

## Case Reports

2019/36

# Are professional foster parents excluded from the right to request payment in lieu of untaken annual leave? (RO)

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## Summary

The decision pronounced by the first instance court related to the right of professional foster parents to request payment in lieu of untaken annual leave based on ECJ case law has been overruled by the Court of Appeal by making reference to a different ECJ ruling.

## Legal background

According to the Romanian Labour Code, paid annual leave is guaranteed to all employees. During the annual leave, the employee is entitled to receive an allowance which may not be less than the basic salary, indemnities and bonuses of a permanent nature due for that period, as provided for in the employment contract.

The annual leave shall be taken every year, excepting the situation when, for justified reasons, the employee is not able to take all or part of the annual leave. In this case, the employee is entitled to take the rest of the annual leave during an 18-month period from the year following the one of entitlement to annual leave.

Payment in lieu of the untaken annual leave is possible only in the event of employment termination.

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## Facts

Five former female employees were employed at the General Directorate for Social Assistance and Child Protection Dolj as professional foster parents, between 2014 and 2016. Taking into consideration the particularities of this job (the condition of obtaining/renewing the attestation under the conditions provided by the applicable legal provisions), the parties concluded several consecutive fixed-term employment contracts between 2014 and 2016 determined by the necessity of obtaining/renewing their attestation. During this time period, the employees accrued untaken paid annual leave.

In 2017, the five former female employees and the Public Administration Union ‘The Force of Law’ (the ‘Claimants’) filed a claim against the General Directorate for Social Assistance and Child Protection Dolj (the ‘Defendant’) requesting payment in lieu of untaken annual leave for the period 2014–2016.

The Tribunal ruled in favour of the Claimants and, among other matters, found that (i) the employment contracts concluded between 2014 and 2016 were terminated, and (ii) the ECJ ruled on 08 November 2018 in the cases C-619/16 and C-684/16 that a worker cannot automatically lose their acquired rights to paid annual leave to which they are entitled because they did not apply for the leave before the end of the employment relationship. Thus, the Tribunal ordered the Defendant to pay compensation for the untaken annual leave for 2014–2016.

Following the Tribunal’s ruling, the Defendant appealed the judgment before the Court of Appeal of Craiova criticising its legality.

## Judgment

The Court of Appeal admitted the appeal, completely overturned the decision pronounced by the Tribunal and dismissed all the Claimants’ requests. The Court stated that the professional foster parent does not benefit from compensation in lieu of untaken annual leave for each terminated contract, as long as the employment relationship between them and their employer is still ongoing.

In substantiating its judgment, the Court of Appeal referred to the decision pronounced by the Romanian Supreme Court of Justice (the ‘SCJ’) in the referral in

the interest of Law no. 25/26 November 2018 (the ‘Decision’).<sup>1</sup>

In this Decision the SCJ interpreted national law on the conditions for obtaining the attestation for professional foster parents and national law on the protection and promotion of the child’s rights. It established that the professional foster parent is not entitled to payment of any compensation for the annual leave taken during which they ensure continuity in the activity of raising, caring and educating the child. Thus, the professional foster parent can only benefit from payment in lieu of untaken annual leave where employment is terminated.

In order to reach this conclusion, the SCJ referred to ECJ case C-147/17 which states that according to Article 1(3) of Directive 2003/88/EC and Article 2(2) of Directive 89/391/EEC, the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into their household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88/EC. Although foster parents shall be considered as ‘workers’ within the meaning of Directive 2003/88/EC, they are in the situation of the exception provided by Article 2(2) of the Directive as they carry on working continuously, including on weekdays, on public holidays or on non-working days and during their annual leave, except where separations from the child during leave are authorised by the competent authority.

Consequently, in overruling the Tribunal’s decision, the Court of Appeal held that the Claimants will be entitled to request payment in lieu of untaken annual leave only at the end of their employment relationships (irrespective of the number of employment contracts concluded with the Defendant) and not at the end of each employment contract concluded with the Defendant.

