Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

8 November 2012*

(Social policy — Directive 2003/88/EC — Short-time working ('Kurzarbeit') — Reduction of paid annual leave on the basis of short-time working — Allowance in lieu)

In Joined Cases C-229/11 and C-230/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Arbeitsgericht Passau (Germany), made by decision of 13 April 2011, received at the Court on 16 May 2011, in the proceedings

Alexander Heimann (C-229/11),

Konstantin Toltschin (C-230/11)

v

Kaiser GmbH,

THE COURT (Fifth Chamber),

composed of M. Ilešič, acting as President of the Fifth Chamber, E.Levits (Rapporteur) and M. Safjan, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Heimann, by R. Zuleger, Rechtsanwalt,

— Mr Toltschin, by R. Zuleger, Rechtsanwalt,

— Kaiser GmbH, by C. Olschar, Rechtsanwalt,

— the German Government, by T. Henze, N. Graf Vitzthum and K. Petersen, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by M. van Beek and V. Kreuschitz, acting as Agents,

* Language of the case: German.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and 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 (OJ 2003 L 299, p. 9; 'Directive 2003/88').

2 The references have been made in proceedings between Mr Heimann and Mr Toltschin, respectively, and their former employer Kaiser GmbH ('Kaiser'), concerning their right to an allowance in lieu of paid annual leave not taken in 2009 and 2010.

Legal context

European Union law

3 Article 31 of the Charter provides:

'Fair and just working conditions

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.'

4 Article 1 of Directive 2003/88, entitled 'Purpose and scope', provides:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of … annual leave …

…'

5 Article 7 of Directive 2003/88, entitled 'Annual leave', is worded 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.'

6 Article 17 of Directive 2003/88 provides that the Member States may derogate from certain provisions of that directive. No derogation is allowed in respect of Article 7 of the directive.

German law

7 The Federal law on leave (Bundesurlaubsgesetz) of 8 January 1963 (BGBl. 1963, p. 2), as amended by Law of 7 May 2002 (BGBl. 2002 I, p. 1529, 'the BUrlG'), provides, in Articles 1 to 3, a right to paid annual leave of at least 24 days.

8 Article 7(4) of the BUrlG provides:

'If, because of the termination of the employment relationship, the leave can no longer be authorised in full or in part, an allowance in lieu thereof shall be paid.'

9 Under the third sentence of Article 11(1) of the BUrlG, reductions in pay during the calculation period resulting from short-time working, temporary employment, or work absences not attributable to any fault of the employee are to be disregarded for the purposes of calculating the leave payment.

The actions in the main proceedings and the questions referred for a preliminary ruling

10 Mr Heimann and Mr Toltschin were employed since 2003 and 1998, respectively, by Kaiser, a sub-contracting business in the motor industry which employs several hundred workers.

11 In 2009, owing to financial difficulties, Kaiser decided to reduce its staff. Accordingly, Mr Heimann and Mr Toltschin were dismissed with effect from 30 June and 31 August 2009, respectively.

12 In May 2009, Kaiser and its works council agreed to a social plan.

13 That social plan provided for the extension of the employment contracts of dismissed workers for one year from the date of their dismissal, while suspending, by the application of 'zero hours short-time working' ('Kurzarbeit Null'), the worker's obligation to work and the employer's obligation to pay him a salary.

14 The purpose of that extension of the employment contracts was to give the workers concerned the opportunity of receiving, for the year following their dismissal, a financial allowance. The Federal Employment Agency grants workers, during a period of 'zero hours short-time working', an allowance known as 'Kurzarbeitergeld'. That allowance, calculated and paid by the employer, replaces the salary of the worker in question for the duration of the short-time working.

15 When, on 30 June 2010, Mr Heimann's employment relationship came to an end, he claimed the sum of EUR 2 284.32 from Kaiser as financial compensation for 15 and 10 days of paid annual leave not taken in 2009 and 2010, respectively.

16 Mr Toltschin, whose employment relationship came to an end on 31 August 2010, claimed a right to financial compensation corresponding to 10 and 30 days of paid annual leave not taken in 2009 and 2010, respectively, representing a total amount of EUR 2 962.60.

17 Kaiser contends that, during the period of 'Kurzarbeit Null', the applicants in the main proceedings did not acquire any rights to paid annual leave.

18 The referring court envisages the application of the *pro rata temporis* rule, treating the 'Kurzarbeit Null' in the same manner as a reduction of a worker's obligation to work resulting from a contractually agreed move from full-time employment to part-time employment, involving a reduction of the paid annual leave to which a worker is entitled during the period of part-time employment.

19 However, being unsure whether that reasoning is in accordance with European Union law, the Arbeitsgericht Passau has decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 31(2) of the [Charter] or Article 7(1) of Directive [2003/88] be interpreted as precluding national legislation or practice according to which, if there is a reduction in the days to be worked each week as a result of a lawful order specifying short-time working, the entitlement to paid annual leave of a worker on short-time working is adjusted pro rata to reflect the ratio of the number of working days each week during the period of short-time working to the number of working days each week for a full-time worker and, as a result, during the period of short-time working, the short-time worker accrues a correspondingly reduced entitlement to annual leave?

