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Case C-426/20

Request for a preliminary ruling

Date lodged:

10 September 2020

Referring court:

Tribunal Judicial da Comarca de Braga – Juízo do Trabalho de Barcelos (Braga District Court – Barcelos Employment Court, Portugal)

Date of the decision to refer:

15 July 2020

Applicants:

GD

ES

Defendant:

Luso Temp – Empresa de Trabalho Temporário, S. A.

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Tribunal Judicial da Comarca de Braga

(Braga District Court)

Juízo do Trabalho de Barcelos – Juiz 2

(Barcelos Employment Court, Section 2)

[…]

Case No 3190/19.5T8BCL

Claim in ordinary proceedings

[…]

[…]

[…]

Request for a preliminary ruling

In these proceedings, the applicants are requesting that the defendant be ordered to pay the sums they say they did not receive in respect of paid holiday and holiday bonus pay owed for the period of time during which they worked for the defendant under temporary employment contracts.

In this context:

– The applicant GD entered into a temporary employment contract with the defendant on 29 October 2017 and was assigned to the company *Inoveplástika – Inovação e Tecnologia em Plásticos, S. A*. until 28 October 2019.

– The applicant ES entered into a temporary employment contract with the defendant on 9 October 2017 and was assigned to the company *Inoveplástika – Inovação e Tecnologia em Plásticos, S. A.* until 8 October 2019.

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The dispute between the parties arises in connection with the rules in the Código do Trabalho (Labour Code) on which they rely in support of their respective positions.

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The applicants maintain that on 1 January of each year (2018 and 2019) they became entitled to 22 days' holiday and that, in addition, they are entitled to 2 days' holiday for each complete month of service during the year in which the employment relationship commenced (2017) and to a number of days' holiday pro rata to the period of service during the year in which the employment relationship was terminated (2019).

The applicants base their claims on the general holiday provisions in Articles 237, 238, 239 and 245 of the Labour Code (adopted by Law 7/2009 of 12 February [2009]), which provide as follows:

'**SUBSECTION X** [Or. 2]

Holiday

Article 237

Holiday entitlement

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1. For each calendar year, workers shall be entitled to a period of paid holiday, which shall accrue on 1 January.

2. As a general rule, the holiday entitlement shall reflect service during the previous calendar year, but shall not be dependent on diligence or performance.

…

Article 238

Length of holiday period

1. The annual holiday period shall be a minimum of 22 working days.

…

Article 239

Length of holiday period in specific cases

1. During the year in which the employment relationship commences, workers shall be entitled to two working days' holiday for each month of the contract period, up to a maximum of 20 days, which may be taken once the contract has been in operation for six full months.

2. In the event that the calendar year ends before completion of the period referred to in the previous paragraph, the holiday may be taken up until 30 June of the following year.

3. Where the provisions in the previous paragraphs apply, no more than 30 working days' holiday may be taken during the same calendar year, without prejudice to the terms of any collective employment agreement.

…

Article 245

Effect of the termination of an employment contract on holiday entitlement

1. On termination of their employment contract, workers shall be entitled to receive holiday pay and holiday bonus pay:

(a) in respect of any accrued holiday that has not been taken;

(b) pro rata to the period of service in the year in which the contract is terminated.

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2. In the case referred to in subparagraph (a) of the preceding paragraph, the holiday period shall be included for the purposes of calculating length of service. **[Or. 3]**

3. Where the contract is terminated during the calendar year following the calendar year in which the employment relationship commenced, or where the term of the relationship is no more than 12 months, the total amount of holiday or payment in lieu to which the worker is entitled may not exceed the annual holiday allowance determined pro rata to the length of the contract.'

Applying these rules to their respective situations, the applicants would be entitled to the following days' paid holiday (and the corresponding holiday bonus pay):

– 4 days' holiday for 2017 (2 full months of the contract period) (Article 239(1));

– 22 days' holiday which accrued on 1 January 2018 (Articles 237(1) and 238(1));

– 22 days' holiday which accrued on 1 January 2019 (Articles 237(1) and 238(1));

– 19 days (22/365 × 301) in the case of the applicant GD and 17 days (22/365 × 281) in the case of the applicant ES (holiday pro rata to the time worked in 2019) (Article 245(1)(b)).

*

The defendant maintains that each applicant is entitled to paid holiday (and the corresponding holiday bonus pay) only pro rata to the length of his or her contract.

It bases its position on the wording of Article 185(6) of the Labour Code, which provides as follows:

'SUBDIVISION V

Provisions governing work by temporary agency workers

Article 185

Employment conditions for temporary agency workers

…

6. Workers shall be entitled, pro rata to the length of their contract, to paid holiday, to holiday and Christmas bonus pay, and to other regular and periodic benefits to which workers in the user undertaking are entitled for performing the same work or work of equal value.

