indicated that in fact, these were not real needs. Ultimately, of course, this is a matter to be determined by the national court.
The Italian government also argued that budgetary considerations required the employer to use fixed-term contracts, as the foundations are financed by the state. The ECJ felt that while this consideration may underlie a social policy choice, budgetary considerations do not of themselves constitute an aim pursued and, therefore, cannot justify the lack of a measure to prevent the misuse of successive fixed-term contracts.
The fifth argument made by the Italian government was that under Italian law there are mandatory competitions for indefinite positions and the use of fixed-term contracts circumvents those. The ECJ felt that this could form an objective reason. Whilst the Framework Agreement does not lay down a general obligation on Member States to provide for the conversion of fixed-term contracts, there must still be an effective way of doing this. In the operatic and orchestral sector, there is no way of doing this at all.
The Italian government's last argument was that adequate protection of workers is guaranteed by the fact that the directors of operatic and orchestral foundations are liable for all contracts that are contrary to law. The ECJ responded that EU law requires that measures taken by Member States are not only proportionate, but also effective and sufficiently deterrent and that it was discriminatory to disapply these rules for employees of operatic and orchestral foundations, when comparable workers in other sectors remain entitled to their protection.

Ruling

Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules, governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date, are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector.

ECJ 6 November 2018, case C-619/16 (Kreuziger), Paid leave

Sebastian W. Kreuziger – v – Land Berlin, German case

Legal background

Article 7(1) of (Working Time) Directive 2003/8/EC grants workers annual leave of at least four weeks, subject to the conditions for entitlement laid down by national law and practice. Article 7(2) prohibits replacing the minimum period of paid annual leave by an allowance in lieu, except where the employment relationship is terminated.
The German regulation on the annual leave of officials and judges (EUrlVO) states that leave must generally be taken during the leave year. Leave which has not been taken within 12 months after the end of the leave year lapses. Unlike the German Federal Law on Leave (which does not apply in this case), the regulation does not provide for an allowance in lieu for untaken leave upon termination of the employment relationship.

Facts

Mr Kreuziger worked as a legal trainee for the Land of Berlin between May 2008 and May 2010. In 2010, he did not take any leave. After his employment had ended, he claimed an allowance for untaken leave, but this was denied. His appeal of that decision was dismissed on the grounds that the applicable regulation lacked that option. In the subsequent appeal proceedings, it was established that Mr Kreuziger was a worker within the meaning of Directive 2003/88. However, there was debate as to whether entitlement to an allowance of Article 7(2) of the Directive is based on the premise that the person concerned is unable to take leave for reasons not attributable to him or her. Ultimately, the Higher Administrative Court asked preliminary questions (which the ECJ rephrased into one question).

Question

Must Article 7 of Directive 2003/88 be interpreted as precluding national legislation such as Paragraph 9 of the EUrlVO, insofar as that legislation entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to termination of the employment relationship, he automatically loses the days of paid annual leave to which he is entitled under

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EU law on the date of termination, and, accordingly, his entitlement to an allowance in lieu of paid annual leave not taken.

Consideration

As a preliminary point, Directive 2003/88 produces a direct effect between an individual and a State, regardless of the capacity in which the latter is acting. If the applicable provision is unconditional and sufficiently precise, it may be invoked against the State (*Dominguez*, C-282/10), including decentralised authorities (*Smith*, C-122/17). Article 7(2) meets these criteria and, hence, can produce direct effect.

The right to paid annual leave is a particularly important principle of EU law. It is also laid down in Article 31(2) of the Charter, which has the same value as the Treaties (*Sobczyszyn*, C-178/15).

Article 7(2) aims to prevent a situation in which the employee has not taken leave and loses all leave rights upon the end of his or her employment, by providing for an allowance. The article imposes no more conditions than (i) the employment relationship being ended, and (ii) the worker having not taken all outstanding leave.

In that regard, the Directive precludes legislation which denies payment for untaken leave, for example, if the worker has not been able to take it because of sickness (e.g. *Schultz-Hoff*, C-350/06). It also precludes that the allowance of Article 7(2) lapses because of a worker's death, as this would retroactively lead to the entire loss of rights (*Bollacke*, C-118/13).

In this case, however, the question is whether the right can lapse if the worker has not applied to take leave.

In that regard, it cannot be inferred from established case law that losing annual leave rights would be impossible, irrespective of the worker's failure to take it. Moreover, holiday pay is intended to let a worker actually take leave, as this is important for rest and leisure. As Article 7(2) provides that the minimum leave cannot be replaced by an allowance in lieu, in fact it forms additional protection (*Robinson-Steele and Others*, C-131/04 and C-257/04). Thirdly, Member States can place conditions on exercising the right. In that regard, it is even possible to provide that the right can be lost, provided that the worker has been able to take it (*Schultz-Hoff*, C-350/06). The national legislation at issue can also be seen as such – it seeks to take the various interests involved into account (*Pereda*, C-277/08).

However, this cannot lead to a loss of rights where the person has not had the opportunity to exercise them. An automatic loss, not subject to the verification that the worker had the opportunity to exercise his right to leave, fails to have regard to the limits that can be imposed on the conditions.

The worker is the weaker party in the relationship. It is therefore necessary to prevent the employer from being able to restrict the employee's rights. The employee may be dissuaded from claiming his or her rights if s/he could be disadvantaged by doing so. Any practice or omission of an employer which could deter a worker from taking annual leave, is incompatible with the purpose of the right to annual leave.

While the Directive does not require employers to force their employees to take leave, they must give them the opportunity specifically and transparently to do so. They must encourage them, formally if need be, to take their leave and keep them informed of the status of it, accurately and in good time. They must also explain that if leave is not taken, it will be lost at some point.

In addition, the burden of proof is on the employer in any claim in court. If it cannot demonstrate that it tried everything to let the employee exercise his or her rights, the leave cannot lapse.

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 must be interpreted as precluding national legislation such as that at issue in the main proceedings, insofar as it entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, that worker loses – automatically and without prior verification of whether the employer had in fact enabled him, in particular through the provision of sufficient information, to exercise his right to leave prior to the termination of that relationship – the days of paid annual leave to which he was entitled under EU law on the date of the termination of that relationship, and, accordingly, his right to an allowance in lieu of paid annual leave not taken.

ECJ 7 november 2018, case C-432/17 (O'Brien), Part-time work

Dermod Patrick O'Brien – v – Ministry of Justice, UK case

Summary

Periods of service prior to the deadline for transposing Directive 97/81/EC (amended by Directive 98/23/EC) must be taken into account for the purpose of calculating the retirement pension entitlement.

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