JUDGMENT OF THE COURT (First Chamber)
6 April 2006 *

In Case C-124/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te 's-Gravenhage (Netherlands), made by decision of 3 March 2005, received at the Court on 16 March 2005, in the proceedings

Federatie Nederlandse Vakbeweging

v

Staat der Nederlanden,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric (Rapporteur), K. Lenaerts and E. Juhász, Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2005,

after considering the observations submitted on behalf of:

— Federatie Nederlandse Vakbeweging, by L.S.J. de Korte and A.C. Vijn, advocaten,

— the Kingdom of the Netherlands, by H.G. Sevenster and M. de Mol, acting as Agents,

— the United Kingdom of Great Britain and Northern Ireland, by T. Linden, acting as Agent,

— the Commission of the European Communities, by N. Yerrell and P. van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 7(2) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41) ('the directive').

2 The reference has been made in the course of proceedings between the Federatie Nederlandse Vakbeweging (Netherlands Federation of Trade Unions, hereinafter 'the FNV') and the Netherlands State on the question of whether the possibility of redeeming days of the minimum period of annual leave within the meaning of the directive, which have been saved up over the course of previous years, is contrary to Article 7(2) of the directive.

Legal framework

Community legislation

3 The directive was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC). As stated in Article 1(1) of the directive, it lays down minimum safety and health requirements for the organisation of working time.

4 Section II of the directive sets out the measures to be taken by the Member States to ensure that every worker is entitled to minimum periods of daily and weekly rest, and paid annual leave. It also lays down rules on breaks and maximum weekly working time.

5 As regards annual leave, Article 7 of the directive provides:

'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.'

6 Article 17 of the directive provides for the power to derogate, under certain circumstances, from a number of its provisions, but not from Article 7 of the directive.

7 The directive was repealed and replaced, with effect from 2 August 2004, by 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). However, Article 7 of the directive is reproduced without change.

National legislation

8 The relevant provisions, adopted in order to transpose the directive into the Netherlands national legal system, are contained in Book 7, Title 10 (employment contract), Chapter 3 (leave), of the Burgerlijk Wetboek (Civil Code, hereinafter 'the BW').

9 Article 7:634(1) of the BW provides:

'An employee shall acquire, for every year in which he was entitled to pay during the full agreed duration of work, entitlement to holiday leave of at least four times the agreed duration of weekly work or, if the agreed duration of work is expressed in terms of hours per year, of at least one equivalent period.'

10 Article 7:638 of the BW provides:

'1. An employer shall be required to enable his employee to take the leave each year to which the employee is entitled, as a minimum, under Article 634.

2. In so far as no provision is made for leave by way of written agreement or by or pursuant to a collective works agreement or regulation adopted by or on behalf of an

administrative body with appropriate authorisation, or by legislation, an employer shall determine the starting and finishing dates of the leave in accordance with the wishes of the employee, unless there are overriding reasons for not doing so. ...

...

6. An employer shall be required to grant the employee the remaining entitlement to leave in days or hours, unless there are overriding reasons for not doing so.

...'

11 In the terms of Article 7:639 of the BW:

'The employee shall, during leave, retain the right to remuneration.'

12 Article 7:640 of the BW provides:

'1. So long as his contract of employment is in force, an employee cannot waive his entitlement to leave in return for compensation.

2. If entitlement to leave is acquired which exceeds the minimum period referred to in Article 634, a derogation from paragraph 1 may be effected by written agreement to the extent to which that entitlement exceeds that minimum.'

13 Under Article 7:642 of the BW:

'An action to enforce a right to leave shall not be brought after the expiration of five years from the end of the calendar year in which the cause of action accrued.'

14 In the terms of Article 7:645 of the BW:

'There may be no derogation to the detriment of the employee from the provisions of Articles 634 to 643 inclusive, unless those articles permit such derogation.'