(2) If the first question is answered in the affirmative:

Must Article 31(2) of the [Charter] or Article 7(1) of Directive [2003/88] be interpreted as precluding national legislation and practice according to which, if the number of days to be worked each week is reduced to zero as a result of a lawful order specifying “zero hours short-time working”, the entitlement to paid annual leave of a worker on short-time working is adjusted pro rata to nothing and, as a result, during the period of “zero hours short-time working”, the short-time worker does not accrue any entitlement to annual leave?’

20 By order of the President of the Court of 27 June 2011, Cases C-229/11 and C-230/11 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred

The first question

21 By its first question, the national court asks, essentially, whether Article 31(2) of the Charter or Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practice, such as a social plan agreed between the undertaking in question and its works council, under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*.

22 In that regard, it should be noted first of all that, according to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law (see Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* [2009] ECR I-179, paragraph 54, and Case C-337/10 *Neidel* [2012] ECR, paragraph 28). The right to paid annual leave is, as a principle of European Union social law, expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties (see Case C-214/10 *KHS* [2011] ECR I-11757, paragraph 37, and *Neidel*, paragraph 40).

23 Secondly, it must be recalled that the right to paid annual leave may not be interpreted restrictively (Case C-78/11 *ANGED* [2012] ECR, paragraph 18).

24 Thus, the Court has held that, with regard to workers on sick leave which has been duly granted, the right to paid annual leave conferred by Directive 2003/88 on all workers may not be made subject by a Member State to a condition that the worker should actually have worked during the reference period laid down by that State (*Schultz-Hoff and Others*, paragraph 41, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 20).

25 According to that case-law, it follows that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave. For the calculation of the allowance in lieu, the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive (*Schultz-Hoff and Others*, paragraph 62).

26 However, although it cannot be accepted that a worker's right to a minimum paid annual leave, guaranteed by European Union law, may be reduced where the worker could not fulfil his obligation to work during the reference period due to an illness, the case-law referred to in the previous paragraph cannot be applied *mutatis mutandis* to a situation of a worker on short-time working, such as that in the main proceedings.

27 As Kaiser correctly points out in its written observations, the situation of a worker unable to work as a result of an illness, and that of a worker on short-time working, are fundamentally different.

28 In that respect, it must be recalled, first, that, in the case in the main proceedings, the short-time working is based on a social plan which is part of a particular form of staff agreement, agreed between the employer and the representative of the undertaking's staff. That social plan provides for the suspension, on the basis of the short-time working, of the reciprocal obligations of the employee and the employer as regards work and salary.

29 Secondly, it must be stated that, during the period of short-time working ensuing from that social plan and consequently, foreseeable for the worker in question, the latter is free to rest or to devote himself to recreational and leisure activities. Accordingly, inasmuch as that worker is not subject to physical or psychological constraints caused by an illness, he is in a situation different from that resulting from an inability to work due to his state of health.

30 Thirdly, the purpose of the social plan, providing for short-time working, consists in forestalling the dismissal of the workers concerned for financial reasons and reducing the negative repercussions of such a dismissal on the workers. Linking the benefit of that advantage granted to the worker by national law to the employer's obligation to pay for paid annual leave during the period of the formal extension, for purely social reasons, of the employment contract, would be liable to make the employer reluctant to agree to such a social plan and, consequently, deprive the worker of its positive effects.

31 Although, therefore, the situation of a worker on short-time working following the implementation of a social plan, such as that at issue in the main proceedings, is different from that of a worker who is unable to work as a result of an illness, it must nevertheless be found that the situation of the former is comparable to that of a part-time worker.

32 In that respect, it must be noted that workers on short-time working have indeed, from a formal point of view, a full-time employment contract. However, as has been pointed out in paragraphs 13 and 28 of the present judgment, for the duration of short-time working, the reciprocal obligations of the employee and the employer as regards work and salary are suspended on the basis of the short-time working, or completely eliminated. It follows that the workers on short-time working must be qualified as 'temporary part-time workers', since their situation is *de facto* comparable to that of part-time workers.

33 With regard to part-time workers, the Court has provided clear indications as regards their right to paid annual leave.

34 In Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, paragraph 33, the Court evoked Clause 4.2 of the framework agreement on part-time work, concluded on 6 June 1997, which is included in the annex to Directive 97/81/EC of the Council, of 15 December 1997, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as modified by Directive 98/23/EC of the Council of 7 April 1998 (OJ 1998 L 131, p. 10), according to which, where it is appropriate, the rule of *pro rata temporis* applies to the conditions of employment of part-time workers. The Court has applied that rule to the grant of annual leave for a period of part-time employment, because for such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds.

35 However, it must be recalled that the Court has specified that this rule cannot be applied ex post to a right to annual leave accumulated during a period of full-time work. Thus, it cannot be inferred from the relevant provisions of Directive 2003/88 or from Clause 4.2 of the framework agreement on part-time work that national legislation may provide, among the conditions for the exercise of the right to paid annual leave, for the partial loss of the right to leave accumulated over a reference period (see *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraphs 33 and 34).

36 It follows from all the foregoing considerations that the answer to the first question must be that Article 31(2) of the Charter and Article 7(1) of Directive 2003/88 must be interpreted as meaning that they do not preclude national legislation or practice, such as a social plan agreed between an undertaking and its works council, under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*.

The second question

37 In the light of the reply given to the first question, it is not necessary to reply to the second question.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 31(2) of the Charter of Fundamental Rights of the European Union and 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 must be interpreted as meaning that they do not preclude national legislation or practice, such as a social plan agreed between an undertaking and its works council, under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis.*

[Signatures]