Court of Justice of the European Union
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Press and Information

Advocate General's Opinion in Case C-214/10
KHS AG v Winfried Schulte

Advocate General Trstenjak takes the view that European Union law does not preclude a limitation of entitlement to annual leave or to an allowance in lieu of leave provided that it is compatible with the objective of recuperation

It is for Member States to establish a limitation period. A limit of 18 months, on expiry of which entitlement to leave or to the allowance in lieu of leave is extinguished, is sufficient

The Working Time Directive[1] grants every worker a right to annual leave. According to the case-law of the Court of Justice, this right to annual leave is inviolable even in cases of long-term illness[2].

Mr Schulte was employed as a locksmith at KHS and its legal predecessor since April 1964. Under the collective agreement applicable to his contract of employment his entitlement to paid annual leave amounted to 30 days per annum. On 23 January 2002 Mr Schulte suffered a heart attack. He subsequently underwent rehabilitation from which he was discharged as unfit for work. From 1 October 2003 onwards Mr Schulte received, for a limited term, a pension on the ground of full reduction of earning capacity and a disability pension, as he was severely disabled since 2002. KHS and Mr Schulte agreed on 25 August 2008 to terminate his employment with effect from 31 August 2008. On 18 March 2009 Mr Schulte lodged a claim with the Arbeitsgericht Dortmund for payment in lieu of leave for the years 2006 to 2008 in respect of 35 days' leave for each year, amounting to €9 162.30 in total. In its judgment of 20 August 2009 the Arbeitsgericht granted the claim for payment in lieu of the statutory minimum entitlement to leave of 20 days and an additional 5 days on grounds of severe handicap fro the years from 2006 to 2008 amounting to €6 544.50 and dismissed the remainder of the claim.

KHS appealed against that judgment to the referring court, the Landesarbeitsgericht Hamm. It found that the leave entitlement of Mr Schulte for 2006 was extinguished on 3 March 2008 under the applicable collective agreement. As, on health grounds, Mr Schulte not only had a full reduction of earning capacity but was also unfit for work after the carry-over period and until the end of his employment relationship, he could not exercise his right to paid annual leave until the end of his employment relationship, as the Court of Justice held in *Schultz-Hoff and Others*. The referring court therefore seeks a ruling from the Court of Justice as to whether European Union law[3], as interpreted by the Court of Justice in its case-law, allows workers to accumulate entitlement to allowances in lieu of leave over several years, even where a worker – as a result of long-term incapacity for work – was not in a position to avail himself of his right to annual leave, and whether the Member States are allowed to set a time-limit of 18 months for those entitlements.

In today's Opinion Advocate General Verica Trstenjak first makes clear that the case-law of the Court of Justice has established an **inviolable right to annual leave even in cases of long-term illness**. In her view, this applies also to the entitlement to payment in lieu of annual leave not taken[4], which may not be refused on the ground that it cannot be claimed because of a long-term

[1] 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 (OJ 2003 L299, p. 9). The specific entitlement arises from Article 7(1) of Directive 2003/88/EC.
[2] Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others*, see Press Release 04/09.
[3] In particular, Article 7(1) of the Working Time Directive.
[4] Article 7(2) Working Time Directive.

illness. That entitlement, which the entitlement to leave becomes on termination of the employment relationship, ultimately serves the purpose of placing the worker in a position to be compensated for his annual leave financially under comparable conditions to those that would apply if he were still in active employment and received an allowance in lieu of leave.

In the view of Advocate General Trstenjak, however, **the accumulation, without any limitation in time, of entitlements to leave or allowances in lieu is not required by EU law**, in order to achieve the objective of recuperation essentially sought by the Directive. In that connection the Advocate General emphasised that the purpose of annual leave, which is to recover from the effort and stress of the working year and draw new strength for the rest of the working year from the relaxation and leisure enjoyed while on leave, is not achieved if that leave is not taken until years later. Accumulating entitlement to leave over several years so as to double or even treble the minimum leave allowance does not increase the recuperative effect. Moreover, the disadvantages arising for the employer both from the prolonged absence of the employee and the financial burden of accumulated entitlement to leave or allowances in lieu are potentially liable to encourage the employer, under some circumstances, to terminate as soon as possible the employment of employees who are unfit for work for long periods, in order to avoid such disadvantages. As regards the entitlement to allowances in lieu, the Advocate General points out that an unlimited accumulation could give rise to an erroneous expectation on the part of the employee that he is entitled to an indemnity on termination of his employment relationship rather than allowances in lieu of leave.

As regards the limitation in time of the possibility of exercising entitlements to leave or allowances in lieu already acquired, **Advocate General Trstenjak** first **rules out the full loss of such entitlements**. It is precisely in cases of long-term illness of a worker that that worker is unable to prevent the automatic and complete loss of entitlement to leave through lapse of time. As regards the **time-limit of 18 months** mentioned by the referring court, on expiry of which entitlement to leave or allowances in lieu is extinguished, the Advocate General points out that such a time limit **is consistent with the purpose of protection enshrined in the Directive concerning certain aspects of the organisation of working time**, as the employee would thus have up to two and a half years to take his minimum leave for a given leave year. At the same time the employer would be secure in the knowledge that there can be no unfettered accumulation of entitlement to leave with the consequent difficulties of organisation of work, and no significant financial burden associated with entitlements to allowances in lieu accumulated over long periods.

Advocate General Trstenjak thus comes to the conclusion that **a limitation of the carry-over period to 18 months, on expiry of which the leave entitlement of the employee is lost, is sufficient and thus ultimately capable of enabling the employee actually to exercise his right to annual leave.** However, the Advocate General emphasises that the period of 18 months represents a **guideline which the Member States should follow as far as possible for the purposes of implementation in their domestic law**. In the absence of Union–wide rules the Member States are in fact free to adopt other rules while observing the limits imposed by the Directive. However the Advocate General considers a possible carry-over period of only six months to be insufficient.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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