Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

6 March 2015 *

(Reference for a preliminary ruling — Social policy — Charter of Fundamental Rights of the European Union — Article 31(2) — Directive 2003/88/EC — Article 7 — Concept of a 'worker' — Person with disabilities — Right to paid annual leave — National legislation contrary to EU law — Role of the national court)

In Case C-316/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 29 May 2013, received at the Court on 10 June 2013, in the proceedings,

Gérard Fenoll

v

Centre d'aide par le travail 'La Jouvene',

Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon,

THE COURT (First Chamber),

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

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 March 2014,

after considering the observations submitted on behalf of:

— G. Fenoll, by G. Delvolvé and A. Delvolvé, avocats,

— l'association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon, by L. Cocquebert, avocat,

— the French Government, by N. Rouam and by D. Colas and R. Coesme, acting as Agents,

— the Netherlands Government, by M. Bulterman and C. Schillemans, acting as Agents,

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

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 12 June 2014,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the concept of a 'worker' within the meaning 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, 'Directive 2003/88') and of Article 31 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The reference was made in the context of proceedings between Mr Fenoll and the Centre d'aide par le travail 'La Jouvène' (La Jouvène work rehabilitation centre) (CAT 'La Jouvene') and the Association de parents et d'amis de personnes handicapées mentales (APEI) (the Association of parents and friends of persons with mental disabilities), Avignon, concerning the applicant's request for an allowance in lieu of paid annual leave not taken.

Legal context

European Union law

3 Article 1 of Directive 2003/88, entitled 'Purpose and scope', provides:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive shall apply to:

(a) minimum periods … of annual leave …

…

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC [of the Council, of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183 p. 1)], without prejudice to Articles 14, 17, 18 and 19 of this Directive.

…'

4 Article 7 of Directive 2003/88, entitled '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.'

5 Article 17 of Directive 2003/88 provides that the Member States may derogate from certain provisions of that directive. However, no derogation is permitted with respect to Article 7.

6 Article 2 of Directive 89/391, entitled ‘Scope’, provides:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.’

French law

The Labour Code

7 The first subparagraph of Article L.223-2 of the Labour Code (Code du Travail), in the version in force at the time of the facts of the case, provides:

‘A worker who, during the reference year, shows that he has been employed by the same employer for a period equivalent to at least one month of actual work shall be entitled to leave, the length of which shall be calculated on the basis of two and a half working days for each month worked; the total period of leave that may be requested may not exceed 30 working days.’

8 Article L.223-4 of the Code provides:

‘Periods equivalent to 4 weeks or 24 days of work shall be treated as equivalent to one month of actual work for the purposes of determining the amount of leave due. Periods of paid leave, compensatory rest periods …, periods of maternity leave …, rest days acquired as a result of a reduction in working time and periods, limited to an uninterrupted duration of one year, during which the performance of a contract of employment is suspended due to an accident at work or a work-related illness, shall be considered to be periods of actual work …’

9 Article L.323-10 of the Code provides:

‘Any person whose chances of obtaining or retaining a job are actually reduced as a result of an alteration in one or more physical, sensory, mental or psychological functions shall be considered to be a disabled worker for the purposes of this section.

The status of disabled worker is recognised by the committee mentioned in Article L.146-9 of the Social Action and Families Code (code de l’action sociale et des familles).

Placement in an establishment or service referred to in paragraph 1, subparagraph 5, of Article L.312-1 of that same code shall be equivalent to recognition of the status of disabled worker.’

The Social Action and Families Code

10 Article L.312-1 of the Social Action and Families Code, in the version in force since 6 September 2003, reads as follows:

‘The following establishments and services, whether or not having legal personality, are social and medico-social establishments and services within the meaning of this Code:

…

5° The establishments or services:

(a) Work rehabilitation centres, with the exception of facilities [having concluded an agreement with the Social Security body concerning rates charged] for the activities referred to in Article L.322-4-16 of the Labour Code and the entreprises adaptées [special undertakings at least 80% of whose employees are disabled workers] defined in Articles L.323-30 et seq. of that Code;

…’

11 Article L.344-2 of that Code, in the version in force from 3 January 2002 to11 February 2005, provided:

‘Work rehabilitation centres, with or without a residential home, accept disabled adolescents and adults who cannot, temporarily or permanently, work in either an ordinary undertaking or an *atelier protégé* [a sheltered work environment, predecessor to the *entreprise adaptée*] or for a centre distributing work to be done at home, or pursue an activity as a self-employed person. These centres offer opportunities for various work activities, medico-social and educational support, and living arrangements which encourage personal development and social integration.

