



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

3 May 2012*

(Social policy — Directive 2003/88/EC — Working conditions — Organisation of working time — Right to paid annual leave — Allowance in lieu in the event of sickness — Public servants (firemen))

In Case C-337/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Frankfurt am Main (Germany), made by decision of 25 June 2010, received at the Court on 7 July 2010, in the proceedings

Georg Neidel

v

Stadt Frankfurt am Main,

THE COURT (Fifth Chamber),

composed of M. Safjan, President of the Chamber, E. Levits (Rapporteur) and A. Borg Barthet, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2012,

after considering the observations submitted on behalf of:

- Georg Neidel, by K. Schmidt-Strunk, Rechtsanwalt,
- the German Government, by J. Möller, acting as Agent,
- the Danish Government, by C. Vang, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the United Kingdom Government, by S. Ossowski, acting as Agent,
- the European Commission, by V. Kreuzschitz and M. van Beek, 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 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 Mr Neidel, the applicant in the main proceedings, and his former employer, the Stadt Frankfurt am Main (the city of Frankfurt am Main) concerning the applicant's right to an allowance in lieu of paid annual leave which had not been taken at the time of his retirement.

Legal context

European Union legislation

- 3 Article 1 of Directive 2003/88, headed '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...

...

 3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of [Council] Directive 89/391/EEC [of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1)], without prejudice to Articles 14, 17, 18 and 19 of this Directive.

...'
- 4 Article 7 of Directive 2003/88, headed '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.'
- 5 Article 15 of Directive 2003/88, headed 'More favourable provisions', provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

- 6 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. However, no derogation is allowed with regard to Article 7 of that directive.

National legislation

- 7 Paragraph 106 of the Hessen Law on Civil and Public Servants (Hessisches Beamtengesetz) provides that each civil or public servant is to be entitled to paid annual leave.

- 8 Paragraph 50(1) of that law provides:

‘Permanent civil and public servants shall retire at the end of the month in which they reach the age of 65 years (age limit).’ For public servants in the professional fire service, the age limit is fixed at 60 years instead of 65 years.

- 9 Under Paragraph 21(4) of the Law on the Status of Civil and Public Servants (Beamtenstatusgesetz), retirement terminates a person’s status as a civil or public servant.

- 10 The Hessen Leave Regulation (Hessische Urlaubsverordnung) (the ‘HUrlVO’) specifies the beginning and end of the leave year and the coming into being and extinction of the entitlement to annual leave.

- 11 Paragraph 8(1) of the HUrlVO provides:

‘...If their status as civil or public servant ends because they have reached the statutory age limit, the leave entitlement of the persons concerned shall amount to six-twelfths of the annual entitlement if their status as civil or public servants ends in the first half of the leave year and to twelve-twelfths if it ends in the second half.’

- 12 Paragraph 9(2) of the HUrlVO, headed ‘Splitting and carrying over’ is worded as follows:

‘As a general rule, leave shall be taken in the leave year. Leave that has not been commenced within nine months after the end of the leave year shall be forfeited.’

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

- 13 Mr Neidel, who was born on 2 August 1949, began work with the public services of the Stadt Frankfurt am Main in 1970. There he held the position of fireman and then that of chief fireman. He had the status of a public servant.

- 14 As of 12 June 2007, Mr Neidel was unfit for service on medical grounds. At the end of August 2009, having reached the age of 60, he retired and has since been in receipt of a pension, which currently amounts to EUR 2 463.24 per month.

- 15 In view of the fact that the regular weekly working time for firemen employed by the Stadt Frankfurt am Main differs from the five-day working week, Mr Neidel’s annual leave entitlement in each of the years from 2007 to 2009 was 26 days. In addition, he was entitled to compensatory leave, calculated in hours, for public holidays falling, in the calendar year concerned, on days that were normally working days.

- 16 In respect of these arrangements, the parties in the main proceedings take the view that Mr Neidel was entitled to a total of 31 days of leave for 2007, of 35 days for 2008 and of 34 days for 2009. The claimant took only 14 days of that leave in 2007. He therefore retained an entitlement to 86 days of leave not taken, which is equivalent to EUR 16 821.60 gross.