## Commentary

The Court of Appeal’s decision is intriguing as it refers to the SCJ’s Decision which deals with a totally different factual situation from the one under discussion. The SCJ case focuses on the inability to request financial compensation for the annual leave taken by foster parents during the period in which they ensure continuity of the child raising, care and education activity, whereas the Court of Appeal case deals with the question on when to grant payment in lieu of accrued but untaken annual leave during several consecutive fixed-term contracts concluded with foster parents.

The decision pronounced by the Court of Appeal has become a representative decision for Romanian case law, considering that the legal notion of ‘termination of the employment contract’ for the professional foster parent

is assimilated to the termination of the employment relationship and not to the termination of each fixed-term employment contract concluded with them.

It remains to be seen whether the national courts will apply the argumentation provided by the Court of Appeal to other professions that are performed with a continuous character, but that do not necessarily concern child raising, care and education activities.

## Comments from other jurisdictions

*Germany (Kerstin Belovitzer, Luther Rechtsanwalts-gesellschaft mbH):* The Romanian decision cannot be transferred to Germany. German courts would have come to a different decision.

The exclusion of professional foster parents from Directive 2003/88/EC applies also in Germany.

German professional foster parents are not employees of the German State. They do not have an employment contract. The responsible authority and the foster parents enter into a regular civil contract. The foster parents receive compensation for their work by the German State. As a result, labour laws do not apply to foster parents. They cannot take annual leave. According to the current German case law, they cannot be considered as “workers” within the meaning of the Directive.

Furthermore, German law only recognizes compensation for untaken annual leave upon termination of the employment contract (Section 7 para. 4 of the German Federal Leave Act). This provision states that if the leave can no longer be granted in whole or in part because the employment relationship has ended, it must be compensated. In Germany, holiday compensation must therefore be paid after the end of the employment contract – not at the end of the contractual relationship. This also applies to fixed-term contracts; if the leave could not be granted before the end of the fixed-term period, it must be remunerated.

Due to the above, it is very unlikely that a German court will come to the same conclusion as the Romanian court.

*Italy (Caterina Rucci, Katariina’s Gild):* Under Italian law, at the end of each fixed-term contract, all untaken holiday shall be paid by equivalent.

The comment would be therefore quite simple, unless the focus of this decision seems to be on what can and should be considered as a working activity, and therefore subject to employment work rules or not.

There is no doubt that under Italian law there is no employment contract between the State and foster parents, who are not paid for their activity but just reimbursed for their expenses.

If the activity is carried out at specific home-similar places, then the people involved will be duly paid and will enjoy daily rest and mandatory holiday periods which can only be substituted by payment in case of termination of the employment contract.

1. According to Romanian legislation, the decisions pronounced by the Constitutional Court and Supreme Court of Justice in referrals in the interests of the law and in interpretation of the law are mandatory.

Basically, there are two big differences:

1. Professional foster parents do not exist in Italy, they are either individuals, or mostly couples, who volunteer and are allowed to help growing children without adopting them and who are obliged to allow natural parents to have and develop contact with their children, depending on the circumstances.
2. Under Italian law, if an employment contract is a fixed-term one, then it ends on expiry of the term and holidays accrued and not enjoyed shall be paid by equivalent: but a number of fixed-term contracts is not a “continuing employment” unless rules on terms have been violated.

Basically, no such judicial claim and case could exist, both due to differences in foster parent’ categories and in rules on fixed-term contracts.

**Subject:** Paid Leave

**Parties:** Five Former Female Employees and the Public Administration Union ‘The Force of Law’ – v – General Directorate for Social Assistance and Child Protection Dolj (DGASPC Dolj)

**Court:** *Curtea de Apel Craiova – Secția I Civilă* (Court of Appeal of Craiova – 1<sup>st</sup> Civil Division)

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