Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 15 April 2021 [1]

Case C-233/20

WD
v
job-medium GmbH, in liquidation

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Social policy – Protection of the safety and health of workers – Directive 2003/88/EC – Article 7 – Allowance in lieu of annual leave paid on the termination of the employment relationship – Termination of the employment relationship due to a worker withdrawal without cause)

I. Introduction

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. [2]

2. The request has been made in proceedings between, on the one hand, WD and, on the other hand, his former employer, a firm entitled job-medium. The dispute concerns WD's request for an allowance in lieu of annual leave not taken before the termination of his employment relationship in the specific context where the termination is due to a decision on the part of the worker to terminate the contract early without having given the appropriate degree of notice.

[1] Original language: English.

[2] OJ 2003 L 299, p. 9.

II. Legal context

A. EU law

1. The Charter of the Fundamental Rights of the European Union

3. Article 31 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Fair and just working conditions', provides:

'1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

2. Directive 2003/88

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

B. Austrian law

5. Paragraph 10(1) and (2) of Urlaubsgesetz (Law on Annual Leave of 7 July 1976, 'UrlG')[3], as amended, states:

'(1) On the date of termination of the employment relationship, the worker shall be entitled, for the reference year in which the employment relationship is terminated, to a compensatory indemnity as compensation for leave corresponding to the duration of employment during the reference year in relation to the entire reference year. Leave already taken shall be deducted from the annual leave due pro rata temporis …

(2) No compensatory indemnity shall be due if the worker terminates the employment relationship prematurely without serious reason.'

III. The facts of the main proceedings

6. WD was employed by job-medium from 25 June 2018 to 9 October 2018. On 9 October 2018, he terminated the employment contract early without having given the appropriate degree of notice. The right to annual leave acquired for the period of employment was 7.33 working days,

[3] BGBl., 1976/390.

of which he had taken four days. Therefore, he had 3.33 working days of remaining annual leave on the date that the employment relationship ended. Job-medium, citing for this purpose Paragraph 10(2) of the UrlG – by virtue of which no allowance in lieu of annual leave is payable in the event of an early and unjustified termination on the part of the worker – did not pay the applicant any allowance in lieu of annual leave.

7. Considering that this provision is contrary to EU law, WD brought an action for payment of this compensation. His action was dismissed at first instance and on appeal on the basis of Paragraph 10(2) of the UrlG.

8. The referring court, in its application for review of this judgment, states that the loss of the right to payment of compensation for annual leave not taken under Paragraph 10(2) of the UrlG is limited to the case of a worker's withdrawal without cause. In this context, cause exists where, at the time of withdrawal, the worker cannot reasonably be expected to maintain the employment relationship, not even for the period of the notice.

9. The Oberster Gerichtshof (Supreme Court) states that the purpose of that provision is, on the one hand, punitive, in that it is intended to discourage workers from terminating the employment relationship prematurely without justification, and, on the other hand, economic, in that it is intended to financially relieve the employer faced with the unforeseeable loss of one of its workers.

10. The referring court has doubts as to whether Paragraph 10(2) of the UrlG is compatible with Article 7 of Directive 2003/88, as interpreted by the Court in its case-law, and with Article 31(2) of the Charter.

11. In particular, it follows from that case-law that the circumstance that a worker terminates his or her employment relationship of his or her own accord does not affect his or her right to receive, where appropriate, financial compensation for annual leave entitlements which he or she has not been able to exhaust before the end of that employment relationship. However, the Court also ruled that an interpretation of Article 7 of Directive 2003/88 which deliberately induced the worker to refrain from taking annual leave in order to increase his or her pay would be incompatible with the objectives pursued by the introduction of the right to paid annual leave.

12. In that regard, the national court points out, first, that, in the case of an unjustified withdrawal of the worker, it is the worker who unilaterally takes the decision not to exercise his or her right to benefit from his or her leave, either in kind or by way of a compensatory allowance. On the other hand, the opening of the right to a compensatory indemnity in the event of premature termination of the employment relationship in the absence of a serious reason would run counter to the principle that no one can benefit from a right resulting from his or her unlawful actions.