- 17 Mr Neidel's request for an allowance in lieu of leave not taken to be paid to him in that amount was rejected by a decision of the Stadt Frankfurt am Main on the ground that German civil and public service law makes no provision for financial compensation for leave not taken. According to the Stadt Frankfurt am Main, Article 7(2) of Directive 2003/88 is not applicable to civil and public servants. Furthermore, it maintains that retirement does not constitute a situation in which 'the employment relationship is terminated' within the meaning of that provision.
- 18 The Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main), before which Mr Neidel brought an action against that decision and which has doubts as regards the merits of the interpretation of Article 7 of Directive 2003/88 put forward by the Stadt Frankfurt am Main, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Does Article 7 of Directive 2003/88 ... also apply to the employment relationships of public servants?
 2. Does Article 7(1) of Directive 2003/88 ... also cover entitlements to annual leave where national law provides for such an entitlement of more than four weeks?
 3. Does Article 7(1) of Directive 2003/88 ... also apply to entitlements to leave of absence granted under national law in addition to annual leave in compensation for work performed on public holidays owing to the irregular distribution of working time?
 4. Can a public servant who has retired base an entitlement to payment in lieu of annual leave directly on Article 7(2) of Directive 2003/88 ... if he has been prevented from working by sickness and has not therefore been able to take leave in the form of leave of absence from work?
 5. Can such an entitlement to payment in lieu be at least partly precluded by the premature forfeiture of entitlement to leave prescribed in national law?
 6. Does the scale of the entitlement to payment in lieu based on Article 7(2) of Directive 2003/88 ... extend only to the minimum leave of four weeks guaranteed by Article 7(1) of Directive 2003/88/EC, or does the entitlement to a payment in lieu also extend to the additional leave entitlements for which national law provides? Do those extended leave entitlements also include entitlements to leave of absence arising solely from a particular distribution of working time?

Consideration of the questions referred

The first question

- 19 By its first question, the national court asks, in essence, whether Article 7 of Directive 2002/88 applies to a public servant carrying out the activities of a fireman in normal circumstances.
- 20 In that regard, it must be borne in mind, first of all, that, according to Article 1(3) of Directive 2003/88, read in conjunction with Article 2 of Directive 89/391, to which it refers, those directives are to apply to all sectors of activity, both public and private, in order to encourage improvements in the safety and health of workers at work and to regulate certain aspects of the organisation of their working time.
- 21 Consequently, the Court has held that Directive 89/391 must necessarily be broad in scope, with the result that the exceptions to that scope, provided for in the first subparagraph of Article 2(2), must be interpreted restrictively (see, to that effect, *inter alia*, Case C-303/98 *Simap* [2000] ECR I-7963,

paragraphs 34 and 35, and Judgment of 12 January 2006 in Case C-132/94 *Commission v Spain*, paragraph 22). Those exceptions were adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases the gravity and scale of which are exceptional (Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 55, and order in Case C-519/09 *May* [2011] ECR I-2761, paragraph 19).

- 22 As none of those circumstances is relevant to the situation of a public servant such as the applicant in the main proceedings, his activity falls within the scope of Directive 2003/88 (see, to that effect, order in Case C-52/04 *Personalrat der Feuerwehr Hamburg* [2005] ECR I-7111, paragraphs 57 to 59).
- 23 It must be noted, next, according to settled case-law, the concept of ‘worker’ within the meaning of Article 45 TFEU has a specific independent meaning and must not be interpreted narrowly. Any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15).
- 24 In that regard, it must be stated that the order for reference does not contain any particulars of such a kind as to raise doubts as to the fact that the employment relationship between Mr Neidel and his employer, the Stadt Frankfurt am Main, had the essential features of an employment relationship set out in paragraph 23 of the present judgment.
- 25 It must, lastly, be stated that the Court has held that, in the absence of any distinction in the exception in Article 45(4) TFEU, concerning employment in the public service, it is of no interest whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of European Union law (see Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5).
- 26 In the light of the foregoing considerations, the answer to the first question is that Article 7 of Directive 2003/88 must be interpreted as applying to a public servant carrying out the activities of a fireman in normal circumstances.

The fourth question

- 27 By its fourth question, the national court asks, in essence, whether Article 7(2) of Directive 2003/88 is to be interpreted as meaning that a public servant is entitled, on retirement, to an allowance in lieu of paid annual leave not taken on account of the fact that he was prevented from working by sickness.
- 28 In that regard, it should be pointed out that, as is clear from the very wording of Article 7(1) of Directive 2003/88, a provision from which that directive allows no derogation, every worker is entitled to paid annual leave of at least four weeks. That right to paid annual leave, which, according to the settled case-law of the Court, must be regarded as a particularly important principle of European Union social law, is therefore granted to every worker, whatever his state of health (see Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* [2009] ECR I-179, paragraph 54). That concept of ‘worker’ applies, as was stated in the answer given to the first question, to a public servant such as the applicant in the main proceedings.

