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The French Supreme Court brings the legal framework on paid annual leave into line with European Union law (FR)

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Summary

The French Supreme Court has recently ruled on two cases concerning paid annual leave. In the first case, the Supreme Court held that an employee whose employment contract is suspended due to an illness, whether of occupational origin or not, continues to acquire paid annual leave rights during this period (Supreme Court, 13 September 2023, no. 22-17.340). In the second case, the Court held that the acquisition of paid annual leave rights due to occupational illness or accident is not limited to one year (Supreme Court, 13 September 2023, no. 22-17.638).

Facts

French law on the acquisition of paid annual leave during sick leave is not compliant with European law as it currently stands.

Article L.3141-3 of the French Labour Code provides "the employee is entitled to two and a half working days of leave for each month actually worked for the same employer".

Article L. L3141-5 further provides:

> The following periods are considered to be periods of actual work for the purpose of determining the annual leave:
> 1. periods of paid leave;
> 2. periods of maternity leave, paternity leave, childcare leave and adoption leave;
> 3. compulsory compensatory rest periods as provided for in Articles L. 3121-30, L. 3121-33 and L. 3121-38;
> 4. rest days granted under the collective agreement concluded in application of Article L. 3121-44;
> 5. periods, up to a maximum uninterrupted period of one year, during which performance of the employment contract is suspended due to an accident at work or occupational disease;
> 6. periods during which an employee is kept on or called up for national service in any capacity whatsoever.

In two recent cases, the validity of these legislative provisions was called into question.

In the first case, Ms. Z and two other employees of Transdev filed lawsuits against their employer in the Employment Tribunal seeking paid annual leave rights acquired during the suspension of their employment contract following sick leave due to non-occupational illness. Their claims were upheld by the Court of Appeals of Reims following which Transdev appealed the decision before the Supreme Court.

In the second case, Mr. B who was hired as a driver by Transports Daniel Meyer was the victim of a work accident and was on leave for one year and eight months due to his accident. He subsequently filed a lawsuit against Transports Daniel Meyer in the Employment Tribunal contesting the limitation of his paid annual leave rights to one year while he was on work accident leave. His claim was dismissed by the Court of Appeals of Paris following which he appealed the decision before the Supreme Court.

Judgment

In two similar rulings, the French Supreme Court held:

> Pursuant to Article 31§2 of the Charter of Fundamental Rights of the European Union, every worker has the right to working conditions which respect their health, safety and dignity. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. (…)
>
> It follows from the case law of the Court of Justice of the European Union that Directive 2003/88/EC

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> makes no distinction between workers who are on sick leave during the reference period and those who work during said period. It follows that, in the case of workers on duly prescribed sick leave, the right to paid annual leave conferred by this Directive to all workers cannot be made by a Member State contingent on the obligation to have actually worked during the reference period established by the said State (CJEU, decision of January 20, 2009, Schultz-Hoff, C-350/06, point 41; CJEU, decision of January 24, 2012, Dominguez, C-282/10, point 20).
>
> By decision of November 6, 2018 (CJEU, decision of November 6, 2018, Bauer and Willmeroth, C-569/16 and C-570/16), the Court of Justice of the European Union ruled that in the event of impossibility to interpret national regulations so as to ensure compliance with Article 7 of Directive 2003/88/EC and Article 31§2 of the Charter of Fundamental Rights, the national court must leave said national regulations unapplied. (…)"

In the first case:

> With regard to an employee, whose employment contract is suspended as a result of sick leave due to non-occupational illness, the provisions of Article L. 3141-3 of the Labour Code, which make the right to paid annual leave subject to effective work, do not allow an interpretation consistent with the European Union law. Therefore, it is up to the national judge to ensure, within the framework of their powers, the legal protection arising from Article 31§2 of the Charter of Fundamental Rights of the European Union and to guarantee its full effect by leaving said national regulations unapplied if necessary. It is therefore appropriate to partially exclude the application of the provisions of Article L. 3141-3 of the Labour Code in that they make the acquisition of paid annual leave rights contingent upon effective work. An employee whose employment contract is suspended as a result of sick leave due to non-occupational illness can claim paid leave rights for this period in application of the provisions of Articles L. 3141-3 and L. 3141-9 of the Labour Code.

In the second case:

> In the case of an employee whose employment contract is suspended as a result of leave of absence due to occupational accident or illness, beyond an uninterrupted period of one year, domestic law does not allow an interpretation consistent with the European Union law. Therefore, it is up to the national judge to ensure, within the framework of their powers, the legal protection arising from Article 31§2, of the Charter of Fundamental Rights of the European Union and to guarantee its full effect by leaving said national regulations unapplied if necessary. It is therefore appropriate to partially exclude the application of the provisions of Article L. 3141-5 of the Labour Code in that they limit acquisition of paid leave for employees on leave of absence due to occupational accident or illness to an uninterrupted period of one year. Such employee can claim their rights to paid leave [beyond one year] in application of the provisions of Articles L. 3141-3 and L. 3141-9 of the Labour Code.