The main proceedings and the question referred for a preliminary ruling

15 In regard to the above legal rules, an information brochure published by the Netherlands Ministry of Social Affairs and Employment and entitled *'Nieuwe*

vakantiewetgeving: Meer ruimte voor maatwerk' (New legislation on leave. Greater scope for made-to-measure work) of February 2001 (hereinafter 'the brochure') explains as follows:

'The basis of the legislation on leave remains the same: every employee is entitled to paid leave. The minimum statutory number of leave days per year is four times the number of working days per week. ...

There can always be more leave, but never less!

...

3. Saving up leave days

Can an employee save up his holidays for a couple of years so that he can undertake an extended world tour?

Yes, that is certainly possible. Holidays can be saved up over a long period before they expire. ...

4. Redemption of leave days

The house urgently needs repairs. Can an employee obtain cash in exchange for the leave days which he has saved up?

Yes, but ... Extra leave days may be redeemed in the future. These are leave days above the mandatory minimum number of days per year or days which have been saved up over the course of previous years.

Example: an employee who has been working on a full-time basis has 50 leave days saved up and wishes to sell them to his employer. He has not yet taken any holidays in that year. In those circumstances, he will be able to sell a maximum of 30 days (50 to 20, the latter figure being the statutory minimum).'

16 During the deliberations in Parliament concerning Article 7:640 of the BW, the Netherlands Government essentially argued as follows: the minimum leave entitlement consists of the number of days to which an employee is, in all cases, entitled in a particular year, setting aside the days which exceed the minimum in that year and any days which have been saved up over the course of previous years. All days saved up over previous years are capable of being redeemed as leave days, regardless of their origin. It is thus irrelevant whether those days have been saved up from leave which exceeded the statutory minimum for a previous year or from the minimum leave for a previous year. In the case where an employee has not made use (in full or in part) of the minimum leave entitlement, for whatever reason, that entitlement will not count as minimum entitlement in a following year. A following year will have its own separate minimum entitlement. Financial compensation may be provided in respect of that unused entitlement from a previous year.

17 It was acknowledged during those deliberations in Parliament that a possibility of redeeming leave days risked encouraging employees not to take leave days in the knowledge that such days not used up in the course of one year of service might be eligible for redemption in later years. It was stated in this regard that personal responsibility had to be left to employers and employees and that it might be expected that those concerned would, in such a case, act in a responsible manner. Attention was in this connection drawn to the fact that an employer was obliged, under Article 7:638(1) of the BW, to enable his employee each year to take at least the minimum amount of leave. The employee may require that his employer grant him such minimum leave.

18 A proposal was put forward to adapt Article 7:640(2) of the BW in such a way that, of the total number of leave days saved up, that portion which arose because less leave than the statutory minimum was taken in preceding years could not be redeemed. That proposal was rejected in the course of those Parliamentary debates.

19 The FNV brought an action before the Rechtbank te 's-Gravenhage (District Court, The Hague) seeking a declaration, essentially, that the Netherlands State acted unlawfully in taking and giving effect to the view, contrary to Article 7(2) of the directive, that in the interpretation of the concept of 'minimum period of leave', mentioned in Article 7:634 of the BW, days, statutory as well as non-statutory, saved up from previous years exceed the minimum leave entitlement and can in principle be eligible for redemption. The FNV applied, in addition, for an order prohibiting the Netherlands State from further dissemination of its erroneous interpretation of Article 7:640 of the BW and from distribution of that brochure, but requiring it to publish the decision to be given.

20 The Rechtbank te 's-Gravenhage dismissed the action. On appeal to the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague), the FNV added an alternative head of claim by which it sought a declaration that, on a reasonable

construction of Article 7:640(2) of the BW, in accordance with Article 7(2) of the directive, the number of leave days in any year below the minimum statutory entitlement which an employee has not taken cannot be eligible for redemption.

