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, *Puškár*, 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

doi: 10.5553/EELC/187791072018003001014

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." In addition: "The minimum period for annual leave may not be replaced by a payment in lieu, except where the employment relationship is terminated."

The Working Time Directive has been implemented in the UK by means of the Working Time Regulations. The Working Time Regulations grant employees and workers paid annual leave, in two separate articles (one for leave and one for pay), or a corresponding amount for untaken leave at the end of the employment relationship. If an employer refuses to grant this paid leave, a worker must in principle complain within three months of the date on which the leave (should) begin.

Facts and national proceedings

Mr King worked for the Sash Window Workshop based on a 'self-employed commission-only contract'. He was paid based on commission and any leave was unpaid. Once his employment relationship was terminated, he claimed payment of all leave, including any leave that had lapsed. His employer refused and Mr King started proceedings. During these proceedings, the court established that he was a worker and hence entitled to annual paid leave. The referring court doubted whether the short claiming period of three months was in line with the Working Times Directive and asked some preliminary questions.

Questions put to the ECJ

1. Must Article 7 of Directive 2003/88 and the right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights of the European Union (the 'Charter') be interpreted as meaning that, in the case of a dispute between a worker and his employer as to whether the worker has the right to paid annual leave under the first of those articles, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave?
2. Must Article 7 of Directive 2003/88 be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave?

ECJ's findings

The right to paid annual leave is a particularly important principle of EU Social Law, the implementation of which must be confined within the limits laid down by the Directive. Although Member States may lay down conditions for the exercise and implementation of the right to paid annual leave, this may not be made subject to any preconditions whatsoever. Directive 2003/88 treats the right to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement that the leave be paid is to put the worker, during such leave, in a position which is, as regards salary, comparable to periods of work. The very purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. However, a worker who faces uncertainty about remuneration would not be able to fully benefit from that leave. Moreover, such circumstances may dissuade him or her from taking leave. Any practice or omission of an employer that may deter a worker from taking leave is therefore incompatible with the Working Time Directive. Against that background, the right to paid leave cannot depend on a factual assessment of the worker's financial situation. The UK legislation brought Mr King in the position that he must first take his leave before it could be established whether this was to be paid (and only after a claim). This is not an effective remedy and therefore contrary to the Working Time Directive.

As regards carrying over and accumulating paid annual leave rights, Mr King did not take leave for reasons beyond his control. As has been previously held in the Schultz-Hoff judgment (C-350/06 and C-520/06), the right to annual paid leave may not be lost (not even after a carry-over period) when a worker has been prevented from using his rights.

Similarly, a worker is entitled to a corresponding amount if this leave is still untaken upon termination of the employment relationship (Article 7(2)). While it has been held that the Directive does not prevent carry-over periods (such as the 15-month period in KHS, C-214/10), this has been in the case of illness. In that context, and given the problems an employer may encounter from long absences, a carry-over period may be allowed. Similarly, there must be specific circumstances which justify exceptions to the rule that leave does not lapse if the worker has not been able to take his leave. Such specific circumstances did not exist in the case at hand. Mr King's employer had in fact benefitted from him not taking leave. It was also not relevant that his employer originally thought that Mr King was not entitled to leave.

doi: 10.5553/EELC/187791072018003001014

Ruling

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, and the right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave under the first of those articles, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave.

Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

ECJ 7 december 2017, case C-189/16 (Zaniewicz-Dybeck), Free movement, Social insurance

Boguslawa Zaniewicz-Dybeck – v – Pensionsmyndigheten, Swedish case

Summary

A minimum benefit as defined in Article 50 of Regulation No 1408/71 may not be calculated in accordance with Articles 46(2) and 47 of that Regulation, but benefits receive in other Member States may be taken into account in calculating the minimum benefit.

Legal context

Chapter 3 of Regulation No 1408/71 (Coordination Regulation) contains provisions on 'old age and death (pensions)', in particular for those who have been subject to the law of two or more Member States. To the extent relevant for this case, Articles 45, 46 and 47 stipulate that a Member State shall take account, where necessary, periods of insurance or of residence spent under the law of any other Member State. The competent institution of a Member State must calculate the 'theoretical amount' of the benefit that would have been accrued if the person had been covered by the law of that Member State. Applying the *pro rata* method, the theoretical amount forms basis of the eventual benefit to which a worker is entitled. Article 47(1)(d) stipulates that periods of accrual completed under the law of other Member States should be calculated based on the average earnings recorded during the periods of insurance completed under the law of the home Member State ('pro rata calculation'). Further, Article 50 stipulates that the Member State in which the worker resides, must supplement the benefits received by the worker until this reaches the minimum amount of benefit, if the Member State has such a minimum benefit.

A Swedish pension consists of three parts, namely the graduated pension, the supplementary pension and the guaranteed pension. The former two are based on the actual income of the person. The latter aims to provide basic protection for those with little or no income and is a tax-funded residence-based benefit. Those who not have been insured for the full 40 years are entitled to a *pro rata* amount. The internal instructions of the Swedish National Insurance fund stipulate that, in calculating the theoretical amount, each insurance period completed in another Member State must be given a notional value corresponding to the average pensionable value of the insurance periods completed in Sweden.

Facts

Mrs Zaniewicz-Dybeck (Zaniewicz), a Polish national, had worked for 19 years in Poland. She then moved to Sweden, where she lived for 24 years and worked there for 23 years before reaching pensionable age. She then applied for a guaranteed pension. (The predecessor of) the Swedish Pension Authority rejected her application. It applied a *pro rata* calculation, which resulted in a theoretical income above the guaranteed pension. Mrs Zaniewicz appealed against this decision, as the benefits she would receive were much lower than they would have been owing, essentially, to the fact that the pension system in Poland is less beneficial. The National Insurance Fund, the Administrative Court and the Administrative Court of Appeal all dismissed her claims. The referring court wondered whether coming up with a notional amount of benefit from another Member State was the right way to proceed, given the character of the guaranteed pension, and it therefore decided to ask preliminary questions.

doi: 10.5553/EELC/187791072018003001014