SUMMARY

ECJ 13 December 2018, C-385/17 (Hein), Paid leave

Torsten Hein – v – Albert Holzkamm GmbH & Co. KG, German case

Summary

Article 7(1) of Directive 2003/88 and Article 31(2) of the CFREU preclude national legislation which allows, for the purpose of calculating remuneration for annual leave, collective agreements to reflect days on which no work was performed due to short-time working, leading to a lower remuneration for annual leave than the normal remuneration. The temporal effect of this judgment cannot be limited.

Legal background

Article 7 of Directive 2003/88 provides that every worker has the right to four weeks of annual paid leave per year. Article 31(2) of the Charter provides for a right to annual paid leave as well. The German Federal law on Leave grants workers a right of annual paid leave of 24 working days per year. Following paragraph 11 of that law, the payment of that annual leave is based on the average earnings in the 13 weeks prior to the start of the week, not including any overtime compensation. It is possible to deviate from that last provision in a collective agreement. This is the case in the collective framework agreement for the construction industry. In short, the remuneration for annual leave is lower if the worker has not been able to work every day as a result of short-time work.

Facts

Mr Hein served as construction worker for Holzkamm. Their employment relationship was governed by the collective framework agreement for the construction industry. Mr Hein was on short-time work for 26 weeks in 2015. Consequently, his remuneration during annual leave was lower than his normal remuneration. Mr Hein believed, however, that periods of short-

time work could not influence his vacation remuneration. The referring court wished to know whether the legal provision enabling the collective agreement to agree on a lower vacation pay was in conformity with Article 7 of the Directive and Article 31(2) of the Charter. Therefore, it asked preliminary questions.

Questions

1. Must Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the Directive, remuneration for annual leave that is lower than the remuneration which he would have received had it been calculated on the basis of his average pay during the reference period without taking into account those reductions in earnings?

If the answer to that question is in the affirmative, that court is uncertain, in the context of the interpretation of the national legislation in accordance with EU law which it could have to carry out, as to the level to which remuneration for annual leave may be reduced without infringing EU law.

2. Is it possible to limit the temporal effects of the present judgment in the event that the ECJ rules that Article 7(1) of Directive 2003/88 and Article 31 of the Charter must be interpreted as precluding national legislation such as that at issue in the main proceedings. In the event that such a limitation is refused, the referring court asks the ECJ, in essence, whether EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case law of the highest national courts, which confirmed the lawfulness of the provisions concerning paid annual leave in the *Bundesrahmentarifvertrag für das Baugewerbe* (BRTV) (Federal collective framework agreement for the construction industry), will continue to apply.

Consideration

First question

First, it must be noted that the right to annual leave must be regarded as a particularly important principle of EU social law (*Maschek*, C-341/15). This right is expressly set out in Article 31(2) of the Charter, which has the same legal value as the Treaties. Second, it must be

noted that the right to annual leave and the right to payment on that account are two aspects of a single right (e.g. *Schultz-Hoff*, C-350/06). These two aspects must be examined.

The right to paid annual leave has the purpose of enabling the worker to rest from the work he has done and to enjoy a period of relaxation and leisure. That purpose is based on the premise that the worker actually worked. As Mr Hein did not perform actual work for 26 weeks, in principle only two weeks are governed by Article 7(1). It is always possible to grant more leave.

As regards the remuneration, under Article 7(1) workers must receive their normal remuneration for that period of rest, so that they are, regarding remuneration, in a position comparable to periods of work (*Robinson-Steele*, C-131/04). Although the structure of the ordinary remuneration is determined by Member States, that structure cannot affect the worker's right to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment (*Williams and Others*, C-155/10). In the present case, applying the short-time provisions results in a significant reduction of vacation pay, which consequently does not correspond to the normal remuneration.

While Holzkamm has argued that the system reducing holiday pay in case of short-time *inter alia* avoids dismissals, all rules must respect the limits of the Directive, as long as it concerns the minimum requirements. The purpose of paying the normal remuneration as holiday pay is to allow workers actually to take the leave. If the holiday pay is lower, a worker might be encouraged not to take leave, which is incompatible with Article 7.

Lastly, as regards overtime, it should be noted that, given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim based on Article 7(1). However, when obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration, the pay for that overtime work should be included in the normal remuneration within the meaning of Article 7(1) of the Directive.

Regarding the role of the national court, it must provide the legal protection of provisions of EU law. It must also ensure that those provisions are fully effective. This must be done by interpreting the law in, so far as possible, the light of the wording and purpose of the Directive. Although it is not possible to interpret *contra legem*, national courts must change established case law if necessary. In a dispute between private persons, national legislation must be interpreted in accordance with the Directive. In view of that answer, it is unnecessary to answer the second part of the question.

Second question

In principle, interpretations of a rule of EU law which are given by the ECJ must be understood and applied from the time of its entry into force. They must be applied even to legal relationships which arose and were established before the judgment (e.g. *Meilicke and Others*, C-292/04). Only in exceptional cases may the ECJ restrict such application. There are two criteria for this: (i) parties must have acted in good faith, and (ii) there should be a risk of serious difficulties. Still, applications of judgments have been limited only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it was apparent that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed (e.g. *Bidar*, C-209/03).

In the present case there is nothing in the file to suggest that the condition as to serious economic repercussions is satisfied. It is therefore not appropriate to limit the temporal effects of the present judgment. National courts are not allowed – if this could be the case based on national law – to limit claims based on the legitimate expectation of employers as regards case law of the highest national courts about the collective agreement, because this would in fact still limit the temporal application despite the ECJ's case law mentioned before.

Ruling

1. Article 7(1) 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 precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the Directive, remuneration for annual leave that is lower than the normal remuneration which he receives during periods of work. It is for the referring court to interpret the national legislation, so far as possible, in the light of the wording and the purpose of Directive 2003/88, in such a way that the remuneration for annual leave paid to workers in respect of the minimum annual leave provided for in Article 7(1) is not less than the average of the normal remuneration received by

those workers during periods of actual work.

2. It is not appropriate to limit the temporal effects of the present judgment and EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case law of the highest national courts, which confirmed the lawfulness of the provisions concerning paid annual leave in the *Bundesrahmentarifvertrag für das Baugewerbe* (BRTV) (Federal collective framework agreement for the construction industry), will continue to apply.

Creator: European Court of Justice (ECJ)
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