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…'

Applying this provision in conjunction with Article 238(1), each of the applicants would be entitled only to 44 days' holiday in respect of a total contract length of 2 years for their respective contracts (22 × 2). **[Or. 4]**

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Article 185, relied on by the defendant, is a specific rule applicable to contracts for temporary agency workers, and it therefore takes precedence over the general regulations governing employment contracts in general. Consequently, in view of its position within the structure of the Labour Code and its wording, the conclusion to be drawn is that the intention of the legislature was to exclude the application of the general holiday arrangements that apply to employment contracts in general, by stipulating that, in all cases, temporary agency workers will be entitled to paid holiday and the corresponding holiday bonus pay only pro rata to their period of service in the user undertaking.

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Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work provides that 'the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, <u>at least those that would apply if they had been recruited directly by that undertaking to occupy the same job</u>', while Article 3(1)(f) of the directive establishes that 'basic working and employment conditions' means 'working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to: (i) the duration of working time, overtime, breaks, rest periods, night work, <u>holidays</u> and public holidays; ii) pay' (emphasis added).

According to the information provided to the European Commission by the Portuguese Government (available at https://eur-lex.europa.eu/legal-content/PT/NIM/?uri=celex:32008L0104), the national legislature transposed this directive precisely by the Labour Code and by Decree-Law No 260/2009 of 25 September 2009.

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There is, therefore, no question as regards workers who work for the user undertaking for a period of no more than 12 months or whose employment relationship commenced in one calendar year and ended in the following calendar year: in the light of the aforementioned Article 245(3), these workers will be in the same position as workers occupying the same job who have been recruited directly **[Or. 5]** by the user undertaking, since the latter will also be entitled to paid holiday and the corresponding holiday bonus pay only pro rata to the duration of the contract.

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However, in other cases, where a temporary agency worker begins working for the user undertaking during one calendar year and stops working for that undertaking 2 or more calendar years later, his or her position is different from that of a worker who was recruited directly by the user undertaking to occupy the same job. In this situation — which applies in these proceedings — the agency worker will be entitled to paid holiday and holiday bonus pay only pro rata to the period of service, whereas a worker recruited directly by the user undertaking will have all the holiday entitlement provided for under the general provisions in the Labour Code. Specifically, in the present case, each applicant will be entitled to 44 days' paid holiday and holiday bonus pay, whereas a worker recruited directly by the user undertaking who has occupied exactly the same job for the same period of time will be entitled to 67 days (in the case of the applicant GD) or 65 days (in the case of the applicant ES).

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Such a situation, which is the result of applying Article 185(6) of the Labour Code, seems directly contrary to Article 3(1)(f) and Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

Under Article 267 of the Treaty on the Functioning of the European Union, jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions, bodies, offices or agencies of the Union lies with the Court of Justice of the European Union.

In these proceedings there is no judicial remedy against the decision handed down (Article 629(1) of the Código de Processo Civil (Code of Civil Procedure) and Article 79 of the Código de Processo do Trabalho (Code of Labour Procedure), both of which provide to the contrary), and therefore this court is under an obligation to refer the matter to the Court of Justice.

The parties were invited to make observations on the staying of the proceedings, and no party voiced any objection. **[Or. 6]**

The defendant submitted observations on the substance of the case in the terms set out in the application which will be forwarded to the Court of Justice together with this decision. This is without prejudice to its right to submit a statement of case to the Court of Justice pursuant to Article 96(1)(a) of the Rules of Procedure of the Court of Justice (OJ 2012 L 265, p. 1).

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In these circumstances, and in the light of all of the above:

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a) These proceedings are stayed, pursuant to Article 269(1)(c) of the Code of Civil Procedure, pending a decision by the Court of Justice of the European Union on the question referred below.

b) The following question is referred to the Court of Justice of the European Union for a preliminary ruling:

Do Article 3(1)(f) and Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work preclude a provision of law such as that in Article 185(6) of the Código do Trabalho (Employment Code) (adopted by Law No 7/2009 of 12 February [2009]), under which temporary agency workers are, in all cases, entitled to paid holiday and the corresponding holiday bonus pay only pro rata to the period of service in the user undertaking, even where their employment relationship commences in one calendar year and ends two or more calendar years later, whereas a worker recruited directly by the user undertaking who occupies the same job for the same period of time will be subject to the general holiday provisions, meaning that he or she will be entitled to a longer period of paid holiday and more holiday bonus pay, since these are not pro rata to the period of service?

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A certified copy is to be made of this decision, the pleadings of the parties and the documents submitted by them (in both the main and the interlocutory proceedings) and the aforementioned application by the defendant, and is to be forwarded by registered letter to the Court of Justice of the European Union […] **[Or. 7]**.

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Notice of this decision is to be served on both parties.

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Barcelos, 15 July 2020.

[…]

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Judge

Filipe César Marques

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