

JUDGMENT OF THE COURT (Grand Chamber)

22 November 2011 *

In Case C-214/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landesarbeitsgericht Hamm (Germany), made by decision of 15 April 2010, received at the Court on 4 May 2010, in the proceedings

KHS AG

v

Winfried Schulte,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and U. Löhmus, Presidents of Chambers, A. Rosas, E. Levits (Rapporteur), A. Ó Caoimh, L. Bay Larsen and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2011,

after considering the observations submitted on behalf of:

— KHS AG, by P. Brasse, Rechtsanwalt,

— Mr Schulte, by H.-J. Teuber, Rechtsanwalt,

— the German Government, by T. Henze, C. Blaschke and J. Möller, acting as Agents,

— the Danish Government, by V. Pasternak Jørgensen and S. Juul Jørgensen, acting as Agents,

— the European Commission, by F. Erlbacher and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2011,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation 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).
- ² The reference has been made in proceedings between KHS AG and Mr Schulte, a former employee, concerning the latter's request for an allowance in lieu of paid annual leave for the years 2006 to 2008 that he had not taken because he suffered a heart attack.

Legal context

Convention No 132 of the International Labour Organisation

- 3 According to Article 9(1) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised):

‘The uninterrupted part of the annual holiday with pay referred to in Article 8, paragraph 2, of this Convention shall be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than eighteen months, from the end of the year in respect of which the holiday entitlement has arisen.’

- 4 The ILO Convention has been signed by 14 Member States of the European Union, of which the Federal Republic of Germany is one.

European Union legislation

- 5 Recital 6 in the preamble to Directive 2003/88 reads:

‘Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.’

6 Article 1 of Directive 2003/88 provides:

‘Purpose and scope

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...

...’

7 Article 7 of that directive reads as follows:

‘Annual leave

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.'

- 8 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. No derogation is allowed with regard to Article 7 of the directive.

National rules

- 9 The Federal Law on leave (Bundesurlaubsgesetz) of 8 January 1963, as amended on 7 May 2002 ('the BUrlG'), provides in Paragraph 1, headed 'Leave entitlement':

'Every worker shall be entitled to paid recuperative leave in each calendar year.'

- 10 Paragraph 3 of the BUrlG, headed 'Duration of leave,' provides in subparagraph 1:

'Leave shall amount to at least 24 working days each year.'

- 11 Paragraph 7 of the BUrlG, headed ‘Timing, carrying-over and allowances in lieu of leave,’ provides in subparagraphs 3 and 4:

‘3. Leave must be authorised and taken in the course of the current calendar year. The carrying-over of leave to the next calendar year shall be permitted only if justified on compelling operational grounds or by compelling reasons relating to the worker himself. If leave is carried over it must be authorised and taken during the first three months of the following calendar year.

4. If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.’

- 12 Article 13 of the BUrlG provides that collective agreements may derogate from certain provisions of that law, including Paragraph 7(3) thereof, provided that such derogations are not to the detriment of the workers.

- 13 The Uniform General Collective Agreement for the Metal and Electrical Industry in North Rhine-Westphalia (Einheitlicher Manteltarifvertrag für die Metall- und Elektroindustrie Nordrhein-Westfalen) of 18 December 2003 (‘the EMTV’) provides in Paragraph 11, headed ‘Principles governing the granting of leave’:

‘1. Employees/apprentices have a right to paid leave in the course of each leave year in accordance with the following provisions. The leave year shall be the calendar year.

Leave entitlement shall lapse three months after the end of the calendar year, unless the worker unsuccessfully attempted to exercise that right or he could not take leave for operational reasons.

If leave could not be taken because of illness, entitlement to leave shall lapse 12 months after the end of the period referred to in the second subparagraph above.

...

3. Payment in lieu of unused leave shall be allowed only in the event of termination of the employment/apprenticeship relationship.'

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

- ¹⁴ Mr Schulte was employed from April 1964 as a locksmith for KHS AG and the company which it succeeded. The EMTV applied to his contract of employment. The entitlement to paid annual leave under the EMTV amounted to 30 days per annum.
- ¹⁵ In January 2002 Mr Schulte suffered a heart attack which left him seriously disabled and he was declared unfit for work. From October 2003 he received a pension on the ground of total invalidity. That continued to be the situation until 31 August 2008, the date on which Mr Schulte's employment relationship ended.