21 The referring court takes the view that it emerges clearly from the background to the legislation, in conjunction with the brochure, that the minimum period of annual leave may, if the employee does not use it up, be replaced in a subsequent year by financial compensation. In the light of the background to the legislation, the content of the brochure in question is such that, in the event of that content being at variance with the manner in which the directive is to be construed and implemented, dissemination of the brochure without any form of warning, which it does not have, will be misleading and consequently unlawful. It is, it finds, entirely plausible that the possibility of later redemption of days of the minimum period of annual leave may lead to employees not taking their minimum leave or not taking it in full. The erroneous interpretation of the directive by the Netherlands State adversely affects the interests of the FNV, in so far as it safeguards employees' interests in the Netherlands.

22 It was in those circumstances that the Gerechtshof te 's-Gravenhage decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it compatible with Community law, and in particular with Article 7(2) of Council Directive 93/104/EC ... for a legislative provision of a Member State to provide for the possibility of a written agreement during a contract of employment to the effect that an employee who has, in one year, not taken his minimum annual leave, or has not taken that minimum leave in full, may receive financial compensation in respect of that leave in a subsequent year?

The question is based on the premiss that the compensation is not given in respect of the employee's entitlement to minimum leave in the current year or in the years following thereon.'

The question referred for a preliminary ruling

23 First, the possible illegality, raised by the Commission of the European Communities, of carrying forward days from the minimum period of annual leave must be dealt with.

24 Without it being necessary to consider that question in detail, it must be noted that the Court has already held that a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law (Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067, paragraph 33). Thus, in the event of the aggregation of several periods of leave guaranteed by Community law at the end of a year, the carrying forward of annual leave or part thereof to the following year may be inevitable.

25 By its question, the referring court is asking, in essence, whether Article 7 of the directive precluded a national provision which, during a contract of employment, permits days of annual leave, within the meaning of the directive, which are not taken in the course of a given year, to be replaced by an allowance in lieu in the course of a subsequent year.

26 Harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods, particularly paid annual leave, and adequate breaks (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 38, and Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraph 41).

27 According to Article 7(1) of the directive, Member States are to 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.

28 The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by the directive itself (see, particularly, *BECTU*, cited above, paragraph 43, and Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29).

29 The directive also embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his safety and health, since it is only where the employment relationship is terminated that Article 7(2) permits an allowance to be paid in lieu of paid annual leave (*BECTU*, paragraph 44, and *Merino Gómez*, cited above, paragraph 30).

30 Admittedly, the positive effect which that leave has for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year. However, the significance of that rest period in that regard remains if it is taken during a later period.

31 Since leave, within the meaning of the directive, may, when taken during a later year, still contribute, none the less, to the safety and health of the worker, it must be held that it continues to be subject to the directive.

32 In any event, the possibility of financial compensation in respect of the minimum period of annual leave carried over would create an incentive, incompatible with the objectives of the directive, not to take leave or to encourage employees not to do so.

33 Consequently, Article 7(2) of the directive precludes the replacement, by an allowance in lieu, of the minimum period of paid annual leave, in the case where it is carried over to a subsequent year.

34 It should be added that Article 7 of the directive is not one of the provisions from which the directive expressly allows derogations (see *BECTU*, paragraph 41). It is therefore immaterial whether financial compensation for paid annual leave is or is not based on a contractual arrangement.

35 In view of all the foregoing considerations, the reply to the question referred must be that Article 7 of the directive is to be interpreted as precluding a national provision which, during a contract of employment, permits days of annual leave, within the meaning of Article 7(1) of the directive, which are not taken in the course of a given year, to be replaced by an allowance in lieu in the course of a subsequent year.

Costs

36 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 (First Chamber) hereby rules:

Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000, must be interpreted as precluding a national provision which, during a contract of employment, permits days of annual leave, within the meaning of Article 7(1) of the directive, which are not taken in the course of a given year, to be replaced by an allowance in lieu in the course of a subsequent year.

[Signatures]