SUMMARY

2011/43 Paid leave lost if not taken in time (LU)

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Facts

The plaintiff had been employed by the defendant since 2002. From late 2005 until early 2007 she did not work on account of maternity leave and subsequent parental leave. She returned to work on 1 February 2007. On 1 March 2007 she called in sick, remaining on sick leave for exactly one year. On 1 March 2008 she returned to work on a part-time basis, but on 16 July 2008 she called in sick again and on 24 September 2008 her contract ended. In summary:

late 2005 - 31 January 2007 leave

February 2007 work

March 2007 - February 2008 sick

1 March - 15 July 2008 work

16 July - 24 September 2008 sick

The plaintiff filed a claim for unfair dismissal, wage arrears, redundancy pay, notice pay and untaken paid annual leave. This case report focuses on the claim as it related to paid leave.

The court of first instance dismissed the claim for wage arrears, redundancy pay and notice pay on the grounds that the defendant had not dismissed her but that her contract had terminated automatically (de jure) pursuant to a provision of the Social Insurance Law.[1] The court awarded compensation for untaken paid leave accrued in 2006/2007 but not for leave accrued in 2008. The plaintiff appealed.

Judgment

The Court of Appeal upheld the lower court's judgment in respect of wage arrears, lay-off pay and notice pay. As for the claim for compensation for untaken paid leave, the Court of Appeal ruled as below.

The court began by noting that, following termination of the employment contract, payment of compensation in lieu of paid annual leave can only be claimed if the employee provides evidence that he or she was prevented from taking leave.

When the plaintiff returned to work on 1 February 2007, she had two days of paid leave owing to her from 2005 and 25 (her annual accrual) from 2006, making a total of 27 days.[2] Given that the plaintiff was not sick during the entire month of February, she would have been able to take off 20 days had she wanted to. Therefore, she lost 20 of the days she had carried over from 2005/2006 (even though she worked during this period), leaving a balance of seven 'old' days. She accumulated 25 'new' days in 2007, so that at the end of that year she would normally have had a balance of 32 days of untaken paid leave. As the plaintiff had taken 2 days off in February 2007 and 5 days off in April 2007, the balance was 25 days.[3]

Given that the plaintiff was not sick in March 2008 (20 working days[4]), she would have been entitled to take 20 days off in that month had she wanted to. Therefore, she lost 20 out of her 25 days of paid leave carried over from 2007, leaving a balance of 5 days. The reason for this is that Luxembourg law allows accrued paid leave to be carried over from one calendar year to the next in only four situations (i.e. first year of employment, leave not taken on account of the employer's needs, maternity leave and parental leave) and, if it is carried over for one of those reasons, it must be taken before 31 March of the next year. Admittedly, none of the four situations foreseen in the law had arisen. However, the court found that the ECJ's case law in combination with Article L.233-6 of the Luxembourg Labour Code (i.e. sick leave must be equated to days worked) called for the application of a similar system. For this reason, the

plaintiff was entitled to compensation of (only) 5 days of untaken paid leave carried over from 2007.

As for 2008, the court disapplied Luxembourg law insofar as it does not entitle an employer whose contract ends de jure to the same compensation for unpaid leave as employees who have been dismissed. The court reasoned that the ECJ's case law and ILO Convention 132 stand in the way of not compensating for untaken paid leave in the event of de jure termination.

Commentary

The present ruling is extremely interesting since it shows for the first time how to deal with the requirements of the Stringer- and Schulz-Hoff case law on the one hand, and the legal carry-over period on the other. Moreover, the present matter contains various legal bases for carrying over annual paid holiday under Luxembourg law: maternity leave, parental leave and sickness. Only the last is not expressly foreseen by Luxembourg Labour Law, but the Court of Appeal decided to apply the lessons drawn by the ECJ's case law. In this regard, the ruling has to be welcomed.

Apart from the above-mentioned cases, Luxembourg law entitles the employee to carry over annual paid leave in two other situations: first, when the employee did not acquire all of his proportional annual paid leave during the first year, based on the fact that an employee is entitled to annual paid leave only after three months of work; second, when an employee is prevented from taking annual leave because of the needs of the company or the wishes of other employees. In this respect, the judgment also has the merit of clearing up one discussed issue since the Stringer- and Schutz-Hoff case law: the payment of compensation for untaken annual paid leave is not automatic but dependent on proof that the employee was prevented from taking annual leave during the legal carry-over period that runs until 31 March of the following year.

In addition, we agree with the extension of the entitlement to untaken annual paid leave for cases of automatic termination of the employment contract based on ILO Convention 132. In fact, under Luxembourg law, the employment contract ends by operation of law after 52 weeks of sickness based on a reference period of 104 weeks. Deciding differently would have been illogical and would have breached the principle that sick leave must be assimilated with worked time.

