

ECJ Court Watch – Landmark Rulings

ECJ 6 November 2018, joined cases C-569/16 (Bauer) and C-570/16 (Willmeroth), Paid leave

Stadt Wuppertal – v – Maria Elisabeth Bauer and
Volker Willmeroth – v – Martina Broßonn, German
case

Legal background

Article 7(1) of (Working Time) Directive 2003/88/EC provides that any worker should receive a minimum of four weeks' annual paid leave per year. Article 7(2) states that this minimum period of annual leave cannot be replaced by an allowance in lieu, except where the employment relationship is terminated. Article 31(2) of the Charter of Fundamental Rights of the EU grants workers a right to paid annual leave.

The German Federal Law on leave (*Bundesurlaubsgesetz*) stipulates that if, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance must be paid in lieu. Under the heading 'Universal Succession', the German Civil Code (*BGB*) stipulates that upon the death of a person, their estate passes as a whole to one or several heirs.

Facts

Ms Bauer is the sole legal heir of her husband, who was employed by Stadt Wuppertal. Mrs Broßonn's husband was employed by an individual, a Mr Willmeroth. After their husbands deceased, both requested – as sole legal heirs – an allowance for outstanding paid leave. Both employers rejected the request. Both in first and second instance, the heirs won the proceedings.

When the case came before the Federal Labour Court (*Bundesarbeitsgericht*), that court pointed out that the ECJ had held in *Bollacke* (C-118/13) that, where the employment relationship is terminated by the death of the worker, Article 7 of Directive 2003/88/EC precludes legislation by which entitlement to paid annual

leave is lost, unless there is an entitlement to an allowance in lieu.

However, the referring court wondered whether the same applied where national law precludes an allowance in lieu from forming part of the estate of the deceased. Moreover, it noted that the purpose of annual leave (rest and relaxation, see e.g. *KHS*, C-214/10) no longer has any meaning when the worker is deceased.

The Court also wondered whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter on Fundamental Rights of the EU are capable of producing a direct effect between individuals (as in the case of Mr Willmeroth, the employer of Mrs Broßonn's husband).

Questions

1. Must Article 7 of Directive 2003/88 and Article 31(2) of the Charter be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions, and not taken by the worker before his death, lapses without being able to give rise to an entitlement to an allowance in lieu of that leave which may be passed on to the worker's legal heirs by inheritance?
2. In the event that it is impossible to interpret a national rule such as that at issue in the main proceedings in such a way as to ensure compliance with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, must the provisions of EU law be interpreted as meaning that they entail that such national legislation must be disapplied by the national court and that the legal heir of the deceased worker must be granted, by the former employer, an allowance in lieu of paid annual leave acquired under those provisions and not taken by that worker? Must such an interpretation of those provisions of EU law, in the present case, also prevail in the context of a dispute between the legal heir of a deceased worker and his former employer where the employer is a private individual?

Consideration

First question

The ECJ held in *Bollacke* (C-118/13) that Article 7 precludes national legislation which provides that the right to paid annual leave lapses without conferring any right to an allowance in lieu of leave not taken, where the employment relationship is terminated by the death of the worker. The order of reference made it clear that the referring court doubted that interpretation, given that the purpose of the right to paid annual leave, namely rest and relaxation, disappears when a person has died.

The right to paid annual leave is a particularly important principle of EU social law. It may not be interpreted restrictively at the expense of the rights that workers derive from it. The right to annual leave is only one of two aspects; it includes the pay that workers continue to receive during leave, which is intended to enable workers to actually take the leave. This should mean that workers can take a proper rest from work and enjoy a period of relaxation and leisure. The minimum period of leave may not be replaced by an allowance in lieu (Article 7(2)).

Upon termination of the employment relationship, taking leave is no longer possible. To prevent the worker from ending up with nothing, Article 7(2) provides for an allowance in lieu. It has two conditions, namely that (i) the employment has ended, and (ii) the employee has not already taken all leave to which s/he was entitled. The reason for termination of the employment is not relevant.

The ECJ felt that while the worker's death deprives the worker of any effective possibility of enjoying the period of rest attached to annual leave, it could not be accepted that his or her death retroactively implied the total loss of the right acquired, given that the right includes an entitlement to payment. In that regard, the ECJ has also held in the past that a leave balance is payable upon retirement (*Maschek*, C-341/15). In that case too, the purpose of annual leave no longer applied.

From a financial perspective, the right to paid annual leave is purely pecuniary and, as such, it should become part of the estate. The death of the worker cannot be used to retrospectively deprive his or her estate and, by extension, should not be prevented from transferring to the worker's heirs.

The loss of the right to paid annual leave or a corresponding allowance in lieu, where the worker has not had the opportunity to benefit from it, would undermine the very substance of that right. Thus, it is essential that, in the case of the worker's death, the estate should receive financial compensation to ensure the effectiveness of the entitlement to paid annual leave.