…’

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

12 Mr Fenoll frequented CAT ‘La Jouvene’ from 1 February 1996 until 20 June 2005. In the beginning, he duly received five weeks of paid annual leave.

13 From 16 October 2004 up until the moment when he left the CAT, Mr Fenoll was on sick leave. At the time when this period of incapacity began he was entitled to 12 days of accrued paid annual leave, not taken by him, for the period of work from 1 June 2003 to 31 May 2004. Furthermore, Mr Fenoll was unable to take his leave for the reference period of 1 June 2004 to 31 May 2005. According to Mr Fenoll the entitlement to annual leave, accrued but not taken, for the two periods referred to above gave him the right to be paid the sum of EUR 945 in financial compensation. The CAT ‘La Jouvene’ refused this payment.

14 The Tribunal d’instance d’Avignon (District Court, Avignon, France) having rejected at final instance his request for compensation, Mr Fenoll lodged an appeal in cassation.

15 The referring court makes reference to the Court of Justice’s case-law relating to Article 7 of Directive 2003/88, and to the case-law relating to the concept of a ‘worker’ within the meaning of Article 45 TFEU. In that respect, the referring court raises the question whether persons placed in a work rehabilitation centre (a ‘CAT’) who do not have the status of employee are covered by the term ‘worker’ within the meaning of EU law.

16 The referring court recalls the terms of Article 31(2) of the Charter, according to which every worker has the right, inter alia, to an annual period of paid leave and maintains that it is settled case-law that EU fundamental rights may be invoked in a case between individuals for the purpose of establishing whether the EU institutions and the Member States have observed those fundamental rights when implementing EU law.

17 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 3 of Directive 89/391/EEC, to which Article 1 of Directive 2003/88/EC of 4 November 2003, determining the scope thereof, refers, be interpreted as meaning that a person placed in a work rehabilitation centre can be classified as a “worker” within the meaning of that article?

(2) Must Article 31 of the Charter be interpreted as meaning that such a person as described in the previous question can be classified as a “worker” within the meaning of Article 31?

(3) May such a person as described in the first question rely directly upon the rights conferred on him by the Charter in order to obtain an entitlement to paid leave if national legislation does not provide for any such entitlement, and must the national courts, in order to ensure that those rights are fully effective, set aside any contrary provision of national law?’

The questions referred

The first and second questions

18 By those questions, which will be examined together, the referring court asks, essentially, whether the term ‘worker’ within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter must be interpreted as meaning that it includes a person admitted to a CAT, such as the centre in the main proceedings.

19 In that regard, it must be borne in mind, first of all, that, according to Article 1(3) of Directive 2003/88, read in conjunction with Article 2 of Directive 89/391, to which it makes reference, those directives are to apply to all sectors of activity, both public and private, in order to encourage improvements in the safety and health of workers at work and to regulate certain aspects of the organisation of their working time.

20 Thus, the Court has held that Directive 89/391 must necessarily be given broad scope, with the result that the exceptions to that scope, provided for in the first subparagraph of Article 2(2), must be interpreted restrictively (see, to that effect, inter alia, judgments in *Simap*, C-303/98, EU:C:2000:528, paragraphs 34 and 35, and *Commission* v *Spain*, C-132/04 EU:C:2006:18, paragraph 22). Those exceptions were adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, the gravity and scale of which are exceptional (judgment in *Neidel*, C-337/10, EU:C:2012 :263, paragraph 21 and the case-law cited).

21 None of those circumstances being relevant to the situation of a person such as the applicant in the main proceedings, his activity falls within the scope of Directive 2003/88.

