2023/39

During holidays an employee is entitled to receive full salary, including all the components normally paid, in accordance with the judgments of the ECJ (IT)

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Summary

The Italian Supreme Court has held that salary paid during holidays must include all the components that are normally paid to the employee when they work. This decision is in line with the judgments of the ECJ and with the purpose of the Working Time Directive 2003/88/EC.

Legal background

The definition of remuneration to be paid during holidays is greatly influenced by the interpretation of the ECJ, which has held that the words 'paid annual leave' included in Article 7(1) of Directive 2003/88 means that for the duration of the annual leave the employee is entitled to the same salary they normally receive when they work (*Schultz-Hoff* and *Stringer*, Joined Cases C-350/06 and C-520/06).

It is necessary that the employer grants to the employees the same level of salary that they normally receive when they work on the assumption that a decrease of salary during holidays involves a disincentive for the employees to exercise the right to take annual leave; this would be contrary to the European rules (*Williams – v – British Airways*, Case C-155/10, and *Hein*, Case C-385/17).

Indeed, any incentive or solicitation which allows an employee to waive their right to holidays is contrary also to the EU rules according to which the employee is entitled to actual rest, with a view to ensuring effective protection of their health and safety (*Koch Personaldienstleistungen*, Case C-514/20).

The Italian Supreme Court also confirmed that the salary due during annual holidays includes all the items that are connected to the job and the personal and professional status of the employee. The same principles apply to the payment in lieu of unused holidays: this payment must also include all the items of the remuneration normally paid to the employee and that are connected to the job performed and the personal and professional status of the employee.

In compliance with the European definition of salary, with reference to the staff of an airline, it was clarified that in the calculation of the salary to be paid during holidays, all the items normally paid must be included and for this a collective bargaining agreement providing for the contrary was considered null and void (see Case C-155/10 and Case C-385/17 above). This is because the rule of the collective bargaining agreement provided for a definition of salary during holiday contrary to the European definition of salary, according to which the salary to be paid during holidays must be comparable to the salary enjoyed when they perform the job.

Facts

Several machinists of a company dealing with public transportation claimed that the salary they were entitled to receive during holidays was calculated taking into account some special items of remuneration ('*indennità di Condotta*' and '*indennità di riserva*') provided for in the collective bargaining agreement as well as other items such as the payment for night work and work during Sundays or during public holidays. The court of first instance held that the items provided for in the collective bargaining agreement ('*indennità di Condotta*' and '*indennità di riserva*') must be included in the calculation of the salary because, according to the definition of those special items in the collective bargaining agreement, they are part of the normal salary to which the employee is entitled. Furthermore, if they were excluded from the calculation of the salary during holidays, the salary for the employees when they enjoy holidays would be decreased by between 13.5% and 19%. This

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doi: 10.5553/EELC/187791072023008004011

decrease would represent a disincentive for an employee from taking holidays.
The court of first instance then specified that not *all* elements of salary should be included in holiday pay, but only the items related to the performance of the work and to their status.

Judgment

The Supreme Court confirmed the decision of the court of first instance, on the basis that the salary due during annual holidays includes all the items directly connected with the job and with the personal and professional status of the employee.
Therefore, the court of first instance was correct in reaching its decision because it:

– had verified that the exclusion of pay components could dissuade workers from taking their holidays; and
– had rightly considered which elements were to be included in holiday pay (which amounted to 25–30% of the normal salary).

Finally, the Supreme Court also confirmed that the decisions of the ECJ have binding effect on national courts that are therefore obliged to construe national legislation in compliance with the purpose of the European legislation with the aim of pursuing the results provided for by the European Union.

Commentary

The decision represents an important confirmation of European law even if this is contrary to a national collective bargaining agreement: indeed, the latter, if it is not in line with European law, must be considered null and void.
European law must prevail and an Italian court must construe national legislation and internal collective bargaining agreements in line with EU law and with the decisions of the ECJ.

Comment from other jurisdiction

Germany (Pia Wieberneit, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the amount of salary paid during holidays is based on the average salary earned by the employee in the last thirteen weeks before the start of holiday. All remuneration components that the employee receives for their work must be taken into account. This includes, for example, bonuses for night work and additional allowances for special work. According to European law, these remuneration components must also be paid during holidays. However, the remuneration paid for overtime within the reference period of thirteen weeks, including any overtime bonus, is not to be taken into account. This is because overtime pay is not part of regular pay and is an exception. The situation is different, however, if overtime is no longer an exception but occurs so regularly that the overtime pay is to be considered as part of regular remuneration.
If there are provisions on salary paid during holidays in a collective agreement that deviate from this legal basis, a distinction must be made as to whether the provision in the collective agreement relates to the statutory minimum holidays or additional holidays granted on the basis of the collective agreement. A provision in a collective agreement that stipulates that the employee receives less salary during holidays than provided for in the Federal Leave Act (*Bundesurlaubsgesetz*) is not applicable to the statutory minimum holidays. This is because the remuneration that would normally be earned if the employee continued to work without taking holidays must be guaranteed.
In light of the above, the decision in Germany would have been similar because the European principles on salary paid during holidays must also be observed in Germany. German courts take this into account in their case law. For example, the ECJ decision *Koch Personaldienstleistungen*, Case C-514/20, mentioned in the case report is a ruling that was issued following a request from the German Federal Labour Court. The case law of the ECJ has subsequently found its way into German case law.

Subject: Paid Leave
Parties: Trenord S.r.l. – v – Baccali Luca, Berardocco Luca Valerio, Botticelli Marco, Ghio Stefano, lo Muzio Marco, Petruzzelli Michele, Varavallo Antonio
Court: *Corte di Cassazione* (Italian Supreme Court)
Date: 26 June 2023
Case number: 18160/2023

doi: 10.5553/EELC/187791072023008004011