2. According to the Court's settled case-law, workers cannot rely on Article 11(2) and (3) of Directive 92/85 to claim that they should continue to receive full pay while on maternity leave as though they were actually working. It is thus necessary to distinguish the concepts of 'payment' referred to in Article 11(2) and (3) of Directive 92/85 from the concept of 'full pay' received when the person is actually working and which, in the present case, includes the special judicial allowance related to expenses that ordinary judges incur in the performance of their professional functions (§ 31-32).
3. As is clear from Directive 92/85 and the case-law of the Court, the legislature of the European Union wished to ensure that, during her maternity leave, the worker should receive an income of an amount at least equivalent to that of the allowance provided for by national social security legislation in the event of a break in her activities on health grounds. When a worker is absent from work because she is on maternity leave, the minimum protection required by Article 11(2) and (3) of Directive 92/85 does not therefore require that the person concerned should continue to receive full pay (§ 33-34).
4. Benefits which the employer pays, whether under legislative provisions or an employment contract, to a worker on maternity leave constitute pay within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117. According to the Court's settled case-law, however, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations. Women taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work (§ 38-39).
5. Therefore, the principle of equal pay between men and women laid down in Article 119 of the EC Treaty (subsequently Article 141 EC) and set out in detail in Directive 75/117 neither requires that women should continue to receive full pay during their maternity leave nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardise the purpose of maternity leave. However, to the extent that it is calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by the reference pay and the end of maternity leave, as from the date on which they take effect. It follows from that case-law that the mere fact that an ordinary judge was not entitled to the special judicial allowance during a period of compulsory maternity leave, unlike her male colleagues who were working, does not constitute discrimination on the grounds of sex within the meaning of Article 119 of the EC Treaty (§ 40-41).

Judgment

Article 119 of the EC Treaty (subsequently Article 141 EC), Article 1 of Council Directive 75/117 […] and Article 11(2)(b) and 11(3) of Council Directive 92/85 […] must be interpreted, in a situation where the Member State concerned did not provide for the maintenance of all the elements of pay to which an ordinary judge was entitled before her maternity leave, as not precluding a national law, such as that at issue in the main proceedings, under which, in the case of a period of compulsory maternity leave taken prior to 1 January 2005, an ordinary judge is not entitled to receive an allowance in respect of costs that ordinary judges incur in the performance of their professional functions, provided that the worker received, during that period, an income in an amount at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on grounds connected with her state of health, this being a matter for the national court to determine.

ECJ 20 July 2016, case C-341/15 (Maschek), Paid leave

Hans Maschek – v – Magistratsdirektion de Stadt Wien – Personalstelle Wiener Stadtwerke

Summary

The fact that a worker retires voluntarily does not deprive him of the right to payment in lieu of paid annual leave he was unable to use up on account of sickness.

Facts

Mr Maschek was employed by the City of Vienna. He was unwell from 15 November to 31 December 2010. Subsequently, he was placed on paid garden leave for the remainder of his term of employment. Initially, it was agreed that he would retire early on 30 September 2011 at age 62. Later his early retirement date was moved to 30 June 2012, when he was 63. Shortly before he retired (the date is not revealed), he became sick again. He took the position that this fact made it impossible for him to take leave. He claimed payment in lieu. His employer declined, basing its refusal on a provision of law providing (i) that, upon termination of employment, the employee is entitled to payment in lieu "where he did not, by his own actions, use up his enti-

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tlement to annual leave" and (ii) that the employee shall be responsible for not having used up his entitlement to annual leave where he leaves as a result of retirement at his request.

National proceedings

The Administrative Court of Vienna, in which Mr Maschek lodged his claim, referred three questions to the ECJ on the interpretation of Article 7 of Directive 2003/88: "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".

ECJ's findings

1. The fact that a worker terminateshis employment relationship at his own request has no bearing on his entitlement to receive, where appropriate, an allowance in lieu of paid annual leave, which he has not been able to use up before the end of his employment relationship. Article 7(2) of Directive 2003/88 must therefore be interpreted as precluding national legislation such as that at issue, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his entitlement to paid annual leave before the end of that employment relationship (§ 25-29).
2. Article 7(2) of Directive 2003/88 precludes national legislation which provides 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 (see ECJ's judgments in *Schultz-Hoff* and *Neidel*). It follows that, as regards the period between 15 November and 31 December 2010, in which it is established that Mr Maschek was on sick leave and was not able, for that reason, to use up, during that period, his entitlement to the annual paid leave which he had acquired, he was entitled to an allowance in lieu of paid annual leave not taken (§ 30-33).
3. In order to ensure the effectiveness of the right to annual leave, it must be held that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness (§ 34- 37).
4. Although the purpose of Directive 2003/88 is to lay down minimum health and safety requirements for the organisation of working time, which Member States must respect, they have the right to introduce more favourable provisions for workers. Thus, Directive 2003/88 does not preclude domestic provisions giving entitlement to more than the minimum period of four weeks' paid annual leave, granted under the conditions for entitlement to, and granting of, the right to paid annual leave laid down by national law. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for Member States to determine the conditions for granting that entitlement (§ 38-39).

Judgment

Article 7(2) of Directive 2003/88 […] must be interpreted:

- as precluding national legislation such as that at issue in the main proceedings, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his rights to paid annual leave before the end of that employment relationship;
- as meaning that a worker is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness;
- as meaning that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness;
- as meaning that it is, on the one hand, for Member States to decide whether to grant workers additional paid leave in addition to the minimum annual paid leave of four weeks provided for in Article 7 of Directive 2003/88. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for the Member States to determine the conditions for granting that entitlement.

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