directive 2003/88, to the extent that the public servant, who retired at his own request, is deprived of the right to an allowance in lieu of paid annual leave not taken, even though, shortly before his retirement, that public servant was sick and presented a medical certificate to that end.

21 Second, the referring court questions the conditions for granting an allowance in lieu of paid annual leave not taken by a worker who, as is the case in the main proceedings, could not, due to illness, have used up his rights to paid annual leave before the end of his employment relationship. It considers in particular that the grant of such an allowance should be conditional on such a worker being required to notify his employer in good time of his illness and to provide it with a medical certificate proving that illness.

22 Third, the referring court raises the question whether, in the event that the Court considers Paragraph 41a(1) and (2) of the BO to be at odds with EU law, national law may provide, in favour of the workers who are excluded from entitlement to an allowance in lieu of paid annual leave not taken under that provision, the detailed rules on the exercise of that entitlement which are more favourable than those provided by the directive, particularly concerning the amount of the allowance to be granted to workers.

23 'In those circumstances, the Verwaltungsgericht Wien (Administrative Court of Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is national legislation, such as the provision at issue of Paragraph 41a(2) of the [BO], which does not allow an employee who has, at his own request, terminated the employment relationship with effect from a particular date an entitlement to an [allowance in lieu of paid annual leave not taken] within the meaning of Article 7 of Directive No 2003/88/EC compatible with Article 7 of Directive 2003/88/EC?

If not, is a provision of national law which lays down that every employee who, at his own request, terminates an employment contract must make every effort to use up any outstanding entitlement to annual leave by the end of the employment relationship and that, in the event of termination of the employment relationship at the request of the employee, an entitlement to an [allowance in lieu of paid annual leave not taken] arises only if, also in the event of request being made for annual leave beginning on the day of the application to terminate the employment relationship, the employee was unable to take a period of leave corresponding to the full extent of an entitlement to an allowance in lieu of leave compatible with Article 7 of Directive 2003/88/EC?

(2) Is it to be assumed that there is only to be an entitlement to an [allowance in lieu of paid annual leave not taken] if the employee who was unable due to incapacity to work to use up his leave entitlement immediately before the termination of his employment relationship (a) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) made his employer aware of his incapacity to work (for example due to illness) and (b) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) provided proof (e.g. through a doctor's sick note) of his incapacity to work (e.g. due to illness)?

If not, is a provision of national law which lays down that there is only to be an entitlement to an [allowance in lieu of paid annual leave not taken] if the employee who was unable due to incapacity to work to use up his leave entitlement immediately before the termination of his employment relationship (a) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) made his employer aware of his incapacity to work (e.g. due to illness) and (b) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) provided proof (e.g. through a doctor's sick note) of his incapacity to work (e.g. due to illness) compatible with Article 7 of Directive 2003/88/EC?

(3) According to the case-law of the Court of Justice of the European Union (see judgments of the Court of Justice of 18 March 2004 in *Merino Gomez*, C-342/01, paragraph 31; 24 January 2012 in *Dominguez*, C-282/10, paragraphs 47 to 50; 3 May 2012 in *Neidei*, C-337/10, paragraph 37) the Member States are free to grant an employee a statutory entitlement to leave or to an allowance in lieu of leave above the minimum entitlement guaranteed by Article 7 of Directive 2003/88. In addition, the entitlements laid down by Article 7 of Directive No 2003/88 have direct effect (see judgments of the Court of Justice of 24 January 2012 in *Dominguez*, C-282/10, paragraphs 34 to 36 and 12 June 2014 in *Bollacke*, C-118/13, paragraph 28).

In the light of that interpretation given to Article 7 of Directive 2003/88/EC, does a situation in which the national legislature allows a certain class of persons an entitlement to an allowance in lieu of leave significantly above the requirements of that provision of the directive have the effect that, as a result of the direct effect of Article 7 of Directive 2003/88/EC, those persons who were, contrary to the terms of [that] directive, refused an entitlement to an allowance in lieu of leave by that national legislation are also entitled to an [allowance in lieu of paid annual leave not taken] to the extent significantly above the requirements of that provision of [that] directive, and which is allowed by the national legislation to the persons favoured by that provision?'

The questions referred for a preliminary ruling

24 By its three questions, which should be considered together, the referring court asks, in essence, whether Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation such as that at issue, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his rights to paid annual leave before the end of his employment relationship. If so, the referring court asks whether national legislation may provide, in respect of a worker who, in

breach of Article 7(2) of Directive 2003/88, is not entitled to an allowance in lieu of paid annual leave not taken, for detailed rules on the exercise of that entitlement which are more favourable than those resulting from Directive 2003/88, in particular as regards the amount of allowance to be granted to that worker.

25 In order to provide an answer which will be of use to the referring court, it must, in the first place, be recalled, as is apparent from the very wording of Article 7(1) of Directive 2003/88, a provision from which that directive allows no derogation, that every worker is entitled to paid annual leave of at least four weeks. That right to paid annual leave which, according to settled case-law, must be regarded as a particularly important principle of EU social law, is therefore granted to every worker, whatever his state of health (judgments in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 54, and *Neidel*, C-337/10, EU:C:2012:263, paragraph 28).

