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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Legal background

Directive 98/23/EC extended the scope of Directive 97/81/EC (Framework Agreement on part-time work) to the United Kingdom. Its transposition deadline was 7 April 2000. Clause 4 of the Framework Agreement stipulates that part-time workers shall not be treated less favourably than comparable full-time workers solely because they work part-time, unless different treatment in justified on objective grounds. The UK implementation legislation (Part-time Workers Regulations 2000) came into force on 1 July 2000.

Facts

Mr O'Brien was a part-time recorder of the Crown Court from 1978-2005 on a *per diem* basis. He was classified in a part-time worker category which was not entitled to a pension. In 2005, he claimed a pension, as he felt wrongly excluded from the entitlement. The subsequent proceedings ultimately led to the ECJ case *O'Brien* (C-393/10). In that case, it was held that national law cannot establish a distinction between full-time judges and part-time judges remunerated on a daily fee basis, unless such a difference in treatment is justified on objective grounds.

In the subsequent proceedings taking place in the UK, it was established that there was no objective justification for the difference in treatment and, hence, that Mr O'Brien was entitled to a pension. In determining the amount, the question arose as to whether the years of service prior to the transposition deadline should be taken into account. This again led to various proceedings, eventually leading to the UK Supreme Court asking a preliminary question.

Question

Must Directive 97/81 be interpreted as meaning that periods of service completed prior to the deadline for transposing that directive, which are taken into account when calculating the pension of a full-time worker, must be taken into account when calculating the pension entitlement of a comparable part-time worker?

Consideration

According to settled case law, procedural rules generally apply from the date on which they enter into force (*Commission – v – Spain,* C-610/10). Substantive rules are usually interpreted as applying to situations existing before their entry into force only insofar as it follows clearly from their terms, the objective or general scheme that they have such effect (e.g. *Meridionale Industria Salumi and Others*, C-212/80 to 217-80).

In addition, a new legal rule applies from the entry into force of the act introducing it, and while it does not apply to legal situations that arose and became definitive prior to entry into force, it does apply immediately to the future effects of a situation which arose under the old law, and to new legal situations. The position is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (*Commission – v – Moravia Gas Storage*, C-596/13). Neither Directive 97/81 nor the Framework agreement derogates from that principle.

Therefore, it must be examined whether the gradual acquisition of pension entitlements over the period preceding the transposition deadline had become definitive at the transposition date.

The UK government argued that deferred pay is accrued in a similar way to 'normal' forms of pay. This means that pension entitlement is earned and increases after the completion of each period of service. Consequently, Mr O'Brien would not have accrued any pension rights before the transposition deadline. According to the UK government, there are similarities with *Barber* (C-262/88) and *Ten Oever* (C-109/91), in which there also were no retroactive effects.

However, the ECJ took the view that the situations in those cases were different. They concerned the temporal effects of a judgment, rather than the retroactive effect of a rule of law. Moreover, the UK government at no time requested to limit the temporal effects of the first ECJ judgment. A restriction of that kind can only be permitted in the judgment which rules on the interpretation requested (*Barber*, C-262/88).

Secondly, regarding the argument that the calculation of the periods of service should be distinguished from the rights to a pension, the ECJ was of the view that it could not be said that the right to a pension is accrued at the end of each period of service. It is only subsequently, taking into account the relevant periods of service that pension rights can be calculated.

Consequently, if the accrual of pension takes place both before and after the transposition deadline, the calculation of those rights is governed by the directive, including for periods of service prior to its entry into force. This situation is also to be distinguished from the situation of the colleagues of the appellant (which the UK government had raised in its arguments).

Ruling

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998, must be interpreted as meaning that, in a case such as that at issue in the main proceedings, periods of service prior to the deadline for transposing Directive 97/81, as amended by Directive 98/23, must be taken into

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account for the purpose of calculating the retirement pension entitlement.

ECJ 13 November 2018, case C-432/17 (Cepelnik), Other forms of free movement

Cepelnik d.o.o. – v – Michael Vavti, Austrian case

Question

Must Article 56 TFEU and Directive 2014/67 be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the competent authorities can order a commissioning party established in that Member State to suspend payments to his contractor established in another Member State, or even to pay a security in an amount equivalent to the price still owed for the works in order to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of the labour law of the first Member State?

Ruling

Article 56 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the competent authorities can order a commissioning party established in that Member State to suspend payments to his contractor established in another Member State, or even to pay a security in an amount equivalent to the price still owed for the works in order to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of the labour law of the first Member State.

ECJ 21 November 2018, case C-245/17 (Viejobueno Ibáñez and De la Vara González), Fixed-term work, Paid leave

Pedro Viejobueno Ibáñez, Emilia de la Vara González – v – Consejería de Educación de Castilla-La Mancha, Spanish case

Legal background

Clause 4 of the Framework Agreement on Fixed-Term Work (annexed to Directive 1999/70/EC) prohibits fixed-term workers from being treated less favourably than comparable permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds.

Article 7(2) of Directive 2003/88/EC (on Working Time and Annual Leave) provides that the minimum period of annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

The Spanish Law (7/2007) on the basic regulations relating to public servants provides, *inter alia*, that vacant posts may be occupied by interim public servants for expressly justified 'reasons of necessity and urgency'. Their employment relationship can be terminated when the reason no longer applies.

An agreement on the selection of interim teachers (similar to a collective bargaining agreement) stipulates that those who have worked at least 5.5 months by 30 June in the year in question will retain their post until the beginning of the next academic year (September). However, the Finance Law of 2012 states that this agreement does not apply, insofar as concerns the payment of an allowance for leave in July and August for certain interim staff. Instead, they receive a limited allowance.

Facts

Mr Viejobueno Ibáñez and Ms de la Vara González were both appointed as interim teachers for the academic year 2011/2012 (they had different employers). On 29 June 2012, both their employers decided to terminate their employment. They both started proceedings, in which it became clear that their positions were terminated because the 'reasons of necessity and urgency' for which they were appointed no longer applied. However, their colleagues in permanent positions kept their posts

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