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ECLI:EU:C:2018:799

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

4 October 2018 (*)

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Right to paid annual leave — Directive 2010/18/EU — Revised Framework Agreement on parental leave — Parental leave not regarded as a period of actual work)

In Case C-12/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 11 October 2016, received at the Court on 10 January 2017, in the proceedings

Tribunalul Botoşani,

Ministerul Justiţiei

v

Maria Dicu,

intervening parties:

Curtea de Apel Suceava,

Consiliul Superior al Magistraturii,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz and E. Levits (Rapporteur), Presidents of Chambers, A. Borg Barthet, A. Arabadjiev, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2018,

after considering the observations submitted on behalf of:

– the Consiliul Superior al Magistraturii, by M. Ghena, acting as Agent,

– the Romanian Government, initially by R.-H. Radu, O.-C. Ichim, L. Liţu and E. Gane, and subsequently by C.-R. Canţăr, O.-C. Ichim, L. Liţu and E. Gane, acting as Agents,

– the German Government, by D. Klebs and T. Henze, acting as Agents,

– the Estonian Government, by A. Kalbus, acting as Agent,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and G. De Socio, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. van Beek and C. Hödlmayr, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2018,

gives the following

Judgment

1 This request 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 request has been made in connection with a dispute between the Tribunalul Botoșani (Regional Court, Botoșani, Romania) and the Ministerul Justiției (Ministry of Justice, Romania), on the one hand, and Ms Maria Dicu, on the other, concerning the determination of her annual paid leave entitlement for 2015.

Legal context

European Union law

Directive 2003/88

3 Recital 6 of Directive 2003/88 states as follows:

'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.'

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

‘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 that directive, entitled ‘Annual leave’, states 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 15 of the directive is worded as follows:

‘This Directive shall not affect Member State’ 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.’

7 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of the directive. However, no derogation is permitted in respect of Article 7 of the directive.

Directive 2010/18/EU

8 The revised Framework Agreement on parental leave concluded on 18 June 2009 (‘the Framework Agreement on parental leave’), annexed to Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13), provides, in Clause 2(1) thereof, as follows:

‘This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child …’

9 Clause 2(2) of the Framework Agreement on parental leave provides:

‘The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.’

10 Clause 5 of that agreement is worded as follows:

‘1. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

2. 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, including any changes arising from national law, collective agreements and/or practice, shall apply.

3. Member States and/or social partners shall define the status of the employment contract or employment relationship for the period of parental leave.

…’

11 Clause 8(1) of the Framework Agreement on parental leave states that the Member States may apply or introduce more favourable provisions than those set out in the agreement.

Romanian law

12 The Legea nr. 53/2003 privind Codul muncii (Law No 53/2003 establishing the Labour Code), in the version applicable at the material time (‘the Labour Code’), provides in Article 10 thereof as follows:

‘An individual employment contract is an agreement under which a natural person, referred to as a worker, undertakes to work for and under the direction of an employer, a natural or legal person, for remuneration, referred to as a salary.’

13 Under Article 49(1), (2) and (3) of the Labour Code:

‘(1) The individual employment contract may be suspended by operation of law, by agreement between the parties or by a unilateral act on the part of one of the parties.

(2) Following suspension of the individual employment contract, the worker shall suspend the provision of work and the employer shall suspend the payment of remuneration.

(3) During the period of suspension, the rights and obligations of the parties, other than those referred to in paragraph (2), may, however, persist, if so provided in special laws, in the applicable collective labour agreement, in individual employment contracts or in rules of procedure.’

14 According to Article 51(1)(a) of the Labour Code:

‘An individual employment contract may be suspended on the initiative of the worker in the following cases:

(a) parental leave to care for a child under the age of 2 …’

15 Article 145(4) to (6) of that code provides:

‘(4) In determining the duration of the period of annual leave, periods of temporary incapacity for work and periods of maternity leave, maternal risk leave and leave to take care of a sick child shall be considered periods of actual work.

(5) Where the temporary incapacity for work or the maternity leave, maternal risk leave or leave to take care of a sick child occurs during a period of annual leave, that period shall be interrupted, with the result that the worker shall be allowed to take the remaining annual leave once the [situation giving rise to the interruption] has come to an end. Where that is not possible, the days of annual leave not taken shall be rescheduled.

(6) The worker shall be entitled to annual leave even where the temporary incapacity for work persists, in accordance with the conditions laid down by law, for a full calendar year, and the employer shall be obliged to grant the annual leave within 18 months of the beginning of the year following that in which the worker was on sick leave.'