- 16 In March 2009 Mr Schulte brought an action before the Arbeitsgericht (Labour Court) Dortmund for payment of allowances in lieu of paid annual leave not taken during the reference periods corresponding to the calendar years 2006, 2007 and 2008.
- 17 The Arbeitsgericht Dortmund upheld the action in respect of those three periods in so far as the payment in lieu sought by Mr Schulte related to the minimum paid leave entitlement of 20 working days per annum under European Union law plus the five days per annum to which he was entitled under German law because he was severely disabled.
- 18 In its appeal against the decision taken by that court, KHS AG argued that Mr Schulte's entitlements to paid annual leave for the years 2006 and 2007 had lapsed, since the carry-over period provided for in the third subparagraph of Paragraph 11(1) of the EMTV had expired.
- 19 The Landesarbeitsgericht (Higher Labour Court) Hamm points out that, under the national legislation and the EMTV, the entitlements to paid annual leave for 2007 and 2008 still existed when the contract of employment ended and only entitlement to paid annual leave for 2006 was lost on account of the expiry of the carry-over period, which amounted to 15 months in total.
- 20 The national court does not however exclude the possibility that the loss, under the national rules, of entitlement to paid annual leave for 2006 is contrary to Article 7(1) of Directive 2003/88.

- ²¹ In those circumstances, the Landesarbeitsgericht Hamm decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is Article 7(1) of Directive 2003/88 ... to be interpreted as precluding national legislation and/or practices under which entitlement to minimum paid annual leave lapses at the end of the reference period and/or carry-over period even in the case where the worker has been unfit for work over a prolonged period (and that prolonged period of unfitness for work has the result that that worker could have accumulated entitlements to minimum leave for several years if the possibility of carrying over such entitlements had not been limited in time)?
- (2) If that question is answered in the negative, must the possibility of carrying over leave entitlement exist for a period of at least 18 months?’

Consideration of the questions referred

First question

- ²² By its first question, the national court asks, essentially, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or practices, such as collective agreements, which limit, by a carry-over period of 15 months on the expiry of which entitlement to paid annual leave lapses, the accumulation of

entitlements to such leave of a worker who is unfit for work for several consecutive reference periods.

23 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 from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) itself, a directive now codified by Directive 2003/88 (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 43; Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 48; and Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* [2009] ECR I-179, paragraph 22).

24 Further, the Court has already had the opportunity to examine the implementation and the conditions for application of this principle of entitlement to paid annual leave by competent national authorities in the case of workers denied entitlement to periods of paid annual leave because they were on sick leave that did not exceed the duration of the reference periods applicable under the relevant national law (*Schultz-Hoff and Others*, paragraph 19).

25 In the course of that examination the Court observed that a provision of national law setting out a carry-over period for annual leave not taken by the end of the reference period aims, as a rule, to give a worker who has been prevented from taking his annual leave an additional opportunity to benefit from that leave. The laying down of such a period forms part of the conditions for the exercise and implementation of the right to paid annual leave and therefore falls, as a rule, within the competence of the Member States (see *Schultz-Hoff and Others*, paragraph 42).

- ²⁶ Thus, the Court held that Article 7(1) of Directive 2003/88 does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a reference period or of a carry-over period. However, the Court attached to that finding of principle the condition that a worker who has lost his right to paid annual leave must have actually had the opportunity to exercise the right conferred on him by that directive (see *Schultz-Hoff and Others*, paragraph 43).
- ²⁷ It is to be noted that a worker who, like the applicant in the main proceedings in relation to 2006, is on sick leave throughout the reference period and beyond the carry-over period laid down by national law, is denied any period giving him the opportunity to benefit from his paid annual leave.
- ²⁸ Although it follows from the abovementioned case-law that a national rule laying down a carry-over period cannot provide that a worker's right to paid annual leave will lapse without him actually having had the opportunity to exercise that right, that conclusion must none the less be qualified in specific circumstances such as those in the main proceedings.
- ²⁹ Otherwise, a worker, such as the applicant in the main proceedings, who is unfit for work for several consecutive reference periods, would be entitled to accumulate, without any limit, all the entitlements to paid annual leave that are acquired during his absence from work.
- ³⁰ A right to such unlimited accumulation of entitlements to paid annual leave, acquired during such a period of unfitness for work, would no longer reflect the actual purpose of the right to paid annual leave.

