

Case C-762/18

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

4 December 2018

Referring court:

Rayonen sad Haskovo (Bulgaria)

Date of the decision to refer:

26 November 2018

Applicant in the main proceedings:

QH

Defendant in the main proceedings:

Varhoven kasatsionen sad of the Republic of Bulgaria

Subject matter of the main proceedings

Action seeking compensation for harm which the applicant in the main proceedings claims to have suffered as a result of an infringement of EU law by the Varhoven kasatsionen sad (Supreme Court of Cassation of the Republic of Bulgaria; 'VKS'), in so far as it refused to uphold the appeal on a point of law against a judgment stating that she is not entitled to paid annual leave for the period in which she could not have used that leave on account of her unfair dismissal

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Must Article 7(1) 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 be interpreted as precluding national legislation and/or case-law, according to which a worker who has been unfairly dismissed and subsequently reinstated by a court decision, is not entitled to paid annual leave for the period from the date of dismissal until the date of his reinstatement?

2. In the event that the first question is answered in the affirmative, must Article 7(2) 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 be interpreted as precluding national legislation and/or case-law, according to which in the event that the employment relationship is terminated once again the worker in question is not entitled to financial compensation for unused paid annual leave for the period from the date of his previous dismissal until the date of his reinstatement?

Legal provisions and case-law of the European Union

Articles 7 and 17 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 (OJ 2003 L 299, p. 9).

Judgments of the Court of Justice of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33); of 3 May 2012, *Neidel* (C-337/10, EU:C:2012:263), and of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576)

Provisions of national law cited and national case-law cited

Kodeks na truda (Labour Code; ‘KT’)

Article 155. Every worker or employee shall be entitled to paid annual leave

Article 224. Upon termination of the employment relationship, the worker or employee shall be entitled to financial compensation for any unused paid annual leave [...], provided that the right to leave has not lapsed.

Article 354 (1) A period during which no employment relationship existed shall likewise be recognised as a period of service in the following cases:

1. the worker or employee was unemployed on account of a dismissal which was pronounced unfair by the competent authorities: from the date of dismissal until the date of reinstatement of the worker in question;

Grazhdanski protsesualen kodeks (Code of Civil Procedure; ‘GPK’), Articles 290 and 291

Judgments of the VKS No. 948 of 21 December 2009, No. 160 of 26 March 2010, No. 346 of 26 May 2010; No. 404 of 6 July 2010; No. 572 of 25 October 2010 and No. 167 of 15 May 2011.

Succinct presentation of the facts and procedure in the main proceedings

- 1 From 1 September 1985, the applicant in the main proceedings, QH, worked in accordance with an employment relationship as a music teacher in a primary school in the town of Plovdiv (Bulgaria).
- 2 By decision No 153 of 29 April 2004 of the Head of the school, her employment relationship was terminated. She appealed against that decision and by a definitive judgment of the Rayonen sad Plovdiv (District Court of Plovdiv) her dismissal was deemed unfair and the applicant in the main proceedings was reinstated. That judgment was implemented by Order No 47 of 10 November 2008.
- 3 By Order No 52 of 13 November 2008 of the Head of the school, QH's employment relationship was once again terminated and this time she did not appeal against her dismissal.
- 4 On 1 July 2009, the applicant in the main proceedings brought an action before the Rayonen Sad Plovdiv against the school, seeking payment of the amount of BGN 7 125 representing compensation for unused paid annual leave for 285 days, that is to say 57 days per year for the period from 30 April 2004 to 30 November 2008, and the amount of BGN 1 100 as compensation for late payment in respect of the first amount for the period from 30 November 2008 to 1 July 2009
- 5 By judgment of 15 April 2010 the Rayonen sad Plovdiv dismissed those claims.
- 6 The applicant in the main proceedings lodged an appeal before the Okruzhen Sad Plovdiv (Plovdiv Regional Court), which, by judgment of 10 February 2011, upheld the first-instance ruling in so far as it rejected the claims for compensation.
- 7 QH brought an appeal on a point of law before the VKS against the judgment of the Okruzhen Sad Plovdiv (Plovdiv Regional Court). However, by decision No 249 of 25 October 2011, the VKS refused to admit the appeal.
- 8 As regards the substantive issue raised by the applicant in the main proceedings, namely whether an unfairly dismissed worker or employee is entitled to compensation for unused paid annual leave on the basis of Article 224(1) KT for the period from the date of termination of the employment relationship until the date of reinstatement on the basis of a judgment that has become final, the VKS stated as follows: ‘ The answer to that question is given in [...] the judgment of the VKS [...] which states that in the period from the time of the date of termination of the employment relationship until the cancellation of the dismissal on the basis of a definitive judgment and the reinstatement of the unfairly dismissed worker or employer in his previous role, that worker or employee did not actually carry out

work under the employment relationship, and therefore for that period of time he was not entitled to use paid annual leave, and in the case of his subsequent second dismissal the employer does not owe the worker or employee compensation for unused paid annual leave for that period of time on the basis of Article 224(1) KT. The treatment by the appeal court of the matter raised is in line with the binding case-law of the VKS and therefore there are no grounds for an appeal on a point of law’.

