SUMMARY

2011/13: Spanish Supreme Court follows Schultz-Hoff (SP)

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Facts

Mr Pascual had been employed as a driver by a construction company since 1988. He was on sick leave from 30 July 2007 until 9 January 2009 (a total of 17 months) and did not take any paid annual leave during that time. Upon returning to work, he asked his immediate boss for the paid annual leave accrued during his sick leave in 2007 and 2008. The company did not respond, whereupon Mr Pascual brought a claim against it. The court of first instance decided in favour of Mr Pascual. The company appealed to the Court of Appeal in Navarra. This court also ruled in Mr Pascual's favour. It confirmed his right to the paid annual leave he had accrued in 2007 and 2008, and it ordered the company to give it to him. The company appealed to the Supreme Court, alleging that the Superior Court's decision was contrary to a decision issued by the Court of Appeal in Aragon in a similar case, and that it was the Supreme Court's duty to unify the doctrine. The Supreme Court agreed that there was a contradiction between the two decisions and decided to unify the doctrine, following the criterion that the ECJ provided in its Schultz-Hoff ruling[1]. That ruling had forced the Spanish Supreme Court to amend its established jurisprudence, which had held that sick leave does not entitle employees to take accrued paid annual leave at a later date. This doctrine had applied to the scenario where an employee was on sick leave during previously agreed paid annual leave, or following the calendar year in which the paid annual leave had accrued. According to the ECJ,

"Article 7(1) of Directive 2003/88/EC [...] must be interpreted as precluding national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave". As a consequence, the Supreme Court ruled in accordance with the ECJ's interpretation of Article 7 of Directive 2003/88. It did so by interpreting two provisions of Spanish law, namely Article 40 of the Spanish Constitution, which guarantees the right to rest, and Article 38 of the Workers' Statute, which regulates annual leave for workers, in a way that makes them compatible with EU law. Thus, the Supreme Court confirmed that Mr Pascual was entitled to take the paid annual leave he had accrued during his 17 months' sick leave.

Commentary

Until January 2009, the Spanish Supreme Court had consistently denied an employee the right to accrued paid annual leave when a period of sick leave had impeded him or her from using it. The ECJ's rulings in Schultz-Hoff, Stringer and Pereda forced the Spanish Supreme Court to change its doctrine. The first case in which it did so was issued in June 2009 and this was followed by several similar judgments. The decision reported above was one of the first to determine that, after lengthy periods of sick leave, the affected employees are entitled to all paid annual leave accrued during that time. This decision, which is in line with the ECJ's doctrine, made Mr Pascual eligible to three months' paid leave in 2009: one month[2] for year 2007, one month for year 2008 and, assuming he continued to be employed by the company throughout the entire year 2009, one month for 2009[3]. Therefore, upon returning to work after being absent for 17 months, Mr Pascual was entitled to three months' accrued paid annual leave. While the reasoning of the Court of Justice in reaching its decision is sound, there are some cases, such as this one, where it may lead to difficulties. Employers may find it hard to accept that employees who have not rendered services for a lengthy period of time are entitled to paid annual leave. In fact, the Constitutional Court does not consider termination of sick employees' employment contracts to be discriminatory, unless the illness entails social stigmatisation or discrimination. Therefore, in my opinion, this jurisprudence may give rise to termination of employment contracts during sick leave, which would be legally unfair, but not unlawful.

Comments from other jurisdictions

Austria (Martin E. Risak): The issues discussed above are unlikely to arise in Austrian courts, as the Austrian Vacation Act ("Urlaubsgesetz") includes the following provisions: an employee

is not only entitled to paid annual leave for times when he or she is on sick leave (during which the employer must continue paying sick pay), but also for those times when the employer is not required to pay sick pay. If an employee becomes ill during scheduled paid annual leave, the period of illness is not counted as part of it, if the illness lasts more than three (calendar) days. Though generally speaking the entire paid annual leave entitlement for one year should be taken within that year, entitlements are not forfeited if they are not taken in full. The Vacation Act provides that entitlement to paid annual leave is lost two years after the end of the annual leave year in which it arose.

Czech Republic (Nataša Randlová): The Czech Labour Code stipulates that it is mandatory for employers to reduce employees' paid annual leave, if they are absent from work on account of sickness. The employer must reduce paid annual leave by one twelfth for the first 100 excused working days and then by one twelfth for every further twenty-one excused working days. Such a reduction is mandatory and the employer must not deviate from this rule. Although these provisions of the Czech Labour Code are not in compliance with the ECJ's interpretation of the Working Time Directive 2003/88, the employee's claim in this case would most likely fail before Czech courts, because the employer must follow Czech legal provisions. The only option for the employee would be to bring a claim against the Czech Republic for its failure to properly implement this Directive.

