lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.

2. A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Article 4(2) of Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from the general principles of EU law, such as the principle prohibiting discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.

ECJ 4 October 2018, case C-12/17 (Dicu), Maternity and parental leave, Paid leave

Tribunalul Botoşani, Ministerul Justiţiei – v – Maria Dicu, Romanian case

Legal background

Article 7(1) of Directive 2003/88/EC on the organisation of working time provides that: "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."

The revised Framework Agreement on parental leave, annexed to Directive 2010/18/EU ('Framework Agreement') provides various rules on parental leave. Clause 2(2) grants leave of four months, in principle. Clause 5(2) stipulates that rights acquired or in the process of being acquired by the worker on the date on which parental leave starts, shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights shall apply.

The Romanian Labour Code provides that employment contracts can be suspended, *inter alia* during parental leave. It also stipulates that all rights and obligations are suspended during the suspension. However, certain rights persist, if this is provided for in special laws. The Labour Code as well as the 'leave regulations for judges and prosecutors' provide for the accrual of annual leave in various situations during maternity leave, but these provisions are silent on parental leave. The leave regulations for judges and prosecutors grant them 35 days of paid annual leave.

Facts

Ms Dicu is a judge at the Botoșani Regional Court. In 2014, she took her entire annual leave entitlement. From 1 October 2014 to 3 February 2015 she was on maternity leave. She then took consecutive parental leave until 16 September 2015, followed by paid annual leave until 17 October 2015. When she returned to work, she requested what she said was her last five days of annual leave for the remainder of 2015. The court refused Ms Dicu's request as it said she had insufficient rights, as no leave had been accrued during parental leave. The court pointed out that Ms Dicu had in fact already taken seven days of leave from her 2016 entitlement.

Ms Dicu then brought proceedings against the court, claiming that she had accrued annual leave rights during her parental leave. The Court of Appeal of Cluj stayed proceedings and asked a question to the ECJ.

Question

Must Article 7 of Directive 2003/88 be interpreted as precluding a provision of national law, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not regard the amount of time spent by that worker on parental leave during that reference period as a period of actual work?

Consideration

The right to paid annual leave of at least four weeks is a particularly important principle of EU social law (*Maschek*, C-341/15) and is expressly set out in Article 31(2) of the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties. While Member States cannot make this right subject to any preconditions, the issue in this case is whether a period of parental leave must be treated as a period of work for the purpose of determining paid annual leave entitlement.

The aim of Article 7 of Directive 2003/88 is to enable a worker to take a rest from working under his or her employment contract and enjoy a period of relaxation

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and leisure (e.g. *Schultz-Hoff*, C-350/06). That purpose, which distinguishes paid annual leave from other types of leave with different purposes, is based on the premise that the worker has actually worked during the reference period. Therefore, the entitlement must be determined by reference to the periods of work actually completed under the employment contract.
Case law has demonstrated that, in certain situations in which the worker is unable to perform his duties, such as sick leave and maternity leave, absent workers must be treated equally to those who have worked. However, these are different situations. Incapacity to work due to sickness is in principle unforeseeable and beyond the worker's control. Article 5(4) of ILO Convention No 132 (to which recital 6 of Directive 2003/88 refers) states that absences from work due to illness for reasons beyond the control of the employee must be counted as periods of service.
By contrast, taking parental leave is not unforeseeable and, in most cases, reflects the worker's wish to take care of his or her child (*Kiiski*, C-166/06). The parent is also not subject to illness and therefore in a different situation than that resulting from an inability for health reasons. The situation is also different from that of a worker on maternity leave. This is intended to protect a woman's physical condition during and after her pregnancy and to protect the special relationship between a mother and her child during the period following pregnancy and childbirth. It should not be hindered by the multiple tasks that would result from the woman working.
Whilst a worker on parental leave remains a worker, the reciprocal obligations can be (and in this case, were) suspended. The worker's period of parental leave could therefore not be treated as a time of actual work. Thus, although the ECJ's settled case-law suggests that a period of leave cannot affect the right to take another guaranteed period of leave, it cannot be inferred from this that Member States must count parental leave in the reference period for annual leave.

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 is to be interpreted as not precluding a provision of national law, such as the provision at issue in the main proceedings, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

ECJ 25 October 2018, case C-451/17 (Walltopia), Social insurance

'Walltopia' AD – v – Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite – Veliko Tarnovo, Bulgarian case

Question

Must Article 14(1) of Regulation No 987/2009, read together with Article 12(1) of Regulation No 883/2004, be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been 'immediately before the start of his employment … already subject to the legislation of the Member State in which his employer is established', within the meaning of Article 14(1) of Regulation No 987/2009, if just before the start of his employment, and even though he did not have the status of an insured person under that legislation, he was a national of that Member State and his residence, within the meaning of Article 1(j) of Regulation No 883/2004, was in that Member State?

Ruling

Article 14(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, read together with Article 12(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been 'just before the start of his employment … already subject to the legislation of the Member State in which his employer is established', within the meaning of Article 14(1) of Regulation No 987/2009, even if that employee was not an insured person under the legislation of that Member State immediately before the start of his employment, if, at that time, that employee had his residence in that Member State, which is for the referring court to ascertain.

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