- 9 Currently, the referring court -the Rayonen Sad Haskovo (Haskovo District Court) - is seised of an action by QH against the VKS concerning payment of an amount of BGN 5 443.39, which represents compensation in the amount of BGN 4 080.24 for the material loss sustained by the applicant in the main proceedings, consisting of the value of compensation payable for unused paid annual leave for 285 days, together with late-payment interest in the amount of BGN 361.50 for the period from 14 November 2008 to 1 July 2009, and BGN 1 001.65 for the period from 2 July 2009 to 25 October 2011, and for payment of the amount of BGN 2 000, representing compensation for the non-material loss sustained by the applicant in the main proceedings, in the form of stress, loss of self-esteem, a sense of deprivation, disappointment and loss of trust in institutions, severe embarrassment and a feeling of uncertainty concerning the lack of protection of her rights, together with statutory interest on those sums arising from the date of injury, that is to say 25 October 2011, until final payment is made. The applicant in the main proceedings maintains that that damage occurred as a result of an infringement of EU law committed by the defendant in the main proceedings by means of Order No 249 of 25 October 2011.

Principal submissions of the parties to the main proceedings

- 10 The applicant in the main proceedings claims that, on the basis of the primacy of EU law over national law and in view of the principle of direct effect of EU law, the VKS should have applied Article 7 of Directive 2003/88 and recognised her right to paid annual leave for the period during which she could not have used it on account of her unfair dismissal. She maintains that if the defendant in the main proceedings had doubts concerning the applicability of that provision, it should have referred a question for a preliminary ruling to the Court of Justice of the European Union, so as to enable the sole court entitled to interpret EU law to rule on the applicability of Article 7 of Directive 2003/88. Moreover, according to the applicant in the main proceedings, under the third paragraph of Article 267 TFEU, the defendant in the main proceedings was required to do so as the court of last instance. The applicant in the main proceedings suffered the alleged harm on account of the failure of the defendant in the main proceedings to fulfil that obligation so that it should be held liable.
- 11 The defendant in the main proceedings argues that Article 7 of Directive 2003/88 is inapplicable in case of the applicant in the main proceedings, since the right to compensation for unused annual paid leave is governed by national legislation

which corresponds to EU law. The abovementioned judgments of the Court of Justice concerning the application of the provision of the Directive in question concerns cases in which workers claimed recognition of paid annual leave under an existing employment relationship and concerning the use of another kind of leave or absence from work for reasons outside their control, but not in relation to an unfair dismissal during which period the applicant in the main proceedings did not have the status of a worker or carry out actual work for which the right to leave may be recognised. The VKS was under no obligation and had no basis for making a reference for a preliminary to the Court of Justice of the European Union, since it did not have doubts concerning that issue on account of its established and consistent case-law, and because it concerns a matter of national law. Furthermore, in that case, the applicant in the main proceedings did not request that a preliminary ruling be made to the Court of Justice of the European Union.

Succinct presentation of the reasons for the reference

- 12 It is apparent from the above facts and from the arguments of the parties that one of the main issues of the present case is whether a worker who has been unfairly dismissed and subsequently reinstated by order of a court is entitled to paid annual leave for the period from the date of dismissal until the date of his reinstatement.
- 13 Bulgarian legislation does not include any rule containing an explicit answer to that question, and the existing legal framework does not allow the matter to be clearly and unambiguously settled.
- 14 According to settled and binding national case-law in such a case, the worker does not have such a right, and the main consideration is that in the period of dismissal up to the annulment of the dismissal by the court and his reinstatement to his previous job, the worker did not actually perform any work, when the purpose of this kind of leave is to allow the worker to rest and recover the energy expended at work.
- 15 Indeed, according to Article 354(1)(1) KT, the period from the date of the unfair dismissal until reinstatement in the previous role is to be recognised as a period of service, even in the absence of an employment relationship and without the worker having worked. However, according to the case-law of the VKS, it does not follow that the dismissed person may obtain rights in relation to an entity with which it has no employment relationship and which is not his employer. In addition, the legal fiction that the period of unfair dismissal constitutes a period of service aims to erase the adverse effects for the worker of unfair dismissal in connection with all the rights determined by employment – acquisition of pension rights, requirements for occupation of a particular post, etc., but that fiction does not relate to the right to paid annual leave, taking into account the nature, spirit and purpose of that right. The right to paid annual leave presupposes the existence of an employment relationship, depends on the nature and difficulty of the work

and has the objective of restoring energy expended at work. Accordingly, such paid annual leave is determined on the basis of time actually worked under the employment relationship after the return to work following reinstatement, without including the period from the time of dismissal until its withdrawal and the reinstatement.

- 16 Therefore, according to the settled case-law of the VKS, if no right to paid annual leave has accrued for a period in which the worker has not worked on account of unfair dismissal, in the event that the employment relationship is once again terminated, the employer is not required to pay compensation to the worker for unused annual leave in respect of that period.
- 17 Directive 2003/88 does not govern the right of an unfairly dismissed worker to paid annual leave for period between the time of dismissal and his reinstatement.
- 18 The case-law of the Court of Justice of the European Union does not include any case corresponding to that in the main proceedings. However, similar situations have been examined concerning workers who have not worked due to illness or accident in which that period was deemed to have been a period of service, and it was accordingly held that for that period they were entitled to paid annual leave and financial compensation if the leave was not used and their employment relationship was terminated.
- 19 Taking into account the lack of clear and precise rules on the matter in question in both national and EU law, on the one hand, and, on the other, the abovementioned judgments of the Court of Justice of the European Union, the referring court has doubts as to whether the relevant national case-law is compatible with Article 7 of Directive 2003/88 and is concerned that could be contrary to the case-law of the Court of Justice of the European concerning the interpretation and application of that provision considering that, from the time of their dismissal until their reinstatement, unfairly dismissed and subsequently reinstated workers are in a comparable situation to other categories of persons who have not worked for reasons beyond their control for periods which have been counted as periods of service.
- 20 Therefore, the referring court considers that, in order to be able to give proper judgment in the present proceedings, it must seek a preliminary ruling from the Court of Justice of the European Union.