

SUMMARY

ECJ 4 October 2018, C-12/17 (Dicu), Maternity and parental leave, paid leave (RO)

A period of parental leave does not count within the reference period for the purpose of determining an employee's right to annual leave under Directive 2003/88/EC.

Tribunalul Botoşani, Ministerul Justiţiei – v – Maria Dicu, Romanian case

Legal background

Article 7(1) of Directive 2003/88/EC on the organisation of working time provides that: “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.”

The revised Framework Agreement on parental leave, annexed to Directive 2010/18/EU (‘Framework Agreement’) provides various rules on parental leave. Clause 2(2) grants leave of four months, in principle. Clause 5(2) stipulates that rights acquired or in the process of being acquired by the worker on the date on which parental leave starts, shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights shall apply.

The Romanian Labour Code provides that employment contracts can be suspended, inter alia during parental leave. It also stipulates that all rights and obligations are suspended during the suspension. However, certain rights persist, if this is provided for in special laws. The Labour Code as well as the ‘leave regulations for judges and prosecutors’ provide for the accrual of annual leave in various situations during maternity leave, but these provisions are silent on parental leave. The leave regulations for judges and prosecutors grant them 35 days of paid

annual leave.

Facts

Ms Dicu is a judge at the Botoşani Regional Court. In 2014, she took her entire annual leave entitlement. From 1 October 2014 to 3 February 2015 she was on maternity leave. She then took consecutive parental leave until 16 September 2015, followed by paid annual leave until 17 October 2015. When she returned to work, she requested what she said was her last five days of annual leave for the remainder of 2015. The court refused Ms Dicu's request as it said she had insufficient rights, as no leave had been accrued during parental leave. The court pointed out that Ms Dicu had in fact already taken seven days of leave from her 2016 entitlement.

Ms Dicu then brought proceedings against the court, claiming that she had accrued annual leave rights during her parental leave. The Court of Appeal of Cluj stayed proceedings and asked a question to the ECJ.

Question

Must Article 7 of Directive 2003/88 be interpreted as precluding a provision of national law, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not regard the amount of time spent by that worker on parental leave during that reference period as a period of actual work?

Consideration

The right to paid annual leave of at least four weeks is a particularly important principle of EU social law (*Maschek*, C-341/15) and is expressly set out in Article 31(2) of the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties. While Member States cannot make this right subject to any preconditions, the issue in this case is whether a period of parental leave must be treated as a period of actual work for the purpose of determining paid annual leave entitlement.

The purpose of Article 7 of Directive 2003/88 is to enable a worker to rest from carrying out the work he is required to do under his employment contract and to enjoy a period of relaxation and leisure (e.g. *Schultz-Hoff*, C-350/06). That purpose, which distinguishes paid annual leave from other types of leave with different purposes, is based on the premiss that the worker actually worked during the reference period. Therefore, the entitlement must be determined by reference to the periods of actual work completed under the employment contract.

Case law has demonstrated that, in certain specific situations in which the worker is unable to perform his duties, such as sick leave and maternity leave, absent workers must be treated equally to those who have in fact worked. However, these are different situations. Incapacity to work due to sickness is in principle unforeseeable and beyond the worker's control. Article 5(4) of ILO Convention No. 132 (to which recital 6 of Directive 2003/88 refers) states that absences from work due to illness for reasons beyond the control of the employee must be counted as period of service. On the other hand, taking parental leave is not unforeseeable and, in most cases, reflects the worker's wish to take care of his or her child (Kiiski, C-166/06). The parent is also not subject to illness and therefore in a different situation than resulting from an inability to work due to his health. His/her situation also differs from a worker who has enjoyed maternity leave. This is intended to protect a woman's biological condition during and after her pregnancy and also to protect the special relationship between a mother and her child during the period which follows pregnancy and childbirth, whilst not be hindered by multiple tasks which would be the result of the woman working.

Lastly, while a worker on parental leave remains a worker, the reciprocal obligations can be (and in this case: are) suspended. The period of parental leave can therefore not be treated as period of actual work. While it is, admittedly, apparent from the ECJ's settled case-law that a period of leave cannot affect the right to take another period of leave guaranteed, it cannot be inferred from that case law (which by the way must be seen in the context of overlapping periods of leave of different types) that Member States must include the period of parental leave in the reference period for determining the annual leave.

Ruling

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 is to be interpreted as not precluding a provision of national law, such as the provision at issue in the main proceedings, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

Creator: European Court of Justice (ECJ)

Verdict at: 2018-10-04

Case number: C-12/17