22 It follows that the provisions of Directive 2003/88, Article 7 thereof in particular, apply to the activity carried out by Mr Fenoll.

23 The question to be answered is, therefore, whether Mr Fenoll carries out that activity as a worker within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter.

24 In that connection, as regards Directive 2003/88, it should be noted that, as the Advocate General maintains in point 29 of his Opinion, that directive makes no reference to the term 'worker' as appearing in Directive 89/391, or to the definition of that term under national legislation (see, to that effect, judgment in *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 27).

25 It follows that, as regards the application of Directive 2003/88, the concept of a 'worker' may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law (judgment in *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 28).

26 As the Advocate General pointed out at point 26 of his opinion, that finding applies also with regard to the interpretation of the term 'worker' within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter, in order that the uniform scope of the right of workers to paid leave *rationae personae* may be ensured.

27 In that context, it should be recalled that, according to the settled case-law of the Court, the term 'worker' within the meaning of Directive 2003/88 must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. So, any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, to that effect, judgments in *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 28, and *Neidel*, C-337/10, EU:C:2012:263, paragraph 23).

28 In order to ascertain whether such a concept can include a person admitted to a CAT, such as Mr Fenoll, the following must be taken into consideration.

29 First, the Court has held that it is for the national court to apply that concept of a 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved (judgment in *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 29).

30 It is in this case apparent from the order for reference that persons admitted to a CAT are not subject to certain provisions of the Labour Code. Nevertheless, that circumstance, creating a legal situation for those persons that must be treated as *sui generis*, cannot be decisive when the employment relationship between the parties to the proceedings is assessed.

31 It should be recalled that, on that point, the Court has already ruled that the *sui generis* legal nature of an employment relationship in national law can in no way whatsoever affect whether or not the person is a worker for the purposes of European Union law (see judgment in *Kiiski*, C-116/06, EU:C:2007:536, paragraph 26 and the case-law cited).

32 Second, it is undisputed that, for a certain period, that is to say, since joining the CAT 'La Jouvene' in 1996 and for at least five consecutive years, Mr Fenoll provided various services for which, moreover, he obtained paid annual leave. It is clear from the file submitted to the Court that those services, together with support of a medico-social nature, were assigned and directed by the staff, as well as by those in charge of the CAT 'La Jouvene', who sought to provide Mr Fenoll with a way of life adapted as best might be to his needs. This kind of organisational framework allows a body such as the CAT,

concerned in the main proceedings, to ensure the personal fulfilment of a seriously disabled person by the enhancement of his capabilities and, as far as possible, to ensure that the activities entrusted to that person are of some economic benefit to the body concerned.

33 Third, it is also clear from the file submitted to the Court that the activities performed by Mr Fenoll within the economic and social programme of the CAT 'La Jouvene' were carried out in return for remuneration. In that context, it should be noted that the fact that his remuneration was substantially less than the guaranteed minimum wage in France cannot be taken into account for the purpose of classifying Mr Fenoll as a 'worker' within the meaning of EU law.

34 According to the Court's settled case-law, neither the level of productivity of the individual concerned, nor the origin of the funds from which the remuneration is paid, nor even the limited amount of that remuneration can in any way whatsoever affect whether or not the person is a worker for the purposes of EU law (see judgments in *Bettray*, 344/87, EU:C:1989:226, paragraphs 15 and 16; *Kurz*, C-188/00, EU:C:2002:694, paragraph 32; and *Trojani*, C-456/02, EU:C:2004:488, paragraph 16).

35 Fourth, it is important to ascertain whether the activities undertaken by Mr Fenoll within the CAT 'La Jouvene' are to be qualified as 'real and genuine', or whether such activities are purely marginal and ancillary and thus cannot, according to the settled case-law cited at paragraph 27 of this judgment, confer the status of 'worker' on the person performing them.

36 In that regard, the Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon and the French Government infer from the facts giving rise to the judgment in *Bettray* (344/87, EU:C:1989:226) that, by analogy, Mr Fenoll cannot be classified as a 'worker', his activities within the CAT 'La Jouvene' supposedly being comparable to those carried out by persons admitted to a therapeutic centre for drug addicts, such as that at issue in that judgment.