France (Claire Toumieux & Susan Ekrami): This decision is in line with recent French case law. Indeed, French case law has also been influenced by Article 7 of European Directive 2003/88/EC, providing that if an employee has been unable to take paid annual leave during the relevant period because of absences related to sickness, a work accident or occupational disability, the accrued paid annual leave will be carried over and can be taken upon his return to work. Very recent case law goes even further by providing that, when a collective bargaining agreement or statutory provision prohibits paid annual leave from being carried over, such provision should be set aside in the case of sickness (Cass. Soc. 11 January 2011, no 09-65.514). The employee concerned would therefore benefit from either the carrying over of his untaken paid annual leave or receipt of a paid annual leave indemnity.

Germany (Paul Schreiner): The federal court for labour law in Germany ("Bundesarbeitsgericht", "BAG") has also changed its stance following the Schultz-Hoff decision and now follows the ruling of the ECJ. Therefore, the case would have been handled similarly in Germany. In 2010, the BAG also held that ever since 23 November 1996, when Directive 93/104 came into force, employers could not rely on case law prior to Schultz-Hoff. This seems quite astounding since up until the year 2006, the German courts still applied the BAG's old case law, which excluded entitlement to paid annual leave for periods in which the employee suffered from continued illness. However, currently the main problem with regard

to Schultz-Hoff is the treatment of non-mandatory entitlement to paid annual leave. If an employment contract foresees an entitlement to paid annual leave above the statutory minimum, it is unclear whether this additional entitlement also follows the rules of Schultz-Hoff. The majority of German courts seem to follow an interpretation that also applies the rulings of Schultz-Hoff. Strictly speaking one could argue that entitlement to paid annual leave exceeding the statutory minimum is purely contractual and not based on national legislation, and therefore the question of whether forfeited paid annual leave is subject to the interpretation of the contract. In most cases (which do not contain a reference to the Federal Vacation Act), the interpretation will probably be that any entitlement to paid annual leave will be time-limited. From a practical point of view, since Schultz-Hoff there have been more cases of termination of employment because of illness. In the past, employers tended to simply wait for the convalescence of the employee to see whether or not he or she could continue to be employed. Because of Schultz-Hoff, entitlement to paid annual leave continues to increase, as do the employer's financial duties. As a consequence, employers now tend to terminate employment contracts in such situations significantly faster than they did in the past.

The Netherlands (Peter Vas Nunes): My reading of Schultz-Hoff is that it applies exclusively to the statutory minimum number of days of annual paid leave, i.e. 20 per year (for a full-time employee) and that the parties to an (individual or collective) employment contract are free to agree what they wish in respect of any additional days. The Dutch Parliament is presently debating how to amend the law in the light of Schultz-Hoff.

United Kingdom (Hannah Vertigen): The UK has seen several recent employment tribunal decisions applying the ECJ's rulings in the Stringer, Schultz-Hoff and Pereda cases, despite the fact that the UK legislation implementing the Working Time Directive is not, on a strict interpretation, consistent with those rulings. In Shah – v – First West Yorkshire Ltd (case no 1809311/09, unreported), for example, a tribunal went so far as to draft an additional paragraph for inclusion in the UK legislation to ensure that it was consistent with Pereda in allowing the carry-over of accrued paid annual leave where sickness has prevented the employee from taking it. However, other tribunal cases have preferred a strict interpretation of the UK legislation, which does not on its face allow the carry-over of annual leave from one leave year to the next. For example, in Khan – v – Martin McColl (case no 1702926/2009, unreported), an employee who had not exercised his right to take holiday during an extended period of sick leave was unable to make a claim in respect of that holiday. The tribunal reasoned that he had not been denied the opportunity to take the annual leave: he had merely not exercised his right to do so. As a result, annual leave from previous years was no longer available for him to take. All of these cases have been first instance decisions, which are not

binding on other tribunals or courts. As such, there is a need for a ruling from a higher court that deals comprehensively with the issues and properly addresses the disparity between the UK legislation and case law from the ECJ.

Footnotes

1 ECJ 20 January 2009 joined cases C-350/06 (Schultz-Hoff) and C-520/06 (Stringer), later confirmed in ECJ 10 September 2009 case C-207/08 (Pereda).

2 Most employees in Spain accrue 22 days' paid leave per year, almost always taken in the month of August, whether the employee wishes to take it then or not.

3 Mr Pascual would have had to take these three months' paid leave before the end of 2009, because in accordance with Spanish law, in the absence of an agreement with the employer or a collective agreement to the contrary, or a Schultz-Hoff-type situation or maternity rights, the right to take paid annual leave extinguishes if it is not taken before the end of the calendar year in which it accrued.

Subject: Vacation time and sick leave

Parties: Pascual – v – Fomento De Construcciones Y Contratas, S.A

Court: Tribunal Supremo (Supreme Court)

Date: 6 July 2010

Case number: Recurso 519/2010

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EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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