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French state held liable for failing to transpose Article 7§1 of the Working Time Directive (FR)

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Summary

The French state was held liable by the Administrative Court of Clermont-Ferrand for failing to transpose Article 7§1 of EU Directive 2003/88/EC on working time.

Facts

Mr C, an employee of Goodyear Dunlop Tires France, went on non-occupational sick leave from 2 April to 31 October 2014. Pursuant to the provisions of the company agreement applicable within Goodyear Dunlop Tires, the period of 2 April to 2 June 2014 was taken into account in calculating his annual leave entitlement, whereas the remainder of his sick leave was disregarded, in accordance with Article L. 3141-5 of the French Labour Code. Mr C brought a claim before the Administrative Court of Clermont-Ferrand, asking the Court to hold the French state liable for failing to have transposed Article 7§1 of Directive 2003/88/EC on working time into national law and asking it to pay him € 932.75 in compensation, which was equivalent to payment for 12.5 vacation days, plus an amount of € 800 for moral prejudice.

Judgment

The Administrative Court of Clermont-Ferrand in its decision of 6 April 2016 upheld the employee's claim and ordered the French state to compensate Mr C for the loss incurred.

> The Court held that "*transposition into national law of European Directives, which is an obligation under the Treaty on the functioning of the European Union, is pursuant to Article 88-1 of the Constitution, a constitutional obligation […]. According to Article 7§1 of Directive 2003/88/EC on working time, member States shall take the necessary measures to ensure that every employee has annual paid leave of at least four weeks in accordance with the terms and conditions of their national laws and/or practices. It follows from the provisions of this Article, as interpreted by the European Court of Justice in its decisions C-350/06 and C-520/06 of 20 January 2009 and its decision C-282/10 of 24 January 2012, that there should be no distinction based on the sick employee's reason for absence for the application of the principle that all employees on sick leave following an accident in the workplace or elsewhere, or following an illness of any nature or origin whatsoever, are entitled to annual paid leave of at least four weeks […]*".

The Court further indicated that the provisions of Article 7§1 of Directive 2003/88/EC could not give rise to any obligation on the employer, as they had not been transposed into national law. However, Article L. 3141-5 of the Labour Code provides that periods when the employment contract is suspended by reason of either a work accident or a non-occupational illness are not considered to be working periods for determining annual leave entitlement, but if an employee is on non-occupational sick leave for a year, this means that he or she will be prevented from having at least four weeks of paid annual leave, which makes this Article incompatible with Article 7§1 of Directive 2003/88/EC and engages the responsibility of the French state.

The Court therefore granted compensation to Mr C, equivalent to the difference between the minimum four-week period of annual leave provided under Directive 2003/88/EC and the amount of annual leave granted to him by Goodyear Dunlop Tires in 2014. The Court estimated the correct figure to be 6.5 days and it required the French State to pay him € 485. However, it dismissed his claim for moral damages for lack of evidence.

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Commentary

According to Article L. 3141-3 of the Labour Code, employees should acquire 2.5 days off work per month of full time effective work. Certain periods of absence count as effective work periods for the purpose of calculating annual leave entitlement, but this does not include periods of absence for non-occupational sick leave. This means that French labour Code does not allow employees to acquire paid vacation days during non-occupational sick leave.

Article L.3141-5 is therefore incompatible with Article 7§1 of Directive 2003/88/EC, which guarantees a minimum of four weeks of paid annual leave to all employees and is interpreted by the ECJ as permitting no distinction between employees who are on sick leave and those who are not.[1] Indeed in 2012, in the *Dominguez* case,[2] the ECJ highlighted that since Directive 2003/88/EC does not make any distinction between employees who are absent from work on sick leave and those who have worked during the same period, it follows that the right conferred by the Directive on all employees to have paid annual leave cannot be made subject to a condition that an employee has worked during the reference period.