37 That approach cannot be followed.

38 It should be noted, first, that if the Court held, at paragraph 17 of the judgment in *Bettray* (344/87, EU:C:1989:226), that activities that are simply a method of re-educating and rehabilitating the persons carrying them out cannot be considered to be real and genuine economic activities, it also specified that that consideration is relevant only to the facts giving rise to that judgment, relating to a person who, because of his drug addiction, had been employed on the basis of a national law designed to provide work for persons who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work in normal conditions (see judgment in *Trojani*, C-456/02, EU:C:2004:488, paragraph 19 and the case-law cited).

39 Next, it should be noted that, even if the tasks carried out within the CAT 'La Jouvene' are, like those intended for drug addicts in the case giving rise to the judgment in *Bettray* (344/87, EU:C:1989:226), reserved for persons who, by reason of circumstances related to their situation, are unable to work in normal conditions, it is nevertheless clear from the file submitted to the Court that the very concept of the regime governing the functioning of a CAT, and the activities carried out by persons with disabilities, is such that those activities do not appear to be purely marginal and ancillary within the meaning of the case-law cited at paragraph 27 of this judgment.

40 As the Advocate General pointed out, in particular at point 42 of his Opinion, the activities carried out by disabled persons within the CAT 'La Jouvene' are not created for the sole purpose of providing an occupation, derivative if necessary, for the persons concerned. Those activities, although adapted to the capabilities of the persons concerned, have a certain economic value too. This is all the more true because those activities make it possible to give value to the productivity of severely disabled persons, however reduced it may be, while at the same time ensuring the social protection they are entitled to.

41 It follows, therefore, from the foregoing considerations that, on the basis of the matters in the file submitted to the Court, a person carrying out activities such as Mr Fenoll's within the CAT 'La Jouvene', may be classified as a 'worker' within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter.

42 The national court must in particular ascertain whether the services actually performed by Mr Fenoll can be regarded as forming part of the normal labour market. For that purpose, account may be taken not only of the statute and practices of the CAT concerned in the main proceedings as a care facility and of the various aspects of the aim of its social aid programme, but also of the nature of the services and the manner in which they are performed (see, by analogy, judgment in *Trojani*, C-456/02, EU:C:2004:488, paragraph 24).

43 In those circumstances the reply to the first two questions is that the concept of a 'worker' within the meaning of Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as meaning that it may include a person admitted to a CAT, such as that at issue in the main proceedings.

The third question

44 By its third question, the referring court seeks to know, essentially, whether Article 31(2) of the Charter must be interpreted as meaning that it may be invoked directly in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law.

45 In that respect it is sufficient to note that, as the Advocate General pointed out at point 23 of his Opinion, Article 31(2) of the Charter is not apt, *rationae temporis*, to apply to a situation such as that in the main proceedings.

46 Mr Fenoll's claim with regard to his annual paid leave relates to a period before the date of entry into force of the Lisbon Treaty and, therefore, before the date from which the Charter acquired the same legal value as the Treaties, pursuant to Article 6(1) of the EU Treaty.

47 Consequently Article 31(2) of the Charter may not as such be invoked in a case such as that in the main proceedings.

48 With regard to whether reference may be made to Article 7 of Directive 2003/88, which specifically concerns the right to paid annual leave, it is clear from the Court's settled case-law that, if national law cannot be interpreted in conformity with the directive — which it is for the referring court to ascertain — Article 7 of that directive may not be invoked in a dispute between individuals, such as that in the main proceedings, in order to ensure the full effect of that right to paid annual leave and to render inapplicable any conflicting provision of national law. Moreover, in such a situation the party adversely affected by the incompatibility of national law with EU law may nevertheless rely upon the case-law deriving from the judgment in *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) in order to obtain, if appropriate, compensation for any damage suffered (see judgment in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 43).

49 In the light of all the foregoing considerations, there is no need to answer the third question referred.

Costs

50 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:

The term 'worker' within the meaning 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, and of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it may include a person admitted to a work rehabilitation centre, such as that in the main proceedings.

[Signatures]