16 Article 2(1) and (2) of the Hotărârea Consiliului Superior al Magistraturii nr. 325/2005 pentru aprobarea Regulamentului privind concediile judecătorilor și procurorilor (Decision No 325/2005 of the Governing Council of the Judiciary approving the regulations on the leave of judges and prosecutors) provides as follows:

'(1) Judges and prosecutors shall be entitled to 35 days' paid annual leave. Such entitlement may not be relinquished or limited.

(2) The duration of the annual leave provided for in [the regulations on the leave of judges and prosecutors] shall be calculated by reference to days worked during a calendar year. In determining the duration of annual leave, periods of temporary incapacity for work and periods of maternity leave, maternal risk leave and leave to take care of a sick child shall be considered periods of actual work.'

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

17 Ms Dicu is a judge at the Tribunalul Botoșani (Regional Court, Botoșani). In 2014, she first took her entire annual leave entitlement and was then on maternity leave from 1 October 2014 to 3 February 2015. Subsequently, she took parental leave from 4 February 2015 until 16 September 2015, during which period her employment relationship was suspended. Lastly, she took 30 days' paid annual leave from 17 September to 17 October 2015.

18 Pursuant to Romanian law, which provides for 35 days' paid annual leave, Ms Dicu asked the court to which she had been appointed to grant her the five remaining days of paid annual leave for 2015, which she intended to take on working days over the end-of-year holiday period.

19 The Tribunalul Botoșani (Regional Court, Botoșani) refused that request on the ground that, under Romanian law, the duration of paid annual leave is commensurate with the period of time actually worked during the current year and, in that regard, that the period of parental leave she took in 2015 could not be regarded as a period of actual work for the purpose of determining her paid annual leave entitlement. The Tribunalul Botoșani (Regional Court, Botoșani) also indicated that the paid annual leave taken by Ms Dicu between 17 September and 17 October 2015 in respect of 2015 included 7 days' leave taken in advance in respect of 2016.

20 Ms Dicu brought proceedings against the Tribunalul Botoșani (Regional Court, Botoșani), the Curtea de Apel Suceava (Court of Appeal, Suceava, Romania), the Ministry of Justice and the Consiliul Superior al Magistraturii (Governing Council of the Judiciary) before the Tribunalul Cluj (Regional Court, Cluj, Romania), seeking a declaration that, for the purpose of determining her paid annual leave entitlement for 2015, the period she took as parental leave is to be regarded as a period of actual work.

21 By judgment of 17 May 2016, the Tribunalul Cluj (Regional Court, Cluj) granted Ms Dicu's application. The Tribunalul Botoșani (Regional Court, Botoșani) and the Ministry of Justice appealed against that decision before the referring court.

22 In those circumstances, the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) has stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does Article 7 of Directive 2003/88/EC preclude a provision of national law which, for the purpose of determining the duration of a worker's annual leave, does not consider a period of parental leave to care for a child under the age of two to be a period of actual work?'

Consideration of the question referred

23 By its question, the referring court seeks to ascertain, in essence, whether Article 7 of Directive 2003/88 is to be interpreted as 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 regard the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

24 In that regard, it should be noted that, as is apparent from the wording of Article 7(1) of Directive 2003/88 itself, every worker is entitled to paid annual leave of at least four weeks, a right which, according to the Court's established case-law, must be regarded as a particularly important principle of EU social law (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 25 and the case-law cited).

25 Moreover, that right, which is enjoyed by all workers, is expressly set out 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 (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 33 and the case-law cited).

26 It should further be noted that, while Member States are not entitled to make the very existence of the right to paid annual leave, which derives directly from Directive 2003/88, subject to any preconditions whatsoever (see, inter alia, judgments of 26 June 2001, BECTU*,* C-173/99, EU:C:2001:356, paragraph 53; of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 28; and of 29 November 2017, King, C-214/16, EU:C:2017:914, paragraph 34), the issue raised in the present 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.

27 In that regard, it is appropriate to recall the purpose of the right to paid annual leave, conferred on every worker by Article 7 of Directive 2003/88, which is to enable 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, inter alia, judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 25; of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraph 31; and of 30 June 2016, Sobczyszyn, C-178/15, EU:C:2016:502, paragraph 25).