IV. The questions referred for a preliminary ruling and the procedure before the Court

13. It is in those circumstances that, by decision of 29 April 2020, received at the Court on 4 June 2020, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a provision of national law under which no allowance in lieu of annual leave is payable in respect of the current (last) working year, where the worker unilaterally terminates ("withdraws from") the employment relationship early without cause, compatible with Article 31(2) of the [Charter] and Article 7 of [Directive 2003/88]?

(2) If the answer to that question is in the negative:

(2.1.) Is it necessary to verify additionally if the worker was unable to use up his annual leave?

(2.2.) If so, what are the criteria for that verification?'

14. Written observations were submitted by WD, job-medium, the Austrian Government and by the European Commission.

15. At the end of the written part of the procedure, the Court considered that it had sufficient information to proceed to judgment without a hearing, in accordance with Article 76(2) of the Court's Rules of Procedure.

V. Analysis

A. The admissibility of the questions

16. In its written submissions, job-medium contended that the questions referred by the Oberster Gerichtshof (Supreme Court) should be declared inadmissible because the provisions referred to therein have already been interpreted by the Court as providing an answer applicable to the facts of the dispute in the main proceedings.

17. In that respect, it suffices to note that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [4]

[4] See, to that effect, judgment of 24 November 2020, *AZ (Forgery of documents)* (C-510/19, EU:C:2020:953, paragraphs 25 and 26).

18. It is, however, apparent from the request for a preliminary ruling that WD was refused payment of the financial compensation for leave not taken at the end of his employment relationship with job-medium on the basis of Paragraph 10(2) of the UrlG, because it terminated that employment relationship prematurely, without giving any serious reason. In the light of those circumstances, the national court sets out the reasons why it has doubts as to the compatibility of that provision with Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter.

19. It is, consequently, obvious that the questions submitted concern the interpretation of EU law and that the answer to those questions are useful and relevant for the resolution of the dispute before the referring court. The questions referred are, therefore, admissible.

B. The right to an allowance in lieu of annual leave in the event of unjustified withdrawal

20. By its first question, the referring court asks whether a provision of national law under which no allowance in lieu of annual leave is payable in respect of the current last working year, where the worker unilaterally terminates the employment relationship early without cause, is compatible with Article 31(2) of the Charter and Article 7 of Directive 2003/88.

21. As a preliminary remark, it must be recalled that Article 7(1) of Directive 2003/88 reflects and clarifies the fundamental right to an annual period of paid leave, affirmed by Article 31(2) of the Charter.[5] In other words, Article 7(1) of that directive merely gives concrete expression to that fundamental right.[6] It follows, therefore, that the right to paid annual leave should not be given a restrictive interpretation.[7]

22. Secondly, it is also appropriate to recall that the purpose of the right to paid annual leave, conferred on every worker by Article 7(1) of Directive 2003/88, is to enable the worker both to rest from carrying out the work he or she is required to do under the contract of employment and to enjoy a period of relaxation and leisure. That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is based on the premiss that the worker actually worked during the reference period.[8]

23. Thirdly, it is clear from the terms of Directive 2003/88 and the Court's case-law that, although it is for the Member States to lay down the conditions for the exercise and implementation of the right to paid annual leave, they must not make the very existence of that right, which derives directly from that directive, *subject to any preconditions whatsoever*.[9]

5 See, to that effect, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others* (C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 115).

6 Judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others* (C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 117).

7 See, to that effect, judgments of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 23), and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 55).

8 See, to that effect, judgments of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraphs 27 and 28), and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraphs 57 and 58).

9 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 28); of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 34); and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 56).