26 On termination of the employment relationship and when therefore it is no longer possible to take paid annual leave, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu in order to prevent this impossibility leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form (see judgments of 20 January 2009 in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 56; 3 May 2012 in *Neidel*, C-337/10, EU:C:2012:263, paragraph 29, and 12 June 2014 in *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 17).

27 It should also be noted that Article 7(2) of Directive 2003/88, as interpreted by the Court, lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended (judgment of 12 June 2014 in *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 23).

28 It follows, in accordance with Article 7(2) of Directive 2003/88, that a worker who has not been able to take all his entitlement to paid annual leave before his employment relationship has ended, is entitled to allowance in lieu of paid annual leave not taken. In that respect, the reason for which the employment relationship has ended is not relevant.

29 Therefore, the fact that a worker terminates, at his own request, his employment relationship has no bearing on his entitlement to receive, where appropriate, an allowance in lieu of paid annual leave which he has not been able to use up before the end of his employment relationship.

30 In view of the foregoing, it must be held that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation such as that at issue, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his entitlement to paid annual leave before the end of that employment relationship.

31 In the second place, concerning a situation such as that at issue in the main proceedings, it must be recalled that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave (judgments in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 62, and *Neidel*, C-337/10, EU:C:2012:263, paragraph 30).

32 Consequently, Article 7(2) of Directive 2003/88 must be interpreted as meaning that an employee is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness (see, to that effect, judgment of 3 May 2012 in *Neidel*, C-337/10, EU:C:2012:263, paragraph 32).

33 It follows that, as regards the period between 15 November and 31 December 2010, in which it is established that Mr Maschek was on sick leave and was not able, for that reason, to use up, during that period, his entitlement to the annual paid leave which he had acquired, Mr Maschek is entitled, pursuant to Article 7(2) of Directive 2003/88, to an allowance in lieu of paid annual leave not taken.

34 In addition, the right to paid annual leave, according to settled case-law, as laid down in Article 7 of Directive 2003/88, has the dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (judgments in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 25, and 22 November 2011 in *KHS*, C-214/10, EU:C:2011:761, paragraph 31).

35 In those circumstances, and in order to ensure the effectiveness of the right to annual leave, it must be held that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness.

36 Consequently, it is for the referring court to examine whether, pursuant to the second agreement between Mr Maschek and his employer, dated 21 July 2011, as set out in paragraph 13 above, Mr. Maschek was actually required not to report to his place of work during the period 1 January 2011 to 30 June 2012, and continued to receive his salary. If so, Mr Maschek will not be entitled to an allowance in lieu of paid annual leave which he was not able to use up during the period.

37 If, on the contrary, during that period, Mr Maschek was not able to use up his entitlement to paid annual leave due to illness, which it is for the referring court to verify, he will be entitled under Article 7(2) of Directive 2003/88, to an allowance in lieu of paid annual leave not taken.

38 As regards, in the third place, the question whether national legislation may provide, in respect of a worker who, in breach of Article 7(2) of Directive 2003/88, is not entitled to an allowance in lieu of paid annual leave not taken, for detailed rules on the exercise of that entitlement which are more favourable than those provided for by Directive 2003/88, in particular as regards the amount of allowance to be granted to that worker, it should be recalled that although the purpose of Directive 2003/88 is to lay down minimum health and safety requirements for the organisation of working time, which Member States must respect, they have, in accordance with Article 15 of that directive, the right to introduce more favourable provisions for workers. Thus, Directive 2003/88 does not preclude domestic provisions giving entitlement to more than the minimum period of four weeks' paid annual leave, guaranteed by Article 7 of that directive, granted under the conditions for entitlement to, and granting of, the right to paid annual leave laid down by national law (see, inter alia, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 47, and 3 May 2012 in *Neidel*, C-337/10, EU:C:2012:263, paragraphs 34 and 35).

39 Accordingly, it is, on the one hand, for the Member States to decide whether to grant workers additional paid annual leave in addition to the minimum annual paid leave of four weeks provided for in Article 7 of Directive 2003/88. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for the Member States to determine the conditions for granting that entitlement (see, judgment of 3 May 2012 in *Neidel*, C-337/10, EU:C:2012:263, paragraph 36).

40 In view of all the foregoing considerations, the answer to the questions posed by the national court is that Article 7(2) of Directive 2003/88 must be interpreted:

— as precluding national legislation such as that at issue in the main proceedings, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his rights to paid annual leave before the end of that employment relationship;

— as meaning that a worker is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness;

— as meaning that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness;

— as meaning that it is, on the one hand, for the Member States to decide whether to grant workers additional paid leave in addition to the minimum annual paid leave of four weeks provided for in Article 7 of Directive 2003/88. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for the Member States to determine the conditions for granting that entitlement.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (tenth chamber) hereby rules:

Article 7(2) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, must be interpreted:

— as precluding national legislation such as that at issue in the main proceedings, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his rights to paid annual leave before the end of that employment relationship;

— as meaning that a worker is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness;

— as meaning that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness;

— as meaning that it is, on the one hand, for the Member States to decide whether to grant workers additional paid leave in addition to the minimum annual paid leave of four weeks provided for in Article 7 of Directive 2003/88. In that case, the Member States may grant to

a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for the Member States to determine the conditions for granting that entitlement.

[Signatures]