28 That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is based on the premiss that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes that the worker has been engaged

in activities which justify, for the protection of his safety and health, as provided for in Directive 2003/88, his being given a period of rest, relaxation and leisure. Accordingly, entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract (see, to that effect, judgment of 11 November 2015, Greenfield, C-219/14, EU:C:2015:745, paragraph 29).

29 Admittedly, it is apparent from established case-law that, in certain specific situations in which the worker is unable to perform his duties as he is, for instance, on duly certified sick leave, the right to paid annual leave cannot be made subject by a Member State to a condition that the worker has actually worked (see, inter alia, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 20 and the case-law cited). Thus, with regard to entitlement to paid annual leave, workers who are absent from work on sick leave during the reference period are to be treated in the same way as those who have in fact worked during that period (see, inter alia, judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 40).

30 The same applies as regards workers on maternity leave, who are, as a result, unable to perform the duties required by virtue of their employment relationship and whose right to paid annual leave must be guaranteed when they are on maternity leave; it must be possible to exercise that right during a different period from that in which they are on maternity leave (see, to that effect, judgment of 18 March 2004, Merino Gómez, C-342/01, EU:C:2004:160, paragraphs 34, 35 and 38).

31 However, the case-law cited in the previous two paragraphs cannot be applied *mutatis mutandis* to the situation of a worker, such as Ms Dicu, who took parental leave during a reference period.

32 It should be noted, first of all, that incapacity for work owing to sickness is, as a rule, not foreseeable (judgment 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 51) and beyond the worker's control (see, to that effect, judgment of 29 November 2017, King, C-214/16, EU:C:2017:914, paragraph 49). As the Court previously stated in paragraph 38 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay, as revised, the principles of which must be taken into account, as stated in recital 6 of Directive 2003/88, when interpreting that directive, counts, in Article 5(4) thereof, absences on account of illness among absences from work 'for such reasons beyond the control of the employed person concerned' which must be 'counted as part of the period of service'. On the other hand, where a worker takes parental leave, that is not unforeseeable and, in most cases, is a reflection of the worker's wish to take care of his or her child (see, to that effect, judgment of 20 September 2007, Kiiski, C-116/06, EU:C:2007:536, paragraph 35).

33 Next, inasmuch as a worker on parental leave 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 (see, by analogy, judgment of 8 November 2012, Heimann and Toltschin, C-229/11 and C-230/11, EU:C:2012:693, paragraph 29).

34 The situation of a worker on parental leave is equally different to that of a worker who has exercised her right to maternity leave. Maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by ensuring that the relationship is not disturbed by the need to perform multiple tasks which would

result if the woman continued to work at the same time (see, to that effect, judgments of 18 March 2004, *Merino Gómez*, C-342/01, EU:C:2004:160, paragraph 32, and of 20 September 2007, *Kiiski*, C-116/06, EU:C:2007:536, paragraph 46).

35 Lastly, while, admittedly, a worker on parental leave remains, during that period, a worker for the purposes of EU law (judgment 20 September 2007, Kiiski, C-116/06, EU:C:2007:536, paragraph 32), the fact nonetheless remains that where, as in the present case, such a worker's employment relationship is suspended pursuant to national law, as permitted by Clause 5(3) of the Framework Agreement on parental leave, the reciprocal obligations of the employer and the worker as regards work and salary are correspondingly suspended temporarily, in particular the obligation on the latter to perform the duties required of him or her in connection with that relationship (see, by analogy, judgment of 8 November 2012, Heimann and Toltschin, C-229/11 and C-230/11, EU:C:2012:693, paragraph 28).

36 It follows that, in a situation such as that in the main proceedings, the period of parental leave taken by the worker concerned during the reference period cannot be treated as a period of actual work for the purpose of determining that worker's entitlement to paid annual leave under Article 7 of Directive 2003/88.

37 It should also be noted that, while it is, admittedly, apparent from the Court's settled case-law that a period of leave guaranteed by EU law cannot affect the right to take another period of leave guaranteed by that law which has a different purpose from the former (see, to that effect, judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 26 and the case-law cited), it cannot be inferred from that case-law, which was developed in the context of situations where the periods to which those two respective types of leave related overlapped or coincided, that Member States are required to treat a period of parental leave taken by a worker during the reference period as a period of actual work for the purpose of determining that worker's paid annual leave entitlement under Directive 2003/88.

38 It follows from all the foregoing considerations that the answer to the question referred is that Article 7 of Directive 2003/88 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.

Costs

39 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 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.**

[Signatures]

* Language of the case: Romanian.