24. On the other hand, it must be also recalled that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as a fundamental right of EU law. As well as an entitlement to a payment, that fundamental right also includes, as a right which is consubstantial with the right to 'paid' annual leave, the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship. [10]

25. In this context, it is also clear from settled case-law of the Court that Article 7(2) of Directive 2003/88 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, secondly, that the worker has not taken all the annual leave to which he or she was entitled on the date that that relationship ended. [11] Moreover, the reason for which the employment relationship is terminated is not relevant as regards the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88. [12]

26. In expressing this view, I do not overlook the fact that the Court has also specified that it cannot be inferred from this interpretation of Article 7 of Directive 2003/88 that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2). [13] The Court also pointed out to similar effect that the worker must not have been able to exercise his or her right to paid annual leave before termination of the employment relationship for reasons essentially beyond his or her control. [14]

27. It is, however, important that the details found in this line of case-law are not misunderstood. Any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his or her paid annual leave during the applicable authorised reference or carry-over periods in order to increase his or her remuneration upon the termination of the employment relationship would be incompatible with the objectives pursued by the introduction of the right to paid annual leave. [15] It is, nevertheless, important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker. [16]

[10] See, to that effect, judgments of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 58), and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 83).

[11] See, to that effect, judgments of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 23); of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 44), of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 31); of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 23), and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 84).

[12] See, to that effect, judgments of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 28), and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 45).

[13] See, to that effect, judgment of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 37).

[14] See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 61), and of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 52).

[15] See, to that effect, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 48).

[16] See, to that effect, judgments of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 50), and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 43).

28. It is therefore a question of ensuring a balance between the rights of the employer and those of the worker. Nevertheless, it must be recalled that, in that balance, the right to paid annual leave should not be interpreted restrictively.[17] In those circumstances, the protection of the employer's interests must be strictly necessary to justify a derogation from the worker's right to paid annual leave.[18]

29. In the present case, it is evident that, in conformity with the purpose of Article 7 of Directive 2003/88, the worker actually worked during the reference period. In other words, the worker has acquired an entitlement to annual leave and that the only reason why the compensatory indemnity is not due is because the worker terminated the employment relationship prematurely and without good cause. In that context, the punitive nature of the deprivation of the allowance in lieu is obvious.

30. Such a mechanism would therefore seem to be contrary to the wording and purpose of Article 7 of Directive 2003/88 which I have set out in the present Opinion. This is all the more so as, according to WD and the Austrian Government, there are other means, contractual or legal, available to the employer to obtain compensation for any loss which it would have suffered as a result of the early departure without reason of his or her worker.[19] In the light of these guarantees, it is all the less probable that the worker will deliberately refrain from taking his or her paid annual leave during the applicable reference period for the sole or the main purpose of increasing his or her remuneration upon the termination of employment.

31. In those circumstances, I have come to the conclusion that Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation according to which no allowance in lieu of annual leave is payable in respect of the current last working year, where the worker unilaterally terminates the employment relationship early without cause.

32. It is, therefore, not necessary to answer the second question asked by the referring court.

VI. Conclusion

33. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the first question referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

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 Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as

[17] See, to that effect, judgments of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 23), and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 55).

[18] See, to that effect, judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 75).

[19] According to WD, his unjustified withdrawal gave rise to the payment of contractual indemnities in favour of job-medium (see WD's written observations, p. 2). According to the Austrian Government, unjustified withdrawal is a breach of contract which in principle entitles the employer to damages on the basis of Paragraph 28 of the Bundesgesetz vom 11. Mai 1921 über den Dienstvertrag der Privatangestellten (Angestelltengesetz) (Federal Act of 11 May 1921 on the Employment Contract of Private Employees (Salaried Employees Act)) and Paragraph 1162a of the Allgemeines bürgerliches Gesetzbutch (General Civil Code) (see Austria's written observations, paragraph 13).

precluding national legislation according to which no allowance in lieu of annual leave is payable in respect of the current last working year, where the worker unilaterally terminates the employment relationship early without cause.