- 29 On termination of the employment relationship, it is in fact no longer possible to take paid annual leave. In order to prevent this impossibility leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu (*Schultz-Hoff and Others*, paragraph 56).
- 30 Consequently, the Court has held 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 (*Schultz-Hoff and Others*, paragraph 62).
- 31 In the present case, the retirement of a civil or public servant terminates his employment relationship and the national law furthermore provides, as was stated in paragraph 9 of this judgment, that it terminates his status as a civil or public servant.
- 32 Consequently, the answer to the fourth question is that Article 7(2) of Directive 2003/88 must be interpreted as meaning that a public servant is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness.

The second, third and sixth questions

- 33 By those questions, which it is appropriate to examine together, the national court asks, in essence, whether Article 7 of Directive 2003/88 is to be interpreted as precluding provisions of national law conferring on a public servant an entitlement to further paid leave, in addition to the entitlement to a minimum paid annual leave of four weeks, which do not provide for the payment of an allowance in lieu if a public servant who is retiring has been unable to use that additional entitlement because he was prevented from working by sickness.
- 34 In that regard, it must be borne in mind that the Court has held that Directive 2003/88 does not preclude provisions of national law giving entitlement to more than four weeks' paid annual leave, granted under the conditions for entitlement to, and granting of, the right to paid annual leave laid down by that national law (judgment of 24 January 2012 in Case C-282/10 *Dominguez*, paragraph 47).
- 35 As appears expressly from Article 1(1) and (2)(a) and from Articles 7(1) and 15 of Directive 2003/88, the purpose of the directive is simply to lay down minimum safety and health requirements for the organisation of working time and it does not affect Member States' right to apply provisions of national law more favourable to the protection of workers (*Dominguez*, paragraph 48).
- 36 Consequently, as it is permissible for Member States to provide, depending on the reason for the worker's absence on sick leave, for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in Directive 2003/88 (*Dominguez*, paragraph 50), it is for them, first, to decide whether to confer on public servants an entitlement to further paid leave in addition to the entitlement to a minimum paid annual leave of four weeks, and either provide or not provide for an entitlement, in respect of a public servant who is retiring, to an allowance in lieu if that person has been unable to use that additional entitlement because he was prevented from working by sickness, and, secondly, to lay down the conditions for the granting of that entitlement.
- 37 It follows that the answer to the second, third and sixth questions is that Article 7 of Directive 2003/88 must be interpreted as not precluding provisions of national law conferring on a public servant an entitlement to further paid leave in addition to the entitlement to a minimum paid annual leave of four weeks, which do not provide for the payment of an allowance in lieu if a public servant who is retiring has been unable to use that additional entitlement because he was prevented from working by sickness.

The fifth question

- 38 By its fifth question, the national court asks, in essence, whether Article 7(2) of Directive 2003/88 precludes a provision of national law which restricts, by a carry-over period of nine months on expiry of which the entitlement to paid annual leave lapses, the right of a public servant who is retiring to cumulate the allowances in lieu of paid annual leave not taken because he was unfit for service.
- 39 In that regard, it must be stated at the outset that in the judgment in Case C-214/10 *KHS* [2011] ECR I-11757, paragraph 35, the Court took the view that 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, it is necessary to assess, in the light of Article 7 of Directive 2003/88, whether that period 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.
- 40 In that context, the Court stated that the right to paid annual leave is, as a principle of European Union social law, not only particularly important, 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 (*KHS*, paragraph 37).
- 41 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 and must be substantially longer than the reference period in respect of which it is granted (*KHS*, paragraph 38).
- 42 In the main proceedings, the carry-over period laid down in Paragraph 9(2) of the HUrlVO is nine months, that is to say a period shorter than the reference period to which it relates.
- 43 In the light of the foregoing considerations, the answer to the fifth question is that Article 7(2) of Directive 2003/88 must be interpreted as precluding a provision of national law which restricts, by a carry-over period of nine months on expiry of which the entitlement to paid annual leave lapses, the right of a public servant who is retiring to cumulate the allowances in lieu of paid annual leave not taken because he was unfit for service.

Costs

- 44 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:

1. **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 must be interpreted as applying to a public servant carrying out the activities of a fireman in normal circumstances.**
2. **Article 7(2) of Directive 2003/88 must be interpreted as meaning that a public servant is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness.**

3. **Article 7 of Directive 2003/88 must be interpreted as not precluding provisions of national law conferring on a public servant an entitlement to further paid leave in addition to the entitlement to a minimum paid annual leave of four weeks, which do not provide for the payment of an allowance in lieu if a public servant who is retiring has been unable to use that additional entitlement because he was prevented from working by sickness.**
4. **Article 7(2) of Directive 2003/88 must be interpreted as precluding a provision of national law which restricts, by a carry-over period of nine months on expiry of which the entitlement to paid annual leave lapses, the right of a public servant who is retiring to cumulate the allowances in lieu of paid annual leave not taken because he was unfit for service.**

[Signatures]