Nevertheless, EU directives have no horizontal effect and the courts cannot interpret domestic law in the light of the wording and the purpose of a directive in order to achieve results sought by that directive, if doing so would result in an interpretation *contra legem*. In other words, the French courts cannot simply dismiss the provisions of Article L.3141-5, as they remain applicable to the employee/employer relationship. The Supreme Court took this position in a decision dated 13 March 2013[3], holding that "*Directive 2003/88/EC cannot, in a dispute between individuals, exclude the effects of national provisions which differ from the Directive and the employee cannot claim compensation in lieu of paid leave during a period of suspension of the employment contract which is not covered by Article L. 3141-5 of the Labour Code*".

That said, according to European case law (including the *Dominguez* case), if an employee has suffered loss because of failure to transpose a directive, it is possible to engage the responsibility of the state for non-compliance of its national law with EU law. This is what happened in this case.

The employee brought a claim before the Administrative Court of Clermont-Ferrand asking the Court to pass judgment against the French state for failing to transpose Article 7§1 of Directive 2003/88/EC into national law and to compensate him for his loss by paying him € 932.75, which equates to 12.5 vacation days plus € 800 for moral prejudice. In its decision of 6 April 2016, the Administrative Court of Clermont-Ferrand held that failure to implement Article 7§1 was likely to engage the responsibility of the French state and ordered it to compensate the employee for the number of lost paid holidays during his non-occupational sick leave. For the Administrative Court, the potential loss was up to the four weeks guaranteed by the Directive. The loss of the fifth week of paid holidays was not covered. Here, the Court estimated the compensation at € 485 in total, corresponding to 6.5 paid holidays.

This is the first time the French state has been held to account for failure to transpose Article 7§1. The Supreme Court had suggested in its 2013 annual report that the legislator should amend Article L. 3141-5 of the Labour Code "*to avoid infringement proceedings against France and actions for damages against the State based on defective implementation of the Directive*."

The decision of the Administrative Court of Clermont-Ferrand could encourage other claimants to act against the state, even if the compensation may be, as in this case, relatively modest.

To avoid a snowball effect, timely intervention of the legislator is in order. This may also be the moment to amend Article L.3141-26 of the Labour Code, which deprives employees dismissed for gross misconduct of their paid leave indemnity, as this was recently ruled unconstitutional by the Constitutional Court in a decision of 2 March 2016.[4]

Finally, another article of the French Labour Code for which the state could be liable is Article L.3121-4, which in its current form is incompatible with Article 2§1 of Directive 2003/88/EC. According to the ECJ,[5] the daily commuting time between the home and first and last customer of itinerant employees should be paid as working time by Article 2§1 of Directive 2003/88/EC, whereas Article L.3121-4[6] does not include itinerant employees. It is probably just a matter time before claims are brought by itinerant employees against the French state to address this.

Comment from other jurisdictions

Germany (Paul Schreiner): A comparable case has been ruled on in Germany: the well-known *Schultz-Hoff* case. The German courts had argued for several years that if an employee was unfit for work for the whole cal-

1. ECJ 20 January 2009, aff. C-350/06 Schultz-Hoff; ECJ 24 January 2012, Case C-282/10 Dominguez.
2. ECJ 24 January 2012, aff. 282/10 Dominguez.
3. Cass. Soc., 13 March 2013, No. 11-22285.
4. Constitutional Court 2 March 2016, No. 2015-523.
5. ECJ 10 September 2015, C-266/14.
6. Article L.3121-4 provides that "*the commuting time between home and place of work is not considered as effective working time. However, if it is unusual, that is to say if it exceeds the normal travel time between the employee's home and his usual place of work, it must be compensated with rest days or consideration […]*".

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endar year, no holiday entitlement accrued, which in part also was based on the fact that German law provides for a forfeiture clause according to which holiday entitlement lapses if not taken during the first three months of the following calendar year. When the ECJ held that this was in violation of European principles, the German Courts followed their lead. Not only do they now believe an employee can accrue holiday even if he was on sick leave for a full calendar year, but the forfeiture clause does not apply in such cases. The forfeiture clause is, however, still valid in any other situation in which annual leave accrued but was not taken. In contrast to the French courts, the German courts have interpreted the law in a way that respects EU law and therefore there is no liability on the German state.

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