Conversely, this judgment seems very unfair as far as the employee's rights are concerned. In terms of the 20 days of annual paid leave for 2005 and 2006, there is little objection that could be made to the court's decision to deprive the employee of this. In fact, Luxembourg law

expressly provides a carry-over of untaken holiday for maternity and parental leave. The employee could therefore have expected to lose her rights to this if she failed to use it before 31 March 2007.

However, as regards the untaken annual paid leave for 2007, it seems artificial to recognise the employee's right to carry over her entitlement to annual paid leave until 31 March 2008, and then to let her lose 20 days of annual paid leave because she could not prove that she was prevented from taking it during that time. In fact, in 2008 - before the Stringer- and Schultz-Hoff case, the Luxembourg Courts still categorically refused to allow any carry-over of untaken holiday by reason of sickness (most recently, Court of Appeal, 8 January 2009, n° 33410). In reality, in that time, the employee could not even have known that she had a right to take her holiday for 2007 after 31 December of that year.

For the same reason, the 7-day surplus of 2005 and 2006 should not have been compensated by days off. It would have been more logical to compensate these 7 days financially, since the employee did not even know of her right during that time. The same could be said about the surplus of 2007 that was carried over to 2008. In all, the Court deprived the employee of at least 22 days of annual paid leave. This retroactive application of the ECJ's case law is not very satisfactory and may be explained by a reluctance to give the EC Working Time Directive 2003/88/EC horizontal effect.

Comments from other jurisdictions

United Kingdom (Joe Beeston): In the UK, the Working Time Directive is implemented by the Working Time Regulations 1998 (ÒWTRÓ). Workers are entitled to 5.6 weeks annual leave a year, in relation to which the WTR provide that:

- 4 weeks must be taken in the leave year in which they fall due; and

- 1.6 weeks can be carried over to the next leave year if this is provided for in an employment contract or other 'relevant agreement'.

In addition, as in Luxembourg, an employer in the UK cannot make a payment in lieu of annual leave except on termination of employment. The WTR do not currently say what should happen if an employee is sick and unable to take holiday in the relevant leave year.

Before the ECJ decision in Stringer, it was assumed in the UK that employees who could not take holiday because they were sick would lose accrued holiday at the end of the holiday year because it could not be carried over to the next year. Since Stringer, the UK courts have been struggling to decide what they should do to give effect to the decision. The position we seem

to have arrived at currently is this:

Workers on sick leave continue to accrue holiday.

If workers on sick leave want to take holiday they may do so. They should request it from their employer in the normal way and will receive holiday pay, not sick pay, for this period.

Although the WTR do not prevent an employer from insisting a worker takes holiday whilst sick, the ECJ decision in Pereda would not be consistent with this, so employers should not try to compel workers to use up holiday whilst sick.

Although, again, the WTR do not provide for holiday to be carried over to the next leave year, the courts have decided that this must be allowed to give effect to Stringer if the worker was prevented from taking the holiday by sickness.

If the worker returns to work and has a sufficient opportunity to take holiday before the end of the holiday year, he or she would not be able to carry it over. There are, as yet, no court decisions on what would be sufficient time, but the periods in this Luxembourg case seem very short.

On termination of employment the worker is entitled to be paid in respect of accrued holiday pay. This would include accrued holiday carried over from previous holiday years. However, there are various arguments about the limitation periods for bringing the claim that might prevent a worker from recovering holiday pay if the claim is not brought in time.

There are still some contradictions between the WTR and the ECJ rulings in Stringer and Pereda. However, recent decisions suggest that UK employment tribunals and courts are taking their lead from the ECJ decisions and the UK government is currently consulting on amending the WTR.

Footnotes

1 Article 14(2) of the Luxembourg Social Insurance Law provides that an employment contract terminates automatically on the date that an entitlement to statutory sick pay is exhausted, which is after 52 weeks of sickness in any given period of 104 consecutive weeks.

2 In fact, she had 33 days of paid leave from 2005 and 2006, but she took six days off at the end of January 2007.

3 The judgment is contradictory on this point since the Court declared that the plaintiff had been on sick leave since 1 March 2007. It has to be assumed that the plaintiff was fit for work for 5 days in April.

4 In fact, March 2008 had 21 working days.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Paid leave

Parties: Mrs X - v - Y.

Court: Labour Court of Appeal

Date: 31 March 2011

Case number: n° 35911

Creator: Cour d'appel (Court of Appeal)
Verdict at: 2011-03-31
Case number: 35911