Commentary

The French Supreme Court finally decided to bring the legal framework on paid annual leave into line with European law, notably through two decisions rendered on 13 September 2023, based on Article 31(2) of the Charter of Fundamental Rights of the European Union.
The Supreme Court had already pointed out on several occasions that the French legislator had to intervene to rectify French law's lack of conformity with European Union law. Back in 2012, the Supreme Court referred a question on the interpretation of its national law to the Court of Justice of the European Union ('CJEU').[1] The CJEU, in the *Dominguez* case, relying on Article 7(1) of Directive 2003/88,[2] affirmed that any worker, whether on sick leave during the reference period as a result of an accident at their place of work or elsewhere, or as the result of sickness of whatever nature or origin, cannot have their entitlement to at least four weeks' paid annual leave affected.
It was therefore clear since 2012 that the French Labour Code was not compliant with Directive 2003/88 as interpreted by the CJEU. However, the French Supreme Court was forced to apply the national law as it was hindered from doing otherwise due to the lack of horizontal direct effect of Directive 2003/88. The Supreme Court could not interpret the national law in conformity with Article 7(1) of Directive 2003/88 either as it would have resulted in an interpretation of national law *contra legem*. Indeed, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem*. This is what the Supreme Court had recalled in a 2013 decision on non-occupational illness.[3]
In 2014, the Supreme Court recalled in its annual report that French law on paid annual leave was not in conformity with European Union law and asked the French legislator to intervene.
In 2018, by two decisions the CJEU recognized the horizontal direct effect of Article 31(2) of the Charter of

1. CJEU, 24 January 2012, Case C-282/10, *Maribel Dominguez*.
2. Article 7 of Directive 2003/88/EC of 4 November 2003 provides: "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 minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated".
3. Cass. soc., 13 March 2013, no. 11-22.285.

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Fundamental Rights of the European Union.[4] Article 31(2) of the Charter provides “every worker has the right to working conditions which respect their health, safety and dignity. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave”.
In the wake of this decision, the French Supreme Court reiterated once again the need for revising Articles L. 3141-3 and L.3141-5 of the Labour Code in its 2018 annual report by noting “the requested modifications are all the more necessary that the CJEU has recognized the horizontal direct effect of Article 31 of the Charter of Fundamental Rights of the European Union”.
Alas, the French Supreme Court’s repeated pleas did not prompt the French legislator to intervene. By two Court decisions rendered on 13 September 2023, the French Supreme Court finally took this matter into its own hands and disapplied provisions of the Labour Code which exclude (Article L.3141-3) or limit acquisition of paid annual leave rights for employees on sick leave (Article L.3141-5) and therefore evolved its settled case law.
Indeed, Article L.3141-3*[5] of the Labour Code subjects acquisition of paid annual leave rights to ‘actual work’. Article L.3141-5 of the Labour Code sets out periods of absence that are assimilated to actual work, amongst which are “periods, within the limit of an uninterrupted period of one year, during which the performance of the employment contract is suspended due to a work accident or occupational illness”.
In the first case, the Supreme Court, by virtue of the horizontal direct effect of Article 31(2) of the Charter of Fundamental Rights of the European Union, partially set aside the provisions of Article L.3141-3 of the Labour Code by holding that employees on non-occupational sick leave have the right to claim paid annual leave rights for the period during which they have been on non-occupational sick leave. In the second case, once again by invoking the horizontal direct effect of Article 31(2) of the Charter of Fundamental Rights of the European Union, the Supreme Court partially set aside the provisions of Article L.3141-5 by holding that employees on leave of absence due to work accident or occupational illness have the right to claim paid annual leave rights for the entire period of their leave as opposed to just one year.
It is worth noting that the Supreme Court’s position is even more favourable than European Union law as it fully applies to the paid annual leave rights, including the fifth week of leave (whereas Directive 2003/88/EC refers to a minimum of four weeks).
Henceforth, the Supreme Court will leave unapplicable the provisions of the Labour Code preventing or limiting acquisition of paid annual leave rights during periods of leave due to work accident or illness (occupational or not).
In the wake of the Supreme Court’s position, several Court of Appeals have already followed in its footsteps by granting paid annual leave to employees on non-occupational sick leave.[6]
It is also noteworthy that the CJEU in a recent decision dated 9 November 2023[7] confirmed that French law on paid annual leave must become aligned with European law. In that case, Keolis had refused to grant its employees paid annual leave accumulated during long-term sick leave. The employees took their case to court, which asked the CJEU whether the right to paid annual leave was directly applicable to the employment relationship with Keolis. The court also questioned the CJEU as to the reasonable period of carry-over of paid annual leave, and whether an unlimited carry-over complied with Directive 2003/88. The CJEU ruled that European law does not prevent a limited carry-over of paid annual leave entitlements in the event of long-term sick leave by holding “Article 7 of Directive 2003/88 must be interpreted as not precluding national legislation and/or a national practice which, in the absence of a national provision laying down an express temporal limit on the carry-over of entitlements to paid annual leave accrued and not exercised due to a long-term absence from work due to illness, allows requests for paid annual leave submitted by a worker less than 15 months after the end of the reference period in which the entitlement to that leave arose and limited to two consecutive reference periods to be granted”.
The pressure to make French law compliant with European law has finally prompted the French legislator to intervene. The French Prime Minister, Ms Élisabeth Borne, recently announced that French law will be brought into line with European law in the first quarter of 2024. She has however promised to “minimize the impact of the French Supreme Court’s position on businesses”. To be continued…