The ECJ also noted that the right to paid annual leave is expressly laid down in Article 31(2) of the Charter. These right applies in all situations governed by EU law. As German national law is an implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply to the case at hand. It fol-

lows from Article 31(2) that it enshrines the right of all workers to an 'annual period of paid leave'. According to the explanations relating to Article 31 of the Charter, which are relevant for its interpretation, Article 31(2) is based on Directive 93/104 and Article 2 of the European Social Charter, as well as point 8 of the Community Charter of the Fundamental Social Rights of Workers. Directive 2003/88 codified Directive 93/104 and Article 7 was reproduced exactly.

The ECJ repeated that the right to paid annual leave consists of two elements, namely leave and pay. In that regard, the right can only be limited under certain strict conditions set out in Article 52(1) of the Charter. As Member States do not have the option to decide that termination of the employment by death retroactively leads to the total loss of rights. For that reason, payment in lieu passes on to the worker's heirs.

Second question

The question of whether a national provision must be disapplied due to its being contrary to EU law only arises if it cannot be made compatible with EU law. Thus, the courts must try to achieve this by interpretation, taking into account the whole body of law and even change established case law if necessary.

There may be direct effect if the provision of a directive appears unconditional and sufficiently precise. It can then be invoked against the State and all organs of its administration, including decentralised bodies. Article 7(2) satisfies the criteria for this and Ms Bauer can invoke it directly against Stadt Wuppertal.

However, because Mr Willmeroth is an individual, Mrs Broßonn cannot invoke it directly against him, as a directive cannot have direct effect between individuals. It must therefore be determined whether Article 31(2) may be invoked between individuals, in order to require a court to set aside its national legislation.

As regards Article 31(2) of the Charter, the right to paid annual leave constitutes an essential principle of EU social law. This principle is derived from various instruments drawn up by Member States both at EU level (Community Charter of the Fundamental Social Rights of Workers) and not at EU level (European Social Charter), to which is referred Article 151 TFEU. Moreover, recital 6 of Directive 2003/88 refers to ILO Convention no. 132. Recital 4 of Directive 93/104/EC refers to the Community Charter of the Fundamental Social Rights of Workers. The right to paid annual leave has therefore not been established by the directives themselves, but by various international instruments, and is mandatory in itself, as an essential principle of EU social law.

Moreover, Article 31(2) is also mandatory and unconditional in nature. Only the exact duration of the right needs to be provided for and, where appropriate, certain conditions for the exercise of that right. Article 31(2) is sufficient in itself to confer on workers a right that they may rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, *Egenberger*, C-414/16, par. 76). Therefore, the national

courts must disapply national legislation negating this principle.

It should be noted that, while Article 51(1) states that while the provisions of the Charter are directed to the EU (and its institutions) and the Member States (the latter only if they are implementing EU law), this does not exclude individuals being unable to invoke them (as also has been held in respect of Article 21(1) in *Egenberger*, C-414/16).

Ruling

1. 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 of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance.
2. Where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. That obligation on the national court is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual.

ECJ 6 November 2018, case C-684/16 (Max-Planck-Gesellschaft), Paid leave

Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. – v – Tetsuji Shimizu, German case

Legal background

Article 7(1) of (Working Time) Directive 2003/88/EC grants any worker annual paid leave of four weeks per year. Article 7(2) states that the minimum period of annual leave cannot be replaced by an allowance in lieu, except where the employment relationship is terminated. Article 31(2) of the Charter of Fundamental Rights of the EU grants workers a right to paid annual leave. The German Federal Law on leave (*Bundesurlaubgesetz*) stipulates that in taking leave, consideration must be given to a worker's wishes, except where there are imperative operational interests or where the wishes of other workers should prevail, for social reasons. Leave must be granted and taken in the course of the current calendar year. Carrying over is permitted only on compelling operational grounds or for reasons that are personal to the employee. If the employment relationship is terminated and therefore leave can no longer be granted, an allowance must be paid in lieu.

Facts

Mr Shimizu was employed by Max-Planck from 1 August until 31 December 2013. As it was clear that his employment would end, on 23 October 2013 Max-Planck requested (but did not order) Mr Shimizu to take his outstanding leave before termination. Mr Shimizu took only two days and, after termination, claimed payment for the remaining 51 outstanding days of leave. Max-Planck rejected his claim, arguing that the outstanding holidays had lapsed on 31 December. This decision was upheld in two instances in court.

When the case came before the Federal Labour Court (*Bundesarbeitsgericht*, the 'BAG'), that court noted that it was not clear whether the right to paid leave had lapsed in this situation. The employee had been in a position to use his leave but had opted not to, and there was no obligation on the employer to force its workers to take leave. As the BAG considered Max-Planck to be an individual (as opposed to a state-controlled body), it also wondered whether Article 7 of Directive 2003/88 and Article 31 of the Charter had direct effect in relations