- ³¹ The right to paid annual leave, as laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union and in Article 7 of Directive 2003/88, has the dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (see *Schultz-Hoff and Others*, paragraph 25).
- ³² In this connection, it is true that the Court has stated that, while the positive effect of paid annual leave for the safety and health of the worker is deployed fully where that leave is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period (Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, paragraph 30, and *Schultz-Hoff and Others*, paragraph 30).
- ³³ None the less, it should be pointed out that the right to paid annual leave acquired by a worker who is unfit for work for several consecutive reference periods can reflect both the aspects of its purpose, as set out in paragraph 31 above, only in so far as the carry-over does not exceed a certain temporal limit. Beyond such a limit annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure.
- ³⁴ In consequence, in light of the actual purpose of the right to paid annual leave directly conferred on every worker by European Union law, a worker who is unfit for work for several consecutive years and who is prevented by national law from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period.

- ³⁵ With regard to the carry-over period beyond which the right to paid annual leave may lapse where entitlements to paid annual leave are accumulated during a period of unfitness for work, it is necessary to assess, in the light of Article 7 of Directive 2003/88 and taking the above considerations into account, whether a period for carrying over entitlement to paid annual leave set at 15 months under national provisions or practices, such as collective agreements, may reasonably be described as a period beyond which paid annual leave ceases to have its positive effect for the worker as a rest period.
- ³⁶ In that context, the following points are to be noted.
- ³⁷ The right to paid annual leave is, as a principle of European Union social law, not only particularly important, as noted in paragraph 23 above, but is also 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.
- ³⁸ It follows that, in order to uphold that right, the objective of which is the protection of workers, any carry-over period must take into account the specific circumstances of a worker who is unfit for work for several consecutive reference periods. Thus, the carry-over period must inter alia ensure that the worker can have, if need be, rest periods that may be staggered, planned in advance and available in the longer term. Any carry-over period must be substantially longer than the reference period in respect of which it is granted.
- ³⁹ That carry-over period must also protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail.

- 40 In the present instance, the carry-over period laid down in the third subparagraph of Paragraph 11(1) of the EMTV is 15 months, which is longer than the reference period to which it relates, a factor which distinguishes the present case from *Schultz-Hoff and Others*, where the carry-over period was six months.
- 41 It should also be noted in that regard that, under Article 9(1) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised), the uninterrupted part of the annual holiday with pay must be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than 18 months, from the end of the year in respect of which the holiday entitlement has arisen. That rule may be construed as being based on the consideration that when the periods for which it provides expire the purpose of the leave entitlement may no longer be fully achieved.
- 42 Therefore, in view of the fact that, according to recital 6 in its preamble, Directive 2003/88 took into account the principles of the International Labour Organisation with regard to the organisation of working time, calculation of the carry-over period should take into consideration the purpose of the right to annual leave as resulting from Article 9(1) of that convention.
- 43 In the light of the foregoing it may reasonably be considered that a period of 15 months for carrying over the right to paid annual leave, such as the period at issue in the main proceedings, is not contrary to the purpose of that right, in that it ensures that the latter retains its positive effect for the worker as a rest period.
- 44 Consequently, the answer to the first question is that Article 7(1) of Directive 2003/88 must be interpreted as not precluding national provisions or practices, such as collective agreements, which limit, by a carry-over period of 15 months on the expiry of

which the right to paid annual leave lapses, the accumulation of entitlements to such leave of a worker who is unfit for work for several consecutive reference periods.

Second question

- ⁴⁵ In view of the answer to the first question, there is no need to answer the second question.

Costs

- ⁴⁶ 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 (Grand Chamber) hereby rules:

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 not precluding national provisions or practices, such as collective agreements, which limit, by a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses, the

accumulation of entitlement to such leave of a worker who is unfit for work for several consecutive reference periods.

[Signatures]