Comments from other jurisdictions

Croatia (Dina Vlahov Buhin, Schoenherr): Croatian law limits the assignment of the employee for performance of the same agency work with the same user to a period of three years, whereas the interruption of less than three months is not considered an interruption of the three-year period. New changes of the law applicable as of 2023 include certain exceptions to this three-year period limitation, in particular (i) for the purpose of replacement of a temporarily absent employee, (ii) for other objective reasons if permitted by the law or collective agreement, and (iii) if required for the purpose of

4. CJEU, 6 November 2018, Cases C-569/16 and C-570/16, *Stadt Wuppertal – v – Bauer* and *Willmeroth – v – Brossonn*; CJEU, 6 November 2018, Case C-684/16, *Max-Planck Gesellschaft*.
5. “The employee is entitled to 2.5 working days of annual paid leave per month of actual work (…)”.
6. CA Paris 12 October 2023 n°20/03063; CA Versailles 15 October 2023 n°21/02398; CA Reims 18 October 2023 n°22/01293.
7. *XT and Others – v – Keolis Agen SARL*.

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completion of work on a project that includes financing from EU funds. By the most recent amendments of the law, the three-year limitation period has been introduced for engagement of the employee by both the user and the agency, while the earlier solution was applicable to the engagement of the employee by the user only. Hence, neither the user nor the agency may contract the work of the same employee for the same user for the same job for an uninterrupted period longer than three years, i.e. even if the employee would change the agency through which he/she was assigned to the user, he/she would not be in position to do the same job for the same user after already working for the respective user for an uninterrupted period of three years. Any work of the assigned employee performed in excess of a three year period would be deemed as an employment relationship concluded for an indefinite period of time with the user. After expiry of the allowed interruption period, the agency would be free to assign to the user other employees for the same job, or the same employee for other jobs. Thus, the Croatian legislator has clearly made the work of the assigned employee of a 'temporary' nature. In that respect, the Croatian courts would rather easily come to the solution for this case, where after expiry of three years it would be assumed that the assigned employee has been employed directly by the user for an indefinite period of time.

Germany (Leif Born, Luther Rechtsanwaltsgesellschaft): The French Supreme Court's decision is hardly surprising from a German perspective and would have been decided identically by the German labour courts. It is already the case under German law that employees also acquire new annual leave entitlements during an illness. This also applies if the illness lasts longer than one year, regardless of whether it is due to an accident at work or an occupational illness or whether it is unrelated to the work activity.

What is interesting about the Supreme Court's decision, however, is the question of how to interpret national regulations that are not compatible with European leave law and the relevant ECJ case law. In Germany, this question has arisen in particular in the interpretation of Section 7(3) of the Federal Leave Act (*Bundesurlaubsgesetz*, 'BUrlG'), which provides for the expiry of annual leave entitlements at the end of the year, at the latest by 31 March of the following year. In Case 350/06 (*Schultz-Hoff*), the ECJ ruled that this provision is not compatible with European law insofar as it stipulates that the annual leave also expires at the end of the year for employees who were unable to take their leave due to illness. As a result of this decision, the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') has amended Section 7(3) BUrlG in line with the Directive and now interprets it in such a way that the provision does not apply if employees are ill and therefore unable to take their annual leave until the statutory expiry date. This interpretation cannot be found in the wording of the law and is justified by the BAG as a development of the law in line with the Directive (*richtlinienkonforme Rechtsfortbildung*). The BAG says that European law requires the further development of national law and may require an interpretation beyond the wording. The development of the law in line with the Directive only finds its limits when the result of the interpretation disregards the clear wording, is not reflected in the law and is not expressly or – in the case of an unintended loophole – tacitly approved by the legislator.

According to the BAG, the interpretation of laws in accordance with the Directive has priority even if the ECJ derives its legal principles on annual leave law from Article 31(2) of the Charter of Fundamental Rights of the European Union. Only if an interpretation in conformity with the Directive is not possible due to the aforementioned limits of legal development must a national law that contradicts the Charter of Fundamental Rights of the European Union remain unapplied. In view of the BAG's generous development of the law in line with the Directive, this is rarely the case. Accordingly, unlike in France, a modification of the BUrlG in Germany is not a major issue.

Italy (Ornella Patané, Toffoletto De Luca Tamajo): An Italian court would have decided the case at hand in the same way. In particular, this case has been the subject of an important jurisprudential and doctrinal debate, which ended with a ruling by the Supreme Court in a United Section (SS. UU No. 14020, 12 November 2001). The Court held that during illness, paid leave accrues in the same way as during ordinary working periods. This is because, according to the Italian Court, the unconditional right to paid leave provided for by Article 36 of the Italian Constitution is to be linked not to the work activity but to the employment contract, which remains existing even during the employee's illness.

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