

tors such as the period during which the workers contributed, the total number of contributions paid or the hours worked, since those factors are considered for horizontal workers, regardless whether they work full time or part-time.

## Ruling

Clause 4(1) of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time [...], does not apply to a contributory unemployment benefit such as that at issue in the main proceedings.

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding legislation of a Member State which, in the case of ‘vertical’ part-time work, excludes days not worked from the calculation of days in respect of which contributions have been paid, and therefore reduces the unemployment benefit payment period, when it is established that the majority of vertical part-time workers are women who are adversely affected by such legislation.

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## ECJ 9 November 2017, C-306/16 (Maio), Working time and leave

Conley King – v – The Sash Window Workshop Ltd, Richard Dollar, Portuguese case

### Summary

The weekly rest period for workers laid down in Article 5 of Directive 2003/88 does not necessarily need to be granted on the day following six consecutive working days.

### Legal framework

The EU regulation concerned in this case is Directive 2003/88, which sets out provisions to ensure the protection of health and safety of workers. It imposes an obligation on Member States to take the measures necessary to ensure that every worker benefits from a legally defined rest period. In this regard, Article 2 of Directive 2003/88 distinguishes the following definitions:

- ‘*Working time*’: any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;
- ‘*Rest period*’: any period which is not working time.

Article 5 of Directive 2003/88 states that Member States are obliged to take measures necessary to ensure that every worker is entitled to a minimum uninterrupted rest period of 24 hours for each *seven-day period*. This Article also refers to Article 3 of Directive 2003/88, which states that Member States must take the measures necessary to ensure that every worker benefits from a minimum daily rest period of 11 consecutive hours per *24-hour period*.

### Facts

From 1991 to 2014, Mr Maio Marques Da Rosa was employed by a company called Varzim Sol, which owns and runs a casino in Portugal. The casino is open every day, except on 24 December, from 15:00 to 3:00 from Sunday to Thursday and from 16:00 to 4:00 on the other days. The work of Mr Maio Marques Da Rosa rotated between work periods and rest periods, during which the employees took turns working at the same work stations. During 2008 and 2009, Mr Maio Marques Da Rosa sometimes worked for seven consecutive days. On March 16 2014, the employment contract of Mr Maio Marques Da Rosa was terminated as a result of a collective redundancy procedure. Subsequently, he brought an action before a Portuguese court seeking an order for Varzim Sol to pay him € 18,602 in damages, because the seven days worked ought to have been paid as overtime and he had not benefited from any additional rest days. He also requested payment of € 7,679 on the grounds that the second day of weekly rest had not always been granted to him on time.

### National proceedings

Following the dismissal of his action, Mr Maio Marques Da Rosa appealed to the Tribunal da Relação of Porto. This Court had doubts regarding the interpretation of Article 5 of Directive 2003/88 and, therefore, asked the ECJ whether the minimum uninterrupted weekly rest period of 24 hours to which a worker is entitled must be provided no later than the day following a period of six consecutive working days.

### Questions put to the ECJ

1. Should Article 31 of the Charter, Article 5 of Directive 93/104 and the first paragraph of Article 5 of Directive 2003/88 be interpreted as requiring the minimum uninterrupted rest period of 24 hours

to which a worker is entitled to be provided no later than the day following a period of six consecutive working days?

2. Must Article 16(a) of Directive 2003/88 be interpreted as meaning that the two days' leave to which that Article confers entitlement may be apportioned freely over the 14-day reference period?

## ECJ's findings

As a preliminary point, the ECJ notes that the facts of this particular case – which took place between January 2004 and January 2010 – fall partly under Directive 93/104 (which was in force until August 2004) and partly under Directive 2003/88 (which entered into force on 2 August 2004). However, the ECJ ruled that the questions referred would be examined and answered based on Directive 2003/88, on the basis that the relevant provisions of both Directives are materially identical.

In answering the first question, the ECJ first of all stated that Article 5 of Directive 2003/88 grants workers an entitlement to a minimum uninterrupted rest period, but does not specify at what point in time this minimum rest period must be taken. For that reason, the ECJ ruled that Member States have a degree of flexibility when it comes to timing. According to the ECJ, this interpretation of Article 5 is supported by the various language versions – including English, German and Portuguese – that emphasise that the minimum rest period must be granted ‘*per*’ each seven-day period.

Secondly, the ECJ ruled that the term ‘seven-day period’ may be regarded as a ‘reference period’, that is a set period within which a certain number of consecutive rest hours must be provided irrespective of when those rest hours are granted. According to the ECJ, the this definition is borne out by a combined reading of Article 16(b) and 22(1)(a) of Directive 2003/88. Under the first provision, the Member States may lay down a reference period not exceeding four months; the second provision provides that no employer may require a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b). The ECJ therefore ruled that an equal division of the number of work hours is not required and that the minimum uninterrupted rest period of 24 hours (plus the 11 hours' daily rest) may be provided at any time within each seven-day period.

Thirdly, the ECJ observed that this interpretation of Article 5 not only benefits the employer but also the worker, since it enables several consecutive rest days to be given to the worker at the end of one reference period and the start of the following one. Lastly, the ECJ stated that Directive 2003/88 merely establishes minimum standards for the protection of workers concerning the organisation of working time. Member States may therefore apply or introduce provisions more favourable

to the protection of the health and safety of workers, or facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable.

In conclusion, the ECJ ruled that the answer to the first question was that Article 5 of Directive 2003/88 must be interpreted as not requiring the minimum uninterrupted weekly rest period of 24 hours to which a worker is entitled to be provided no later than the day following a period of six consecutive working days, but requires that rest period to be provided within each seven-day period.

The ECJ ruled the second question inadmissible as the referring court had not set out the precise reasons that led it to raise the question. The ECJ clarified that it is essential for a national court to provide at least some explanation as to why it is asking for an interpretation of particular EU provisions the link between those provisions and the national law in question (ECJ 27 September 2017, *Pušár*, case C-73/16, paragraph 120).

## Ruling

Article 5 of Directive 2000/34/EC must be interpreted as not requiring the minimum uninterrupted weekly rest period of 24 hours to which a worker is entitled to be provided no later than the day following a period of six consecutive working days, but requires that rest period to be provided within each seven-day period.

## ECJ 29 November 2017, case C-214/16 (Conley King), Paid leave

Conley King – v – The Sash Window Workshop Ltd, Richard Dollar, British case

## Summary

The Working Time Directive precludes provisions that establish the right to be paid only after leave has been taken. Further, the right to paid leave (or a corresponding payment at the end of the employment relationship) cannot lapse if the employee has been deterred from taking the leave.

## Legal background

Article 7(1) of Directive 2003/88/EC (the ‘Working Time Directive’) stipulates that “Member States shall